Contracting Around Conflicts in a Family Representation: Louis Brandeis and the Warren Trust

Richard W. Painter
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RICHARD W. PAINTER†

I. THE BRANDEIS CONFIRMATION HEARINGS AND THE WARREN TRUST

Almost as much has been written about Louis Brandeis’s Boston law practice as about his jurisprudence on the Supreme Court. The phrase “lawyer for the situation” is discussed extensively in legal literature, but these words, which Brandeis purportedly used to describe his own style of lawyering, have yet to evolve into a clearly defined standard of professional conduct. Much has also been written about the bitterly fought confirmation hearings for President Wilson’s nomination of Brandeis to the Court.

† Professor of Law, University of Illinois College of Law. Warren Knowles Visiting Professor of Legal Ethics, University of Wisconsin (Spring 2001). B.A. 1984, Harvard University; J.D. 1987, Yale Law School.


2. This phrase was attributed to Brandeis at his confirmation hearings by Boston lawyer Sherman Whipple, a supporter of Brandeis who was trial counsel for Ned Warren in the Warren Trust matter described below. See Spillenger, 105 Yale L J at 1504 (cited in note 1) (describing misapprehension among many commentators that Brandeis testified at his own confirmation hearings, which he did not).

3. The closest parallel in contemporary ethics rules is Model Rule 2.2 (“Intermediary”). See ABA Model Rules of Professional Conduct, Rule 2.2.

4. Even before the Brandeis nomination to the Court, President Wilson got a taste of what lay ahead when Brandeis was proposed for membership in the Cosmos Club in Washington, D.C. Justice Hitz of the United States Court of Appeals for the District of Columbia wrote to President Wilson on January 30, 1915, that: “Several members of the Club have started an opposition to Mr. Brandeis which bids fair to be successful unless his friends come strongly to his support. The grounds of opposition to Mr. Brandeis are stated to be that he is a reformer for revenue only; that he is a Jew; and that he would be a disturbing element in any club of gentlemen.” On February 1, 1915, President Wilson wrote to the Cosmos Club’s
This Article does not generally describe Brandeis's style of practicing law. Neither does this Article address the overall merits of the accusations made against Brandeis, other than to reiterate the obvious points that Brandeis became a lightning rod for criticism because his political ideology was perceived to be outside the mainstream, that ethnic prejudices underlay some of the opposition to Brandeis's nomination, and that his accusers in some instances alleged conduct that they had not complained about publicly before his nomination to the Court. The Senate Judiciary Committee heard exhaustive testimony on legal ethics allegations against Brandeis and then confirmed his nomination in a vote almost strictly along party lines.

Instead of addressing all of the allegations raised in the hearings, this Article focuses on one specific transaction in which Brandeis's legal ethics were criticized—the matter of the Warren Trust. The Warren Trust involved a large paper manufacturing business owned by the family of Brandeis's law school classmate, co-author, and law partner, Samuel Dennis Warren, Jr. The Warren family's bitter dispute over this business, and other matters, ended tragically with a lawsuit and then, shortly afterwards, Sam Warren's suicide in 1910. Although these events had deep-seated causes within the Warren family itself, the tragedy was to be publicly blamed on the Warrens' lawyer, Louis Brandeis, in his 1916 confirmation hearings for the Supreme Court.

The Warren Trust is worth studying—and including in a legal ethics casebook—for several reasons. First, the discussion of this episode at the hearings shows that conflicts typically arising in representation of family businesses have changed relatively little in the past one hundred years, and that professional responsibility standards applied to these conflicts have changed relatively little as well. Almost all of the witnesses at the 1916 hearing were sensitive to conflicts that arise when a single lawyer represents an entire family, yet most of the witnesses were cognizant of the difficulty, and often practical impossibility, of insisting on separate representation for individual family members. Moorfield Storey (counsel for Sam's brother Fiske Warren in the 1910 Warren family law-

__admissions committee, saying that he held Brandeis in “highest esteem” and that “his admission to the Club would not only be an act of justice to him, but would add a member of very fine quality to its list.” Brandeis eventually was elected to the Club. See Alpheus Thomas Mason, Brandeis: A Free Man's Life 466-67 (1956). For discussion of anti-Semitism as it affected Brandeis's life and professional career, see A. Gal, Brandeis of Boston (1980); T. Karfunkel and T. Ryley, The Jewish Seat: Anti-Semitism and the Appointment of Jews to the Supreme Court (1978).


6. Id at 1152.

suit) testified that it was a "common practice" for a lawyer to represent an entire family in connection with a trust or business, despite potential conflicts of interest, and Storey's description of prevailing practice would be accurate today. Although a lawyer today might memorialize in writing family members' consent to common representation and their recognition of the risks involved, the dilemma and the way in which that dilemma is resolved in many cases—in favor of common representation—is basically the same.

The Warren Trust is also interesting because the testimony about the matter by Brandeis's opponents before the Senate Judiciary Committee shows how preconceived notions about a lawyer's character and the character of his clients interfere with objective evaluation of the lawyer's ethics. "Eyewitness" accounts were shaped by exaggeration of Brandeis's role in Sam Warren's management of the trust property after the Trust was set up in 1889, naive idealization of relations within the Warren family before the dispute over the Trust erupted, and prejudicial assumptions about Brandeis's character and approach to business transactions. Brandeis's supporters challenged his opponents' account of what happened, but without confronting the prejudicial assumptions that underlay his opponents' version of events.

Most important, nobody in the hearing room appears to have really understood the transaction that lay at the heart of the Warren Trust matter—a family decision about what to do with the family's business after the death of its founder, Sam Warren's father Samuel D. Warren, Sr. Only one of Samuel D. Warren, Sr.'s five children, Sam, had any sustained interest in operating this business, but all of his children expected it to provide them with an independent income. A problem which probably would be addressed today by setting up a close corporation, or perhaps a limited liability company ("LLC"), was left unresolved when Samuel D. Warren, Sr., died, with instructions in his will that a way be found for the family to operate the business or that it be sold. For the business to stay in the family, control and appropriate compensation had to be given to family members who wanted to operate the business and had the ability to do so, principally Sam and a cousin who had worked with Sam's father in the business for years, Mortimer Mason.

Far from helping Sam cheat his less industrious siblings, Brandeis may have devised an arrangement that saved the business from the auction block (although in retrospect the Warren family might have been happier had the business been sold). Brandeis did so by starting with the most prevalent organizational form of the day, the dynastic trust, and then contracting around its fiduciary rules so the business could be effectively managed by Sam and Mortimer Mason. It turned out that Brandeis may not have effectively contracted around

8. See Hearings before the Subcommittee of the Senate Committee on the Judiciary on the Nomination of Louis D. Brandeis to be an Associate Justice of the Supreme Court of the United States, 64th Cong, 1st Sess 279 (1916) ("Hearing").
fiduciary rules governing dynastic trusts, either because he erroneously thought immutable rules could be treated as default rules or (more likely) because he and Sam thought nobody in the family would sue. The terms of the contract devised by Brandeis, however, should have been apparent to all of the Warrens, and the duplicity that he was accused of at his confirmation hearings was not supported by the facts.

Unfortunately for the Warrens, deep-seated familial conflict could not be alleviated by wealth. Indeed money became a catalyst for exacerbating conflict. Decades after the Trust was formed, it was plagued by interpersonal conflict as well as by the same legal problems that today underlie disputes over close corporations—accusations of control person opportunism coupled with minority desire for an exit not provided for by the organizational form's legal rules. Unfortunately for Brandeis, when he was nominated to the Court in 1916, in the eyes of many it was not the Warrens themselves but Brandeis who was to blame. Brandeis was not present at his confirmation hearings to explain what really happened and the principal protagonist in this episode, Sam, had killed himself six years earlier.

**THE WARREN FAMILY**

Samuel Dennis Warren, Sr., was a first generation capitalist of New England ancestry who dedicated his life to building his family business (a large paper manufacturing facility in Maine with a sales branch, known as S.D. Warren & Co., in Boston). Warren was also determined to achieve for his family a leading role in Boston society. His wife Susan Clarke Warren, a minister's daughter, became a prominent socialite and voracious collector of art and antiques, and his four male children (Sam, Henry, Ned and Fiske) all attended Harvard College. His daughter Cornelia was encouraged to become an ambitious collector of art and a civic leader in Boston.9

The Warren children had more than sufficient wealth to support themselves and to make substantial civic and cultural contributions to Boston. As they grew older, they each took advantage of financial freedom to go their separate ways. Sam, the oldest son, adhered most closely to his father's path. After graduating from Harvard College (were he was a member of the Porcellian Club) and Harvard Law School (where he graduated second in his class behind Louis Brandeis), he practiced law with Brandeis for over a decade until his father's death in 1888. Sam then took over control of the family paper business that he administered through a trust designed in large part by Brandeis (described more

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completely below). Sam also became a leader in Boston society, marrying the daughter of a prominent senator from Delaware and eventually becoming a trustee of the Museum of Fine Arts ("MFA"), where he led the construction of the MFA’s current building on Huntington Avenue.10

The other sons, however, did not follow the examples of their father and older brother. Henry, hunchbacked and severely disabled since childhood, never married and spent much of his relatively short life (he died at age forty-six in 1899) pursuing the study of Sanskrit and the Buddhist religion at a house he built for himself on Quincy Street near Harvard Yard (now known as Warren House and for many years the home of the Harvard English Department). Henry had very little interest in business affairs.11

Fiske had a passing interest in the family business, enough so that he became a minor partner in the firm that was to operate the paper mills after his father’s death. His true passion, however, was leftist politics, and in particular the anti-imperialist cause that swept Boston when President McKinley, and then President Theodore Roosevelt, embarked on foreign adventures to catch up with the imperial ambitions of the European powers.12 As Fiske traveled to the Philippines and elsewhere around the world, he frequently appeared on the front page of Boston newspapers accused of treason against his country and was increasingly a source of embarrassment for the Warrens.13 Fiske also used his share of the family wealth to start experimental communities in various suburbs of Boston, all of which were based on socialist principles and which at times embraced other causes, including nudism. As Fiske turned toward these pursuits, and away from the family business, his share in the firm that operated the paper mills was steadily reduced by the controlling partner, his brother Sam.14

Ned Warren’s passion was the art and culture of ancient Greece. Ned had much to resent about Boston, whose still-Puritanical moral code condemned his homosexuality. Ned’s sexual preferences were integrated with his love of classical culture, which he believed promoted a “masculinity” superior to the philistine culture of bourgeois Boston. Ned’s passions for art and romance led him, upon graduating from Harvard, first to Oxford (which he found culturally and intellectually superior to a “vulgar” Harvard), then to Paris and Italy where he began his lifelong pursuit of collecting antiquities, and finally to buy an estate in southern England (Lewes House) where his acquisitions could be displayed and where he and select gentlemen friends could live and pursue their study of classical Greece. Ned’s art acquisitions gradually increased in number and expense.

10. See id at 62 (describing Sam’s life as an undergraduate at Harvard); id at 100-07 (describing the successful law practice of Warren and Brandeis in the 1880s and Sam Warren’s marriage to Mabel Bayard in 1883).
11. See id at 67-68, 77-81.
12. See id at 153-58.
13. See id at 155-57.
14. See id at 6.
and he enlisted the help of art experts, most notably Bernard Berenson, to assist him in amassing a collection of impressive dimensions.15

As Ned got older, he embarked on a crusade to bring the values of classical Greece, including the classical view of masculinity, back to his native Boston. His vehicle for accomplishing this was art—the many statues and other antiques that he would buy in Europe and then either donate or sell back to the MFA. Although Ned was responsible for much of the MFA’s current antiquities collection, his ambitions for even greater glory were frustrated by two other powerful figures in Boston’s art world, both of whom had the “home court” advantage of being present there most of the year: Isabella Stewart Gardner who was building her own collection at Fenway Court and Ned’s older brother Sam who looked with disdain on Ned’s lifestyle and on Ned’s “waste” of money on antiques. Sam, as a trustee of the MFA, also was raising money for the museum’s new building and worried that further expenditure on the museum’s collection would detract from this effort. Sam thus controlled not only the family finances, in effect doling out an “allowance” to Ned from the profits of the paper mills, but was controlling what Ned could do in the Boston art world as well. Ned, who had dedicated his life to art, resented this interference bitterly, and one consequence was that Ned began to question Sam’s conduct in his own sphere of influence, the family business.16

Cornelia inherited her mother’s interest in collecting art and antiques, but also had an active interest in the promotion of settlement houses and other social work. She was also a strong supporter of women’s education at Wellesley College and elsewhere around Boston.17 Although she never married, Cornelia was an active participant in family life. She was probably her mother’s closest confidant and later was an intermediary in disputes between Ned and Sam, and sometimes between Fiske and Sam. Her practicality and concern for the needs of the less fortunate, however, made it difficult for her to identify with Ned’s romantic ambitions or to sympathize with his steadily increasing expenditure of money both on antiques and on “stipends” for young male protégés enlisted to help him in the study of antiquity.18

15. See id at 72-76 (describing Ned’s undergraduate years at Harvard); id at 85-89 (describing Ned’s romantic pursuits and involvement with the aesthetic movement at Oxford); id at 112-23 (describing the daily routine of Ned and his young protégés at Lewes House in Sussex, England).

16. See id at 132-36 (describing competition between Ned and Mrs. Gardner in acquiring art and Sam’s involvement with the MFA as a trustee); id at 161-62 (describing Ned’s resentment of Sam’s interference with his collecting and of Sam’s control over the Mills Trust).

17. See id at 107-11 (describing Cornelia’s early involvement with Wellesley College and with the founding of settlement houses in Boston’s South End); id at 136-43, 189-91 (describing Cornelia’s continued work with, and financial support for, the settlement house movement in Boston).

18. See id at 190-91 (distinguishing Cornelia’s reformist outlook from the aesthetic movement embraced by Ned). Cornelia, unlike Sam, however, remained on friendly terms with Ned until Ned filed his lawsuit against Sam. See id at 211 (discussing Cornelia cutting Ned out of her will because of her anger at Ned over his lawsuit against Sam).
LOUIS BRANDEIS

Brandeis was a newcomer to Boston. Born in Louisville, Kentucky, to parents who emigrated from Prague, he did not receive a formal college education. Largely self-taught, he enrolled in Sam Warren’s class at Harvard Law School at age eighteen and graduated first in his class. Through his law partnership with Warren, he successfully integrated himself into Boston’s legal and social establishment and was listed in the 1891 edition of the Boston Social Register. Although of Jewish descent, Brandeis did not embrace Judaism until 1905 nor the Zionist cause until 1912.

With an increase of anti-Semitism in the early 1900s, Brandeis’s shift to the left politically and his move to Washington to take on high profile cases, Brandeis later found much of the Boston bar aligned against him in 1916. In the 1880s and early 1890s, however, he focused primarily on representing private clients in Boston. When Samuel D. Warren, Sr., died in 1888, Brandeis was called upon to assist his law partner Sam in designing a structure for keeping the Warrens’ business within the family.

THE TRUST

Samuel D. Warren, Sr., ran S.D. Warren & Co. in two parts: the paper mills and real estate in Maine (collectively, the “Mills Property”), which he had bought in the 1850s with partners whom he eventually bought out, and a firm (S.D. Warren & Co.) that operated the Mills Property as well as a paper selling office in Boston. Samuel D. Warren, Sr., was the principal partner in S.D. Warren & Co., with various other Boston businessmen going in and out of the partnership. His cousin Mortimer Mason was the principal operating officer of, and a partner in, S.D. Warren & Co. (but had no title in the Mills Property). Samuel D. Warren, Sr.’s son Sam and Brandeis, practicing law as Warren and Brandeis, provided legal services to S.D. Warren & Co.
When Samuel D. Warren, Sr., died in 1888, he left the family houses in Boston to his wife, various sums of money to his brothers and sisters, and one third of the remainder of his estate to Mrs. Warren and two thirds to be divided up among his five children. The bulk of his estate was the Mills Property, which at the time his will was written in 1882 he did not know what to do with because none of his children seemed to be interested in working for S.D. Warren & Co. Sam, the only one who might be interested, was enjoying a successful law practice with Brandeis. The will provided that the business was to be run by the executors appointed by the will for eighteen months, after which they would consult the family and decide what to do with it (the will suggested that they might want to sell it). The executors, who would have the final authority to decide what to do with the Mills Property on behalf of the beneficiaries, were Sam, Mortimer Mason, and Mrs. Warren.26

By the time of Samuel D. Warren, Sr.'s death, he had persuaded Sam to gradually phase out his law practice and work for S.D. Warren & Co. instead, and even Fiske was working for the business in a junior capacity.27 The decision was thus made in 1889 that the Mills Property would stay in the family and be operated by Sam, Fiske, and Mortimer Mason. It is not known what was said to each family member when they were consulted about this decision, but all did consent. Mrs. Warren and all five children signed documents (probably drafted by Brandeis) conveying their interest in the Mills Property over to a dynastic trust (the "Trust") for a period of thirty-three years. The trustees were to be the executors Mr. Warren had appointed in his will: Sam, Mortimer Mason, and Mrs. Warren. It was also understood at the time the Mills Property was conveyed to the Trust that the Trust would in turn lease the Mills Property to a firm also to be called S.D. Warren & Co. (the "Firm"), that the Firm would operate the manufacturing facility and share the profits therefrom with the Trust, and that the principals of the Firm would be Sam, Fiske, and Mortimer Mason.28 Brandeis was to act as counsel in the transaction for both the Trust and the Firm. For reasons explained below, Brandeis was also a conduit through which the lease was accomplished; the Mills Property was leased first to Brandeis and then by him to the Firm.29

The lease from the Trust through Brandeis to the Firm (the "Lease") was

26. Green, Mount Vernon Street Warrens at 81-83 (cited in note 9) (describing Mr. Warren's death and the provisions of his will). See also Hearings at 277-79 (cited in note 8) (testimony of Moorfield Storey discussing the same).

27. Green, Mount Vernon Street Warrens at 83 (cited in note 9).

28. Id at 83-85 (describing establishment of the Mills Trust). See also Hearings at 138-51 (cited in note 8) (testimony of Hollis Bailey); id at 277-79 (testimony of Moorfield Storey).

29. See Hearings at 140 (cited in note 8) (testimony of Hollis Bailey) ("the three trustees—Samuel D. Warren, Mr. Mason, and Mrs. Warren, Sr.—made a lease of the property to Mr. Brandeis, as a conduit, and through him or from him, to Mr. Warren individually, to Mr. Mason individually, and to Mr. Fiske Warren a small fractional interest.")
drafted by Sam or Brandleis and provided that the Firm would pay rent equal to 6 percent of the book value of the Mills Property (valued at approximately $2 million at the time) plus one half of the profits of the Firm (the business had earned $460,000, or a return of nearly 25 percent, in 1888, but future earnings were of course uncertain). The Firm could back out of the Lease at any time, but the Trust had to give several years notice prior to terminating the Lease. In essence, this meant that if the Mills were operating less profitably than expected, the Firm could approach the trustees to renegotiate the rent. If the business were unexpectedly profitable, on the other hand, the Firm would be guaranteed enjoyment of its share of the profits for several years before the trustees could ask to renegotiate. The partners of the Firm were also authorized to make improvements at the Mills of an amount up to one third of the net income of the Firm, an amount that was to be charged to the Trust (repairs were charged to the Firm).

Monies paid over to the Trust were to be distributed in the same proportion as Samuel D. Warren, Sr., had disposed of his property in his will: five fifteenth to Mrs. Warren and two fifteenths to each of his five children.

The arrangement thus perpetuated the two-tiered structure used by Sam Warren, Sr.—his sole ownership of the Mills Property (which had now been conveyed to the Trust) and the operation of the Mills Property by the Firm (which now consisted of Sam, Mortimer Mason, and Fiske). Sam's authority

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31. Green, Mount Vernon Street Warrens at 83 (cited in note 9). See also Hearings at 140 (cited in note 8) (testimony of Hollis Bailey stating that the Lease specified a rent “of 6 percent interest on the real estate leased to the firm, and half of the net profits of the firm, and it also provided that the lessees should make repairs and replacements, and the lessors, the trustees, should make additions.”); id at 283 (testimony of Sherman Whipple, trial counsel for Ned in his 1910 lawsuit and supporter of Brandleis's nomination, stating that the Lease “provided that the lessees might, upon giving a very short notice—comparatively short notice—terminate the lease, and thus the responsibility which they had assumed and the lease would be brought to an end, while, as I remember, the lessors were bound for quite a long term of years, which had the effect of permitting the lessees on short notice, if things were going against them, to terminate the lease and turn the property back so that its further operation or disposition would be upon the trust; that is, the trustees.”).
32. Green, Mount Vernon Street Warrens at 83 (cited in note 9). See also Hearings at 138-51 (cited in note 8) (testimony of Hollis Bailey describing the Trust arrangement).
33. The similarity of the Trust to Samuel D. Warren's prior arrangement was discussed by Moorfield Storey at Brandleis's confirmation hearings:

SENATOR FLETCHER. There is no criticism to make of the execution of the leases by these trustees, in which some of the trustees were lessees?
MR. STOREY. That seemed to be inevitable. The partner in the firm had been the owner of the property. On his death the property descended, under the will, to his heirs. They became the owners. It was important that the relation between the property and the selling agency should continue. It was inevitable that the arrangement should be made. From the very nature of the case, it was impossible for them [not] to be on both sides of the contract. The only question was whether the contract was fair, and was carried out. The contract was submitted to all parties and they agreed to it.

SENATOR FLETCHER. I understand the deed of trust contained a provision which authorized the trustees to lease and sell.
over the Mills Property could be checked only by the two other trustees, his mother and Mortimer Mason, neither of whom were likely to challenge his decisions. Indeed Mrs. Warren may have been appointed a trustee only after one of the beneficiaries, Henry, asked that there be a trustee not connected with the Firm. The Trust's beneficiaries also knew that two of the three trustees, Sam and Mortimer Mason, would be operating the business and controlling the Firm, with Fiske being their junior partner (Fiske's minor share in the Firm was steadily diminished in subsequent years as Fiske took less and less interest in the business). Although the other family members might not have understood all of the legal details, the fundamentals of this arrangement, in particular the assumption of control over the family business by Sam and Mortimer Mason,

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MR. STOREY. The purpose was to reestablish the same relations that existed between Mr. Warren, while he was alive, and his firm, as between his heirs and the new firm. . . . And of course Mr. Warren, in his life, was on both sides of that contract, and all that could be done was to make a fair contract. The contract was drawn and submitted to all parties. As I say, I saw nothing in it to criticize. 

Hearings at 279 (cited in note 8).

34. "On May 4, 1889, four weeks before the papers were executed, there was a written letter which Sam Warren wrote to Henry, as follows:

Boston, May 4, 1889

My Dear Henry:

I enclose you a copy of the original draft of the trust agreement and of an amended draft thereof. The latter is the result of my cogitations since I talked with you and, I believe, is an improvement on the old in one or two particulars.

First. It meets your point regarding a trustee not connected with the business.

Second. It provides for a reserve of income independent of improvements at the mills. Since you preferred not to have a general power of reinvestment for a specified fraction of the income, I think it necessary for the protection of the trust property, to have at least the power to reserve as a guaranty against future needs. The trustees, in other words, ought [sic] not to be called upon to pay out every cent of income at the end of each year, not expended for improvements, no matter what the needs or prospects of the coming or future year might be. This reserve would also make it possible to supply any deficiency of income below the normal expenditures of the beneficiaries in a bad year, making it up in a good.

Third. In order to meet a possible legal objection to an absolute period of 23 years for the duration of the trust, I have inserted the first limitation that it shall not endure beyond the life of the survivors of the residuary legatees. The death of such survivor will not, I trust, take place within 23 years.

The above, I believe, are the principal changes, although I have altered it in some other details. The total result is the product of some thought, and I desire to have it copied and put in final form as soon as may be. Please show to mother and Pussy.

Your affec.

Sam.

Henry C. Warren, Esq.

"... 'Pussy' meant Miss Cornelia Warren." Id at 858 (Testimony of Edward McClennen). The duration of the Trust was in fact thirty-three years. Either Sam erred in this letter in referring to "an absolute period of 23 years," or the letter was not properly typed into the hearing transcript.

35. Fiske was originally to receive 16 2/3 percent of the Firm's profits, Sam 33 1/3 percent, and Mortimer Mason 50 percent. In 1896, this distribution was changed to Fiske 10 percent and Sam 40 percent, and then changed again in 1902 to Fiske 5 percent and Sam 45 percent, and finally in 1902 to Fiske 2 1/2 percent and Sam 47 1/2 percent. Green, Mount Vernon Street Warrens at 5-6 (cited in note 9).
should have been apparent to everyone.

Deciding on this approach instead of selling the Mills Property was to have serious, and ultimately tragic, consequences for the Warren family. First, the arrangement separated ownership of the business from control, giving the owners of the business (the beneficiaries of the Trust) almost no say over how it was run or how much of the profits paid to the Trust would be distributed to them in cash as opposed to being reinvested in the Mills Property as capital improvements. Ned, and sometimes Fiske, resented their older brother Sam's control over their financial lives. The principals of the Firm also were compensated for their services by receiving half of the Firm's profits in excess of 6 percent of the principal (the book value of the Mills Property), meaning that if the business did well they could make an enormous amount of money. Furthermore, the Firm's principals controlled its accounts and, by manipulating various factors such as the amounts spent on capital improvements (chargeable to the Trust) as opposed to repairs (chargeable to the Firm), could increase the Firm's profits. Finally, and probably most important, there was no exit option for the Trust beneficiaries. They had committed themselves to this arrangement for thirty-three years.

II. THE CLOSE CORPORATION ANALOGY

The Warren Trust coupled with the Lease accomplished much the same thing as what today would probably be accomplished by using a closely held corporation, or perhaps an LLC. In some respects the arrangement was similar to a close corporation, but in other ways it was quite different.

No Exit. As is true for shareholders in a closely held corporation, the beneficiaries of the Warren Trust had no exit from the arrangement and thus no access to their capital, unless the majority of the trustees wanted to give it to them by distributing assets from the Trust. In a close corporation, a judicially provided exit—dissolution—is generally only available upon a showing of oppression. Similarly, the Trust beneficiaries could only exit without the trustees' consent if the beneficiaries went to court and alleged breach of trust by the trustees. A lawsuit was thus the only way to force either dissolution of the Trust or a settlement that would allow the beneficiaries access to their capital. (When Ned did sue in 1910, he settled for a cash buyout of his interest in the Trust.)

Governance. If a close corporation is an oligarchy (of the majority shareholders), a dynastic trust is an autocracy (the trustees have near absolute power). Whereas close corporation default rules provide any coalition of majority shareholders authority to control the entity, a trust divorces ownership from control

36. See generally In re Kemp & Beal, 64 NY 2d 63, 473 NE2d 1173 (1984) (discussing the evolution of the legal doctrine of oppression in a close corporation and the various tests used to determine if there has been majority oppression of minority shareholders sufficient to warrant dissolution).
and gives the beneficiaries no governance role. This is usually, however, exactly what a trust settlor intends. In some situations, the descendants of a business founder are incapable or uninterested in exercising even general oversight functions, requiring that most of them be excluded from control. Allowing every descendant a governance role would expose the business to the whim of a single generation of heirs who could sell out too cheaply or maximize short-term cash flow at the expense of long-run goals (even a small shareholder in a close corporation can accomplish such objectives by forming alliances with other shareholders). The legal rules of a dynastic trust address this problem by giving absolute power to the trustee, whereas the close corporation can only divorce control from majority ownership if tailor-made rules are included in the articles of incorporation, for example, by distinguishing between voting and nonvoting stock.

_Nixon v Blackwell_, a recent Delaware close corporation case, illustrates how close corporation default rules can be contracted around to create a governance arrangement remarkably similar to the Warren Trust. In _Nixon_, a close corporation with two classes of stock was used to deal with the active/passive investor dichotomy in a family closely held business; voting class A stock was given to the managers, most of whom were from outside the family, and nonvoting class B stock was given to family members who were passive investors. The family patriarch set up this arrangement to give the managers control over the company and an incentive to run it efficiently, while at the same time providing income to his heirs. As in the case of the Warren Trust, the family members who were passive investors complained when the managers used their control to enrich themselves, in this case by giving themselves liquidity through share repurchase agreements.

_Fiduciary Duty Norms and Conflicts of Interest._ In _Nixon_, the complaining family members lost in court, which underscores the vastly different fiduciary duty norms that govern a close corporation on the one hand and a dynastic trust on the other. While the _Nixon_ court purported to apply a fairness analysis to the managers’ share repurchase agreements, the court really only inquired into whether the share repurchases had a legitimate business purpose, and found that they did. The court observed that the family patriarch had chosen to take control away from his heirs for a reason and had also chosen to organize the business as a corporation, an organizational form in which courts have historically deferred to directors’ decisions. As in many jurisdictions, there was substantial deference in _Nixon_ to the corporation's control persons under the so-called “business judgment rule.” This in part reflects a recent trend toward increased

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37. 626 A2d 1366 (Del 1993).
38. See id at 1371-73.
39. Id at 1379.
40. The law governing fiduciary duties in close corporations in Massachusetts is stricter than the standards articulated in _Nixon_. See _Donahue v Redd Electrotype_, 328 NE2d 505 (Mass 1975). As pointed out
tolerance of interested director transactions (particularly insofar as many modern courts even bypass scrutinizing a transaction for fairness to the corporation if the transaction is approved of by disinterested directors or shareholders). Even in Brandeis's time, however, courts in Massachusetts and other states recognized that directors sometimes transact with their corporations out of necessity (often by advancing loans to a corporation in financial difficulties), and that it would be counterproductive to invalidate a transaction that was open and fair to the corporation.

There were similar transactions with control persons in the Warren Trust. Just as some directors work for a close corporation on a day-to-day basis and are compensated for doing so, two of the three trustees of the Warren Trust (Sam and Mortimer Mason) were principals in the Firm, meaning there was substantial overlap between the Trust's governing body and the persons paid to manage the Trust's property. The problem, of course, was that the Warren Trust was not a corporation.

Prohibitions on conflicts of interest in a trust are a lot more onerous. First, trustees are prohibited from self-dealing in the trust property. While the Warren Trust perhaps technically avoided this prohibition by leasing the Mills Property first to Brandeis as a conduit and then by him to the Firm, the Lease was below, even in Massachusetts, fiduciary standards under corporate law are not as strict as under the law of trusts (see text accompanying notes 43-49).

41. See Del Gen Corp Law § 144.
42. See Saltmarsh v Spaulding, 147 Mass 224, 230 (1888) (upholding sale of a corporation's mortgaged property to one of its directors to pay off a loan to the corporation: "A director of a corporation is not prohibited from lending it money when they are needed for its benefit, and when the transaction is open, and otherwise free from blame; nor is his subsequent purchase of its property at a fair public sale by a trustee under a deed of trust, executed to secure a payment of the debt, invalid."). See also Holt v Bennett, 146 Mass 437, 439 (1888) ("There was no reason why this corporation should not conduct its business in the ordinary manner, even if incidentally debts for borrowed money were paid to its directors, this being done fairly and in its prosecution of the object for which it was formed.").
43. Consider Hayes v Hall, 188 Mass 510, 511, 74 NE 935, 936 (1905) (holding that sale of trust property to a trustee is only permitted under court decree after notice to the trust beneficiaries and a hearing). Brandeis's law partner Edward F. McClennen was certainly aware at the time of Ned Warren's suit that it would be very difficult substantively to defend an arrangement in which a third party conduit was used to avoid this principle of trust law. The Hayes ruling was based upon a report that McClennen had himself submitted as a court-appointed special master, and in which he had found breach of trust by a trustee who arranged for a third party to bid at a public sale for trust property that was then conveyed to the trustee's wife. See id at 510-11.
44. The arrangement probably was intended to comply with statutory prohibitions on self-dealing by trustees by at least technically avoiding a transaction directly between the Trust and the Firm. Massachusetts statutes required a trustee to disgorge to the trust any profit derived by him from his use of trust property or occupancy of the real estate owned by the trust. See Public Statutes of Massachusetts ch 144, § 4 (1886) (enacted November 19, 1881, to take effect February 1, 1882) ("Every executor, administrator, guardian, and trustee shall be chargeable in his account with all the personal estate of the deceased which comes to his hands and which is by law to be administered, although not included in the inventory; also with all proceeds of real estate sold or mortgaged, and with all interest, profit, and income that come to his hands from the personal estate of the deceased."); id at § 5 ("If the real estate has been used or occupied by an executor or administrator, he shall account for the income thereof as ordered by the probate court with
clearly vulnerable to legal challenge by one of the Trust beneficiaries.\textsuperscript{45} Second, the law of trusts requires forfeiture at the option of trust beneficiaries of all gains earned by trustees from the trust property.\textsuperscript{46} "The trustee who deals with trust property for the trustee's own account is liable to disgorge the profits to the trust even if the trustee paid fair value for the property."\textsuperscript{47} It does not matter whether the trust was harmed, or even benefited, from the trustee's actions.\textsuperscript{48} Any profit derived by Sam and Mortimer Mason from their operation of the Mills Property could thus be forfeited to the Trust. Although Brandeis had opined that the Lease was legal under the Massachusetts law of trusts, alleged self-dealing by Sam or the other trustees in carrying out the terms of the Lease (or enforcing those terms on behalf of the Trust) would be subject to close judicial scrutiny if any of the beneficiaries were to sue. There would be no "business judgment rule"—or even a "fairness test"—standing between Sam and his siblings if any of them were to cry foul and Sam could not prove that all of the beneficiaries had assented after full disclosure to everything he had done.\textsuperscript{49}
The Warren family thus sought the no-exit and governance features provided by the rules of a dynastic trust, but sought to contract around strict fiduciary rules on trustees' conflicts of interest for something closer to the rules that would in most jurisdictions govern close corporations. The Warrens in essence wanted to treat fiduciary duty rules as default rules even though the law of trusts saw them as immutable. In order for the trustees to be one step removed from the lessee, the property was leased by the Trust to Brandeis as a conduit and then in turn to the Firm. The bargain was in form an arm's length transaction, and technically it probably complied with the law. In reality—a reality of which all of the Warren family members were aware—it was anything but an arm's length transaction and was vulnerable to subsequent challenge by any of the Trust beneficiaries.

The Warrens could theoretically have chosen an organizational form with fiduciary duty rules more closely resembling the arrangement that they wanted, perhaps by putting the Mills Property in a close corporation or similar entity. Because close corporation governance rules, however, link majority ownership with control, the Warrens would have had to contract around these rules, for example, by giving voting stock to the managers and nonvoting stock to the passive investors. There were other problems with the corporate form as well. It was still relatively new, particularly in Massachusetts, and capitalization requirements were stringent. Furthermore, the Mills Property was in Maine and the selling operations in Boston, and at the time there was considerable uncertainty about whether a corporation in one state could own real estate in another state without risk that the property would escheat to the state. There was also considerable uncertainty over the powers of corporations to contract and the consequences of exceeding those powers. Furthermore, a corporation would have

50. Consider Public Statutes of Massachusetts chs 105-06 (1886) (setting forth legal requirements for Massachusetts corporations). One of the more stringent requirements was that shares in a corporation be paid for either in cash or with property the value of which had been attested to and approved by the Commissioner of Corporations. Id at ch 106, § 48. For the purpose of carrying on a manufacturing business, the statute provided that the corporation had to have capital of not less than five thousand nor more than one million dollars. Id at ch 106, § 7. Arguably, the value of the property in the Mills Trust exceeded the allowed amount.

51. See generally Arthur M. Alger, *Consequences of Illegal or Ultra Vires Acquisition of Real Estate by a Corporation*, 8 Harv L Rev 15, 16 (1894-95) (describing and criticizing "the view expressed, either directly or inferentially, in the authorities in question, that corporate realty unlawfully acquired may be seized by the State"); Arthur M. Alger, *The Doctrine of Public Policy as Applied to Ownership of Real Estate by Foreign Corporations*, 9 Harv L Rev 91 (1895-96) (discussing state statutes that prohibit a foreign corporation from taking or holding land within its borders and the prospect of judge-made law imposing a similar prohibition).

52. See generally George Wharton Pepper, *The Unauthorized or Prohibited Exercise of Corporate Power*, 9 Harv L Rev 255 (1895-96) (describing the ultra vires doctrine and its impact on the enforcement of con-
had the disadvantage of being permanent, whereas the Trust would be dissolved in thirty-three years. For whatever reason, Brandeis and Sam chose to start with the form with which they and the family members were most familiar—the dynastic trust.

The dynastic trust was extraordinarily popular in Boston at the time. It was, however, generally used by families having older fortunes than the Warrens had. These families usually owned securities and other financial assets requiring the supervision of a money manager rather than a business manager. Professional trustees, at first individuals and then institutions, thus sprung up in the late nineteenth century to manage the wealth of Boston's mercantile aristocracy. The dynastic trust's separation of ownership from control was just what these families wanted to safeguard fortunes from the whims of a single generation, and the dynastic trust's fiduciary rules were little trouble because there were few occasions for a trustee legitimately to engage in self-dealing transactions with a portfolio of financial assets. When used to hold business assets that needed day-to-day management by a business manager, on the other hand, the dynastic trust was an awkward vehicle. The trustee would have to hire a manager willing to work under the supervision of the trustee. The conflict of interest prohibition in the law of trusts was particularly troublesome if the trustee and the manager were one and the same. On the other hand, it could be awkward to separate control of the business from its management, in effect, to ask a salaried manager to work under the supervision of a trustee and have no say in the most important decisions affecting the business. Furthermore, the fiduciary norms of the dynastic trust made it difficult to incentivize the manager (particularly if he was also a trustee) by giving him a share of the business's profits.

The weak link in the Warren Trust arrangement was thus fiduciary duty rules that could only be contracted around in form, not substance. Over one hundred years after the Warren Trust was established, Professor John Langbein argued in 1995 that fiduciary norms in trusts should be treated as default rules, and pointed to specific cases in which “[c]onflicts of interest are sometimes embedded in the very relationship that induces the settlor to ask the particular individual to serve as trustee.” “Using the hypothetical bargain analysis of contract, the question is whether, had the settlor anticipated the opportunity to make the trust better off by allowing the fiduciaries to become co-venturers in such a situation, he would have authorized the step.” As Professor Langbein pointed out, however, cases in which the settlor probably would have wanted to contract

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54. See id at 554.
56. Id at 666.
around fiduciary duty norms have still been decided against the trustee.\textsuperscript{57} Professor Langbein, in advocating an approach that would have upheld Brandeis's arrangement against fiduciary duty claims, is even now ahead of his time.

Still, \textit{ex ante}, the dynastic trust may have been the best available choice for the Warren family, given the dynastic trust's desirable governance norms (clear separation of the beneficiaries' ownership from the trustees' control) and restrictions on early exit. Sam Warren and Brandeis might not have worried about the dynastic trust's inflexible fiduciary duty rules, probably because they believed no family member would sue. Alternatively, they perhaps naively believed that a court would understand that the Warren family had contracted around these rules and would only hold Sam liable for unjust enrichment. Whatever the reason, the Warsens' choice of the dynastic trust, with its strict immutable fiduciary standards, as the starting point for their organizational structure was to provide Ned Warren with a loaded gun that years later he could aim at Sam.

\textbf{SUBSEQUENT DEVELOPMENTS}

What happened? In part the expected happened. When he was young, Ned's interest in preserving the value of the principal in the Trust corresponded with the interest of his siblings in doing the same, and indeed Ned urged early on that "the mills must be kept up at all cost."\textsuperscript{58} This meant reinvesting money into the business in order to increase its future earning potential. Ned, however, was unlikely to have heirs (he actually did adopt a son in the last decade of his life, but long after the dispute over the Warren Trust ended in 1910). As all five siblings grew older (and Henry died in 1899, leaving his interest to the others), Ned's interests started to diverge from the others and maximizing distributions became for Ned an increasingly important concern.\textsuperscript{59}

Also, Ned was the only one of the Warren siblings, besides Sam, who be-

\textsuperscript{57} Id at 665-67, citing \textit{In re Rothko}, 372 NE2d 291 (NY 1977) (two of three executors whom Mark Rothko selected to administer his estate held liable for conflict of interest in transaction selling Rothko paintings to the Marlborough Gallery, even though Rothko had sold his paintings through the Marlborough Gallery throughout his lifetime and had selected these two executors knowing that they had strong ties to the Gallery); \textit{Boardman v. Phipps}, [1967] 2 App Cas 46 (HL), aff'd \textit{Phipps v. Boardman}, [1965] Ch 992 (defendant trustee developed a plan to reorganize a close corporation in which trust held one quarter of the stock and when the trust declined to purchase additional shares purchased these shares himself; trustee held liable to disgorge to the trust his profit on personally acquired shares, even though the reorganization caused the value of the trust's shares to increase substantially).

\textsuperscript{58} \textit{Hearings at} 859 (cited in note 8) (testimony of Edward McClenen).

\textsuperscript{59} "Along in the latter part of the nineties the correspondence showed that Edward was getting into the purchase of these antiquities and using a large amount of money in that way, and there began to be—perhaps I ought not to say a large amount of money, because it is also comparative—but he was using money in that way and feeling cramped to some extent in consequence of that, but no criticisms, as I recall it, of the way the money was being expended in improving the plant. Of course, the improvement of the plant was recognized by them all as being an investment of their funds in increasing their capital." \textit{Id} (testimony of Edward McClenen).
believed his intellectual and professional pursuits to be a business. Ned believed that there was considerable money to be made in classical antiquities, and indeed Edward McClennen acknowledged at Brandeis's confirmation hearings in 1916 that in this regard Ned's judgment was superior to that of Sam, who believed Ned's purchases to be a waste of money. As Ned engaged more extensively in the antiquities business and his schemes became grander, he convinced himself that antiquities were really a better place to invest money than a paper mill run by his older brother. He wanted access to his share of the principal in the Trust as well as the income, and began to look for an exit from the Trust altogether. Exit for a beneficiary from a dynastic trust not being easy, he began to look into the only way out—suing for breach of trust by the trustees.

In part the unexpected happened. The 1890s were a very poor decade for the American economy as a whole, and not particularly successful years for S.D. Warren & Co. Declining profits for the Firm, coupled with Sam's decision to invest in capital improvements, reduced the income available to the beneficiaries. In 1897, Sam wrote to Ned and Cornelia, telling them that their income from the trust would drop by 25 percent from $33,000 to $26,000, and that things were unlikely to improve soon. According to Ned's attorneys, Sam also responded to the financial pressure by spending money on repairs (which were the responsibility of the Firm) and allocating it to capital improvements paid for by the Trust. Curiously, the Firm did not take advantage of the opportunity it had under the Lease to terminate and demand renegotiation of the rent. The Firm's end of the bargain thus was sufficiently attractive, even in hard economic times, for the Firm to continue. According to Ned's attorneys, the principals in the Firm made more than $2,000,000 over twenty years (an average of $100,000 per year) for running the business, twice as much as what, in Ned's view, they could fairly charge.

There may have been some opportunistic conduct on Sam's part (particularly if he improperly billed repairs to the Trust as improvements), but part of the problem was a difference in priorities. Indeed it is likely that Sam, Sr., the father of five children, would have preferred the reinvestment preferences of Sam over the distribution preferences of Ned, and Sam, acting with the consent

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60. Id at 872 (testimony of Edward McClennen).
61. Green, Mount Vernon Street Warrens at 197 (cited in note 9) (discussing Ned's desire to sell out his interest in the Trust to someone like J.P. Morgan).
62. See id at 146.
63. Id.
64. Hearings at 278-79 (cited in note 8) (testimony of Moorfield Storey); id at 861-62 (testimony of Edward McClennen).
65. Id at 139-40 (testimony of Hollis Bailey). Using the 1897 figures for the income to the Trust beneficiaries, cited in Green, Mount Vernon Street Warrens at 146 (cited in note 9), $195,000 was paid out to the trust beneficiaries on an annual basis ($26,000 being a two-fifteenths share of this total) compared with the $100,000 the principals of the Firm earned on average each year for managing the business. Most of the money earned by the Firm was split between Sam and Mortimer Mason.
of the other trustees, clearly had the power to make decisions about such things as tradeoffs between distribution and reinvestment. Nonetheless, Sam's near absolute power as a trustee came with immutable fiduciary duty rules imposing a very high standard on Sam and requiring judicial scrutiny of any transaction that hinted at self-dealing. Because the arrangement inherently involved self-dealing in substance, even if technicalities such as the lease of the Mills Property through Brandeis as a conduit had made it legal, this meant that, if Ned took Sam to court over the Firm's performance of the Lease terms, Sam was likely to lose.

Ned retained a Boston lawyer, William Youngman, in 1906 to conduct a review of the Trust's and the Firm's accounts. On December 19, 1909, Youngman and another Boston lawyer, Hollis Russell Bailey, brought a bill in equity on behalf of Ned against Sam as trustee and against the estate of Mortimer Mason, also as a trustee, alleging that they had from 1889 to 1909 disposed of the Trust property in breach of their fiduciary duties as trustees. Louis Brandeis was not named as a defendant and was not present in the courtroom (his law partner Edward McClennen defended the suit on behalf of Sam). In 1910, Sam Warren was examined at length before a master by Sherman Whipple, trial counsel for Ned, but Sam shot himself before the examination was completed. The case was settled shortly after Sam's death when the other family members bought out Ned's interest in the Trust for over one million dollars.66

III. CLIENT CONFLICTS IN LEGAL REPRESENTATIONS

COMMON REPRESENTATION—AN EVOLVING STANDARD?

Rules governing client conflicts changed over the course of the twentieth century and in particular became more detailed with each draft of the ABA's standards. The trend from broad standards to more precise rules is evident from comparing the 1908 ABA Canons with the 1969 Model Code, and again with the 1983 Model Rules. The "appearance of impropriety" standard used to define conflicts jurisprudence.67 This standard, however, is gone in the Model Rules and is only rarely mentioned by courts deciding conflicts cases.68 The

66. See Green, Mount Vernon Street Warrens at 10-12 (cited in note 9) (describing Sam's suicide); id at 212 (discussing the settlement buying out Ned's interest in the Trust for $1,770,000). See also Hearings at 277-79 (cited in note 8) (testimony of Moorfield Storey describing the settlement with Ned).

67. See Model Code, Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety"). The Model Rules contain no similar provision.

68. See, for example, General Motors v New York, 501 F2d 639 (2d Cir 1974) (Kaufman J) (applying the "appearance of impropriety" standard to disqualify a former government lawyer who substantially participated in the bringing of an antitrust suit by the Justice Department from representing a private plaintiff in a similar antitrust suit against the same defendant).

69. See Charles W. Wolfram, Former-Client Conflicts, 10 Geo J Leg Ethics 677, 686 (1997) (discussing
standard for defining a “conflicting interest” in Canon 6 was very ambiguous and the “differing interests” standard in the Model Code was not much clearer. An “adverse interest” under Model Rule 1.7 is not always easy to identify, but the rule identifies adversity as the determinative criteria for a conflict and in the comments gives some guidance as to what adversity means.

Still, the basic standards governing client conflicts have remained remarkably consistent over time. Although it could be argued that Brandeis was unfairly criticized at his confirmation hearings for practicing law according to the standards of his day, this view does not square with the sophisticated understanding of client conflicts displayed by both Brandeis’s critics and his supporters in the discussion of the Warren Trust matter. Indeed, the testimony by all of the witnesses reveals an understanding of basic conflicts rules that is remarkably similar to the understanding we have today. Brandeis’s representation of Samuel D. Warren, Sr.’s executors, and indirectly the entire Warren family, in setting up the Trust and his subsequent representation of the trustees, on the one hand, and his representation of Sam and the other principals of the Firm, on the other, did involve representing differing interests to some extent. Brandeis appeared, however, to have the consent of all of the Warrens to the common representation (at least none of them objected to the representation), meaning the representation probably complied with ethics rules then and now. Then, as now, there is deep ambivalence about common representations of this sort. As Moorfield Storey pointed out to the Senate Judiciary Committee, “I think it is a common practice, but, I think, a bad practice.”

This so-called “bad practice” continues today. Whenever a group of investors, related to each other or not, approaches a lawyer to set up a close corpora-

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70. Canon 6 (1908) (a “conflicting interest” exists “when, in behalf of one client, it is [the lawyer’s] duty to contend for that which duty to another client requires him to oppose.”). Canon 6 provided that “[i]t is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts.”

71. Model Code DR 5-105(A) (a lawyer “shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C)”). Model Code DR 5-105(C) (“a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.”).

72. See Model Rule 1.7, cmt [3] (“Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.”).

73. Hearings at 279 (cited in note 8) (testimony of Moorfield Storey).
tion or similar entity and the lawyer undertakes the representation, potential conflicts emerge as soon as the investors allocate voting control, share repurchase options, and other rights within the entity. The lawyer sometimes technically avoids the conflict by undertaking to represent the entity itself rather than the individuals, but there is no avoiding the fact that articles of organization drafted by the lawyer can favor one of the individual investors over another. Sometimes, the investors obtain separate counsel, but often they do not. Advantages of the common representation include lower legal fees, lower “attitudinal negotiation costs” for the transaction, and more attention being given to strategies that increase total value rather than to how value will be distributed in unlikely contingencies. Less emphasis on legal protection for individual investors also may encourage the parties to devise non-legal mechanisms for assuring good faith performance by their counterparts. For one or more of these or other reasons, the advantages of common representation often outweigh the disadvantages; in other words, investors, particularly those from within the same family, still view this “bad practice” as preferable to each hiring his or her own lawyer.

Even after a dispute arises within an entity set up by a lawyer for a group of individuals, there are circumstances where the lawyer may continue to represent some of the parties against the others. Clearly, the lawyer cannot do so if the lawyer previously represented all of the clients individually. If, however, the lawyer undertook to represent the entity itself—whether a corporation, LLC, or similar entity, including a trust—the lawyer may continue to take instructions from its directors, trustees, or other persons having legal control over it. As a practical matter, the lawyer representing the entity may represent the control persons against the minority who are challenging their authority.

**BRANDEIS’S PROFESSIONAL CONDUCT IN THE WARREN TRUST MATTER**

The first issue raised by Hollis Bailey in his testimony against Brandeis before the Senate Judiciary Committee was whether Brandeis should have represented both the Trust and the Firm at the same time. This was the “bad practice” acknowledged by Moorfield Storey also to be a “common practice.” The propriety of the common representation in this instance depended on two issues: whether the two clients, the Trust and the Firm, gave informed consent to the arrangement and whether Brandeis could have adequately represented them both under the circumstances. Informed consent on the part of the Trust arguably meant informed consent from each of its beneficiaries. The better argument, however, is that what was required was the informed consent of the

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74. See id at 138-59 (testimony of Hollis Bailey).
75. Id at 279 (testimony of Moorfield Storey).
76. This standard is set forth today in Model Rule 1.7(a).
Trust's trustees, who were also the executors under Samuel D. Warren, Sr.'s will. Because two of these trustees—Sam and Mortimer Mason—were on the other side of the transaction as principals of the Firm, the person whose consent was most important was the third trustee, Sam's mother Mrs. Warren, who was also the beneficiary of five fifteenths of the property in the Trust. Unfortunately, very little is known about what Mrs. Warren knew about the Lease. Mrs. Warren, however, was an intelligent and strong-willed person and probably would not have allowed a financial arrangement to which she had not consented. What she knew about Brandeis's legal work for the family is less clear, but there is no evidence that she ever objected to Brandeis's representation of the Trust and the Firm at the same time.

Furthermore, Brandeis probably adequately represented both the Firm and the Trust. Brandeis's principal role was to handle the legal technicalities of the arrangement (particularly structuring the Lease so it would be valid under the law of trusts and so the beneficiaries would be protected from the liability of partners). Most of the substantive issues in the Lease were business issues that should have been understandable to the beneficiaries when they conveyed their interests in the Mills Property to the Trust knowing that the Lease would soon follow. Mrs. Warren, the only nonconflicted Trustee, must have understood the essential feature of the deal—that Sam, Mortimer Mason, and to a lesser extent Fiske would be compensated through the Firm for managing the business. The other beneficiaries appear to have understood this as well. Although there were business terms in the Lease the significance of which the beneficiaries may not all have understood (particularly concerning allocation of responsibility for repairs and improvements to the Mills Property), the overriding legal

77. See Green, Mount Vernon Street Warrens at 59-60 (cited in note 9).

78. Brandeis also furnished a legal opinion to the effect that the Lease accomplished the Warrens' desired objectives. See Hearings at 141 (cited in note 8) (testimony of Hollis Bailey stating that Brandeis "wrote an opinion, which was sent to the different beneficiaries, saying that the plan was one that was legally correct and proper, that by means of the trust the beneficiaries would be protected from individual liability as partners, and that it was a proper arrangement.").

79. There was some dispute about how much the various beneficiaries knew about the Lease at the time it was entered into. Ned in particular was bound to know less than the others because he was living in Europe at the time. According to Hollis Bailey, Ned did not see the Lease itself but did know that the trustees were empowered to run the business themselves or to lease the Mills Property. See id (testimony of Hollis Bailey that "[m]y client, Mr. Edward Warren, was not shown a copy of the lease, or the lease itself. He did sign a deed conveying the property to the trustees, but he did not see a copy of the deed of trust which provided that the trustees should either carry on the paper business or make a lease on suitable terms to someone else. He learned of the lease and what had taken place some time after 1903, when he employed independent counsel, Mr. Youngman"). But see id at 278 (testimony of Moorfield Storey stating that the arrangement "was submitted to [Ned Warren] and agreed to by him, and I saw nothing in the arrangement as to which he could complain."); id at 858 (testimony of Edward McClennen referring to a November 9, 1889, letter from Sam to Ned "in which reference is made to the fact that the rate of rent is 6 percent and the interest in the profits.").

80. See note 34 above (quoting correspondence between Sam and Henry at the time the Trust was established).
issue was the very high fiduciary duties that would be imposed on any self-dealing by the trustees.

Hollis Bailey and William Youngman claimed at the 1916 confirmation hearing that Brandeis used the Lease to help Sam cheat his siblings, but Sam was the person exposed to the highest legal risk from the transaction the way it was structured. It is also unlikely that Sam's alleged opportunistic conduct would have been prevented by separate representation of the Trust at the outset as opposed to more careful monitoring by the beneficiaries of the trustees' compliance with their fiduciary duties during the lifetime of the Trust. It was the Warrens' deference to Sam and then Ned's sudden interest in the Trust's affairs beginning around 1906 that contributed most to the dispute that ensued.

This does not mean that Ned would not have been better off having independent counsel to advise him. On exit and governance issues, Ned probably had different preferences than the other beneficiaries and should have been encouraged to avoid a Trust under which his inheritance would be controlled for thirty-three years by an older brother with whom he had a very troublesome relationship. Still, however, Ned must have understood that he had no exit or governance rights in the Trust, and, perhaps because he was preoccupied with living in England at the time, he did not object. With respect to distributions from the Trust, Ned's interests were mostly aligned with the interests of the other beneficiaries not associated with the Firm: Henry, Cornelia, and Mrs. Warren. Separate counsel for each of them would have been superfluous, although perhaps they should have jointly hired a separate lawyer or financial advisor,

81. *Hearings* at 473 (cited in note 8) (testimony of Hollis Bailey and William Youngman, counsel to Ned in his 1910 lawsuit and opponent of Brandeis's nomination; the latter stating that Sam had to be persuaded by Brandeis to put this plan into effect: "Mr. Brandeis had convinced [Sam] that the plan, or the scheme, as he called it, was a proper one."). Despite Bailey and Youngman's willingness to vilify Brandeis in the Warren Trust matter at his confirmation hearings, claims against Brandeis were not included in Ned's 1910 lawsuit, and Bailey admitted in his 1916 testimony that the facts underlying his accusation against Brandeis had not been testified to before. Id at 138 (testimony of Hollis Bailey).

82. Probably the most significant contribution that separate counsel for the Trust might have made would have been designing a mechanism for monitoring the Firm's performance under the terms of the Lease other than reliance on the supervisory powers of the trustees. For example, it could have been agreed at the outset that an independent financial advisor would determine what expenditures were repairs as opposed to improvements. Substantial delegation of supervisory powers to third parties, however, would have departed from the governance rules for a dynastic trust, which vest almost complete discretionary authority in trustees.

83. See *Hearings* at 278 (cited in note 8) (testimony of Moorfield Storey: "It probably, in view of what happened afterwards, would have been better if Mr. Edward Warren had independent advisers to counsel him.").

84. Even Fiske's interests, given his relatively small interest in the Firm, did not deviate substantially from those of the others. See id at 278 (testimony of Moorfield Storey: "They were all of age, and Fiske Warren, up to that time, had not been very active as a business man, any more than Edward Warren, but he was on the ground and was in a position to employ counsel. Mr. Edward Warren was on the other side of the water. At the time, as I say, there was nothing in the relations between the different members of the family to suggest that there was any divergence of interests, or any reason why they should not act harmoniously, as they did.").
particularly if they favored a more liberal distribution policy than a majority of the trustees were willing to allow. Ned, if he favored an even more liberal distribution policy than his mother or siblings, perhaps should have hired an advisor of his own. Brandeis, however, undertook to represent the Trust and its trustees, not Ned or any of the beneficiaries individually, making separate counsel for each of the beneficiaries, or lack thereof, peripheral to Brandeis's role in the matter.

A second conflicts issue was raised when Brandeis's law partner, Edward McClennen, represented Sam in the 1910 trial of Ned's suit while Brandeis was in Washington, D.C., attending to the Congressional investigation of corruption charges against Interior Secretary Ballinger. The issue was whether Brandeis should have allowed McClennen to represent Sam after Brandeis had represented the Trust in the same matter. In essence, the charge was that Brandeis was conflicted out of defending Sam against Ned's lawsuit because he had represented the Trust—and thus indirectly Ned—in the same matter and by imputed disqualification McClennen was disqualified as well. Nobody apparently sought to disqualify McClennen at trial in 1910 (perhaps explaining why neither Bailey nor Youngman chose to focus on this allegation in their testimony at the hearings), but this did not stop several senators from engaging McClennen in a lengthy discussion of successive conflicts rules.

McClennen's response to this allegation was that Brandeis had set up the Trust and had represented the Trust and its trustees, not Ned Warren or any of the other beneficiaries individually, and that he was therefore right to defend the trustees when the conduct of the Trust was challenged. In essence,

85. Brandeis apparently did draft a will for Ned, but this was an unrelated matter. See id at 141 (testimony of Hollis Bailey discussing Brandeis's having drawn wills for both Mrs. Warren and Ned).

86. "Ballinger, [President] Taft's Secretary of the Interior, had fired a subordinate, Richard Glavis, for impugning his integrity before the President by reporting suspicions about Ballinger's dealings with the Guggenheim mining interests. Glavis had previously been in touch with the administration's chief forester, Gifford Pinchot, the leading progressive spokesman on conservation issues, and by this time an ardent opponent of Ballinger's policies. The two went to Collier's Weekly, which in turn published their story of frustration. Collier's Weekly, Nov. 13, 1909, at 15-17, 27. The administration called for a Congressional investigation to vindicate Ballinger, and also threatened to sue Collier's for libel. Brandeis, among other leading lawyers, was called in by Collier's, to represent Glavis. The Republicans on the committee sought to whitewash the matter and frustrated the lawyer at most turns. But Brandeis, smelling blood, sought the wounds. Soon, by his questioning and 'detective-work,' he discovered that Taft had exonerated Ballinger without being aware of all the facts and then, along with his attorney general, Wickersham, had antedated certain documents to conceal his neglect." L.S. Zacharias, Repaving the Brandeis Way: The Decline of Developmental Property, 82 Nw U L Rev 596, 610 n 61 (1988). The Ballinger affair was to be one of many reasons for the strong political opposition to Brandeis's nomination to the Supreme Court.

87. Today, this issue would be governed by Model Rule 1.9 (former client conflicts) and Model Rule 1.10 (imputed disqualification).

88. *Hearings* at 874 (cited in note 8).

89. Id at 874 (testimony of Edward McClennen: "Well, I never had thought of that problem before. Of course, the only way in which in these matters Mr. Brandeis had ever represented Ned Warren at all was derivatively; that is, he had been counsel for these trustees and counsel for S.D. Warren & Co.").

90. SENATOR WORKS. Did it ever occur to your mind that there might be any reason why
McClennen and Brandeis were in a position no different from a lawyer today who sets up a close corporation and then represents the corporation and its directors when the conduct of the directors is challenged by a minority shareholder.

Another criticism of Brandeis, implicit in the testimony if not explicitly stated, centered around his effort to contract around immutable rules governing dynastic trusts by elevating form over substance. Brandeis, acting as a conduit, took a lease on the Mills Property from the Trust and then leased it to the Firm in order to get around the prohibition on trustees’ self-dealing that would otherwise have voided the Lease transaction. Although this device might have appeared devious, Brandeis was doing what good business lawyers do—he chose an organizational structure that accomplished some of the Warren family’s objectives (preventing easy exit and reserving control of the business for Sam and Mortimer Mason) and then devised a solution to a problem that this organizational structure handled poorly (the need to compensate and incentivize Sam, who was giving up the practice of law, Mortimer Mason, and to a lesser extent Fiske for running the business). Without this arrangement, the Warren family probably would have had to sell the Mills Property.

Whether or not the objective of keeping the business in the family was a wise one, Brandeis properly left this for the Warrens to decide.91 Furthermore, all of the Warrens, particularly Sam, probably knew that they had not contracted out of substantive fiduciary law for trusts; if the trustees’ conduct was ever challenged, strict fiduciary standards would be used to evaluate any self-interested conduct involved. Thus, Brandeis did not contract around, and probably did not even try to contract around, liability for breach of the high fiduciary standards in the law of trusts. If anybody was left with fewer legal rights in the arrangement than he might have expected, it was Sam, not Ned or the other beneficiaries.

The arrangement’s attractiveness to Sam rested upon the assumption that nobody in the Warren family would sue the trustees and that the immutable fiduciary duty rules for trusts thus would never be litigated.92 This assumption was probably a good one in 1889, as the Warrens had much to lose in family

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91. See Model Rule 1.2 (providing that a lawyer shall abide by a client’s decisions concerning overall objectives of a representation).

92. See Hearings at 279 (cited in note 8) (testimony of Moorfield Storey: “Of course, wherever the same person is interested on both sides to a contract, complications may arise, but where, as in that case, the parties were brothers and sister and mother, etc., there was no disposition, I am sure, on the part of anyone to take advantage of anybody else.”).
reputation and otherwise by taking each other to court and much to gain by working out their differences privately. Of course, things did not work out that way, as relations between Ned and Sam steadily worsened and Ned, as reluctant as he was to sue, finally did sue in 1910. Condemning the 1889 arrangement and Brandeis as its architect because things did not work out as expected, however, would be blatant hindsight bias.

**CONCLUSION**

The Warren Trust is an example of how hindsight bias and ethnic bias affected the Brandeis confirmation hearings. The Trust and Lease arrangement designed by Brandeis for the Warrens was presumed to be flawed because, otherwise, a family of such stature in Boston's Protestant merchant community would never have embroiled itself in the litigation that followed.

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93. A 1910 letter from Ned to Sam confirmed that Ned, as much as he disliked his brother, was very reluctant to file the bill in equity. See id at 860 (testimony of Edward McClennen: "This is a letter which was received by Mr. Sam Warren on December 14, 1909, and reads as follows: 'My Dear Sam: I have had to file the bill because otherwise it would have been difficult to obtain a satisfactory before Monday next, but—First. I hope that you will make me contented to withdraw it; and Second. The phrases are such as in a legal document I have felt obliged to sign, but are very far from representing my feelings toward you aside from the business of my desire for unanimous fraternal procedure. Let us try to agree; it would be much pleasanter. Your affectionate brother, E.P. Warren, Bellevue Hotel, Boston, December 13, 1909.'").

94. Professor Jeffrey Rachlinski and others point out that decision makers are likely to overstate the predictability of past events. See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U Chi L Rev 571, 571 (1998). See also Kim A. Kamin and Jeffrey J. Rachlinski, *ExPost ≠ Ex Ante, Determining Liability in Hindsight*, 19 Law & Hum Behavior 89 (1995). This so-called "hindsight bias" can affect how legal rules are applied by decision makers who assess whether an actor's conduct met a standard such as reasonableness. Rachlinski concludes that adjustments to the litigation system for hindsight bias are generally not necessary. Rachlinski, 65 U Chi L Rev at 624-25. However, with respect to judging other people's ethics, whether in an attorney disciplinary proceeding or in a setting such as a confirmation hearing, there may be more cause to worry.

95. Ethnic bias in the Brandeis confirmation hearings was an obvious if not openly talked about issue. So much has been written on how anti-Semitism affected Brandeis's life that there is little to add here, except to observe that it is easier to generate publicity for an accusation against a person that fits stereotypes of his or her ethnic group than of conduct that does not. Sharp practices on behalf of moneyed clients have for a long time plagued the bar, yet allegations of such conduct only this one time in the twentieth century became the centerpiece of a case against a Supreme Court nominee. (The Warren Trust episode was relitigated before the Senate Judiciary Committee against the wishes of the Warren family after it was leaked to a Boston newspaper hostile to Brandeis, probably by the Warren family's own lawyers.) More recently, unwelcome sexual advances, long a problem at the bench and bar (and in the United States Senate for that matter), were first raised as an issue in the confirmation hearing of the second African American nominated to the Court, Justice Clarence Thomas. The fact that these two Justices (both also highly controversial in their political views) were accused of conduct so easily fitting into stereotypes may be a coincidence. If not, something more troublesome is going on that requires reexamination of the ethics of the confirmation process itself.

96. Even George W. Anderson, counsel appointed by the Judiciary Committee to present evidence in favor of Brandeis, solicited testimony as to the high standing of the Warrens. See *Hearings* at 284 (cited in note 8):

MR. ANDERSON. Mr. Samuel D. Warren and his father both belonged to the class of men eminent in business and well-known for their personal integrity?
There was one glaring omission from the entire discussion of the Warren Trust matter at the hearings—a frank acknowledgment of how deeply troubled the Warren family really was. William Youngman was ridiculed by several senators for going too far and claiming that Sam Warren was somehow duped ("chloroformed") into cheating his siblings by a devious Brandeis.\(^7\) Nonetheless, nobody, not even Brandeis's staunch defenders, brought up the deep divisions within the Warren family that caused this tragedy to happen or even mentioned to the Committee that Sam had killed himself. Nobody questioned the Warrens' capacity to operate their business or to be civic leaders of Boston and of the nation.\(^8\) Attacking Brandeis's character was fair game, but there was not even a cursory look at how conflicting ambitions in the Warren family led to its destruction. Ned's inability to get the respect he believed Sam owed him and the reasons for their conflict (particularly its sexual overtones) were not discussed.

Brandeis may have used imperfect judgment—at least in hindsight—in his design of the Trust and in his representation of the Warrens (arguably he selected an inappropriate organizational form in the dynastic trust and should have taken more care to explain the potential conflicts to the trustees before they consented to his concurrent representation of the Firm). Still, the facts show that the Warren family itself, not the legal forms drafted by Brandeis, was responsible for the tragedy that ensued. Sometimes it is indeed the client, and not the lawyer, who is to blame.

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MR. WHIPPLE. That is true.
MR. ANDERSON. Men against whose character and reputation no breath had ever arisen?
MR. WHIPPLE. I can not say as to that, because I was not familiar enough with social or business life prior to this time to make a statement; but I have always understood that the elder Warren was an honorable merchant of very high standing, and certainly Mr. Samuel Warren stood very well in the community—stood very high in the community.

97. Id at 501-02 (testimony of William Youngman).
98. Sam Warren, Sr., had testified before the Senate Labor Committee in 1883 about his successful labor relations. Green, *Mount Vernon Street Warrens* at 34 (cited in note 9).