The Role of the Lawyer as Deal Maker in Health Care Acquisitions: From Amoral to Immoral?

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Abstract: This article proposes ethical — and legal — accountability for lawyers representing clients such as private equity (PE) firms who create ownership structures for nursing home systems. Using PE ownership as a case study, I will show that nursing home residents are often harmed and Medicaid costs inflated. I propose private law provides tools to compel such accountability, through (1) aiding and abetting doctrines and (2) fiduciary doctrines that require that the fiduciary be responsible for its vulnerable beneficiaries, not just ethically but for damages and equitable relief. I further propose that the teaching of Professional Responsibility needs to be changed to force law students to consider the effect of legal practice on third parties in situations like health care financing.

Introduction

Lawyers in our legal system have not traditionally been held morally or legally accountable for who their clients are, what their clients have done, or what attorneys will do for their clients as long as it is within the bounds of the law. Professional responsibility ethical rules support zealous advocacy on behalf of clients in criminal and civil trial settings — justified by adversary context, the judge's control of the trial, and the chances to appeal.[1] Some have argued that lawyers are privileged to do whatever is necessary to serve their clients in light of these factors.[2]

The justification of a range of amoral legal behavior may be acceptable in criminal defense work. But the extremes of "zealous advocacy" outside the criminal arena have led to movement by state bars to remove "zeal" from their rules of professional responsibility.[3]

Most lawyers practice in the universe of transactional corporate work.[4] As Judith McMorow and Luke Scheur have written, "[t]he overly broad notion that lawyers are not accountable for the goals of their clients serves as a crutch that prevents corporate lawyers from considering and articulating the moral value of their services. Corporate lawyers, and society, are better off if lawyers dig into the reason why their work offers value to the world."[5]

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This article, written as part of a symposium dedicated to the work of Professor Charity Scott, will build on her scholarship that looks at lawyering and how to improve how lawyers can work ethically with their clients.[6] I will consider how to promote legal and ethical accountability for big firm lawyers representing equally big clients such as private equity clients who finance enterprises such as nursing homes in the health care world.

This Article argues that corporate lawyers cannot ethically claim that they are not morally responsible for their work on behalf of corporate clients-clients who function in a world of relatively minimal legal oversight. Nor do these lawyers deserve a pass from accountability – such an ethical immunity is granted to the legal profession too often in its approach to lawyer ethics.

I. The Practice of Law Today: Big Law and Big Clients

A. Big Law and Private Equity

The practice of law has undergone a sea change since the 1960s and 1970s. Big firms are now huge: in 1972 my Boston firm *Palmer & Dodge* had only 40 lawyers and functioned well; today its name is *Locke Lord* and it has around 620 lawyers all over the world — an example of the legal industry's move toward consolidation of smaller law firms.[7] Health care has similarly moved from solitary hospitals and small nursing home chains to large consolidated systems. Business lawyering has been supercharged by this consolidation driven by competition.

Firm size and pressure to get clients creates powerful incentives for a firm lawyer to become a "hired gun." Kagan and Rosen argue that such a hired gun "...acts as a cynical manipulator of the tools made available by a complex legal system. He takes advantage of the forms and the letter of the law, rather than the spirit or intent, to maximize his client's narrowly defined and essentially asocial goals."[8] Gordon speaks of the decline of the counselor's ethic and its reasons: the growth of Big Law and profit maximization / partner; he criticizes the "...cults of market economism and shareholder-wealth maximization as supreme goods."[9]

I will argue that transactional legal work — with particular emphasis on the health care area — must be grounded in a new model of ethical practice. Professional identity formation in large law firms, doing transactional work, is built on legal blindness to third party harms. As Donald Langevoort notes, "[t]he lawyer who advises a client in structuring a transaction typically operates as one side's financial engineer, developing the efficient mix of contract terms, representations and warranties for the satisfaction of both parties. Done artfully, this engineering readily can maximize the client's advantage, conceal client weaknesses and avoid contractual devices or remedies that might thwart any fraud..."[10]

Private equity firms are wonderful clients for big law firms. Private equity is a huge component in an international finance system, highly motivated to hunt for opportunities whenever the corporate prey offers a promising short-term opportunity for high profits. These private equity deals also provide highly lucrative clients for Big Firm corporate billing, and the source of much lawyer work and billables. A private equity firm spends an average of $10.5 million annually on its outside counsel legal fees, with the vast majority (92%) spending between $2 million and $25 million — and 6 percent spending more than $25 million.[11]

A recent private equity report valued the global private equity market size at $445.4 billion in 2022 and is projected to reach $1,098.74 billion by 2032.[12] Private equity now dominates significant portions of the U.S. economy.[13] In 2020, the private equity sector employed 11.7 million workers throughout the U.S., brought in $900 billion in wages and benefits, and generated $1.4 trillion in GDP, managing more than $6 trillion in assets.

A recent book labels these companies *The Plunderers*,[14] arguing that private equity is the financial equivalent of plagues of locusts in stripping its acquired enterprises bare. What is the lawyer's obligation if she knows that the client's dealmaking will cause harm to a whole class of vulnerable third parties? The very playbook of these private equity firms is designed to strip assets and reduce staff in settings even when such strategies both (1) cause harm to vulnerable residents and (2) inflate charges to Medicaid through related transaction billing — pure "false claims" concealed from federal payers such as Medicaid. Langevoort's observation fits the world of nursing home harms: he notes that "[i]t is thus too quick to say that lawyers are not a proximate cause of a tainted transaction simply because their role was limited to advice and drafting."[15]

The private practice of law has become big business rather than a "noble profession." Critics argue that it should therefore be subject to direct accountability, and perhaps even stricter rules.[16] Lawyers practicing "Big Law" "...can have a significant and deleterious effect on the quality of the social fabric — i.e., law is essentially politics by a different name."[17] Nonaccountability forms part of what has been termed "the standard conception of legal ethics."[18] That conception is fraying — given the large sums of money that private equity is bring to the practice of law, it is time to develop categories of accountability for clients' actions

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that bring harm to third parties of clients—and for the lawyers engineering these large deals.

B. Magic Words of Big Private Equity: Innovation, Efficiency and Markets

Private equity uses three magic words to justify their investments in healthcare, including nursing homes — these words are the marketing gospel for private equity self-justification. They are *innovation*, *efficiency*, and *markets*. First, *innovation* is often invoked by the industry in its defense. One website places innovation in a central place in private equity investing: "Private equity funds are expected to increase the efficiency and revenues and increase the profits of portfolio companies due to the assimilation of innovation and technology."[19] Another website states that "[i]t's a sector that is somewhat economically recession-proof....A dynamic driving private equity investment is innovation. Healthcare is at the forefront of innovation and technology. There is tremendous interest to investing in the healthcare ecosystem to help drive better outcomes — to invest in companies that are innovative and are leveraging technology to create better patient outcomes at a lower cost."[20]

This rationale runs through the private equity literature as a mantra, but it has little connection to nursing home care, which requires under federal law staffing trained and available to care for elderly patients — innovation and new technologies are not easy to imagine and create in this world of the vulnerable and fragile patient. Supportive nursing care, good diets, and adequate numbers of trained staff to handle patients with complex needs are not achieved by either innovation or technology. Good staff are required at levels that give patients the care and respect they deserve.

Efficiency is a second magic word — it promises that a facility can work better if it is streamlined with fewer staff and simpler procedures. Nursing homes however are not mass production facilities that benefit from speeding up the production line; nor are they complex operations that would benefit from modernizing computer systems to elimination slowdowns in a system — they are utterly human-centric care systems.

Finally, *markets* are claimed to justify private equity expansion into healthcare.[21] This ideology developed early in nursing home history as it became an industry built on "market" solutions to end-of-life care for the elderly.[22] Early advocates of privatization argued that a private ownership system could be more efficient — providing quality services at a lower cost.[23] Leslie King writes: "In instituting Medicare and Medicaid, the U.S. did *not* create a system of government-run nursing homes or specifically incentivize the development of not-for-profit nursing homes, as it might have done. Purposefully or not, lawmakers created a system of large, for-profit, chain nursing homes."[24]

Private equity owners have achieved neither higher quality nor lower cost in nursing home care. Markets are characterized by transparency if prices are public and all relevant activity is visible to everyone. Buyers have full information and are able to shop among largely fungible products — competition rules. Such a market assumes traders who engage with one another at a designated time and place, abiding by shared rules — a town square on market day. What we see with private equity health care entities is an antimarket — opaque, monopolistic, with consumers who are unable to shop easily and are often constrained by location. These private equity entities concentrate power and wealth, promising exceptional profits only to a few.[25] It is what the great French historian Braudel has called a form of jungle capitalism, where "the great predators roam and the law of the jungle operates."[26]

Let's start at the beginning with corporate clients and whether these clients have crossed a line into creating harm to third parties by the deals being made. Lawyers doing deals frequently invoke the mantra of "efficiency" and "innovation" as the benefits of a profit-driven model such a private equity financing of health care organizations. Is a market justification for efficiency and profit enough to shield clients from responsibility? I have heard lawyers explain to me that markets bring efficiency, and we have to let these forces run in health care. McMorrow and Scheur have observed that "...the market is capable of harshly immoral acts-slavery as a prime example-and is not exempt from questions of rightness and wrongness. Although the market is *capable* of promoting the common good, just as people are, it is also capable of doing great harm."[27]

Lawyers in Big Law who serve such clients risk becoming complicit in client misdeeds, rationalizing whatever the client wants to achieve and denying any wrongdoing. After all, the work is challenging, the billables are substantial, and the big firm loves the cash flow of private equity clients. As one legal scholar has argued, in complicated business transactions "... venality competes not so much with stupidity as with honest, even good faith behavior that only in hindsight seems incredible."[28] ...[I]n a noisy world of complicated abstractions an involved actor has a diminished capacity to perceive danger signals that might indicate fraud."[29]

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II. Private Equity and Nursing Homes as a Case Study

My case study is private equity financing of nursing homes.[30] Why choose private equity to test justifications for both client legal responsibility and lawyer responsibility? It sounds like quite a stretch to hold both a private financial company — and therefore its lawyers — ethically and legally responsible for "normal" business deal making. It is not a stretch — dealing making and rollups in the nursing home industry are recipes for harming residents of those homes.

I will contend private equity ownership of nursing home care for elderly vulnerable residents is a perfect example of the merits of private equity accountability in health care systems. These nursing home residents are exceptionally vulnerable and yet the quality of their daily lives is too often shortchanged by their owners — particularly private equity owners. I will show that the private equity playbook is designed to make as much money as possible in a short period of time for its many investors with little or no regard for consequences to third parties affected by the deal — little accountability is apparent. These incentives creative powerful profit incentives that can blind the lawyers and officers in the private equity investment bubble to the harms that result.

The United States has more than 26,000 nursing homes, and they care for more than 1.4 million residents.[31] About 24 percent of nursing homes are operated by not-for-profit corporations, 7 percent are government-owned, and 70 percent are for-profit, with 58 percent are operated by corporate chains. [32] Private equity firms now are estimated to hold from 5 to 11 percent of nursing facilities nationwide.[33]

Regulatory control of this industry is weak.[34] Government regulators are hard-pressed to inspect and sanction the thousands of nursing homes in the United States.[35] The National Academies of Sciences, Engineering, and Medicine (NAS) 2022 report is striking: "Despite significant measures to improve the quality of nursing home care in OBRA '87, the current system often fails to provide high-quality care and underappreciates and underprepares nursing home staff for their critical responsibilities."[36] The COVID pandemic revealed and amplified shortcomings in nursing home care, such as "inadequate staffing levels, poor infection control, failures in oversight and regulation, and deficiencies that result in actual patient harm."[37] A New Jersey report on nursing home performance during the pandemic went so far as to recommend that private equity financing should be prohibited in New Jersey nursing homes.[38]

A. Locusts: Leveraged Buyouts, Staff Cuts, and Harms

Private equity investment involves acquisition of a total or partial ownership interest in an entity that is not publicly traded.[39] Its business model is designed for financial efficiency and maximization of short-term returns for investors. The model of private equity is actively antithetical to the operation of a quality nursing facility.[40] Private equity firm–owned nursing homes are not like other for-profit homes.[41] Private equity firms seek high annual returns of 20% or more. Private equity demands a rate of return in 3-5 years of around 20-30%, and typically a firm moves on at that point, selling the system.

These firms are like locusts, highly motivated to move rapidly to generate high short-term profits for their investors. Private equity firm–owned nursing homes reduce staffing, services, supplies, and equipment, which may have an adverse association with quality of care, whereas non-private equity for-profit nursing homes may have business strategies with longer time horizons. Nursing homes purchased by private equity firms may be responsible for the debt used by the private equity firm as part of a leveraged buyout to acquire the facilities, thereby reducing their financial resources and leaving them carrying heavy debt.[42] Typically a firm moves on at that point, selling the new consolidated firm after having extracted value from the firm and often leaving it in poor condition.[43]

The Centers for Medicare and Medicaid Services (CMS) has been slow to curb most of this private equity behavior. Such private equity firms prioritize short-stay, post-acute care patients over long-term residents, in order to gain higher federal reimbursements compared to state Medicaid reimbursements for nursing home care. The result — higher short-term mortality, higher antipsychotic use, reduced patient mobility, fewer nurse hours per resident day, and higher costs for post-acute patients as the result of private equity acquisition.[44] Private equity owned nursing homes have a higher health deficiencies score index and lower overall inspection and staffing ratings, compared to other ownership types. They have lower resident acuity index compared to other ownership types. It turns out that non-profit nursing homes which are generally smaller demonstrate less reliance on Medicaid financing and have higher quality metrics overall.[45]

1. Leveraged Buyout (LBO) Debt as a Profit Tool

Private equity uses leveraged buyouts (LBOs) to load acquired firms with high levels of debt. The strategy is to leverage debt on the firms acquired in order to

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pay themselves and other shareholders dividends in the order of magnitude of hundreds of millions of dollars.[46] The debt that is assumed to fund the acquisition can be up to 70% of the cost. The use of Real Estate Investment Trusts (REITs) coupled with LBOs leaves the acquired company with high levels of debt — while its private equity acquirer has extracted profits through high fees and dividend payments.[47] None of this money goes toward resident care improvements.[48] The strategy simply destabilizes the long-term health of the nursing home.[49]

Private equity use of LBO debt triggers aggressive cost cutting in nursing home chains as the private equity firms demand the boards and officers of chains to hit their rate-of-return metrics. Cutting billing, legal and human resource departments for example reduces "wasteful" overhead. In nursing homes, the private equity ownership toolkit in particular drains nursing home assets and reduces needed spending on nurses and aides.[50] Other changes include reducing staffing levels and cutting wages, often accompanied by efforts to resist unionization.[51] For-profit nursing homes routinely determine staffing levels based on census and reimbursement as opposed to resident acuity — for-profit facilities have 16% fewer staff than nonprofits after accounting for differences in residents' needs.[52]

Overmedication of patients is an inevitable byproduct of these financial constraints. Staff have to be cut to meet system metrics for income, and this smaller staff is left with more patients to manage and is tempted to overmedicate them. *Human Rights Watch* interviewed people who live in nursing homes and their family members who described the harmful cognitive, social, and emotional consequences of the overuse of antipsychotic medications: sedation, cognitive decline, fear, and frustration at not being able to communicate. They found that "...[m]ost or all antipsychotic drugs are associated with sedation and fatigue in people with dementia."[53]

2. "Related Party Transactions"

Private equity uses related-party transactions as contra-market "pillaging" techniques. Nursing home chain owners often outsource goods and services to multiple entities in which they also have an ownership or financial interest. These entities then allow ancillary clinical services to be fragmented and spun off[54] — laboratory, radiology, pharmacy, and specialty medical staffing.[55] For many residents in skilled nursing facilities, those services can be billed to Medicare separately from the basic nursing home inpatient charges.[56] Rather than shopping for the best price in the market, "...the owners can establish highly favorable contracts in which their nursing homes pay more than they might in a competitive market. These profits are then siphoned off, not recorded in nursing home accounts, and hidden in affiliated companies."[57] A recent study concluded that "...although Medicaid payment rates are generally lower than other payers, *Medicaid payments appear to exceed the costs of care for Medicaid-covered residents in some facilities*. [Italics mine]"[58] These hidden overcharges raise the possibility of False Claims actions under the False Claims Act (FCA).

The financial playbook of private equity risks poor quality for nursing home residents[59] — as well as draining the Medicare and Medicaid budgets through strategies of revenue inflation.[60] Patients suffer and die from neglect caused by a cost-cutting private equity ownership mode of finance.[61] The Private equity strategies are cumulative and opportunistic, striving to capture and extract excess profits from every aspect of a nursing home system. The profits are intended to satisfy investors first and not to improve the care in a nursing home.[62]

B. The Evidence of Harm to Nursing Home Residents

Private equity ownership increases 90-day mortality by 2.4 percentage points, or 15% of baseline mortality among Medicare residents, adding up to more than twenty thousand deaths over the course of 12 years.[63] The Government Accounting Office (GAO) identified "...longstanding issues with nursing home quality, such as infection control and resident abuse and gaps in CMS oversight."[64]

Another study in the British Medical Journal conducted a systematic review of all empirical research that evaluated PE owned health care operators, with nursing homes and hospitals the most studied in earlier research. The authors applied several outcome measures to test the effects of PE ownership: health outcomes, costs to patients or payers, costs to operators, and quality. They found that private equity ownership was most consistently associated with increases in costs to patients or payers and mixed to harmful impacts on quality. The authors found "[n]o consistently beneficial impacts of PE ownership" and concluded that PE ownership "...is often associated with harmful impacts on costs to patients or payers and mixed to harmful impacts on quality."[65]

III. Corporate Controls and Legal Duties

If quality in PE-owned nursing homes is poor, adverse event levels are higher than other nursing homes, and patients are treated badly as a result of short staffing, isn't this the problem of nursing home management?

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How can accountability reach up to corporate owners and private equity investors? The answer is also found in the private equity playbook of private equity control over nursing home system financing and operational strategies.

A. Private Equity Corporate Control of Nursing Home Systems

Private equity firms exercise centralized top-down control of the whole operation including subsidiaries when they acquire a nursing home chain. The first question is where the authority lies in a complicated multi-level structure like many PE-owned systems. Who has knowledge of the strategies for high profitability? Complexity shields the enterprise from liability by making it difficult and expensive for plaintiff lawyers to pursue a defendant with assets.[66] Such strategies constitute deception in financial statements to conceal real income and assets among a myriad of subsidiaries.[67] Without data and visibility, plaintiff lawyers and regulators are all blinded. The complex and opaque ownership structures that private equity firms typically create makes transparency difficult, given diffusion of ownership and responsibility.[68] This restructuring makes state/federal oversight more difficult.[69] New SEC rules passed in 2023 are a first step toward transparency in the private equity industry.[70]

The private equity playbook is focused on control of a company.[71] As a private equity newsletter describes it: "...[P]rivate equity firms seek to take as much control of a company as necessary to execute their investment thesis, giving equal importance to value extraction and value creation. ...The private equity leveraged buyout strategy typically involves the acquisition of a majority ownership stake in a portfolio company, which generally allows the sponsor to appoint the board of directors and fill key executive management positions....Ownership and governance of a private organization are typically well aligned, if not one and the same."[72]

The most recent example is Welsh Carson, a large New York-based private equity firm that invests heavily in health care investments. The Federal Trade Commission has brought an antitrust action against Welsh Carson, unraveling its complicated chain of ownership in order to prove that "[i]t is the "primary architect" of U.S. Anesthesia Partners (USAP) — a firm it created specifically to "roll up" independent anesthesia practices into a single dominant provider with the power to extract high prices from Texas employers and patients."[73] Welsh Carson not only devised this decade-long "consolidation strategy," it participated in its execution by identifying USAP's acquisition targets, negotiating and approving the deals, and providing or securing hundreds of millions of dollars in funding to bankroll them. Welsh Carson also struck deals to allow USAP clear its competitors out of the way or set their prices.

Welsh Carson created a complex structure of companies that acted together as a single company, managed and directed by the same high-level Welsh Carson executives. Welsh Carson employees then set up a company, named USAP, as the vehicle to achieve consolidation. It then chose the leadership for USAP, with experience in rolling up more than 100 neonatology practices while running another company. Most significantly, the leadership team worked with a consultant to create a modeling tool to identify anesthesia practices to acquire, "a tool that USAP used for years afterwards to carry out the alleged conduct. In its own words Welsh Carson was USAP's primary architect."[74]

The result was that Welsh Carson become the financier, owner, and manager of the acquired entities, setting the terms and conditions of operation. A private equity firm with this level of management control is acting as a controlling fiduciary where health care entities have patients (and nursing homes have residents).

Since lawyers are involved at each step of this process, lawyers should also be accountable as fiduciaries for harms to nursing home residents.

B. Compliance: From External Oversight to Fiduciary Obligations to Private Law Duties.

Compliance programs have become universal in corporations, creating a regulatory track parallel to the general counsel office. Owners of nursing homes and boards of directors of private equity firms have compliance obligations under federal law.[75] Owners of nursing homes and boards of directors of private equity firms have compliance programs that impose fiduciary duties related to oversight.[76] Aren't internal compliance mechanisms enough?

This apparent extensive regulation of the nursing home industry can provide owners and board members with knowledge of regulatory failures resulting from deficiencies cited by state and federal surveyors. This survey process provides the exact nature of care deficiencies, including the scope and severity of these regulatory compliance failures.[77] Once deficiencies are cited, the nursing home must submit a plan of correction that must be approved by regulators in order for the facility to come back into compliance and keep federal and state funds under Medicare and Medicaid flowing to the facility. Unfortunately, the dreams of compliance are wispy — state inspections are rare, and penalties are few.[78]

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All nursing homes are also now mandated to have a compliance and ethics program in effect.[79] The performance of purchasing and owning a nursing home must include an effectiveness evaluation of the organization's compliance and ethics program. The knowing failure to have such a program has been argued to evidence "reckless disregard" under the Federal False Claims Act.[80] Is this internal compliance mechanism of self-regulation not enough to police the private equity industry?

The problem with these compliance duties is that (1) they are aimed primarily at making the ownership matrix transparent to consumers shopping for a place for their family member (and to regulators) and (2) enforcement is minimal and rarely imposes sanctions.[81] More is needed. As I have argued, private equity acts knowingly and opportunistically through its financial playbook — deliberate pillaging of nursing home, residents, and government payers. Actions by private equity owners of nursing homes are "intentional"— the core strategies are intended to load nursing homes with debt, build structures to inflate charges to Medicaid and Medicare, and cut staffing and other costs with the predictable results of poor care, poor staffing, increased resident mortality, more adverse events, and fraud on Medicaid.[82]

We are left with the promises of private enforcement. Fiduciary law is a private law enforcement tool to achieve some form of accountability, as is tort law. The nursing home context is appropriate for the use of fiduciary doctrine, which normally tends to focus on corporate dealings with shareholders and other financial situations that involve wrongdoing. Fiduciary duties are common in the corporate world, imposing duties on boards of directors and corporate managers. Fiduciary duties give the beneficiary of such duties a right to sue the fiduciary for their breach of fiduciary duty, as a matter of private remedies. Fiduciary law coupled with a court's equitable tools provides a far more muscular approach to nursing home bad actors than does either tort or contract law limited to damage remedies.[83] Fiduciary law offers future-looking equitable tools to change the private equity calculus for those who invest in and run nursing homes.[84] It identifies opportunistic power used against the vulnerable. It allows vulnerable beneficiaries and their families to demand honesty and selflessness of their fiduciaries.[85]

Imposing a fiduciary duty on an organization raises the baseline for conduct and the measurement of failure and breach of duty. Fiduciary doctrine can create a presumption of wrongdoing for this class of relationships.[86] Fiduciary law creates legal rights grounded in equity for those who need protection, allowing tolling of statutes of limitation and easing a plaintiff's burden of proof. And fiduciary law can draw on a range of equitable remedies. Remedies in fiduciary law are "comprehensive and tenacious."[87] Equity rather than law provides the enforcement engine for breaches of fiduciary duties. Remedies beyond equitable compensation include disgorgement, equitable recission, accounting for profits, constructive trusts, and declaratory judgments — a whole equity arsenal is available.[88]

I will demonstrate how a fiduciary duty can be imposed on the owners and managers of nursing home systems.[89] This nursing home fiduciary duty is supported by a sturdy legal foundation, built on three arguments.[90]

1. Medicaid as a Fiduciary

Medicaid is the primary federal payer of nursing home expenses. Sara Rosenbaum and her co-authors have argued that Medicaid has a fiduciary duty standard, based on statutory State plan requirements for medical assistance requiring "…such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined and such care and services will be provided in a manner consistent with simplicity of administration and the ***'best interests of the recipients.'***"[Italics mine.][91] This "best interests of the recipients" standard is analogous to ERISA's fiduciary duty standard.[92] Since state programs certify and regulate all owners of nursing home chains, whether non-profit or for-profit, this standard of fiduciary duty obligates states and their nursing home managers and owners.

2. The Resident as "Vulnerable"

Fiduciary law establishes a norm of special obligations, creating higher expectations than we normally allocate to others in contractual relationships.[93] As Rotman writes, "…the fiduciary concept brings law closer to the human condition by anticipating potential problems that exist in certain forms of interaction characterized by power imbalances and vulnerability and prohibits their development through the entrenchment of strict principles on fiduciaries."[94] This concept of fiduciary law fits the nursing home relationship between owners/managers and residents perfectly.[95] Several court decisions have recognized the fiduciary duty of nursing home owners and managers toward residents.

The court in *Schenk v. Living Centers-East* emphasized the unique vulnerability of residents in nursing homes:

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> Residents are in the care and custody of the home on a 24–hour basis, with all their needs necessarily supplied by the facility. Residents are almost invariably in poor physical and/or mental health; they are frequently incompetent and unable to comprehend much less protest any mistreatment or neglect; their families likewise are not in a position to readily know whether injuries are caused by genuine accidents or whether they result from neglect or abuse. [] These various factors make such residents particularly vulnerable to neglect and a variety of possible abuses with detection arguably difficult ... unlike the situation where a presumably competent person seeks a consultation with a physician for a particular problem or even requires hospitalization for a particular malady. [96]

The *Schenck* court then builds a conceptional foundation for the fiduciary duty count in the plaintiff's complaint:

> [M]any if not most nursing home residents are in a vulnerable physical and/or mental state. Placing a loved one in such a facility necessarily entails trust on the part of the family as well as the resident. Since the residents reside in the home, the family has comparatively limited access and opportunity to learn if the resident is neglected or otherwise mistreated. *If entrusting one's money to a receiver or conservator created a business relationship, one would hope at least in principle that entrusting a valued family member to the care of a business entity such as a nursing home would carry similar responsibilities.* [97][Italics mine.]

The *Schenk* court acknowledges the realities of nursing home care: most residents are vulnerable physically, lack the cognitive skills in many cases to protect themselves, did not "choose" their home, and need a heightened level of personal attention and care.[98] The *Petre* court observed that no relationship better "fits the description [of the fiduciary capacity] than [the relationship] which exists between a nursing home and its residents."[99]

3. Anti-Opportunism: Fiduciary Controls Over "Self-Interest Seeking with Guile"

The third leg of nursing home fiduciary duty is built on the extreme opportunism of private equity ownership in health care. The generally accepted definition of opportunist behavior in fiduciary law is that of Williamson. His definition is as follows:

> By opportunism I mean self-interest seeking with guile. This includes but is scarcely limited to more blunt forms, such as lying, stealing and cheating. Opportunism more often involves subtle forms of deceit ... More generally, opportunism refers to the incomplete or distorted disclosure of information, especially to calculated efforts to mislead, distort obfuscate, or otherwise confuse.[100]

Fiduciary law strives to control such opportunistic behavior: Smith defines "opportunism" as "behavior that is undesirable but that cannot be cost-effectively captured — defined, detected, and deterred— by explicit ex ante rulemaking ... It often consists of behavior that is technically legal but is done with a view to securing unintended benefits from the system, and these benefits are usually smaller than the costs they impose on others."[101]

4. Equitable Powers.[102]

Courts have the power to impose fiduciary duties and equitable powers against management and owners. The equitable tool of disgorgement is one example. In *Rohlfing v. Manor Care, Inc.*,[103] the executor of a nursing home resident's estate sued Manor Care, the nursing home operator, its parent, and the related pharmaceutical company for antitrust violations, fraud, and breach of fiduciary duty. His goal was to recover excessive fees the resident was forced to pay because of the nursing home's pharmaceutical policies. The court allowed class certification for antitrust and RICO claims, the Illinois Consumer Fraud Act (ICFA), and the breach of fiduciary duty.

Manor Care owned a network of 179 facilities in 28 states, offering a spectrum of services to residents — from "high acuity" (intensive) nursing care to custodial care and assisted living arrangements. Manor Care owned an 82.3 percent interest in 18 of the facilities which were required to get their pharmaceutical services from Vitalink Pharmacy Services, Inc. (Vitalink). Vitalink also provided consulting services for Manor Care residents, such as monitoring potential drug interaction problems and reviewing patients' drug administration records.

The court expanded on the nature of a fiduciary duty: "A fiduciary duty exists in relationships where 'there is confidence reposed on one side and a resulting superiority and influence on the other.' ... It is certainly true that 'many, if not most nursing home

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residents are in a vulnerable physical and/or mental state,'[*Schenck*], which could place their caregivers in a position of confidence and influence."[104]

The court in *Rohlfing* held that the plaintiff, Rohlfing, had alleged a proper claim for breach of fiduciary duty.[105] The plaintiff in *Rohlfing* alleged that Manor Care charged him excessive prices for pharmaceuticals, thus breaching their fiduciary duties. The court found that Rohlfing had alleged a claim for breach of fiduciary duty, quoting *Quist v. Dorn*: "Courts of Equity will scrutinize with jealous vigilance the transactions between parties occupying fiduciary relations toward each other…"[106]

Rohlfing is an example of the abuse of *related party transactions*, specifically use of a pharmacy service owned by the nursing home system to extract high prices for drugs and drug services. If such a case goes to trial, a plaintiff can seek disgorgement of excess gains — to be returned to nursing home residents.

Courts have also allowed suits against corporate owners of nursing homes for breach of fiduciary duties. In *Isby Brandon v. Beverly Enterprises, Inc.*,[107] defendants were the corporate owners of the nursing home — the administrator was not a defendant. The District Court considered whether a fiduciary breach could be claimed against non-diverse defendants, the corporate owners of the nursing home.[108] The *Isby Brandon* court held that patients could prove a fiduciary duty at trial as a matter of Mississippi law against corporate owners, who could be joined in a diversity action.[109]

IV. Lawyers as Legal Engineers: Complicity and Compliance[110]

The *Enron* scandal in 2001 resulted in a wave of new regulations and legislation designed to increase the accuracy of financial reporting for publicly traded companies. The *Sarbanes-Oxley Act* of 2002 imposed on accounting firms harsh penalties for destroying, altering, or fabricating financial records and also prohibited auditing *firms from doing any* concurrent *consulting business for the same clients*.[111] Lawyers however were unscathed.

Lawyers who do deals for private equity clients raise several issues. Should lawyers have any ethical obligations to raise concerns with a private equity client about the acquisition of a nursing home system or the playbook strategies for extracting profits? Should a lawyer refuse to work on a private equity client merger and acquisition project? Should the lawyer blow the whistle on corporate conduct that harms third parties both economically and physically? As McMorrow and Scheuer write: "…corporate lawyers cannot accurately claim that they are not morally responsible for their work on behalf of corporate clients — clients who have a legally impaired ability to engage in independent moral reasoning, and who function in a world of relatively minimal legal oversight."[112] A corporate transactional lawyer after all lacks the justifications of a criminal defense lawyer for suspending her moral judgment.

Accountability of lawyers for transactional work on behalf of clients that harms third parties is necessary. Lawyers excuse their blindness to client harms to third parties by a range of self-serving excuses.[113] Gordon summarizes the excuses: lawyers are profit maximizers and regulators are the enemy; lawyers are risk-managers; lawyers are limited-function actors, unaware of harms; lawyers are sacred advocates zealously representing clients.[114] Gordon, considering these excuses, notes that those defending these approaches to the law "…sometimes seem to suggest that business entities should have special privileges — more leeway than individual persons — to game and evade regulations they do not like, because, as engines of growth, job-creation, innovation, and shareholder wealth, they are heroic actors on the social scene, a breed of Nietzschean supermen, beyond good and evil."[115] Strong rhetoric!

Corporate lawyers have asserted that corporate managers have a duty to profit-maximize — a mandate for a socially efficient market — choosing to leave third party harms to redressed by private law or regulatory regimes. Elhauge has argued to the contrary that "… this canonical view is mistaken both descriptively and normatively. In fact, the law gives corporate managers considerable implicit and explicit discretion to sacrifice profits in the public interest."[116] Gordon notes: "… it follows that the manager who ignores or tries to nullify the valid objectives of law and regulation is not acting as a responsible or faithful agent of his principal, the good corporate citizen. If the corporation should be constructed and presumed to have the interests of a good, law-respecting, citizen, so should its lawyers (even more so)."[117]

Lawyers' roles as professionals, as Loughrey notes, are built on a justificatory framework that "requires them to zealously defend and advance their clients' interests (partisanship) and adopt a neutral non-judgmental approach to their clients' instructions (neutrality)."[118] She notes the excuses that this view creates: neutrality means that "…a lawyer should not be held accountable for their clients' actions, nor for the things they do on their clients' instructions (non-accountability).[119] External accountability is needed, in Loughrey's words, to "….de-bias individual lawyers' decision-making and offset the influence of self-interest, rationalisation, denial and avoidance behav-

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iour."[120] Economic incentives, confirmation bias, and group pressures lead to avoidance of negative information and excusing of unethical conduct.[119]

The transactional lawyer's client is often a company — like a private equity fund. Such companies are not moral persons and do not take into account a full range of moral considerations when determining what the company can do, instead focusing on investor or shareholder interests. "The principle of respect for persons does not therefore require respect for a company's autonomy: it is doubtful that it is even legitimate to describe companies as autonomous. Given this, a significant rationale for lawyers adhering to neutrality and suspending their moral judgment does not apply."[122]

Accountability for private equity deals is complicated by the playbook of private equity. A lawyer who is answerable only to the client may have little incentive to resist client demands to devise such products. Nor can regulators easily police obfuscation through financial constructions. If the financial products are intentionally "opaque", regulators will have a hard time seeing "through the fog of complexity."[123] McBarnet writes:

> The rule of law may be seen as a fundamental of democratic society, but that is not how it is approached in the practice of legal engineering. In the mindset of the legal engineer, law or regulation is not a legitimate and authoritative command to be taken at face value, respected and obeyed. It is simply a nuisance, an obstacle to be overcome, a material to be worked with and reshaped to one's advantage, a challenge in a regulatory cat and mouse game.[124]

Such designed opacity allows "the culture of circumvention"[125] to go unchallenged and impedes the ability of regulators to hold those responsible to account. It also obstructs debate over the legitimacy of such activity and the degree to which lawyers should be accountable for it.[126]

A. Primary Fiduciary Duties of Lawyers[127]

We need to take the next step, defining primary fiduciary duties of lawyers using the ABA Model Rules of Professional Conduct. Lawyers are not simply agents of clients — they are also licensed fiduciaries of the legal system and have obligations to third parties.[128] The ABA Model Rules of Professional Conduct were adopted in 1983. Model Rule 1.6, section (b) addresses what I consider to be a statement of a lawyers' minimum fiduciary responsibilities to third party. Rule 1.6 states in relevant part:

> (b) A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) 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.

This is a modest step forward, allowing (but failing to mandate) a lawyer to release of information to prevent death or serious bodily harm, to stop a client from committing a crime or fraud harming the financials of a third party, or to rectify such harms. It however does acknowledge that lawyers have independent fiduciary duties to third parties to avoid serious harms and they need to consider these duties. One reason that lawyers must take Rule 1.6 seriously is that is pathway to tort law duties of aiding and abetting.

B. Tort Law: Aiding and Abetting[129]

Accountability is needed for many private equity deals in the health care area. The sources for this accountability rest on several sources of corporate and legal duties. We have discussed one platform for corporate duties, resting on the applications of fiduciary doctrine to opportunistic behaviors that harm vulnerable parties. Some courts permit a cause of action for a lawyer's aiding and abetting her client's breach of fiduciary duty, and the lawyer's law firm can also be liable.[130] The Restatement (Second) of Torts section 874 and the Restatement (Third) of Law Governing Lawyers section 51 permit a cause of action for a lawyer's aiding and abetting her client's breach of fiduciary duty. Section 51, comment h states that "[a] Lawyer is usually so situated as to have special opportunity to observe whether the fiduciary is complying with those obligations."[131]

Tort law offers a second source of duties built on tort law rules based on the responsibility of persons to

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third parties. This duty is articulated by Section 876 of the Restatement (Second) of Torts, which provides:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

State courts are increasing sympathetic to this doctrine as articulated in the Restatement. The most recent example is the Pennsylvania Supreme Court, which adopted the aiding and abetting cause of action in *Marion v. Bryn Mawr Tr. Co.* in 2023.[132] The *Marion* court upheld the plaintiff's argument that a cause of action for aiding and abetting was necessary. The court held:

> Policy considerations also favor this path. The availability of this cause of action may help to deter secondary actors from contributing to fraudulent activities, which would curtail fraud overall. *Many frauds, especially complex commercial frauds, cannot be perpetrated without the active assistance of secondary actors such as accountants, lawyers, bankers, analysts, etc.* [Italics mine]. Recognition of this tort could also help ensure victims of fraud are made whole. It is not uncommon, again particularly in the context of complex commercial frauds, for the primary fraudster to be unable to fully compensate his victims. In these circumstances, aiding and abetting liability may be a way for fraud victims to gain a greater measure of redress than they would otherwise be able to achieve. Moreover, while helping to deter fraud and compensate victims, our formal adoption of this cause of action will not subject innocent actors to liability.[133]

The court's policy justifications are robust: real deterrence of bad actors who may otherwise escape accountability and improved compensation of victims. The court unfortunately required that the party sued have "actual knowledge of the fraud,"[134] a high burden of proof as to scienter compared to "constructive knowledge."

Political cultures change and attitudes toward lawyer responsibility are also changing.

Private equity financing can be "immoral" in the case of private equity financing of health care roll-ups to create new systems of nursing homes, behavioral health facilities, dental clinic networks, and other providers of health services. The lure of high salaries and the pressures of big firm values can corrupt lawyer's judgment, rationalizing harms to third parties as little more than "collateral damage" of an efficient market mechanism.

V. Reorienting Legal Education

Private equity financing can be "immoral" in the case of private equity financing of health care roll-ups to create new systems of nursing homes, behavioral health facilities, dental clinic networks, and other providers of health services. The lure of high salaries and the pressures of big firm values can corrupt lawyer's judgment, rationalizing harms to third parties as little more than "collateral damage" of an efficient market mechanism.

We now have to rethink our roles as teachers in a law school classroom. Charity Scott has written a wonderful article about what professors should say in the classroom.[135] She asks whether we as professors should be neutral, disclose our points of view on an issue, or even disclose personal or scholarly information relevant to the class. Charity sorts through the risks and benefits of personal revelations of a professor's point of view, leaving the professorial reader with the following conclusion: "The challenge of good teaching is thus very much like the challenge of developing good laws and implementing good ethics and policies in the health field: we are engaged in a continual effort of reflection to try get the right balance for most of us most of the time."[136]

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I am in general agreement with this conclusion — teaching is a constant struggle to be effective and find the right balance. However, I worry that we law professors may teach our law courses in ways that "… not only demythologize doctrine, they also reinforce a skepticism about its underlying moral foundations."[137] The growth of law and economics and its adoption as an admittedly useful teaching tool has further undercut a moral foundations approach by turning class discussions into a search for "efficiency" in legal products and financing. This is the problem of Big Law, Big Clients, and Big Deals.

A. Teaching What Lawyers Do and How They Justify It.

I will amend Charity's balancing act to include a broader set of weights to add to the scales of teaching. I suggest that a professor has a duty to disclose and discuss with students the ethical issues that many areas of transactional corporate law raise. Teaching students about lawyering means that in Deborah Rhode's words, we must "…force focus on the way that legal structures function, or fail to function, for the have-nots. Another is to equip and inspire students to contribute to the public good and to reflect more deeply on what that means in professional contexts."[138] Amen to that.[139]

As wealthy Private Equity firms couple with Big Law to absorb many American health care institutions, they also absorb a great many young lawyers. We as health law academics need to help students understand how to think about the social good, about concentrations of power, about the failures of markets in the face of wealthy private institutions and the role of aggressive financing schemes in corrupting and hollowing out our social institutions.

We can balance our teaching about the law and how it is practiced with a systematic and reflective approach to how the practice has evolved. We have to expand our own competences in many areas in order to do this knowledgeably. We need to install awareness in our students of profound imbalances of power in our political and regulatory systems. What is the role of a lawyer representing what I will term an "immoral" client — not a poor criminal defendant who needs a strong defender against the prosecutor and the state's resources — but powerful rich financial entities driven by enticing profit incentives to "pillage" and "plunder" under the pretext of achieving free market efficiencies? I think that young lawyers-to-be need to confront the complex moral choices of many Big Law firms' clients, and know how to look for harms that might result.

I urge law professors to face the limits of our codes of professional responsibility. In-house lawyers doing corporate work face more ethical complexity than we teach about in doctrinal classes. As Mark Sargent writes, "These worlds are governed by social and economic dynamics not reflected in the codes of professional responsibility, our detached theorizing, our encomia of justice, our insistence on the nobility of the profession, and our often hypocritical protestation that we are educating students to be 'good' lawyers leading a 'balanced' life."[140]

Kleinberger has argued that legal education can do better to systematically teach legal ethics within a moral responsibility framework. He writes: "The law school can begin to awaken the moral sensibilities of its students by expanding the domain of critical analysis to include the mores of the legal profession. To combat the amorality that grows from the doctrine that lawyers' work is inherently and presumptively moral, the law school should expose that doctrine to the rigorous, critical analysis that is the hallmark of law school education."[141]

The "hidden curriculum" is part of what critics described as the obliviousness of the legal academy, "an amorphous collection of implicit academic, social, and cultural messages, unwritten rules and unspoken expectations, and unofficial norms, behaviors and values of the dominant-culture context in which all teaching and learning is situated."[142] These often invisible values of legal education are what Cramton calls the "ordinary religion of law school classroom."[143] These values can include moral relativism or discouragement from discussing values at all.

They can also include the tendency of advocates to take goals of clients for granted, and related commitments such as adversariness, argumentativeness, and zeal.[144] Lawyers don't get a free pass from tests of ethical conduct because they see themselves as merely tools of advice and drafting — as Langevoort reminds us, they are just as much "the proximate cause of a tainted transaction" as the clients are.[145]

B. Students: Learning about Economics

I will take this one step further — beyond the teaching of legal ethics and professional responsibility, we need to inject a healthy dose of how the economy works, how businesses are financed and how health care in particular has been financed by private money, such as venture capital and private equity.[146] Tales of the *Enron* disaster, the banking crisis of 2008, and other financial disasters point to legal engineering as one of the prime mover of economic disasters, and every

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law student should learn about how law can engineer while regulators dither.[147]

My law school's health law concentration has a required Health Care Finance course, taught by adjuncts who do venture capital deals or specialize in private equity mergers and acquisitions and small entity rollups into larger systems. A regular lecture series with debates would improve law student awareness of the strengths and flaws of a health care system which is not only growing through consolidation but is expanding private equity ownership in rural hospitals, ambulatory nursing companies, and many other health care auxiliary functions.

Along with this comes a necessary discussion of theories of regulation, the history of the privatization of health care, and the nature of the practice of Big Law today. Only then can students really grasp the ethical dimensions of tradeoffs that have been made, and the effect and power of money in shaping the prevailing ideologies of privatization in health care generally. If graduates choose not to work for large firms, or decide to work toward change within Big Firms, they will be a positive force for change.

Conclusion

I have great admiration for the work of Charity Scott. It's no wonder that Charity devoted so much of her writing and speaking to finding ways to promote wellness in lawyers. Lawyers rationalize their work for clients who do bad things,[148] and the practice of law thus rationalized can at times sicken lawyers. And more importantly, as Roger Cramton notes. "…by constantly going to the edge of the law and taking a very permissive view of what the law permits, these lawyers gradually adopt a mindset that ignores and may eventually assist the client's managers in illegality that harms third persons and the client entity."[149]

We can do better as law professors and help our students do better as lawyers in the long run. My answer to Charity Scott's questions "Should professors say what they think" in class is yes. This must be balanced, rigorous, methodical, open to debate, laced with history, and full-throated treatment of how financing of enterprises works in our society. Our training of lawyers demands no less.

Note

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78. Kohn et al., *supra* note 34, at 149-150.
79. 42 C.F.R. § 483.85(b) (2022). It provides: "(a) Definitions. For purposes of this section, the following definitions apply: *Compliance and ethics program* means, with respect to a facility, a program of the operating organization that — (1) Has been reasonably designed, implemented, and enforced so that it is likely to be effective in preventing and detecting criminal, civil, and administrative violations under the Act and in promoting quality of care; and (2) Includes, at a minimum, the required components specified in paragraph (c) of this section. *High-level personnel* means individual(s) who have substantial control over the operating organization or who have a substantial role in the making of policy within the operating organization. *Operating organization* means the individual(s) or entity that operates a facility."
80. *See, e.g.*, *United States ex rel. Hunt v. Merck-Medco Managed Care, L.L.C.*, 336 F. Supp. 430, 440–41 (E.D. Pa. 2004) (arguing that the defendant satisfied the submitted false claims in "reckless disregard" under the FCA by having compliance programs that were "non-existent or insufficient").
81. See Kohn et al, *supra* note 34. at 149-150.
82. For an opinion supporting the recognition of a lawyer's full fiduciary duty to nonclients in certain instances, see *Leroy v. Allen*, 872 N.E. 2d 254, 286 (Ohio 2007) ("[A]n attorney retained by a fiduciary owes a similar duty to those with whom the client has a fiduciary relationship.").
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