Attorney Liability under RICO § 1962(c) after *Reves v Ernst & Young*

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Professional service providers such as accountants and attorneys are not immune from liability under the Racketeer Influenced and Corrupt Organizations Act ("RICO").¹ Courts have interpreted and applied RICO's broad prohibitions liberally, leaving professionals susceptible to criminal prosecutions and civil actions for treble damages.² Section 1962(c) of RICO poses the greatest threat to professionals, making it unlawful for "any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity" ³ This language presents an obvious question: What degree of "conduct" or "participation" will support a verdict against a professional? In *Reves v Ernst & Young*, a suit against auditors, the Supreme Court provided a partial answer, requiring that professionals "participate in the operation or management of the enterprise."⁴

The *Reves* "operation or management" test is a restrictive interpretation of § 1962(c) and will make it difficult (though not impossible⁵) for plaintiffs to collect damages from auditors, who are generally not involved in the operation or management of their clients' businesses. Less certain, however, is the effect *Reves* will have on the liability of other professionals under § 1962(c). The *Reves* Court adopted a test applicable to all professionals, but its holding depended strongly on the precise nature of the auditor's services. Thus, to the extent that a particular professional's services, as compared to an auditor's, are more

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¹ Pub L No 91-452, 84 Stat 922, 941 (1970), codified as amended at 18 USC §§ 1961-1968 (1988 & Supp 1992).

² See 18 USC § 1963 (criminal penalties); 18 USC § 1964(d) (civil damages).

³ 18 USC § 1962(c).

⁴ 113 S Ct 1163, 1173 (1993).

⁵ The *Reves* Court specifically noted that its holding did not close the door on professionals' § 1962(c) liability. *Id.*

intimately connected with management, *Reves* will provide less protection.

Purportedly using *Reves* as a guide, nearly all lower courts that have since considered attorney liability under § 1962(c) have exonerated the defendants, finding that where an attorney provides nothing more than "legal services," she cannot be said to have participated in the operation or management of an enterprise. The "legal services" standard, however, misinterprets *Reves* by mechanically applying the inapposite model of auditor services and disregarding the unique qualities of the attorney-client relationship. This approach permits too many attorneys to escape liability where, under a proper reading of *Reves*, they should not be so lucky. This Comment explores the advantages and disadvantages of the current standard and suggests an approach more faithful to the *Reves* analysis, the goals underlying RICO, and business and economic realities. Part I briefly examines the setting in which the Supreme Court decided *Reves*. Part II describes and assesses the lower courts' application of *Reves* to attorney liability under § 1962(c). Finally, Part III rejects the current legal services approach in favor of a more nuanced standard which more accurately reflects both the spirit and the letter of *Reves*.

I. APPLICABILITY OF § 1962(C) TO PROFESSIONALS BEFORE *REVES*

A. Section 1962(c) in Context

To assess the current standard for determining whether an attorney has operated or managed an enterprise, it is first useful to explore the goals of RICO. If a standard applying the *Reves* test can be developed that better comports with RICO's goals, it should be preferred over the current approach. This subsection examines RICO's structure and goals and fits § 1962(c) within the statutory scheme.

Congressional debates reveal a uniform, broad goal behind RICO's enactment: the eradication of organized crime.⁶ Congress enacted RICO to assist prosecutors in dismantling organized criminal enterprises from top to bottom,⁷ including eliminating

⁶ See 84 Stat at 923 (Congress passed the Act "to seek the eradication of organized crime . . . [by] providing enhanced sanctions and new remedies.").

⁷ See 116 Cong Rec 18939 (June 9, 1970) (remarks of Senator McClellan). See generally David B. Smith and Terrance G. Reed, *Civil RICO* § 1.01 (Matthew Bender, 1993).

the "infiltration of organized crime and racketeering into legitimate organizations."⁸

Courts have often justified expanding RICO's reach on the basis of its broad language⁹ and Congress's sweeping intentions as evidenced by RICO's liberal construction clause.¹⁰ Yet RICO has limits, as the Supreme Court emphasized in *Reves*¹¹ and as other courts had previously recognized.¹² Nevertheless, Congress clearly intended that courts interpret RICO liberally in order to realize the statute's purpose: the eradication of organized crime.¹³

To further its goal of eradicating organized crime, RICO establishes both a civil remedy¹⁴ and criminal penalties.¹⁵ Civil-RICO plaintiffs must demonstrate injury to business or property¹⁶ stemming from at least one of four types of violations.¹⁷ All

⁸ Organized Crime Control Act of 1969, S Rep No 91-617, 91st Cong, 1st Sess 76 (1969). While most of the legislative history leading to RICO focuses on the need to eradicate the infiltration of legitimate businesses by organized criminal organizations, RICO's scope includes the infiltration of illegitimate businesses as well. See *United States v Turkette*, 452 US 576, 590-91 (1981).

⁹ See, for example, *H.J. Inc. v Northwestern Bell Telephone Co.*, 492 US 229 (1989). Although Congress's stated and proximate purpose in enacting RICO was combatting organized crime, id at 245, Congress consciously adopted "commodious language capable of extending beyond organized crime." Id at 246.

¹⁰ RICO's liberal construction clause provides that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes." 84 Stat at 947.

¹¹ 113 S Ct at 1172 (noting the clause "is not an invitation to apply RICO to new purposes that Congress never intended," but rather an aid for resolving ambiguity), citing *Sedima, S.P.R.L. v Imrex Co.*, 473 US 479, 492 n 10 (1985).

¹² See, for example, *Grider v Texas Oil & Gas Corp.*, 868 F2d 1147, 1150 (10th Cir 1989) ("[T]he general principle that RICO is to be accorded a liberal interpretation cannot justify expanding [the statute] beyond the limits of [its] own language."); *Ouaknine v MacFarlane*, 897 F2d 75, 83 (2d Cir 1990) (stating undue application of the liberal construction clause would "permit abrogation of the explicit words of the statute").

¹³ See text accompanying notes 6-8. There is a natural tension between the statutory language of "a carefully crafted piece of legislation," *Ianelli v United States*, 420 US 770, 789 (1975), and the liberal construction clause. See also Gregory P. Joseph, *Civil RICO: A Definitive Guide* § 3 at 3-4 (ABA, 1992) (noting that a liberal construction may be necessary in cases not involving organized crime because "any stinting construction may also apply in organized crime prosecutions").

¹⁴ 18 USC § 1964.

¹⁵ 18 USC § 1963.

¹⁶ 18 USC § 1964(c).

¹⁷ Section 1962 contains three causes of action in addition to § 1962(c). Under § 1962(a), it is unlawful to invest income derived from a "pattern of racketeering activity" to acquire an interest in, or to establish or operate any enterprise engaged in or affecting interstate or foreign commerce. Section 1962(b) prohibits the acquisition of an interest in, or control of, any enterprise affecting interstate or foreign commerce through a pattern of racketeering activity. Finally, 1962(d) prohibits any person from conspiring to violate any of the provisions of subsections (a), (b), or (c). Parties may also be liable for aiding and abetting a violation of § 1962. See Joseph, *Civil RICO* § 17 at 108-10 (cited in note 13).

RICO causes of action require the plaintiff to allege the existence of an enterprise,¹⁸ racketeering activity,¹⁹ a pattern of racketeering activity,²⁰ and an effect on interstate or foreign commerce. In addition, a plaintiff must establish certain elements specific to the type of violation alleged. Section 1962(c) describes the type of violation most often attributed to accountants, attorneys, and other professionals:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.²¹

Thus, in addition to the elements common to all RICO causes of action, § 1962(c) requires that the defendant be employed by or associated with the enterprise, that the defendant and the enterprise be separate entities,²² and, most important for purposes of this Comment, that the defendant have participated in the conduct of the enterprise's affairs.

¹⁸ Defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 USC § 1961(4).

¹⁹ Defined by an exhaustive list of predicate acts for the purposes of a RICO violation, including mail, wire, and securities fraud; witness, victim, or informant tampering; and extortion. 18 USC § 1961(1).

²⁰ A "pattern of racketeering activity" requires at least two acts of racketeering activity . . . the last of which occurred within 10 years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 USC § 1961(5). See also *H.J., Inc.*, 492 US at 238 ("Section 1961(5) concerns only the minimum number of predicates necessary to establish a pattern; and it assumes that there is something to a RICO pattern beyond simply the number of predicate acts involved.") (emphasis omitted).

²¹ 18 USC § 1962(c).

²² See, for example, *McCullough v Suter*, 757 F2d 142, 144 (7th Cir 1985) (reasoning that the "person" who allegedly violates section 1962(c) must be distinct from the enterprise whose affairs that person is allegedly conducting because "you cannot associate with yourself"). But see *United States v Hartley*, 678 F2d 961, 986-990 (11th Cir 1982) (noting that a corporation can both be a named defendant and satisfy the enterprise requirement). See also Davis J. Howard, *Moving to Dismiss a Civil RICO Action*, 35 Cleve St L Rev 423, 436-40 (1987) (noting the majority rule that "person" must be distinct from "enterprise" for purposes of § 1962(c)); Douglas E. Abrams, *The Law of Civil RICO* § 4.7.1 at 223 n 4 (Little, Brown, 1991) (collecting cases).

B. Professionals' Liability in the Pre-Reves World

Most civil-RICO suits allege a violation of § 1962(c).²³ Suits against professionals usually include a § 1962(c) or § 1962(d) allegation, because it is much more likely that a professional has participated in the conduct of the enterprise's affairs,²⁴ or conspired to do so,²⁵ rather than invested in,²⁶ or acquired an interest in or control of,²⁷ their client's enterprise through a pattern of racketeering activity.

The *Reves* Court's recent interpretation of 1962(c)'s "conduct or participate" element will undoubtedly affect a plaintiff's ability to state a claim against a professional for damages caused by the professional's allegedly inappropriate behavior. To clarify *Reves*'s impact on attorneys' liability, this subsection briefly explores the continuum of tests developed by the circuit courts prior to *Reves*.

1. Suing professionals under § 1962(c) in the pre-*Reves* world.

While suits under other subsections of § 1962 were possible, pre-*Reves* lawsuits against professionals such as lawyers,²⁸ accountants,²⁹ investment bankers,³⁰ and others³¹ were typically

²³ See Abrams, *Civil RICO* § 4.7.1 at 222, citing Arthur F. Mathews, et al, *Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law* 57 (ABA, 1985) (estimating that 97 percent of civil-RICO claims alleged a § 1962(c) violation).

²⁴ See 18 USC § 1962(c). See also C. Stephen Howard, Payne L. Templeton, and Devan D. Beck, *RICO Claims Against Accountants After Reves v. Ernst & Young*, 467 PLI/Lit 291 (1993) (accountants are most often sued under § 1962(c) and the conspiracy subsection, 1962(d)); *Counsel or Conspirator?*, Cal Lawyer 33 (June 1993) (noting section 1962(c) is used most frequently to plead RICO claims against outside professionals).

²⁵ See 18 USC § 1962(d).

²⁶ See 18 USC § 1962(a).

²⁷ See 18 USC § 1962(b).

²⁸ See, for example, *Bennett v Berg*, 710 F2d 1361, 1364-65 (8th Cir 1983) (en banc) (holding sufficient attorney participation in conduct must be alleged to support a § 1962(c) claim); *Blake v Dierdorff*, 856 F2d 1365, 1372 (9th Cir 1988) (holding allegations sufficient to implicate attorneys); *Odesser v Continental Bank*, 676 F Supp 1305, 1312-13 (E D Pa 1987) (holding claims under §§ 1962(c) and 1962(d) sufficient).

²⁹ See, for example, *Bank of America v Touche Ross & Co.*, 782 F2d 966, 968-69 (11th Cir 1986) (involving § 1962(c) and § 1962(d) violations); *Goldman v McMahan, Brafman, Morgan & Co.*, 706 F Supp 256, 261-62 (S D NY 1989) (section 1962(c) claim against accountant inadequate).

³⁰ See, for example, *Rodriguez v Banco Central*, 727 F Supp 759, 772 (D Puerto Rico 1989) (declining to dismiss plaintiff's § 1962(c) claim).

³¹ See *Yellow Bus Lines, Inc. v Drivers, Chauffeurs & Helpers Local Union* 639, 913 F2d 948, 950 (DC Cir 1990) (en banc) (labor unions); *City of New York v Joseph L. Balkan, Inc.*, 656 F Supp 536, 541 (E D NY 1987) (contractors); *Gilbert v Prudential-Bache Securities, Inc.*, 643 F Supp 107, 108-09 (E D Pa 1986) (brokerage firm); *General Accident In-*

based on § 1962(c). Before *Reves*, a professional's liability depended in large part on the particular circuit's interpretation of the § 1962(c) "conduct or participate" element.

The Second Circuit, for example, adopted an expansive view of what constitutes such activity. That circuit maintained that a defendant conducted the activities of an enterprise when (1) the defendant was "enabled to commit the predicate offenses solely by virtue of [his or her] position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses [were] related to the activities of that enterprise."³² The defendant-professional thus faced liability for merely committing predicate acts somehow related to the enterprise or the defendant's position within it.

Particularly devastating to professionals was the Eleventh Circuit's "benefits" test, which concluded that "[t]he word 'conduct' in § 1962(c) simply means the performance of activities necessary or helpful to the operation of the enterprise."³³ Under this test, a defendant who aided the enterprise in any way through a pattern of racketeering activity was liable under RICO.

The Eighth and D.C. Circuits employed tests more favorable to professional defendants. Under the Eighth Circuit test, the defendant must have been involved in the operation or management of the enterprise to be liable under § 1962(c).³⁴ The D.C. Circuit adopted a stricter version of the Eighth Circuit's test, requiring the defendant to exercise "significant control over or within an enterprise."³⁵

surance Co. of America v Fidelity and Deposit Co. of Maryland, 598 F Supp 1223, 1241 (E D Pa 1984) (banks).

³² *United States v Scotto*, 641 F2d 47, 54 (2d Cir 1980) (holding that defendants had participated in the conduct of a union's affairs when they committed crimes they could only commit by virtue of their union positions). The Third and Ninth Circuits followed *Scotto*. See *United States v Provenzano*, 688 F2d 194, 200 (3d Cir 1982); *United States v Yarbrough*, 852 F2d 1522, 1544 (9th Cir 1988). The Fifth and Seventh Circuits followed a more restrictive version of *Scotto*, making the test conjunctive rather than disjunctive. See, for example, *Overnite Transportation Co. v Local No. 705*, 904 F2d 391, 393 (7th Cir 1990) ("(1) The defendant must have committed the racketeering acts; (2) the defendant's position in or relationship with the enterprise facilitated the commission of the acts; and, (3) the acts had some effect on the enterprise."); *United States v Cauble*, 706 F2d 1322, 1332-33 (5th Cir 1983) (same test).

³³ *Bank of America*, 782 F2d at 970. But see *United States v Webster*, 669 F2d 185, 186 (4th Cir 1982); *United States v Kovic*, 684 F2d 512, 516 (7th Cir 1982) (both rejecting the benefits test).

³⁴ *Bennett*, 710 F2d at 1364 (dicta) ("A defendant's participation must be in the conduct of the affairs of a RICO enterprise, which ordinarily will require some participation in the operation or management of the enterprise itself.").

³⁵ *Yellow Bus Lines*, 913 F2d at 954.

2. The *Reves* test.

In *Reves v Ernst & Young*, the Supreme Court adopted the Eighth Circuit's relatively permissive operation-or-management test.³⁶ In *Reves*, a Farmer's Cooperative ("the Co-op") sold demand notes that became virtually worthless after the Co-op declared bankruptcy.³⁷ Purchasers of the notes sued Arthur Young and Company,³⁸ the accounting firm hired to audit the Co-op's books, alleging that their fraudulent valuation of a gasohol plant made the Co-op appear solvent, thus inducing the plaintiffs to purchase the notes.³⁹ The issue before the Supreme Court in *Reves* was the Eighth Circuit's affirmance of summary judgment in favor of Arthur Young on petitioners' RICO claim.⁴⁰ The Eighth Circuit had applied the operation-or-management test first adopted in *Bennett v Berg*,⁴¹ finding that Arthur Young's conduct, however negligent or reckless, did not "rise to the level of participation in the management or operation of the Co-op."⁴²

The Court affirmed, finding the more restrictive operation-or-management test consistent with RICO's statutory language.⁴³ The Court held that § 1962(c)'s language requires a defendant to have participated in the direction of the enterprise, and be some-

³⁶ 113 S Ct at 1173.

³⁷ Id at 1168.

³⁸ The purchasers originally sued 40 individuals and entities; all but Arthur Young settled. Id. During the events giving rise to the litigation, Arthur Young and Company merged with Russell Brown and Company; the merged firm later became Ernst & Young. Id at 1167. This Comment follows the Court's convention of using Arthur Young's name throughout.

³⁹ See id at 1167-69. The controversy over the valuation concerned the date the Co-op acquired the plant. In 1980, the Co-op's general manager, Jack White, began borrowing from the Co-op to finance the construction of the plant by his own company, White Flame Fuels, Inc. By the end of 1980, White owed the Co-op approximately \$4 million. Several months later, the Co-op's board agreed to purchase White Flame.

The Co-op hired Arthur Young to perform its 1981 audit. One key requirement of the audit was the assessment of an accountant's valuation of the gasohol plant. The auditor used the accountant's \$4.5 million value, which assumed counter-factually that the Co-op had owned White Flame from the beginning of the plant's construction in 1979. Had the Co-op purchased the plant from White, the plant would have to have been valued at its fair market value, which was between \$444,000 and \$1.5 million. If the valuation were any lower than \$1.5 million, the Co-op would have been insolvent. Arthur Young presented its audit report without telling the Co-op's board of its conclusion that the Co-op always had owned the plant, or that but for this key assumption, the Co-op would be insolvent. Id at 1166-67.

⁴⁰ Id at 1169.

⁴¹ 710 F2d at 1364.

⁴² *Arthur Young & Co. v Reves*, 937 F2d 1310, 1324 (8th Cir 1991).

⁴³ *Reves*, 113 S Ct at 1170.

how involved in the decision-making process.⁴⁴ In adopting the Eighth Circuit's test, the Supreme Court rejected the various tests developed by other circuits. The Court implicitly rejected the Second Circuit's expansive test, noting that mere participation in an enterprise's affairs cannot be grounds for a § 1962(c) violation.⁴⁵ The Court also implicitly rejected the Eleventh Circuit's approach, noting that the word "conduct" requires more than minimal participation or assistance.⁴⁶ Thus, after *Reves*, it is not enough that a professional is enabled to commit predicate acts through her position in an enterprise, or that the professional assisted in the commission of such act. The Court explicitly rejected the most restrictive test, set forth by the D.C. Circuit. As the Court noted, a defendant need not exercise "*significant control* over or within an enterprise" to be liable.⁴⁷ The Court therefore adopted a restrictive, but not the most restrictive, reading of the language of § 1962(c).

The *Reves* Court's interpretation will have its greatest impact on the liability of "outsiders," including attorneys, who are associated with the enterprise but are not employees. The Court noted that its decision would not affect outsider liability under subsections 1962(a) and (b),⁴⁸ and that outsider liability under § 1962(c) requires an association with the enterprise and participation "in the conduct of *its* affairs—that is, participat[ion] in the operation or management of the enterprise itself"⁴⁹ The Court rejected the notion that its decision immunized outsiders from § 1962(c) liability, suggesting that an enterprise may be managed or operated by outsiders when they "exert control" over the enterprise.⁵⁰

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 1169 & n 3.

⁴⁷ *Id.* at 1170 n 4, quoting *Yellow Bus Lines*, 913 F2d at 954 (emphasis added in *Reves*).

⁴⁸ *Reves*, 113 S Ct at 1173. Section 1962(b) would require the outsider-professional to commit a pattern of racketeering activity and acquire an interest in an enterprise *through* a pattern of illegal activity. Thus, a professional who acquires a position in an enterprise and then commits a series of predicate acts is not liable under § 1962(b). Similarly, to be liable under § 1962(a), a professional would have to invest income derived from racketeering in the client enterprise—rare for a professional. See text accompanying notes 23-27. See also *ABA Model Code of Professional Responsibility* EC 5-2 & 5-3 (1983) (advising lawyers to refrain from maintaining financial interests in property in which the client has a financial interest).

⁴⁹ 113 S Ct at 1173.

⁵⁰ *Id.*

II. THE EFFECT OF *REVES* ON ATTORNEYS

The *Reves* Court adopted the operation-or-management test and applied it to one type of outside professional, an auditor. The Court affirmed the circuit court's decision that the defendant's auditing services did not rise to operation or management of the enterprise. The *Reves* Court, however, did not specify how courts should determine whether an outside professional's conduct does rise to the level of operation or management.

In the wake of *Reves*, lower courts have responded to the Supreme Court's incomplete instructions by fashioning their own standards for assessing whether a defendant-professional has satisfied the *Reves* requirement. One would expect these standards to give different outcomes for different sorts of professional service providers; after all, some services place the professional closer to management than others. In evaluating attorney liability under § 1962(c) after *Reves*, however, lower courts have not paid sufficient attention to the nature of the services provided by lawyers. Instead, they have uniformly excused attorneys from liability through application of a crude "legal services" standard. This Section examines this standard and its many problems, suggesting that this approach oversimplifies *Reves* and is overprotective of attorneys.

A. The Gap Between *Reves* and Attorneys

The operation-or-management test was easy to apply to Arthur Young—and will probably prove easy to apply in most future cases involving auditors—because it is difficult to imagine an auditor's involvement with an enterprise rising to the level of operation or management. Traditionally, an auditor's role is to express an opinion on the client's financial statements.⁵¹ Auditors are ethically prohibited from being connected with their client "as a promoter, underwriter, or voting trustee, a director or officer or in any capacity equivalent to that of a member of management or of an employee."⁵² Even if Arthur Young had ventured beyond its traditionally accepted role, its departure would most likely not have risen to the level of operation or manage-

⁵¹ American Institute of Certified Public Accountants, Vol A *AICPA Professional Standards* AU § 110.02 at 61 (AICPA, 1986).

⁵² American Institute of Certified Public Accountants, Vol B *AICPA Professional Standards* ET § 101.01.B.1 at 4411 (AICPA, 1986).

ment because an auditor's traditional role is so far removed from that level of participation.⁵³

Thus, the Supreme Court adopted the operation-or-management test in an easy case, one unlikely to press the limits of the doctrine. Indeed, the Court explicitly refused to decide "how far § 1962(c) extends down the ladder of operation [to subordinates] because it is clear that Arthur Young was not acting under the direction of the Co-op's officers or board."⁵⁴ Nor does *Reves* describe the degree of participation in management that is necessary for liability. Is day-to-day management required, or is control over decision making with respect to the particular predicate acts sufficient?⁵⁵

Because even the traditional attorney-client relationship is more complex than that of an auditor and her client, *Reves* provides little guidance as to when an attorney will be liable under § 1962(c). Applying the operation-or-management test to attorneys who have committed predicate acts while rendering services to clients presents additional questions. The nature of an attorney's services is much different from an auditor's, and an attorney's role is much more likely to present a hard case. Auditors provide an objective view of their clients' books, so an auditor's traditional services should not affect the way that a client conducts her business.⁵⁶ An attorney's professional role, however, is often to suggest how a company might change its course of conduct to avoid legal liability or to engage in a profitable commercial transaction. An attorney's legal advice will inevitably shape the course of a corporation's actions and is likely to have a concrete effect on a company's future plans. Moreover, a lawyer's client may systematically "rubber stamp" her recommendations, invariably heeding whatever advice the attorney gives. Generally, it seems

⁵³ See *Reves*, 113 S Ct at 1173 ("Although the professional standards adopted by the accounting profession may be relevant, they do not define what constitutes management of an enterprise for the purposes of § 1962(c).").

⁵⁴ Id at 1173 n 9.

⁵⁵ Under CERCLA, for example, a person who maintains an indicia of ownership (such as a lender) in a facility is not liable for environmental response costs unless that person "participate[s] in the management" of the facility. See 40 CFR § 300.1100 (1993). As in the RICO context, courts differed as to when a lender had met this portion of the test. The EPA has interpreted CERCLA to require the holder of a security interest to engage in decision-making control or day-to-day management over environmental decisions before being liable. See 40 CFR § 300.1100(c).

⁵⁶ If the auditor refuses to approve the client's books, the auditor might indirectly change the way the client crunches its numbers, so that the financial reports ultimately become more accurate. However, an auditor's purpose, unlike an attorney's, is not to change or directly affect the client's course of conduct.

more likely that an attorney's conduct, rather than an auditor's, will be deemed operation or management of an enterprise. Put another way, an attorney may be able to exert control⁵⁷ over a client's enterprise without going beyond traditional roles.

In addition, the scope of an attorney's services is much broader and more dynamic than that of an auditor's. While an auditor's primary function is to scrutinize a firm's financial statements and business data, an attorney's functions or purposes are not well defined, and are constantly changing.⁵⁸ Moreover, attorney-client relationships suffer from fewer restrictions than auditor-client relationships. Unlike auditors, attorneys are not forbidden from taking a managerial role in their clients' businesses.⁵⁹ In fact, many law firms have partners who serve on boards of directors of their clients' corporations.⁶⁰ Attorneys can and do play active roles in their clients' businesses by promoting deals, soliciting investors, and conducting meetings at the firm.⁶¹ Applying *Reves* in these situations is equally problematic.

⁵⁷ See *Reves*, 113 S Ct at 1173 (suggesting that an outsider able to exert control may be liable under § 1962(c)).

⁵⁸ The Model Rules of Professional Conduct and Model Code of Professional Responsibility provide suggested ethical guidelines to states regulating attorney conduct, but these guidelines in no way limit the broad range of permissible services that lawyers can render. For example, in 1991, the ABA adopted Model Rule 5.7, which was designed to restrict the movement of law firms into ancillary non-legal businesses (such as investment banking) by limiting a law firm's provision of these services to those hiring the firm for its legal services. One year later, the ABA repealed Rule 5.7. See Stephen Gillers and Roy D. Simon, Jr., *Regulation of Lawyers: Statutes and Standards* 236 (Little, Brown, 1993). Those opposing the Rule argued that it amounted to a "sweeping condemnation" of ancillary services that have been provided by attorneys "for generations." See *id.* at 246-47. In other words, the Rule attempted to separate legal from non-legal services, defining the latter as "ancillary," even though those "ancillary" services (such as trust, financial planning, and general insurance services) have been traditionally offered by lawyers to clients. With or without Rule 5.7, it is unclear how courts applying the legal services standard, see text accompanying notes 62-64, would analyze these ancillary, "non-legal" services.

⁵⁹ See Charles W. Wolfram, *Modern Legal Ethics* § 13.7.4 at 783-39 (West, 1986).

⁶⁰ Thomas W. Hyland, *Law Firm's Exposure to Third Parties—An Expanding Doctrine*, *Lawyers' Liab Rev Q J* 1, 3 (Apr 1992) (study finding that 68.2% of law firms with 41 or more lawyers had members who served as directors and officers of client corporations, while 40% of firms with fewer than 10 lawyers had members on their clients' boards).

⁶¹ George D. Reyecraft, *Conflicts of Interest and Effective Representation: The Dilemma of Corporate Counsel*, 39 *Hastings L J* 605, 614 (1988).

B. Shortcomings of the Existing Standard

1. The legal services standard defined.

In fashioning a standard to determine whether an attorney has operated or managed an enterprise, courts have attempted to apply *Reves's* auditor analysis to attorneys, effectively ignoring the difference between lawyers and auditors. Using this standard, courts have invariably granted summary dismissal of § 1962(c) claims against attorneys on the ground that the attorneys were not involved in the operation or management of the alleged enterprise.⁶² The dispositive factor in all cases applying *Reves* to attorneys has been that the attorney did no more than provide legal services, in some cases unprofessionally, to the client.⁶³ Courts typically interpret *Reves* to mean that where an attorney's role is "limited to providing legal services," whether the services are rendered "well or poorly, properly or improperly," the attorney is not liable.⁶⁴

2. The legal services standard misapplies *Reves*.

This "legal services" standard—asking whether an attorney's role was limited to providing legal services—is a deceptively simple standard arising from an overly broad reading of *Reves*.

⁶² See, for example, *Baumer v Pacht*, 8 F3d 1341, 1344 (9th Cir 1993) (dismissing a § 1962(c) claim against an attorney who did not play "any part in directing the affairs of the enterprise"); *Sassoon v Altgelt, 777, Inc.*, 822 F Supp 1303, 1307 (N D Ill 1993) (dismissing a § 1962(c) claim against attorneys who drafted a limited partnership offering and provided legal services to the partnership); *Gilmore v Berg*, 820 F Supp 179, 183 (D NJ 1993) (dismissing a § 1962(c) claim because the allegedly false private placement memoranda were "common professional services typically rendered by attorneys for their business clients"); *Morin v Trupin*, 832 F Supp 93, 98 (S D NY 1993) (dismissing a § 1962(c) claim because drafting legal correspondence and directing clients to sign prepared documents did not rise to operation or management); *Charmarac Properties, Inc. v Pike*, 1993 Fed Secur L Rptr (OCH) 97802, 97951 (S D NY 1993) (dismissing a § 1962(c) claim because the complaint failed to allege an attorney's control or direction over the enterprise). See also *Nolte v Pearson*, 994 F2d 1311, 1314, 1317 (8th Cir 1993) (affirming a directed verdict for defendant attorneys who prepared allegedly false opinion letters and other informational memoranda). But see *Crowe v Smith*, 1994 US Dist LEXIS 3884, *22-23 (W D La) (denying attorneys' motion to dismiss plaintiffs' § 1962(c) claim because, under facts alleged in complaint, operation or management "could be found").

⁶³ See, for example, *Baumer*, 8 F3d at 1344 (finding an attorney whose role was "limited to providing legal services" not liable under *Reves* test); *Sassoon*, 822 F Supp at 1307 (providing legal services insufficient for § 1962(c) liability after *Reves*); *Gilmore*, 820 F Supp at 182-83 (same); *Morin*, 832 F Supp at 98 (same); *Nolte*, 994 F2d at 1317 (same).

⁶⁴ *Baumer*, 8 F3d at 1344. See also *Nolte*, 994 F2d at 1317; *Charmarac Properties*, 1993 Fed Secur L Rptr at 97951-52 (allegations of attorney's unprofessional conduct and performance of legal services insufficient to state a § 1962(c) claim).

By misinterpreting *Reves*'s application of the operation-or-management test, courts absolve too many attorneys of § 1962(c) liability.

The *Reves* Court noted that Arthur Young's conduct did not usurp management's responsibility and conformed to the AICPA's professional standards, at least with respect to the generation of the Co-op's financial statements.⁶⁵ The majority specifically considered the nature of the services Arthur Young performed and concluded that they did not rise to the level of operation or management of the enterprise.⁶⁶ Thus, the case should not be read too broadly: *Reves* only holds (1) that performing *traditional auditing tasks* is insufficient to trigger liability, and (2) that § 1962(c)'s "conduct or participate" element requires operation or management, making it more difficult for "outsiders" to meet than some of the lower courts had thought.⁶⁷

Courts applying *Reves* have consistently and correctly recognized that Arthur Young was not, and could not be, liable for performing traditional auditing functions.⁶⁸ Yet these courts have inappropriately read *Reves* too broadly when applying it to attorneys. In so doing, they have created a standard that warps the narrow decision in *Reves* and has the potential of corrupting RICO's goals.

The legal services standard asks whether the attorney's role was confined to giving legal services, and if it was, simply absolves the attorney of liability.⁶⁹ Some courts applying *Reves* to cases involving attorneys reason that since Arthur Young was not liable for performing traditional auditing services, attorneys are not liable under the operation-or-management test if they perform traditional legal services, even if their conduct is unprofessional.⁷⁰ Other courts simply assert that after *Reves*, attor-

⁶⁵ 113 S Ct at 1173-74.

⁶⁶ Id at 1174.

⁶⁷ Id at 1173. See also text accompanying notes 43-50.

⁶⁸ See, for example, *Baumer*, 8 F3d at 1344; *Biofeedtrac, Inc. v Kolinor Optical Enterprises*, 832 F Supp 585, 591 (E D NY 1993).

⁶⁹ Possibly, courts applying the legal services standard are implicitly defining "legal services" as only those activities that would not give rise to *Reves* liability. If so, the standard is circular and completely useless as a guide for determining liability of attorneys, saying, in effect, that attorneys are not liable when they perform services that do not give rise to liability.

⁷⁰ The most blatant statement of this misinterpretation appears in *Biofeedtrac*, 832 F Supp at 590-92. There, the court first noted that Justice Souter, in his dissent in *Reves*, claimed that Arthur Young had stepped into the shoes of management by creating the very financial statements they audited. Id at 591. The *Reves* majority did not respond directly to Souter's claim, but the *Biofeedtrac* court noted that "in rejecting [Souter's]

neys whose role is limited to providing legal services are not liable under § 1962(c).⁷¹ This "legal services" standard ignores the Court's emphasis on the *nature* of the services that Arthur Young rendered. As an auditor, Arthur Young's traditional role would come nowhere near even the operation-or-management test's nebulous threshold.

Reves did not suggest that an outside attorney who performs only legal services cannot operate or manage an enterprise. Recognizing the differences between auditors and attorneys, it is illogical to extend, unmodified, the *Reves* methodology to attorneys. Given the amorphous nature of attorney services, it is inappropriate to assert, as the legal services standard does, that "merely" rendering legal services cannot trigger RICO liability after *Reves*.

3. Further difficulties with the legal services standard.

a) Lack of a definition. Although the legal services standard obviously requires a more precise definition of "legal services," no court has attempted to provide one. As a result, the standard gives attorneys no guidance as to how they should limit their roles in client activities, if at all. This invites courts to be inconsistent when they are faced with hard cases.

For example, in *Biofeedtrac, Inc. v Kolinor Optical Enterprises*, the court seemed unsure whether participation on the board of directors of a client's corporation was a legal service.⁷² The court noted that "[c]orporate counsel customarily fill such roles," insisting that attorneys could participate on the board of directors "without becoming a part of the operation or management of

view, the Court held, by its silence, that even when professionals go beyond their customary role, they will not be deemed to have participated" in an enterprise's operation or management. *Id.* The *Biofeedtrac* court reads *Reves* as protecting any professional performing only "traditional" services. However, the *Reves* holding only suggests that auditors will not be liable if they perform traditional services. There is no logical reason why a professional cannot perform "traditional" services (as defined by the profession) and at the same time operate or manage an enterprise.

⁷¹ See, for example, *Baumer*, 8 F3d at 1344 ("[Defendant-attorney's] role was limited to providing legal services . . . Whether [defendant] rendered his services well or poorly, properly or improperly, is irrelevant to the *Reves* test. We are therefore compelled to conclude that . . . the complaint fails to allege a 1962(c) cause of action . . ."); *Gilmore*, 820 F Supp at 182 (Defendant's actions "merely constituted the rendition of professional services . . . Such conduct does not constitute participation in the direction of the affairs" of the enterprise involved.); *Morin*, 832 F Supp at 98 ("Defendants' conduct consisted of providing legal services . . . This is not, under *Reves*, sufficient to support liability under § 1962(c)."); *Sassoon*, 822 F Supp at 1307.

⁷² 832 F Supp at 591.

the enterprise."⁷³ After *Biofeedtrac*, it is unclear which functions an attorney may assume as a corporate director without risking RICO liability.

Without a concrete definition of a legal service, courts are bound to face cases in which the ill-defined legal services standard leads them to a questionable result. *Biofeedtrac* itself illustrates how broadly "legal services" can be defined. There, the plaintiff corporation entered into an agreement with Kolinor to distribute vision-training devices for which the plaintiff held patents.⁷⁴ After meeting the principals of Kolinor, an attorney, Christopher Kuehn, left a New York law firm to start his own practice with Kolinor as his sole client. The plaintiff alleged that Kuehn was actively involved in a fraud involving production of a competing vision trainer. Not only did Kuehn incorporate two corporations whose apparent purpose was to develop and manufacture the competing device, he also served as the sole director of the newly formed corporations.⁷⁵ Despite this extensive and ongoing participation by an "outside" attorney in his only client's fraudulent activities,⁷⁶ the court held that the *Reves* test was not satisfied because Kuehn's role was limited to providing legal advice and services. The court even found that Kuehn's suggestion to Kolinor that Kuehn enter into negotiations with the plaintiff to mask Kolinor's scheme fell within the realm of legal services.⁷⁷

Importantly, however, the *Biofeedtrac* court stressed that Kuehn did not have an employment contract with his client, had no vote as a shareholder in the corporation, received no remuneration other than fees for legal services, and at "no time . . . participate[d] in or even offer[ed] an opinion regarding a business point."⁷⁸ If the court believed that providing legal services was insufficient to trigger liability, this language suggests what additional facts might have satisfied the *Reves* test. Perhaps Kuehn could have been held liable had he performed these tasks; but, once again, the court's failure to draw a clear distinction between legal services and operation or management, while at the same

⁷³ *Id.*

⁷⁴ *Id.* at 587.

⁷⁵ *Id.* at 587-88.

⁷⁶ The *Biofeedtrac* court did not consider Kuehn an "insider" despite his role as director of the newly formed corporations. See *id.* at 591.

⁷⁷ *Id.*

⁷⁸ *Id.*

time implicitly assuming such a line exists, provides little guidance.

b) *Failure to consider context.* The legal services standard fails to consider the context in which the service is rendered. Usually, the provision of legal services is negotiated at arm's length, with a client approaching a law firm requesting that the firm perform certain legal services. However, a law firm can perform the same legal services in a much different context, with the firm and the client working toward a common, illegitimate goal, or with the firm following its own agenda. One can think of numerous cases, where, irrespective of context, attorney conduct ventures so far beyond providing legal services that the operation-or-management standard is met.⁷⁹ Still, the standard's failure to consider the context in which the legal service is rendered can be problematic. A law firm's performing a legal service in response to a client's request is a much different case from a law firm's approaching a long-time client and "suggesting" that the same service be rendered. In both cases, the law firm's activities are arguably limited to rendering legal services, but the services are rendered in quite different contexts. In the latter case, the opportunity for an attorney to operate a RICO "enterprise" through her "suggestions" is much greater.

A corollary of this failure to consider context is the legal services standard's tendency to discount the relationship between a client and her attorney. For example, though it may be considered a legal service, an attorney's position on a client's board of directors seems likely to fall under the *Reves* operation-or-management test. In applying the legal services standard, one court noted that even if the law firm defendant had "substantial persuasive power to induce management to take certain actions,"⁸⁰ it would not be enough to meet the *Reves* test as long as the firm's conduct consisted of "providing legal services."⁸¹ But nothing in *Reves* indicates that a firm with influence and power can-

⁷⁹ For example, an attorney could exert control over an enterprise through bribery. See *Reves*, 113 S Ct at 1173. In such a case, an attorney might bribe a manager or executive of a corporation to take certain actions or allow the law firm to perform legal services that would further the firm's objectives. Applying the legal services standard—without regard to the transaction's context—suggests bribery would amount to the operation or management of the enterprise.

⁸⁰ *Morin*, 832 F Supp at 98.

⁸¹ *Id.*

not be participating in the operation or management of its client.⁸²

III. REPLACING THE LEGAL SERVICES STANDARD

The legal services standard is overprotective because it automatically exonerates attorneys who participate in the operation or management of an enterprise while performing only legal services. Courts would more faithfully conform to the *Reves* test in attorney-defendant cases if they focused on the “exert control” language in *Reves*,⁸³ as well as on RICO’s goal of attacking the “infiltration of organized crime and racketeering into legitimate organizations.”⁸⁴ This Section suggests three factors that courts should consider to determine whether an attorney’s conduct amounts to participation in the operation or management of the client’s business.⁸⁵

A. Searching for Indicative Factors

As discussed above, one of the fundamental flaws of the current legal services standard is that it does not define the scope of a legal service. Because the nature of an attorney’s profession is so dynamic, it is difficult—if not impossible—to reach a coherent definition that is fluid enough to change with the profession. The legal services standard gives a court wide and unguided discretion in applying the *Reves* test since each court may define legal services to match its taste and the particular facts of the case.

In considering whether an attorney has participated in the operation or management of an enterprise, courts should examine the attorney’s actual conduct and the specific services rendered. A mere breach of ethical or professional guidelines and stand-

⁸² In fact, the Court specifically noted that an enterprise might be operated or managed by others who are able to “exert control” over the enterprise, *Reves*, 113 S Ct at 1173, but the Court failed to define “exertion of control.” A law firm with substantial persuasive power may well exert de facto control over a client’s actions. This idea is explored in depth in the text accompanying notes 99-105.

⁸³ 113 S Ct at 1173 (“An enterprise also might be ‘operated’ or ‘managed’ by others ‘associated with’ the enterprise who exert control over it as, for example, by bribery.”).

⁸⁴ See S Rep No 91-617 at 76 (cited in note 8). See also text accompanying notes 6-8.

⁸⁵ This discussion only addresses the question of whether an attorney or a law firm has conducted or participated in the affairs of an enterprise. A court finding that the level of legal services rendered or the relationship between attorney and client would support liability must still find that the other elements necessary to state a § 1962(c) claim have been met.

ards, without more, gives no indication of whether an attorney has met the *Reves* test. Because RICO liability requires a pattern of racketeering activity in addition to participation in operation or management, meritorious RICO suits will always involve a breach of the professional code of conduct or responsibility.⁸⁶ The important question is which legal services are so intimately related to the operation or management of an enterprise that, when combined with a pattern of racketeering activity, they give rise to § 1962(c) liability. Because attorneys' services and client relationships are so varied, courts need a flexible standard to apply the *Reves* test properly. While the *Reves* majority was silent as to such a standard, both the *Reves* dissent and post-*Reves* courts have pointed to one or more of the following three factors as important in deciding when conduct rises to operation or management: the usurpation of management's responsibilities, the initiation of legal services, and the exercise of persuasive power.

Although receiving brief mention in several cases, none of these factors has been consistently applied to analyzing attorney conduct under the operation-or-management test. Nor is it clear how a court mentioning one of these factors would integrate it into the legal services standard.

Rather than asking whether an attorney's conduct has been confined to providing legal services, a court should ask whether any one or more of these three indicative factors were present during the provision of those services. A significant presence of any one of the factors could indicate participation in operation or management. Although such an approach necessarily turns on the facts of each case, it still limits discretion when compared to the current legal services standard. Currently, attorneys doing unorthodox work may fear RICO liability because of the uncertainty that their work will not be deemed a "legal service" by a particular court. A more precise approach would enable courts to follow *Reves* more faithfully and afford attorneys the opportunity to plan their behavior to avoid RICO liability.

⁸⁶ See Rule 8.4, Model Rules of Professional Conduct, declaring it professional misconduct to:

- (b) commit a criminal act that reflects adversely on the lawyer's honesty[, or]
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

See also Model Code of Professional Responsibility DR 1-102(A), providing that lawyers shall not:

- (3) engage in illegal conduct involving moral turpitude[, or]
- (4) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

1. Factor one: usurping management's responsibilities.

One of the most obvious, but difficult, ways to determine whether an attorney has participated in the operation or management of an enterprise is to ask whether the attorney has usurped the responsibilities of managers, directors, or other decision makers. The *Reves* Court suggested that if Arthur Young had performed tasks that were management's responsibility, this would have satisfied the operation-or-management test.⁸⁷ Thus, in looking at the attorney's services, a court should look at whether, in performing them, the attorney in effect made decisions that the enterprise's decision makers usually make, or that decision makers in other businesses traditionally make.⁸⁸

The usurpation factor would cover two ways in which an attorney may participate in the operation or management of an enterprise. First, the client might delegate to the attorney a task traditionally performed by management or provided by law to be management's responsibility. Second, an attorney could act without obtaining the approval of management or the directors of a corporation.

The *Reves* decision raises several questions about how to apply the usurpation factor. For example, the extent to which professionals must participate in the operation or management of the enterprise's affairs to be liable under § 1962(c) remains unsettled. Is an attorney who makes one managerial decision, accompanied by a pattern of racketeering activity, liable under § 1962(c), or must the attorney manage the enterprise on a day-to-day basis?⁸⁹

The answer seems to be that any level of participation in the management of a firm is sufficient, so long as the participation occurs through the predicate acts comprising the pattern of racketeering activity. The *Reves* Court acknowledged that profession-

⁸⁷ The Court suggested that Arthur Young had not generated the representations in the Co-op's financial statements itself, and had therefore not performed a managerial task according to AICPA's professional standards. Moreover, the Court noted that the AICPA standards do not define when an accountant has managed an enterprise. 113 S Ct at 1173-74. Had a lower court found that Arthur Young performed tasks which should have been performed by management, it seems likely that the Court would have upheld the decision.

⁸⁸ The usurpation factor is explicitly delineated in the *Reves* dissent. Justice Souter suggests that "[b]y assuming the authority to make key decisions . . . and by creating financial statements that were the responsibility of the Co-op's management, Arthur Young crossed the line separating 'outside' auditors from 'inside' financial managers." Id at 1178 (Souter dissenting).

⁸⁹ See text accompanying notes 54-55.

al outsiders associated with an enterprise can be liable under its test,⁹⁰ but these professionals are unlikely to have a continual relationship with the enterprise. If day-to-day management of the enterprise were required, then auditors hired periodically could never be liable under § 1962(c), a possibility implicitly rejected in *Reves*. Moreover, requiring day-to-day operation of the enterprise would undermine the basic goal of RICO, to prevent the infiltration of corrupt organizations into legitimate businesses. An attorney, or indeed any professional, need not be involved in daily decision making to control or otherwise affect the business's course of conduct.⁹¹

The likelihood of an attorney usurping management's responsibilities has increased, especially in the area of securities transactions.⁹² Attorneys are frequently involved in promoting deals, soliciting investors, and conducting meetings at the law firm.⁹³ Indeed, attorneys often find themselves at the "fulcrum of corporate decisionmaking."⁹⁴ When attorneys make decisions traditionally made by their clients, they are participating in the operation or management of the enterprise. Of course, there is nothing ethically or professionally wrong with such participation. However, when an attorney combines intimate involvement with a client's decision making with a pattern of racketeering activity, the aims and goals of RICO demand that such activity be punishable under RICO.

⁹⁰ 113 S Ct at 1173.

⁹¹ Once a court determines that an attorney has operated or managed an enterprise's affairs, it must ask whether the operation or management was done "through" a pattern of racketeering activity. Aside from its bribery example, *Reves* did not address what it means to manage an enterprise through such a pattern. *Id.*

⁹² See, for example, Note, *Securities Attorneys Face Liability For Wrongs of Their Corporate Clients*, 5 St John's J Legal Comm 403, 412-14 (1990) (describing the increasing liability of securities attorneys stemming from competition among law firms and pressures from management to take a more active role in transactions).

⁹³ Reycraft, 39 Hastings L J at 614 (cited in note 61).

⁹⁴ Note, 5 St John's J Legal Comm at 412, citing *ABA Committee Discusses Kern Ruling, Internationalization, SEC Amicus Briefs*, 20 Sec Reg & L Rep, 1783, 1786-87 (Nov 25, 1988). The ABA report uses the facts of *In the Matter of Allied Stores Corp.*, 1987 Fed Sec L Rptr (CCH) ¶ 84,142, to illustrate the degree to which attorneys can become involved in securities transactions. In *Allied Stores*, the SEC alleged that Kern, a Sullivan & Cromwell attorney and member of Allied's board of directors, decided, without consulting Allied's managers, other members of the board, or officers, not to disclose certain information required by law. *Id.* at 88,763-65. In failing to discuss with his clients the decision not to disclose, Kern effectively met the usurpation test. See also *Feit v Leasco Data Processing Equipment Corp.*, 332 F Supp 544, 575-76 (E D NY 1971) (rejecting an attorney's attempt to dismiss securities fraud charges against him because he had participated in the firm's security offerings).

2. Factor two: initiating legal services.

In some cases, an attorney knowingly assists the client's illegal activity at the client's request and in furtherance of the client's goals. This is not enough to trigger § 1962(c) liability⁹⁵—the attorney has responded to a client's request, and the managerial or operational decision was made independently. Conversely, when an attorney suggests that a certain legal service be undertaken, and then commits a predicate RICO act while performing the service, she might logically be considered to be operating or managing the client's affairs. Initiation of legal services is thus a second factor that might indicate to a court that an attorney has crossed the *Reves* line into operation or management.

The United States District Court for the District of New Jersey suggested the initiation factor in dicta in *Gilmore v Berg*.⁹⁶ Owners of unregistered securities in a limited partnership sued, among others, an attorney, alleging numerous causes of action, including a violation of RICO. The plaintiffs complained that the partnership purchased property at an inflated price and that the transaction was illegal and impaired the value of their investment. As a part of the private-placement memoranda sent to the plaintiffs describing the investment, the attorney had signed a letter stating that the partnership had paid the market price for the property.⁹⁷ After rejecting the plaintiffs' RICO claim because the defendant had only provided legal services, the court specifically noted that the plaintiffs failed to show that the defendant "played any role in initiating or formulating" the process by which interests in the partnership were sold to the plaintiffs.⁹⁸

RICO's goal of preventing the infiltration of legitimate businesses provides the strongest justification for including initiation as a factor in determining when an attorney has met the *Reves* test. When an attorney believes that a particular service will

⁹⁵ However, it may be sufficient to trigger aiding and abetting or conspiracy liability under RICO. See 18 USC §§ 2, 1962(d). For a general discussion of aiding and abetting or conspiracy liability, see Joseph, *Civil Rico* § 17 (cited in note 13); Howard, et al, 467 PL/Lit 291 (cited in note 24) (discussing the likelihood that, after *Reves*, plaintiffs will more often plead aiding and abetting and conspiracy theories of liability).

⁹⁶ 820 F Supp 179, 183 (D NJ 1993).

⁹⁷ Id at 180-81.

⁹⁸ Id at 183. See also *Azriella v Cohen Law Offices*, 1994 US App LEXIS 6646, *30-31 (2d Cir) (attorney who played "no role in the conception, creation, or execution" of the fraudulent activity not liable under § 1962(c)).

benefit her client, the attorney should present the opportunity and allow the client to decide whether to ultimately retain the lawyer to perform this service. However, when the lawyer both suggests that a service be performed and, in the course of performing the service, commits fraud or some other predicate act, the possibility of infiltration is high enough to justify RICO liability. At the very least, when an attorney suggests a course of action and then pursues it, the attorney has effectively directed the corporation's affairs.

3. Factor three: exercising persuasive power.

Whether an attorney has participated in operation or management seems logically to turn on the degree of influence or persuasive power an attorney has over her client's decision making. Although some courts have recognized persuasive power as a factor, they have held that attorneys exercising even a substantial degree of persuasive power over the decisions of an enterprise could not participate in the operation or management of the enterprise.⁹⁹ This generalization ignores the realities of many attorney-client relationships. For example, an attorney who has earned a great deal of respect and trust among the officers of her client's corporation may find that managers merely "rubber stamp" her advice. It seems likely, then, that an attorney might "exert control" over a manager who knows that if he does not follow counsel's advice, his actions may be questioned by a superior.

Unfortunately, it is difficult to assess when an attorney's influence is so great that her advice in effect amounts to the decision of her client. Also, if carelessly applied, the persuasion factor will punish those attorneys who have developed intimate relationships with their clients. The enhanced risk of RICO liability will discourage attorneys from developing an intimate, trusting relationship—a desirable relationship from the client's perspective. Therefore, defining how the persuasive power factor should be applied requires a delicate balancing of RICO's goals and client interests.

RICO's goals suggest that a law firm that has developed an intimate relationship with a client such that the firm's decision is

⁹⁹ See *Federal Fidelity Savings and Loan Association v Felicetti*, 830 F Supp 257, 260 (E D Pa 1993) (Although real estate appraisals "substantially influenced the decision making" of the enterprise, they did not meet the *Reves* test.).

automatically authorized should be punished under RICO if the firm engages in a pattern of racketeering activity. The risk of corrupt infiltration and control of the enterprise is greatest after the law firm has established a trusting relationship and then sets out to control or manipulate the enterprise or otherwise convinces the enterprise to engage in racketeering activity. Yet RICO's anti-infiltration goal might undermine attorney-client relationships if the persuasion factor were overemphasized. However, if refined, the persuasion factor can provide courts with useful insight into when attorney influence should factor into the operation-or-management inquiry. The best way to confine the persuasion factor is to recognize that a law firm has an incentive to infiltrate an enterprise or unite in its fraudulent scheme if the firm stands to gain financially. Unless there is some interconnection between the firm and the enterprise, a firm's influence will not be lucrative.

A firm's legal advice generates fees, and fee-generation benefits the firm. However, the legal services must maximize the enterprise's profits or the enterprise will lose faith in the firm's advice. Unless the firm has some alternate interest or means of siphoning off the enterprise's profits, it will not pay for the firm to infiltrate. Therefore, the persuasion factor should focus not on the indirect influence that a firm has, but on the incentives a firm has to engage in prohibited activity. For example, if a firm receives fees that are tied to a client's profits or a firm has an equity interest in the client corporation, a court should be less reluctant to find participation in operation or management.¹⁰⁰

Along similar lines, if a member of the firm is on the enterprise's board of directors, a court should consider this a sufficient meshing of interests to meet the *Reves* test—at least for purposes of avoiding summary judgment. Given the incentives involved, courts should view the participation on a client's board of directors, or an attorney's equity interest in the enterprise, as a strong indication of participation in operation or management.¹⁰¹ When an attorney is a member of the board of direc-

¹⁰⁰ The *Biofeedtrac* court suggested that this type of influence might be an important factor in determining an attorney's RICO liability after *Reves*. 832 F Supp at 591 (noting that the defendant had received no remuneration other than ordinary fees, had no vote as a shareholder, and had no employment contract). But see *Charmarac*, 1993 Fed Secur L Rptr at 97952 ("[U]nwarranted and unjustifiable professional fees [do] not save plaintiff's RICO claim from dismissal.").

¹⁰¹ Compare *Biofeedtrac*, where the court places no emphasis on an attorney's participation on the board of a corporation he formed at his client's direction. 832 F Supp at 591.

tors of the enterprise, the attorney, either directly or indirectly, plays "some part in directing"¹⁰² the enterprise's affairs, and therefore participates in the operation or management of the enterprise. Even if the board of directors only makes hiring decisions, the attorney can choose managers who will act in the attorney's interests as a board member.

If the defendant-lawyer was on the corporate board of directors, or had an equity interest in the enterprise, these facts should be *prima facie* evidence of operation or management in the enterprise.¹⁰³ Remember, there is no danger of RICO liability so long as the attorney does not engage in a pattern of racketeering activity. However, the mixture of such a pattern and a high-level position in the client firm should be sufficient to trigger RICO liability when it otherwise might not be warranted.

This presumption will no doubt discourage attorneys from taking board positions. Since corporations value attorneys' input and can benefit from their board membership, this presumption arguably disserves corporations. However, outside of RICO, law firms face similar problems whenever they commit fraud or malpractice while a partner serves on the board of directors for a client.¹⁰⁴ Thus many law firms, fearing liability, already urge their attorneys to refrain from holding an equity interest in a corporate client or serving on the client's board of directors.¹⁰⁵ Therefore, the presumption's impact on attorney behavior may not be severe.

B. Assessment of the Factor Approach

After analyzing these three factors, a court will be better able to assess whether an attorney has managed or operated an

¹⁰² *Reves*, 113 S Ct at 1170 (emphasis omitted).

¹⁰³ This accords with Congress's view of a director's role in other contexts as well. For example, under FIRREA, federal banking agencies have authority to bring certain enforcement actions against an "institution affiliated party," defined as "any director, officer, employee, or controlling stockholder . . . or agent for an insured depository institution." 12 USC §§ 1813(u) (Supp 1992). Such institution-affiliated parties, including directors, are prohibited from "participat[ing] in any manner in the conduct of the affairs" of certain financial institutions once an order has been issued against the affiliate. 18 USC §§ 1818(e)(1), 1818(e)(6)(A) (Supp 1992).

¹⁰⁴ See, for example, Tim O'Brien, *Some Firms Never Learn*, Am Lawyer 63, 63-64 (Oct 1989). The Attorney's Liability Assurance Society ("ALAS") prohibits its members from sitting on the board or being officers of corporate clients. *Id.* at 67. ALAS discourages, but does not prohibit, equity participation. *Id.* But see Hyland, *Lawyers' Liab Rev Q J* at 3 (cited in note 60).

¹⁰⁵ See Hyland, *Lawyer's Liab Rev Q J* at 4.

enterprise. The purpose of the three-factor standard is to force courts to look at the context in which the services were performed—a context ignored by the legal services standard. After making the three inquiries, a court will be better able to decide a summary judgment motion or a motion to dismiss for failure to state a claim. As it is unlikely that all three factors will be present in one case, the strong presence of one factor should be sufficient to indicate some participation in operation or management.

As with any multi-factor approach, a court has discretion in determining whether the individual inquiries amount to a conclusion that the defendant's actions have triggered potential liability. However, the discretion courts have under the suggested approach is preferable to the unguided discretion of the current legal services standard. Moreover, the three-factor approach forces courts to justify their decisions after looking at factors that relate directly to whether an attorney has operated or managed her client's affairs. Unlike inquiries under the legal services standard, courts will now be asking the right questions. Asking whether an attorney provided more than "legal services" is unhelpful and irrelevant.

To illustrate how a court might apply this approach, consider the facts of *Biofeedtrac*.¹⁰⁶ A court would first ask whether Kuehn, the defendant-attorney, usurped his client's (Jordan's) decision-making role in the alleged scheme to create a competing vision trainer. The published facts regarding the Kuehn-Jordan relationship are sparse, but it does not appear that Kuehn usurped his client's role in Kolinor Optical Enterprises & Consultants. The decisions regarding the manufacture of the competing vision-training device seem to have been the client's.¹⁰⁷

However, there is an indication that once Kuehn understood Kolinor's plan to manufacture a competing vision trainer, he initiated legal services to further the scheme. Kuehn specifically suggested to his client that Kuehn, in contract negotiations, should falsely give the plaintiff the impression that Kolinor was eager to distribute plaintiff's trainer, which would mask Jordan's scheme to manufacture a competing device.¹⁰⁸ While Kuehn himself suggested that he lie to the plaintiff to further Jordan's

¹⁰⁶ See text accompanying notes 72-78.

¹⁰⁷ See *Biofeedtrac*, 832 F Supp at 587-88 ("Kuehn advised Kolinor regarding its plan . . ."; "Kolinor decided to distribute its own vision training device . . ."; Kuehn wrote a letter to Kolinor's principal, George Jordan, examining the legal risks of "Jordan's scheme.").

¹⁰⁸ *Id.*

scheme, this should probably not be deemed "initiation." Jordan apparently approached Kuehn for assistance with his plan to develop a competing trainer.¹⁰⁹ Thus, Kuehn's suggestion was in response to the initial request for services and was designed to further Jordan's own aims.

The third factor, the exercise of persuasive power, weighs heavily against Kuehn. Once Kuehn knew of Jordan's plan, he became intimately involved in the scheme and became the sole director of the corporations that presumably were to control the manufacture and distribution of the competing device.¹¹⁰ Kuehn volunteered to act as corporate secretary; he drafted the bylaws, organizational minutes, shareholder agreements, and business and organizational plans.¹¹¹ Moreover, Kuehn's participation on his client's board of directors would raise a presumption that he participated in its operation or management. Kuehn might claim that the corporations were mere shells, and at the time of the lawsuit, they had played no role in the infringing scheme. However, once Kuehn created the corporations, playing a key role in defining each corporation's organization and business purpose, he should be deemed to have participated in the operation or management of these newly formed corporations.

In *Biofeedtrac*, then, the three-factor approach suggests that *Reves's* test is met, but this is only the first step toward Kuehn's liability under RICO. It may be that the pattern of racketeering activity occurred outside of Kuehn's role as director of the corporations. If the plaintiff defines the RICO enterprise as the operation of Kolinor, then Kuehn's directorship in an entirely separate enterprise is irrelevant. However, *Reves* and the suggested approach answer only whether there has been participation in the operation or management of the defined enterprise.

Overall, on the facts of *Biofeedtrac*, a court should conclude that Kuehn participated in the operation or management of the newly formed corporations, but that his conduct before these corporations were created was not sufficient direction of his client's affairs to meet the *Reves* test. Of the three factors, only the participation on a client's board of directors raises a presumption that *Reves* was met. Had Kuehn met either or both of the first two factors, but not the third, a court would have to

¹⁰⁹ Id at 587.

¹¹⁰ The court does not specify what else the two Delaware corporations headed by Kuehn were to do.

¹¹¹ Id at 588.

assess, in light of RICO's goals and the context of the attorney-client relationship, whether he participated in the operation or management of the illegal enterprise.

CONCLUSION

Courts should abandon the legal services standard in favor of a more flexible, albeit more complex, test. The variety of legal services that attorneys provide necessitates a standard that will catch all forms of attorney participation in operation or management. By looking for three specific factors often indicative of de facto operation or management by an attorney—substantial usurpation by the attorney of management's responsibilities, initiation of the legal services by the attorney, and the wielding of significant persuasive power—courts should be able to distinguish attorneys innocently working for the wrong enterprise from attorneys intimately involved in the operation and management of a racketeering enterprise.