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Seminar 11

Count on Consent—Do Not Expect Forgiveness.

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I. Introduction

The rules of professional conduct prohibit lawyers from representing a client when there is a conflict of interest involving current, former, and prospective clients. Rule 1.7 addresses current client conflicts and Rule 1.9 addresses former client conflicts. Rule 1.18 addresses prospective clients. And, Rule 1.8 addresses specific situations that present personal interest conflicts. To comply with these rules, lawyers must identify and resolve all conflicts before beginning, and address those that arise during, a representation. This seminar will review the various types of conflicts lawyers may face, review the process for obtaining consent, and identify the consequences of failure to identify and resolve conflicts.

II. Current Client Conflicts

A. Direct Adversity

Determining whether parties' interests are directly adverse in nonlitigation matters is often more difficult than in litigation matters. Yet, the conflicts rules apply in these situations and provide that representing directly adverse parties without consent is prohibited.

In analyzing nonlitigation conflicts, there usually is no judge or other readily accessible arbiter of conflict of interest principles. Consequently, it is unclear how the current client who correctly asserts a lawyer's ethical disability in representing the other party can remove that lawyer from the offending representation. If the upset client discharges the lawyer on the other matter, the conflict may have disappeared. There is considerable doubt, however, whether the lawyer, by forcing the client's hand in that manner, can deprive the client of the status of a current client. Alternatively, unhappy clients have at times brought actions for injunctive relief to resolve the issue. In any event, a lawyer who proceeds in a conflict situation risks a malpractice or breach of fiduciary duty claim, as well as a disciplinary complaint.

1. Commercial Negotiations

Assume Lawyer represents Company A in a transaction with Company B, *e.g.*, the sale of a business. Company B is a client of Lawyer's firm in other unrelated matters but is represented by separate counsel in this matter. Lawyer is reluctant to seek Company B's consent to the representation of Company A, perhaps fearing Company B will not give it. Lawyer reasons that the parties are not adverse in litigation, and that they are not even acrimonious. Besides, Company B wants the deal, and will not walk away because Lawyer is representing Company A. The deal closes, but Company B suffers economic harm. Company B then sues Company A for fraud, misrepresentation, and breach of contract. Company B sues Lawyer for aiding and abetting that wrongdoing and for breaching a fiduciary obligation to Company B. Company B argues that Lawyer had a conflict and violated Model Rule 1.7(a)(1) in acting against Company B's interests. A variation on this problem is that the deal goes poorly for Company A, and Company A claims Lawyer pulled his punches to Company B's advantage.

The authorities agree that, in the context of a commercial negotiation, a lawyer's representation of one client can be "directly adverse" to another client within the meaning of Model Rule 1.7(a)(1). *See* Hazard and Hodes § 11.4; *Restatement* § 121, Comment *b*. Some relationships, *e.g.*, seller-buyer and borrower-lender, seem inherently adverse. It is in one party's interest for the agreement to provide greater security, for example, and in the other party's interest to provide less security. Comment [7] to Model Rule 1.7 supports this view, specifically addressing the foregoing hypothetical situation:

> Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Hazard and Hodes and the *Restatement* seem to take a more lenient view. Both state that the intensity of the adversity or the hostility in the negotiation context should be a key factor. Thus, they would probably allow a firm to represent a seller client in a transaction with a buyer who is also a client (on other matters), but who is represented by other counsel on that transaction.

In addition to a possible "direct adversity" conflict, there is also a "pulling punches" issue under Model Rule 1.7(a)(2) in the hypothetical. Will the lawyer work as hard for Client A if the lawyer knows that the deal or certain terms of the deal may harm Client B? The answer will likely depend on the facts surrounding the negotiation and the relationship of the lawyer and the lawyer's law firm with each of the clients. The analysis often will require a higher degree of subtlety and subjectivity than is normally required in litigation, where it is almost always self-evident who is adverse to whom.

Even if a representation is adverse to an existing client, usually it may be undertaken with consent, provided that doing so will not adversely affect the representation of either client. Model Rule 1.7(b). It is in this context that the degree of hostility or adversity likely to exist in the negotiations is particularly relevant, for it may determine whether the conflict is consentable.

These complex issues are probably more unsettled than any other significant issue in the law of conflicts of interest. Given the uncertainty, before engaging in a negotiation "adverse to" an existing client that is represented by other competent counsel in that negotiation, a lawyer should seek that client's consent. Moreover, the lawyer should not assume that the other client in the negotiation has implicitly consented merely because it is aware of the lawyer's role, because Rule 1.7(b) requires "informed consent" confirmed in writing. In seeking consent, the lawyer must preserve the confidences of the client the lawyer represents in the negotiation. The lawyer should also obtain the consent of the client he is representing in the negotiation.

2. Zero-Sum-Game Situations

The zero-sum-game situation occurs when what Client A wins, Client B loses, for example when both clients are seeking to acquire the same piece of property or other asset. If one firm represents both clients, the firm will inevitably be in the position of benefitting one client at the expense of the other. These situations typically create a conflict for the firm. *See Restatement* § 121, Comment *c(i)*, Illustration 1 (lawyer cannot represent two competitors seeking to obtain same broadcast license from agency, where lawyer will have to advocate on behalf of each). *See also* Illinois Opinion 04-01 (Nov. 2004) (lawyer cannot represent two clients interested in obtaining same property); New York City Opinion 2001-3 (2001) (Rule 1.7(a) would apply to businesses that engaged same lawyer to prepare bids for same government contract). The conflicts rules in some non-U.S. jurisdictions permit representation of two clients competing for the same asset.

Whether a court will consider a zero-sum-game conflict consentable is difficult to predict. The outcome is likely to depend upon the facts, including the degree to which the lawyer will be required to advocate on behalf of each client, whether third parties are also competing for the prize, and the degree to which either client will be adversely affected by the outcome. *Compare Restatement* §121, Comment *c(i)*, Illustration 1 (lawyer may not advocate on behalf of two competitors seeking same broadcast license, even with consent) *with Restatement* § 128, Comment *d(i)* (lawyer may represent two clients against defendant with limited funds provided lawyer obtains informed consent of both).

The analysis of whether a firm has a zero-sum-game conflict becomes more difficult when the firm represents only one of the clients in the transaction, and its second client is represented by another law firm. District of Columbia Opinion 356 (Nov. 2010) addressed this situation. A lawyer who represented a client bidding to acquire a company learned that a second client planned to bid to acquire the same company. The lawyer could not seek informed consent from the second client because the first client had asked her to keep its bid confidential. The committee concluded that the lawyer had a conflict, but that she need not withdraw because the conflict was "thrust upon" her. The District of Columbia Rules of Professional Conduct, unlike the rules in most other jurisdictions, specifically provide that a lawyer need not withdraw if a conflict is "thrust upon" the lawyer. *See* District of Columbia Rule of Prof'l Conduct 1.7(d). Other jurisdictions might not be so lenient. The lawyer would not have a conflict, according to the committee, if she merely suspected another client might bid for the company but could not identify a specific client that was likely to do so.

Although not addressed in District of Columbia Opinion 356, a lawyer in this situation might also have a material limitations conflict with respect to the first company on the theory that she might pull her punches in handling the deal out of loyalty to the second client. Such a conflict would require disclosure to and consent from the first client. Issues of confidentiality concerning the second client's interest in bidding might complicate or preclude getting this consent.

Lawyers should be wary of agreeing to represent two clients in any zero-sum-game scenario, especially without the informed consent of both clients. These are difficult situations, authorities are sparse, and the outcome in any instance will depend upon the specific facts involved.

3. The "Hot Potato" Issue

Suppose a lawyer represented Client A on small real estate matters. Although the lawyer's firm has nothing pending for A at the present time, A is likely a "current" client of the firm. Another lawyer in the firm is asked to represent Client B in a major case against A. The case against A has nothing to do with the real estate matters on which the firm has represented A. The lawyer analyzes the claim and deems it to be meritorious and potentially a lucrative representation. After discussing the matter, the firm's executive committee votes to discontinue its representation of A and accept the representation of B against A. May the firm follow this course of conduct?

The majority view, expressed in a frequently quoted opinion, is that "[a] firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client." *Picker Int'l, Inc. v. Varian Assocs., Inc.*,

670 F. Supp. 1363, 1365 (N.D. Ohio 1987), *aff'd*, 869 F.2d 578 (Fed. Cir. 1989). *See also Unified Sewerage Agency of Wash. Cnty., Or. v. Jelco Inc.*, 646 F.2d 1339, 1350 (9th Cir. 1981); *Argue v. David Davis Enters., Inc.*, 2004 U.S. Dist. LEXIS 22630, at *6, 2004 WL 2480836, at *2 (E.D. Pa. Nov. 4, 2004); *Pioneer-Standard Elecs., Inc. v. Cap Gemini Am., Inc.*, 2002 U.S. Dist. LEXIS 7120, at *7, 2002 WL 553460, at *2; *Santacroce*, 134 F. Supp. 2d at 367; *Int'l Longshoremen's Ass'n, Local Union 1332 v. Int'l Longshoremen's Ass'n*, 909 F. Supp. 287, 293 (E.D. Pa. 1995); *Stratagem Dev. Corp.*, 756 F. Supp. at 794; *Reed*, 825 N.E.2d at 414; *In re Johnson*, 84 P.3d 637, 641 (Mont. 2004); *Truck Ins. Exch. v. Fireman's Fund Ins. Co.*, 6 Cal. App. 4th 1050, 1059 (1992); Massachusetts Opinion 92-03; *Restatement* § 121, Comment *e(i)*; Hazard and Hodes § 20.10.

Stratagem Development, 756 F. Supp. at 789, involved a situation like the hypothetical. The court disqualified the law firm from suing a "former" client, notwithstanding that the firm withdrew from representing the client it sued before filing the complaint. The court reasoned that merely by discussing with Client B a suit against Client A (or planning that suit), the firm had violated its duty of loyalty to Client A, which it represented on unrelated matters. *See also Atl. Pac. Home Loans, Inc. v. Superior Court of San Diego Cnty.*, 2006 Cal. App. Unpub. LEXIS 11228, at *15–16, 2006 WL 3616997, at *6 (Dec. 13, 2006) (not citable) (lawyer leaving firm that represented adverse client was equivalent to dropping that client); *Santacroce*, 134 F. Supp. 2d at 370–71 (party was current client at relevant time).

Not all authorities agree with the "hot potato" analysis. District of Columbia Opinion 272 (May 21, 1997), for example, rejected the "hot potato" rule, at least in certain situations. Distinguishing several of the cases discussed above, the opinion noted that under limited circumstances, a law firm can withdraw from representation of a current client for whom no active matters are pending to represent a long-standing client adverse to the inactive client.

The Alabama Supreme Court also declined to apply the "hot potato" rule where the law firm was not responsible for creating the conflict and withdrew from representing the party least likely to be harmed by the withdrawal. *See Ex parte AmSouth Bank, N.A.*, 589 So. 2d 715, 722 (Ala. 1991). *See also Metrop. Life Ins. Co. v. Guardian Life Ins. Co. of Am.*, 2009 U.S. Dist. LEXIS 42475, at *13–14, 2009 WL 1439717, at *5 (N.D. Ill. May 18, 2009) ("hot potato" rule does not necessarily apply where firm has no active matters for adverse client and its work for that client was sporadic); *McCook Metals L.L.C. v. Alcoa*, 2001 U.S. Dist. LEXIS 497, at *9–10, 2001 WL 58959, at *3 (N.D. Ill. Jan. 16, 2001) ("hot potato" rule inapplicable because terminated client was not long-standing client and retained client was not more lucrative client); *Kaminski Bros., Inc. v. Detroit Diesel Allison*, 638 F. Supp. 414, 416–17 (M.D. Pa. 1985) (conflict analyzed under Rule 1.9 after firm withdrew from one representation); *Philbrick v. Chase*, 2003 Conn. Super. LEXIS 1661, at *12–14, 2003 WL 21384532, at *5 (June 3, 2003) (same).

In *Fujitsu Ltd. v. Belkin Int'l, Inc.*, 2010 U.S. Dist. LEXIS 138407, 2010 WL 5387920 (N.D. Cal. Dec. 22, 2010), the court extended the "hot potato" rule to a situation involving two existing clients. When it discovered it had a concurrent conflict, the firm ceased representing the client for which it had done "very little" work. Nevertheless, in ruling on a disqualification motion in this litigation, the court found the firm had breached its duty of loyalty, declaring that "allowing a law firm to resolve voluntarily created conflicting loyalties by simply dropping the less favored client undermines [the expectation of undivided loyalty]." The court relied on a perceived California "per se rule of disqualification that applies to concurrent representations," and disqualified the firm.

California professional conduct rules are not identical to the Model Rules, and courts in Model Rules jurisdictions have reached a different result. Comment [4] to Model Rule 1.7 states that where more than one client is involved in a conflict, whether the lawyer may continue to represent any of the clients is "determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client … , given the lawyer's duties to the former client." In the following cases, the court allowed a lawyer with a conflict to remain in one of the matters: *In re Dayco Corp. Derivative Sec. Litig.*, 102 F.R.D. 624, 632–33 (S.D. Ohio 1984); *Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library, Inc.*, 474 F. Supp. 223, 227 (S.D.N.Y. 1979). While none of these cases is a classic "hot potato" situation where the lawyer "fired" one client in order to represent the other, they illustrate how a relatively blameless law firm may be allowed to "dump" one client in favor of another after the conflict becomes an issue. A firm may also be allowed to drop an "accommodation" client (a co-client taken on at the request of the regular client) to continue representing a regular client.

If a representation has been properly terminated before any conflict arises a firm is generally permitted to sue the former client on matters unrelated to the prior representation. To avoid this problem, lawyers should send close-out letters at the end of matters, particularly where the firm has represented the client in only one matter. Dropping a current client to take on a new client in a matter adverse to the dropped client is, however, a risky proposition. Moreover, if confidential information concerning the potential new matter is acquired during the initial client interview, the lawyer also might have to resign from the former representation (as well as decline the new one).

4. "Thrust Upon" Conflicts

Assume that a law firm has been representing Client A in extended and contentious patent litigation against Corporation B. The litigation has lasted for more than two years, and Client A has incurred substantial legal fees during that period. Corporation B then acquires 100% of the stock of Corporation C. And, at the time of the acquisition, a partner of the firm is representing Corporation C in a real estate transaction. Corporation B then moves to disqualify the firm in the patent litigation, relying on the cases discussed above, asserting that the firm cannot be adverse to it while simultaneously representing its new, wholly owned subsidiary, Corporation C. The firm offers to resign as real estate counsel to C, thus curing the conflict, but the general counsels of B and C refuse to accept that the firm's resignation will cure the conflict.

Applying the "hot potato" rule would result in the firm's disqualification in the patent litigation. Some courts, however, recognize an exception to the "hot potato" rule and would not disqualify the firm where the conflict has been "thrust upon" the firm by a corporate merger or acquisition, and the firm withdraws from the other representation. *See Installation Software Techs., Inc. v. Wise Solutions, Inc.*, 2004 U.S. Dist. LEXIS 3388, at *24–27, 2004 WL 524829, at *8–9 (N.D. Ill. Mar. 2, 2004); *Carlyle Towers Condo. Ass'n, Inc. v. Crossland Sav., FSB*, 944 F. Supp. 341, 349 (D.N.J. 1996); *In re Wingspread Corp.*, 152 B.R. 861, 864–65 (Bankr. S.D.N.Y. 1993); *Hawthorne Partners v. AT&T Techs., Inc.*, 1993 U.S. Dist. LEXIS 2575, at *5, 1993 WL 63003, at *2 (N.D. Ill. Mar. 1, 1993); *Gould, Inc.*, 738 F. Supp. at 1126; *Pennwalt Corp. v. Plough, Inc.*, 85 F.R.D. 264, 274 (D. Del. 1980). *See also Restatement* § 128, Comment *e*, Illustration 4, and § 132, Comment *j*. *But see GATX/Airlog Co. v. Evergreen Int'l Airlines, Inc.*, 8 F. Supp. 2d 1182, 1188 (N.D. Cal. 1998), *vacated, mandamus denied sub nom., GATX/Airlog Co. v. U.S. Dist. Court for the N. Dist. of Cal.*, 192 F.3d 1304 (9th Cir. 1999) (California federal court opined in dicta that the "thrust upon" defense established in *Gould* is probably not good law in California). The Model Rules recognize that, depending on the circumstances, a lawyer with a "thrust upon" conflict may be able to withdraw from one of the representations to avoid the conflict. *See* Model Rule 1.7, Comment [5].

Another situation where the "thrust upon" argument has been effective to avoid disqualification is where Client A creates a conflict by joining a lawsuit (represented by other counsel) adverse to Client B, which is represented by the law firm in the litigation. *See generally Ex parte AmSouth Bank, N.A.*, 589 So. 2d 715.

The "thrust upon" exception to the "hot potato" rule has been, for the most part, limited to the situations described above. *See, e.g.*, Philadelphia Opinion 2009-07 (conflict that was "entirely foreseeable" was not "thrust upon" firm). When a court believes the firm is an innocent victim of a conflict, however, it might extend the concept to other circumstances. *Commonwealth Scientific & Indus. Research Org. v. Toshiba Am. Info. Sys., Inc.*, 297 F. App'x 970, 974 (Fed. Cir. 2008), is one such example. The firm there represented Commonwealth Scientific & Industrial Research Organisation (CSIRO) in several infringement actions to enforce its patent for wireless technology against local area network (LAN) component manufacturers. While the actions were pending, another patent client advised the firm that it had agreed to indemnify several of its customers who were defendants in the CSIRO infringement suits. To remedy the conflict, the firm dropped the other client. That client then sought to intervene in two of the patent infringement cases for the purpose of seeking to stay the litigation, or in the alternative, to disqualify the firm. The court found that because the firm could not have anticipated these indemnification arrangements, the conflict was "thrust upon" the firm and should be judged under the more lenient former client conflict standard. Applying that standard, the court concluded the firm need not be disqualified.

Several courts have grappled with the difficult problem of what a lawyer with a "thrust upon" conflict should do when at least one of the clients refuses to consent to the conflict or agree to the lawyer's withdrawal. In *Ex parte AmSouth Bank*, 589 So. 2d at 718, the court declined to disqualify the firm representing the defendant when a corporate client of the firm joined the litigation as a plaintiff. It permitted the firm to resign from the corporate representation of its other client and to continue to defend its client in the litigation against the then "former" client. *Id.* In a similar situation, the court in *Installation Software Techs., Inc*, 2004 U.S. Dist. LEXIS 3388, at *26, 2004 WL 52489, at *8, refused to allow a conflicted firm to withdraw from representing the innocent plaintiff in the litigation. The court advised, however, that the firm would have to withdraw from representing its other client that had created the conflict by acquiring the defendant. *Id. See also Sumitomo Corp. v. J.P. Morgan & Co., Inc.*, 2000 U.S. Dist. LEXIS 1252, at *12–15, 2000 WL 145747, at *5 (S.D.N.Y. Feb. 7, 2000).

New York City Opinion 2005-05 (June 2005) provides a road map of how to resolve a "thrust upon" conflict situation. The opinion advises that a lawyer who believes he or she is confronted with such a conflict should apply a balancing test to decide whether withdrawal is appropriate and, if so, from which representation to withdraw. "[T]he overriding factor should be the prejudice the withdrawal or continued representation will cause the parties, including whether representation of one client over the other would give an unfair advantage to a client." Other factors the lawyer should consider are which client's conduct caused the conflict; whether either client is using the conflict as leverage in the matter; the cost and inconvenience to each client of retaining new counsel; whether the lawyer's vigor of representation would be affected in the continuing representation; and the lawyer's overall relationship to each client. The opinion cautions that if the matters are substantially related or confidential

information is involved, the lawyer's withdrawal may not cure the conflict because the continuing representation would probably result in a former client conflict. Even though this opinion is not binding on any court, it provides useful guidance for a lawyer who believes he or she has a "thrust upon" conflict. *See also* Orange County Opinion 2012-1 (lawyer may withdraw from either representation if he complies with his ethical duties of loyalty and confidentiality); District of Columbia Opinion 292 (June 15, 1999).

Sometimes when a conflict is thrust upon a lawyer, the lawyer is unable to seek consent from the client causing the conflict because the nature of the first representation is confidential. District of Columbia Opinion 356 addressed this problem, applying D.C.'s unusual thrust-upon conflicts rule. Under District of Columbia Rule of Professional Conduct 1.7(d), if a "thrust upon" conflict that is not reasonably foreseeable is not waived, the lawyer does not have to withdraw from either representation, unless a conflict also arises under another provision of the rule. Given this language, the D.C. committee concluded that a lawyer who is precluded from even seeking consent because of the confidential nature of the first representation need not withdraw from either representation. As far as we know, D.C. Rule 1.7(d) is unique. Therefore, the opinion's precedential value in other jurisdictions is limited.

A client's "creation" of a conflict may provide a reason to allow screening to cure a conflict, even in the many jurisdictions that would not otherwise allow screening. In *Gould, Inc.*, 738 F. Supp. at 1128, for example, the court required the firm to withdraw from representing the moving party and ordered the firm to establish an ethical wall to avoid imputation of the conflict.

5. Corporate Family Issues

Suppose Corporation A, a longtime firm client, asks you to represent it in a major commercial suit against Corporation B. Your conflicts investigation reveals that one of your partners is in the middle of a large real estate deal for Corporation C, a new client. Corporation C's parent is Corporation B, the prospective defendant. May your firm sue Corporation B while simultaneously representing its subsidiary, Corporation C, in an unrelated matter?

The answer will probably depend upon which jurisdiction's case law and ethics decisions apply and the particular facts involved. Comment [34] to ABA Model Rule 1.7, adopted in most jurisdictions, states:

> A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

Similarly, ABA Formal Opinion 95-390 (Jan. 25, 1995) concluded that a suit against a client's corporate affiliate does not necessarily constitute "direct" adversity under Model Rule 1.7(a)(1), and that a tribunal must examine the facts in each particular case. The opinion also advised that an agreement between a firm and a corporate client regarding which members of the corporate family should be considered "clients" of the firm for conflicts purposes should be enforced. *See also e2Interactive, Inc. v. Blackhawk Network, Inc.*, 2010 U.S. Dist. LEXIS 48333, at *24–25, 2010 WL 1981640, at *9 (W.D. Wis. May 17, 2010) (absent explicit agreement to contrary, subsidiaries of corporate clients should not be considered clients of firm); Illinois Opinion 95-15 (May 17, 1996) ("a corporate affiliation, including a majority or even sole ownership of a subsidiary, without more, does not make a client corporation's affiliate an additional client of the lawyer"); Alabama Opinion 1992-20 (Sept. 22, 1992); New York County Opinion 684 (July 8, 1991) (adopting balancing test); Maryland Opinion 87-19 (undated); *Restatement* § 121, Comment *d*. *Cf. Restatement* § 128, Comment *e*, and § 131, Comment *d*.

In contrast, some authorities have applied a bright-line rule, holding that a firm may not be adverse to an affiliate of a corporate client. *See, e.g., Gen-Cor, LLC v. Buckeye Corrugated, Inc.*, 111 F. Supp. 2d 1049, 1053–54 (S.D. Ind. 2000) (but no disqualification); *Stratagem Dev. Corp. v. Heron Int'l N.V.*, 756 F. Supp. 789, 792–93 (S.D.N.Y. 1991); *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F. Supp. 1121, 1125–26 (N.D. Ohio 1990). *See also* Massachusetts Opinion No. 92-03 (Sept. 22, 1992); *Hilton v. Barnett Banks, Inc.*, 1994 U.S. Dist. LEXIS 19444, at *9–10, 1994 WL 776971, at *3–4 (M.D. Fla. Dec. 30, 1994).

Many courts apply a factual analysis. In *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204 (2d Cir. 2010), the court considered whether, and under what circumstances, representation adverse to a client's corporate affiliate implicates the duty of loyalty owed to the client. The district court had granted the opposing party's motion for disqualification, finding that the opposing party and its parent company, which was a client of the respondent firm, were so closely related that they should be considered one entity for conflicts purposes. The Second Circuit affirmed, stating that the record established "such substantial operational commonality" between the parent company and its subsidiary that the district court's decision to treat them as one client was within its "ample discretion." *Id.* at 211.

As a starting point, the Second Circuit agreed with the ABA's position in Opinion 95-390 that affiliates should not automatically be considered one entity for conflicts purposes. The court found, however, that the affiliated companies at issue had a high degree of operational commonality. The factors supporting this conclusion included the subsidiary's reliance on the parent company for accounting, audit, employee benefits, and information technology, among other things. In addition, both companies relied on the same in-house legal department. In fact, the parent company's in-house legal department helped negotiate the agreement that was the subject of the dispute and participated in mediation efforts and hiring of outside counsel for the matter. Finally, the subsidiary was a wholly owned subsidiary of the firm's client and management in the two companies overlapped in part. Under these circumstances, allowing the firm to represent a party adverse to the subsidiary would constitute a representation of an existing client in a matter adverse to another existing client. Other courts have reached similar conclusions. *See generally Cascades Branding Innovation, LLC v. Walgreen Co.*, 2012 U.S. Dist. LEXIS 61750, 2012 WL 1570774 (N.D. Ill. May 3, 2012); *Jones v. Rabanco, Ltd.*, 2006 U.S. Dist. LEXIS 53766, 2006 WL 2237708 (W.D. Wash. Aug. 3, 2006); *JPMorgan Chase Bank ex rel. Mahonia Ltd. v. Liberty Mut. Ins. Co.*, 189 F. Supp. 2d 20 (S.D.N.Y. 2002); *Discotrade Ltd. v. Wyeth-Ayerst Int'l, Inc.*, 200 F. Supp. 2d 355 (S.D.N.Y. 2002); *Conn. Limousine, LLC v. Indus. Roofing & Paving*, 2005 Conn. Super. LEXIS 416, 2005 WL 648140 (Feb. 17, 2005).

New York City Opinion 2007-03 (Sept. 2007) provides a detailed analysis of the corporate affiliate conflict. The opinion concluded that whether a firm can undertake a representation adverse to an affiliate of a current client should be determined by a three-part test. First, the firm must determine if the affiliate is a de facto current client of the firm, which, in turn, depends upon whether the corporate client has an objectively reasonable belief that its affiliate has become a de facto firm client. That determination should be made by analyzing whether and to what extent the affiliate and current corporate client share: (1) common officers, directors, or management; (2) common offices; (3) a common legal department or general counsel; (4) common corporate services; and (5) a common infrastructure, including factors such as computer systems and health care plans. If the affiliate is a de facto client, then the firm cannot undertake a representation adverse to the affiliate without the informed consent of all affected clients.

Second, if the affiliate is not a de facto client, the firm must decide whether there is a substantial risk that its representation of either the corporate client or the new client will be materially limited by its responsibilities to the other client. If so, the firm can undertake the representation only if it determines that it can competently represent both clients and obtains informed consent from each of them. Third, even if the proposed adverse representation passes the first and second tests, the firm must determine whether it has confidential information about the current client that is so material to the new adverse engagement that it cannot represent the new client without disclosing the information.

The authorities that apply a fact-specific test differ as to which factors are important and the relative weight to be given to each. Some courts have focused on the relationship between the affiliates, applying a so-called "unity of interest" test. *Teradyne, Inc. v. Hewlett-Packard Co.*, 1991 U.S. Dist. LEXIS 8363, at *10–11, 1991 WL 239940, at *4 (N.D. Cal. June 6, 1991), was one of the first decisions adopting this approach. The court applied a qualitative test to determine if there was a unity of interest between parent and subsidiary sufficient to justify treating them as one client. Other authorities applying a unity of interest test include *Travelers Indem. Co. v. Gerling Global Reins. Corp.*, 2000 U.S. Dist. LEXIS 11639, at *14–15, 2000 WL 1159260, at *5–6 (S.D.N.Y. Aug. 14, 2000); *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, LLP*, 69 Cal. App. 4th 223, 227 (1999); *Ramada Franchise Sys., Inc. v. Hotel of Gainesville Assocs.*, 988 F. Supp. 1460, 1463–64 (N.D. Ga. 1997) (lawyer-client relationship transferred to sister corporation because of unity of interest between corporations; no disqualification because matters were not substantially related); Orange County Opinion 2012-01 (undated).

In *Certain Underwriters at Lloyd's, London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 914, 922–23 (N.D. Cal. 2003), the court held that the unity of interest test should be applied differently when analyzing current client conflicts than when former client conflicts are at issue. In a successive representation conflict, the primary concern is the duty of confidentiality owed the client, whereas in current conflict situations, the focus is on the duty of loyalty to the client. Thus, in analyzing current conflicts, the issue is whether there is a sufficient unity of interest between the affiliates such that the firm's representation in the instant case reasonably diminishes the "level of confidence and trust in counsel" held by the affiliate. *Id.* at 922. The court found the requisite diminution of trust and confidence because of two factors: (1) a relatively direct financial relationship between the affiliates; and (2) the common management and supervision of legal issues in the two suits involved. Based on this finding, it held the related companies should be treated as one entity and disqualified the firm.

Other authorities have ruled that a parent and subsidiary should be considered the same for conflicts purposes only if the two entities are true alter egos. Notably, two California courts and a California ethics committee have adopted this test. *See Apex Oil Co., Inc. v. Wickland Oil Co.*, 1995 U.S. Dist. LEXIS 6398, at *7, 1995 WL 293944, at *2 (E.D. Cal. Mar. 2, 1995); *Brooklyn Navy Yard Cogeneration Partners, L.P. v. Superior Court of Orange Cnty.*, 60 Cal. App. 4th 248, 257–58 (1997); California Opinion 1989-113 (July 6, 1990). *But see Morrison Knudsen Corp.*, 69 Cal. App. 4th at 253–54; *Certain Underwriters at Lloyd's, London*, 264 F. Supp. 2d at 922–23 (California

courts rejected alter ego test and adopted instead unity of interest test). For other cases adopting an alter ego test, *see Reuben H. Donnelley Corp. v. Sprint Publ'g & Adver., Inc.*, 1996 U.S. Dist. LEXIS 2363, 1996 WL 99902 (N.D. Ill. Feb. 29, 1996); *Gould, Inc.*, 738 F. Supp. 1122–23.

In applying any of the fact-based tests, an important factor is whether the nature of the affiliates' relationship makes it likely that the firm acquired confidential information that it could use against the affiliate. In *Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC*, 663 N.Y.S.2d 499, 500 (Sup. Ct. 1997), for example, the court held that because the firm's representation of the defendant's subsidiary had no relationship to the subject litigation and was geographically far removed in Moscow, there was no risk that the plaintiff had any confidential information regarding the defendant. The court, therefore, declined to disqualify the firm. *See also Vanderveer Grp., Inc. v. Petruny*, 1993 U.S. Dist. LEXIS 13614, at *10, 1993 WL 308720, at *3 (E.D. Pa. Aug. 13, 1993) (court should inquire into nature of information disclosed and how it might be used).

Another significant issue in some of the cases is whether the entities share the same general counsel. *See, e.g., Teryadyne*, 1991 U.S. Dist. LEXIS 8363 at *15, 1991 WL 23994, at *6 discussed above; Orange County, California Opinion 2012-01. Courts will accept the argument that a firm should not be giving advice to the general counsel on one day and opposing the same general counsel the next day, regardless of the formal distinctions among corporate clients. Firms taking a case against a party that shares an inside counsel office with a firm client in the same corporate family should assume that a conflict will be asserted and often found.

The issue of when a firm can take on a representation adverse to a corporate affiliate is a difficult one. Even if there is no direct adversity, a suit against an affiliated corporation, significant shareholder, or the like, may give rise to a material limitation conflict that violates Model Rule 1.7(a)(2), *i.e.*, it may tempt the firm to pull its punches or otherwise materially limit its representation. Thus, even if one finds no direct adversity, the situation still requires careful analysis.

Because of the uncertainty as to how a court will analyze this issue, lawyers should take steps to ensure that corporate affiliates of both the proposed adverse party and the potential client are run through the firm's conflicts database, and any potential conflicts investigated and resolved. Lawyers also should address the corporate affiliate issue in their engagement letter through a specific, prospective waiver of affiliate conflicts. In some jurisdictions, a provision in the engagement letter merely stating that corporate affiliates are not firm clients might suffice. *See e2Interactive, Inc.*, 2010 U.S. Dist. LEXIS 48333, at *6–7, 2010 WL 1981640, at *2, cited above (court held subsidiary was not firm client, noting that engagement letter excluded affiliates as clients); ABA Formal Opinion 95-390. *Cf. Avocent Redmond Corp. v. Rose Elecs.*, 491 F. Supp. 2d 1000, 1004–06 (W.D. Wash. 2007) (engagement letter language stating firm did represent corporate affiliates was held to be dispositive). *But see GSI Commerce Solutions Inc.*, cited above (language stating that firm represented only parent corporation and not its unnamed affiliates was insufficient to waive corporate affiliate conflicts).

B. Material Limitation Conflicts

1. In General

Under Model Rule 1.7(a)(2), a lawyer cannot, absent informed consent, represent a client if the lawyer's duties to another client, a former client, or a third person, or a personal interest of the lawyer create a "material limitation" on the representation. "Material limitation" conflicts present the underlying rationales for finding a conflict, but do not involve "direct adversity." Whether such a conflict exists usually depends on the likelihood and extent to which the lawyer's professional judgment in one representation will be impacted by the other representation or interest. *See, e.g., Estate of Re v. Kornstein Veisz & Wexler*, 958 F. Supp. 907, 929 (S.D.N.Y. 1997) (on motion for summary judgment, court let stand claim for breach of fiduciary duty on basis that referrals received by defendant law firm from another firm involved in same arbitration might have affected conduct of defendant firm). *See also* Model Rule 1.7, Comment [8]; *Restatement* § 121.

Material limitation conflicts arise in a variety of circumstances and can be difficult to assess. They often occur in the context of representing multiple clients in a single matter, both in litigation and in nonlitigation matters. They can also arise when a lawyer represents clients involved in different matters and in situations involving the lawyer's own interests or the interests of third parties. *See, e.g.*, ABA Formal Opinion 07-449 (Aug. 9, 2007) (representing judge and simultaneously appearing before same judge may create material limitation conflict).

2. Confidential Information Conflicts

One of the trickiest material limitation conflicts is the "confidential information conflict." The conflict develops because a lawyer in the firm obtains information from Client A that the lawyer is duty bound to keep confidential. Then, the firm learns (sometimes during conflict analysis) that this information is material to work that another lawyer in the firm is doing for Client B. If Client A declines to allow the firm to disclose or use the information for the benefit of Client B, the firm may have a confidential information conflict. That is, the lawyer representing Client A may have

a "material limitation" on the representation of Client B under Model Rule 1.7(a)(2), and if so, that conflict is imputed to all firm lawyers under Model Rule 1.10(a). *See generally Restatement* § 60.

In considering this situation, one ethics committee initially noted that the lawyer may not, without the consent of Client A, disclose or use Client A's confidential information in the representation of Client B. *See* New York City Opinion 2005-02 (Mar. 2005). The committee then explained that this creates a conflict in two situations: (1) "where the information the lawyer has … from the first representation is so material to the second representation that the lawyer cannot avoid using the information"; and (2) where the lawyer's inability to use Client A's confidential information will affect the lawyer's independent professional judgment. Whether a conflict exists in either of these situations depends upon "the totality of the circumstances," particularly the materiality of the information. This opinion rejects the proposition that the inability to disclose the information to Client B is in itself a conflict. Other authorities disagree. *See Romano v. Ficchi*, 2009 N.Y. Misc. LEXIS 1240, at *7–8, 2009 WL 1460781, at *3 (N.Y. Sup. Ct. May 22, 2009) (plaintiff can sustain claim against lawyer who failed to disclose information relevant to her representation); Kansas Opinion 03-03 (Sept. 16, 2003) (lawyer who obtained confidential information from one client that was material to representation of another client had material limitation conflict). *Cf. STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77–78 (Minn. 2002) (no duty to disclose information that was not material to representation).

In *Skidmore v. Warburg Dillon Read LLC*, 2001 U.S. Dist. LEXIS 6101, at *14, 2001 WL 504876, at *5 (S.D.N.Y. May 10, 2001), the court decided the issue based on the foreseeability of the confidential information problem. The firm had represented two former employees in separate age discrimination claims against their former employer. One of the former employees settled his claims, but the other filed an Age Discrimination in Employment Act complaint against the company. The company moved to dismiss the suit under Canon 4 of New York's Lawyer's Code of Professional Responsibility (since replaced by New York Rule of Professional Conduct 1.6), which required a lawyer to maintain client confidences, arguing that the firm would have to use confidences of its former client in representing plaintiff. After finding the company had standing to seek disqualification, the court denied the motion. The court reasoned that because both clients knew that the same firm represented them in very similar claims, they should have reasonably expected that the firm would learn facts from one that would be useful to the other's case. We believe some courts would reach a different result. *Cf. State ex rel. Verizon W. Va. Inc. v. Matish*, 740 S.E.2d 84, 93 (W. Va. 2013) (similar facts, but prior employees had entered into confidentiality agreement with company; court found that inability to disclose confidential information did not give rise to conflict because counsel could find out same information in discovery, and current employees had consented to representation); *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277, 1286–87 (Pa. 1992) (proprietary method of dealing with union rules learned from client may not be used on behalf of client's competitors).

If a firm has a confidential information conflict and its inability to use confidential information for the benefit of a client threatens to cause a problem for that client, the firm probably should withdraw from that representation, for both loss prevention and, ultimately, client relations reasons. On the other hand, if the firm determines that substitute counsel is highly unlikely to discover the secret information, and the firm believes that the client will be substantially harmed by a withdrawal, the firm may want to consider seeking client consent to continue the representation. It is not clear, however, whether confidential information conflicts are consentable. Thus, a firm may run a risk that a court or ethics committee may find fault with its conduct, even though the firm is doing what it considers to be in the best interest of its client.

3. Multiple Representation in Nonlitigation Matters

Conflicts involving multiple representations in nonlitigation matters usually occur in one of two contexts. The first is where a lawyer intentionally represents multiple clients having a common objective, such as three individuals desiring to form a partnership or corporation, each of whom will have a one-third ownership interest and equal management authority; a husband and wife who wish to construct a joint and mutually dependent family estate plan; a buyer and seller in a routine property transfer; a lender and borrower in a credit transaction who have agreed on the terms of the loan before consulting the lawyer; or a lawyer acting as intermediary to help resolve a dispute between two or more clients. The second context is where the lawyer does not intend to represent multiple parties, but one or more parties in the matter nevertheless believes the lawyer is doing so.

4. Intentional Multiple Representation.

Multiple or joint representations are subject to the prohibitions of Model Rule 1.7, and Comments [29] to [33] to that rule discuss "special considerations" in such representations. Comment [29] cautions that, in some situations, the risk that the common representation will fail is so great that the lawyer should not undertake the representation in the first place. In other situations, the lawyer can proceed only with informed consent, which, as Comment [31] makes clear, normally should include an understanding that "information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other."

One issue that sometimes arises in a multiple representation is the disclosure necessary to obtain informed consent. *See, e.g.*, Arizona Opinion 07-04 (Nov. 2007). According to the Arizona opinion, the lawyer must have a comprehensive discussion with the clients regarding the potential risks and advantages of the joint representation and then thoroughly document that disclosure. Although the precise disclosure will depend on the particular facts and circumstances, the following should be covered: (1) the conflicting or potentially conflicting interests of the other clients; (2) courses of action that may be foreclosed or limited by the joint representation; (3) the effect of the joint representation on confidentiality and the attorney-client privilege; (4) any reservations the lawyer might have about the representation if the lawyer were representing only that client; and (5) the consequences if one client later withdraws its consent to the joint representation. *See also* Alaska Opinion 2012-3 (Oct. 26, 2012) (joint representation of entity and majority shareholders); *In re Disciplinary Proceeding Against Botimer*, 214 P.3d 133, 136 (Wash. 2009) (en banc) (lawyer suspended, in part, for not obtaining written informed consent to conflicts in joint representation). Although not required by most professional conduct rules, Lawyers should request that each of the joint clients sign a written agreement documenting the disclosure and consent. And bear in mind that joint clients probably cannot agree in advance to waive the right to approve the specific terms of an aggregate settlement proposal.

When one of the joint clients revokes its consent to the multiple representation, and the joint representation agreement is silent on the issue, the lawyer may not be able to continue representing the nonrevoking client. *See* New York State Opinion 903 (Jan. 30, 2012). According to North Carolina Opinion 2007-11 (July 13, 2007), the lawyer might be able to do so if the other client revoked consent without good reason. The circumstances that should be considered include the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the expectations of the other client, and whether the lawyer's withdrawal will cause material detriment to the nonrevoking client or the lawyer. *See also Interstate Props. v. Pyramid Co. of Utica*, 547 F. Supp. 178, 182–83 (S.D.N.Y. 1982) (when one of two joint clients revoked conflict consent, court refused to disqualify firm from representing remaining client, even though circumstances were unchanged); *Restatement* § 122, Comment *f*. This does not mean that subsequently the lawyer could represent the remaining joint client against the former joint client in a substantially related matter. *See Fiduciary Trust Int'l of Cal. v. Super. Ct. of Los Angeles Cnty.*, 218 Cal. App. 4th 465, 481–82 (2013) (rejecting argument that joint confidences rule in multiple representations creates exception to prohibition on former client conflicts).

The best approach to joint representations is to specify an exit strategy in the consent agreement, so that both the lawyer and the clients will know how to proceed if one client revokes consent or the lawyer otherwise withdraws from one of the representations. New York State Opinion 903 and North Carolina Opinion 2007-11 expressly approve of this approach. As Comment [31] to Model Rule 1.7 suggests, the consent agreement also should address how confidential information will be handled, usually explaining that it will be shared with the other client(s). In most situations, the consent should provide that the lawyer may use the information even if the lawyer withdraws from representing one of the joint clients. During any joint representation, the lawyer must continue to evaluate whether additional disclosure and consents may be necessary as the representation progresses.

5. Unintentional Multiple Representation.

Conflicts arising out of unintentional multiple representations are a serious problem for lawyers, particularly in business transactions, and have resulted in a substantial number of major claims. Often, the alleged conflict was not a conflict, or if so, caused no actual harm to the plaintiff. Juries sometimes disagree, however, and the potential for an erroneous jury verdict can necessitate a substantial settlement. In many of the cases resulting in large verdicts or settlements, a good argument can be made that the jury's verdict (or a judge's decision, *e.g.*, denying summary judgment) was wrong. But that is little comfort, and these situations continue to pose significant risk.

A typical scenario is that several parties (*e.g.*, real estate developers) meet with Lawyer and ask Lawyer to document the deal that they have worked out. Lawyer has represented one of those parties before and considers that party his client. Lawyer papers the deal and later represents the client, aggressively asserting that party's rights against the other developers under the terms of the parties' agreement. The other developers suffer economic harm and sue, alleging they were also Lawyer's clients. That is, they claim Lawyer was the "lawyer for the deal" and violated Model Rule 1.7 because he did not withdraw from the representation when a conflict arose among the co-clients.

Another way an unintentional representation arises is when Lawyer starts out as counsel to a majority shareholder or general partner and then subsequently does legal work for the entity that is formed. Then, although it was apparent at the outset that Lawyer represented one party, other members of the venture claim that Lawyer's work for the venture imposed fiduciary obligations on Lawyer to protect minority members, shareholders or limited partners as well. The claim against Lawyer becomes one for breach of fiduciary obligation, as well as for "aiding and abetting" a client's wrongdoing. *See* Brenda Sapino Jeffreys, *Irate Jury Slams Gardere*, Tex. Law., Nov. 9, 1998 (in similar situation, jury reportedly returned verdict of $59.5 million against firm and partner involved). *See*

also Meredith Hobbs, *Holland & Knight's Lesson? Get a Disclaimer*, Daily Rep. (May 21, 2012) ("I'm not your lawyer" disclaimer might have prevented $34.5 million jury verdict against law firm).

Lawyers cannot stop representing clients in deals involving multiple parties, but they can try to avoid any ambiguity about lawyer-client relationships. Often, serious claims arise where there is no engagement letter, or the letter is poorly drafted. Frequently, there are no "I'm not your lawyer" letters directed to members of the venture that the lawyer did not intend to represent. Consider the following:

(i) At the outset of the representation, decide whom you represent. If that decision necessitates obtaining conflicts consents, get them.

(ii) Inform everyone involved in the transaction whom you are representing. This is not always easy. For example, how do you tell limited partners with whom you have no contact that you are not their lawyer? One possible solution is to insert the "I'm not your lawyer" disclaimer in the deal documents, such as the subscription agreement submitted to limited partners.

(iii) Explain the consequences of your decision regarding the identity of your client. For example, if you represent only the majority shareholder in organizing a corporation, explain to the minority shareholders that although you will draft operative documents, you are not representing them and if they desire legal representation, they cannot rely on you, but must hire their own counsel. Make sure they understand that the documents you prepare are intended to protect the interests of the majority shareholder, not them. If you do represent multiple organizers, explain that, under the Model Rules, if a conflict develops, and they cannot resolve it, you will have to withdraw from representing all of them unless they have consented to your continued representation of one or more of them.

(iv) In multiple representations, deal specifically with the treatment of confidential client information. Each client should agree that all material confidential information will be shared with all the joint clients, regardless of the source of that information. If the parties wish to treat confidential information differently, that may be a yellow flag that you should consider carefully in deciding whether to accept the engagement. Among other things, you should decide whether and how it will categorize and segregate information that it receives. And any agreement that material confidential information will not be shared should be clearly expressed in writing.

(v) Put it in writing! In conflict case that resulted in a seven-figure settlement, the lawyer had drafted a communication to the other person in the deal with an "I'm not your lawyer" paragraph in it. The paragraph was deleted, at the insistence of the lawyer's client, who felt it was too confrontational and would disrupt the business relationship between the co-venturers. The deal failed and the other party sued the client and the lawyer, alleging that the lawyer was the lawyer for both parties. In another case, a firm documented that it did not represent certain participants in a venture. The venture experienced problems, and the nonclient participants sued the law firm. With the benefit of specific documentation, the firm obtained summary judgment. (Later, a jury returned a seven-figure verdict against other defendants in the case.) *Rosenbaum v. White*, 692 F.3d 593, 600–01 (7th Cir. 2012) is another case where the Seventh Circuit held that similar language protected the firm. The court found that a disclaimer in a private placement operating agreement stating that the investors had the opportunity to review the agreement with their own counsel alerted the investors that the firm that drafted the agreement did not represent them.

(vi) If you have carefully structured your representation to comply with the conflicts rules (*e.g.*, by representing the corporation and not the individuals), do not change your actions in midstream (*e.g.*, by working to advantage one constituent).

(vii) Study the law in your jurisdiction to determine if it may impose an unwanted lawyer-client relationship upon you. With respect to questions of state law involving partnerships and close corporations, it is important to stay current to accurately determine who is your client, or what you have to do to prevent someone from becoming your client.

Following these guidelines is no guarantee you will not be sued, but if you have carefully documented your relationships, and avoided representing allegedly conflicting interests, defending a malpractice case will be far less difficult, and the ultimate result is likely to be more acceptable.

6. "Joint Confidences" Rule

When a lawyer represents multiple parties, an important principle known as the "joint confidences", or "co-client" rule comes into play. According to this rule, unless the clients agree otherwise, there is no attorney-client privilege, and no confidentiality obligation on the part of the lawyer, between and among clients jointly represented by the same lawyer in a common enterprise with respect to all matters relating to that enterprise. *See Restatement* § 75; Model Rule 1.7, Comment [31]. *See also Brennan's, Inc. v. Brennan's Rests., Inc.*, 590 F.2d 168, 171–72 (5th Cir. 1979); *Allegaert*, 565 F.2d 246; *Alexander v. Superior Court*, 685 P.2d 1309, 1314 (Ariz. 1984) (en banc); Massachusetts Opinion 09-03 (Jan. 15, 2009); Maryland Opinion 2006-15 (May 5, 2006). *Cf. Roush v. Seagate Tech., LLC*, 150 Cal. App. 4th 210, 224–25 (2007) (rule inapplicable where clients not true joint clients). Of course, the normal attorney-client privilege and confidentiality obligation apply outside the joint client group. The effect of the joint confidences rule is that, if one of the clients suddenly discloses to the lawyer that he has done or intends to do something that might adversely affect the others, the lawyer not only is permitted, but is probably required, to disclose that information to the others in the joint client group. Failure to disclose could make the lawyer liable to the party who was entitled to receive the disclosure.

The ABA Ethics Committee and several state bar ethics committees have taken a contrary view, advising that a lawyer representing joint clients must maintain the confidences of each client. *See* ABA Formal Opinion 08-450 (Apr. 9, 2008) (*but see* Massachusetts Opinion 09-03 (limiting this ABA opinion)); District of Columbia Opinion 296 (Feb. 15, 2000) (*but see* District of Columbia Rule of Professional Conduct 1.7, Comment [16]); Florida Opinion 95-04 (May 30, 1997). These authorities further hold that the prohibition against disclosing the confidences creates a Rule 1.7(a)(2) conflict between the clients, and the lawyer must withdraw from one or both representations. New York City Opinions 1986-02 (Apr. 30, 1986) and 1994-10 (Oct. 21, 1994) address the disclosure obligations regarding wrongdoing in a New York limited partnership.

This is a difficult and common problem in a joint representation. Lawyers should be able to avoid it by complying with the direction in Comment [31] to Model Rule 1.7 to reach a specific understanding with all of the joint clients at the outset that secrets of any one of them relevant to the common enterprise will be disclosed to the others. *See An Unnamed Att'y v. Ky. Bar Ass'n*, 186 S.W.3d 741, 742–43 (Ky. 2006) (private reprimand of lawyer upheld because he failed to explain to joint clients whether information would be shared). *See generally* John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. Ill. L. Rev. 741, 803-14 (1992); Hazard and Hodes § 11.15; *Restatement* § 60, Comment *l*; *Restatement* § 75, Comment *d*. *Cf.* District of Columbia Opinion 327 (Mar. 2005) (where joint clients agree that confidential information provided by any one of them "may" be shared with others, lawyer who learns confidential information from one joint client must disclose information to others). If any one of them refuses to agree to that disclosure stipulation, it is a signal that group harmony is fragile, and the lawyer probably should not undertake the joint representation. *See* Model Rule 1.7, Comment [16].

ABA Formal Opinion 08-450, however, presents some risk that such an agreement will not be upheld. The ABA Committee expressed strong doubt about whether co-clients can consent to their lawyer sharing information divulged by any one of them, reasoning that in such situations, where the agreement is made before the lawyer understands the facts giving rise to the conflict, disclosure is always inadequate. Opinion 08-450 dealt with an insurance defense situation where the firm represented an employer and its presumably unsophisticated employee. Its conclusion should be limited to that situation. Nevertheless, in a jurisdiction with no other authority on point, there is a risk that a trial judge will follow the ABA opinion.

C. Organizational Conflicts

1. In General

"Organizational conflicts" arise because in an organization, there are inherently multiple interests. To eliminate what would otherwise be probably unwaivable conflicts, the "entity" theory deems there to be only one interest and then concludes that only certain people get to define that interest. *See Restatement* § 131, Comment *b*. Most problems in this area arise when there are disputes within the organization or when the lawyer is asked to take on a matter against a constituent of the organization.

Model Rule 1.13 addresses several issues involved in representing organizational clients. Rule 1.13(a) makes clear that the lawyer retained by an organization represents the organization, not the constituents (*e.g.*, directors and officers). Rules 1.13(b) and (c) deal with the lawyer's rights and obligations if the lawyer learns of wrongdoing within the organization that is likely to result in substantial injury to the organization. These provisions impose up-the-line reporting duties on lawyers with respect to organizational clients like the reporting duties of lawyers for public companies imposed by the Sarbanes-Oxley Act of 2002.

Model Rule 1.13(f) embodies the civil counterpart of the "Miranda Warning":

> In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Rule 1.13(f) is premised upon the practical notion that during an organizational representation, the constituents of the organization may become confused about the duties the lawyer owes to them. Whenever the organization and a constituent may become adverse, and there is a danger that the constituent may erroneously assume or believe that the lawyer is looking after the constituent's interests or has duties of confidentiality and loyalty to the constituent, the lawyer must warn the constituent that the lawyer's allegiance is to "the company." Comments [10] and [11] to Model Rule 1.13 expand on this theme:

> [10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.
>
> [11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

See also Hazard and Hodes § 17.13; *Restatement* § 131, Comment *e*. *Pacific Dunlop Holdings, Inc. v. Barosh*, 1993 U.S. Dist. LEXIS 955, at *10–13, 1993 WL 22688, at *3–4 (N.D. Ill. Jan. 29, 1993), *rev'd on other grounds*, 22 F.3d 113 (7th Cir. 1994), provides an example of a firm that complied with the above, and thereby avoided disqualification.

2. General Partnerships.

May the lawyer for a general partnership sue one of the partners on behalf of another client in an unrelated matter? The answer depends upon whether the lawyer represents only the partnership entity, or, alternatively, represents the entity and the individual partners.

ABA Formal Opinion 91-361 (July 12, 1991) unequivocally adopted an entity analysis and advised that a lawyer for a general partnership is not thereby a lawyer for the partners. The Fifth Circuit followed that analysis in *Hopper v. Frank*, 16 F.3d 92, 96–97 (5th Cir. 1994). *See also Richter v. Van Amberg*, 97 F. Supp. 2d 1255, 1263 (D.N.M. 2000); *Responsible Citizens v. Superior Court of Fresno Cnty.*, 16 Cal. App. 4th 1717, 1728–29 (1993); *Greate Bay Hotel & Casino,* 624 A.2d at 106–07 (lawyers for business trust could be adverse to one of trustees); California Opinion 1994-137 (undated); Virginia Opinion 1458 (May 11, 1992); *Cacciola v. Nellhaus*, 733 N.E.2d 133, 137 (Mass. App. Ct. 2000) (lawyer for partnership does not represent individual partners, but may owe them fiduciary duty).

In contrast, the Indiana Supreme Court declined to adopt ABA Formal Opinion 91-361 in *Rice v. Strunk*, 670 N.E.2d 1280 (Ind. 1996). It concluded that where a partnership is subject to the Uniform Partnership Act (UPA), and the partnership is managed by all of the general partners, the lawyer for the partnership has a lawyer-client relationship with each of the general partners (as well as the partnership). The court went on to hold, however, that the UPA could be superseded where the partners structured the partnership so that its management was delegated to fewer than all the partners. *Id.* at 1288–89. In that situation, the lawyer-client relationship would run only to the partnership as an entity and not to any particular partner. The court warned that even under these circumstances, a lawyer-client relationship can exist with an individual partner if the specific circumstances indicate that the lawyer affirmatively assumed the representation of a partner. *See also Al-Yusr Townsend & Bottum Co., Ltd. v. United Mid East Co., Inc.*, 1995 U.S. Dist. LEXIS 14622, at *13–16, 1995 WL 592548, at *4–6 (E.D. Pa. Oct. 3, 1995) (lawyer for joint venture represented venturers because he had discussed confidential matters with them); *Franklin v. Callum*, 804 A.2d 444, 448 (N.H. 2002) (lawyer for joint venture represented each venturer); *Dembitzer v. Chera*, 728 N.Y.S.2d 78 (App. Div. 2001) (plaintiff's lawyers disqualified because defendant was general partner of partnership represented by lawyers); *Chaiklin v. Bacon*, 2000 Conn. Super. LEXIS 1729, at *11–13 (June 30, 2000) (lawyer who represented limited liability company that was similar to partnership also represented company's principals); *Sec. Bank v. Klicker*, 418 N.W.2d 27, 30 (Wis. Ct. App. 1987) (whether lawyer-client relationship existed with individual partners was question of fact).

Connecticut Informal Opinion 93-13 (Apr. 26, 1993) went further, declaring that a lawyer may not rely on ABA Formal Opinion 91-361 and oppose a partner when the lawyer took no steps at the outset of the representation to make clear to the partner that the lawyer would be representing only the partnership.

A different issue is whether a lawyer who represents a partnership may represent the majority of the partners against an unhappy partner who allegedly breaches some duty to the group. Here there may be a greater tendency to see the lawyer as taking sides among individuals rather than as a neutral advocate for the entity. In *Griva v. Davison*, 637 A.2d 830 (D.C. 1994), for example, a lawyer attempted to represent two of three partners of a general partnership and the partnership in a matter adverse to the third partner. The court ruled that because the third partner had a veto power over partnership action, the lawyer could not represent the first two partners and the partnership without the third partner's consent.

3. Limited Partnerships.

Suppose Lawyer represents the general partner of a limited partnership and also does legal work for the partnership. One of the limited partners sues either the general partner or the partnership, or both. The general partner asks Lawyer to handle the defense of the suit. The limited partner moves to disqualify Lawyer, contending that because Lawyer represented the general partner and the partnership, Lawyer also represented the limited partners or, at the very least, had a fiduciary or similar relationship with the limited partners preventing Lawyer from being adverse to them.

There is a split of authority over the extent to which Lawyer has a client or other fiduciary relationship that prevents Lawyer from taking a position adverse to a limited partner. In *Roberts v. Heim*, 123 F.R.D. 614, 622–23 (N.D. Cal. 1988), the court held that, at least for discovery purposes, counsel for the limited partnership was also counsel for the limited partners. *See also Johnson v. Superior Court of San Diego Cnty.*, 38 Cal. App. 4th 463, 476–77 (1995) (listing factors that determine whether partnership's lawyer also represents individual partners); *Wortham & Van Liew v. Superior Court of San Diego Cnty.*, 188 Cal. App. 3d 927, 932–33 (1987). *But see Quintel Corp., N.V. v. Citibank, N.A.*, 589 F. Supp. 1235, 1241–42 (S.D.N.Y. 1984) (lawyer for general partner had no fiduciary duty to limited partners who were represented by their own lawyer); *Ferguson v. Lurie*, 139 F.R.D. 362, 368 (N.D. Ill. 1991) (communications between general partners and their lawyers were privileged and, therefore, not discoverable by limited partners).

4. Close Corporations.

Conflicts involving representation of close corporations and/or principals of those corporations have been a significant problem lawyers and law firms. Under Model Rule 1.13(a), a lawyer for a corporation can represent the entity in a matter adverse to one of its constituents. The situation is not so clear in the case of close corporations, and the decisions are more varied. The cases and opinions have arisen primarily in two contexts: (1) a shareholder or other constituent sues a close corporation's lawyer for malpractice; and (2) a shareholder or other constituent seeks to disqualify a close corporation's lawyer for being adverse to the shareholder.

In the malpractice context, the general rule is that shareholders of a close corporation do not have standing to sue the corporation's lawyer for malpractice because the lawyer represented the corporation, not the shareholders. *See Mansergh v. Daigneault*, 2003 Cal. App. Unpub. LEXIS 100, at *10–11, 2003 WL 42554, at *14 (not citable) (Jan. 7, 2003); *Holmes v. Winners Entm't, Inc.*, 531 N.W.2d 502, 505 (Minn. Ct. App. 1995); *Brennan v. Ruffner*, 640 So. 2d 143, 145–46 (Fla. Dist. Ct. App. 1994) (only three shareholders); *Bowen v. Smith*, 838 P.2d 186, 189–90 (Wyo. 1992), *overruled on other grounds by Bevan v. Fix*, 42 P.3d 1013 (Wyo. 2002) (unclear how many shareholders; may not be "close" corporation); *Hager-Freeman v. Spircoff*, 593 N.E.2d 821 (Ill. App. Ct. 1992) (generally there is no lawyer-client relationship, but finding sufficient additional facts for case to proceed against lawyer); *Skarbrevik v. Cohen, England & Whitfield*, 231 Cal. App. 3d 692, 701–02 (1991); *TJD Dissolution Corp. v. Savoie Supply Co., Inc.*, 460 N.W.2d 59, 63 (Minn. Ct. App. 1990); *Goerlich v. Courtney Indus., Inc.*, 581 A.2d 825, 827–28 (Md. Ct. Spec. App. 1990); *Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings & Berg, P.C.*, 541 N.E.2d 997, 1001 (Mass. 1989); *Felty v. Hartweg*, 523 N.E.2d 555, 556 (Ill. App. Ct. 1988); *Egan v. McNamara*, 467 A.2d 733, 738–39 (D.C. 1983); *Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*, 309 N.W.2d 645, 648 (Mich. Ct. App. 1981) (but lawyer owes fiduciary duty to shareholder); *Hile v. Firmin, Sprague & Huffman Co., L.P.A.*, 595 N.E.2d 1023, 1025–26 (Ohio Ct. App. 1991) (directors of close corporation could not sue corporation's lawyer for malpractice because lawyer did not represent them). *See also Goeth v. Craig, Terrill & Hale, L.L.P.*, 2005 Tex. App. LEXIS 2815, at *12–20, 2005 WL 850349, at *5–6 (Apr. 14, 2005) (although law firm represented corporation and its shareholders, shareholders did not have standing to bring suit against lawyer for malpractice that injured corporation).

Where there were special circumstances, however, including the fact that the lawyer had previously represented the complaining shareholders, the shareholders of a close corporation have been held to have standing to sue the corporation's lawyer. *See Sickler v. Kirby*, 805 N.W.2d 675, 692 (Neb. Ct. App. 2011); *Neuffer v. Pelavin & Powers, P.C.*, 2001 Mich. App. LEXIS 2478, at *2–3, 2001 WL 1324704, at *1 (Oct. 26, 2001); *Meyer v. Mulligan*, 889 P.2d 509, 515 (Wyo. 1995); *Opdyke v. Kent Liquor Mart, Inc.*, 181 A.2d 579, 584–85 (Del. 1962).

Similarly, the disqualification cases generally hold that a close corporation's lawyer does not represent the shareholders. Thus, they have refused to disqualify the lawyer for being adverse to a shareholder. *See generally*

Nadherny v. Roseland Prop. Co., Inc., 2002 U.S. Dist. LEXIS 20760, 2002 WL 31426748 (D. Mass. Oct. 29, 2002); *McKinney v. McMeans*, 147 F. Supp. 2d 898 (W.D. Tenn. 2001); *Corresp. Servs. Corp. v. J.V.W. Inv. Ltd.*, 2000 U.S. Dist. LEXIS 11881, 2000 WL 1174980 (S.D.N.Y. Aug. 16, 2000); *In re Tetzlaff*, 31 B.R. 560 (Bankr. E.D. Wis. 1983); *Bobbitt v. Victorian House, Inc.*, 545 F. Supp. 1124 (N.D. Ill. 1982); *Wayland v. Shore Lobster & Shrimp Corp.*, 537 F. Supp. 1220 (S.D.N.Y. 1982); *Rabb v. Tuthill*, 2012 Mass. Super. LEXIS 287, 2012 WL 5508384 (Nov. 8, 2012); *Mayer-Wittmann Joint Ventures, Inc. v. Gunther Int'l, Ltd.*, 1994 Conn. Super. LEXIS 1507, 1994 WL 271795 (June 6, 1994); *McCarthy v. John T. Henderson, Inc.*, 587 A.2d 280 (N.J. Super. Ct. App. Div. 1991); *Terre Du Lac Prop. Owners' Ass'n, Inc. v. Shrum*, 661 S.W.2d 45 (Mo. Ct. App. 1983). In *Carlson v. Fredrikson & Byron, P.A.*, 475 N.W.2d 882, 890–91 (Minn. Ct. App. 1991), *overruled on other grounds by Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406 (Minn. 1994), the court held that representing a party in a matter where the adverse party was a director of a corporate client of the firm did not create an impermissible conflict. *But see Manoir-Electroalloys Corp. v. Amalloy Corp.*, 711 F. Supp. 188, 192–94 (D.N.J. 1989) (stating in dicta that firm could not be adverse to corporation where firm represented corporation's president on unrelated matters and where charges made by firm's client in litigation would have adverse effect on president).

In contrast, the following courts disqualified a close corporation's lawyer because the lawyer was adverse to a shareholder or other constituent. *See generally Rosman v. Shapiro*, 653 F. Supp. 1441 (S.D.N.Y. 1987); *Bd. of Managers of Eleventh Street Loftominium Ass'n v. Wabash Loftominium, L.L.C.*, 876 N.E.2d 65 (Ill. App. Ct. 2007); *Flores v. Willard J. Price Assocs., LLC*, 799 N.Y.S.2d 43 (App. Div. 2005); *Applebaum v. Verndale Corp.*, 2002 Mass. Super. LEXIS 263, 2002 WL 1917262 (Aug. 19, 2002) (lawyer for close corporation owes fiduciary duty to minority shareholder); *Detter v. Schreiber*, 610 N.W.2d 13 (Neb. 2000); *Margulies*, 696 P.2d 1195; *In re Bowman Trading Co., Inc.*, 471 N.Y.S.2d 289 (App. Div. 1984); *Woods v. Superior Court of Tulare Cnty.*, 149 Cal. App. 3d 931 (1983). *See also Eternal Pres. Assocs., LLC v. Accidental Mummies Touring Co., LLC*, 759 F. Supp. 2d 887, 894 (E.D. Mich. 2011) (corporation's lawyer may owe duties to shareholders); *Patrick v. Ressler*, 2001 Ohio App. LEXIS 4403, at *7–9, 2001 WL 1142357, at *3 (Sept. 28, 2001) (same). In these cases, however, there were usually additional circumstances present (*e.g.*, the shareholder may have been a former client of the lawyer or may have disclosed confidences to him during his representation of the corporation).

Most state ethics opinions that have addressed the issue follow the general rule imposing no lawyer-client relationship. District of Columbia Opinion 216 (Jan. 15, 1991) found the lawyer for a close corporation could be adverse to a bank that was a 50% shareholder of the corporation. Likewise, Virginia Opinion 1517 (Apr. 12, 1993) advised that a lawyer for a corporation owned equally by two shareholders could be adverse to one of the shareholders provided the lawyer had never represented, or obtained confidences from, that shareholder. *Accord* Alaska Opinion 2012-3 (Oct. 26, 2012) (must analyze lawyer's dealings with shareholders to determine whether attorney-client relationship exists); Texas Opinion 564 (Oct. 2005); California Opinion 1999-153 (undated); Oregon Opinion 2005-85 (Aug. 2005) (representation of corporation with only two shareholders does not automatically constitute representation of shareholders). *But see* Rhode Island Opinion 93-58 (Oct. 5, 1993) (lawyer could not represent majority shareholder and corporation against only other shareholder without latter's consent); *In re Brownstein*, 602 P.2d 655, 657 (Or. 1979) (disciplinary case where court held that representation of close corporation constitutes representation of shareholders unless other arrangements have been made) (distinguished and narrowed in *In re Conduct of Kinsey*, 660 P.2d 660 (Or. 1983)); *In re Banks*, 584 P.2d 284, 289–90 (Or. 1978) (same).

South Carolina Opinion 91-24 (Oct. 1991) involved a lawyer representing a limited partnership who inquired whether he could ethically take a case in which the adverse party was a corporation 95% owned by a general partner of the limited partnership. The opinion noted only that an impermissible conflict was "likely" and discussed several of the authorities cited in this section. *See also* the discussion of ABA Formal Opinion 95-390 above.

III. Former Client Conflicts

A. Same or Substantially Related Matter Conflicts

1. Former Client Rule

Suppose Lawyer represented Client A in the negotiation and execution of a contract with B. Shortly after, A discharged Lawyer. Five years later, C comes to Lawyer and asks Lawyer to file an action against A, claiming that the contract that Lawyer worked on violates the antitrust laws. Lawyer files the action, and A's new counsel moves to disqualify Lawyer, claiming that the new action is substantially related to Lawyer's 2006 representation of A. Will Lawyer be disqualified?

Lawyers are frequently asked to represent a client who is adverse to a former client of the firm. Model Rule 1.9(a) addresses whether a firm should take on such a representation:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially

> adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

In the hypothetical above, a lawyer-client relationship existed with former Client A, and the former representation and the current matter are substantially related, and the client's interests are materially adverse. Under the former client rule, A's motion is likely to be granted. *See, e.g., NCK Org. Ltd. v. Bregman*, 542 F.2d 128, 132–33 (2d Cir. 1976).

Model Rule 1.9(a) specifically provides that this conflict can be cured by informed consent from the former client, confirmed in writing. In contrast, Section 132 of the *Restatement*, and the professional conduct rules in effect in several states, require that the lawyer obtain consent from both the current and former clients. *See, e.g.*, Virginia Rule of Prof'l Conduct 1.9(a); Oregon Rule of Prof'l Conduct 1.9(a). Regardless of whether state professional conduct rules require it, the better course is to obtain the consent of both the current and former clients.

According to one court, the former client conflict rule can apply even if the former client is deceased. In *In re Conduct of Hostetter*, 238 P.3d 13, 18 (Or. 2010), the court found that the rule applies if the deceased client's interests survive the client's death, and the interests are adverse to the client the lawyer is currently representing. According to the court, this decision is a case of first impression in any jurisdiction.

2. Are the Matters "Substantially Related" and the Interests "Materially Adverse?"

a. "Substantially Related."

The meaning of the term "substantially related" has been the subject of a great deal of litigation, and courts have defined the term in various ways. *Compare Rogers v. Pittston Co.*, 800 F. Supp. 350, 353 (W.D. Va. 1992), *aff'd*, 996 F.2d 1212 (4th Cir. 1993) (substantially related means "identical" or "essentially the same"), *with Phillips v. Haidet*, 695 N.E.2d 292, 296 (Ohio Ct. App. 1997) (substantial relationship requires "commonality of issues"). *See also Atlantic City v. Trupos*, 992 A.2d 762, 774–75 (N.J. 2010) (discussing various interpretations); *S.D. Warren Co. v. Duff-Norton*, 302 F. Supp. 2d 762, 768–70 (W.D. Mich. 2004) (same). The difficulty in applying the term is illustrated in *Williams v. Bell*, 793 So. 2d 60, 6139 (Miss. 2001), where a fractured Mississippi Supreme Court held that litigation and a property transfer made in contemplation of that litigation were not substantially related matters. Three judges dissented, concluding that the matters were substantially related. *See id.* at 614.

Often the substantial relationship test depends upon whether the firm could have acquired any confidential information during the earlier representation that could be used against the former client in the subsequent representation. *See, e.g., Kaselaan & D'Angelo Assocs., Inc. v. D'Angelo*, 144 F.R.D. 235, 241 (D.N.J. 1992); *People v. Frisco*, 119 P.3d 1093, 1096 (Colo. 2005) (en banc); *State ex rel. Wal-Mart Stores, Inc. v. Kortum*, 559 N.W.2d 496, 501 (Neb. 1997). *But see In re Meridian Auto. Systems-Composite Operations, Inc.*, 340 B.R. 740, 747–48 (Bankr. D. Del. 2006) (substantial relationship test may be satisfied even if no confidential information acquired). Comment [3] to Model Rule 1.9 makes this test part of the definition of "substantially related." It provides:

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

See also Restatement § 132, Comment *d*.

Normally, in determining whether there is a substantial risk that the lawyer learned confidential information from the former client that could be used against it in the new matter, the former client should not be required to reveal what specific information it disclosed. *See* Model Rule 1.9, Comment [3]. Rather, the court should "examine whether there is a substantial risk that confidential information as would normally or typically have been obtained" in the prior representation would materially aid the adverse party in the new representation. *See Bowers v. Ophthalmology Grp.*, 733 F.3d 647, 653 (6th Cir. 2013). *See also Koch v. Koch Indus.*, 798 F. Supp. 1525, 1536 (D. Kan. 1992).

If circumstances make it likely that the lawyer's current client knows the confidential information that the former client disclosed to the lawyer, the substantially related standard may not be satisfied. *See Unanue*, 2004

Del. Ch. LEXIS 37, at *29, 2004 WL 602096, at *8 (no disqualification where lawyer could not have confidential information that new client also did not have). *See also* Comment [3] ("Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying."). *But see Knight v. Ferguson*, 149 Cal. App. 4th 1207, 1213–14 (2007) (defendants' lawyer disqualified even though defendants had learned the confidential information their lawyer allegedly possessed).

In *Jessen v. Hartford Casualty Ins. Co.*, 111 Cal. App. 4th 698 (2003), the court discussed the meaning of "substantial relationship" at great length and held that if the relationship between the lawyer and the former client was direct, meaning the lawyer personally provided legal advice to the client, the court should presume the lawyer acquired confidential information. If the relationship was indirect, the court would need to examine the nature of the relationship carefully. The court also articulated a broad standard for determining when matters are substantially related: "when the evidence before the trial court supports a rational conclusion that information material to the evaluation, prosecution, settlement or accomplishment of the former representation given its factual and legal issues is also material to the evaluation, prosecution, settlement or accomplishment of the current representation given its factual and legal issues." 111 Cal. App. 4th at 713.

Comment [3] to Model Rule 1.9 states that the passage of time may be a relevant factor in determining whether two representations are substantially related. In *Niemi v. Girl Scouts of Minn. and Wis. Lakes and Pines*, 768 N.W.2d 385, 391–92 (Minn. Ct. App. 2009), a Minnesota court refused to find that two representations were substantially related because they occurred 25 years apart. Other courts, however, have held representations to be substantially related even though they occurred many years apart. In *EON Corp. IP Holdings LLC v. Flo TV Inc.*, 2012 U.S. Dist. LEXIS 136388, at *14–15, 2012 WL 4364244, at *5 (D. Del. Sept. 24, 2012), the court disqualified the law firm representing defendant because it had represented plaintiff's parent company 17 years earlier, finding the matters were substantially related despite the passage of time. *See also HealthNet, Inc. v. Health Net, Inc.*, 289 F. Supp. 2d 755, 760 (S.D.W. Va. 2003) (similar). In *Madison 92nd St. Assoc., LLC v. Marriott Int'l, Inc.*, 2013 U.S. Dist. LEXIS 160290, at *31–33, 2013 WL 5913382, at *11 (S.D.N.Y. Oct. 31, 2013), the court found adverse representations that occurred 10 years apart to be substantially related and sanctioned the firm for failing to identify the conflict. *See also Fallacaro v. Fallacaro*, 1999 Conn. Super. LEXIS 947, at *9–10, 1999 WL 241743, at *4 (Apr. 6, 1999) (representations were substantially related even though 11 years had elapsed between them).

Model Rule 1.2(c) permits a lawyer to limit the scope of a representation where the limitation is reasonable and the client gives informed consent. Theoretically, a lawyer could limit the scope of a new representation to a particular legal issue or a defined stage in the proceedings so as to avoid a substantial relationship with a prior representation. At least one ethics authority has validated this approach under certain circumstances. *See* District of Columbia Opinion 343 (Feb. 2008). Limiting the scope of a representation so as to accept a new engagement that otherwise would create a former client conflict, however, should be done only with the prior approval of the firm's loss prevention partner or ethics committee. Under most circumstances, it likely will be difficult to successfully limit the representation and thereby avoid a conflict.

b. "Materially Adverse."

Whether the party represented in the new matter is "materially adverse" to the former client has not been the subject of much dispute because normally the parties are adverse in litigation and the requirement is easily satisfied. In a nonlitigation context, however, material adversity can be difficult to determine. According to ABA Formal Opinion 99-415 (Sept. 8, 1999), material adversity is similar to direct adversity.

Simpson Performance Products, Inc. v. Robert W. Horn, P.C., 92 P.3d 283 (Wyo. 2004), is one of the few cases that has specifically considered the meaning of "materially adverse." A lawyer sued Simpson Performance Products, Inc. (SPP) for unpaid fees, and SPP argued that the lawyer should be required to forfeit the fees because his subsequent representation of another client was materially adverse to SPP and therefore violated Wyoming Rule 1.9. The issue on appeal was whether the lawyer's representation of the other client was "materially adverse" to SPP's interests. SPP argued that the requirement was met because if the other client's lawsuit was successful, SPP's relationship with its major customer would be damaged. The court held that determining whether the standard is met requires a factual analysis as to "whether the current representation may cause legal, financial, or other identifiable detriment to the former client." 92 P.3d at 288. The court also considered whether the lawyer's duties of loyalty and confidentiality to SPP were affected. The court found no evidence of any harm to SPP's relationship with its customer or that the lawyer compromised his duties to SPP, and therefore concluded there was no Rule 1.9 violation. *See also FMC Techs.*, 420 F. Supp. 2d 1153, 1159 (representation in which lawyer was to cross-examine former client was "materially adverse" to former client); *Selby v. Revlon Consumer Prods.*, 6 F. Supp. 2d 577, 581 (N.D. Tex. 1997) (representation was "materially adverse" to former client whose testimony could expose her to defamation claims).

In Los Angeles County Opinion 513 (July 18, 2005), a lawyer asked whether he might continue representing the defendant in a medical malpractice action after the plaintiff designated one of the lawyer's former clients as an expert witness. The expert witness was a doctor the lawyer had represented 20 years earlier. In analyzing whether

the representation was barred by California's former client conflict rule, the committee concluded that "material adversity" does not require formal adversity, but means any context in which the former client's interest in confidentiality is threatened by the lawyer's new employment. The committee determined that the situation under review satisfied that requirement.

3. When Does a Current Client Become a Former Client?

Assume your firm has represented Client A sporadically for the past five years in a variety of small transactional matters. Your firm has done no work for A for the past six months and has had no contact with A during that period, except to send A letters seeking payment of overdue fees. Now, one of your firm's best clients has asked you to represent it in a major suit against A. The suit is not substantially related to your work for A, and your firm does not possess any confidential client information from A related to the new suit. Can you undertake this representation?

The issue is whether A is a current, or former, client of your firm. If A is a current client, Model Rule 1.7 requires you to obtain A's informed consent before accepting the representation of a client that is "directly adverse" to A. If A is a former client, no consent is required because Model Rule 1.9 prohibits representations adverse to former clients only when the matters are "substantially related." Terminating A in an attempt to turn A into a former client so that you can accept the adverse representation is unlikely to remedy the conflict.

The issue of when a party becomes a "former" client is not easy, particularly if the firm has not sent a "close-out" letter to the client. Often the question the court or ethics committee focuses on is whether the client reasonably believed that it was still a current client. *See, e.g., Roderick v. Ricks*, 54 P.3d 1119, 1125–26 (Utah 2002). Where the status of the lawyer-client relationship is ambiguous, courts frequently blame the lawyer for the ambiguity and hold that the client should be considered a "current" client. *See, e.g., SWS Fin. Fund A v. Salomon Bros. Inc.*, 790 F. Supp. 1392, 1398 (N.D. Ill. 1992); *Int'l Bus. Machs. Corp.*, 579 F.2d at 282–83. The hypothetical above illustrates this principle.

Jones v. Rabanco, Ltd., 2006 U.S. Dist. LEXIS 53766, at *1–2, 2006 WL 2237708, at *1, is an extreme example of a firm's failure to clarify client status being construed against the firm and leading to its disqualification. Plaintiffs' firm had represented the defendant in an unrelated matter that settled years earlier and had not had any contact with the defendant for three years. Nevertheless, the court held the defendant was still a current client of the firm and disqualified it from representing plaintiffs because: (1) the settlement agreement resolving the earlier matter provided that copies of future communications regarding the agreement should be sent to the law firm; (2) the firm had not closed its file on the defendant's matter; and (3) the firm was paying to store 49 boxes of the defendant's documents in an off-site storage facility. In reaching its decision, the court relied on Comment [4] to Model Rule 1.3, which states, in part:

> If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

Numerous other courts have found for the client in cases where client status was ambiguous. *See, e.g., Metro. Life Ins. Co. v. Guardian Life Ins. Co. of Am.*, 2009 U.S. Dist. LEXIS 42475, at *10–12, 2009 WL 1439717, at *4 (no ongoing matters, but no close-out letter); *Oxford Sys., Inc. v. CellPro, Inc.*, 45 F. Supp. 2d 1055, 1065 (W.D. Wash. 1999) (law firm had represented defendant over a 13-year period, it was the only firm defendant used in Washington state, and firm had represented defendant as recently as 11 months prior); *Mindscape, Inc.*, 973 F. Supp. at 1132–33 (firm had power of attorney to protect plaintiff's patent interests, had corrected a mistake on one of the patents, and had not told plaintiff it was no longer client); *Research Corp. Techs., Inc. v. Hewlett-Packard Co.*, 936 F. Supp. 697, 701 (D. Ariz. 1996) (recent minor contact made defendant current client of plaintiff's firm); *Shearing v. Allergan, Inc.*, 1994 U.S. Dist. LEXIS 21680, at *5–6, 1994 WL 382450, at *2 (D. Nev. Apr. 4, 1994) (firm had represented adverse party for more than 10 years, but most recent matter had concluded year prior); *SWS Fin. Fund A*, 790 F. Supp. at 1398 (no billable work for many months, but series of informal contacts); *Manoir-Electroalloys Corp.*, 711 F. Supp. 188, 190 (probate client whose will was in firm's vault and who had made appointment to update will was current client); *Ferguson Elec. Co., Inc. v. Suffolk Constr. Co., Inc.*, 1998 Mass. Super. LEXIS 289, at *7–8, 1998 WL 140101, at *3 (Mar. 20, 1998) (even though firm had completed its work, plaintiff was still current client because firm had not notified plaintiff its work was complete, language of engagement letter did not limit scope of representation, and engagement letter addressed only plaintiff's, not firm's, right to terminate lawyer-client relationship). *Cf. Unanue*, 2004 Del. Ch. LEXIS 37, at *17–19, 2004 WL 602096, at *4–5 (unclear whether representation had ended because firm had failed to clearly terminate relationship and return client documents).

There are, of course, limits as to how far this "rule of ambiguity" will stretch. In *Heathcoat v. Santa Fe Int'l Corp.*, 532 F. Supp. 961, 963–64 (E.D. Ark. 1982), the court held that a "Dear Friend" letter sent to a former client advising of changes in the tax code did not turn the former client into a current client. Another tribunal concluded that a lawyer who had represented a client in a recently concluded patent interference proceeding did not currently represent the client, even though the time to appeal had not yet run. *See Abbott Labs. v. Centaur Chem. Co., Inc.*, 497 F. Supp. 269, 272 (N.D. Ill. 1980). In *Artromick Int'l, Inc. v. Drustar, Inc.*, 134 F.R.D. 226, 231 (S.D. Ohio 1991), the court held that despite some "conflicting signals," the facts that the client had not paid his last legal bill, the client had in the meantime used other lawyers, and the lawyer had not aggressively pursued collection of his bill, showed sufficient intent to terminate the lawyer-client relationship. *See also McCook Metals L.L.C.*, 2001 U.S. Dist. LEXIS 497, at *8–9, 2001 WL 58959, at *2–3 (movant was not current client of firm that had handled one finite project; parties' other communications were merely "business development"); *Leber Assocs., LLC v. Entm't Grp. Fund, Inc.*, 2001 U.S. Dist. LEXIS 20352, at *16–17, 2001 WL 1568780, at *5 (S.D.N.Y. Dec. 5, 2001) (plaintiff who had not received advice for two years was not current client); *Banning Ranch Conservancy v. Superior Court of Orange Cnty.*, 193 Cal. App. 4th 903, 912 (2011) (engagement letter that established framework for future representations did not create ongoing attorney-client relationship); *Nat'l Med. Care, Inc. v. Home Med. of Am., Inc.*, 2002 Mass. Super. LEXIS 342, at *12–13, 2002 WL 31068413, at *4 (Sept. 12, 2002) (counsel no longer represented company where engagement letter clearly limited scope of engagement).

The time when client status is evaluated can be a key factor in determining whether a client is a current or former client. In *Santacroce*, 134 F. Supp. 2d at 370, the respondent argued that the time to determine client status should be when the adverse complaint was filed, at which time the respondent was a former client of the firm. The court decided, however, that the appropriate time was when the firm learned about the potential action. Because the movant was a current client at that time, the court analyzed the conflict under Model Rule 1.7.

Any decision as to whether a party is a current or a former client is inherently fact-intensive. That reality, and the rule of ambiguity applied by some courts, suggests that lawyers should use close-out letters at the end of a matter to help establish that the client does not have the status of a continuing client. Many lawyers fear such letters because of the perceived adverse effect they have on obtaining future business from the client. The two concepts, however, are not mutually exclusive. Personal sentiments and an invitation to become a client in the future can be added to a close-out letter to avoid possible alienation.

Be aware that your firm's records and databases might be used against you on this issue. If, for example, the accounting department or the conflicts of interest staff maintains a list of "current clients," or merely "clients" or "inactive clients," your opponent will argue that a party on that list is a current client. Accordingly, firm records and databases should clearly denominate "former clients" of the firm.

IV. Confidential Information Conflicts

A. Prospective Clients

Prospective clients sometimes disclose confidential information in preliminary consultations with lawyers that can cause two closely related problems. The first occurs when a prospective client discloses confidential information about a matter that conflicts a firm out of representing any other party in that matter. This may happen if a major controversy arises in a city, involving multiple parties with conflicting interests, or if the prospective client is organizing a "beauty contest." The second occurs when a prospective client discloses confidential information that pertains to another firm client. We addressed current client confidential information conflicts above.

Model Rule 1.18, which has been adopted in many states, delineates a lawyer's ethical obligations to prospective clients who do not become clients. The rule clarifies that a lawyer is obligated to protect confidences from prospective clients, and that information received during pre-engagement consultations can be a basis for disqualifying from "substantially related" matters a lawyer who receives information that could be "significantly harmful" to the prospective client. See generally Cascades Branding Innovation, LLC v. Walgreen Co., 2012 U.S. Dist. LEXIS 61750, 2012 WL 1570774 (N.D. Ill. May 3, 2012); O Builders & Assocs., Inc. v. Yuna Corp. of N.J., 19 A.3d 966 (N.J. 2011) (discussing Rule 1.18 requirements); Sturdivant v. Sturdivant, 241 S.W.3d 740 (Ark. 2006) (applying Rule 1.18 to disqualify firm); New York City Opinion 2013-1 (2013) (explaining New York's Rule 1.18); New Hampshire Opinion 2009-2010/1 (undated) (applying New Hampshire Rule 1.18 to electronic messages). See also Disciplinary Counsel v. Cicero, 982 N.E.2d 650, 656 (Ohio 2012) (lawyer suspended for one year for violating confidentiality provision in Ohio Rule 1.18).

O Builders, 19 A.3d at 977, held that the term "substantially related," as used in Rule 1.18, has the same meaning as it does under Rule 1.9. It also defined the term "significantly harmful" to require that the information gained from preliminary meetings be prejudicial to the former prospective client in the instant matter. *Accord State ex rel. Thompson v. Dueker*, 346 S.W.3d 390, 396–97 (Mo. Ct. App. 2011). Wisconsin Opinion EF-10-03 (Dec. 17, 2010) provided a more expansive definition:

> Information may be "significantly harmful" if it is sensitive or privileged information that the lawyer would not have received in the ordinary course of due diligence; or if it is information that has long-term significance or continuing relevance to the matter, such as motives, litigation strategies, or potential weaknesses. "Significantly harmful" may also be the premature possession of information that could have a substantial impact on settlement proposals and trial strategy; the personal thoughts and impressions about the facts of the case; or information that is extensive, critical or of significant use.

See also In re Perry, 293 P.3d 170, 175–76 (Mont. 2013) (lawyer did not receive information that could be significantly harmful to potential client); North Dakota Opinion 11-02 (Mar. 2, 2011) (same).

Significantly, however, Model Rule 1.18(d) permits the disqualified lawyer's firm to avoid disqualification from related matters for other clients if: (1) the personally disqualified lawyer takes reasonable steps to minimize the amount of confidential information received from the prospective client; (2) the personally disqualified lawyer is screened from any related matter and receives no part of the fee from such matter; and (3) the former prospective client is notified of the screen in writing. Persons that communicate unilaterally to a lawyer without any reason to expect the lawyer is willing to discuss entering a lawyer-client relationship are not "prospective clients" covered by the rule. *See* Comment [2] to Model Rule 1.18; New York Rule of Professional Conduct 1.18(e); New York City Opinion 2013-1; Iowa Opinion 07-02 (Aug. 8, 2007).

Even in the absence of a professional conduct rule addressing the issue, numerous courts have disqualified firms because a lawyer learned confidential information during a preliminary consultation. In *Bays v. Theran*, 639 N.E.2d 720, 724 (Mass. 1994), the plaintiff moved to disqualify defendant's firm because plaintiff had several telephone conversations with a lawyer in the firm. The lawyer never met with, or did any legal work for, the plaintiff. Nevertheless, because the plaintiff had conveyed confidential information to the lawyer that was relevant to the plaintiff's lawsuit, the court disqualified the firm. For cases with similar holdings, *see generally Green v. Montgomery Cnty*, 784 F. Supp. 841 (M.D. Ala. 1992); *Bridge Prods., Inc. v. Quantum Chem. Corp.*, 1990 U.S. Dist. LEXIS 5019, 1990 WL 70857 (N.D. Ill. Apr. 27, 1990); *Pound v. DeMera Cameron*, 135 Cal. App. 4th 70 (2005); *People ex. rel. Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.*, 980 P.2d 371, 379–80 (Cal. 1999) (court noted that initial interview was with other lawyers working on case); *Herbert v. Haytaian*, 678 A.2d 1183 (N.J. Super. Ct. App. Div. 1996); *Garner v. Somberg*, 672 So. 2d 852 (Fla. Dist. Ct. App. 1996); *Clark v. Ferris*, 1992 Conn. Super. LEXIS 3400, 1992 WL 361688 (Nov. 23, 1992); *Desbiens v. Ford Motor Co.*, 439 N.Y.S.2d 452 (App. Div. 1981); Utah Opinion 05-04 (Sept. 8, 2005); Virginia Opinion 1794 (June 30, 2004) (waiver invalid because potential client did not specifically consent to lawyer's use of confidential information); *Restatement* § 15.

Georgia Int'l Brokerage v. Stroher, No. 1-92-CV-0175-JOF (N.D. Ga. Mar. 26, 1993) is an extreme extension of this line of authority. There, the disqualified lawyer merely counseled a former client as to whom the former client should hire to sue someone. The court held the lawyer could not represent the defendant.

Other courts have declined to disqualify a firm because of a preliminary meeting with the opposing party. Often in these cases, the court's ruling is based on its conclusion that the potential client did not disclose any significant confidential information. *See, e.g., Modanlo v. Ahan* (*In re Modanlo*), 342 B.R. 230, 237–38 (D. Md. 2006); *Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487, 1491 (D. Utah 1995) (half-hour meeting discussing mostly generalities not enough to disqualify); *Davis*, 1993 U.S. Dist. LEXIS 7137, at *6, 1993 WL 180224, at *2 (CLE teacher answer to question from subsequent opponent during class not enough to disqualify); *see generally Benchmark Capital Partners IV, L.P.*, 2002 Del. Ch. LEXIS 108, 2002 WL 31057462; *Camuto v. Camuto*, 1999 Conn. Super. LEXIS 2724, 1999 WL 956688 (Oct. 6, 1999). *See also* New York City Opinion 2006-02 (Apr. 2006) (participation in beauty contest does not necessarily preclude future adverse representations). Another relevant factor in some decisions is the nature and extent of the potential client's contact with the lawyer. *See Polyagro Plastics, Inc. v. Cincinnati Milacron, Inc.*, 903 F. Supp. 253, 257–58 (D.P.R. 1995) (10-minute telephone conversation with prospective co-counsel not enough to disqualify); *State ex rel. DeFrances v. Bedell*, 446 S.E.2d 906, 911 (W. Va. 1994) (one-hour meeting; no attorney-client relationship established and no confidences disclosed); *In re Marriage of Zimmerman*, 16 Cal. App. 4th 556, 564–65 (1993) (20-minute conference not enough to prevent interviewing lawyer from representing other side). At least one court considered it significant that a substantial period of time had passed since the potential client's preliminary conference with the lawyer. *See Derrickson v. Derrickson*, 541 A.2d 149, 152–53 (D.C. 1988) (husband had sought to hire lawyer for divorce eight years prior; same lawyer permitted to represent wife in divorce matter involving same facts). Virginia Opinion 1794 found the lawyer should not be disqualified if the potential client's intent was to create a conflict. *See also* Model Rule 1.18, Comment [2].

Even before the promulgation of Model Rule 1.18, some authorities refused to impute a potential client conflict to the firm if the firm promptly screened the lawyer involved. *See Halligan v. Blue Cross & Blue Shield*, 1994 WL 497618, at *2 (D.N.D. Jan. 24, 1994) (court impressed that firm had erected screen and no confidences had been shared among firm lawyers); *INA Underwriters Ins. Co. v. Rubin*, 635 F. Supp. 1, 5 (E.D. Pa. 1983); *Hughes*

v. Paine, Webber, Jackson & Curtis, Inc., 565 F. Supp. 663, 672–73 (N.D. Ill. 1983) (discussing firm use of screen); *Restatement* § 15, Comment *c* (permits screening of lawyer who obtained information during initial consultation). *See also* Virginia Opinion 1832 (May 10, 2007) (secretary who learned confidential information from prospective client had to be screened to prevent firm's disqualification).

The second problem caused by preliminary consultations occurs when a lawyer learns something from a potential client about an existing firm client. Suppose Prospective Client says something that a lawyer should not hear because somebody else in the firm is already representing Prospective Client's potential adversary, Old Client. The classic example is that Prospective Client informs a lawyer of its intention to commence a hostile (but at that point still secret) takeover of Old Client, or to institute litigation against Old Client. Of course, most lawyers would check their firm's conflicts database immediately, discover the conflict, and promptly advise Prospective Client that the firm cannot handle the matter. The tricky issues are how much the firm must tell Prospective Client about the reasons why it cannot handle the matter; what (if any) assurances the firm must give to Prospective Client about not disclosing what Prospective Client said; what happens if the lawyer who listened to Prospective Client is the same lawyer who is in charge of Old Client's work; and whether the firm has an obligation to disclose this information to Old Client before the sneak attack is launched against Old Client two weeks later.

This general problem is the subject of ABA Formal Opinion 90-358 (Sept. 13, 1990), which assumes that the would-be client has consulted the law firm in good faith and not (as occasionally happens) primarily for the purpose of disqualifying the firm. The opinion advises that, even though the firm immediately declines to represent the would-be client: (1) the information received must be kept confidential; and (2) under 1983 Model Rule 1.7(b) [current Model Rule 1.7(a)(2)], if the firm's inability to use or disclose the sensitive information obtained constitutes a "material limitation" on the firm's representation of an existing client, the firm must cease representing the existing client *on that matter*. According to the opinion, because of the imputed disqualification rule (Model Rule 1.10(a)), the result is the same even if the lawyer who conducted the initial interview has nothing to do with the existing client's matter; the tainted lawyer's conflict is imputed to other firm lawyers, so the entire firm is disqualified. *See, e.g., Gilmore v. Goedecke Co.*, 954 F. Supp. 187, 190 (E.D. Mo. 1996) (following ABA Formal Opinion 90-358). *But see Northam v. Virginia State Bar*, 737 S.E.2d 905, 911 (Va. 2013) (in a questionable decision, court held no imputation because lawyer representing existing client did not know about conflict caused by his partner's preliminary consultation; court ignored Virginia's Rule 1.18).

Several state bar ethics committees have also addressed this problem. Vermont Opinion 96-09 (undated) indicated that if a prospective client conveys information material to the representation of an existing client, and its use would be detrimental to the prospective client, the lawyer should cease representing the existing client. District of Columbia Opinion 326 (Dec. 2004) and Delaware Opinion 1990-01 (Jan. 24, 1990) concluded that confidential information disclosed by a would-be client in the initial interview is fully protected from use or disclosure, but they did not address the additional question of whether the entire firm is disqualified from the existing client's matter under the circumstances described in ABA Formal Opinion 90-358. *See also* Rhode Island Opinion 91-72 (Nov. 5, 1991).

Flatt v. Superior Court of Sonoma Cnty., 885 P.2d 950 (Cal. 1994), is not about disqualification from hearing too much, but it is worth noting here. In the initial interview the lawyer learned that her firm already represented the other side and advised the interviewee that the firm could not represent him. The lawyer did not admonish the interviewee about the statute of limitations, nor did the lawyer tell the interviewee that it was important to go promptly to another lawyer. The interviewee did nothing for a year and a half and eventually learned that the statute had run. He sued the firm. The California Supreme Court ruled that, because of the firm's duty of loyalty to its existing client, the firm had no duty to advise the rejected client about the statute of limitations or the importance of seeking new counsel.

To avoid conflicts caused by interviews with potential clients, lawyers should refuse any substantive information from a prospective client (whether in a relatively casual phone conversation or in the office) until the prospective client informs the lawyer of the name of every party who might be involved in the matter (particularly the potential adverse parties), and all of those parties have been cleared through the firm's conflicts database. At least one ethics committee has indicated that the lawyer can refer the declined client to another lawyer. *See* District of Columbia Opinion 326.

If this is not practical, the lawyer could obtain a limited waiver of confidentiality by the would-be client. This type of waiver was approved in ABA Formal Opinion 90-358:

> It also would be proper … for the lawyer to advise the would-be client that, because of the need to obtain information [in order to check for conflicts] … the information divulged preliminarily for this purpose will not be confidential, and that the lawyer or firm would not be barred as a result of receiving the information from representing another client if a conflict of interest or potential conflict is found to exist or if for other reasons no representation is undertaken. The waiver of confidentiality

should be in writing and signed by the client; it should reflect clearly that all relevant consequences of providing the waiver were fully explained to and understood by the would-be client.

The "if for other reasons no representation is undertaken" language indicates that this client waiver technique may be particularly useful when the circumstances establish that the client is arranging a beauty contest. *See also* New York City Opinion 2006-02 (participation in beauty contest does not necessarily preclude future adverse representations). *But see* New Hampshire Opinion 2009-2010/1 (undated) (expressing skepticism toward consents from prospective clients, particularly if given by "clicking" agreement to an electronic disclaimer). Nancy Cherney et al., *Conflicts of Interest Issues*, 50 Bus. Law. 1381, 1399 (1995), has forms suggested by the ABA Task Force.

V. Personal Interest Conflicts

A. Prior Work Conflicts

Assume your firm has done transactional work for a client. Someone alleges economic harm because of matters related to the transaction and sues the client. The client asks your firm to represent it in the litigation. Can this be a problem? Unfortunately, sometimes it can: depending upon the circumstances, the litigation may generate situations where the law firm's interest may differ from the client's interest. For example, a drafting ambiguity or error by the firm in the underlying transaction may have an effect on the litigation strategy: one approach, arguing the language is clear on its face, might favor the firm in minimizing a later malpractice action. Another approach, arguing that the language is ambiguous, might be better for the client. Other common situations may present such conflicts. If there has been a misstep in handling a litigation matter, the firm's interest in settling the matter to avoid later claims could conflict with the client's interest in pushing for a better result. The same problem could arise if some misstep or error occurred during a proceeding, and the firm is handling a related sanctions motion or the appeal of the matter. Failure to deal with this issue, what is commonly referred to as a "prior work" conflict, has resulted in malpractice claims.

Iowa Opinion 09-03 (Aug. 25, 2009) considered whether a lawyer could represent a litigant if the litigation involved the firm's prior transactional work. It concluded that this situation often results in a "material limitation" conflict under Iowa Rule of Professional Conduct 1.7 (which is identical to ABA Model Rule 1.7). The opinion suggests that a conflict exists if the firm's prior involvement creates a "significant risk" that the lawyer's independent judgment in conducting the litigation will be affected. Unfortunately, the opinion fails to discuss the consentability of such conflicts. Instead, it implies that if there is such a conflict, the inquiry ends, and the lawyer may not take on the matter.

The IRS has recognized a similar conflict when the same lawyer who served as bond counsel seeks to represent the bond issuer in an IRS audit. The IRS requires that the lawyer present a conflict waiver before proceeding with the audit representation. The conflict derives from Section 10.29 of Circular 230, 31 C.F.R. Part 10 (2013), the rules governing practice before the IRS. Like Model Rule 1.7(a)(2), Section 10.29 provides that a conflict of interest exists if there is a significant risk that the representation will be materially limited by the "personal interest of the practitioner."

Not every matter arising out of a law firm's prior work creates a conflict requiring disclosure to, and consent by, the client. To determine whether such a conflict may exist, apply the following analysis. First, consider the possibility that legally deficient prior firm work contributed materially to the lawsuit arising from a transaction, a recommendation to settle, or the issues on appeal. Second, analyze whether there are potentially divergent legal strategies for handling the litigation, settlement, or appeal so that the potential exists for the firm's own interests to interfere with the legal judgment of the litigators handling the matter. Third, in litigation arising from a transactional matter, consider whether any firm lawyer is likely to be a necessary witness. If any claim of malpractice would be wholly frivolous, and if there does not appear to be any way the litigator's judgment could possibly be affected, or any lawyer as witness problem, there probably is not even a duty to raise the conflict issue. If, on the other hand, some claim could be raised that the firm's prior work was deficient and variable strategic decisions are likely to exist, the firm might be able to disclose the issues to the client and obtain consent. *See Martin v. Turner*, 2011 U.S. Dist. LEXIS 17021, at *15–16, 2011 WL 717682, at *5 (E.D. Pa. Feb. 18, 2011) (court declined to disqualify counsel, primarily because client had waived all conflicts). *Cf. Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 514–15 (N.J. 1995), *overruled on other grounds, Olds v. Donnelly*, 696 A.2d 633 (N.J. 1997). Some prior work conflicts are nonconsentable, however. Where you cross the consentability line is sometimes difficult to assess.

What is the best way to deal with prior work conflicts?

(i) When the issue arises, consult the firm's general counsel or ethics committee. The analysis of whether a conflict exists, and, if so, whether the conflict is consentable, is better done by a neutral person (experienced in doing conflicts analysis) than by the lawyers working on the matter.

(ii) If there is a substantial chance there has been actual malpractice, the firm probably should not defend the lawsuit, advise the client on settlement, or handle the appeal.

(iii) In more ambiguous circumstances, the firm should make full disclosure of the strategy issue, both orally and in writing, and obtain the client's written consent to continue the representation. The loss prevention partner should approve the form of the written disclosure and consent

(iv) If the general counsel or ethics committee recommends disclosure and consent, require that all firm lawyers follow that advice or appeal to the management committee.

(v) Suggest that the client consult other counsel (consent counsel) especially if there is a serious question on consentability. Consent counsel may, and often will, be in-house counsel. The legal test for consentability in many jurisdictions is whether a neutral lawyer would advise the client to consent. Obviously, evidence that a neutral lawyer advised the firm to consent is solid evidence supporting consentability.

Following these suggestions is no guarantee that a firm will avoid prior work conflict claims. The firm will, however, avoid some claims and make others easier to defend.

VI. Imputation of Conflicts

Model Rule 1.10 provides that while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9. Accordingly, when lawyers practice together in a law firm, conflicts should be analyzed from the viewpoint that a firm is, in effect, one lawyer. If any single lawyer has a conflict, that conflict is imputed to every lawyer in the law firm. Only two exceptions apply. First, imputation does not apply where the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. Second, imputation will not apply where the prohibition is based upon a what is commonly referred to as a lateral lawyer conflict—that is, the conflict relates to the lateral's former client while formerly associated with a prior firm. In those circumstances the Model Rule permits the disqualified lawyer's current firm to screen the lateral—strict compliance Model Rule 1.10 (a) (2) is required (screen, no fee apportioned to the disqualified lawyer, and notice to the affected client. Not all states have adopted the lateral lawyer screening rule. The only option in those states is obtaining consent from the disqualified lawyer's former client.

VII. Consent to Conflicts

A. Requirements for Valid Consent

To be valid, client consent to a conflict of interest must satisfy specific requirements. Under the Model Rules, the fundamental requirement is that it be "informed consent" (*see* Model Rules 1.7(b)(4) and 1.9(a)–(b)), which is defined in Model Rule 1.0(e) as adequate information about the "material risks" and "reasonably available alternatives to the proposed course of conduct." *See also* Comments [6] and [7] to Model Rule 1.0. The 1983 Model Rules used different terminology, requiring that the consent be given "after consultation." *See, e.g.*, 1983 Model Rules 1.7(a)–(b) and 1.9(a)–(b). "Consultation" was defined as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

The disclosure necessary to satisfy the informed consent requirement is a difficult question that depends upon the facts of the situation. According to the *Restatement*, it requires "that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client." *Restatement* § 122 (1). *Compare In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382–83 (Tex. 2005) (disclosure that described nature of proposed representation, prior work for client, time period involved, name of lawyer who did the work, and how representation concluded, was adequate), *with Woolley v. Sweeney*, 2003 U.S. Dist. LEXIS 8110, at *22–23, 2003 WL 21488411, at *7 (N.D. Tex. May 13, 2003) (consent that failed to mention specific conflicts was invalid). What is relatively clear is that merely informing the client that the firm represents another client with adverse interests is not sufficient to satisfy the disclosure requirement. *See, e.g., Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 820 F. Supp. 1212, 1217 (N.D. Cal. 1993) (disclosure requirement not met where lawyers had advised client "in passing" that they were participating in adverse matter without providing details); *Superior Court Attorney Disciplinary Bd. v. Qualley*, 828 N.W.2d 282, 287–89 (Iowa 2013) (informing client that lawyers had potential conflict was insufficient disclosure).

Numerous courts, the *Restatement*, Comment [6] to Model Rule 1.0, and Comment [22] to Model Rule 1.7 indicate that client sophistication is relevant in evaluating the adequacy of disclosure. *See, e.g., Fisons Corp. v. Atochem N. Am., Inc.*, 1990 U.S. Dist. LEXIS 15284, at *20, 1990 WL 180551, at *7 (S.D.N.Y. Nov. 14, 1990). *See*

also Restatement § 122, Comment *c(i)*. *But see Bishop v. Maurer*, 823 N.Y.S.2d 366, 369 (App. Div. 2006) (consent upheld despite lack of detailed disclosure and unsophisticated client). Although disclosure should always be thorough and understandable, this is especially important when seeking consent from an individual or from a small corporate entity without inside counsel.

In re Conduct of Brandt, 10 P.3d 906 (Or. 2000), a disciplinary proceeding, provides an example of how far some courts will go in requiring thorough disclosure. The Oregon Supreme Court found that the two lawyers for the plaintiff in the underlying matter had violated the Oregon conflicts rule by entering into an arrangement whereby they agreed to be retained by defendants after plaintiff's case was settled. After entering into this agreement, the lawyers advised the client orally about the potential conflict and confirmed the disclosure in writing. In the disclosure letter, the lawyers stated that they had agreed to be retained by defendants after the settlement was finalized, the retainer would preclude them from bringing similar claims against the defendants, the retainer might create a potential conflict, and the client should seek independent counsel regarding the potential conflict. The client then sought independent counsel who advised that the accused lawyers had an actual conflict. Despite his knowledge of the conflict, the client executed the settlement agreement. Nevertheless, a majority of the Court found that the lawyers failed to satisfy the rule requiring "full disclosure" of conflicts and suspended both lawyers from practice. 10 P.3d at 919–21. According to the majority, the lawyers should have disclosed the arrangement and that the retainer contained an indemnity provision if the client sought recovery from the lawyers, and they should have explained in detail how the lawyers' judgment might be affected by the conflict.

Complicating the disclosure requirement, conflicts are frequently detected and consent sought at the outset of a representation. At that time, the lawyer may not yet know all the pertinent facts. Any lawyer who is trying to obtain valid consent, however, needs to ascertain facts sufficient to describe the nature and potential effects of the conflict. Subsequently, if the lawyer learns additional facts that materially alter the situation, the lawyer should supplement the initial disclosure and obtain a new consent. *See Restatement* § 122, Comment *f*.

Although each conflict disclosure is unique and must be tailored to the particular facts, we suggest that all disclosures should include: (1) a thorough description of the conflict, including an explanation of the interest of the lawyer or other client that creates the conflict and a citation to the applicable rule of professional conduct; (2) the consequences of the representation, including any alternative action that is precluded because of the conflict; (3) in a dual client representation, the consequences of withdrawal of consent by either client; and (4) any effect the representation will have on client confidentiality.

Model Rule 1.7 has additional requirements with respect to concurrent conflicts of interest. Model Rule 1.7(b) provides that despite a current conflict, a lawyer may represent a client only if:

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

The provisions of the 1983 Model Rules that are still in effect in some states are slightly different. As to material limitation conflicts, 1983 Model Rule 1.7(b)(1) prohibits a lawyer from representing a client unless the lawyer reasonably believes the representation will not be adversely affected. 1983 Model Rule 1.7(a), which proscribes representation of directly adverse parties, is even more stringent. That rule requires, in addition to consent, that the lawyer reasonably believes the representation will not "adversely affect the relationship with the other client." Arguably, this requirement could preclude a representation if a client subjectively felt betrayed, even though the client conceded the representation was competent. We are not aware of any case that has gone this far. Moreover, the validity of the waiver should be judged at the time of the waiver, and the client's consent to the adverse representation is evidence that the client reasonably believed there would be no material impairment of the relationship when the client gave consent.

What is the best way to determine whether it is reasonable for the lawyer to believe he or she will be able to provide competent and diligent representation to each affected client? Someone other than the lawyer involved in the representation, such as the firm's general counsel or ethics committee should participate in the determination. In close cases, you may wish to obtain the advice of an outside ethics expert. Also, the firm may want to suggest that the client consult consent counsel. In any situation where consentability is an issue, the likelihood of the waiver being upheld (*e.g.*, if the waiving client later changes its mind) is greater if the client was advised by consent counsel. *See generally Welch v. Paicos*, 26 F. Supp. 2d 244 (D. Mass. 1998); *Lease v. Rubacky*, 987 F. Supp. 406 (E.D. Pa. 1997). Comment [6] to Model Rule 1.0 states that a client who is represented by other counsel in giving consent

"should be assumed to have given informed consent." *But see In re Conduct of Brandt*, 10 P.3d at 920–21 (consent counsel consulted but disclosure of the conflict was deemed insufficient).

Obviously, consulting consent counsel can be problematic (*e.g.*, an overly aggressive lawyer recommending the client refuse to consent without good reason). If a corporation is involved, and it has in-house counsel, involve the in-house counsel and document their participation. Sometimes the client will have other outside lawyers who may not handle the type of matter involved, but who could reasonably act as consent counsel. Consent counsel may not be a panacea, but it sometimes is an alternative to declining the representation altogether when consentability is uncertain. In a malpractice or disqualification context, an "expert" witness will pontificate, with hindsight perspective, about the inadequacy of the disclosure. The "breathing room" provided by consent counsel can be helpful in that situation.

Ohio lawyers should be cognizant of a novel Ohio waiver decision. An appellate court found that a firm acted in bad faith when it sent a request for a conflict waiver directly to the client despite knowing that the client was represented by another firm in the matter in which the conflict allegedly existed. *See Carnegie Cos., Inc. v. Summit Props., Inc*., 2012 Ohio App. LEXIS 1151, at *14–15, 2012 WL 1026104, at *6 (Mar. 28, 2012). Although we believe that the *Carnegie* holding is unique, Ohio lawyers should be mindful of it when requesting a waiver.

Ideally, all conflict consents should be in writing and signed by the client. *See State ex rel. Bluestone Coal Corp. v. Mazzone*, 697 S.E.2d 740, 754–55 (W. Va. 2010) (court noted that waiver letter had not been signed by client). Model Rules 1.7(b) and 1.9 require only that a conflict consent be "confirmed in writing," which means that the writing may be sent by the lawyer to the client but need not be signed by the client. *See* Comment [20] to Model Rule 1.7 and Model Rule 1.0(b). Most states that have adopted a version of the 2002 Model Rules have incorporated the "confirmed in writing" requirement. A few states, including Wisconsin and Wyoming, require that the writing be signed by the client.

Several states still have a version of the 1983 Model Rules, which did not require conflict consents to be in writing. Even in those jurisdictions, however, written disclosure and consent are clearly in the firm's interest. Oral consents are usually difficult to prove, and most courts have held that the lawyer has the burden of proving that the client consented. *See, e.g., In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157, 162 (3d Cir. 1984); *United States v. Gordon*, 334 F. Supp. 2d 581, 586–87 (D. Del. 2004).

Although Model Rule 1.9(a) requires consent only from the former client, the *Restatement* and several states' rules of professional conduct require that the lawyer obtain consent from both the current and former clients. *See Restatement* § 132; *see also* Virginia Rule of Prof'l Conduct 1.9(a); Oregon Rule of Prof'l Conduct 1.9(a). Regardless of whether state rules require it, however, we suggest that to minimize risk lawyers obtain the consent of both their current and former clients.

VIII. Consequences of Conflicts

A. Motions to Disqualify

The most likely result of a conflict of interest is that the lawyer tainted by the conflict and the lawyer's firm will be disqualified from the representation. Courts in some jurisdictions have held that, at least for concurrent conflicts, disqualification is mandatory. *See Carnegie Cos., Inc.*, 918 N.E.2d at 1069 (Ohio Ct. App. 2009) (per se disqualification rule in Ohio); *SpeeDee Oil Change Sys., Inc.*, 980 P.2d at 379 (Cal. 1999) (in California, rule of per se disqualification applies to current conflict situations). Courts in other jurisdictions have held that on a motion to disqualify, all doubts should be resolved in favor of disqualification. *See, e.g., Burgess-Lester*, 643 F. Supp. 2d at 813. Others take a contrary view: "[D]isqualification of a party's chosen counsel is a harsh sanction and 'an extraordinary remedy' which should be resorted to sparingly." *City of Apopka*, 701 So. 2d at 644. *Accord Metro. Life Ins. Co. v. Guardian Life Ins. Co. of Am.*, 2009 U.S. Dist. LEXIS 42475, at *14–17, 2009 WL 1439717 (N.D. Ill. May 18, 2009); *Wyeth v. Abbott Labs.*, 692 F. Supp. 2d 453, 458 (D.N.J. 2010). Some courts do not automatically disqualify a firm because of a conflict. Instead, they examine the circumstances, balancing factors such as: (1) the nature of the conflict; (2) the potential harm caused by a disqualification; (3) the effectiveness of counsel in light of the conflict; and (4) the public's perception of the profession. *See, e.g., Research Corp. Techs.*, 936 F. Supp. at 703. Thus, in some circumstances, where the conflict causes no harm, a conflicted law firm can escape disqualification. *See generally Alzheimer's Inst. of Am., Inc.*, 2011 U.S. Dist. LEXIS 140345, 2011 WL 6088625; *Wyeth*, 692 F. Supp. 2d 453; *Bos. Scientific Corp. v. Johnson & Johnson Inc.*, 647 F. Supp. 2d 369 (D. Del. 2009); *Bayshore Ford Truck Sales, Inc. v. Ford Motor Co.*, 380 F.3d 1331 (11th Cir. 2004); *UMG Recordings, Inc. v. MySpace, Inc.*, 526 F. Supp. 2d 1046 (C.D. Cal. 2007) (court fashioned less harsh remedy); *Pfizer, Inc. v. Stryker Corp.*, 256 F. Supp. 2d 224 (S.D.N.Y. 2003); *Morin v. Maine Educ. Ass'n*, 993 A.2d 1097 (Me. 2010) (disqualification motion denied because no showing of actual prejudice); *Express Scripts, Inc. v. Crawford*, 2007 Del. Ch. LEXIS 18, 2007 WL 417193 (Jan. 25, 2007); *Philbrick*, 2003 Conn. Super. LEXIS 1661, 2003 WL 21384532; *In re Meador*, 968 S.W.2d 346 (Tex. 1998); *Ex parte AmSouth Bank, N.A.*, 589 So. 2d 715. *Cf.* Philadelphia Opinion 2009-7 (July

2009) (firm could avoid conflict between two clients by limiting scope of one representation). A lawyer might also avoid disqualification because of equitable considerations, such as a delay in raising the conflict.

B. Actions for Damages, Including Punitive Damages

Conflicts affect a firm's malpractice exposure in two ways. First, they may, if the other necessary elements are present (*e.g.*, proximate cause and damages), form the core of a malpractice or breach of fiduciary duty case. Second, where the basis of a malpractice complaint is some other conduct (*e.g.*, an alleged mistake), the conflict often "colors" the claim, making the defense more difficult.

If a firm is disqualified in the middle of protracted litigation because of a conflict of interest that the firm should have identified, the client that is required to replace counsel in midstream may have a claim for damages proximately caused by the conflict (*e.g.*, fees paid to educate new counsel or to replace "tainted" work product). *See Damron v. Herzog*, 67 F.3d 211, 215–16 (9th Cir. 1995) (under Idaho law, plaintiff stated cause of action for malpractice based on conflict); *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn. Ct. App. 1989) (client of disqualified firm has cause of action against firm if client can show that firm was negligent and that damages resulted from disqualification). *See also Restatement* § 49; Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice*, § 17.18 (2013 ed.).

In addition to a malpractice claim, a client may also be able to sue a lawyer who failed to reveal a conflict on a theory of breach of fiduciary duty or constructive fraud. *See, e.g., Airgas, Inc. v. Cravath, Swaine & Moore* LLP, 2010 U.S. Dist. LEXIS 78162, at *12–19, 2010 WL 3046586, *4–6 (E.D. Pa. Aug. 3, 2010) (firm defeated disqualification, but faced breach of fiduciary duty claim for representing one client adverse to another); *see generally USA Power, LLC v. PacifiCorp.*, 235 P.3d 749 (Utah 2010); *Klemme v. Best*, 941 S.W.2d 493 (Mo. 1997) (en banc); *Cummings v. Sea Lion Corp.*, 924 P.2d 1011 (Alaska 1996). In *Milbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537, 544–45 (2d Cir. 1994), the court upheld a jury verdict against Milbank for $2 million on a theory that the firm had breached its fiduciary duty to its client. Milbank had represented a principal in the attempted purchase of certain assets. The transaction was delayed, and the firm later allegedly represented the principal's agent in the purchase of the same assets, over the objections of the principal. Even though the facts were complex and vigorously disputed, the Second Circuit nevertheless held that the jury could have found that Milbank breached its fiduciary duty to the principal.

Bringing an action for breach of fiduciary duty rather than for malpractice may have the practical effect in some states of lengthening the applicable statute of limitations, although in *Egan v. Stoler*, 653 N.W.2d 855, 860 (Neb. 2002), the court ruled that the statute of limitations for malpractice actions applies to claims alleging a conflict of interest. *See also Morris v. Margulis*, 754 N.E.2d 314, 319–20 (Ill. 2001).

If negligence is the basis of plaintiff's complaint, expert testimony (*e.g.*, by a law professor or retired judge) that counsel had a conflict of interest and violated the applicable professional conduct rules may influence the finder of fact, particularly on difficult issues like causation. A dramatic example of the effect of a conflict of interest occurred in *Automated Marine Propulsion Sys., Inc. v. Sverdlin*, No. 97-02103 (Tex. 215th Dist. Ct., Harris Cnty., Oct. 27, 1998). In that case a Texas inventor, Anatoly Sverdlin, was sued by business associates over disagreements about the business. Sverdlin counterclaimed and filed a claim against Gardere & Wynne, alleging negligence and breach of fiduciary duty. Sverdlin claimed that Gardere had a conflict in that it represented him and the other participants in the business and that the law firm had failed to protect him. The jury returned a verdict of $1.2 billion against various defendants including the Gardere firm. The jury assessed damages against the firm and the partner involved in the amount of $59.5 million. The parties subsequently settled for an undisclosed amount.

In an appropriate case, a court may award punitive damages in an action based on a conflict. For example, in *Vaughn v. Akin, Gump, Hauer & Feld, L.L.P.* (*In re Legal Econometrics, Inc.*), 1997 WL 560617, at *8 (N.D. Tex. Aug. 29, 1997), *aff'd*, 1999 U.S. Dist. LEXIS 7082, 1999 WL 304564 (N.D. Tex. May 11, 1999), a bankruptcy judge found a law firm liable on a conflict of interest claim and entered judgment against the firm and certain of its partners for approximately $7 million: $3.5 million in compensatory damages and $3.5 million in punitive damages. *See Young v. Becker & Poliakoff, P.A.*, 88 So. 3d 1002, 1009 (Fla. App. 2012), *review denied*, 103 So. 3d 144 (Fla. 2012) (court affirmed $2 million punitive damages award; conflict between lawyers' and client's interests); *Cummings*, 924 P.2d at 1023 (jury award of punitive damages upheld). *Cf. Wilson v. Vanden Berg*, 687 N.W.2d 575, 585–86 (Iowa 2004) (lawyer who denied conflict liable for punitive damages on fraud theory). *But see Brush v. Gilsdorf*, 783 N.E.2d 77, 81 (Ill. App. Ct. 2002) (based on Illinois statute, prayer for punitive damages dismissed in action for breach of fiduciary duty); *Fortnow v. Hughes Hubbard & Reed, LLP*, 2005 N.Y. Misc. LEXIS 2917, at *6, 2005 WL 3506955, at *5 (Sup. Ct. Nov. 30, 2005) (demand for punitive damages stricken).

C. Fee Forfeitures

Conflicts have led to substantial fee forfeitures. In *Image Technical Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1358 (9th Cir. 1998), for example, Coudert Brothers was disqualified as plaintiff's counsel before trial because it was at the time representing one of the defendant's operating divisions. After the plaintiff prevailed at

trial, it sought to recover its attorneys' fees from defendant, including $400,000 that it allegedly owed Coudert Brothers. The Ninth Circuit found that because of Coudert Brothers' conflict, the firm was not entitled to any fees from plaintiff. Therefore, to avoid giving plaintiff a windfall, the court denied this portion of plaintiff's fee request. *See also Rodriguez v. Disner*, 688 F.3d 645, 653–54 (9th Cir. 2012) (plaintiff counsel's fee request denied because of conflict even though firm had obtained $49 million settlement for class); *Marshall v. N.Y. Div. of State Police*, 31 F. Supp. 2d 100, 107–08 (N.D.N.Y. 1998) (fee lodestar cut in half because of conflict); *Fair v. Bakhtiari*, 195 Cal. App. 4th 1135, 1158 (2011) (lawyer who violated California counterpart to Model Rule 1.8(a) could not recover in quantum merit for legal services rendered); *A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli*, 113 Cal. App. 4th 1072, 1079 (2003) ("general rule" is to deny fees to firm that violates ethical duty); *Reid v. Reid*, 950 S.W.2d 289, 292 (Mo. Ct. App. 1997) (court overturned award of $65,000 in fees because of conflict); *see generally In re Estate of Brandon*, 902 P.2d 1299 (Alaska 1995); *In re Life Ins. Trust Agreement of Seeman*, 841 P.2d 403 (Colo. Ct. App. 1992); *Gilchrist v. Perl*, 387 N.W.2d 412 (Minn. 1986); *Restatement* § 37. *Cf. Liberty Mut. Ins. Co. v. Gardere & Wynne, L.L.P.*, 82 F. App'x 116 (5th Cir. 2003) (refusing to order forfeiture of fees paid by other clients).

In *Hendry v. Pelland*, 73 F.3d 397 (D.C. Cir. 1996), the court held that disgorgement of fees was an appropriate remedy where the lawyer had violated applicable conflicts rules even though there was no evidence the ethical violation caused any actual damage to the client. Disgorgement of fees was also found to be appropriate without proof of causation or damages in several other cases. *See generally Huber v. Taylor*, 469 F.3d 67 (3d Cir. 2006); *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179 (Tex. App. 2002); *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999); *Crawford & Lewis v. Boatmen's Trust Co. of Ark., Inc.*, 1 S.W.3d 417 (Ark. 1999); *Eriks v. Denver*, 824 P.2d 1207 (Wash. 1992) (en banc). *Restatement* § 37 supports this approach. It provides for forfeiture by "[a] lawyer engaging in [a] clear and serious violation of duty to a client," and that both "threatened or actual harm to the client" should be taken into account. *But see Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 840 (2d Cir. 1993) (lawyers may be entitled to fees even though they breached their fiduciary duty); *Pringle v. La Chapelle*, 73 Cal. App. 4th 1000, 1006–07 (1999) (no fee forfeiture where violation of professional conduct rules was only technical and caused no harm); *In re Marriage of Pagano*, 607 N.E.2d 1242, 1250–51 (Ill. 1992) (breach of fiduciary duty does not always require fee forfeiture); *Lindseth v. Burkhart*, 871 S.W.2d 693, 695 (Tenn. Ct. App. 1993) (fee forfeiture for fiduciary duty breach not automatic).

Courts have taken various approaches in determining the amount or extent of a fee forfeiture. In *Dewey*, 536 A.2d at 253–54, a law firm that represented plaintiffs in substantial tobacco litigation hired a lateral lawyer who had worked on that very litigation for the defendants' law firm. Because the plaintiffs' firm had been so careless and insensitive in failing to take steps to protect the defendants' confidences, the court ordered the firm to complete the cases and charge the plaintiffs no fees for work done after the ruling. *See also So v. Suchanek*, 670 F.3d 1304, 1311 (D.C. Cir. 2012) (district court should increase amount of fee forfeiture because of lawyer's "rampant misconduct."); *see generally Fin. Gen. Bankshares, Inc. v. Metzger*, 523 F. Supp. 744 (D.D.C. 1981), *vacated on other grounds*, 680 F.2d 768 (D.C. Cir. 1982) (firm required to forfeit fees for period of disloyalty); *In re Marriage of Newton*, 955 N.E.2d 572 (Ill. App. Ct. 2011) (lawyer who knew about conflict at outset of representation denied any compensation). As noted in Comment *e* to § 37 of the *Restatement*, the extent of the forfeiture will likely depend upon the particular circumstances: "Sometimes forfeiture for the entire matter is inappropriate … . Ultimately the question is one of fairness."

Bankruptcy courts routinely require disgorgement of fees that were paid to a lawyer after a conflict arose. Disgorgement is more prevalent in bankruptcy cases because the Bankruptcy Code specifically authorizes the denial of fees to professionals who are not disinterested. *See* 11 U.S.C. § 328(c). *See also In re W. Delta Oil Co. Inc.*, 432 F.3d 347, 353 (5th Cir. 2005); *In re Granite Partners, L.P.*, 219 B.R. 22 (Bankr. S.D.N.Y. 1998) (court denied $3 million of firm's fee request). Some bankruptcy courts have required disgorgement of any fees paid to a lawyer with a conflict even if the fees were paid before the conflict arose. *See, e.g., In re El San Juan Hotel Corp.*, 239 B.R. 635, 647–48 (B.A.P. 1st Cir. 1999), *aff'd*, 230 F.3d 1347 (1st Cir. 2000); *In re Prince*, 40 F.3d 356, 359–60 (11th Cir. 1994); *Gray v. English*, 30 F.3d 1319, 1324 (10th Cir. 1994). Indeed, the Sixth Circuit has held that a bankruptcy court cannot allow any fees to nondisinterested counsel. *In re Federated Dep't Stores, Inc.*, 44 F.3d 1310, 1320 (6th Cir. 1995). *See also In re BBQ Res., Inc.*, 237 B.R. 639, 641–42 (Bankr. E.D. Ky. 1999). Other courts have taken a more flexible approach and held that a bankruptcy court has wide discretion to deny fees to nondisinterested counsel. *See generally Kravit, Gass & Weber, S.C. v. Michel* (*In re Crivello*), 134 F.3d 831 (7th Cir. 1998); *In re Prince*, 40 F.3d 356; *In re Angelika Films 57th, Inc.*, 227 B.R. 29 (Bankr. S.D.N.Y. 1998).

Several state bar opinions have found that a lawyer who refers a matter to another lawyer because of a conflict cannot accept a referral fee. *See, e.g.*, New York State Opinion 745 (July 18, 2001). These opinions are based on the rationale that the lawyer could not assume joint responsibility for the representation, which is required to divide fees. Opinion 745 indicated, however, that if the conflict is consentable, the lawyer can ethically receive a fee.

D. Disciplinary Actions

State bar disciplinary boards and committees routinely discipline lawyers who violated the conflicts of interest rules. The punishments include suspension from practice, *e.g., In re Botimer*, 214 P.3d at 141; *In re Carey*, 89 S.W.3d 477, 504 (Mo. 2002); *Fla. Bar v. Sofo*, 673 So. 2d 1, 2 (Fla. 1996); public reprimands, *e.g., In re Disciplinary Proceeding Against Stansfield*, 187 P.3d 254, 265 (Wash. 2008) (en banc) (negligent violation of former client conflicts rule); *Clermont Cnty. Bar Ass'n v. Bradford*, 685 N.E.2d 515, 517 (Ohio 1997); and even disbarment, *e.g., In re Stein*, 177 P.3d 513, 530 (N.M. 2008); *In re Beckner*, 778 N.E.2d 806, 811 (Ind. 2002); *In re Disciplinary Action Against Davis*, 585 N.W.2d 373, 377–78 (Minn. 1998). Often, the conflict is egregious or the lawyers have engaged in some other reprehensible conduct in addition to the conflict of interest. *See, e.g., In re Herzog*, 710 So. 2d 793, 794 (La. 1998) (lawyer suspended from practicing law for 18 months because he had represented both sides in corporate merger and sale of assets). In some instances, however, a lawyer has been disciplined for a more routine conflict of interest. *See, e.g., In re Disciplinary Action against Kala*, 811 N.W.2d 576, 583–84 (public reprimand and two years probation for violating conflicts rules); *In re Conduct of Knappenberger*, 108 P.3d 1161, 1170 (Or. 2005) (en banc) (lawyer who violated former client conflict rule suspended for 120 days); *In re Johnson*, 84 P.3d 637, 643 (Mont. 2004) (lawyer publicly censured for Rule 1.7 violation); *In re Wenz*, 87 P.3d 376, 383 (Mont. 2004) (same); *Office of Disciplinary Counsel v. Mazer*, 712 N.E.2d 1246, 1248 (Ohio 1999) (lawyer who represented two clients with "clear and distinct" interests suspended for six months); *In re Conduct of Howser*, 987 P.2d 496, 501 (Or. 1999) (en banc) (lawyer reprimanded for violation of former client rule).

The standard for determining whether to impose disciplinary action based on a conflict may be different from that applied in deciding a disqualification motion. In *State ex rel. Clifford v. W. Va. Office of Disciplinary Counsel*, 745 S.E.2d 225, 231 (W.Va. 2013), the court found that the focus of a disqualification motion is whether the conflict will prejudice one of the parties, which is not an issue in a disciplinary proceeding. Thus, a trial court's denial of a disqualification motion based on a conflict does not necessarily preclude a separate disciplinary complaint based on the same conflict.

Lawyers also have been disciplined for not adequately disclosing conflicts. In *Iowa Supreme Court Board of Prof'l Ethics and Conduct v. Wagner*, 599 N.W.2d 721, 731 (Iowa 1999), for example, a lawyer with a conflict who gave partial, but not full, disclosure of the conflict was suspended for three months. The respondent lawyer represented both the buyer and seller in a large commercial real estate transaction involving the sale of a restaurant. The lawyer had represented the restaurant's owner for some time. When the owner decided to sell the restaurant, the lawyer agreed to act as a broker on the sale, *i.e.*, the owner would pay him a commission if he found a buyer. The lawyer found a buyer whom the lawyer had represented in the past. The lawyer told the buyer that he represented the seller and that it might be in his best interest to retain an independent lawyer. He also told him that if controversies arose, he would withdraw. Nevertheless, the court found the lawyer failed to satisfy his duty of full disclosure. He did not explain in detail the reasons why the conflict could affect the buyer's interests. He also failed to tell the buyer that he would receive a commission for finding a buyer or that the buyer should get his own appraisal. The Iowa Supreme Court suspended the lawyer's license indefinitely, with no possibility of reinstatement for three months. *See also An Unnamed Att'y*, 186 S.W.3d 741, 743 (lawyer disclosed potential conflict to joint clients but failed to explain how he would handle information he learned during course of the representation); *see generally In re Brandt*, 10 P.3d 906.

A federal agency might also suspend a lawyer from practice before it if the lawyer neglected a conflict of interest in violation of the agency's professional conduct rules. In *Bender v. Dudas*, 490 F.3d 1361, 1369–70 (Fed. Cir. 2007), the Federal Circuit upheld a decision by the U.S. Patent and Trademark Office (PTO) excluding from the PTO practice a lawyer who had failed to fully disclose his financial arrangement with an invention promoter in violation of the agency's conflict rules.

IX. Hypotheticals

Hypothetical #1

Law Firm ABC regularly represents Shopping Center Owner in leasing, financing matters and other matters. Shopping Center Owner informs Law Firm ABC that it has entered into a letter of intent with Retailer XYZ and would like to engage Law Firm ABC to prepare and negotiate a lease with Retailer XYZ, which will be the first lease between the parties. In performing a conflict check, Law Firm ABC learns that eighteen months ago, a partner in the firm defended Retailer XYZ in a discrimination lawsuit filed by a former employee. The lawsuit settled nine months ago and since that time Law Firm ABC has not represented Retailer XYZ in any other matters.

Is there a conflict of interest?

Hypothetical #2

Retailer XYZ contacts Law Firm ABC and requests that the firm represent Retailer XYZ in a obtaining a new secured line of credit with Bank MNO. In performing its conflict check, Law Firm ABC determines that it

currently represents Trust Company PQR, which was acquired by Bank MNO six months ago but continues to operate as a subsidiary of Bank MNO as a separate legal entity with its own management team and in-house counsel.

Is there a conflict of interest?

Hypothetical #3

Health Club JKL has filed for bankruptcy. Health Club's secured lender, Bank MNO, has requested that Law Firm ABC represent it in the bankruptcy proceedings. Subsequently, Law Firm ABC learns that another one of its clients is an unsecured creditor of Health Club JKL and is represented by another firm in the bankruptcy proceedings.

Is there a conflict of interest?

Hypothetical #4

Law Firm ABC has been engaged by Shopping Center Owner to represent it in pursuing a claim against its Insurer OPM due to damage caused by a flood, as to which Insurer OPM has initially responded with a denial of coverage letter. In performing a conflict check, Law Firm ABC determines that Insurer OPM is a 95% joint venture partner in an office building owned by another client of the firm, Office Owner LLC, for which Law Firm ABC currently performs leasing work.

Is there a conflict of interest?