ALLOCATING INFLUENCE

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> *The herd seek out the great, not for their sake but for their influence; and the great welcome them out of vanity or need.*
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> -Napoleon Bonaparte[1]

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[1] *See* Quotations Book, http://quotationsbook.com/quote/17849/ (last visited May 17, 2009).

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INTRODUCTION

Influence peddlers, influence seekers, and government officials have a long and fascinating history.[2] Centuries ago, those in need of government action greatly appreciated the value of "an audience with the king" and paid handsomely for such access, to the benefit of both the influence peddler and the influence seeker.[3] Twenty-first century influence peddlers offer influence seekers a similar service, but often do so subject to restrictions not faced by their medieval predecessors.[4]

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[2] Some recent commentators note, only partially in jest, that influence peddling, a.k.a. lobbying, and not prostitution, was the world's oldest profession. In their spin on the well-known "Garden of Eden" temptation story from the Bible, the Serpent was the first lobbyist and his first successful target was Eve, whom the Serpent persuaded to eat the forbidden apple by "portraying knowledge gained from the apple as a virtue rather than [the] vice" that the other side, God, had made it out to be. Nicholas W. Allard, *Lobbying Is an Honorable Profession: The Right to Petition and the Competition to be Right*, 19 STAN. L. & POL'Y REV. 23, 23 & n.1 (2008) (citing Thomas M. Susman, *Lobbying in the 21st Century - Reciprocity and the Need for Reform*, 58 ADMIN. L. REV. 737, 738 (2006)). Though they are viewed by many as villains, less pejorative assessments of lobbyists note that they "provide vital information to lawmakers, help craft carefully balanced legislation, communicate insights from government officials to their clients, and otherwise provide the essential grease that makes the government run (more or less) smoothly." *See* Alan B. Morrison, *Lobbyists—Saints or Sinners?,* 19 STAN. L. & POL'Y REV. 1, 1 (2008); *see also* Lloyd Hitoshi Mayer, *What Is This "Lobbying" That We Are So Worried About?*, 26 YALE L. & POL'Y REV. 485, 486 (2008) (noting that "the most successful 'lobbyists' include American heroes such as Patrick Henry, Susan B. Anthony, and Martin Luther King, Jr.").

[3] *See* Susman, *supra* note 2, at 738 ("Lobbying has surely been around as long as there has been government itself.").

[4] *See generally* WILLIAM V. LUNEBURG & THOMAS M. SUSMAN, THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LAW GOVERNING LAWYERS AND LOBBYISTS, (Am. Bar Ass'n Section of Admin. Law and Regulatory Practice ed., 3d ed. 2005) (outlining regulations applicable to lobbyists); *see infra* Part III.D (describing lobbying disclosure rules). However, there is some evidence that even medieval practitioners recognized and respected conflict of interest principles. *See* Helen A. Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: A "Foolish Consistency"?*, 111 PENN ST. L. REV. 1, 11–12 n. 44 (2006) ("As early as 1280, a London Ordinance forbade attorneys from representing adverse parties in the same action and from dropping one client to represent another in the same case.") (citing Jonathan Rose, *The Ambidextrous Lawyer: Conflict of Interest and the Medieval and Early Modern Legal Profession*, 7 U. CHI. L. SCH. ROUNDTABLE 137, 146–47 (2000)).

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Many of these restrictions are intended to make the whole influence exchange more "ethical," yet public perception indicates that additional reforms are necessary.[5]

When the influence peddler is a lawyer, and the influence seeker is a client, different ethical rules may come into play depending upon the decision maker before whom influence is sought.[6] If the decision maker resides in the legislative branch (*e.g.*, a United States congressman), then the Lobbying Disclosure Act and similar laws impose restrictions intended to increase transparency.[7] If the decision maker resides in the judicial branch (*e.g.,* a state court judge), then the rules of professional conduct prohibit a lawyer from improperly influencing the judicial

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[5] According to a recent George Washington Battleground Poll, the vast majority of Americans support more transparency in lobbying practices. *See* The George Washington University Battleground Poll 2006, *summarized at* Lake Research Partners, http://www.lakeresearch.com/polls/BG030206.htm (last visited June 6, 2009). For example, eighty-seven percent of those polled support greater disclosure by lobbyists about their work and their level of Congressional contacts and eighty-six percent support greater disclosure by Members of Congress about their contact with lobbyists and about campaign contributions from lobbyists. *Id*.

[6] Although the rules may vary depending upon the decision maker, there is a current effort to reconcile at least the very definition of lobbying in these multiple contexts. *See* Mayer, *supra* note 2, at 508–18 (chronicling the definition of "lobbying" in various federal and state laws) (citing FRANK R. BAUMGARTNER & BETH L. LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE 34 (1998) (positing that the desire to influence the policy process is the "common thread" of all lobbying)).

[7] *See* Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 ; Honest Leadership and Open Government Act , Pub. L. No. 110-81, 121 Stat. 735 (2007); Elisabeth Bassett, *Reform Through Exposure*, 57 EMORY L.J. 1049, 1076–78 (2008) (describing new disclosure requirements imposed by Honest Leadership and Open Government Act, including more frequent reporting and more detailed disclosures).

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decision maker.[8] If the decision maker resides in an executive or administrative agency, then "the rules"—to the extent they apply—are not so clear.[9]

Any attempt to clarify the ethics of administrative agency influencing should start with a core principle underlying modern legal ethics—the avoidance and/or resolution of conflicts of interest.[10] Accordingly, this Article addresses a conflict of interest—the "allocating influence conflict"—that, to date, has escaped proper identification or analysis.[11] In its simplest form, an allocating influence conflict emerges when:

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[8] *See* Mayer, *supra* note 2, at 529–531 (documenting procedural and institutional limits on interest group influence on judges); MODEL RULES OF PROF'L CONDUCT R. 8.4 (2008) ("It is professional misconduct for a lawyer to: . . . (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law."). This prohibition may be intended to offset the oft-stated notion that "A good lawyer knows the law; a great lawyer knows the judge."

[9] *See* Mayer, *supra* note 2, at 526–29 (describing how influence is exercised over executive branch officials); *see* LUNEBURG & SUSMAN, *supra* note 4, at 178–85 (describing difficulty in determining applicability of lobbying restrictions to communications with administrative agencies such as the Environmental Protection Agency); *see infra* Part III.D (reviewing statutory and executive lobbying restrictions). The general lack of clear ethical guidance on administrative agency lobbying—or "influencing"—means that important public policy decisions may happen in a "no rules" environment. *See* LUNEBURG & SUSMAN, *supra* note 4, at 495 ("None of the [Model Rules] directly address[es] the activities of lawyers qua lobbyists."); *see also* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 815–24 (1992) (critiquing generally applicable Model Rules versus categorical or practice-specific rules and suggesting contextual focus as future guide). *See generally* Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1993).

[10] *See* John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 458 (1993) ("In recent years, conflicts of interest in the practice of law have presented the legal profession with some of the most serious problems of professional responsibility."); *see also* James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal to Extend to Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1187 (2000) (identifying one core value of the legal profession as "independent judgment in advising the client, uninfluenced by considerations other than the requirements of the law and the client's best interests") (citing MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.9–1.13, 2.1). Accordingly, "this principle thus requires that, insofar as possible, a lawyer must avoid any conflict of interest when rendering legal advice to a client." *Id.*

[11] *See infra* Part III (demonstrating that existing ethical guidance provides a foundation for, but does not adequately address, allocating influence conflicts).

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(i) a lawyer properly may, and was retained by the client to, influence an agency decision maker;[12] and

(ii) there is a significant risk that allocating influence on behalf of one client is reasonably certain to inhibit substantially the lawyer's ability to influence the same decision maker on behalf of another client.[13]

Essentially, if a lawyer's exercise of influence over an agency decision maker on behalf of one client could harm another client or the lawyer himself, then that lawyer likely faces an allocating influence conflict.[14]

Although allocating influence conflicts occur frequently in practice (and with particular frequency in administrative law practice),[15] primary legal ethics sources do not explicitly address

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[12] "Properly" is an important part of this definition because Rule 8.4(e) already prohibits stating or implying an ability to influence "improperly" a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law. MODEL RULES OF PROF'L CONDUCT R. 8.4(e) (2008). Instances in which a lawyer properly may influence a decision maker include when lobbying a member of Congress or her staff or during an *ex parte* meeting with an administrative agency Commissioner or her staff. *See infra* Part I.A (describing circumstances in which a lawyer may face an allocating influence conflict).

[13] For the purposes of this Article, one should consider an allocating influence conflict as a subset of the "current client" conflict category. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2008). However, there may be situations where an allocating influence conflict can arise even absent a current client conflict.

[14] Exactly which officials qualify as a "decision maker" varies depending on the circumstances and the applicable agency rules. For example, the Securities and Exchange Commission defines "decisional employee" to mean:

> i) The administrative law judge assigned to the proceeding in question; and (ii) All members of the staff of the Office of Opinions and Review; and (iii) The legal and executive assistants to members of the Commission; and (iv) Any employee of the Commission who has been specifically named by order of the administrative law judge or the Commission in the proceeding to assist thereafter in making or recommending a particular decision; and (v) Any other employee of the Commission who is, or may reasonably be expected to be, involved in the decisional process of the proceeding.

See 17 C.F.R. § 200.111(d)(3) (2004).

[15] *See* Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1109–11 (1995) [hereinafter, Macey &

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them.[16] Similarly, although a few scholars have noted individual "problems" that possibly could qualify as allocating influence conflicts, no scholarship has explained how to identify allocating influence conflicts or, perhaps more importantly, how to address them ethically.[17] This lack of guidance means that many conflicts of interest are occurring without proper identification by the affected lawyer and without effective oversight from lawyers charged with enforcing ethical standards.[18] In turn, the practical harm to clients generally is the same harm associated with all other conflicts of interest—the loss of loyalty, independent judgment, and zealous advocacy from one's lawyer.[19]

Part I of this Article defines an allocating influence conflict.[20] In addition to providing a basic definition, it describes the circumstances in which these conflicts typically emerge, and distinguishes the allocating influence problem from other comparatively benign resource-allocation conflicts.[21] Part II of this Article demonstrates the pressing need to address allocating

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Miller, *Regulatory State*] (explaining how "private-sector lawyers" practicing "before government agencies" frequently face a conflict-like problem given that they are "repeat players" before that agency); *see infra* Part IV.B (showing how Macey & Miller's identification of the "repeat player problem" supports treating allocating influence problem as a conflict of interest); *see infra* Part I.A (describing particular practice scenarios in which allocating influence conflicts are most likely to occur).

[16] *See infra* Part III (demonstrating that various sources, including the Model Rules, state rules, bar opinions, and federal and state lobbying statutes do not address allocating influence conflicts).

[17] *See infra* notes 126–135 and accompanying text (summarizing existing legal scholarship, which provides a foundation for addressing allocating influence conflicts).

[18] In each state, a disciplinary committee, often composed of practicing lawyers, typically reviews ethics complaints, as delegated and supervised by the state supreme court. *See* LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW, 176 (2d ed. 2008).

[19] *See, e.g.,* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2008) (identifying "loyalty and independent judgment" as key interests protected by conflict of interest rules); *Id.* at pmbl. ¶ 2 ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); *see also* Jones & Manning, *supra* note 10, at 1186–90 (describing core values of legal ethics).

[20] *See infra* Part I.B (crafting a specific definition of an allocating influence conflict).

[21] *See infra* Part I.A (depicting the typical "scene" of an allocating influence conflict); *infra*

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influence conflicts given their prevalence and their harmful effects on both clients and the profession.[22] Part III demonstrates that existing ethics sources, though lacking direct recognition of allocating influence conflicts, provide the proper foundation for addressing them.[23] Part IV addresses how to resolve allocating influence conflicts, first by showing how allocating influence conflicts fit within the existing conflict of interest framework and, second, by suggesting specific revisions to the comments to the Model Rules of Professional Conduct.[24]

I. DEFINING AN ALLOCATING INFLUENCE CONFLICT

Properly defining an allocating influence conflict requires a three-level inquiry. The definition necessarily begins with the scene of the conflict, *i.e.*, the circumstances in which allocating influence conflicts arise, as shown below in Section A.[25] After establishing the scene, Section B identifies the specific facts that must be present in order for the scene to generate an ethical dilemma known as an allocating influence conflict.[26] Section C then shows how allocating influence issues, which should be addressed as conflicts of interest, differ from mere resource allocation problems.[27]

Part I.B & C(demonstrating how allocating influence conflicts are an ethically-significant type of resource allocation conflict); *infra* Part IV.A (illustrating how an allocating influence conflict threatens the core principles underlying conflict of interest prohibitions).

[22] *See infra* Part II.A (showing how frequently allocating influence conflicts occur); *infra* Part II.B (positing that allocating influence conflicts affect clients and the profession).

[23] *See infra* Part III.

[24] *See infra* Part IV.D (suggesting one additional comment and one revised comment regarding Model Rule of Prof'l Conduct, R 1.7).

[25] *See infra* Part I.A.

[26] *See infra* Part II.B.

[27] *See infra* Part I.C.

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A. The Scene of the Conflict – Administrative Law Practice

Private-sector clients often hire administrative lawyers to convince agency decision makers to alter or retain the agency's rules so that the client may pursue its preferred business strategy.[28] Administrative lawyers do this "convincing" through written submissions to the agency, similar in substance to a litigator's brief.[29] However, unlike their counterparts in litigation, who generally may not attempt to influence a judge, administrative lawyers may lobby or "influence" agency decision makers through informal *ex parte* communications, such as an in-person

[28] Or, in some cases, one may seek to block or complicate a competitor's preferred legal strategy. For example, if a lawyer's client provides voice services over a copper wire-subject to multiple agency regulations perceived as burdensome, such as those requiring E911 capability-one may try to convince the Federal Communications Commission to impose similar regulations on a new type of competing service provider, such as one that provides voice services using the internet via voice-over internet protocol technology. *See In re IP-Enabled Services: E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36 and 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCCR 10245, 10246 (2005) (reviewing conflicting positions in rulemaking proceeding in which the Federal Communications Commission was considering "requiring providers of interconnected voice over Internet Protocol (VoIP) service to supply enhanced 911 [or] (E911) capabilities to their customers"); *see also* John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1142–43 (2000) (describing how *ex parte* lobbying efforts were used to influence FCC's decisions regarding Personal Communications Service licensing); *see generally* Kevin Werbach, *Only Connect*, 22 BERKELEY TECH. L.J. 1233 (2007) (documenting FCC proceedings regarding regulatory status of voice-over internet protocol service).

[29] *See* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 100–01 (2003) ("To make a rule, an agency must publish a proposed version of the rule or a statement of the rule's subject matter, allow a period of time for private parties to file written comments with the agency, and, after the comments have been received, publish a final version of the rule with a statement of basis and purpose."). Federal agencies typically perform two basic functions—rulemakings and adjudications. *See* 5 U.S.C. § 553 (2004) (rulemaking); 5 U.S.C. § 554 (adjudications). The initial scenario described herein focuses on the rulemaking function. In agency rulemakings, interested parties may file comments and reply comments in response to a notice of proposed rulemaking. *See* 5 U.S.C. § 553(c). Under certain agency rules, parties also may engage in written or in-person *ex parte* presentations. *See, e.g.*, 47 C.F.R. § 1.1200 *et seq*. (2008); *see also supra* notes 48–51 and accompanying text (noting agencies that permit *ex parte* communications often subject to limitations).

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meeting with an agency commissioner or a phone call to an agency staff person.[30] A lawyer with access to, and influence over, a key agency decision maker often is hired by multiple clients, each expecting that the lawyer's fee entitles them to that lawyer's access and influence.[31] As a result, an administrative lawyer often must decide how to "allocate influence" among these multiple clients.

To better appreciate the "scene of the conflict," picture yourself as a lawyer who routinely practices before an administrative agency in Washington, D.C. On one particular day, your office phone rings. Client A needs agency action on a pending waiver request before its board meeting next week.[32] As you dial the number of your most trusted staff contact at the agency to urge quick action on Client A's request, an email arrives.[33] Client B needs the same agency to approve

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[30] *See* Rubin, *supra* note 29, at 119–20 (explaining how the permissibility of *ex parte* consultations varies based on the nature of the proceeding). Such communications often are permitted under an agency's rules regarding *ex parte* communications which may condition the permissibility of the communication on later public disclosure of the communication. *See infra* notes 49–51 and accompanying text (reviewing the *ex parte* rules applicable to various administrative agency proceedings).

[31] *See* Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L. REV. 579, 585 (1992) (positing that "when the stakes are very large, clients want lawyers who have real experience in a given area, just the way a patient with a brain tumor wants to hire a physician who has done many similar surgeries").

[32] For example, Tribune Television Company sought and obtained two temporary waivers from the Federal Communications Commission permitting it to own two television broadcast stations in the same market, even though such common ownership would violate the agency's multiple ownership rules. *See In re Counterpoint Commc'ns, Inc.*, 20 FCCR 8582, 8582–83 (2005). *See generally* David Pritchard, Christopher Terry,& Paul R. Brewer, *One Owner, One Voice? Testing a Central Premise of Newspaper-Broadcast Cross-Ownership Policy*, 13 COMM. L. & POL'Y 1 (2008) (discussing Tribune waiver proceeding in criticism of FCC rule requiring such waivers).

[33] Many administrative agencies publish a public phone directory but only the well-connected lawyer has access to important staff members' direct dial numbers. *See, e.g.*, http://www.fcc.gov/fcc-bin/findpeople.pl (enter name in search box) (last visited June 5, 2009) (listing the same general 10-digit number for multiple staff members who possess separate individual, yet unpublished, direct dial numbers). However, those lawyers with influential relationships are privy to certain direct dial numbers and often utilize their "smile dial" capabilities to a client's advantage. *See* Macey & Miller, *Regulatory State*, supra note 15, at 1111

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its merger application so it may close on a transaction before the financial quarter ends.[34] Your most trusted staff contact at the agency is well-positioned to speed up action on Client A's request and on Client B's request. However, you feel that you cannot ask your staff contact to assist both Client A and Client B (*i.e.*, to grant you two personal favors in a single day) without risking your influential relationship with your staff contact, a relationship established over the past several years.[35] Welcome to your first "allocating influence" dilemma for the day—how to allocate your influence over a decision maker between Client A and Client B and still maintain your relationship with the agency decision maker.

B. A Basic Definition

The Client A versus Client B conflict described above is a single, practical example of an allocating influence conflict. In more abstract terms, an allocating influence conflict begins to emerge when: (i) a lawyer properly may, and was retained by the client to, influence an agency decision maker, and (ii) there is a significant risk that allocating influence on behalf of one client

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(noting that "law firms that are repeat players before regulatory agencies are truly favored in the sense that they are given preferential treatment by the bureaucrats in the agencies").

[34] The Federal Communications Commission and Federal Trade Commission often must approve certain mergers. *See* 47 U.S.C. § 214 (2004) (providing FCC with authority to review certain telecommunications mergers via declaration that "[n]o carrier . . . shall acquire or operate any line . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require [such acquisition]"); 47 U.S.C. § 310 (2004) (providing FCC with authority to review various mergers involving licensees via declaration that "[n]o construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner . . . to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby").

[35] *See* Macey & Miller, *Regulatory State*, *supra* note 15, at 1110 (noting that, when administrative lawyers seek to "appease the agency bureaucrats," they "may be unwilling to zealously assert the client's interests if doing so would alienate the bureaucrats" and jeopardize the lawyer's long-term personal interest).

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is reasonably certain to inhibit substantially the lawyer's ability to influence the same decision maker on behalf of another client.[36] If these two elements are present, then an allocating influence conflict is present and a lawyer may not proceed with the representation(s) absent client consent.

C. Distinguishing Allocating Influence Conflicts from Other Resource Allocation Issues

If one casts the above definition of an allocating influence conflict in general terms, the first element requires a lawyer's possession of or access to a finite resource and the second element requires a risk that use of that resource to one client's benefit will restrict the lawyer's ability to use that same resource to benefit another client. In an allocating influence conflict, the finite resource to be allocated is proper influence over a decision maker.[37] However, other resources that arguably satisfy these first two elements include time, staff support, or even filing cabinet space.[38] A lawyer who must decide how to allocate these everyday resources among clients does not face an ethically-significant conflict of interest; indeed, any conflict of interest definition that

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[36] *See supra* notes 12–13 and accompanying text.

[37] *See* John P. Heinz, *The Power of Lawyers*, 17 GA. L. REV. 891, 892 n.2 (1983) ("Thus, if one's work involves allocative decisions about resources that are scarce and valued, the autonomy or control that permits one to make those decisions authoritatively constitutes power or influence."); *see also* Burnele V. Powell, *What Clients Want and Why They Can't Have It*, 52 EMORY L.J. 1135, 1144 (2003) ("I assert, then, that what clients want, in the absence of a lawyer willing to offer victory, is a lawyer who *exudes* victory . . . a 'lawyer of stature.' Clients wish to believe that, despite their lawyer's inability to say it, she will act as though the *client's question* really has been taken seriously.").

[38] *See* Heinz, *supra* note 37, at 1144.

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included these resource allocation issues would be too broad.[39] Thus, a narrower definition is necessary.

So, what is it that separates an allocating influence conflict from any other decision in which a lawyer must allocate a finite resource, such as "time in the day"? The defining characteristics involve two client-focused elements: (i) the client's choice to retain the lawyer being based primarily on the lawyer's access to the finite resource;[40] and (ii) the client's ignorance regarding both the resource's limited nature and the consequences of the resource's allocation to someone else (*i.e.*, that the lawyer could or will use the resource on behalf of another client to her

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[39] Ask a busy lawyer how her day was and she may offer you a metaphor: "I spent my whole day putting out fires," with each "fire" being a client problem she addressed. *See, e.g.*, Sue Reisinger, *Wachovia Hires an Expert at Putting Out Fires*, CORPORATE COUNSEL MAGAZINE, Aug. 11, 2008, *available at* http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202423655554 (reporting Wachovia's hiring of new general counsel who "has put out fires throughout her career" as a lawyer). Deciding how to divide one's time and other finite resources among different client "fires" is a problem virtually all lawyers face. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 7–8 (1988) ("Ideally independent lawyers freely decide . . . how to divide their time between paying clients and other commitments, what strategies and tactics to follow in pursuit of the clients' ends, and so forth. On this view, professionals are distinctive not only because they respect their profession's self-imposed restraints as well their clients' needs, but also because at the core of their jobs there is an empty stage where all outside direction ends, where the structures and constraints are theirs to supply alone. The client dictates (as moderated by the lawyer's advice) the results to be sought and has the final say on major decisions, but there are large interstices of often crucial choices reserved for the professional's judgment."); *see also The State of the Legal Profession 1990*, 1991 A.B.A. YOUNG LAW. DIVISION 22–23 (estimating that nearly half of the lawyers surveyed did not have enough time for themselves or their families due to work obligations); *see, e.g.*, Jeremy R. Moss, *Making Time*, ABA GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION, *available at* http://www.abanet.org/genpractice/lawstudents/articles/makingtime.html (noting that "time is a precious commodity" for lawyers). However, a certain subset of lawyers—namely, those that properly may influence a decision maker with a client's fate in his hands—faces a relatively unique and ethically significant resource allocation problem. For these lawyers, the "water" they have to offer their many *en fuego* clients is "influence" and there's only a limited supply. Further, the very reason these lawyers were retained by their clients was their perceived access to such water. Finally, these lawyers' clients are not aware that their lawyers' choice to put out another client's fire may mean that their own blaze continues to burn. In such circumstances, the lawyer faces an allocating influence conflict.

[40] *See infra* note 44 and accompanying text.

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detriment).[41] The presence of these latter two elements distinguishes an allocating influence conflict—which is harmful to clients and in need of addressing—from other more benign resource allocation conflicts, which do not require an ethically sound remedy.[42]

For example, it is highly unlikely that a client would hire a particular lawyer primarily due to his access to filing space or pens. Similarly, it is highly unlikely that a client would not know that a lawyer's time is limited and that his choice to spend time on another client's matter would limit his ability to spend time on that client's matter.[43] In contrast, when the finite resource is influence over a decision maker, the client-focused elements flip-flop. Specifically, a lawyer with influence over a decision maker often is retained due to—or solely because of—his influence.[44] The failure to deliver on this implicit commitment to exercise influence on behalf of an individual client may even constitute a breach of contract.[45] Further, a client may not be aware that her lawyer must divide his influence among clients and may exercise that influence on behalf of someone else to her detriment.[46] Thus, there is a lack of transparency with respect to allocating influence that is absent with respect to allocating other finite resources. Ultimately,

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[41] Macey & Miller, *Regulatory State, supra* note 15, at 1111.

[42] Consequently, the proper remedies for an allocating influence conflict focus on these latter two elements. *See infra* Part III.

[43] Further, the allocation of time is well-documented in a client's bill, thus providing transparency that is lacking when the resource instead is influence.

[44] This phenomenon is part of the broader trend of clients seeking lawyers with narrow specializations. *See* Epstein, *supra* note 31, at 585 (demonstrating that legal specialists are in high demand, especially in high-stakes matters). Administrative lawyers, who often specialize in a practice before a single administrative agency or even before a single bureau of a single agency, thus face an increased intensity when it comes to conflict of interest issues. *See also* Macey & Miller, *Regulatory State*, supra note 15, at 1111 (discussing special treatment afforded to "repeat players before regulatory agencies").

[45] *See* Epstein, *supra* note 31, at 580–581 (articulating the contractual principles underlying conflicts of interest).

[46] Macey & Miller, *Regulatory State, supra* note 15, at 1111 ("[L]awyers may trade off the rights of some clients in order to curry favor with the agency and thereby advance the rights of other clients.") (citation omitted)

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this lack of transparency, coupled with heightened client expectations, means that lawyers should make influence allocation decisions according a higher ethical standard than they must make allocation decisions involving other resources.

II. The Case for Addressing Allocating Influence Conflicts Now

Once defined and understood as a special type of resource allocation issue, the next logical question regarding allocating influence conflicts may be, "Why should we care?" Simply put, the legal ethics community should care about allocating influence conflicts given: (A) the frequency with which they occur, and (B) their harmful effects on clients and the profession, as demonstrated in turn below.[47]

A. Allocating Influence Conflicts Occur Frequently

The allocating influence conflict scenario described above occurs frequently for lawyers practicing before administrative agencies and other lawyers valued for their influence. This is because administrative agencies—unlike courts—often permit (if not expect) a lawyer to meet directly with agency decision makers to present her client's position, without the "other side" present.[48] Such meetings or discussions are known as *ex parte* presentations.[49]

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[47] *See infra* notes 45–67 and accompanying text.

[48] *See, e.g.*, 47 C.F.R. § 1.1206 (2004) ("Unless otherwise provided . . . ex parte presentations . . . to or from [Federal Communications] Commission decision-making personnel are permissible in the following proceedings, which are referred to as permit-but-disclose proceedings, provided that *ex parte* presentations to Commission decision-making personnel are disclosed pursuant to paragraph (b) of this section…"). Some federal agencies, like the Securities and Exchange Commission, require that all parties be given notice and opportunity to participate in *ex parte* communications. *See* 17 C.F.R. § 201.120(a)(1) (2004) ("Except to the extent required for the disposition of *ex parte* matters as authorized by law, the person presiding over an

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Every *ex parte* presentation is an opportunity to exercise influence. Thus, any agency that permits *ex parte* presentations in matters of importance is fertile ground for allocating influence conflicts.[50] The vast number of administrative agencies at the federal, state and local levels make

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evidentiary hearing may not: (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate."). Other agencies, such as the Federal Election Commission, permit single-sided *ex parte* presentations provided that a notice describing the nature of the communication be made part of the public record. *See* 11 C.F.R. § 201.4(a) (2004) ("A Commissioner or member of a Commissioner's staff who receives an ex parte communication concerning any rulemaking or advisory opinion . . . shall . . . provide a copy of a written communication or a written summary of an oral communication to the Commission Secretary for placement in the public file of the rulemaking or advisory opinion. The Commissioner or staff member shall advise any person making an oral communication that a written summary of the conversation will be made part of the public record."). The proceedings in which *ex parte* communications are permissible include informal and formal rulemakings, the heart of any agency's work, as well as other proceedings, including high-profile merger reviews. *See supra* notes 32–35 and accompanying text.

[49] *See* 5 U.S.C. § 557(d) (2004) (describing restrictions on *ex parte* presentations applicable to federal agencies generally)*; see, e.g.*, 47 C.F.R. § 1.1202(b) (2004) (defining the term "*ex parte presentation*" as used before the Federal Communications Commission) (emphasis in original). *Ex parte* presentations may be in-person, telephonic, or even by email. *See, e.g.*, 47 C.F.R. § 1.1202(b) (including written and oral presentations within the definition of an *ex parte* presentation and noting that "written communications include electronic submissions transmitted in the form of texts, such as by Internet electronic mail"). The ability to get such meetings scheduled, and the time allowed during each such meeting, are finite and highly valued resources. *See* ERWIN G. KRASNOW, DAVID R. SIDDALL & MICHAEL D. BERG, FCC LOBBYING xi (2001) ("More lobbyists representing more interests means less time to make your case before the FCC and more competition for the attention of decision makers. Like the spectrum they allocate, the time of those officials is scarce."). The fact that some lawyers perpetually are more successful at obtaining *ex parte* meetings with important decision makers is well-known among lawyers in the administrative law bar and the agencies before whom they practice but is not as well understood by existing and prospective clients. *Id.* at 33–38 (describing process for obtaining meetings with FCC decisionmakers and associated opportunities for allocating influence). This asymmetrical information problem likely could be reconciled by requiring informed client consent to allocating influence conflicts, as suggested in Part IV, *infra*. *See generally* U.S. GEN. ACCOUNTING OFFICE, FCC SHOULD TAKE STEPS TO ENSURE EQUAL ACCESS TO RULEMAKING INFORMATION, GAO-07-1046, 3–18 (2007) (documenting and criticizing one example of the information gap between "stakeholders [that] had access to nonpublic information" and those that lacked access to such information and describing the harmful effects of that gap on the agency decision-making processes and results).

[50] Agencies that permit *ex parte* presentations in at least some proceedings include the Food and Drug Administration, *see* 21 C.F.R. § 10.55 (2004) (indicating, *inter alia*, that "[a]n interested person may meet or correspond with any FDA representative concerning a matter prior

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the likely number of potential allocating influence conflicts quite large.[51] Considering the number of lawyers practicing before such agencies,[52] and the number of clients each lawyer represents, the potential number of allocating influence conflicts grows exponentially.

B. Allocating Influence Conflicts Harm Clients and the Profession

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to publication of a notice announcing a formal evidentiary public hearing"), the Environmental Protection Agency, *see* 18 C.F.R. § 385.2201 (2004) (exempting notice-and-comment rulemakings, certain investigations and other proceedings from rules governing "off-the-record communications"), the Federal Communications Commission, *see* 47 C.F.R. § 1.1206 (2004), and the Federal Election Commission, *see* 11 C.F.R. § 201.4 (2004). Important *ex parte* communications also occur in non-administrative contexts, such as when a criminal defense attorney speaks informally with a prosecutor regarding a possible plea. In the latter scenario, the judge, and not the prosecutor technically is the "decision maker"; however, in practice, a prosecutor's recommendation regarding a plea carries significant, and often determinative, weight. *See generally* Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007) (discussing different factors that influence the plea bargaining system).

[51] *See supra* note 50 (listing federal agencies allowing ex parte presentations). At the state level, some administrative agencies have more flexible *ex parte* policies than others. *Compare* CAL. PUB. UTIL. COMM'N R. PRACT. & P. 8.2(a) (permitting ex parte communications "without restriction or reporting requirement" in any "quasi-legislative proceeding"), *with* ARIZ. ADMIN. CODE 14–3–113(C)(1) (prohibiting any "oral or written communication, not on the public record, concerning the substantive merits of a contested proceeding or siting hearing to a commissioner or commission employee involved in the decision-making process for that proceeding or siting hearing"); *see also* 4 CODE COLO. REG. 723–1–1105 (prohibiting "ex parte communications concerning any disputed substantive or procedural issue" except communications in various proceedings, including those "relating to a pending non-adjudicatory proceeding"); OHIO ADMIN. CODE 4901-1-09 (prohibiting *ex parte* communications "unless all parties have been notified and given the opportunity to be present or to participate by telephone, or a full disclosure of the communication insofar as it pertains to the subject matter of the case is made"); ORE. ADMIN. R. 860-012-0015 (discouraging *ex parte* communications, which, "if made, must be disclosed to ensure an open and impartial decision-making process"); 5 VA. ADMIN. CODE 5-20-50 (prohibiting *ex parte* communications "without giving adequate notice and opportunity for all parties to participate").

[52] Although it is difficult to pinpoint the number of lawyers practicing administrative law, one helpful metric is the 17,000 lawyer-members of the American Bar Association's Administrative Law and Regulatory Practice Section. *See* Am. Bar Ass'n, Membership Information, http://www.abanet.org/adminlaw/members.html (last visited May 29, 2009).

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The frequency with which allocating influence conflicts occur, though striking, is insufficient reason to address them absent some demonstrated harm. However, if it can be shown that such conflicts cause significant harm, the case for addressing them would be much stronger. As shown below, this harm indeed is present.[53] Left unacknowledged and unaddressed, allocating influence conflicts will continue to impose significant costs on clients and the profession.

For a client, the most obvious harm of an allocating influence conflict is the loss of a lawyer's independent judgment and zealous advocacy.[54] A lawyer with the ability to secure only a single meeting in a given week with an agency decision maker faces a difficult judgment call—which client matter should she discuss in that meeting?[55] And, even after making that judgment call, she faces yet another difficult question—should she emphasize the dire need for immediate action on behalf of Client A, as the client expects, or should she downplay that need for

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[53] *See infra* notes 54–71 and accompanying text.

[54] *See* Monroe H. Freedman, *A Civil Libertarian Looks at Securities Regulation*, 35 OHIO ST. L.J. 280, 285 (1974) (noting that pressure to "curry favor" with agency personnel "intimidate[es] attorneys into foregoing zealous advocacy on behalf of their clients"). Although protecting independent judgment was a primary motivation for ethical rules going back to the 1908 legal ethics canons, some commentators have identified a decline in the profession's respect for this bedrock principle. *See also* MODEL CODE OF PROF'L RESPONSIBILITY (1969) (addressing conflicts of interest under Canon 5, which was titled, "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client"); *see generally* Gordon, *supra* note 39 (chronicling a perceived decline in the professional independence of lawyers); ABA CANONS OF PROF'L ETHICS, Canon 6 ("It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts.").

[55] Some commentators have considered this problem to be a "conflict" that, as indicated above, results in the loss of "zeal" in the lawyer's representation. *See* Macey & Miller, *Regulatory State*, *supra* note 15, at 1109 (describing "'repeat-player' problem" as one of two "conflicts" that arise in administrative law practice that are difficult to resolve under market principles alone).

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immediacy given the likelihood that she will need to make a similar claim on behalf of Client B in the near future?[56]

Such decisions inevitably tempt a lawyer to trade off one client's interests to benefit another or to benefit the lawyer herself.[57] Indeed, as one preeminent scholar has noted, some agencies effectively "encourage lawyers to trade off the rights of some clients in order to curry favor with the [agency] and thereby advance the rights of other clients," which turns a temptation into a near necessity.[58] In these circumstances, the client is harmed because his lawyer no longer is making decisions with the client's interests paramount. Instead, the allocating influence conflict has compromised the lawyer's independent judgment. A failure to address allocating influence conflicts now will ensure that this harm continues.

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[56] Macey and Miller, drawing upon Freedman, aptly describe this general ethical dilemma as follows: "Thus, at one stage of a proceeding before an agency, a client may benefit because his attorney receives 'the opportunity, denied to others, to appear before [an agency] at a critical stage' in the proceedings. At a later stage in the proceedings, however, the lawyers may 'trade off the rights of some clients in order to curry favor with the [agency] and thereby advance the rights of other clients.'" *Id.* at 1111 (citation omitted).

[57] *See id.* (arguing that the appearance of agency lawyers before the same decision makers on behalf of multiple clients "creates a conflict that can cause private-sector lawyers who represent clients before government lawyers and bureaucracies to subordinate the interests of their clients to their own long-term interests in maintaining a close and cordial relationship with the government lawyer or bureaucracy"). Like the boy who cried "Wolf!" too many times, a lawyer who insists that every client matter is an emergency worthy of an agency decision maker's immediate attention soon will find calls unanswered and pleas ignored. *See* AESOP, AESOP'S FABLES 91 (George Fyler Townsend trans., Forgotten Books 1965) ("A shepherd-boy, who watched a flock of sheep near a village, brought out the villagers three or four times by crying out, 'Wolf! Wolf!' and when his neighbors came to help him, laughed at them for their pains. The Wolf, however, did truly come at last. The Shepherd-boy, now really alarmed, shouted in an agony of terror: 'Pray, do come and help me; the Wolf is killing the sheep;' but no one paid any heed to his cries, nor rendered any assistance. The Wolf, having no cause of fear, at his leisure lacerated or destroyed the whole flock.").

[58] *See* Freedman, *supra* note 54, at 285 (arguing that SEC practices "represen[t] a conscious effort to encourage lawyers to trade off the rights of some clients in order to curry favor with the Commission and thereby advance the rights of other clients").

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The loss of independent judgment is a clear and easy-to-categorize harm resulting from allocating influence conflicts.[59] A more subtle, yet perhaps more significant, harm results from the gap between a client's expectations regarding influence allocation and the actual way in which influence is allocated.[60] A client that desires prompt agency action in a matter often seeks a lawyer the client perceives capable of influencing the agency decision maker.[61] In many cases, this perceived influence may be the single determinative factor that the client uses in hiring a lawyer.[62]

The *quid pro quo* is simple and direct—the client pays the higher rate or retainer in exchange for the lawyer's influence.[63] Consequently, the client reasonably may expect that,

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[59] As noted above, scholars previously have focused on a related yet distinct effect—the lawyer's perceived inability to zealously represent his client given the interest in maintaining a cordial relationship with the agency. *Id.*

[60] Gaps like these are ripe for addressing via ethical rules because the primary purpose of ethical rules, at least from an economic perspective, is to fill gaps in attorney-client contracts. *See* Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 967 (1997) [hereinafter Macey & Miller, *Economic Analysis*] ("The codes of professional responsibility, in other words, contain a number of 'gap-filling' or 'default' rules that supply terms to an attorney-client contract."). Further, "[a]mong the most important [gap fillers] are those related to conflicts of interest." *Id*.

[61] Macey & Miller, *Regulatory State*, *supra* note 15, at 1111 (arguing that "repeat players before regulatory agencies are truly favored in the sense that they are given preferential treatment by the bureaucrats in the agencies" and that "[c]lients, of course, are attracted to law firms whose lawyers qualify for such preferential treatment").

[62] *See* Epstein, *supra* note 31, at 585 ("[C]lients want lawyers who have real experience in a given area, just the way a patient with a brain tumor wants to hire a physician who has done many similar surgeries.")

[63] For example, a client may agree to pay $600 an hour for Lawyer A in lieu of $220 for Lawyer B, though both are equally competent in other areas, solely because Lawyer A, by virtue of a previous stint as a legal advisor to an agency commissioner, has direct access to and influence over that decision maker. *See* Gordon, *supra* note 39, at 37 (noting that clients value a lawyer who "has not only pierced the veil of legal mysteries but also has access to persons and milieux exotic to the provincial client"). Gordon further posits that "[l]awyers might acquire such contacts and knowledge through government service, involvement in political campaigns, or just from having been on the scene." *Id*. Examples of lawyers who may have acquired such "influence" were Wall Street lawyers and "Washington lawyers [who] have served as intermediaries between corporations and government agencies." *Id*. (citing J. GOULDEN, THE

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when the lawyer has an opportunity to influence the relevant decision maker, the lawyer will do so on behalf of the client. Gone unacknowledged, however, is that several other clients likely hired the same lawyer based on a similar understanding.[64] The lawyer's decision to discuss one client's matter over other clients' matters automatically harms those other clients and deprives them of the single thing for which they thought they were paying a premium.[65] This gap between a client's expectation and the lawyer's actual service delivery creates a loyalty problem that, in turn, serves as an intrinsic justification for addressing allocating influence conflicts through the professional responsibility rules.[66] The disconnect between expectations and delivery also may be viewed as a "backsliding" or "agency cost" problem.[67]

SUPER-LAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS 174–218 (1971); M. GREEN, THE OTHER GOVERNMENT: THE UNSEEN POWER OF WASHINGTON LAWYERS 67–242 (1975)).

[64] That clients hire certain lawyers based on their perceived "access" is not a new or automatically troubling concern. *See* Gordon, *supra* note 39, at 37 (noting that a "client's dependence on the lawyer's special knowledge increases[] as the content of representation moves away from the client's familiar turf onto the lawyer's"). Complicating matters here, however, is the fact that the lawyer also has his relationship with the decision maker that he may be reluctant to use on behalf of any client at this time. *See* Freedman, *supra* note 54, at 285 (documenting the temptation to preserve a relationship with a decision maker at the expense of the current client).

[65] This may be viewed as an informational asymmetry problem, which is common in lawyer-client relationships. *See* Macey & Miller, *Economic Analysis*, *supra* note 60, at 970–71 (describing the core information asymmetry problem as occuring when "[t]he lawyer possesses a store of specialized knowledge, skill, and judgment that the client lacks"). As shown below, more transparency, via mandatory lawyer-to-client disclosure, would help resolve the information asymmetry problem and leave the decision in the client's informed hands. *See infra* notes **Error! Bookmark not defined.Error! Bookmark not defined.–Error! Bookmark not defined.Error! Bookmark not defined.** and accompanying text.

[66] This gap between a client's expectations and the lawyer's delivery served as a significant justification for addressing a "positional" conflict as a conflict of interest. *See* Dzienkowski, *supra* note 10, at 494–95; MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 24 (2008) (listing "the clients' reasonable expectations in retaining the lawyer" and "the significance of the issue to the immediate and long-term interests of the client" as factors to consider when evaluating a positional conflict of interest); *see also infra* Part IV (discussing parallels between positional conflicts of interest and allocating influence conflicts of interest). As one conflicts scholar has stated, clients expect that their lawyers will be loyal and, specifically, will not "concurrently . . . attack[] the view previously taken for them." Dzienkowski, *supra* note 10, at 494 (citation

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Ultimately, the problem is one of resource allocation, as discussed above or, in other words, an allocating influence conflict.[68] What makes the harm especially troubling, however, is that the resource to be allocated—influence—is the key resource for which the client is paying.[69] Because the conflict strikes at the heart of the client's expectations, the failure to deliver on that expectation is even more harmful to the client than another type of resource allocation conflict.[70]

In the best-case scenario, the client may be aware that the lawyer has other clients with similar expectations, and thus temper her own influence-related expectations accordingly.[71] Such

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omitted). Further, the client's loyalty expectation regarding position-taking is greater with respect to issues at the heart of the client's case. *Id*. at 494–95 ("[T]he more central the position, the higher the client's expectation that the lawyer will remain loyal on that particular issue."). Thus, because allocating influence conflicts affect the core of a client's expectations, they are especially problematic conflicts of interest.

[67] *See* Epstein, *supra* note 31, at 580 (discussing conflicts of interest in terms of "agency costs"). In agency cost terms, the gap may be described as follows: "In any contract, it is easy to promise the moon, but tempting to deliver only a slice of green cheese. The promise may determine the scope of the obligation, but it is the performance that ultimately matters . . . ." *Id.* Even viewed in this context, however, a personal interest conflict emerges because "[t]he risks of self-interest are such that the attorney may not undertake actions that work for the benefit of the client because of the high costs" to himself of taking such actions. *Id*. at 580–81. *See also* Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1707 (1998) ("Agency costs may arise when clients delegate discretion over their affairs to lawyers. Ethical rules are an important way to minimize these costs and ensure a minimum level of quality in legal services.").

[68] *See supra* Part I.C.

[69] In this sense, the lawyer's resolution of an allocating influence conflict deprives a client of the primary benefit of the bargain. Although it is possible that market principles theoretically could punish lawyers who resolved allocating influence conflicts unethically, scholars have shown that the "repeat-player" problem in allocating influence conflicts is not easily resolved by such market principles. *See* Macey & Miller, *Regulatory State*, *supra* note 15, at 1110–11.

[70] *See supra* Part I.C (discussing comparatively benign resource-allocation issues).

[71] Sophisticated clients likely understand this. For example, an in-house lawyer at a major wireless phone company likely understands, when hiring Lawyer X, that Lawyer X will meet with agency decision makers on behalf of other clients when he could be spending that time discussing the company's matter. However, the same understanding may not be held by a less sophisticated client. Further, even if understood, many clients may not "fix" the problem by hiring a different lawyer because only a small number of lawyers have the kind of access and influence critical to resolution of the client's problem. *See supra* notes **Error! Bookmark not defined.Error! Bookmark not defined.–Error! Bookmark not defined.Error! Bookmark**

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clients likely know that they have to share the lawyer's influence with other clients. What they do not know, however, is how the lawyer decides to divvy up that influence and whether it is allocated ethically. Most likely, even those clients with "conflict awareness" expect that the lawyer will allocate that influence in a proper, ethical way. However, absent any recognition of, or guidance on how to deal with, allocating influence conflicts, this is not going to be the case. Instead, lawyers will be tempted to resolve allocating influence conflicts based on other, perhaps unsavory, factors—such as which client gives the lawyer the most work per year. Accordingly, even sophisticated clients who know that conflicts likely will emerge are harmed by allocating influence conflicts.

III. EXISTING ETHICS SOURCES REGARDING ALLOCATING INFLUENCE

Despite the frequency with which they occur, and the resulting harm to clients if left unresolved or resolved improperly, there is little existing guidance regarding allocating influence conflicts in any recognized ethics source.[72] Existing rules of professional conduct, comments to such rules, bar ethics opinions, and legal scholarship address conflicts of interest, generally, but do not explicitly address allocating influence conflicts of interest.[73] Similarly, federal and state statutes that address the ethics of influencing—those regarding lobbying and associated

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not defined. and accompanying text; *see also* Macey & Miller, *Regulatory State*, *supra* note 15, at 1111 (predicting that "repeat player problem" could not "easily be solved by having clients select law firms that were not repeat players before agencies" because that "solution . . . often results in higher costs for the clients . . . [a]nd, of course, there could be no guarantee that the neophyte law firm selected would not use the opportunity presented by the client to attempt to become a repeat player before the agency").

[72] *See infra* Part III.

[73] *See infra* notes 75–95 and accompanying text (model rules); notes 96–**Error! Bookmark not defined.Error! Bookmark not defined.** and accompanying text (state rules); notes **Error! Bookmark not defined.Error! Bookmark not defined.–Error! Bookmark not defined.Error! Bookmark not defined.** and accompanying text (bar opinions).

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disclosures—focus on reducing the potential harm to the public at large versus the harm to the individual seeking lobbying assistance, *a.k.a.*, the client.[74] Although these sources provide no explicit identification or resolution of allocating influence conflicts, they do provide a solid foundation for addressing them. Thus, it is important to understand these potential sources of guidance prior to proposing allocating influence conflict solutions involving these sources and the ethical principles upon which they are based.

A. Model Rules Regarding Conflicts of Interest

In searching for ethical guidance on allocating influence, one may logically first consult the Model Rules of Professional Conduct adopted by the American Bar Association ("Model Rules").[75] The general intent of the Model Rules is to "assur[e] the highest standards of professional competence and ethical conduct."[76] A practical purpose of the Model Rules is to provide "suggested" rules to the various state courts empowered to adopt and enforce ethical

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[74] *See infra* notes **Error! Bookmark not defined.Error! Bookmark not defined.–Error! Bookmark not defined.Error! Bookmark not defined.** and accompanying text (state and federal lobbying statutes).

[75] MODEL RULES OF PROF'L CONDUCT (1983) (amended in 1987, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1997, 1998, 2000, 2002, 2003, 2007, and 2008). Although there is some debate concerning exactly how the ethical principles in the Model Rules apply to lawyer-lobbyists, there is little doubt that the core principles and duties apply to most lawyer-lobbyists. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 35.2, at 35–3 (Supp. 2003) ("A lawyer representing a client before a nonadjudicative body, such as a legislature or an administrative agency engaged in rulemaking, is still an advocate. All of the normal duties of competence, diligence, and loyalty attach to the lawyer's conduct in such a forum."). For additional discussion of the general applicability of legal ethics to lawyers engaged in influencing or lobbying, see LUNEBURG & SUSMAN, *supra* note 4, at 487–520 (discussing "The Ethical Responsibilities of a Lawyer-Lobbyist"); William R. Bruce, *Professional Responsibilities of Lobbyists*, 23 MEMPHIS ST. U. L. REV. 547, 547 (1993); and Kenneth R. Button, *The District Of Columbia Conflict of Interest Rules And Lawyer-Lobbyists: A Troubled Marriage*, 8 GEO. J. LEGAL ETHICS 961, 971–79 (1995).

[76] MODEL RULES OF PROF'L CONDUCT Preface (2008).

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rules governing lawyers practicing in their particular states.[77] Thus, although the Model Rules technicallyare not binding on anyone, they are binding to the extent that a particular state has adopted them in whole or in part.[78]

Structurally, the Model Rules contain prohibitions on certain types of conduct while identifying other conduct as permissible or suggested, subject to the reasonable discretion of the lawyer.[79] For example, the Model Rule regarding confidentiality states that a lawyer "shall not reveal" a client's confidential information, thus acting as a prohibition on revealing a client confidences.[80] In contrast, the rule regarding fee agreements merely acts as a suggestion, indicating that they "preferably" be in writing.[81]

Conflicts of interest fall into the former category—prohibitions— because the Model Rules generally prohibit a lawyer from continuing a representation involving a conflict of interest.[82]

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[77] *Id.* at Chairperson's Introduction ("The Model Rules of Professional Conduct are intended to serve as a national framework for implementation of standards of professional conduct.").

[78] As noted below, forty-nine states have adopted the Model Rules in whole or in part. *See infra* note 96 and accompanying text.

[79] MODEL RULES OF PROF'L CONDUCT Scope ¶ 14 ("The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.").

[80] *Id.* at R. 1.6(a). Like many of the Model Rules, the prohibition on revealing client confidences is subject to exceptions based on particular circumstances. *Id.* ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."). Rule 1.6(b) provides exceptions for when a "lawyer reasonably believes [it is] necessary" to "prevent reasonably certain death or substantial bodily harm," "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services," among others. *Id.* at R. 1.6(b)(1), (b)(3).

[81] *Id.* at R. 1.5(b). As a result of these structural differences, revealing a client's confidence would be considered a rule violation, automatically subjecting the violating lawyer to discipline, while having a verbal fee agreement would not.

[82] Without consent, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." *Id.* at R. 1.7(a).

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The Model Rules further dictate how such conflicts should be avoided or resolved.[83] In certain circumstances, the Model Rules indicate, conflicts may be waived by the client.[84]

Under the Model Rules, conflicts of interest are categorized by the type of client involved—a current client, a former client, or a prospective client.[85] With respect to current clients (vs. former clients), the Model Rules recognize three types of conflicts of interest—direct adversity conflicts, material limitation conflicts, and personal interest conflicts.[86] Condensing all three types into a simple summary leads to the following: a current client conflict of interest occurs if there is a "significant risk" that a lawyer's representation of a client will be "materially limited" by: (i) the lawyer's responsibilities to another client or former client, (ii) the lawyer's responsibilities to a third person, or (iii) the lawyer's personal interests.[87]

Although one side of the conflict equation is broken down into specific interests (interest of the client, a third person or the lawyer himself), the other side of the equation is not. Instead, the rule drafters would have us believe that it merely is a question of whether one of these specific interests, on the one hand, conflicts with "a lawyer's" representation of "a client," on the other

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[83] *Id.* at pmbl. ¶ 9 ("In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts.").

[84] A conflict is waivable or consentable if

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

Id. at R. 1.7(b).

[85] *See id.* at R. 1.7 (current client), R. 1.9 (former client), and R. 1.8 (prospective client).

[86] *See id.* at R. 1.7 cmts. 6–12.

[87] *Id.* at R. 1.7(a)(2).

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hand.[88] There is little guidance in the rules themselves regarding particular types of lawyers or particular types of clients, despite the fact that, within the practice of "law," there is limitless variation. Thus, a basic assumption underlying the Model Rules regarding conflicts is that they apparently are written, or at least are intended to be written, broadly enough to encompass all practice scenarios.[89]

Without a breakdown in the rules themselves, the primary practice-specific guidance is in the comments following the conflict rules.[90] Comments to the Model Rules often are a good source for practicing lawyers in search of more specific or nuanced guidance regarding a particular rule.[91] For example, when legal scholars and others grew concerned that litigators were not identifying or addressing "positional" conflicts, the ABA modified an existing comment.[92]

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[88] *See id.* at R. 1.7.

[89] *See generally id.* at pmbl. & Scope.

[90] *See id.* at Scope ¶ 14 ("Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."). Although the conflict of interest rules do not make practice-area-based distinctions, certain other rules do make such distinctions. *See, e.g.*, *id.* at R. 3.8 (detailing special duties of criminal prosecutors).

[91] *See id.* at Scope ¶ 21 ("The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.").

[92] *Compare Id.* at R. 1.7 cmt. 24 ("Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.") *with* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 9 (2000) ("A lawyer may not represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be

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Thirty-five comments follow the current client conflicts of interest rule.[93] Although some of these comments attempt to clarify how the conflict rules apply in various practice circumstances, none addresses administrative law practice.[94] Nor does any comment address the specific problem of allocating influence within any practice.[95]

B. State-Level Rules Regarding Conflicts of Interest

Although states are under no obligation to adopt the Model Rules, forty-nine of them have adopted the Model Rules in whole or in part.[96] Forty states also have adopted the comments accompanying the Model Rules.[97] The Model Rules' failure to anticipate, acknowledge, or

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adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.").

[93] *Id.* at R. 1.7 cmts. 1–35.

[94] *See* LUNEBURG & SUSMAN, *supra* note 4, at 495 ("Unfortunately, most of the Model Rules and their state counterparts seem to assume that lawyers are either litigators or transactions attorneys.").

[95] For practice-specific comments, see MODEL RULES OF PROF'L CONDUCT R. 1.7 cmts. 24 (litigation), 26 (transactional matters), 27 (trusts and estates), 29–33 (joint representation), and 34–35 (organizational clients).

[96] California is the only state with rules not based on the ABA Model Rules. *See* Am. Bar Ass'n Center for Prof'l Responsibility, Dates of Adoption of the Model Rules of Professional Conduct, http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited June 6, 2009). The District of Columbia and the Virgin Islands also follow the Model Rules format. *Id*. Effective Aug. 1, 2009, Maine was the forty-ninth state to adopt rules that more closely track the Model Rules. *See* MAINE RULES OF PROF'L CONDUCT (2009), *available at* http://www.courts.state.me.us/rules_forms_fees/rules/MRProfCond6-4-09.pdf.

[97] *See* Am. Bar Ass'n's Center for Professional Responsibility, State Adoption of Comments to Model Rules of Professional Conduct as of February 2009, http://www.abanet.org/cpr/jclr/comments.pdf. These states are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id*.

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address allocating influence conflicts of interest thus has led to similar failures in state-level rules and codes of professional conduct.[98]

Forty-one states and the District of Columbia have adopted Model Rule 1.7 regarding Conflicts of Interest in whole or in part.[99] State variations on the Model Rules regarding conflict of interest generally are minor, such as not requiring that a conflict waiver be in writing[100] or replacing a phrase like "a tribunal" with "any tribunal."101 No state variation addresses allocating influence conflicts.[102] Nor does any state rule or comment provide specific guidance regarding conflicts in administrative law practice.[103] Thus, state rules and comments—like the Model Rules and comments—provide virtually no guidance regarding allocating influence conflicts.

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[98] Each state, typically at the state supreme court level, adopts the ethical rules applicable to lawyers admitted or practicing law in that state. *See* LERMAN & SCHRAG, *supra* note **Error! Bookmark not defined.Error! Bookmark not defined.**, at 20 ("In most states, the highest court of the state, not the legislature, is responsible for adopting the rules of conduct that govern lawyers.") (citation omitted).

[99] The nine states that have not adopted Model Rule 1.7 in whole or in part are Alabama, California, Georgia, Hawaii, Massachusetts, New Mexico, Tennessee, Texas, West Virginia. *See* Am. Bar Ass'n, Model Rule 1.7 Comparison (Aug. 9, 2007), http://www.abanet.org/cpr/jclr/1_7.pdf (last visited June 7, 2009) [hereinafter ABA Model Rule 1.7 Comparison). Fifteen states have adopted Model Rule 1.7, aside from numbering, in its entirety. *Id.* (Arkansas, Colorado, Delaware, Indiana, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, Oklahoma, Rhode Island, South Carolina, Utah, Vermont). Nineteen states adopted the Model Rule regarding conflicts with only minor variations. *Id.* (Alaska, Arizona, Connecticut, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Michigan, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Dakota, Virginia, Washington, Wisconsin, and Wyoming). Seven states, plus the District of Columbia, have a conflicts rule with moderate or greater structural or substantive differences from the Model Rule 1.7. *Id.* (D.C., Florida, Maine, Mississippi, New York, North Dakota, Ohio, and Oregon).

[100] *Id.*; ILL. RULES OF PROF'L CONDUCT, R. 1.7 (1990).

[101] ABA Model Rule 1.7 Comparison, *supra* note 99; CONN. RULES OF PROF'L CONDUCT, R. 1.7(b)(3) (2007).

[102] ABA Model Rule 1.7 Comparison, *supra* note **Error! Bookmark not defined.Error! Bookmark not defined.**.

[103] *Id.*

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C. ABA and State Bar Opinions

Given the frequency with which they occur in practice,[104] one may expect ABA formal or state bar opinions to have addressed allocating influence conflicts. However, the lack of rule-based guidance makes lawyer-based complaints unlikely. Similarly, the lack of transparency to clients, identified above, likely mutes any complaint from clients who suffer as a result of these conflicts.[105] Because these two sources—fellow lawyers and clients themselves—are unlikely to lodge allocating influence complaints, it makes sense that ABA and state-level disciplinary boards have not issued any formal opinions providing allocating influence conflict guidance.[106]

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[104] Although Rule 8.3 and its state equivalents mandate that lawyers report known instances of professional misconduct by other lawyers, in many states, the instances of actual reporting are few and the instances of discipline for non-reporting are fewer. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2008) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."); Daryl van Duch, *Best Snitches: Illinois Lawyers Land of Lincoln Leads the Nation in Attorneys Turning in Their Peers*, NAT'L L.J., Jan. 27, 1997, at A1 (excerpted in Lisa G. Lerman & Philip G. Schrag, ETHICAL PROBLEMS IN THE PRACTICE OF LAW (2d ed. 2008) ("While nearly every state has adopted a rule requiring lawyers to report misconduct of other lawyers, there are relatively few public reports of discipline of lawyers for not reporting.")).

[105] *See* Macey & Miller, *Regulatory State*, *supra* note 15, at 1111 (noting that "it is difficult for clients to tell when [allocating influence] conflicts will arise before it is too late"); *See also* Macey & Miller, *Economic Analysis*, *supra* note 60, at 971 ("Because clients often cannot distinguish good legal work from bad, the client will rarely be an effective monitor of the attorney's behavior (unless the client is a sophisticated party, such as a firm that employs its own in-house counsel).").

[106] Bar opinions have addressed how other ethical restrictions apply in particular administrative law circumstances. *See, e.g.*, State Bar of Cal. Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 2001-156 (2001) (advising whether a conflict of interest may arise "when . . . officials of a city . . . seek legal advice on the same matter and the constituents' positions on the matter are antagonistic"); Ala. OGC Formal Op. 1993-12 (whether a lawyer "may represent clients before a state agency even though [his] partner serves as a hearing officer for said agency"); Conn. Bar Ass'n, Comm. on Prof'l Ethics, Informal Op. 95-7(1995) (concluding that "it is not a violation . . . for an attorney to communicate ex parte with [an agency] investigator, provided there is no attempt to influence the investigator unlawfully").

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D. Statutory and Executive Lobbying Restrictions

Although parts A through C above address all typical sources of ethics guidance applicable to practicing lawyers, federal and state-level restrictions on lobbyists also are potentially relevant to the extent that they apply to administrative agency lawyers. This is because, fundamentally, much of the "influencing" done by a lawyer practicing before an administrative agency is identical to the influencing done by a traditional Congressional lobbyist.[107] The location may be different—the offices of an agency versus the halls of Congress—but the exercise of influence on behalf of a paying client is the same. As a result, many restrictions conventionally viewed as applicable to lobbyists also apply to administrative lawyers who influence agency decision makers.[108]

Federal lobbying restrictions generally require the influence peddler, or lobbyist, to disclose his "lobbying contacts" in a quarterly report.[109] These disclosure obligations, on first glance,

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[107] Historians believe that the term "lobbyist" originated with President Ulysses S. Grant's practice of speaking with "those who would wait in the lobby of Washington, D.C.'s Willard Hotel to smoke a cigar with [the] President…or to meet Congressmen." Allard, *supra* note 2, at 37; *see also* Ron Smith, *Compelled Cost Disclosure of Grassroots Lobbying Expenses*, 6 KAN. J.L. & PUB. POL'Y 115, 122 & 170 n.34 (1996) (surmising that Grant complained about all the "lobbyists" who were blocking his access to "his toddy"). Of course, at the time of Grant's presidency, administrative agencies did not exist to the extent they exist today or else perhaps they, too, would have joined in the fun.

[108] *See infra* notes 109–120 and accompanying text.

[109] 2 U.S.C. § 1604 (2004); 2 U.S.C. § 1602 (defining "lobbying contact"). The substance of the required disclosure typically includes the name of the lobbyist and client, a brief list of the issues to be addressed in the lobbying, identification of the House of Congress or federal agency lobbied (but not individual names), and estimated amounts of income from the lobbyist's client(s). 2 U.S.C. § 1604(b) ("Each semi-annual report filed . . . shall contain (1) the name of the registrant, the name of the client . . . (2) for each general issue area in which the registrant engaged in lobbying activities . . . (A) a list of the specific issues upon which a lobbyist employed by the registrant engaged in lobbying activities . . . (B) a statement of the Houses of Congress and the Federal agencies contacted . . . (C) a list of the employees of the registrant who acted as lobbyists on behalf of the client; and (D) a description of the interest, if any, of any foreign entity. . . .(3) in the case of a lobbying firm, a good faith estimate of the total amount of

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appear to apply to persons lobbying or influencing administrative agency officials.[110] However, via the many exceptions listed in the definition of "lobbying contacts," and the limited definition of "covered executive branch official," much of the influence exerted by administrative lawyers likely is not covered by federal lobbying restrictions.[111]

The exact applicability of the federal lobbying restrictions to administrative agency influencing is outside the scope of this Article. What is relevant, however, is the lack of guidance in these lobbying restrictions regarding conflicts of interest like allocating influence conflicts, even if they do apply to agency influencing activities.[112] The lack of federal statutory guidance regarding conflicts of interest is not surprising when one considers the primary purpose of these laws. Specifically, federal lobbying restrictions are intended to protect the general public via disclosure and the scrutiny such disclosure facilitates.[113] Even President Barack Obama's recent executive order, "Ethics Commitments by Executive Branch Personnel," applied only to the pre-

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all income from the client . . . during the semiannual period . . . ").

[110] *See* LUNEBURG & SUSMAN, *supra* note 4, at 177–78 (noting that, after Lobbying Disclosure Act of 1995, "communications with executive branch officials related to the administration of federal laws are considered lobbying and may trigger registration and disclosure obligations").

[111] *See id.* at 179 ("The LDA identifies a relatively narrow list of officials with whom communications are considered lobbying contacts."); *id*. at 182 ("The LDA includes a long list of exceptions that, to some extent, contract the broad scope of the LDA's definition of a lobbying contact."). Another provision of the LDA that contracts its applicability to administrative agency influencers is the "twenty percent rule," under which twenty percent of the time one spends on behalf of a client must be dedicated to "lobbying activities" in order for one to be deemed a "lobbyist." *See id.* at 37 (citing 2 U.S.C. § 1602 (10) (2004)).

[112] *See id.* at 499 (noting that lawyer-lobbyists face a difficult challenge "because there is little guidance in the [ethics] literature on applying the conflict rules to the nuances of a lobbying practice.")

[113] *See generally* Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 516 (2007) (criticizing the effectiveness of disclosure obligations' focus on lobbyists as the main actors) (citing 2 U.S.C. § 1601 (3) (2004)). Lobbyists or influence peddlers have their own beliefs regarding the effectiveness of lobbying reform. *See, e.g.*, Trevor D. Dryer, *Gaining Access: A State Lobbying Case Study*, 23 J. L. & POL. 283, 284–85 (2007) (sharing results of interviews with lobbyists who tend to believe that "robust disclosure and reporting" are essential elements of lobbying reform).

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or post-government lobbying activities of government personnel to preclude suspicious "side-switching" in an effort to increase public confidence in government.[114]

Although the purposes of these Congressional and executive efforts indeed may be laudable, they do not include express protections for another participant in the influence exchange—the influence seeker, or client.[115] Rather, the only express protections for the client are set forth in legal ethics rules which, as discussed above, do not adequately address allocating influence conflicts.[116] Thus, federal lobbying restrictions can be eliminated as a potential source of adequate guidance regarding these conflicts.

Like their federal counterparts, state lobbying restrictions focus on disclosure by the lobbyist regarding the identity of the client, the issue discussed, and the compensation paid.[117] Even the most recent state lobbying reform efforts, many of which were enacted in response to specific scandals, are directed solely at increased disclosure[118] or at establishing commissions to more

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[114] Exec. Order No. 13490, 74 Fed. Reg. 4673 (Jan. 21, 2009). President Barack Obama's recent executive order was the latest in a long line of executive orders regarding presidential oversight of administrative agencies' practice and procedure. *See* Michael Hissam, *The Impact of Executive Order 13,422 on Presidential Oversight of Agency Administration*, 76 GEO. WASH. L. REV. 1292, 1293–96 (2008) (chronicling previous executive orders and their effects on agency administration).

[115] *See* William V. Luneburg, *Anonymity and its Dubious Relevance to the Constitutionality of Lobbying Disclosure Legislation*, 19 STAN. L. & POL'Y REV. 69, 88 (2008) ("Unlike certain special relationships, like those involving the attorney and client or the association and member, where the law casts a veil of protection over the communications among the parties to the relationship, there is no similar special relationship between lobbyist and client, on the one hand, and legislator or administrator, on the other, that justifies confidentiality of communications.").

[116] *See supra* notes **Error! Bookmark not defined.Error! Bookmark not defined.**–106 and accompanying text.

[117] *See* Roberta Baskin, *The State of State Legislative Ethics: Watching the Watchdogs*, 39 IND. L. REV. 487, 489-90 (2006) (grouping state laws regarding lobbying into "two categories: disclosure and conduct"). For a comprehensive comparison of state-level lobbying restrictions, *see* The Center for Public Integrity's Lobby Disclosure Comparisons, 2003, at http://projects.publicintegrity.org/hiredguns/comparisons.aspx.

[118] *See, e.g.*, Calon Russell, *Lobbying Reform: What is the Problem?,* 12 LEWIS & CLARK L. REV. 853, 858–863 (2008) (chronicling recent reform efforts in Oregon).

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investigate allegations of impropriety regarding government employees.[119] Although Pennsylvania recently extended its lobbying disclosure regulations to attempts to influence "administrative action," it is too soon to predict whether this effort, or future efforts using it as a model, will provide the kind of direct guidance necessary to prevent and respond to allocating influence conflicts.[120]

IV. ADDRESSING THE ALLOCATION OF INFLUENCE THROUGH THE CONFLICT OF INTEREST RULES

The proposal of detailed solutions to allocating influence conflicts may be viewed as premature until a consensus emerges regarding their existence and harms. However, when the allocating influence "problem" is viewed as an actual conflict of interest, similar to already-recognized conflicts of interest, then the need to address this problem—and the structure in which to do so—becomes quite clear. Ultimately, if one concedes that allocating influence conflicts exist, and that they are worthy of additional, more focused guidance, then the most direct way to address a perceived lack of guidance regarding allocating influence conflicts is to add a comment, and improve upon an existing comment, to the Model Rule 1.7 regarding conflicts of interest.

[119] *See, e.g.*, Daniel E. Shuey, *Showing Up to Sit Out: Attorney-Commissioners on the New York State Commission on Public Integrity*, 21 GEO. J. LEGAL ETHICS 1025, 1031–34 (2008) (chronicling the Public Employee Ethics Reform Act of 2007 which created the New York State commission on Public Integrity).

[120] *See* Act of November 1, 2006, P.L1213-, NO. 2006-134, 65 PA. CONS. STAT. ANN.§13A01–13A11 (West 2007). Under Pennsylvania's new Lobbying Act, "administrative action" is defined to include activities such as the "proposal, consideration, promulgation or rescission of a regulation." *Id*.

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A. The Allocating Influence "Problem" is a Conflict of Interest That Should Be Addressed in the Conflict of Interest Rules

Fundamentally, a conflict of interest is a conflict of duties. If a lawyer feels like his duty (of loyalty, diligence, confidentiality or another) to one person conflicts with his duty to another person, client, or to himself, then he may have a conflict of interest.[121] Under the Model Rules of Professional Conduct, a current client conflict of interest occurs if there is "direct adversity" or if there is a "significant risk" that a lawyer's representation of one client will be "materially limited" by that lawyer's responsibilities to another client, to a former client, to a third person, or by the lawyer's personal interests.[122] Material limitation from any of these sources—another client, a former client, a third person or the lawyer himself—is sufficient to create a conflict of interest.[123]

An allocating influence dilemma involves significant risk of material limitation from at least three, if not all four, of these sources, making it a clear conflict of interest. The scenario presented above—a lawyer with one *ex parte* meeting (or a single opportunity to exercise influence) but more than one client (A and B) with a need for such influence—illustrates the presence of these risks and limitations.[124] In that scenario, there is a significant risk that the

[121] Underlying the lawyer-client relationship and the conflict of interest rules is an expectation that the lawyer's representation will not be limited by his responsibilities to another. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2008) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests.").

[122] *Id.* at R. 1.7(a).

[123] *Id.* ("Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.").

[124] *See supra* notes **Error! Bookmark not defined.Error! Bookmark not defined.–Error! Bookmark**

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lawyer's responsibilities to Client A will be materially limited by his responsibilities: (i) to Client B, because use of the 20 minute meeting to discuss Client A's matter will make it much more difficult to influence the decision maker on behalf of Client B in the future; (ii) to a third person, the decision maker, with whom the lawyer seeks to maintain an influential relationship; and, similarly, (iii) to the lawyer himself, whose future prospects depend upon maintaining an influential relationship with the decision maker.[125] Thus, in a frequently-faced influence allocation scenario, a conflict of interest emerges on several levels.

B. Treating Allocating Influence Issues as Conflicts of Interest Is a Natural Extension of Previous Conflict of Interest Scholarship

As explained above, viewing allocating influence dilemmas as conflicts of interest is consistent with the conflict of interest rules and the core principles underlying those rules. Treating allocating influence issues as conflicts of interest also is a natural extension of previous conflict of interest scholarship. Although no existing scholarship expressly identifies allocating influence conflicts as done herein, a few scholars have addressed one critical aspect of allocating influence dilemmas that supports their treatment as conflicts of interest—that certain aspects of administrative law practice lead to frequent and troubling conflicts between a client's interest and the lawyer's personal reputational interest.

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not defined.Error! Bookmark not defined. and accompanying text (describing a common administrative lawyer conflict scenario).

[125] *See* Macey & Miller, *Regulatory State*, *supra* note 15, at 1107 ("[For] private-sector lawyers who represent clients before government agencies…the client's interests can be subjugated to the long-term interest of the lawyer or law firm in maintaining a cordial relationship with the particular agency . . . .").

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Three preeminent ethics scholars have suggested that administrative lawyers often are tempted to put their personal reputational interests ahead of a client's interest. In the 1970s, renowned ethics scholar Monroe Freedman first shared this concern as part of a broader expose regarding potential ethical abuses at the Securities and Exchange Commission.[126] Essentially, Freedman opined that SEC lawyers, through intimidating and likely unethical practices, were causing the securities bar to sacrifice zealous representation of their clients.[127] Although not expressly stated as such, Freedman's concern regarding the lack of zealous representation ultimately was a concern that the conflict of interest between the client and the lawyer was resulting in a loss of independent judgment.[128] As a result, the problem first identified by Freedman is best understood as a conflict of interest that emerges most often in administrative law practice in general, and not just at the SEC.

Freedman's SEC-related concerns reappeared in the 1990s as part of Jonathan R. Macey & Geoffrey P. Miller's *Reflections on Professional Responsibility in a Regulatory State*.[129] In *Reflections*, Macey and Miller submit that market mechanisms that typically control lawyer behavior, and mitigate ethical concerns, often do not work effectively in the "regulatory sector."[130] One example of this "market failure," cited by Macey and Miller is the problem first identified by Freedman, which they artfully label a "repeat player problem."[131]

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[126] Freedman, *supra* note 56, at 285.

[127] *See id.* (noting that SEC practices "are directed toward intimidating attorneys into foregoing zealous advocacy on behalf of their clients.").

[128] *See Id*.

[129] *See* Macey & Miller, *Regulatory State*, *supra* note 15, at 1105 ("This combination of constraints upon lawyer behavior is effective at controlling many of the ethical problems that arise within the private sector. We argue, however, that a variety of factors prevent this combination of constraints from working effectively within the regulatory sector.").

[130] *See Id.* at 1106.

[131] *See Id*. (noting that, "because . . . lawyers often are 'repeat-players' in their actions before government regulators, they have strong incentives not to alienate the bureaucrats [which leads]

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Because administrative lawyers, unlike other lawyers, often must appeal to the same agency officials on behalf of multiple clients over a long period of time, they properly are viewed as "repeat players."[132] These "repeat players" have a personal interest in maintaining a cordial, working relationship with the agency officials whom they repeatedly must influence; indeed, their solid relationships with these officials often form the primary basis of their practice.[133] Given these long term personal interests, repeat players are tempted to sacrifice a client's immediate interest in zealous and persistent advocacy to protect the lawyer's long-term interest in maintaining fruitful relationship with the agency official.[134] In other words, there is a conflict of interest between the client's interest in zealous advocacy and the lawyer's personal interest in maintaining the relationship for future use.[135]

Macey and Miller, like Freedman, ultimately were concerned that a lawyer may kowtow to agency officials at the expense of clients in order to preserve the lawyer's relationship with those

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to less than zealous representation because lawyers balance the immediate interests of their present client against the long-term interests of their firms in maintaining a cordial relationship with a particular bureaucrat or bureaucracy" in order to avoid sanction). Another conflict of interest scholar, John S. Dzienkowski, used the "repeat player" terminology but did so when referring to the client, not the lawyer. Dzienkowski, *supra* note 10, at 486–87 (noting that, in a positional conflict scenario, "the one-time litigant may be most at risk when the other representation involves a repeat player.").

[132] *See* Macey & Miller, *Regulatory State*, *supra* note 15, at 1106.
[133] *See id.* at 1106, 1111.
[134] *See id.* at 1110.
[135] One also could characterize this conflict of interest as an agency cost. *See* Ribstein, *supra* note 67, at 1709 ("Agency costs typically involve conflicts between the agent's and principal's interests.). Viewed in these terms, the "[l]awyer's interests…may diverge from those of clients in terms of their willingness to take risk" because "[l]awyers stand to lose in terms of reputation . . . from a bad result but do not share in the client's gain from a good result." *Id*. at 1710. Essentially, this leads to a personal interest conflict. Another personal interest conflict is that "[l]awyers . . . may have selfish reasons to favor the interests of one client over those of another." *Id*. at 1709

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agency officials.[136] Although not explicitly stated, these concerns were justified given existing conflict of interest principles.[137] More importantly for present purposes, these scholars' identification of the repeat player problem as the cause of personal interest conflicts fundamentally supports treating allocating influence dilemmas as conflicts of interest.

C. Treating Allocating Influence Dilemmas as Conflicts of Interest is Consistent with Existing Guidance Regarding Positional Conflicts

Previous scholars' identification of the repeat player problem—and the conflict of interests inherent to that problem—support treating the allocating influence problem as a conflict of interest. The bar's current standards on positional conflicts provide further "precedent" for treating allocating influence dilemmas as conflicts of interest. As described above, the Model Rules prohibit certain conflicts of interest in Rule 1.7 and flesh out the applicability of the prohibition to certain practice scenarios via the comments.138 One scenario addressed in the "Conflicts in Litigation" portion of the comments is a special type of conflict of interest known

[136] In identifying this sacrifice of clients' interests, Freedman primarily assigned blame to the agency instead of to the private sector lawyers practicing before that agency. Specifically, Freedman accused the SEC of "dragooning members of the private Bar . . . as federal police and prosecutors of their own purported clients" Freedman, *supra* note 56, at 281, and of "depend[ing] upon intimidation of individuals, business firms, and attorneys through aggressive abuse of its power over the economic life and death of those subject to its jurisdiction" Freedman, *supra* note 56, at 282. Macey and Miller, on the other hand, tended to believe that this blaming of SEC lawyers was misplaced. *See* Macey & Miller, *Regulatory State*, *supra* note 15, 1110 ("We believe that Professor Freedman is wrong, however, to blame the lack of forceful representation by the securities bar solely on the misconduct of the SEC, although we have no reason to doubt his analysis in this regard.").

[137] At one point, Macey and Miller describe the "repeat player problem" as a "conflict of interest" but they do not demonstrate how this is so, do not offer a concrete definition of the conflict, and do not offer any guidance regarding how to avoid or resolve such conflicts, presumably because the "repeat player problem" primarily served as an example to support their more general thesis that the market could not effectively bar certain ethical issues in the regulatory sector. *See* Macey & Miller, *Regulatory State*, *supra* note 15, at 1109, 1105–06.

[138] MODEL RULES OF PROF'L CONDUCT R. 1.7 and cmts. 23–35.

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as a “positional conflict.”[139]

As set forth in the Model Rules, a positional conflict of interest emerges “if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.”140 The comment further cites various factors to consider when determining whether to advise a client regarding a positional conflict, including whether the respective cases are at the appellate or trial level and “the client’s reasonable expectations in retaining the lawyer.”141 If a positional conflict results in “significant risk of material limitation,” then the lawyer must choose between one of the conflicting positions and withdraw from the other, or, as with other conflicts of interest, obtain a client waiver.142

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[139] *Id.* at R. 1.7 cmt. 24 (2008).

[140] *Id.* Dzienkowski defined a positional conflict as follows: “A positional conflict of interest occurs when a law firm adopts a legal position for one client seeking a particular legal result that is directly contrary to the position taken on behalf of another present or former client, seeking an opposite legal result, *in a completely unrelated matter.*” Dzienkowski, *supra* note 10, at 460 (emphasis in original). Although some have questioned whether positional conflicts should be analyzed differently, *see* Anderson, *supra* note 4, at 5, 30-37, the general consensus is that positional conflicts are conflicts of interest in certain defined circumstances and the rules, bar opinions and other sources generally support this understanding. *See. e.g.*, DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 610-13 (5th ed. 2009) (describing positional conflicts via a discussion of case examples and existing legal scholarship).

[141] *See* MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 24 (2008) (“Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer.”). *See also supra* notes **Error! Bookmark not defined.Error! Bookmark not defined.**–67 and accompanying text (explaining significance of client’s expectations in analyzing conflicts of interest).

[142] MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 24 (2008) (“If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.”); *Id.* at R. 1.7(b) (consent). The ABA first expressly acknowledged positional conflicts in 1983. Anderson*, supra* note 4, at

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The concerns that motivated expansion of the positional conflict definition align significantly with the concerns that underlie allocating influence conflicts. Although positional conflicts often are understood as concurrent client conflicts, i.e., taking a position for one client that conflicts with the position taken for another conflict, they also involve a conflict between the client and the lawyer's personal interest, i.e., a personal interest conflict.[143] Positional conflicts involve personal interest conflicts in that a lawyer considering whether to make an argument inconsistent

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13; *see also id.* at 13–15 (positing that "enormous growth and specialization of the legal profession" along with a "philosophical" shift toward realism motivated ABA to address positional conflicts in the Model Rules). Previously, the Model Rules and comments suggested that positional conflicts existed only if one simultaneously took antagonistic positions in appellate courts. Prior to its amendment in 2002, the positional conflict comment read as follows:

> A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 9 (2000). *Compare id.*, *with* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 cmt. f (2000) ("A lawyer ordinarily may take inconsistent legal positions in different courts at different times. While each client is entitled to the lawyer's effective advocacy of that client's position, if the rule were otherwise law firms would have to specialize in a single side of legal issues. However, a conflict is presented when there is a substantial risk that a lawyer's action in Case A will materially and adversely affect another of the lawyer's clients in Case B. Factors relevant in determining the risk of such an effect include whether the issue is before a trial court or an appellate court; whether the issue is substantive or procedural; the temporal relationship between the matters; the practical significance of the issue to the immediate and long-run interests of the clients involved; and the clients' reasonable expectations in retaining the lawyer. If a conflict of interest exists, absent informed consent of the affected clients under § 122, the lawyer must withdraw from one or both of the matters."). Scholarly criticism regarding the limited reach of the ABA's positional conflict of interest definition led to an ABA Formal Opinion expanding the definition and, ultimately, to a more expansive Model Rule comment. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993); Anderson, *supra* note 4, at 15–18. The two primary lines of criticism were the comment's ambiguity and its failure to say anything about "notice and disclosure of positional conflicts to clients." Anderson, *supra* note 4, at 15. A 1993 ABA Ethics Opinion rejected the trial versus appellate court distinction in favor of a more nuanced, factor-based inquiry. *Id.* at 15–17 (summarizing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993)). Thus, in 2002, the ABA modified a comment to Rule 1.7 regarding "positional" conflicts of interest to read as described above. *Id.* at 17.

[143] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 10 (2008).

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with an argument already made for another client must balance the second client's interest in him making the argument with his own personal interest in keeping the first client happy and inclined to send more work the lawyer's way.144 Essentially, "where a client provides repeat business, a lawyer would not want to offend that client by taking on a case or making an argument of which that client disapproves."145

In this respect, a positional conflict—or, at least, the avoidance of a positional conflict—may be more properly viewed as a personal interest conflict and a concurrent client conflict. Because it involves both types of conflicts, a positional conflict shares much in common with an allocating influence conflict. Given these fundamental similarities, it makes sense to use a comment-based solution, similar to the positional conflict comment, to address allocating influence conflicts of interest.

D. The ABA Should Amend the Comments to Model Rule 1.7 to Address Allocating Influence Conflicts

A comment regarding allocating influence conflicts could track the structure already used with respect to positional conflicts—a description of when an allocating influence conflict exists,

[144] Anderson, *supra* note 4, at 31–32 (demonstrating that the avoidance of a positional conflict of interest involves a "business conflict" for the lawyer).

[145] *Id.* at 3. Anderson further posits that "[i]t is when a lawyer decides *not* to make a contrary argument for one client in order to avoid offending or harming another client that an ethical problem is likely to be present." *Id*. at 3–4 (emphasis in original). In this respect, the lawyer may avoid a pure positional conflict but does so based on prioritizing his own personal or economic interest, which may be a more serious problem than the positional conflict the lawyer sought to avoid. *Id.* at 31–32 ("The more serious problem occurs when a lawyer favors one client over the other for business reasons and therefore suppresses a positional conflict by either not raising the argument for the less favored client or by tailoring it so that it does not conflict with the argument for the more favored client.").

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supplemented by an example, followed by a general but consentable prohibition.[146] The descriptive or definitional element largely could track the definition presented above, followed by a specific example from administrative law practice. Together, these elements would help practicing lawyers determine whether they face an allocating influence conflict. Further, the comment should identify the circumstances in which an allocating influence conflict may be waived and whether it may be waived prospectively.[147]

Based on the above-described framework, already in place in the Model Rules, I propose the following amendment to the comments following Model Rule 1.7, heading "Nonlitigation Conflicts,"[148] to be inserted after current comment 27:

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[146] One also could list factors that make such a conflict more or less likely to be present in any individual case, as done with positional conflicts. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 24 (2008) ("A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer.").

[147] *See Id.* at R. 1.7(b) (defining circumstances in which client may waive or consent to a conflict of interest).

[148] Because allocating influence conflicts of interest occur most frequently in administrative law practice, any comment addressing them likely should be placed under the "Nonlitigation Conflicts" heading versus the "Conflicts in Litigation" heading. Current comments under the Nonlitigation Conflicts heading address practice areas such as transactional matters, estate planning, and negotiating a settlement. *See id.* at R. 1.7 cmt. 26 (referencing Comment 7, noting that "[d]irectly adverse conflicts can also arise in transactional matters, with an example), Comment 27 (describing how "conflict questions may arise in estate planning and estate administration") & Comment 28 (addressing circumstances in which nonlitigation conflicts may be waived). The fact that Comment 26 begins by stating that "[c]onflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation" further supports this placement of allocating influence conflict guidance.

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> A lawyer who properly may, and is retained by a client to, influence a decision maker via personal contact (such as a lawyer lobbying Congress or a lawyer meeting with an administrative agency official) often may face a conflict of interest when he must choose how to allocate a finite amount of influence among multiple clients. This type of conflict, an allocating influence conflict, occurs if there is a significant risk that allocating influence on behalf of one client is reasonably certain to inhibit substantially the lawyer's ability to influence the same decision maker on behalf of another client. If such a significant risk is present, then, absent informed consent of the affected client(s) under 1.7(b), the lawyer shall refuse one of the representations or withdraw from one or both matters.[149]

Because an allocating influence conflict of interest also involves a conflict between one client's interest and the lawyer's own personal interest in maintaining a certain relationship with a decision maker, additional guidance specific to this type of "personal interest" conflict is

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[149] As an alternative approach, one could advise lawyers how to resolve allocating influence conflicts based on certain preferred factors rather than prohibiting them altogether. Under such an approach, the comment could continue as follows: "In circumstances in which obtaining prior consent is not practicable, a lawyer may continue the representation, despite the allocating influence conflict, only if the lawyer resolves the conflict based on the lawyer's professional judgment and not based on unreasonable, subjective factors such as by favoring the client that provides the lawyer with the most annual billable hours." This resolution approach versus a prohibition approach may be preferable to the extent that allocating influence conflicts, like positional interest conflicts, "cannot be resolved by a simple rule that permits or prohibits their existence; instead, a series of considerations must determine how a particular positional conflict of interest is handled." *See* Dzienkowski, *supra* note 10, at 520–21 & n. 257 (showing that the resolution approach tracks the approach used in other model rules that "establish a set of procedures that the attorney must follow in order to accomplish a particular task.").

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appropriate. Accordingly, I propose that comment 10 following Model Rule 1.7, heading "Personal Interest Conflicts," be revised as follows, with new language in italics:

> The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. *Finally, a lawyer who properly may, and is retained by a client to, influence a decision maker via personal contact (such as a lawyer lobbying Congress or a lawyer meeting with an administrative agency official) shall not permit his personal interest in maintaining an ongoing beneficial relationship with a decision maker to materially limit the lawyer's representation of the client.* See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

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These two modest revisions to the Model Rule comments would serve several purposes, including mitigation of the harms documented above.[150] At the very least, the comments would alert lawyers who lobby or influence decision makers that they face a special obligation, in addition to those imposed upon non-lawyer lobbyists, to exercise their influence consistent with a lawyer's general duty of independent judgment for each and every client.[151] Further, this increased awareness, in combination with the obligation to avoid allocating influence conflicts or obtain client consent to such conflicts, in turn, would better ensure that clients are aware of how they will be represented. Clients, empowered with this information, then may make an informed decision to continue with a representation despite the presence of an allocating influence conflict or to hire another lawyer lacking such conflicts of interest.[152]

CONCLUSION

[150] *See supra* notes 49–67 and accompanying text (documenting harms).

[151] Increasing awareness in this manner is one of the primary purposes of the Comments. *See* MODEL RULES OF PROF'L CONDUCT Scope ¶15 (comments "are sometimes used to alert lawyers to their responsibilities . . . .").

[152] Although permitting advance waivers of conflicts of interest admittedly may "raise[] several questions," such as whether a client may be "consent[ing] to a problem without a full appreciation of the facts and the potential damage," two aspects of an allocating influence conflict make such questions less critical. *See* Dzienkowski, *supra* note 10, at 528. First, because an allocating influence conflict is, at its core, a resource allocation problem, which many clients deal with often in their day-to-day lives, it is very likely that clients will be able to appreciate the nature of the problem. Second, because *ex parte* meetings with agency decision makers generally must be documented through a post-meeting, publicly-available notice, it at least is possible that clients may track how "thinly spread" their lawyers' influence is at any given time. The easy-to-understand nature of the conflict, coupled with relatively easy monitoring capabilities, should balance any concerns regarding advance waivers. *See id.* at 528–29 (questioning the efficacy of an advance waiver because "it requires a client to consent to a problem without a full appreciation of the facts and the potential damage" and because "once the conflict begins to affect the representation, the lawyer would need to obtain a new consent based on the new information"); *c.f.* Macey & Miller, *Economic Analysis*, *supra* note 60*,* at 1004 (suggesting that per se bans on attorney conflicts of interest are unwarranted, at least in purely economic terms, when "a fully informed, rational, and, sophisticated client" has consented to the conflict).

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A lawyer's influence is a finite resource for which a client pays significant value. Because the exercise of this influence in the client's favor is the heart of a client's expectations, the lawyer's allocation of this resource must be done ethically and with due regard to conflict of interest principles.[153] Regarding conflicts of interest generally, lawyers are subject to ethical rules intended to protect clients.[154] Lobbyists, on the other hand, are subject to state and federal statutes intended to protect the general public.[155] Although it is understood that these sources of ethical guidance apply to lawyers practicing before administrative agencies, exactly how they apply is, at best, unclear. One particular area in which lawyers need additional guidance is how the legal ethics "conflict of interest" concept applies to a lawyer attempting to influence an agency decision maker. As demonstrated above, providing concrete guidance in this area is important given the frequency of, and harm caused by, allocating influence conflicts.[156] The best way to provide this necessary guidance is in the comments to the Model Rules themselves.[157] Only after doing so will we, as a profession, begin to ensure that lawyers are allocating influence—ethically.

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[153] *See supra* notes **Error! Bookmark not defined.Error! Bookmark not defined.–Error! Bookmark not defined.Error! Bookmark not defined.** and accompanying text (explaining ethical significance of client's expectations).

[154] *See supra* notes **Error! Bookmark not defined.Error! Bookmark not defined.**–103 and accompanying text.

[155] *See supra* Part III.D.

[156] *See supra* Part II.

[157] *See supra* Part IV.D.

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