In the course of their practice, many lawyers help entrepreneurs form legal entities through which the entrepreneurs will conduct new business ventures. The entity serves as the legal structure for the business venture; it might be a partnership, a limited liability partnership, a limited partnership, a limited liability limited partnership, a limited liability company, or one of the several different types of corporations. When entrepreneurs first contact lawyers, the entrepreneurs have a business venture in mind but no legal entity through which to conduct the business. If all goes well, the end product of the collaboration between the lawyers and the entrepreneurs will be a legally-recognized entity with an owner or co-owners, some financial wherewithal, a set of duly authorized constituents who can act on behalf of the entity, rules for its governance, and, perhaps, a lawyer of its own. The formation process is governed by the substantive law applicable to the particular type of entity being formed. Hence, the lawyer who is assisting the entrepreneur will do so with an eye cast more broadly on the law governing the various entities that might be used for the proposed business venture. Part of the formation process occurs before the entity exists as a matter of law, and part takes place after the entity’s legal birth.

More attention has been paid to the legal issues surrounding the formation of the various types of business entities than to the legal structure of the relationship between the lawyer, the entrepreneurs, and the legal entity that will be formed and through which the entrepreneurs will conduct their business. In 2002, however, an Arizona State Bar Ethics Committee opinion addressed the relationship between the lawyer, the entrepreneurs, and the proposed entity.1 It advised lawyers that they could form a new corporation for entrepreneurs that they were representing in other matters, and, during this process, be counsel only for the proposed entity and not for any of the entrepreneurs.2 This intriguing opinion has prompted the author to write this Article, which examines the various ways lawyers may structure their legal relationships with entrepreneurs who seek assistance in forming business entities, and the various ways lawyers may structure their legal relationships with the entities that will be formed as a result of this collaboration. This Article calls lawyers’

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1 W. Allen Separk Distinguished Professor of Law, The University of Tennessee College of Law.


2 Id.
attention to some of the issues that should be considered when two or more entrepreneurs approach a lawyer seeking help forming and organizing a corporation, but the lawyer only wants to represent one client at a time and wants that client to be either an individual or a de jure legal entity acting through a duly authorized constituent. Subsequent articles will address the situation in which the lawyer is willing to represent multiple clients in connection with the formation and organization of the new business; the situation in which the lawyer is willing to structure the legal representation so that, prior to the formation of the business entity, the lawyer’s only client will be an entity that does not yet exist; and the situation in which the lawyer and the entrepreneurs decide that a legal entity other than a corporation should be used as the vehicle for conducting the new business.

When two or more entrepreneurs approach a lawyer for help in forming and organizing a corporation, the lawyer must decide whether he or she is allowed to, and wants to, represent only one of the entrepreneurs. If so, the lawyer must determine how to structure the ensuing representation, taking into account that some services the lawyer provides must be rendered prior to incorporation, while some must be rendered after incorporation. If the lawyer decides to represent one of the entrepreneurs or the corporation after its formation, the lawyer must, “before or within a reasonable time after commencing the representation,” communicate to the client, “preferably in writing,” the scope of the representation and the amount of the lawyer’s fee. To get to this point, however, the lawyer, the entrepreneurs, and the newly formed corporation first must reach an agreement about the identity of the lawyer’s client, the scope of the lawyer’s representation, and the payment of the lawyer’s fee for the services rendered. The lawyer also needs to be sensitive to the duties he or she will owe to the client and to the various non-clients with whom the lawyer will interact during the formation and organization of the corporation. Let us start, then, with the arrival of the entrepreneurs in the lawyer’s office and examine

3 See, e.g., Griva v. Davison, 637 A.2d 830, 832 (D.C. 1994) (addressing the representation of three general partners during the formation and organization of a limited partnership and the subsequent representation of the limited partnership after its formation and organization). For further discussion, see generally Carl A. Pierce, ABA Model Rule 2.2: Once Applauded and Widely Adopted, Then Criticized, Ignored or Evaded, Now Sentenced to Death with Few Mourners, But Not in Tennessee, 2 TRANSACTIONS: TENN. J. BUS. L. 9 (2000) (examining a proposal to repeal American Bar Association (“ABA”) Model Rule of Professional Conduct 2.2—that has since been approved by the ABA—which governed joint representation of multiple entrepreneurs forming a business entity, and addressing the issue as to conflict of interest governed by ABA Model Rule of Professional Conduct 1.7).


5 MODEL RULES OF PROF’L CONDUCT R. 1.5(b) (2002).
the process at the end of which the lawyer and entrepreneurs agree that the lawyer will represent one of the entrepreneurs throughout the formation and organization of the corporation, or, alternatively, that the lawyer will represent one of the entrepreneurs until the corporation is formed, at which time the corporation is capable of retaining its own lawyer.

When an entrepreneur contacts a lawyer regarding the formation and organization of a corporation, that individual becomes a prospective client of the lawyer.\(^6\) If two or more entrepreneurs contact the lawyer together, each would become a prospective client.\(^7\) Indeed, because they approached the lawyer together, we might call them prospective co-clients. Things get more complicated if the entrepreneurs contacting the lawyer purport to do so on behalf of a larger group of entrepreneurs, opening the question of whether members of the larger group also should be regarded as prospective clients. An additional complication arises if one entertains the possibility that a proposed corporation could become a prospective client prior to its incorporation. To keep things relatively simple, however, consider two entrepreneurs in the lawyer’s office for the purpose of retaining the lawyer to help them form and organize a corporation. Who might they be and what might they want?

Each of the entrepreneurs may be a person that the lawyer is currently representing in other matters, a person the lawyer has previously represented in other matters, or a person talking with the lawyer for the first time. One might be a newcomer while the other currently is represented, or formerly has been represented, by the lawyer. These entrepreneurs will have some plans in mind for their business venture. They may expect that other persons will be involved in the proposed business venture as investors or active participants. They may contemplate entering into pre-incorporation subscription or employment agreements to which they and

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\(^6\) See id. R. 1.18(a) (defining prospective client as “[a] person who discusses . . . the possibility of forming a client-lawyer relationship with respect to a matter”).

\(^7\) Although I am assuming that two or more entrepreneurs initially approach the lawyer and that the lawyer represents only one of these entrepreneurs, most of the points made in this Article apply with equal force when the lawyer is approached by a single entrepreneur who contemplates that others will be involved as shareholders, directors, or officers of the proposed corporation. Indeed, although it might seem artificial, the same would be true if a single entrepreneur approached the lawyer concerning the formation and organization of a corporation in which the entrepreneur would be the sole shareholder, the sole director, and the sole officer of the corporation. The only issues discussed in this Article that would not be implicated in the latter situations would be those arising from the entrepreneurs’ status as prospective clients. The lawyer would only have to address such issues if the lawyer declined to undertake the proposed representation.
others will be parties. They may contemplate pre-incorporation transactions with persons who will do business with the corporation but who will not become shareholders or otherwise be involved in the management of the corporation’s business. At the outset, each wants the lawyer’s assistance throughout the formation process, both before and after the birth of the legal entity, and both may want the lawyer’s assistance thereafter, as well. They may or may not be familiar with the legal steps required for the effective formation and organization of a corporation, or be aware of the legal risks associated with a corporation’s formation and organization. Hopefully, the lawyer will be more familiar with such legal matters than the client.

I. SCOPE OF THE PROPOSED REPRESENTATION – THE FORMATION AND ORGANIZATION OF A CORPORATION

Let us start by considering the scope of the proposed representation: the formation and organization of a corporation. This scope is particularly important because the peculiar nature of corporations, and the law governing their formation and organization, complicates the establishment of lawyer-client relationships within which the lawyer will provide the legal services needed to get the corporation up and running. The scope of the proposed representation is also important because, in appropriate circumstances, a lawyer and a client may agree to limit the scope of the representation. For example, a lawyer and a client may agree to limit the scope of the representation to a portion of the tasks needed to accomplish the client’s objectives for the representation, with an understanding that the lawyer will represent a different client to complete the remaining tasks necessary to accomplish these objectives. It is also important to identify any potential disagreements that may arise during the formation and organization of the corporation between the lawyer’s client and others who are not represented by the lawyer. Given the limited scope of this Article, it is impossible to discuss all of these issues in detail; they must be noted, however, because they may be relevant to the legal structure of the

8 Id. R. 1.2(c) (noting that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent”).

9 The lawyer’s client might be one of the entrepreneurs or, at some later point, the corporation acting through its directors or officers.

10 Those not represented by the lawyer may include the entrepreneur who the lawyer declined to represent, the entrepreneur who the lawyer represented during the first part of the incorporation process but whose representation was terminated when the lawyer began to represent the corporation after its incorporation, the corporation if the lawyer did not subsequently become its lawyer, or any other person participating in the corporation’s formation and organization as a subscriber, purchaser of shares, director, officer, or employee.
representation within which the lawyer will provide the legal services needed to form and organize the corporation.

Generally stated, the subject matter of the proposed representation is the formation and organization of a corporation the entrepreneurs can use for their business venture. This representation should begin with one of two discussions between the lawyer and entrepreneur. If the corporation will be formed in a jurisdiction whose corporate law is based on the ABA Model Business Corporation Act, one discussion relates to the contents of the proposed corporation’s articles of incorporation (commonly referred to as the certificate of incorporation or the charter, and hereinafter “charter”), which must be signed and filed with the secretary of state by one or more persons designated as the corporation’s incorporator.\(^{11}\) The filing of the charter by the secretary of state is the legal prerequisite for the corporation’s de jure incorporation, which may be effective either on the date of filing by the secretary of state or on a later date specified in the charter.\(^{12}\) The charter must specify the number and kind of shares the corporation is authorized to issue.\(^{13}\) It also may address many important issues of interest to the proposed corporation and its shareholders, including restraints on the alienation of the corporation’s shares, rights of the corporation or other shareholders to purchase shares upon the occurrence of specified events, preemptive rights to subscribe to subsequently issued shares, the allocation of decision-making authority between the board of directors and the shareholders, and the requirements for amending the charter. This discussion also should address the contents of the corporation’s bylaws, a document that must be adopted post-incorporation by the incorporator or the corporation’s initial board of directors.\(^{14}\) The bylaws do not need to be filed with the secretary of state. The discussion might also embrace the possibility of free-standing agreements that will not be included in the corporation’s charter or bylaws, such as a repurchase

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\(^{11}\) Model Bus. Corp. Act § 2.01 (2003).

\(^{12}\) Id. § 2.03.

\(^{13}\) Id. § 2.02(a)(2). Also of great importance, and a possible source of disagreement among those expected to participate in the proposed venture as shareholders, directors, officers, or employees, will be optional provisions regarding the “purposes for which the corporation is organized;” “managing the business and regulating the affairs of the corporation;” and “defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders.” Id. § 2.02(b)(2)(i)-(iii).

\(^{14}\) Id. § 2.06(a). The bylaws are another possible source of disagreement among those expected to participate in the proposed venture as shareholders, directors, officers, or employees because they “may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation.” Id. § 2.06(b).
agreement between the corporation and some or all of the shareholders or a shareholder’s voting agreement between some or all of the shareholders.\textsuperscript{15}

The second discussion, which could precede or follow the discussion about the charter, bylaws, and other agreements, would involve a variety of pre-incorporation transactions to which the entrepreneur might become a party, including pre-incorporation subscription agreements with prospective shareholders\textsuperscript{16} and pre-incorporation agreements with prospective customers and suppliers.\textsuperscript{17} Once these activities are underway, the entrepreneur is commonly referred to as a promoter of the corporation, with the pre-incorporation transactions commonly called promoter’s contracts.\textsuperscript{18}

After drafting the charter, and, more often than not, after drafting the bylaws and any other agreements intended to take effect after incorporation, the lawyer arranges for the person or legal entity named in the charter as the corporation’s incorporator to file the charter with the secretary of state. Typically the lawyer assumes responsibility for the filing even if the lawyer is not listed as the incorporator. What counts, however, is not filing the charter \emph{with} the secretary of state but the filing of the charter \emph{by} the secretary of state after the secretary determined that it, and the proposed business, comply with the state’s corporate law. Again, the lawyer typically assumes responsibility for determining that the secretary of state has filed the charter. The lawyer also should advise the promoter of the possible adverse consequences of commencing business before the secretary of state has filed the charter.

\textsuperscript{15} See, e.g., id. § 6.27 (Restriction on Transfer of Share and Other Securities), § 7.30 (Voting Trust), § 7.31 (Voting Agreements), § 7.32 (Shareholder Agreements).

\textsuperscript{16} See id. § 6.20 (Subscription for Shares Before Incorporation). A pre-incorporation subscription agreement is irrevocable for six months unless otherwise provided in the agreement or unless all subscribers agree to revocation. \textit{Id.} § 6.20(a).

\textsuperscript{17} These discussions will typically revolve around the structure of the pre-incorporation transaction and its effect on the personal liability of the entrepreneur and the rights of the corporation to accept or reject the contract after the effective date of its incorporation. With respect to the promoter’s liabilities, see id. § 2.04 (“All persons purporting to act . . . on behalf of a corporation, knowing there was no incorporation . . . are jointly and severally liable for all liabilities created while so acting.”); \textsc{Franklin A. Gevurtz}, \textsc{Corporation Law} § 1.3.2 (2000) [hereinafter Gevurtz]. With respect to the rights of the corporation to enforce or reject a pre-incorporation contract, see \textsc{Gevurtz} § 1.3.1.

\textsuperscript{18} See, e.g., \textsc{Robert W. Hamilton}, \textsc{The Law of Corporations in a Nutshell} §§ 5.4–5.6 (5th ed. 2000) (discussing promoters and promoters’ contracts in chapter on pre-incorporation transactions).
Upon the effective date of its incorporation, the corporation becomes a legal entity that exists separate and distinct from those who are using the corporate form to conduct their business and who may be authorized to act on its behalf. The corporation is now a legally-recognized entity that is capable of being a lawyer’s client; it will become a client when its duly authorized constituents establish an attorney-client relationship on its behalf. Until this is done, however, the newly formed corporation—now a legal person—is still a person without a lawyer.\(^\text{19}\)

The filing of the charter by the secretary of state marks the boundary between the pre-incorporation and post-incorporation phase of the process through which the corporation is formed and organized. There are several ways the corporation can be organized after its incorporation, with the key question being the identification of the person or persons who are authorized to take the steps required to complete the corporation’s organization. If the charter establishes a board of directors and names the initial directors, the board will “hold an organizational meeting . . . to complete the organization of the corporation by appointing officers, adopting bylaws, and carrying on any other business brought before the meeting.”\(^\text{20}\) Otherwise the incorporators must hold the organizational meeting and “elect directors and complete the organization of the corporation” or “elect a board of directors who shall complete the organization of the corporation.”\(^\text{21}\) Although not specifically mentioned, some of the actions typically associated with organizing the corporation include opening bank accounts, issuing shares of stock to the co-owners of the business,\(^\text{22}\) approving or rejecting (typically approving) any pre-incorporation contracts entered into by the promoter on behalf of the proposed corporation, and retaining a lawyer to represent the corporation in connection with the completion of its organization.

\(^{19}\) RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (2000) (“A relationship of client and lawyer arises when . . . a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either . . . the lawyer manifests to the person consent to do so; or . . . the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . . .”).

\(^{20}\) MODEL BUS. CORP. ACT § 2.05(a)(1) (2005).

\(^{21}\) Id. § 2.05(a)(2)(i)-(ii).

\(^{22}\) If there is a subscription agreement, shares may be issued by calling for payment from the subscribers, which must be as uniform as practicable among the subscribers. Id. § 6.20(b). Otherwise, the board of directors determines whether, when, and to whom to issue shares, the number of shares to be issued, and the amount and kind of consideration to be paid to the corporation for the shares. Id. § 6.21.
After formation of the corporation and some organizational activities—at a minimum after the directors are named or elected—the corporation may begin conducting business other than that which is required for its organization. The retention of a lawyer to represent the corporation in connection with both its internal affairs and its dealings with the outside world could be among these initial transactions. It is important, however, to differentiate between transactions related to the organization of the corporation and other post-incorporation transactions. This distinction is important in part because only a board of directors or duly appointed officers have authority to obligate the corporation in such transactions or to retain counsel to represent the corporation in them, and also because the completion of the corporation’s organization would terminate a legal representation limited to the formation and organization of a client. Although the statute does not specify a time at which a corporation’s organization will be deemed complete, one can glean from the statute that the corporation’s organization will be treated as complete when the corporation’s charter has been filed by the secretary of state and, in addition, the corporation has a board of directors, bylaws, officers, a bank account in the corporation’s name, and has issued its authorized shares to the initial co-owners of the business.

During the process through which the corporation is formed, organized, and begins conducting its business, there are many important issues the promoter should

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23 Model Business Corporation Act section 2.05(a) limits the power of the incorporator—distinct from either a board of directors named in the charter or elected by the incorporator—to completion of the organization of the corporation. Otherwise “all corporate powers shall be exercised by or under the authority of . . . its board of directors,” id. § 8.01(b), or by officers having authority to do so as set forth in the bylaws or prescribed by the board of directors. Id. § 8.41.

24 See MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 4 (2002). (“If a lawyer’s employment is limited to a specific matter, the relationship terminates when the matter has been resolved.”).

25 Model Business Corporation Act section 2.05(a) refers to completion of the organization of the corporation by a board of directors named in the charter in terms of “appointing officers, adopting bylaws, and carrying on any other business brought before the meeting.” One reading of the statute is that the organization of a corporation will be deemed complete when bylaws are adopted, officers are appointed, and the organizational meeting has concluded. If the meeting is adjourned, the question arises as to what other business might be regarded as incidental to the corporation’s organization. Business that might be regarded as incidental to the corporation’s organization includes opening a bank account for safekeeping of funds, issuing shares to the initial shareholders, and ratifying or adopting pre-incorporation contracts, or making payments for services rendered in connection with the corporation’s formation and organization. If, as will be discussed below, a lawyer and an entrepreneur agree that the lawyer’s representation of the entrepreneur will terminate upon completion of the corporation’s organization, it will be necessary for them to reach an understanding of what must be completed for the corporation to be organized.
address. There is considerable room for disagreement between the promoter and the persons the promoter expects to participate in business as co-owners, directors, officers, managerial agents, suppliers, or customers. Many of the disagreements will have both legal and business dimensions. Of particular importance are transactions in which the interests of the promoter may differ from those of the corporation or those who will be purchasing the corporation’s shares. For example, such divergent interests may involve the issuance of shares to the promoter, the employment of the promoter as an officer of the corporation, or the negotiation of any agreement affecting the relative decision-making power of the promoter and other participants in the governance of the corporation. Such issues should be understood as involving differing rather than adverse interests and should be identified as potential sources of disagreement among persons who intend to reach a mutually agreeable resolution, rather than as a source of likely disputes between hostile and suspicious combatants. Although, as noted below, this distinction may not make a legal difference in determining whether a lawyer’s representation of the promoter will be affected by a conflict of interest or will be deemed adverse to the interests of a former client, it offers a perspective from which to examine the various ways the attorney might structure the legal relationships. Let us begin by thinking through the steps the lawyer should take as he or she proceeds to establish an attorney-client relationship with one, but not all, of the entrepreneurs who seek legal advice and services needed to incorporate and complete the organization of the corporation.

II. THE ENTREPRENEURS AS PROSPECTIVE CLIENTS

When two entrepreneurs come to the lawyer’s office to discuss the possibility of legal representation in connection with the formation and organization of a corporation, the lawyer first must identify each entrepreneur as a prospective client and as a prospective co-promoter of the corporation to be formed.

Next, the lawyer must determine whether he or she may undertake the representation of at least one of the entrepreneurs. The question of whether the lawyer may represent both of the entrepreneurs or only the proposed corporation is beyond the scope of this Article. Instead, we will focus on whether the representation of either entrepreneur is precluded because the lawyer lacks the time, knowledge, or skill necessary to handle the matter competently or diligently, or

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26 See MODEL RULES OF PROF’L CONDUCT R. 1.1, 1.3.
because the proposed representation will involve a conflict of interest that would preclude the lawyer from providing competent and diligent representation.\textsuperscript{27}

The lawyer must first perform a capacity check to determine whether representation would be precluded because the lawyer, or other lawyers associated with the lawyer in a firm, lack the time, knowledge or skill necessary to handle the matter competently and diligently. This will depend, of course, on the expertise and current workload of the lawyers, the scope of the representation, the complexity of the proposed corporation and the number, kind, and complexity of the transactions necessary for its formation and organization. If the lawyer or the lawyer’s firm cannot handle the matter competently and without unreasonable delay, or become capable to do so without undue expense, the lawyer must either decline the representation or, with the informed consent of the entrepreneur, associate another lawyer whose participation will enable the lawyer to competently provide the needed services in a timely fashion.\textsuperscript{28}

The lawyer must also perform a conflicts check to determine whether he or she must decline the representation, or at least obtain the entrepreneur’s informed consent to the representation, because of a conflict between the entrepreneur’s interests and the interests of others whose interests and relationship with the lawyer might undermine his or her loyalty to the entrepreneur. First, the lawyer must be aware of the possibility that his or her representation of the promoter may involve a conflict because the proposed representation is directly adverse to or would be materially limited by the lawyer’s representation of a current client\textsuperscript{29} or would be materially limited by duties owed to a former client or prospective client.\textsuperscript{30} These current or former clients might include persons who are expected to participate in the proposed venture. The lawyer also must be aware of the possibility that the

\textsuperscript{27} \textit{See id. R. 1.7(a).}

\textsuperscript{28} \textit{See id. R. 1.1 cmt. 1, 1.2(a), 1.4. If the lawyer associates another lawyer in the representation and the client (or the person who pays the fee for the client) pays a single fee to one of the lawyers, the lawyers must also comply with the rule governing fee splitting between lawyers who are not associated with each other in a law firm. \textit{See id. R. 1.5(e).} This rule permits fee-splitting only if the division is in proportion to the services performed by each lawyer or if each lawyer assumes joint responsibility for the representation; the client agrees to the arrangement (including the share each lawyer will receive); the agreement is confirmed in writing; and the total fee is reasonable. \textit{Id.} Joint responsibility entails ethical and financial responsibility for the representation as if the lawyers were associated in a partnership. \textit{Id.} R. 1.5 cmt. 7.}

\textsuperscript{29} \textit{MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(1).}

\textsuperscript{30} \textit{Id. R. 1.7(a)(2).}
proposed representation might be materially adverse to a former client in a matter substantially related to the planned venture.\textsuperscript{31} If this conflict is present, of course, it is unlikely that the former client will participate in the venture.

The lawyer also needs to address potential conflicts of interest arising from the lawyer’s own interests, such as an ownership interest in or a creditor relationship with an entity expected to transact business with the proposed corporation.\textsuperscript{32} In addition, the lawyer must address the conflict of interest questions that will arise if the lawyer expects to purchase or otherwise be issued shares in the proposed corporation.\textsuperscript{33} Moreover, the lawyer must look for possible conflicts of interest arising from the lawyer’s relationships with persons expected to participate in or do business with the proposed corporation that might materially limit the lawyer’s representation of the entrepreneur. One of the expected investors, for example, might be the lawyer’s spouse, child, or a person with whom the lawyer has close and extensive business dealings.\textsuperscript{34} These potential conflicts of interest should be noted to prevent lawyers from being lulled into complacency about conflicts of interest because they are not going to represent both entrepreneurs. A heightened sensitivity to such issues in transactional practice is particularly important because the ABA has asserted that a lawyer who represents a client in a business transaction has a conflict of interest if the lawyer is \textit{adversely} representing another client in a transaction with the first client, even though the transactions are completely unrelated.\textsuperscript{35} In essence,
for purposes of the conflict of interest rules, the ABA treats a business transaction as if it were a lawsuit, even though one might assume that there is considerably less adversity between parties to business deals than between litigants. For present purposes, however, let us assume that the lawyer has not represented, is not representing, and will not represent any individuals or entities that are expected to participate in or do business with the proposed corporation, and that the lawyer has no personal interest in or any relationship with any of the expected participants that would materially limit his or her representation of the prospective clients. Alternatively, let us assume that the lawyer properly determined that he or she could request participants’ consent to the representation, then told the participants everything necessary for them to give informed consent, and secured the informed consent, either confirmed in writing or, preferably, in a writing signed by the affected participant.36

III. CHOOOSING THE CLIENT

Assuming that the lawyer may represent either of the prospective clients, the lawyer must decide whom to represent. If only one entrepreneur had sought to retain the lawyer, the lawyer must decide whether to undertake or decline the proposed representation. Among other variables, this decision will depend on the lawyer’s assessment of the entrepreneur, the type of assistance the entrepreneur is seeking, and the amount of the lawyer’s fee for providing such assistance. If the lawyer declines the representation, he or she would be well-advised, although not required, to send the entrepreneur a letter confirming the decision not to undertake the proposed representation. The lawyer also should identify the entrepreneur as a former prospective client, note the information the lawyer provided to the entrepreneur before declining the representation, and determine whether the consultation should be entered in the firm’s conflict checking system.37 Amid all this focus on the lawyer’s choice, however, we should not forget that the entrepreneur also must decide whether to hire the lawyer. As will be discussed below, the legal

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36 See MODEL RULES OF PROF’L CONDUCT R. 1.7(b) (permitting representation affected by a conflict of interest if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client” and “each affected client gives informed consent, confirmed in writing”); see also id. R. 1.0(e) (“Informed consent denotes the agreement . . . to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”).

37 See id. R. 1.18(c) & (d).
structure within which the lawyer will provide the needed services may be an important factor in these decisions.

The lawyer’s choice is more complicated when two or more entrepreneurs come to the lawyer’s office. At the outset, both are prospective clients. One option is for the lawyer to decline to represent either entrepreneur, send each a letter confirming this decision, and repeat the conflicts of interest protocol. Another alternative is to represent one entrepreneur and decline to represent the other. The choice may be difficult, but the real challenge is determining how to manage the process—and perhaps how to structure the representation—so that the lawyer’s choice is acceptable to both entrepreneurs.

The lawyer must be aware that both entrepreneurs are prospective clients to whom the lawyer owes a duty of confidentiality that is not extinguished because the lawyer eventually declines the representation. The duty of confidentiality that the lawyer owes to each entrepreneur is not diminished by the presence of the other entrepreneur. The communications between these prospective clients and the lawyer are also protected by the attorney-client privilege, but neither entrepreneur may invoke the privilege against the other if a dispute arose between them about the proposed incorporation. The lawyer also should be aware that if he or she acquires too much information concerning the proposed incorporation, the lawyer and others in the firm will be precluded from representing anyone in connection with the proposed incorporation without the consent of the entrepreneur the lawyer declined to represent.

38 Id. R. 1.18(b) (“Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.”). Rule 1.9(c) affords the same confidentiality protections to former clients as Rule 1.6 affords to currently represented clients, except that adverse use of the information—without disclosure—is permitted when the information has become generally known. Id. R. 1.9(c).

39 See id. R. 1.6.

40 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68, 72, & 75 (2000).

41 MODEL RULES OF PROF’L CONDUCT R. 1.18(c)-(d). If the lawyer who discussed the representation with the rejected entrepreneur received information relating to the proposed business venture that could be significantly harmful to that entrepreneur, the lawyer will be disqualified—absent the entrepreneur’s informed consent—from representing anyone else with interests materially adverse to the entrepreneur in the proposed venture or any matter substantially related to it. Id. R. 1.18(c). Also, absent the consent of the prospective client, this disqualification will be imputed to other lawyers in the firm, unless the lawyer who discussed the matter with the prospective client takes reasonable
The lawyer could handle the consultation by seeking only the information needed to decide whether the lawyer can and wants to undertake the representation and which of the entrepreneurs the lawyer will represent. This would minimize the possibility that the entrepreneur who was not selected as the client could scuttle the representation by invoking his or her rights as a former prospective client. Alternatively, the lawyer could explain the situation to the entrepreneurs at the outset and ask each to waive his or her right as a prospective client to object to the lawyer’s subsequent representation of the other. Perhaps the most sensible approach would be for the lawyer to deal with both prospective clients on the assumption that he or she will not represent either entrepreneur unless they both approve the lawyer’s choice of who will be the client. The lawyer also might decide not to represent either entrepreneur unless the lawyer is satisfied that he or she could represent both as co-clients.

IV. DECLINING TO REPRESENT ONE OF THE ENTREPRENEURS

Once the lawyer and entrepreneurs agree that the lawyer will represent only one of the entrepreneurs, the relationship between the lawyer and entrepreneurs changes. The entrepreneur still in the running to become a client remains a prospective client. The entrepreneur who the lawyer has declined to represent becomes a former prospective client who, momentarily, is not represented by counsel. There are several things the lawyer should consider in light of these changes. First, the lawyer should ensure that the entrepreneur who the lawyer has declined to represent understands that no attorney-client relationship has been established.\footnote{Of course, this should be done any time a lawyer declines the representation of a prospective client, and a lawyer would be well advised to promptly confirm the oral communication in writing.} Given the joint request for services, this communication should also indicate that the lawyer intends to represent the other entrepreneur in any subsequent dealings between the two entrepreneurs, will be seeking to further the best interests of that entrepreneur in those dealings, and will not be assuming any duty on behalf of other participants in the proposed representation. To emphasize these points, the lawyer might advise the entrepreneur to retain a lawyer if he or she needs assistance in their subsequent dealings. These precautions are necessary to minimize the risk that the entrepreneur who the lawyer has declined to represent will

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measures to avoid exposure to more disqualifying information than is necessary to determine whether to represent the entrepreneur. \textit{Id.} R. 1.18(d)(2). If such reasonable measures are taken, the other lawyers in the firm will not be disqualified if the lawyer who discussed the matter with the entrepreneur is “timely screened from any participation in the matter” and “written notice is promptly given to the prospective client.” \textit{Id.} R. 1.18(d)(2)(i)-(ii).
\end{quote}
subsequently be held to be the lawyer’s client or otherwise be held to be in a fiduciary relationship with the lawyer. Additionally, such communications may be regarded as the first step in the lawyer’s ongoing duty to ensure that unrepresented persons with whom the lawyer will interact in the formation and organization of the corporation do not misunderstand the lawyer’s role in the matter.

In addition to communicating with the entrepreneur the lawyer has declined to represent, the lawyer must resolve an additional problem before conversing with his or her anticipated client. This problem relates to the continued presence of the unrepresented entrepreneur during the conversation between the lawyer and the entrepreneur the lawyer has chosen to represent about the structure of their attorney-client relationship. Remember, of course, that the lawyer’s confidentiality obligations apply to both entrepreneurs with respect to any communications that occurred while they were prospective co-clients; such communications also are protected by the attorney-client privilege except in the event of a dispute between the prospective co-clients. The problem is that once the entrepreneur the lawyer will not represent is no longer a prospective co-client, his or her presence is more

43 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (stating that the lawyer-client relationship exists if the client manifests intent that the lawyer provide services and the lawyer fails to manifest unwillingness to do so and the lawyer should reasonably know that the person is relying on the lawyer to provide the services in question).


45 MODEL RULES OF PROF’L CONDUCT R. 4.3.

46 The ABA Model Rules of Professional Conduct do not recognize an exception to confidentiality in connection with the joint representation of clients or a joint discussion with prospective clients. This is indirectly recognized by the proposition that a joint representation poses a potential conflict of interest between the lawyer’s duty of confidentiality owed to each co-client and the lawyer’s obligation to keep each client reasonably informed about the representation. See MODEL RULES OF PROF’L CONDUCT R. 1.7 cmts. 30 & 31. The attorney-client privilege applies to communications between a person and a lawyer he or she consults for the purpose of obtaining legal assistance. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 68(2) & (4), 70, 72 (noting that the privilege is applicable to communications between the prospective client and the lawyer for the purpose of establishing an attorney-client relationship, even if the lawyer does not undertake the representation of the prospective client). Because prospective clients enjoy the same privilege as clients, persons contacting a lawyer jointly to establish an attorney-client relationship should enjoy the same privilege as co-clients—that is, the attorney-client privilege is available against third persons, subject to the right of the prospective clients to waive the privilege with respect to their own communications; the privilege, however, is not available to either prospective client in a subsequent adverse proceeding between them. Id. § 75.
likely to jeopardize the availability of the attorney-client privilege. The lawyer could ask the entrepreneur the lawyer will not represent to leave and then resume the conversation with the remaining prospective client. Alternatively, the lawyer could terminate the conversation with both entrepreneurs, with an understanding that the chosen entrepreneur will return to finalize the structure of the attorney-client relationship and begin discussing the charter, bylaws, and pre-incorporation transactions. Obviously, this slows the process down. The lawyer could discuss the possible consequences of proceeding in the presence of the entrepreneur the lawyer will not represent—with particular emphasis on its effect on the availability of the attorney-client privilege against third persons—and allow the chosen client to waive the privilege to the extent it would be lost by continuing the conversation in the presence of the unrepresented entrepreneur. If the chosen entrepreneur has nothing to hide, this might be perfectly acceptable, particularly since the waiver would only extend to things said in the presence of the unrepresented entrepreneur.

V. STRUCTURING THE LAWYER-CLIENT RELATIONSHIP WITH THE ENTREPRENEUR THE LAWYER WILL REPRESENT

With these issues resolved, the lawyer and the entrepreneur can finalize their attorney-client relationship so the lawyer can begin taking the necessary steps for the corporation’s formation and organization. In thinking about the legal structure of the relationship between the lawyer, the entrepreneur, and the proposed entity, the lawyer must keep two distinct aspects of this structure in mind. The first aspect relates to the professional and agency relationships between the lawyer, the entrepreneur, and the proposed entity, and, in particular, the identification of the person or entity who will be the lawyer’s client. This professional relationship—commonly called the attorney-client relationship—is a specialized type of agency relationship the existence of which is determined by applying general principles of agency law and, more specifically, the agency law applicable to lawyers as recently restated in the American Law Institute’s (“ALI”) Restatement (Third) of the Law Governing Lawyers. The attorney-client relationship exists as a matter of law.

47 See id. §§ 68, 70, 71 (stating that the privilege is available only if the communicating person reasonably believes that no one other than a privileged person will learn what has been said; to be a privileged person, one has to be either a prospective client or an agent of the prospective client who is necessary to facilitate communication between the prospective client and the lawyer).

48 See RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

49 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (“A relationship of client and lawyer arises when . . . a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . . .”).
Once an attorney-client relationship is established, the lawyer must act in accordance with both the agency law governing lawyers—the violation of which may subject the lawyer to civil liability—and the applicable rules of professional conduct—the violation of which may subject the lawyer to professional discipline. The professional relationship is the source of the lawyer’s duties: the lawyer owes primary duties to the client and more limited duties to refrain from specified conduct adverse to persons with whom the lawyer deals on behalf of the client.

The second aspect of the legal structure of the attorney-client relationship relates to the contractual or business relationship between the lawyer, the entrepreneur, and the proposed corporation. The essential elements of this business relationship are the specification of the services the lawyer promises to perform, including the identification of those individuals for whose benefit such services will be performed, and the specification of, or basis for determining, the lawyer’s fee that will be paid by the client or someone acting on behalf of the client. These business aspects of the legal structure within which the lawyer will work are governed by the common law of contracts and, more specifically, the contract law applicable to lawyers as recently restated in the Restatement (Third) of the Law Governing Lawyers.

The professional and business aspects of the legal relationship between the lawyer, the entrepreneur, and the proposed corporation can be bundled together into a single attorney-client relationship between one person and one lawyer, with the

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50 See MODEL RULES OF PROF'L CONDUCT, Preamble and Scope ¶ 17 (stating that “substantive law external to these Rules determine whether a client-lawyer relationship exists”).

51 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 48, 50, 51, 55, 56.

52 See MODEL RULES OF PROF'L CONDUCT, Preamble and Scope ¶ 19.

53 Most of the lawyers’ duties, as set forth in the ABA Model Rules of Professional Conduct, “attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.” Id., Preamble and Scope ¶ 17. This includes the lawyer’s duties to the client set forth in Chapter 1 (Client-Lawyer Relationship) and Chapter 2 (Counselor). Similarly, Chapters 3 and 4, both of which set forth limited restrictions on what a lawyer may do on behalf of a client, only apply when a lawyer is representing a client. See, e.g., id. R. 4.1 (“In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person . . . .”).

54 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 (noting that a contract between a lawyer and a client should be interpreted from the perspective of a reasonable client and that modifications to the agreement must be fair to the client).
person being the client, the fee payor, and the sole intended beneficiary of the lawyer’s services. Nevertheless, it is important for lawyers to be aware of the differences between the professional and business relationships because an attorney-client relationship can exist even though the client is not contractually obligated to pay a fee; conversely, a person who is not a client can be contractually obligated to pay the lawyer’s fee. In this context, the lawyer must pay careful attention to the scope of the services provided and when representation of the client will terminate—the temporal dimensions of the scope of the lawyer’s representation of the entrepreneur.

A. Structuring the Professional Relationship

Against this backdrop, the lawyer and the promoter may agree that the lawyer will represent the promoter throughout the formation and organization process, both before and after the legal birth of the entity, and may agree that the lawyer will represent the promoter thereafter in any matters relating to the new corporation and the conduct of its business. This representation may include actions taken by the promoter after becoming a shareholder, director, or officer of the newly formed corporation. Until the lawyer or promoter terminates this ongoing representation, the promoter is deemed a current client of the lawyer and the lawyer is subject to the full panoply of duties a lawyer owes to a current client. These include the duty of competence, diligence, communication, confidentiality, and loyalty. The lawyer could confirm the exclusivity of the relationship with the entrepreneur by informing any persons with whom the lawyer will interact prior to incorporation that he or she is neither representing them nor the proposed corporation. This is particularly important if persons other than the promoter are acting jointly with the promoter as co-promoters or joint venturers in connection with the corporation’s formation.

55 Consideration is not required to create an attorney-client relationship, as evidenced by the fact that lawyers often represent clients on a pro bono basis. See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §14 & cmt. a (defining the criteria for formation of a client-lawyer relationship without reference to compensation and specifying that “[e]ven if a relationship ensues, the client may not owe the lawyer a fee” and that “[w]hen a fee is due, the person owing it is not necessarily a client”); see also id. § 134 (addressing compensation of a lawyer by a person other than the client).

56 See MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”).

57 See, e.g., id. R. 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: Current Clients). If the client is an organization—such as a corporation that has been formed with the assistance of a lawyer—the lawyer must also comply with Rule 1.13 (Organization as Client). Id. R. 1.13.
The lawyer should also communicate such a disclaimer to any prospective initial investors, directors, or officers of the proposed corporation. If someone other than the promoter or the lawyer will serve as the corporation's incorporator, that incorporator also should be warned that the lawyer is only representing the promoter. To err on the side of caution, the lawyer might communicate this notice in writing, or ask the non-clients to sign a written acknowledgment that the lawyer does not represent them. In this regard, it might be useful to have a standard form disclaimer that could be signed by third parties whose relationship to the promoter or the proposed corporation might lead them to mistakenly assume that the lawyer represents them.

This ritual should be repeated after incorporation to alert the new corporation and its participants that the lawyer represents the promoter personally and not the newly formed corporation or any persons who will participate in the corporation's affairs as shareholders, directors, or officers. This is especially important if the promoter becomes a director or officer who might be regarded as duly authorized to retain a lawyer on behalf of the corporation, or if the corporation pays the lawyer’s fee for representing the promoter. In this context, the notification that the lawyer is not representing the corporation should be provided to a duly authorized constituent of the corporation other than the promoter, and the lawyer should secure a signed acknowledgment of the duly authorized constituent’s understanding that the lawyer is not representing the corporation. Again, the corporation's duly authorized constituent, or any person who may believe the lawyer is representing them in addition to the promoter, could sign a standard form disclaimer.

Assuming the lawyer will establish an attorney-client relationship with the promoter, the lawyer and promoter may agree that the lawyer will represent the promoter only until such time as the corporation is legally capable of retaining a lawyer. Then, the corporation, acting through a duly authorized constituent, may retain the promoter's lawyer or some other lawyer to represent it. In this scenario, the lawyer and the promoter will agree that the lawyer's representation is limited in scope, which is permissible if the limitation is reasonable under the circumstances and the promoter gives informed consent.\textsuperscript{58} The lawyer's representation of the promoter would simply terminate upon completion of the limited set of tasks the lawyer agreed to perform, with the corporation left to decide whether it wants to retain a lawyer and, if so, which one.

\textsuperscript{58} Id. R. 1.2(c).
The lynchpin is the lawyer’s specification of the scope of the representation. For example, the scope of the representation could be limited to services relating to the formation and initial organization of the entity. Here, the lawyer’s representation would continue beyond the legal birth of the entity until all aspects of the entity’s initial organization are complete. Alternatively, the lawyer might limit the scope of the promoter’s representation to the tasks necessary for the legal birth of the corporation. In this situation, the lawyer’s representation would terminate at the effective date of the corporation’s incorporation. As of the incorporation date, the corporation will either have an incorporator or an initial board of directors possessing the authority to retain a lawyer on the corporation’s behalf to complete the organization of the corporation.

Upon completion of the limited scope representation, the lawyer’s representation of the promoter terminates. The lawyer becomes subject to the duties lawyers owe to their clients in connection with the termination of a representation. The promoter becomes one of the lawyer’s former clients. The duly authorized constituents of the corporation are free to retain a lawyer or to proceed without the assistance of counsel. They could, of course, ask the promoter’s lawyer to represent the corporation now that the lawyer no longer represents the promoter, but the constituents are free to hire a different lawyer to complete the corporation’s organization and to represent it as it commences its business.

Most likely, the lawyer and the promoter will want the lawyer to represent the corporation on an ongoing basis after it is formed and organized. The promoter or lawyer may be unwilling to consent to the lawyer’s simultaneous representation of multiple clients in connection with the corporation’s formation, organization, and subsequent operation as a going concern. If so, the lawyer must terminate representation of the promoter before entering into an attorney-client relationship with the corporation.

This transition might be handled in one of two ways. First, the termination of the lawyer’s representation of the promoter could be independent of the corporation’s subsequent retention of the lawyer, but coordinated so that the representation of the corporation begins as soon as the representation of the promoter terminates. How this would be done depends on the way the corporation is organized—by the incorporator, by a board of directors the initial members of which are named in the charter, or by a board of directors the initial members of

59 A corporation’s organization is complete after the election of directors, the appointment of officers, the adoption of bylaws, and the issuance of shares to those contemplated as the initial co-owners of the business.
which are elected by the incorporator. Ultimately, the promoter’s lawyer must have provided services that would enable the corporation, acting through duly authorized constituents, to hire its own lawyer. The alternative, and the more likely way to handle the transition, would be for the promoter and the lawyer to agree that the lawyer’s representation of the promoter terminates when the corporation, acting through duly authorized constituents, retains the lawyer to represent it. Prior to the termination of the lawyer’s representation of the promoter, the promoter would be the lawyer’s only client. After the commencement of the corporation’s representation and termination of the promoter’s representation, the corporation would be the lawyer’s only client. The promoter will become one of the lawyer’s former clients.

The lawyer assuming the representation of the corporation will be subject to the rules and laws applicable to any lawyer who undertakes the representation of an organizational client. Normally, a lawyer retained by a corporation represents only the corporation, acting through its duly authorized constituents, and none of its constituents as individuals. Nevertheless, the lawyer must take care to ensure that neither his former client—the promoter—nor any of the corporation’s constituents can make a non-frivolous argument that the lawyer was representing them as individuals or owed them any other fiduciary duties. The lawyer also should identify those constituents who are duly authorized to represent the corporation in its dealings with the lawyer. This group of constituents includes the board of directors, but only when the directors act collectively at properly held board meetings. The lawyer should clarify the scope of authority the board has delegated to the corporation’s officers or other employees to deal with the lawyer. In many cases the board will appoint the promoter as the corporation’s president and give him the authority to retain and deal with the lawyer on the corporation’s behalf. When the lawyer deals with the promoter—who is now a former client—in the promoter’s new capacity as the corporation’s president, it is particularly important for the lawyer to clarify that he is only representing the corporation.

The lawyer also must redo the conflicts check that was conducted after he or she decided to undertake the representation of the promoter. In performing this conflicts check, the lawyer should ask the following questions: Will the lawyer represent the corporation in transactions directly adverse to clients he or she represents in other matters? Will the lawyer’s relationship with any of the persons

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60 See id. R. 1.13.

61 Id. R. 1.13(a).
the corporation will deal with materially limit the representation of the corporation? If so, may the lawyer request consent to the representation, and what must he or she do to secure the informed consent of the affected person?

Finally, given the promoter’s status as a former client, the lawyer must address the possible conflict of interest problems that may arise if there will be transactions between the promoter and the corporation—such as the execution of an employment contract, the issuance of shares, or the promoter’s reimbursement for expenses incurred during the corporation’s formation and organization. From the promoter’s position as the lawyer’s former client, the issue is whether the representation of the corporation will be materially adverse to the promoter’s interests and substantially related to the matter in which the lawyer represented the promoter. If so, the lawyer must secure the promoter’s informed consent, confirmed in writing, to the lawyer’s representation of the corporation. From the corporation’s standpoint, the issue is whether there is a significant risk that the lawyer’s representation of the corporation will be materially limited by the lawyer’s duties to the promoter as former client. In particular, the issue is whether the lawyer’s ongoing duty not to reveal information relating to the former client’s representation, or to use such information to former client’s disadvantage, will materially limit the lawyer’s representation of the corporation. If so, the lawyer will be allowed to represent the corporation only if the lawyer reasonably concludes that the limitation will not preclude competent and diligent representation of the corporation, and a duly authorized constituent of the corporation (other than the promoter) gives informed consent to the representation, confirmed in writing.

62 Id. R. 1.9(a) (“A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.”).

63 Id.

64 Id. R. 1.7(a)(2) (A lawyer has a concurrent conflict of interest if “there is a significant risk that the representation of [a client] will be materially limited by the lawyer’s responsibilities to . . . a former client.”).

65 A lawyer’s confidentiality obligations to a former client may materially limit the representation of a client by precluding communication of information reasonably necessary for the client to make reasonably informed decisions concerning the representation. See id. R. 1.4, 1.9, 1.7 cmt. 9.

66 Id. R. 1.7(b)(1) & (4); see also id. R. 1.13(g) (“If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.”). Although Rule 1.13(g) on its
One might be concerned that the lawyer’s representation of the corporation would be materially limited because of the lawyer’s relationship with the promoter. This problem would be exacerbated if the lawyer had represented the promoter in other matters as well, and could expect to represent the promoter again in the future. A cautious lawyer would treat every transaction between the promoter and the corporation that is related to the corporation’s formation and organization as a conflict of interest transaction requiring the informed consent of both the promoter, as former client, and the corporation, as current client. In addition, the lawyer must not forget that former dealings with the entrepreneur that the lawyer declined to represent might be a basis for the lawyer’s disqualification from representing the corporation in a transaction relating to the corporation’s formation and organization.  

B. Structuring the Lawyer’s Business Relationship With the Promoter and the Corporation

Having reached an agreement about the structure of the professional relationship with the client, the lawyer should also address the business aspects of the relationship. The primary issue is determining who will pay the lawyer’s fee. An obvious candidate is the promoter, particularly with respect to payment for the lawyer’s services rendered prior to the corporation’s formation; the promoter also may be a likely candidate to pay the lawyer’s fees if the lawyer continues to represent the promoter throughout the corporation’s organization. The corporation could reimburse the promoter for payments to the lawyer for services rendered for the benefit of the entity either before or after its legal birth. The promoter’s entitlement to such reimbursement, if any, and the propriety of the corporation’s constituents approving such reimbursement will depend on applicable corporate law. If the fee is a fixed fee, it could be payable in advance, or upon the corporation’s formation, organization, and issuance of shares to those contemplated as the initial shareholders. The agreement could call for progressive payments in which portions of the aggregate fixed fee are due as various tasks are completed. The fee might be contingent on the successful formation and organization of the corporation. Other面 applies only to dual representation, its underlying principle is that the organization’s consent to a representation affected by a conflict should not be made by a person whose interests are adverse to the organization. See id. R. 1.3(g).

67 Id. R. 1.18(c)-(d).

68 See, e.g., MODEL BUS. CORP. ACT § 6.28 (2005) (permitting the corporation to pay for organizational expenses “from the consideration received for shares”).
than the identity of the fee payor, however, these issues—as well as issues related to the amount the lawyer will be paid—are beyond the scope of this Article.

If the professional relationship is structured so that the lawyer will represent the promoter initially and then represent the corporation after its formation, the promoter could pay the lawyer’s fee for services rendered while the lawyer represented the promoter, and the corporation could pay the lawyer’s fee for the services thereafter provided to the corporation. Alternatively, the lawyer and promoter could agree that the corporation would be obligated to pay the fee. Thus, the promoter would be the client and the proposed corporation would be the fee payor. From the lawyer’s standpoint, the problem is that the corporation cannot be obligated to pay the lawyer’s fee prior to its legal birth. The corporation will be obligated if, after its birth, the payment is approved, adopted, or ratified by a duly authorized constituent of the corporation. This is the only viable alternative if the lawyer’s fee is to be paid by issuing shares of the corporation’s stock—a mode of fee payment that involves many issues that are beyond the scope of this Article. Yet another alternative would be for the promoter to assume personal responsibility for the lawyer’s fee, subject to a novation in the event the corporation, acting through duly authorized officials, assumes the promoter’s obligation to pay the lawyer’s fee.

The lawyer should be aware of two important red flags if the professional and business aspects of the lawyer-client relationship are structured so that the fee payor is someone other than the lawyer’s client. The first red flag is that the ABA Model Rule of Professional Conduct 1.8(f) requires the client—either the promoter or the corporation—to give informed consent to the lawyer’s acceptance of compensation from someone other than the client. Rule 1.8(f) also prohibits the lawyer from allowing the fee payor to interfere with the lawyer’s independent professional judgment, or to have access to information relating to the client’s representation. When the corporation is the client, someone other than the promoter needs to give this consent, even if the promoter is an officer of the corporation duly authorized to retain and compensate counsel. The second red

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69 See, e.g., Kridelbaugh v. Aldrehn Theatres Co., 191 N.W. 803, 804 (Iowa 1923). See generally GEVURTZ, supra note 17, at § 1.3.1 (explaining that a corporation is not bound by a contract entered into before its legal existence).

70 MODEL RULES OF PROF’L CONDUCT R. 1.8(f).

71 Id.

72 Because of the promoter and the corporation’s conflicting interests concerning third party fee payment, and the effect of the fee arrangements on the lawyer’s respective duties to the promoter and the corporation, the fee arrangement should be treated the same as a joint representation of the
flag—derived from the old saw that “she who pays the piper calls the tune”—arises because it may be reasonable for the fee payor to believe that he or she is a client. Thus, the lawyer should disclaim the representation of the fee payor, preferably in writing.73

VI. THE LAWYER’S DUTIES TO THE PROMOTER AND OTHERS ASSOCIATED WITH THE FORMATION AND ORGANIZATION OF THE CORPORATION

Having determined the identities of the client and the fee payor, the lawyer must clarify his or her responsibilities to the promoter and any other non-client third parties who the lawyer will deal with on behalf of the promoter or the corporation. Indeed, this is an issue that should factor into the lawyer’s decision about how to legally structure the professional relationships within which the lawyer will form and organize the corporation. Let us assume, then, that the promoter is the lawyer’s only client both before and after the formation of the corporation, and that all other persons with whom the lawyer deals during the pre-incorporation phase are non-clients. The same will be true after incorporation: the newly formed corporation, its shareholders, directors, officers, and employees are added to the list of non-clients with whom the lawyer may deal in connection with the corporation’s formation and organization.

Initially, it may appear that the lawyer owes many duties to the promoter as client and very few duties to those persons with whom the lawyer and the promoter will interact during the corporation’s formation and organization. The lawyer’s duties to the promoter include the duties of competence, diligence, communication, obedience, confidentiality, and loyalty.74 The lawyer owes no such duties to non-

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73 See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. c (2000) (providing as examples the surrounding facts and circumstances that will serve as a client’s manifestation of intent sufficient to result in an attorney-client relationship the situation where the client discusses the possibility of representation and then sends the papers and payment requested by the lawyer). In this situation, the lawyer would be required to manifest his lack of consent to the representation in order to avoid the formation of an attorney-client relationship. Id. The lawyer must establish that circumstances known to the fee payor indicate that the lawyer was not going to represent the fee payor, but someone else. Id.

74 See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.1 (Competence), 1.3 (Diligence), 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.4 (Communication), 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: Current Clients). If the client is an
clients. However, when dealing with non-clients on a client’s behalf, the lawyer cannot knowingly make false statements of law or fact,\textsuperscript{75} cannot assist the client in committing a crime or perpetrating a fraud against the non-clients,\textsuperscript{76} and cannot engage in conduct that has “no substantial purpose other than to embarrass, delay, or burden” the non-clients.\textsuperscript{77} If the non-client is not represented by counsel in the matter, the lawyer must correct any misapprehension the non-client might have about the lawyer’s role; the lawyer may not provide legal advice to the non-client other than advising the non-client to obtain counsel.\textsuperscript{78} If any of those with whom the lawyer and entrepreneur will interact, including the newly formed corporation, have retained counsel with respect to the formation and organization of the corporation, and the promoter’s lawyer is aware of that representation, the lawyer must not communicate with the represented person without the consent of that person’s lawyer.\textsuperscript{79} Thus, the promoter’s lawyer would have to direct all communication about the formation, organization, and initial operations of the organization, such as a corporation that has been formed by a lawyer, the lawyer must also comply with Rule 1.13. \textit{Id.} R. 1.13 (Organization as Client).

\textsuperscript{75} \textit{Id.} R. 4.1(a).

\textsuperscript{76} \textit{Id.} R. 1.2(d), 4.1(b).

\textsuperscript{77} \textit{Id.} R. 4.4(a).

\textsuperscript{78} \textit{Id.} R. 4.3. When dealing with an unrepresented co-promoter, prospective investor, or an unrepresented constituent of an unrepresented corporation, the entrepreneur’s lawyer must not state or imply that he or she is disinterested in the matter and, if the lawyer “knows or reasonably should know” that the unrepresented individual or entity misunderstands the lawyer’s role in the matter, he or she must “make reasonable efforts to correct the misunderstanding.” \textit{Id.} The prohibition against giving legal advice does not apply where the lawyer advises the non-client to secure counsel; the prohibition only applies “if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.” \textit{Id.} For present purposes, it is particularly important to note

This Rule does not prohibit a lawyer from negotiating the terms of a transaction . . . with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer’s client will enter into an agreement . . ., prepare documents that require the person’s signature and explain the lawyer’s own view of the meaning of the document or the lawyer’s view of the underlying legal obligations.

\textit{Id.} R. 4.3 cmt. 2.

\textsuperscript{79} \textit{Id.} R. 4.2.
corporation to the lawyers representing the other participants. This requirement, however, does not preclude direct communication between the promoter and other participants; further, the lawyer is allowed to advise the promoter concerning such communication.\footnote{Id. R. 4.2 cmt. 4, 8.4 cmt. 1.}

Lawyers might regard this limited set of restrictions on their dealings with third persons as one of the benefits of structuring the representation so the lawyer represents only the promoter or, at some later point, only the corporation, particularly when compared with the extensive duties a lawyer owes to jointly represented clients.\footnote{When a lawyer jointly represents two clients in a single matter, the lawyer owes the same duties he or she would owe if the clients were separately represented. Although the comment to Model Rule of Professional Conduct 1.7 states that “the lawyer’s role is not that of partisanship normally expected in other circumstances” and “that the clients may be required to assume greater responsibility for decisions than when each client is separately represented,” there is no support for this comment in the rule. \textit{Id.} R. 1.7 cmt. 32. In any event, impartiality is no less a duty than partisanship, and surely the lawyer cannot abdicate all responsibility to assist the jointly represented clients in making informed decisions. The comment also contains this questionable caveat: “[E]ach client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.” \textit{Id.} R. 1.7 cmt. 33. In addition to the duties that correspond to these rights, we must note the lawyer’s duty to communicate with each client, duty to preserve the confidentiality of each client’s communications, and duty to ensure that intervening events do not require the lawyer to withdraw from the representation or at least to advise the clients of the intervening events and secure their informed consent to continued joint representation. \textit{Id.} R. 1.4, 1.6, 1.7.} This, however, may be a dangerous trap for the unwary. At the heart of the problem is the status of the lawyer’s client first as a promoter of the proposed corporation and thereafter as a director, officer, or controlling shareholder of the newly formed corporation. It generally is understood that promoters owe a fiduciary duty to the proposed corporation throughout its formation and organization.\footnote{\textit{James D. Cox \\& Thomas Lee Hazen, Cox \\& Hazen on Corporations} § 5.14, at 206 (2d ed. 2003) (“Promoters have such far-reaching control over the enterprise during its formative stages, and even after incorporation, that the law imposes on them fiduciary obligations toward the company . . . .”). Cox and Hazen also note that the promoters’ fiduciary duties arise “when the promoters form a clear intention to promote the corporation.” \textit{Id.}} This duty also may extend to individuals contemplated as the initial shareholders of the corporation.\footnote{\textit{Id.} (stating that the promoters’ “fiduciary relationship extends to the promoted corporation [and] its stockholders”).} Also, a promoter may owe fiduciary duties to others who are active in the formation and organization of the corporation, as they
may be regarded as joint venturers. If, as often is the case after incorporation, the promoter becomes one of the corporation’s initial directors, officers, or a controlling shareholder, the promoter will owe fiduciary duties to the corporation and, in some situations, to its shareholders as well. Although a full catalog of these fiduciary duties is beyond the scope of this Article, it should be noted that these duties require full disclosure and fair dealing far beyond what is required in arm’s-length dealings between parties who owe no fiduciary duties to each other. To summarize, the question is whether the promoter’s lawyer may be subject to professional discipline or civil liability if the lawyer knowingly assists a promoter in breaching a fiduciary duty owed to co-promoters, the proposed corporation, or those contemplated as the corporation’s initial investors. The same question arises when the lawyer subsequently represents the promoter in the promoter’s newly acquired status as a director, officer, or controlling shareholder of the corporation.

There is authority to support the proposition that the status of a lawyer’s client as a fiduciary does not alter the lawyer’s duties in dealing with the beneficiaries of the client’s fiduciary duties. For example, the ABA Standing Committee on Ethics and Professional Responsibility has held that the fact that a lawyer’s client owes fiduciary duties to another does not, in itself, expand or limit the lawyer’s obligation to the fiduciary under the Model Rules of Professional Conduct, nor does it impose obligations on the lawyer “toward the beneficiaries that the lawyer would not have toward other third parties.” Thus, the lawyer does not have a heightened duty of disclosure to the beneficiary that would override the lawyer’s duty to refrain from revealing information relating to the fiduciary’s representation without the fiduciary’s consent. Additionally, the lawyer would not be prohibited from assisting the fiduciary in taking action adverse to the beneficiary unless doing so would assist the client in committing a crime or perpetrating a fraud against the beneficiary. Thus, a lawyer may assist a client in breaching a fiduciary duty owed to another, so long as the client’s conduct does not constitute a crime or fraud. In this regard, the

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84 Id. (“The fiduciary relationship extends to . . . fellow promoters.”).

85 Id. § 5.14, at 206-11.

86 Id. § 5.14, at 206 (The promoters’ fiduciary duty requires them to “act with utmost good faith in all dealings with the corporation and its shareholders.”). In general, this duty requires full disclosure, and in the absence of full disclosure, it requires the dealings to be substantively fair. Id. § 5.14, at 206-07. Similarly, the fiduciary duties of corporate directors, officers, and controlling shareholder require full disclosure or substantive fairness. Id.§§ 10.09-10.15, at 202-20; §§ 11.01-11.04, at 221-27; § 11.11, at 252.

ABA’s Ethics 2000 Commission rejected a reporter’s proposal to amend the Rules to prohibit a lawyer from assisting a client in breaching a fiduciary duty.\textsuperscript{88}

Consistent with this approach is the Oregon Supreme Court’s recent holding in \textit{Reynolds v. Schrock} that “a lawyer acting on behalf of a client and within the scope of the lawyer-client relationship . . . is not liable for assisting the client in conduct that breaches the client’s fiduciary duty to a third party.”\textsuperscript{89} The court identified the following activities as being within the scope of the lawyer’s representation of the client in connection with the disposition of property interests assumed to be a breach of the client’s fiduciary duties to a joint venturer: 1) advising the client that the agreement establishing the joint venture did not preclude the client from selling the property in question; 2) asking the escrow agent handling the sale to keep the sale confidential; 3) assisting the client in revoking her prior consent to sell certain property; and 4) accepting payment of substantial fees for this and other legal work.\textsuperscript{90} The court also indicated that drafting documents or correspondence in connection with the transaction would be within the scope of the lawyer’s representation.\textsuperscript{91} On the other hand, the court treated certain conduct as outside the scope of the lawyer’s representation: 1) conduct unrelated to the representation even if it involves a client; 2) conduct that is in the lawyer’s interest and is contrary to the client’s interests; and 3) conduct involving the commission of a crime or fraud.\textsuperscript{92} After providing such guidance, the court acknowledged that its test does not identify a bright line between liability and immunity, but it opined that the new test is preferable to tests employed by other courts.\textsuperscript{93} The court’s test describes, in the broadest possible terms, the lawyer’s immunity from civil liability for assisting a client in breaching a fiduciary duty. Does this holding mean that a promoter’s lawyer should be reassured that he or she can do the client’s bidding without fear of professional discipline or civil


\textsuperscript{89}Reynolds v. Schrock, 142 P.3d 1062, 1069 (Or. 2006).

\textsuperscript{90}Id. at 1071.

\textsuperscript{91}Id. at 1070.

\textsuperscript{92}Id. at 1069.

\textsuperscript{93}Id. at 1071.
liability so long as the lawyer acts in accordance with what lawyers typically do for clients in similar transactions?

Lawyers for fiduciaries should not be lulled into complacency by the ABA Ethics Opinion and Reynolds v. Schrock. Liability for assisting a client in breaching a fiduciary duty is recognized by the ALI in its Restatement (Third) of the Law Governing Lawyers, and some states may be more willing than Oregon to impose such liability. Perhaps such uncertainty is due to the fact that a client’s breach of a fiduciary duty is a class of legal wrongdoing that is distinguishable both from frauds—the perpetration of which a lawyer clearly may not assist—and from a client’s breach of a contract—which a lawyer may assist without risk of liability so long as the lawyer does not employ unlawful means.

Notwithstanding the Oregon Supreme Court’s decision in Reynolds v. Schrock, the unsettled state of the law leaves a lawyer who is representing a promoter in an uncomfortable situation if the promoter asks the lawyer to assist in conduct that the lawyer believes may violate the promoter’s fiduciary duties to a co-promoter, the proposed corporation, or persons contemplated as the initial shareholders of the corporation. In this regard, the lawyer should pay particular attention to the fact that non-disclosure of material facts by a fiduciary in a transaction with a beneficiary is

94 See Restatement (Third) of the Law Governing Lawyers § 56 (2000). (“[A] lawyer is subject to liability to a . . . nonclient when a nonlawyer would be in similar circumstances.”). Comment h broadly asserts, “Lawyers are also liable to nonclients for knowingly participating in their clients’ breach of fiduciary duties owed by clients to nonclients . . . .” Id. § 56 cmt. h. Support can be found for limiting this proposition to trustees and other similar fiduciaries, such as guardians, and excluding lawyers for corporate constituents who owe fiduciary duties to the corporation or other constituents. Id. § 51 cmt. h. The distinction is based on the unexplained assertion that, in the latter situation, there is a greater likelihood that the exposure to civil liability would significantly impair the lawyer’s rendering of services to the client. This does not seem to lay the issue to rest.

95 See, e.g., Chem-Age Indus., Inc. v. Glover, 652 N.W.2d 756, 775 (S.D. 2002) (indicating that liability could be imposed if the lawyer “rendered ‘substantial assistance’ to the breach of duty, not merely to the person committing the breach”). The Oregon Supreme Court stated that its test was more predictable than that of other courts, but also conceded that even its “test does not identify a bright line between liability and immunity.” Reynolds, 142 P.3d at 1071.

96 See Model Rule of Prof’l Conduct R. 1.2(d) (2002) (“A lawyer shall not . . . assist a client . . . in conduct that the lawyer knows is criminal or fraudulent . . . .”).

97 See Restatement (Third) of the Law Governing Lawyers § 57(3) (“A lawyer who advises or assists a client to make or break a contract . . . is not liable to a nonclient for interference with contract . . . if the lawyer acts to advance the client’s objectives without using wrongful means.”).
treated as a fraud in the Restatement (Second) of Torts. 98 Similarly, non-disclosure may be treated as a fraud within the meaning of ABA Model Rule of Professional Conduct 1.2(d), which prohibits a lawyer from assisting a client in engaging in conduct the lawyer knows is fraudulent. 99 One way to resolve this uncertainty for the protection of all concerned—the promoter, the lawyer, and other participants—would be for the lawyer and the promoter to agree that the promoter’s objective is to be fair to the corporation and those who will participate as its initial shareholders. Additionally, the promoter could agree not to ask the lawyer to engage in any conduct that would violate the entrepreneur’s fiduciary duties. Finally, the promoter could agree to make full disclosure as would be required of a fiduciary under the circumstances. Such an agreement would permit the lawyer to withdraw from the representation if the promoter insisted on conduct that violated the agreement. In the event of the lawyer’s withdrawal, the agreement might allow the lawyer to inform the beneficiaries of his or her withdrawal from the promoter’s representation. Such an agreement also might allow the lawyer to do some, but not all, of what would be required if the lawyer jointly represented the promoter and other co-promoters, the corporation, or anyone else to whom the promoter owes a fiduciary duty. Such an agreement protects lawyers against the disciplinary and liability risks associated with the uncertainty concerning a lawyer's accountability for assisting a client in breaching fiduciary duties owed to others. This is particularly true if a lawyer can obtain such an agreement without expanding the professional and legal duties owed to the client and without adding to the limited professional and legal duties owed to non-clients.

VII. CONCLUSION

This Article has examined some of the possible complexities a lawyer must work through when entrepreneurs request help forming and organizing a corporation for a proposed business venture. This Article does not suggest that every incorporation will be complex, nor does it suggest that the lawyer always will struggle to determine what he or she is allowed to and wants to do. This Article’s purpose is to alert lawyers to the complexities that may be lurking when the lawyer will represent only one client at a time, and to suggest some steps the lawyer might take to minimize pitfalls. Primarily, a lawyer may avoid traps by improving

98 Restatement (Second) of Torts § 551 (1977) (treating as a misrepresentation the failure to disclose to a party in a business transaction “matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them”).

99 See Pierce, supra note 90, at 788-96, 824-31. For a recommendation that lawyers be expressly prohibited from knowingly assisting a client to breach a fiduciary duty owed by the client to a third person, see id. at 894-99.
communication with the client and any non-clients with whom the lawyer may deal on behalf of the client. Of particular significance is the suggestion that, by limiting the scope of the lawyer’s representation, the lawyer may further reduce the number of traps into which he or she might fall when dealing with third persons. If nothing else, this Article calls attention to the relationship between the rules of professional conduct, the law governing lawyers, and a professional activity in which many lawyers engage without paying as much attention to the legal structure of the representation as they pay to the legal structure of the business they are forming and organizing. This Article represents the first step to a fuller understanding of the legal structure of the lawyer’s role in the formation and organization of a corporation or other legal entity through which business will be conducted. Hopefully it will provide a foundation for future thinking about the legal structure of the representation that results when the lawyer agrees to represent multiple clients simultaneously in the formation and organization of a corporation or agrees to structure the representation so the lawyer only represents a proposed entity, both before and after its formation.