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THE LAWYER AS LOVER: ARE COURTS ROMANTICIZING THE LAWYER-CLIENT RELATIONSHIP?

*Bruce A. Green**

I. INTRODUCTION

Lawyers have a special relationship with their clients, in that lawyers are generally expected to devote themselves to their clients and their clients' causes no matter how morally undeserving those clients or causes happen to be (as long as lawyers do not help their clients break the law). Lawyers and judges largely take the attorney-client relationship and its expectations for granted. Not so academics. For some years, moral philosophers and others have contemplated whether and how to justify a professional relationship that appears to sacrifice the greater public good for the individual client's benefit.¹

Forty years ago, Professor Charles Fried of Harvard Law School took a swing at this question in an article called, *The Lawyer as Friend*.² Seeking to justify "the ideal of professional loyalty to one's client" that is intrinsic to "the traditional conception of the law-

* Louis Stein Chair, and Director, Stein Center for Law and Ethics, Fordham University School of Law. This paper was prepared for a Touro Law School symposium on "Billy Joel and the Law." My thanks to Sam Levine for organizing the symposium and inviting me to participate, and my thanks to him, Susan Saab Fortney, Russ Pearce, Becky Roiphe and Ellen Yaroshefsky for comments on an earlier draft.

¹ See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853 (1992); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613; Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980) (arguing "for a new conception of professional ethics in which lawyers must acknowledge personal responsibility for the consequences of their professional conduct"); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988). See also Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529 (1984) (discussing and critiquing some moral philosophers' underlying assumptions about the lawyer-client relationship).

² Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

yer's role,"³ Professor Fried argued that, like a friend or relative, a lawyer is morally entitled to give special priority to one person's interests by virtue of the special relationship.⁴ He characterized a lawyer as "his client's legal friend" or "limited-purpose friend," explaining that, "like a friend," a lawyer acts in another's "interests, not his own."⁵ Professor Fried acknowledged how friendships differ from lawyer-client relationships: "the ideal [friendship] is reciprocal" and not financially motivated.⁶ However, he regarded these differences as irrelevant to his argument that the lawyer's role justifies prioritizing the client's interests in order to "help to preserve and express the autonomy of his client vis-à-vis the legal system," even when the client is morally or socially unworthy.⁷

One may gain a different perspective on lawyers' fidelity to clients if, instead of analogizing lawyers to friends, one compares lawyer-client relationships to romantic ones – that is, if one envisions lawyers as lovers. Not lovers in a literal sense: initiating a sexual relationship with a client would be unethical and would get a lawyer into a heap of trouble.⁸ To adapt Professor Fried's terminology, imagine the lawyer as a "legal" or "limited-purpose" lover, or as a lover in the legal system.⁹

Unlike Fried's article, this essay is not a philosophical explo-

³ *Id.* at 1061.

⁴ *See id.* at 1071.

⁵ *Id.* at 1071-73.

⁶ *Id.* at 1074.

⁷ Fried, *supra* note 2, at 1074. For critiques of Fried's analysis, see, e.g., WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 19-20 (1998); James E. Fleming, *The Lawyer as Citizen*, 70 *FORDHAM L. REV.* 1699, 1702-08 (2002); DAVID LUBAN, *The Adversary System Excuse*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 106-07 (David Luban ed., 1983) (analyzing Professor Fried's argument that by serving a client a lawyer is engaged in a moral good); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *WIS. L. REV.* 29, 108-09 (1978) (challenging Fried's analogy on the ground, among others, that unlike friends, who adopt each others' ends, lawyers adopt clients' ends but the relationship is not reciprocal); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 *NOTRE DAME L. REV.* 1, 49-51 (1999).

⁸ *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(j) (2014) ("A lawyer shall not have sexual relations with a client . . ."). *See generally* Stacey DeBroff, *Lawyers As Lovers: How Far Should Ethical Restrictions on Dating or Married Attorneys Extend?*, 1 *GEO. J. LEGAL ETHICS* 433 (1987); Cheyney Ryan, *Lawyers as Lovers: Gold Diggers of 1933 or "I'd Rather You Sue Me than Marry Me,"* 30 *U.S.F. L. REV.* 1123 (1996); William K. Shirey, Note, *Dealing with the Profession's "Dirty Little Secret": A Proposal for Regulating Attorney-Client Sexual Relations*, 13 *GEO. J. LEGAL ETHICS* 131 (1999).

⁹ Fried, *supra* note 2, at 1071.

ration of whether lawyers should be devoted to clients at public expense. Rather, drawing on particular cultural understandings, this essay is a normative exploration of whether lawyers can and should be devoted to clients not only at the expense of others' interests but also at the expense of their own self-interest. In particular, it asks whether lawyers can and should meet courts' expectations of loyalty, candor, and confidentiality.

The argument, here, is that just as pop singers might idealize attributes such as fidelity and candor in romantic relationships, courts sometimes romanticize analogous attributes such as loyalty and candor in lawyer-client relationships. Moreover, just as it is unrealistic to expect lovers consistently to achieve romantic ideals, it may be unrealistic to expect lawyers consistently to achieve analogous professional ideals. Although the analogy between lawyers and lovers will seem frivolous, it leads to a serious point: courts should adopt a less idealized rhetoric and express more realistic expectations of the lawyer-client relationship.

II. FROM THE BILLY JOEL CANON: THE ROMANTIC IDEAL

For insight into the romantic side of the "lawyer as lover" equation, one can look widely in popular culture, but it seems apt to look to the canon of Billy Joel, given the popularity of his music.

Some of Billy Joel's songs are about loners – his Billy the Kid, for example, "always rode alone."¹⁰ However, many more of his lyrics are about people in relationships. Some of these relationships might be described as professional ones – for example, his piano man's relationship to the audience.¹¹ But as one would expect of pop songs, a greater portion of Billy Joel's lyrics are about people in *romantic* relationships – not one-night-stands or hookups, but intimate relationships involving intense feeling and attraction. If the lyrics resonate with listeners, perhaps that is because they tell us something we already know about what lovers want and how lovers behave.¹²

What do lovers want from their counterparts? What do they

¹⁰ BILLY JOEL, *The Ballad of Billy the Kid*, on PIANO MAN (Columbia Records 1973).

¹¹ BILLY JOEL, *Piano Man*, on PIANO MAN (Columbia Records 1973).

¹² Billy Joel's lyrics are not, however, considered his strong suit. Nick Paumgarten, *Thirty-Three-Hit Wonder*, THE NEW YORKER (Oct. 27, 2014), <http://www.newyorker.com/magazine/2014/10/27/thirty-three-hit-wonder> (observing that "[Joel] states things very plainly, in the Tin Pan Alley tradition. The lyrics aren't difficult. Anyway, he is chiefly a melo-dist").

value in a relationship? What are the romantic ideals? Often sung in the first person – in the Billy Joel persona – the lyrics offer expected answers. The (presumably male) romantic partner wants *candor*, starting with *honesty*: “[h]onesty is . . . mostly what I need from you.”¹³ The lover values *companionship*, *constancy* and *commitment*: “[s]he’s got a way about her/ I don’t know what it is/ But I know that I can’t live without her.”¹⁴ Romances are supposed to endure.

But what do lovers get? Billy Joel’s lyrics suggest that the romantic ideals are ideals, not expectations and certainly not guarantees. They are not realistically attainable, at least not always. The Billy Joel canon acknowledges that romantic relationships fail – they “will not last forever,”¹⁵ and they may not even last a day.¹⁶ What begins “with a passionate start” usually ends in “cold remains,”¹⁷ and the idea that the relationship will “go the distance”¹⁸ is entirely “a matter of trust.”¹⁹ This is true in two senses. The success of a romantic relationship rests on mutual trust – lovers have to trust each other and be trustworthy. But even then, one has to trust in its survival – to take it as a matter of faith.

Even before romantic relationships are over, romantic ideals are hard to achieve. One cannot trust a romantic partner to keep one’s deepest, darkest secrets: “we all fall in love/ But we disregard the danger/ Though we share so many secrets/ There are some we

¹³ BILLY JOEL, *Honesty*, on 52ND STREET (Columbia Records 1978).

¹⁴ BILLY JOEL, *She’s Got a Way*, on COLD SPRING HARBOR (Columbia Records 1971); BILLY JOEL, *You’re my Home*, on PIANO MAN (Columbia Records 1973) (“Well, I’ll never be a stranger/ And I’ll never be alone/ Wherever we’re together that’s my home.”).

¹⁵ BILLY JOEL, *This is the Time*, on THE BRIDGE (Columbia Records 1986) (“This is the time to remember/ ‘Cause it will not last forever/ These are the days to hold on to/ ‘Cause we won’t/ Although we’ll want to.”).

¹⁶ BILLY JOEL, *This Night*, on AN INNOCENT MAN (Columbia Records 1983) (“This night is mine/ It’s only you and I/ Tomorrow/ Is such a long time away/ This night can last forever”); see also BILLY JOEL, *Until the Night*, on 52ND STREET (Columbia Records 1978) (“So many broken hearts, so many lonely faces/ So many lovers come and gone.”).

¹⁷ BILLY JOEL, *A Matter of Trust*, on THE BRIDGE (Columbia Records 1986); see also BILLY JOEL, *Scenes From An Italian Restaurant*, on THE STRANGER (Columbia Records 1977) (“[Brenda and Eddie] lived for a while in a very nice style/ But it’s always the same in the end/ They got a divorce as a matter of course.”).

¹⁸ JOEL, *A Matter of Trust*, *supra* note 17.

¹⁹ See *id.* (“You can’t go the distance/ With too much resistance/ . . . Some love is just a lie of the heart/ The cold remains of what began with a passionate start/ . . . But that can’t happen to us/ Because it’s always been a matter of trust”); see also BILLY JOEL, *Stop In Nevada*, on PIANO MAN (Columbia Records 1973) (“[T]hough she finds it hard to leave him/ She knows it would be worse to stay/ He wouldn’t understand the reasons/ That make a woman run away.”).

never tell.”²⁰ The romantic attributes are ideals that may not be fully attainable even by those who try hard. Lovers may value openness but do not entirely reveal themselves to each other: “Well we all have a face/ That we hide away forever/ . . . They’re the faces of the stranger/ . . . Did you ever let your lover see/ The stranger in yourself?”²¹ Even when we try to be open, communication is too imperfect: “If I only had the words to tell you/ If you only had the time to understand/ Though I know it wouldn’t change your feelings/ And I know you’ll carry on the best you can.”²² Lovers may want honesty, but: “Honesty is such a lonely word/ Everyone is so untrue/ Honesty is hardly ever heard.”²³ For Billy Joel’s persona, it is often, perhaps always, impossible to achieve the ideal, to live up to the hopes and expectations of romantic relationships.

III. THE LAWYER-CLIENT RELATIONSHIP: WHY LAWYERS ARE LIKE LOVERS?

Are lawyers like lovers? One scholar has argued that law and love are incompatible.²⁴ But at least with regard to the expectations that go with these different relationships, lawyers and lovers have something in common. The romantic ideals, such as commitment and candor, should seem familiar to lawyers, since these ideals find their counterparts in the legal profession’s “core” fiduciary values of loyalty, confidentiality, and candor: they are hallmarks of the lawyer-client relationship.²⁵ Others have previously recognized this, observ-

²⁰ BILLY JOEL, *Stranger*, on THE STRANGER (Columbia Records 1977).

²¹ *Id.*

²² BILLY JOEL, *If I Only Had The Words (To Tell You)*, on PIANO MAN (Columbia Records 1973).

²³ JOEL, *Honesty*, *supra* note 13. Of course, Billy Joel’s songs are decades old. If one doubts their currency, one only needs Google. If you are exploring confidentiality in romantic relationships, you might ask, “Do you keep your lover’s secrets?” but what you would get is advice about how to betray your romantic partner. *See, e.g.*, Mike Cameron, *5 Ways For Women To Have Successful Married Affairs*, THE EC2DISABLED BLOG (Aug. 26, 2013), <http://ec2disabled.com-mike-all-5-ways-for-women-to-have-successful-married-affairs>; *see also* Lizzie Crocker, *Rules David Petraeus Broke: Seven Tips for a Top-Secret Affair*, THE DAILY BEAST (Nov. 13, 2012), <http://www.thedailybeast.com-articles-2012-11-13-rules-david-petraeus-broke-seven-tips-for-a-top-secret-affair>. Further, if you are hoping to learn how to promote candor between romantic partners, be forewarned not to seek advice on Google about how to “maintain an open relationship.”

²⁴ *See generally* PAUL W. KAHN, *LAW AND LOVE: THE TRIALS OF KING LEAR* (2000).

²⁵ Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1116 (2000).

ing, for example, that lawyers, like lovers, serve as confidants²⁶ and are expected to be honest.²⁷

Although judges' descriptions of professional practice are not universally rosy,²⁸ courts adopt a highly idealized rhetoric when they speak of lawyers' fiduciary duties under the common law of agency.²⁹ This was true beginning at least as early as the mid-nineteenth century³⁰ and continues to the present day. As Professor Wolfram has noted,³¹ contemporary judges describing lawyers' common-law

²⁶ See Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887, 1921 (2010) (observing that "information is frequently shared with a few trusted confidantes--doctors and lawyers, and also spouses, lovers, and friends--under legitimate expectations that these secrets should not be shared with all the world").

²⁷ See Alexander M. Sanders, Jr., *Everything You Always Wanted to Know About Judges but Were Afraid to Ask*, 49 S.C. L. REV. 343, 350 (1998) (indicating that "lawyers, like lovers, matadors, and even presidents, are appraised by whether they cheat along the way").

²⁸ See, e.g., *United States v. Benjamin*, 328 F.2d 854, 863 (2d Cir. 1964) (observing that "[i]n our complex society . . . the lawyer's opinion can be [an] instrument[] for inflicting pecuniary loss more potent than the chisel or the crowbar").

²⁹ See, e.g., Charles W. Wolfram, *A Cautionary Tale: Fiduciary Breach as Legal Malpractice*, 34 HOFSTRA L. REV. 689, 708 (2006) ("As a general concept, the high-sounding expressions of the fiduciary concept perhaps provide courts with emotive phrases to describe a kind of low-resolution photo of desired lawyer conduct as well as a somewhat blurry vision of client vulnerability and trust."); see also Alice Woolley, *The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations*, 65 TORONTO L. J. 285 (observing that "[c]ourts invoke the lawyer's status as a fiduciary rhetorically, infused with the 'warm glow of generalities' rather than analytic rigor") (quoting Wolfram, *supra*, at 709). For other notable discussions of the lawyer as fiduciary, see generally Ray Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235 (1994); Sande Buhai, *Lawyers As Fiduciaries*, 53 ST. LOUIS U. L.J. 553 (2009); Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why a Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137 (1999).

³⁰ See *Stockton v. Ford*, 52 U.S. 232, 247 (1850):

There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

Id.; see also *Galbraith v. Elder*, 8 Watts 81, 94 (Pa. 1839). New York's high court has traced lawyers' heightened duties to an 1846 essay by Sir Francis Bacon. See *In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994) ("Sir Francis Bacon observed, '[t]he greatest trust between [people] is the trust of giving counsel.' This unique fiduciary reliance, stemming from people hiring attorneys to exercise professional judgment on a client's behalf--'giving counsel'--is imbued with ultimate trust and confidence.") (alteration in original) (citation omitted).

³¹ Wolfram, *supra* note 29, at 707.

duties to clients sometimes draw on Benjamin Cardozo's 1928 characterization of the fiduciary relationship between business partners and between co-venturers,³² whose fiduciary duties include "the duty of *the finest loyalty*. . . . Not honesty alone, but *the punctilio of an honor the most sensitive*"³³ Building on this and other early opinions, one judge wrote around a decade ago:

The relationship existing between attorney and client is characterized as highly fiduciary, and requires proof of *perfect fairness* on the part of the attorney. Specifically, the relationship between attorney and client has been described as one of . . . most abundant good faith, requiring *absolute and perfect candor, openness and honesty*³⁴

Another contemporary judge has written: "The standards of the legal profession require *undeviating fidelity* of the lawyer to his client. No exceptions can be tolerated."³⁵ What courts demand of lawyers – "the finest loyalty," "the punctilio of the honor most sensitive," "absolute and perfect candor," and "undeviating fidelity": if one listens to pop music, aren't these exactly what one hopes to find in a lover?

In at least one respect, the romantic analogy seems more apt than Fried's fraternal one. While one presumably favors one's friends over strangers, the ideals of friendship do not preclude taking account of one's own interests and of others' interests when dealing with friends. Brougham famously said that "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."³⁶ The ideals of unqualified self-sacrifice and single-minded devotion to another expressed by Brougham – and by the courts – seem more characteristic of romantic than fraternal relationships.

³² See, e.g., *Sealed Party v. Sealed Party*, No. Civ.A. H-04-2229, 2006 WL 1207732, at *5, *20-21 (S.D. Tex. May 4, 2006) (holding "that the Client has proven by a preponderance of the evidence that the Attorney had a continuing fiduciary duty not to reveal confidential information to others, and that the Attorney violated that duty by issuing the Press Release")(quoting *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928)).

³³ *Meinhard*, 164 N.E. at 546 (emphasis added). "Punctilio" means careful observance.

³⁴ *Sealed Party*, 2006 WL 1207732, at *6 (emphasis added) (citations omitted).

³⁵ *Van Dyke v. White*, 349 P.2d 430, 438 (Wash. 1960) (emphasis added).

³⁶ 2 THE TRIAL OF QUEEN CAROLINE 8 (Joseph Nightingale ed., London, Albion Press 1821). See generally MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 71-72 (3d ed. 2004) (identifying Brougham's speech as "[t]he classic statement of th[e] ideal" of "entire devotion to the interest of the client").

But there is an important difference between the expectations of lovers and lawyers: at least as far as Billy Joel's lyrics go, no one really expects lovers to live up to the romantic ideals in the absolute, at least not for long. He offers a vision of romance in which lovers are likely to betray, withhold and break up. The judicial conception of law practice, on the other hand, elevates the romantic ideals to legal commands. It is not enough for lawyers merely to aspire to loyalty or to hold it up as an ideal. Courts tell us we have a *duty* of loyalty – indeed, a duty of “undeviating fidelity” – and if we fall short we may be sanctioned, sued or even, at times, imprisoned.³⁷ As for honesty, courts do not concede that it “is such a lonely word . . . hardly ever heard” from lawyers, but insist that lawyers behave as fiduciaries with “absolute and perfect candor, openness and honesty.”³⁸ Courts express the expectations of the lawyer-client relationship in absolute and idealized terms and then expect lawyers to live up to them.

Of course, courts' pronouncements may sometimes be dismissed as merely rhetorical flourishes, but not always. Courts sometimes give effect to a duty of loyalty that some would consider unexpectedly demanding.³⁹ One example is the so-called “hot potato doctrine,” which courts have developed in the context of ruling on motions to disqualify lawyers based on alleged conflicts of interest.⁴⁰ In circumstances where it would ordinarily be permissible under the ethics rules for a lawyer to end an attorney-client relationship – e.g., where ending the relationship will not materially prejudice the cli-

³⁷ See Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 333-42 (1998) (discussing *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981), in which a lawyer was convicted of fraud for concealing a conflict of interest).

³⁸ JOEL, *Honesty*, *supra* note 13; Green, *supra* note 37, at 333-42.

³⁹ See Lindsay R. Goldstein, Note, *A View from the Bench: Why Judges Fail to Protect Trust and Confidence in the Lawyer-Client Relationship - An Analysis and Proposal for Reform*, 73 FORDHAM L. REV. 2665, 2691-93 (2005) (explaining that courts sometimes discount the extent to which, at least from the client's perspective, trust is necessary to an effective lawyer-client relationship and, from the lawyer's perspective, there is a need for at least some residue of good will).

⁴⁰ See, e.g., *Ex parte AmSouth Bank, N.A. v. Drummond Co.*, 589 So. 2d 715, 721-22 (Ala. 1991) (stating that “a law firm should not be allowed to abandon its absolute duty of loyalty to one of its clients so that it can benefit from a conflict of interest that it has created”). See generally John Leubsdorf, *Conflicts of Interest: Slicing the Hot Potato Doctrine*, 48 SAN DIEGO L. REV. 251, 252 (2011) (explaining that a law firm cannot “drop a client like a hot potato” in order to keep a more lucrative client happy) (quoting *Picker Int'l, Inc. v. Varian Assoc.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987)).

ent⁴¹ – some courts have held that it is impermissibly disloyal for the lawyer to drop the client for the purpose of representing that client’s adversary. The explanation for the doctrine is that it is disloyal to end the relationship in order to be adverse to the client, even under circumstances where a lawyer would have been permitted to end the relationship for no reason at all, and even where the lawyer would have been allowed to represent the adversary if the prior representation had ended naturally.⁴² Given how easily one may exit a romantic relationship, notwithstanding prior professions of loyalty and fidelity, and the acrimony that often follows, it seems fair to say that more is expected of lawyers than of lovers, at least in this respect.

One might ask whether the courts, as well as lawyers who embrace the judicial rhetoric, are romanticizing professional values and virtues, expressing unrealistic expectations.⁴³ For example, focusing on the duty of “absolute and perfect candor” espoused by some courts, Vincent Johnson has persuasively argued that “[i]f the phrase . . . is read literally and without qualification, it cannot possibly be an accurate statement of an attorney’s obligations under all circumstances,” and that in most situations, lawyers’ disclosure obligations should be limited to what is reasonable.⁴⁴ Leaving aside whether clients are morally worthy or unworthy, can lawyers realistically achieve the courts’ stated expectations of undeviating fidelity and perfect candor?

⁴¹ See MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(1) (stating that “a lawyer may withdraw from representing a client if . . . withdrawal can be accomplished without material adverse effect on the interests of the client”).

⁴² See, e.g., *Celgard, LLC v. LG Chem., Ltd.*, 2014 U.S. App. LEXIS 24742, at *4-5 (Fed. Cir. Dec. 10, 2014) (implementing an expansive idea of loyalty in applying the concept that a lawyer may not be “directly adverse” to a current client – for example, in decisions holding that a lawyer may not represent a party in a lawsuit against a corporate client’s supplier because the success of the lawsuit will increase the client’s costs) (citing *Freedom Wireless, Inc. v. Boston Comm. Group, Inc.*, 2006 U.S. App. LEXIS 32797 (Fed. Cir. Mar. 20, 2006)).

⁴³ Although there is not a single accepted view of the loyalty obligation within the bar, some lawyers embrace the judicial rhetoric. For an example of the divergence among views on the appropriate implications and scope of lawyers’ loyalty obligations, compare Lawrence Fox, *The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty*, 121 YALE L.J. ONLINE 567 (2012), with James W. Jones & Anthony E. Davis, *In Defense of a Reasoned Dialogue About Law Firms and Their Sophisticated Clients*, 121 YALE L.J. ONLINE 589 (2012).

⁴⁴ Vincent R. Johnson, “*Absolute and Perfect Candor*” to Clients, 34 ST. MARY’S L.J. 737, 738-39, 792-93 (2003).

IV. IMPEDIMENTS TO UNDEVIATING FIDELITY AND PERFECT CANDOR

Should lawyers be undeviatingly faithful to and perfectly candid with their clients, though lovers need not? Like lovers, lawyers are subject to pressures, distractions and self-interests that interfere with their ability to be loyal, forthcoming and trustworthy.⁴⁵ Beneath the role of lawyer, as of the lover, we are only human.⁴⁶ There is a growing professional literature, drawing on behavioral and social science teachings, exploring how common human failings undermine lawyers' ability to achieve professional ideals and expectations.⁴⁷ Why should courts think lawyers are different and able to live up to high ideals when romantic partners cannot?

One way lawyers differ from lovers is that, in most cases, they do not have romantic affection toward their counterparts and may not have positive feelings at all. Lawyers may have passion for their work,⁴⁸ and they may identify – or over-identify – with clients,⁴⁹ but lawyers do not ordinarily *love* their clients. On the contrary, emotional and intellectual detachment from clients is considered a

⁴⁵ See Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1129 (2013) (observing that “[l]awyers’ judgments can be influenced by a myriad of desires - including the desire to satisfy the client, to make partner, to generate fees, to manage their own cash flow, to win a case, to achieve or maintain a particular reputation or status, to ‘do justice,’ or to manage limited time”).

⁴⁶ See, e.g., BILLY JOEL, *Leave a Tender Moment Alone*, on AN INNOCENT MAN (Columbia Records 1998) (“Even though I’m in love/ Sometimes I get so afraid/ I’ll say something so wrong/ . . . Yes I know I’m in love/ But just when I ought to relax/ I put my foot in my mouth.”).

⁴⁷ See, e.g., Tigran Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 69-70 (2009) (drawing on social science literature to analyze criminal defense lawyers’ conflicts of interest); Bruce Green & Jane Campbell Moriarty, *Rehabilitating Lawyers: Perceptions of Deviance and its Cures in the Lawyer Reinstatement Process*, 40 FORDHAM URB. L.J. 139, 166- 67, 169 (2012) (discussing relevance of social science research to whether disciplined lawyers should be readmitted to the bar); Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 477 (2007) (discussing relevance of social psychology research showing that “under certain circumstances, we will conform to group opinions and obey authorities who issue illegal instructions”); Robbennolt & Sternlight, *supra* note 45, at 1112 (applying social science insights in analyzing lawyers’ professional conduct).

⁴⁸ See Russell G. Pearce et al., *Revitalizing the Lawyer-Poet: What Lawyers Can Learn from Rock and Roll*, 14 WIDENER L.J. 907, 919-20 (2005).

⁴⁹ See John Lande, *Lessons from Mediators’ Stories*, 34 CARDOZO L. REV. 2423, 2429 (2013) (“Sometimes lawyers over-identify with their clients. Indeed, sometimes lawyers not only take on their clients’ one-sided views of the counterparty, but they also develop personal antagonisms with the counterpart lawyers.”).

professional virtue necessary in order to give objective advice and assistance.⁵⁰ Lovers may be expected to be blind to each others' faults or even make a virtue of them: the Billy Joel persona promises his romantic partner to love her forever "just the way you are."⁵¹ But lawyers need not approve of their clients socially or morally.⁵² Some have considered whether lawyers *should* love their clients, not in the romantic sense, but in a religious, moral, spiritual, or fraternal sense.⁵³ But, as Abbe Smith put it, in discussing lawyers' relation-

⁵⁰ See Daniel Markovits, *What Are Lawyers For?*, 47 AKRON L. REV. 135, 139 (2014) ("[T]he principle of professional detachment . . . appears throughout the formal and informal ideology of the bar, including prominently in the Model Rules of Professional Conduct."). For a critique of the concept, see Sofia Yakren, *Lawyer as Emotional Laborer*, 42 U. MICH. J.L. REFORM 141, 150-51 (2008):

[W]hen the legal profession nonchalantly counsels lawyers to invoke detachment in order to advocate zealously regardless of how they feel about a case or a client, it assumes implicitly either that lawyers are able to comply without negative consequence, or that it is their professional obligation to pay a psychological price. Either way, the legal profession fails to acknowledge explicitly the emotional hardships potentially attending the process of compromising one's personal identity for professional role.

Id.

⁵¹ BILLY JOEL, *Just the Way You Are*, on THE STRANGER (Columbia Records 1977); see also BILLY JOEL, *She's Always a Woman to Me*, on THE STRANGER (Columbia Records 1977) ("She can kill with a smile, she can wound with her eyes . . . but she's always a woman to me.").

⁵² See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2002) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."). See generally Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 7 (2003) (blaming "intense identification between lawyer and client" for "much in the way of contemporary professional misconduct and malaise (role confusion, lawlessness, maldistribution of legal services, and positional balkanization of the profession)"); W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, 34 HOFSTRA L. REV. 987, 991 (2006) (arguing that "although the constitutive rules of the practice of lawyering permits the exercise of some limited amount of moral discretion in client selection (and in other aspects of the professional relationship), this discretion ought to be circumscribed to a degree that would be intolerable in ordinary moral life"); W. Bradley Wendel, *Moral Judgment and Professional Legitimation*, 51 ST. LOUIS U. L.J. 1071, 1073 (2007) (arguing that lawyers "should refrain from exercising moral judgment on the basis of non-legal values").

⁵³ See, e.g., ROBERT K. VISCHER, MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE: LESSONS IN LOVE AND JUSTICE (2013); Robert J. Condlin, "What's Love Got To Do With It?" - "It's Not Like They're Your Friends for Christ's Sake": *The Complicated Relationship Between Lawyer and Client*, 82 NEB. L. REV. 211, 212-13 (2003) (analyzing writings suggesting from a religious perspective that lawyers should love their clients but concluding that it is preferable for lawyers to respect their clients); Eli Wald & Russell G. Pearce, *What's Love Got to do with Lawyers? Thoughts on Relationality, Love, and Lawyers' Work*, 17 LEGAL ETHICS 334 (2014) (arguing that lawyers' traditional premise about clients is false and that they should embrace the true relational nature).

ships with clients in a criminal defense practice:

The worst aspect of the idealization of the lawyer-client relationship . . . is the idea that lawyers have to love their clients. Defenders who claim to love all their clients are simply not being honest. Not all clients are likeable. Not all clients are easy objects of empathy or compassion. Some can be downright loathsome.⁵⁴

Whatever one might think about the virtue of (chastely) loving one's clients, no one would seriously suggest that this is the norm.

Arguably, this distinction cuts in favor of greater expectations for lawyers than for lovers: emotional attachment and other complexities of romantic relationships create impediments for lovers not shared by lawyers to maintaining trust, loyalty, fidelity and confidentiality. On the other hand, romantic attraction and affection should make lovers more motivated than lawyers to achieve high expectations. If the popular conception of romance rightly recognizes that romantic partners cannot easily maintain undeviating fidelity and perfect candor toward loved ones, how can lawyers be expected to consistently achieve comparable ideals in relationships with clients whom they do not necessarily like?

Another obvious difference plainly cuts against higher demands on lawyers: whereas lovers conventionally pledge fidelity only to one another, most lawyers have multiple clients to whom they owe loyalty. Perhaps, as Brougham suggested, an advocate should think only about the one client being served at the moment, but that may not be easy.⁵⁵ While lawyers should not neglect any given client's matter while trying to serve them all, it may be unrealistic to expect a lawyer at each moment to treat every client with "utmost care." Loyalty to clients may also be limited by competing obligations to third parties⁵⁶ and to the courts.⁵⁷ Even in the context of advocacy, courts

⁵⁴ Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1231-32 (2004).

⁵⁵ 2 THE TRIAL OF QUEEN CAROLINE, *supra* note 36, at 8.

⁵⁶ William H. Simon, *The Legal and the Ethical in Legal Ethics: A Brief Rejoinder to Comments on the Practice of Justice*, 51 STAN. L. REV. 991, 1002 (1999) (observing that "unlike the lover's, the lawyer's role entails duties to remote others"). This set of obligations generally distinguishes lawyers from other fiduciaries as well. Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301, 311 (1998) ("What differentiates lawyers from the general run of agents is the nature of the duties a lawyer owes to nonclients.").

⁵⁷ See, e.g., Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-*

themselves recognize that lawyers' duties to the client are tempered by competing obligations.⁵⁸ Courts idealize lawyers' duties to the court, just as they idealize lawyers' duties to their clients.⁵⁹ The conflicting obligations of lawyers suggests that it would be more difficult for lawyers to be undeviatingly loyal to their clients than for lovers to be undeviatingly loyal to their romantic partners.

There is one difference, however, that may unequivocally justify higher expectations for lawyers. Lawyers must qualify for a license, are trained and socialized, and are regulated by multiple authorities,⁶⁰ the very point of which is to produce lawyers who behave better than people ordinarily do. One does not need a license to enter a romantic relationship. There is no such thing as unauthorized practice of love, and one need not possess any qualifications or receive training. Lawyers are taught to be fiduciaries and, if they lapse, they risk negative professional and financial consequences. Perhaps lawyers are therefore motivated to tread more carefully because the stakes are higher for lawyers who cheat on clients than for lovers who cheat on their romantic partners. This may explain why lawyers seem to have a better track record than lovers. But professional regulation has its limits,⁶¹ and even well-socialized lawyers may not find it easy or natural to resist pressures and incentives to fall short of the ideals of the lawyer-client relationship. Rather, professional regulation poses a dilemma for lawyers: being imperfect. Perhaps lawyers cannot be undeviatingly loyal and honest, and cannot entirely avoid letting secrets slip out, but they risk professional and financial harm if they slip up.

First-Century New Governance, 77 *FORDHAM L. REV.* 1245, 1263 (2009) (noting that “[t]he question of how to reconcile an attorney’s loyalty to the client with her duties to her profession and the public is at the center of numerous ethical debates”); Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 *GEO. WASH. L. REV.* 1, 45-51 (2005) (arguing that modern legal ethics codes reject extreme partisanship). For a critical view of lawyers’ competing obligations to the court, see James A. Cohen, *Lawyer Role, Agency Law, and the Characterization “Officer of the Court,”* 48 *BUFF. L. REV.* 349 (2000).

⁵⁸ Cohen, *supra* note 57, at 352.

⁵⁹ See, e.g., *Steinle, Jr. v. Warren*, 765 F.2d 95, 101 (7th Cir. 1985) (arguing that as “an officer of the court . . . [a lawyer’s] duty to the court is paramount, even to the interests of his client”).

⁶⁰ See generally Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation--Courts, Legislatures, or the Market?*, 37 *GA. L. REV.* 1167 (2003); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 *HARV. L. REV.* 799 (1992).

⁶¹ See Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 *S. CAL. L. REV.* 1273 (1998).

V. MAY LAWYERS TELL “PRETTY LIES”? THE LEGAL PROFESSION’S APPROACH

Do romantic partners really want or need what they say they want? Billy Joel sings, “I don’t want some pretty face/ To tell me pretty lies/ All I want is someone to believe.”⁶² But Billy Joel may not believe what he sings. He is not necessarily writing lyrics in his own voice. The Billy Joel persona may be lying to his fictional partner, perhaps as part of a seduction, or lying even to himself. And even if he truly wants absolute honesty, is that what he needs? Clancy Martin, a philosophy professor who recently authored a book titled “Love and Lies,” argues that love and absolute honesty are incompatible: “[r]elationships last only if we don’t always say exactly what we’re thinking. We have to disguise our feelings, to feint, to smile sometimes when we want to shout. In short, we have to lie.”⁶³

Likewise, with respect to lawyer-client relationships, one might ask from a normative perspective whether absolute loyalty, candor and confidentiality are desirable even assuming they are attainable. Concepts such as loyalty, candor and confidentiality have no fixed, intrinsic meaning. These concepts are constructed by courts and the legal profession. For the U.S. courts, the fiduciary duties can sound like almost sacred obligations, absolute and invariable. The profession tends to construct these duties in more realistic or relative terms;⁶⁴ it has more forgiving and qualified expectations of lawyers, as reflected in the professional conduct rules, for which the bar has initial drafting responsibility,⁶⁵ and in bar association ethics opinions interpreting the rules.⁶⁶ In the profession’s view, loyalty, candor and confidentiality are not absolute but should be qualified in light of

⁶² JOEL, *Honesty*, *supra* note 13.

⁶³ Clancy Martin, *Good Lovers Lie*, N.Y. TIMES, Feb. 7, 2015, at SR4.

⁶⁴ This is one of a number of ways in which the bench and bar take conflicting views of lawyers’ professional obligations. *See generally* Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992); *See also* Zacharias, *supra* note 57, at 57-59.

⁶⁵ *See, e.g.*, *D’Andrea v. Epstein, Becker, Green, Wickliff & Hall, P.C.*, 418 S.W.3d 791, 797 (Tex. App. 2013) (finding that even if a law firm did not violate the applicable conflict-of-interest rule by engaging in work for one client that was adverse to another current client, the firm may be liable for breaching its duty of loyalty because “a violation of the disciplinary rules is not necessary . . . to establish civil liability for attorneys”). For a discussion of the relationship between the bar and the courts in the process of adopting legal ethics codes, *see* Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73, 90-97 (2009).

⁶⁶ For a discussion of the role of ethics opinions, *see* Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731 (2002).

others' interests or even in light of the client's best interests. Further, from the profession's perspective, these duties are not invariable, but are the default terms of a professional relationship, in that clients can generally negotiate for greater protection or bargain protections away to benefit the lawyer.⁶⁷

Professional conduct rules do not speak explicitly in terms of loyalty: they do not expressly obligate lawyers to be "loyal" to their clients or forbid "disloyalty." The rules restrict lawyers from engaging in representations involving conflicts of interest.⁶⁸ The accompanying Comment roots this restriction in the concepts of "[l]oyalty and independent judgment," which are said to be "essential elements in the lawyer's relationship to a client."⁶⁹ But the correlation between disloyalty and conflicts of interest is not necessarily exact. The core of disloyalty involves either acting against the client's interests with regard to the matter in which the client is represented or acting adversely to the client generally. Some courts speak of a "fiduciary duty to avoid conflicts of interest,"⁷⁰ but the equation between loyalty and the avoidance of conflicts seems questionable, at least if one has in mind how professional conduct rules define conflicts. The conflict of interest rules are prophylactic rules,⁷¹ and they are less about loyalty than about competence and confidentiality: the rules require lawyers to avoid situations where interests other than those of the client may lead lawyers to represent the client inadequately or misuse the client's confidences. This is made clear by provisions allowing a client to consent to the lawyer's representation, notwithstanding a conflict of interest, as long as the lawyer can provide "competent and diligent representation."⁷²

Insofar as the rules also address loyalty implicitly and in part, their concern may be with the client's perception rather than with the reality. In many situations, clients may give "informed consent" to a

⁶⁷ See, e.g., Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1753-56 (1998); Fred C. Zacharias, *Integrity Ethics*, 22 GEO. J. LEGAL ETHICS 541, 585 (2009) (observing that "[o]ne view of legal ethics regulation is that the codes ordinarily set a baseline of default rules that lawyers and clients can bargain around," as in the case of the conflict-of-interest and confidentiality rules).

⁶⁸ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7 (2002).

⁶⁹ *Id.* at cmt. 1.

⁷⁰ See, e.g., *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 592 (3d Cir. 2009).

⁷¹ Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 104-05 (1996).

⁷² MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1) (1983).

lawyer's conflict of interest under the rules, because the rules address risks of harm that may never occur.⁷³ Further, the possibility of client consent is inconsistent with the concept to “*undeviating fidelity*” that courts attribute to the lawyer-client relationship.

In the course of interpreting professional conduct rules, bar association committees often refer to the “duty of loyalty,”⁷⁴ but typically look to the rules themselves to illuminate its scope, with the result that the legal profession sometimes approves of conduct that is harmful to a client and that some would intuitively consider disloyal. In other words, disloyalty is not necessarily forbidden under the professional conduct rules. For example, one might consider it “disloyal” for a lawyer to espouse personal views that are adverse to the client's interests or to seek to reform the law in ways that would prejudice the client, but the bar's position is that because the rules do not proscribe this conduct, clients are not always entitled to expect their lawyers to avoid prejudicing them outside the context of the lawyer's professional work.⁷⁵ Likewise, one might consider it disloyal for a lawyer to represent a client's economic competitor, but the bar says that a lawyer ordinarily may do so, because this falls outside the restraint on “direct adversity.”⁷⁶ Even more contestably, the ABA has concluded that a lawyer may help one client write another client out of his will, regardless of how the lawyer's conduct is perceived by the client whose expectations are thwarted with the lawyer's aid.⁷⁷ Perhaps the most compelling rejection of the judicial idea of “*undeviating fidelity*” is the professional conduct rule listing situations in which a lawyer may seek to end a lawyer-client relationship, including when “the client insists upon taking action . . . with which the lawyer has a fundamental disagreement,” deliberately fails to pay the lawyer's fee, or “fails to cooperate in the representation.”⁷⁸

⁷³ *Id.* at (b)(4).

⁷⁴ See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001) (stating that “[l]awyers owe to clients, unlike third persons, a duty of loyalty that transcends the lawyer's convenience and interests”).

⁷⁵ See N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Op. 1997-3 (“The obligation of loyalty to the client applies only to a lawyer in the discharge of professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of the client.”) (quoting Code of Professional Responsibility, EC 7-17); see also Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77 (2006).

⁷⁶ MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6.

⁷⁷ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-434 (2004).

⁷⁸ MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4)–(5), (7).

As with “loyalty,” the professional conduct rules do not speak explicitly of “candor” to clients. Nor do they, by their terms, establish an affirmative duty, as a matter of candor, to tell clients what they might want to know. The rules generally require truthfulness but not candor.⁷⁹ One relevant professional rule, titled “Communication,”⁸⁰ requires lawyers to “reasonably consult with the client . . . keep the client reasonably informed . . . comply with reasonable requests for information . . . [and] . . . explain matters to the extent reasonably necessary.”⁸¹ Even the accompanying explanation says nothing about candor *per se*, but observes that “[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.”⁸² Another relevant professional conduct rule forbids dishonesty and deceit toward others, including clients,⁸³ but it too is not a candor rule; it does not require lawyers to volunteer information that the client would want to know.⁸⁴

In interpreting professional conduct rules, bar association committees take a qualified approach to the idea of candor to the client.⁸⁵ While judicial opinions sometimes say that lawyers must disclose everything they know of importance to the client,⁸⁶ the professional duty to communicate is qualified. For example, an ethics opinion recognizes that the extent of the lawyer’s disclosure obligation is limited by the duty to keep other clients’ secrets, and that lawyers may continue a representation even when lawyers possess some relevant information they can never tell the client.⁸⁷

⁷⁹ See *City of Livonia Empl. Ret. Sys. v. Boeing Co.*, 711 F.3d 754, 758 (7th Cir. 2013) (discussing Kant’s famous emphasis on the difference between the duty of truthfulness and the duty of candor).

⁸⁰ MODEL RULES OF PROF’L CONDUCT R. 1.4 (2014).

⁸¹ *Id.*

⁸² *Id.* at R. 1.4 cmt. 1.

⁸³ MISCONDUCT, ANNOTATED MODEL RULES PROF’L CONDUCT R. 8.4 (c) (2015).

⁸⁴ Another honesty rule provides that “a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.” MODEL RULES OF PROF’L CONDUCT R. 4.1 (a) (2014). The rule apparently does not apply to communications with clients. See *State ex rel. Okla. Bar Ass’n v. Bolusky*, 23 P.3d 268 (Okla. 2001).

⁸⁵ MODEL RULES OF PROF’L CONDUCT pmb. (2015).

⁸⁶ See, e.g., *Baker v. Humphries*, 101 U.S. 494, 500 (1879) (“It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive.”); *Schweizer v. Mulvehill*, 93 F. Supp. 2d 376, 397 (S.D.N.Y. 2000) (“Negligent or willful withholding of information material to the client’s decision to pursue a course of action is a breach of the duty of due care.”).

⁸⁷ See N.Y. City Bar Ass’n., *Formal Opinion 2005-02: Conflicts Arising From Possession*

The bar's critics have emphasized the influence of professional self-interest on professional self-regulation,⁸⁸ and one might be tempted to credit professional self-interest for rules that are more forgiving and less demanding than judicial pronouncements on the lawyer-client relationship. But it is equally plausible that the bar has a clearer picture of the lawyer-client relationship and a better understanding of what is desirable and realistically achievable.

VI. DIFFERING VIEWS OF THE LAWYER-CLIENT RELATIONSHIP

At least in theory, it is possible to justify the occasional mismatch between common-law fiduciary duties and professional conduct rules that address the same aspects of the lawyer-client relationship. The courts' pronouncements are typically made in lawsuits involving lawyers' potential civil liability where the underlying question is how to allocate responsibility for financial harm to the client whose lawyer failed to achieve the ideal of loyalty, candor, or confidentiality.⁸⁹ One might choose, in some situations, to allocate the cost to the lawyer even when the lawyer was not morally blameworthy for shortcomings. One might adopt a more forgiving standard to govern the same professional conduct for disciplinary purposes, because lawyers should not be punished unless their conduct is blameworthy.⁹⁰

of Confidential Information of Another Client: The Committee on Professional and Judicial Ethics, 60 *The Record* 450, 461-62 (2005). The bar opinion acknowledged judicial decisions taking a more expansive view. *Id.* at 462-63 (citing *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 783-84 (2d Cir. 1999); *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 125-26 (2d Cir. 2002)).

⁸⁸ See, e.g., Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 *TEX. L. REV.* 639, 641 (1981); Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 *CATH. U. L. REV.* 165, 166-68 (2007); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 *TEX. L. REV.* 689, 691 (1981); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 *VA. L. REV.* 1707, 1708 (1998).

⁸⁹ The lawyer's fiduciary duties may also underlie actions to disgorge attorney's fees for a breach of duty, see note 92, *infra*, or to enjoin a lawyer from engaging in conduct that would entail a fiduciary breach. See, e.g., *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1279, 1284, 1287 (Pa. 1992).

⁹⁰ Courts sometimes say that attorney discipline is meant to protect the public, not to punish lawyers, but it would be unrealistic to suggest that punishment is not among the courts' objectives. See generally Stephen Gillers, *Lowering the Bar: How Lawyer Discipline in New York Fails to Protect the Public*, 17 *N.Y.U. J. LEGIS. & PUB. POL'Y* 485 (2014); Green & Moriarty, *supra* note 47, at 145.

There are at least two reasons why this explanation is unpersuasive or, at best, incomplete, however. First, opinions rarely acknowledge that fiduciary duties can differ from disciplinary duties because of the different procedural contexts in which these duties are elaborated and the different consequences of finding an impropriety.⁹¹ Second, the fairness of making a lawyer bear the cost of harmful conduct does not explain why courts order forfeiture of attorneys fees for breaches of the fiduciary duty of loyalty that cause no financial harm.⁹² Courts assume that clients are entitled to loyalty and that disloyalty is itself a wrong. Decisions on lawyers' fiduciary duties set a normative standard wholly apart from concerns about the allocation of risk or about financial harm.

The rhetoric about fiduciary duty does not inevitably lead to unrealistically high standards. Sometimes, despite their soaring rhetoric, courts look to the professional rules and understandings to give meaning to the fiduciary duties. Courts often look to the confidentiality and conflict-of-interest rules, in particular, to set the contours of the fiduciary duties of confidentiality and loyalty.⁹³ It might be argued that, in some of these situations, the relevant rules are prophy-

⁹¹ *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1279, 1284, 1287 (Pa. 1992), is an interesting opinion that discussed the difference between fiduciary duties and disciplinary rules. In this case, the court held that a breach of the duty of loyalty could be found even when the conflict of interest rules did not proscribe the conduct in question, and noted examples of earlier decisions in which courts were ahead of the ethics rule drafters in proscribing conduct. The court equated "loyalty" with the obligation to avoid conflicts of interest, but made clear that even when the ethics rules did not proscribe a conflict of interest, courts could enjoin the representation to enforce the fiduciary duty. The opinion is in tension with the apparent premise of ethics rule drafters that the ethics rules are generally more demanding than the civil liability standards and therefore should not necessarily be adopted as a basis of civil liability. *See* ABA Model Rules of Prof'l Conduct, Preamble and Scope, at 20 (the Rules "are not designed to be a basis of civil liability" although "a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct").

⁹² *See* *Huber v. Taylor*, 469 F.3d 67, 77 (3d Cir. 2006); *Burrow v. Arce*, 997 S.W.2d 229, 232, 240 (Tex. 1999) ("[A]n attorney [or any fiduciary] who breaches his fiduciary duty to his client may be required to forfeit his right to all or part of his fee."); *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982).

⁹³ *See, e.g., Diversified Group, Inc. v. Daugerdas*, 304 F. Supp. 2d 507, 511 (S.D.N.Y. 2003) (confidentiality rule); *Schweizer v. Mulvehill*, 93 F. Supp. 2d 376, 404-05 (S.D.N.Y. 2000) (conflict rules); *Estate of Re v. Kornstein Veisz & Wexler*, 958 F. Supp. 907, 925-26 (S.D.N.Y. 1997) (conflict rules). Courts are especially likely to defer to the confidentiality rules, which include exceptions that are predicated, in part, on analogous attorney-client privilege doctrine and in part on professional judgments about situations in which lawyers should have discretion to disclose client confidences for public-policy reasons. Thus, courts do not describe a disciplinary duty of "utmost" or "strictest" confidentiality comparable to their descriptions of the fiduciary duties of loyalty and candor.

lactic rules that restrict conduct that should not be reached by agency law – for example, that failing to obtain the client’s consent to an otherwise permissible conflict of interest under the professional conduct rule is not necessarily “disloyal” as a matter of agency law, and that the problem is one of inadequate disclosure. In these instances, one might argue, lawyers do not deserve to face civil liability on top of potential professional discipline. Even if this is the case, the lawyer is not being held to an unrealistically high standard as a matter of fiduciary duty, but is held to the preexisting disciplinary standard.

There is a risk, however, that in drafting professional conduct rules, the bar will defer to the courts’ idealized view of the lawyer-client relationship. That is a possible explanation for the development of Rule 1.7(a)(1) of the ABA Model Rules, which forbids a lawyer from representing a party adversely to a current client without the other client’s consent.⁹⁴ The rationale for the rule is that appearing adversely to one’s client is disloyal. But, according to Professor Bussel, this principle was recognized only recently in the U.S. jurisprudence and is not recognized today in some common-law legal systems.⁹⁵ The bar drafted professional conduct rules expressly forbidding a lawyer from appearing against a current client only after courts began to read this restriction into more vaguely worded conflict-of-interest provisions.

There is also a risk that the courts’ idealized view will influence their approach to professional discipline, notwithstanding the bar’s contrary views. Consider, for example, a New York disciplinary action, *In re Holley*.⁹⁶ The lawyer in question mistakenly accommodated a reporter’s request for a copy of a document filed in a lawsuit in which the lawyer’s firm represented a party.⁹⁷ The lawyer was uninvolved in the lawsuit and unaware that the document was filed under seal.⁹⁸ Disciplinary authorities brought a sanction proceeding based not on the lawyer’s inadvertent violation of the court’s sealing order but on his inadvertent disclosure of the client’s confidential information.⁹⁹

At the time, the relevant confidentiality rule cut lawyers some

⁹⁴ MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(1).

⁹⁵ Daniel J. Bussel, *No Conflict*, 25 GEO. J. LEGAL ETHICS 207, 207-08, 211-12 (2012).

⁹⁶ 729 N.Y.S.2d 128 (App. Div. 1st Dep’t 2001).

⁹⁷ *Id.* at 130.

⁹⁸ *Id.*

⁹⁹ *Id.* at 130-32.

slack. It did not protect all information relating to the representation, but allowed disclosure of non-privileged information when the disclosure would not harm or embarrass the client and was not of particular concern to the client.¹⁰⁰ Moreover, the rule did not cover unwitting disclosures of confidential information, but only “knowing” disclosures.¹⁰¹ If the court document were publicly available, as the lawyer had assumed, there would have been no problem with sparing the reporter a trip to the courthouse by acceding to the reporter’s request. So the implicit question in the case was whether lawyers must exercise utmost care to protect clients’ confidences.

Both the lawyer-referee who heard the *Holley* case and four of the five members of the volunteer panel that subsequently reviewed the referee’s recommendation concluded that the lawyer’s mistaken conduct was not a sanctionable breach of duty.¹⁰² The state court rejected this view, however, and publicly sanctioned the lawyer.¹⁰³ Declining to be bound by the terms of the confidentiality rule, the court held that the lawyer’s “failure to take adequate precautions to safeguard confidential materials of a client, even if considered unintentional, was careless conduct that reflects adversely on his fitness to practice law.”¹⁰⁴

Holley illustrates two problems with the courts’ romanticization of the lawyer-client relationship. First, courts and others may take the soaring judicial rhetoric too seriously. Courts may treat lawyers with undue harshness, enforcing unrealistic or unfair expectations that fail to take account of lawyers’ human fallibility, the pressures under which lawyers function and the competing interests that they legitimately serve.¹⁰⁵ One can understand imposing civil liabil-

¹⁰⁰ N.Y. Code of Prof’l Responsibility DR 4-101(a). The contemporary counterpart is N.Y. Rules of Prof’l Conduct R. 5.8 (2009).

¹⁰¹ N.Y. Code of Prof’l Responsibility DR 4-101(b).

¹⁰² 729 N.Y.S.2d at 130-31.

¹⁰³ *Id.* at 133.

¹⁰⁴ *Id.* at 132 (citing *Matter of Marrin*, 622 N.Y.S.2d 255 (App. Div. 1st Dep’t 1995)).

¹⁰⁵ This risk is exacerbated because courts are not obligated to defer to the drafters’ intent in interpreting disciplinary rules, as they would ordinarily be in interpreting statutes. Rather, because courts themselves promulgate the disciplinary rules, they have latitude to interpret the rules to effectuate their view of sound regulatory policy. See generally Bruce A. Green, *Doe v. Federal Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485 (1989). Sometimes this will mean limiting the apparent reach of a rule. But this may also mean expanding the rule’s apparent reach to give effect to the perceived “spirit” or purpose of the rule. See Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527, 531 (2003).

ity on Holley for any harm he caused, on the assumption that he ought to have born the cost. But from both the rules' ex ante perspective and the ex post perspective of the lawyers who reviewed the evidence, his conduct was understandable and not deserving of moral opprobrium. Likewise, there is a risk that clients reading what courts write will develop unrealistic expectations of lawyers. In addition, lawyers may develop unrealistic expectations of themselves and therefore suffer the stress of trying to live up to an unrealistically high ideal.

Second, the inconsistent approaches to the lawyer-client relationship can cause confusion for courts, lawyers, and others.¹⁰⁶ It may not always be clear to judges which standards to apply in a given situation – for example, whether to employ the professional rules as interpreted by the bar or whether to interpret fiduciary duties independently and more demandingly. It may also be unclear to lawyers where to look for guidance regarding the standards governing their conduct.

VII. CONCLUSION: FRIENDS, LOVERS AND LAWYERS

Lawyers have a special relationship with clients that gives rise to an expectation that they treat clients differently from strangers. Analogizing lawyers to friends or lovers may help explain this expectation, but there may be little need to explain. Lawyers' right and obligation to put clients' interests over those of the general public is probably not seriously contested.

At least for lawyers, the hard questions revolve around the extent and limits of the loyalty, candor and confidentiality duties. On these questions, it is not particularly illuminating to say that a lawyer is like a friend or lover. For one thing, the expectations of romance are almost certainly not universal: Billy Joel's lyrics express one vision, but not the only one. Even if there were a consensus on the duties of lovers, there is no reason why they should be the same for lawyers. Whatever the commonalities may be, lawyers are not lovers, but fiduciaries in an inherently asymmetric, nonexclusive, and ordinarily passionless relationship that is often short-lived by design.

On reflection, one might also question the utility of analogiz-

¹⁰⁶ See Zacharias, *supra* note 57, at 17 (discussing the costs of divergent professional standards).

ing lawyers to other fiduciaries.¹⁰⁷ Fiduciaries are not all identical. Lawyer-client relationships are not reciprocal, unlike the relationships among co-venturers and business partners. Lawyers are licensed and subject to judicial regulation that takes account of duties to others aside from clients. There is no reason why lawyers' fiduciary duties to clients should necessarily be identical to the duties of one business partner to another. Justice Cardozo's dictum, assuming it is not excessive even for co-venturers and business partners, may not fit equally for lawyers and other fiduciaries, of which there are many, including marital partners.¹⁰⁸

Labeling lawyers as "fiduciaries" and then invoking high-flown language about fiduciary duties is not a reasonable way to decide how lawyers should behave. The practice of law is too complicated and contextual.¹⁰⁹ Courts sometimes recognize this. Through the power to regulate the bar, courts adopt professional conduct rules that reflect more nuanced views of lawyers' obligations. The rules are ordinarily drafted by the bar, which might be expected to take account of the practical realities of the attorney-client relationship but might also be unduly concerned with lawyer-self-interest. This may or may not be the best way to determine lawyers' duties to clients for purposes of civil liability and discipline, but surely this is better than romanticizing the lawyer-client relationship in judicial prose. When it comes to ascertaining the scope of lawyers' fiduciary duties, courts should employ analyses, not just analogies.

¹⁰⁷ See, e.g., Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879 (noting that fiduciary principles differ across different fiduciary relationships); but see D. Gordon Smith, *The Critical Resource Theory*, 55 VAND. L. REV. 1399, 1400 (2002) (attempting "to craft a unified theory of fiduciary duty").

¹⁰⁸ See generally Alexandria Streich, *Spousal Fiduciaries in the Marital Partnership: Marriage Means Business but the Sharks Do Not Have a Code of Conduct*, 34 IDAHO L. REV. 367, 383 (1998).

¹⁰⁹ See Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357, 363 (1998); Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149, 149 (1993); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1163 (1993).