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SUING A CURRENT CLIENT

*Thomas D. Morgan*¹

I. INTRODUCTION

A. *The Issue Stated*

General Manufacturing Co. is a diversified producer of consumer items. It has a storage and distribution facility in suburban Capital County. Each year, General Manufacturing asks the law firm of Able & Baker to file a written protest of the property tax assessment on the facility. Able & Baker has done no other kind of legal work for General Manufacturing. This year's protest has been submitted but has not yet been resolved.

Able & Baker has now been consulted by Marlene Wilson. Ms. Wilson was seriously injured by a defect in a hair dryer made by General Manufacturing. She has asked Able & Baker to bring a product liability suit against that company on her behalf and has agreed to pay a contingent fee. Over 100 such suits are usually pending against General Manufacturing at any given time. Previous such cases against General Manufacturing in Capital County have been defended by Young & Zeller, another local firm.

The example is simple, but it poses the issue of this paper. If Able & Baker undertook to file Ms. Wilson's cause of action, the firm would be in a position of filing suit against a company that is its client in a completely unrelated matter.²

If General Manufacturing were a *former* client of Able & Baker, the firm clearly *could* take the case. The test would be whether a product

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2. As used in this essay, two matters are "unrelated" when no work done on or information learned in one representation would be relevant to the other. In the illustration, none of the facts learned or arguments used in protesting the tax assessment on a local building would have any relevance whatsoever to the proposed product liability action.

The essay further assumes that the client being sued has other counsel in the matter in question, or has access to such counsel, and that the client understands that the lawyer filing the action is not its lawyer with respect to that case.

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liability case is a matter “substantially related” to protesting a tax assessment.³ The answer clearly would be no.⁴

However, in our illustration, Able & Baker is handling a *pending* matter for General Manufacturing, making it a current client.⁵ In Formal Opinion 93-372, the ABA Committee on Ethics and Professional Responsibility articulated — only somewhat apologetically — what now seems widely thought to be the governing rule in such current client cases:

[W]hen corporate clients with multiple operating divisions hire tens if not hundreds of law firms, the idea that, for example, a corporation in Miami retaining the Florida office of a national law firm to negotiate a lease should preclude that firm’s New York office from taking an adverse position in a totally unrelated commercial dispute against another division of the same corporation strikes some as placing unreasonable limitations on the opportunities of both clients and lawyers. [However,] . . . the Model Rules quite correctly treat such a situation as presenting a conflict.⁶

The Committee was alluding to ABA Model Rule 1.7(a) which provides:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.

3. ABA Model Rule 1.9(a). The standard did not appear in the ABA Canons of Ethics or the ABA Code of Professional Responsibility, but it was widely applied in the cases since being first used by Judge Weinfeld in *T.C. Theater Corp. v. Warner Brothers Pictures, Inc.*, 113 F.Supp. 265 (S.D.N.Y. 1953).

4. American Law Institute, *Restatement of the Law Third: The Law Governing Lawyers*, Proposed Final Draft No. 1 (1996) (hereafter *Restatement*), § 213, Comments d(ii) & (iii), explains the “substantially related” standard:

A matter is substantially related if it involves the work the lawyer performed for the former client. For example, a lawyer may not on behalf of a later client attack the validity of a document that the lawyer drafted if doing so would materially and adversely affect the former client. . . . The substantial relationship standard is employed most frequently to protect the confidential information of the former client. A subsequent matter is substantially related to an earlier matter . . . if there is a substantial risk that the subsequent representation will involve the use of confidential information of the former client.

5. Under the cases, General Manufacturing likely would be considered to be a current client of Able & Baker even if there were not an assessment protest currently pending. The fact that General Manufacturing regularly uses Able & Baker for this kind of work would likely make it a current client unless that relationship were clearly terminated. *See, e.g., IBM v. Levin*, 579 F.2d 271 (3d Cir. 1978); *Manoir-Electroalloys Corp. v. Amalloy Corp.*, 711 F.Supp. 188 (D.N.J. 1989).

6. Formal Opinion 93-372 (April 16, 1993), “Waivers of Future Conflicts of Interest,” *ABA/BNA Lawyers’ Manual on Professional Conduct* 1001:173, 174.

One Committee member was even more definitive about the meaning of Model Rule 1.7(a) in his recent dissent to ABA Formal Opinion 95-390:

All members of this Committee agree that a lawyer may never take a position directly adverse to a client . . . no matter how minor the matter and no matter how distant geographically, by industry, or by personnel, the new proposed representation is from the original one the lawyer is handling. Not only is that the rule, but that is what the rule should be.⁷

It has long seemed to me that such a categorical prohibition on bringing suit on behalf of one client against another of the lawyer's present clients is based on a superficial reading of the relevant cases, a reading out of context of a poorly-drafted Model Rule, and a seeming disregard of the arbitrary costs imposed on lawyers and litigants by such a rule.⁸ I suggest, in short, that the proposition "a lawyer may never take a position directly adverse to a client" is both *not* the rule and *not* what the rule *should* be.⁹

7. ABA Formal Opinion 95-390 (January 25, 1995), "Conflicts of Interest in the Corporate Family Context," ABA/BNA Lawyers' Manual on Professional Conduct 1001:258, 272 (Dissent of Lawrence J. Fox).

8. I will not pause to develop here the fact that enforcement of conflict of interest standards is costly for lawyers, clients, and the courts. Restatement, § 201, Comment b, explains:

First, conflict avoidance can make representation more expensive. To the extent that conflict of interest rules prevent multiple clients from being represented by a single lawyer, one or both clients are put to the necessity of finding additional lawyers. That may entail uncertainty concerning the successor lawyers' qualifications, usually additional cost, and the inconvenience of separate representation. Second, limitations imposed by conflicts rules can interfere with client expectations. At the very least, one of the clients might be deprived of the services of a lawyer whom the client had a particular reason to retain, perhaps based on a long-time association with the lawyer. In some communities or fields of practice there may be no lawyer who is perfectly conflict-free. Third, obtaining informed consent to conflicted representation itself might compromise important interests. . . . The process of obtaining consent is not only potentially time-consuming; it might also be impractical because it would require the disclosure of information that the clients would prefer not to have disclosed, for example, the subject matter about which they have consulted the lawyer. Fourth, conflicts prohibitions interfere with lawyers' own freedom to practice according to their own best judgment of appropriate professional behavior. Any legal restrictions on the practice of law have that effect, but it is appropriate to give significant weight to the freedom and professionalism of lawyers in the formation of legal rules governing conflicts.

9. The Restatement's attempt to deal with this question has been very general, but the Proposed Final Draft is quite categorical. See Restatement § 209, Comment *e*.

[A] lawyer may not sue a current client on behalf of another client, even in an unrelated matter, unless consent is obtained under the conditions and limitations of § 202.

B. Who Cares What the Rule Is?

Filing suit against one current client on another's behalf might seem so rare as not to matter. It has not been treated extensively in law school teaching materials.¹⁰ However, at least one hundred cases and ethics opinions have addressed the issue in a significant way. Indeed, bringing claims that raise the issue has become something of a cottage industry.¹¹

The issues discussed here have also deeply divided members of the ABA Committee on Ethics and Professional Responsibility. Formal Opinion 95-390,¹² dealing with application of the rule in the corporate context, was over two years in the drafting and produced four impassioned dissents from a committee that traditionally issues unanimous opinions. Clearly, an issue that divisive deserves closer analysis.

Furthermore, the rule now has become federalized. *In re Dresser Industries*¹³ was a class action antitrust case brought against makers of oil well drill bits. Susman Godfrey was counsel for the plaintiffs; it also currently represented Dresser in two unrelated cases. The Texas Disciplinary Rules of Professional Conduct are different from Model Rule 1.7(a) and provide that a lawyer is only prohibited from representing one client against the other if the matters are "substantially related."¹⁴ The District Court followed the Texas Rules and found no substantial relationship between the cases.¹⁵ However, the Fifth Circuit said the Texas Rules were not controlling in federal court; a uniform federal rule applies, and "[u]nquestionably, the national standards of attorney con-

10. E.g., Gillers, *Regulation of Lawyers: Problems of Law and Ethics* (4th Ed. 1995), gives it about four pages. Hazard, Koniak & Cramton, *The Law of Lawyering* (2d Ed. 1994), treats it in about 1 1/2 pages. Rhode & Luban, *Legal Ethics* (2d Ed. 1995), seems not to address the issue at all. In each of its six editions, Morgan & Rotunda, *Problems and Materials on Professional Responsibility* has devoted one problem to the rule.

11. In the interest of full disclosure, I should acknowledge that I have been retained from time to time to testify as an expert witness on some of the issues addressed in this essay. My testimony has been consistent with the views expressed here, and my position on the issues antedated being asked to serve as an expert.

12. *Supra* n. 7.

13. 972 F.2d 540 (5th Cir. 1992).

14. Texas Disciplinary Rule 1.06(b) provides that, except with client consent, "a lawyer shall not represent a person if the representation of that person (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm." . . . In short, the Texas rule adds two requirements to Model Rule 1.7(a); the matters must be "substantially related" and the adversity must be "material," not simply "direct."

15. That decision was not obviously correct. The Court of Appeals noted that the Susman lawyers had access to Dresser's in-house counsel and manufacturing, accounting and finance data. 972 F.2d at 541-42. However, because the standard of review in the proceeding for a writ of mandamus was clear error, rather than take on that finding, the Court of Appeals transformed the case into a question of federalism that had not directly been decided below.

duct forbid a lawyer from bringing a suit against a current client without the consent of both clients.”¹⁶

Finally, the issue became even more focused for me during redrafting of the conflict of interest chapter of the Restatement of the Law Governing Lawyers. Putting the issue in the terms of our example:

The same facts as in the original illustration, but this time Marlene Wilson is not an injured consumer but someone who periodically sells \$1,000 or so worth of office supplies to General Manufacturing. GM has redrafted its purchase order and Ms. Wilson has called her regular lawyers, Able & Baker, to explain the new terms to her. Able & Baker realizes it may have to call General Manufacturing itself for clarification or to propose terms Ms. Wilson would prefer. Does Ms. Wilson’s call present Able & Baker with a conflict of interest? Does Able & Baker have to get the consent of both General Manufacturing and Ms. Wilson before responding to her question?

My own view is almost certainly not; in the example, no suit has been filed against a current client, and it is inconceivable that the adverse effect on General Manufacturing of Ms. Wilson’s preferred terms would be material. But some of my colleagues¹⁷ vigorously disagreed; in their view, the same logic that condemns filing suit against a current client also condemns even giving advice about business dealings with General Manufacturing in spite of the fact that Able & Baker’s representation of General Manufacturing is in a completely unrelated matter and General Manufacturing has other counsel with respect to the terms of the purchase order. Where there is that much debate about what concededly would be an extension of the basic rule, the rule itself seems in need of reexamination.

16. 972 F.2d at 545. The Court noted that it is largely impossible to get consent from each of the members of a class, but it did acknowledge:

We are mindful, however, that the Texas rules’ allowance of some concurrent representation may be necessary either to prevent a large company, such as Dresser, from monopolizing the lawyers of an area or to assure that certain classes or unpopular clients receive representation. Although we do not now reach the matter, our consideration of social benefit to offset the appearance of impropriety might allow such a representation if the balance clearly and unequivocally favored allowing such representation to further the ends of justice. *Id.* at n. 12.

17. I do not believe it is appropriate in this setting to attribute views to particular individuals. The occasion for the discussion, however, was a meeting of the reporters with a distinguished committee of members of the ALI Council and Advisers to the Restatement of the Law Governing Lawyers.

C. *Some Preliminary Issues*

Before developing my thesis, three obvious objections to it should be articulated and addressed so as to highlight what my thesis is and is not.

1. *Suing a current client is foolish.* Any client has an absolute right to fire its lawyer and to tell others how badly the client was treated. The client who is sued by its lawyer is likely to exercise that right.

I agree. Nothing in this paper will advocate that lawyers file suit against one of their clients on behalf of another. The problem typically arises, however, in a case like our illustration; the lawyer represents a client with a significant and apparently meritorious claim against a client for whom the lawyer's work is episodic, modest in amount, and wholly unrelated to the issues in the litigation. Or, the issue may even arise when the client to be sued is a third-party defendant in a case not initiated by the suing client at all; the situation is simply one in which competence requires filing the third party action to protect the defendant against liability and the question is whether new counsel must be retained to bring that action.

The bottom line question in such cases is whether one — often long-time — client who seeks the lawyer's help in bringing or defending a matter must always be required to retain another lawyer because an adverse party is also a client of the preferred lawyer in some other matter. A categorical prohibition says "yes"; I say that answer has to be nonsense.

2. *Clients may consent to waive the prohibition.* The rule should present no practical problem. The effect of the rule should only be to require a lawyer's communicating with his or her clients to avoid giving any of them an unexpected surprise.

Again, I agree in theory. Except when warning is not an option — such as when seeking an emergency restraining order — a lawyer would be well advised to tell both the client seeking action and the client against whom the lawyer plans to proceed about the proposed representation and the lawyer's relation to each litigant. Good client relations are important, as is compliance with the ethical requirement of communication with clients about matters material to the respective representations.¹⁸

18. ABA Model Rule 1.4(a). ABA Formal Opinion 93-372 (April 16, 1993), even permits lawyers to get waivers of conflicts in advance of the time they arise. The opinion notes that a client may waive a *current* conflict if the client knows (1) the subject matter of the adverse representation and (2) what confidential information the client has disclosed that might be put at risk, if any. The lawyer also must reasonably believe there will be no adverse effect on the representation. As for

On the other hand, the problem discussed in this essay typically arises because the client threatened with suit refuses to grant consent, often solely out of a desire to make life difficult for the opponent. Indeed, it is widely suspected that clients in the position of General Manufacturing routinely give small portions of their legal work in a community to each of several law firms, precisely to be able later to invoke the categorical prohibition on those firms' later filing suit against it. I argue here that that tactic should not always be successful.

3. *Bright line rules are desirable so as to reduce the need for collateral litigation.* Clear rules might create anomalous results in a few cases, but in the vast majority of cases, they prescribe what a lawyer may and may not do and thus reduce costs by permitting issues to be resolved more expeditiously.

Again, that seems sensible in the abstract. The problem, however, is that the arguably categorical prohibition has turned out not to provide clarity after all.¹⁹ All sorts of questions arise such as: Is "current client" status determined as of the time the suit is filed, or is the relevant time when the lawyer was first consulted?²⁰ Suppose the named client is not being sued but the defendant is the client's spouse or child, parent or subsidiary?²¹ When is representation "directly" adverse rather than only "indirectly" so, and should anybody care?²² Suppose different lawyers are involved in the various cases, but the lawyers are partners in offices

future conflicts, the client must be able to know the nature of the conflicts being waived. Further, consent to waive the basic conflict does not automatically include waiver of protection of the client's confidential information, and it still must be reasonable to conclude there will be no adverse effect on the representation.

19. As indicated in the text at n. 11, in the course of researching this paper I have discovered that, depending on exactly what one counts in the universe of related issues, over 100 cases and ethics opinions have addressed the questions raised in this essay. One of the functions of this essay will be to collect these cases and opinions and organize them roughly by subject matter. No one can know how many cases have been resolved without opinion, of course, but the number is likely to be several hundred.

20. See, e.g., *Jeffrey v. Pounds*, 67 Cal.App.3d 6, 136 Cal.Rptr. 373 (1977) (relevant date when lawyer agreed to take the case).

21. See, e.g., *Estates Theaters, Inc. v. Columbia Pictures Industries, Inc.*, 345 F.Supp. 93 (S.D.N.Y. 1972) (adverseness to subsidiary treated as if to parent corporation represented by lawyer in an unrelated matter).

22. See, e.g., ABA Model Rule 1.7(a); *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir. 1981); ABA Formal Opinion 95-390 (January 25, 1995), "Conflicts of Interest in the Corporate Family Context," ABA/BNA Lawyers' Manual on Professional Conduct 1001:258.

far distant from each other?²³ Suppose the lawyers share office space but are not otherwise related?²⁴

None of these questions is imaginary; each has required costly litigation. Further, I believe that because the categorical rule appears both simple and arbitrary, it represents an apparently low-cost way for a party to delay proceedings or impose a burden on an opponent. Thus, litigation tactics alone likely have dictated trying to stretch the number of cases that fit within the principle.

D. My Proposal

This essay will argue that the rule should stop short of a categorical prohibition against a lawyer's filing suit against a current client.

A "substantial relation" between the cases should not be required; that test goes primarily to protection of confidential information and more than that is at stake in these cases, but I believe a single rule is being used today to deal with two quite different issues.

First, in the case of the client being sued by "its" lawyer, the question should be whether a reasonable client in the circumstances of the case would perceive a breach of loyalty, "loyalty" being understood as more than exclusively a financial concept.

Second, in the case of the client on whose behalf suit is brought, the test should be whether there is a credible basis for believing the lawyer may not represent that client wholeheartedly out of a desire to preserve good relations with the client being sued.

At minimum, courts should require a showing that the proposed suit against a current client will have a "material" adverse effect on representation of one or both current clients before prohibiting or sanctioning the representation.

The approach suggested here would require an exercise of judgment that might seem to provide less certainty and predictability than a categorical prohibition would produce, but I believe that in the case of this rule, the opposite would prove true.

23. See, e.g., ABA Model Rule 1.10(a) (imputes conflict to "lawyers associated in a firm"); *Image Technical Services v. Eastman Kodak Co.*, 820 F.Supp. 1212 (N.D.Cal. 1993) (lawyers in Washington, D.C., and Hong Kong).

24. See, e.g., *Matter of Sexson*, 613 N.E.2d 841 (Ind. 1993) (lawyers sharing office space).

II. DEVELOPMENT OF THE PRESENT RULE

A. *The Years Before 1964*

One of the first things to understand about filing suit against one's present client is how relatively recent the prohibition is. In the 1950s, for example, Henry Drinker noted few ethics opinions criticizing the practice, and no reported cases.²⁵ The conflict of interest concerns of the ABA Canons of Ethics²⁶ then applicable were simply (1) that the lawyer not misuse a client's confidential information, (2) that work on behalf of one client not "cause the lawyer to contend for that which duty to another client requires him to oppose," and (3) that clients should know whatever facts might cause them to select some a different lawyer. Thus, when the partner of a Kentucky prosecutor asked if he could represent civil claimants against a city, the Court said: "Laying side by side the canon's definition of conflict of interest and the statute prescribing the prosecutor's duties to the city we are unable to see any conflict."²⁷

25. Henry S. Drinker, *Legal Ethics* 111-13 (1953). The issue is taken up largely in passing. Drinker does cite N.Y. County Bar Opinion 232 (1925), for example, saying it was improper for a lawyer representing an executor in administration of an estate to accept a retainer from the executor's wife to sue the executor for divorce.

See also, N.Y. County Bar Opinion 292 (1932), where A was said to represent B against C, while C now wants A to represent him against D. Both B & C were said to be regular clients of A. "A cannot, with propriety, represent C in an action against D while he is also representing B in litigations with C," the Committee said. Nor can A "with propriety, represent B in an action against C, while he is also representing both B and C in actions against third parties."

In 1934, ABA Formal Opinion 112 had "advise[d] against" a lawyer filing a breach of contract action on behalf of a terminated agent against an insurance company that regularly asked the lawyer to defend workers' compensation cases. Even with the company's consent, the lawyer was told not to accept "employment for a new client in a case where fidelity to the new client may require examination of the motives and the good faith of the insurance company." . . . ABA Formal Opinion 112 (1934), in *Opinions of the Committee on Professional Ethics* (1967), pp. 364, 365.

26. The text of Canon 6 provided:

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

27. In re Advisory Opinion of Kentucky State Bar Association, 361 S.W.2d 111, 112 (Ky.App.1962). *But see, e.g.*, Florida Bar Association, Committee on Professional Ethics, Opinion No. 59-25 (1960): "It is our opinion that it would not be proper to represent the Personnel Board of the City and at the same time to appear before the City Council on behalf of private clients and to file suit against the City even though unrelated to personnel problems, since the lawyer is directly

B. *The Years 1964 - 1976: Rottner to Cinema 5*

The principal case establishing the rule against suing a current client seems to have been *Grievance Committee v. Rottner*.²⁸ Stewart Twible, Jr., had first consulted the firm of Lessner, Rottner, Karp & Jacobs in 1959 when he sought to sue a doctor and two state policemen who had temporarily confined him to a mental institution. It seems he had been in a fight and was accused of assaulting his son. The firm declined to represent him. Indeed, the lawyer (George Lessner) noted that he thought Twible probably *was* mentally ill. Shortly thereafter, however, another lawyer in the firm (Ronald Jacobs) did represent Twible in two collection matters and talked with him about compensation for the death of his dog. The work was done virtually pro bono; Twible paid a total fee of \$25. In June, 1962, Twible asked Jacobs to collect \$200 from a 19-year old with no apparent assets. The complaint was filed, but after Jacobs prepared papers needed to get a default judgment, Twible neglected to come in to sign the papers.

Thus, the last collection matter was still "open" when on July 31, Thomas O'Brien contacted lawyer Paul Sullivan of the same firm to sue the aggressive Mr. Twible for assault and battery. Lawyer Sullivan did so with a vengeance. He alleged willful, vindictive conduct by Twible, sought punitive damages and attached Twible's home. That led Twible to complain to the bar association.²⁹

The firm's defense was that the O'Brien case had nothing to do with Twible's collection matter.³⁰ No confidential information would be compromised, no legal arguments used on Twible's behalf would now be used against him, and neither O'Brien's nor Twible's choice of counsel would reasonably be affected by knowing that Twible's pending claim was still being handled by the office. However, the Superior Court convicted the firm's lawyers of a violation, reprimanded them, and ordered them to take no fees for either matter. It held that the conduct violated the "preamble to the canons of professional ethics . . . even apart from any consideration of the existence of a conflict of interest."³¹ Citing a

employed by the City Council to represent and advise the Council * * *." Even consent could not overcome the public misunderstanding, the Committee said.

28. *Grievance Committee of the Bar of Hartford County v. Rottner*, 152 Conn. 59, 203 A.2d 82 (1964).

29. Although John Rottner's name will be forever associated with this case, he was involved only as a senior partner of the firm. He apparently had nothing to do with the underlying facts. 203 A.2d at 83-84.

30. Twible could have argued that the original consultation about the fight with his son was "substantially related" to the O'Brien complaint, but apparently no such argument was made.

31. The preamble to the Canons of Professional Ethics (1908) provided in part:

need to maintain "public confidence in the Bar," the court concluded that "a firm may not accept any action against a person whom they are presently representing even though there is no relationship between the two cases."³²

The Connecticut Supreme Court agreed and said the rule as stated should be:

[R]igidly followed by the legal profession. When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion. If, as in this case, he is sued and his home attacked by his own attorney, who is representing him in another matter, all feeling of loyalty is necessarily destroyed, and the professional is exposed to the charge that it is interested only in money.³³

Although it found little or no authority to cite in support of its result, the Court was undaunted.

The almost complete absence of authority governing the situation . . . clearly indicates to us that the common understanding and the common conscience of the bar is in accord with our holding that such a suit constitutes a reprehensible breach of loyalty and a violation of the preamble to the Canons of Professional Ethics.³⁴

Rottner, then, turned on appearance of impropriety, the perceived breach of loyalty to the client being sued. Four years later, in *Kelly v. Greason*,³⁵ the principle was invoked again to suspend law partners Kelly and Whalen from the practice of law for two years. In addition to practicing law, Whalen worked as an outside adjuster for Nationwide Insurance. The partnership had filed medical claims with Nationwide on behalf of Nationwide insureds and had brought personal injury cases

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be . . . so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. . . . It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

32. 203 A.2d at 84. The Court cited N.Y. County Lawyers Assn. Question and Answer No. 450 (June 21, 1956).

33. 203 A.2d at 84.

34. *Id.* at 85. A case it did not cite but might have was *Memphis & Shelby County Bar Assn v. Sanderson*, 52 Tenn.App. 684, 378 S.W.2d 173 (1963) (among many charges, lawyer simultaneously represented man in workers' compensation case and the man's wife in seeking to divorce him.)

35. 23 N.Y.2d 368, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968).

against defendants insured by Nationwide. The New York Court of Appeals noted:

Potentially, a claimant against an insurance company is adverse in interest to the carrier, which would most often seek to minimize any liability. Thus, it was *prima facie* evidence of professional misconduct for the partnership to represent claimants, whether assureds of Nationwide or not, in their claims against the carrier, while at the same time Whalen was the carrier's employee.

The problem with that theory in this case was that Nationwide had *consented* to the lawyers' filing such claims. Thus, the question became whether the lawyers had violated any duty to the *claimant* clients. The Court said such a violation was indeed possible.

[L]oyalty to Nationwide, and concern for Whalen's continued employment by the carrier, could have influenced the effectiveness and vigor with which claims against the carrier were prosecuted.³⁶

Because the disciplinary charge had not focused on whether those clients had *also* consented, the matter was remanded to take evidence on that issue. The principle established, however, was one that I believe is central to analysis of the rule: The interests of *either* or *both* the client being sued and the client on whose behalf suit was brought could be at risk in such a case.

It was yet another four years until the decision in *Estates Theaters, Inc. v. Columbia Pictures Industries, Inc.*,³⁷ the first case to consider these issues in terms of the new ABA Code of Professional Responsibility.³⁸ The plaintiff was a theater owner in Queens who sued distributors and other theater owners for allegedly conspiring to discriminate against

36. 296 N.Y.S.2d at 945. See also, *Matter of Kushinsky*, 53 N.J. 1, 247 A.2d 665 (1968) (lawyer reprimanded for representing corporation in a stockholder action and individual in a criminal case before end of case he had filed against both on behalf of another client).

37. 345 F.Supp. 93 (S.D.N.Y. 1972).

38. Relevant parts of ABA Model Code of Professional Responsibility included:
DR 5-105(A):

A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

DR 5-105(C):

In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

EC 5-1:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties.

him in availability of films. He was represented by Joseph Ruskay. Ruskay also had another client, United Artists Theater Circuit (UATC), that he was defending in similar antitrust claims brought by other plaintiffs. UATC was not a defendant in this case, but a UATC subsidiary was alleged to be a beneficiary of the discrimination. Thus, if Ruskay's client won this case, that subsidiary might lose its alleged advantage.³⁹

Responding to a motion to disqualify Ruskay, Judge Weinfeld reasoned that Ruskay would be tempted not to bring out all the details of the conspiracy because that might give aid to the plaintiffs in the case in which he defended UATC. Following the insight of *Kelly v. Greason*, the Court said:

A lawyer should not be permitted to put himself in a position where, even unconsciously he will be tempted to 'soft pedal' his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another.⁴⁰

Ruskay then said that if he was required to withdraw from one of the cases, he would prefer that it be the other case, the one in which he

[citing *Rottner* in fn. 1] Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

EC 5-14:

Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

EC 5-15:

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he . . . should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC 5-16:

In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflicts and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. . . .

39. If that wasn't confusing enough, if plaintiff won, it might have disadvantaged UATC by helping the government win yet another case against UATC in which Ruskay also was not involved.

40. 345 F.Supp. at 99. Judge Weinfeld specifically saw the cases as "substantially related," the concept he had earlier initiated, see n.3, *supra*, although Ruskay disagreed.

was defending UATC. That would eliminate any incentive to “soft pedal” his arguments on behalf of the plaintiffs — the stated ground for his disqualification — but the Court went ahead and disqualified him in the plaintiffs’ case instead, saying:

The Rule itself does not vest the choice of withdrawal in the lawyer — to so construe it would do violence to its spirit and purpose. Mr. Ruskey has represented UATC for many years in the consolidated actions, long prior to his retainer by plaintiff herein. To permit him to choose to withdraw from his representation of his first client and to continue as attorney for the second, whose interests are antagonistic to the first, would nullify the objective of the Rule.⁴¹

Then, twelve years after *Rottner* began this short line of cases, *Cinema 5, Ltd. v. Cinerama, Inc.*,⁴² confirmed and defined the rule. Manly Fleischmann was a partner in both a Buffalo firm and a firm in New York City. The Buffalo firm represented Cinerama in two private anti-trust cases in Western New York that alleged discriminatory and monopolistic practices in licensing and distribution of films. Later, but while that case was still pending, the New York City firm brought suit *against* Cinerama on a similar charge.

In the District Court, Judge Brieant found the cases were “substantially related.” He believed Cinerama’s ability to trust the confidentiality of what it told its Buffalo defenders required disqualification of the New York City firm from appearing for the plaintiff. If that were the end of the story, the case would not have been memorable. In affirming disqualification, however, the Second Circuit held that the “substantial relationship” test applied to cases involving *former* clients, but not to cases like this one that involved *current* clients.

The propriety of this conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients.

When Cinerama retained Mr. Fleischmann as its attorney in the Western District litigation, it was entitled to feel that at least until that limi-

41. 345 F.Supp. at 100. Other cases decided during this period include *Hawk Industries, Inc. v. Bausch & Lomb, Inc.*, 59 F.R.D. 619 (S.D.N.Y. 1973) (firm may not serve as class counsel against a company when it is already counsel for plaintiffs in a derivative action involving the company because in the latter action the corporation was a nominal plaintiff); *State v. Galati*, 64 N.J. 572, 319 A.2d 220 (1974) (criminal defense lawyer also represented the Policemen’s Benevolent Assn; because of the trust relationship the lawyer had with members of the PBA chapter he represented, he could not handle a criminal defense if an officer from that chapter would be called to testify); *Sokoloff v. Sokoloff*, 82 Misc.2d, 797, 371 N.Y.S.2d 106 (1975) (wife’s divorce lawyer’s petition for fees to be paid by the husband denied because, concurrently, lawyer was representing the husband in connection with the sale of a business).

42. 528 F.2d 1384 (2d Cir. 1976).

tation was at an end, it had his undivided loyalty as its advocate and champion. . . . [W]hen Mr. Fleischmann and his New York City partners undertook to represent Cinema 5, Ltd., they owed it the same fiduciary duty of undivided loyalty and allegiance.⁴³

The Court went on to define the test to be applied in such cases:

Whether such adverse representation, without more, requires disqualification in every case, is a matter we need not now decide. We do hold, however, that the "substantial relationship" test does not set a sufficiently high standard by which the necessity for disqualification should be determined. . . . Where the relationship is a continuing one, adverse representation is *prima facie* improper, and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation. We think that appellants have failed to meet this heavy burden.⁴⁴

I believe the *prima facie* standard of *Cinema 5* was the correct standard and that reading it as a virtual *per se* prohibition has been a serious mistake.⁴⁵ To see how that mistake happened, however, requires a look at yet more cases.

C. *The Years 1977 to 1983: Cinema 5 to the Model Rules*

The cases decided in the critical period after *Cinema 5* but before adoption of the Model Rules exhibit no single pattern. Some courts tended to be more sensitive than others to the need to strike a balance between the clients' interest in free choice of counsel and their interest in avoiding the adverse consequences of dealing with a lawyer who has conflicting loyalties.

Jeffry v. Pounds,⁴⁶ the leading California case, for example, was a suit for attorney's fees. Pounds was injured in an auto accident and

43. 528 F.2d at 1387.

44. *Id.* Even though the Court was confident Fleischmann would avoid being personally involved in either case, "we cannot impart this same confidence to the public by court order." *Id.*, n.1. *Cinema 5* was soon followed in *Rubinstein v. Foster Brothers Manufacturing Co.*, 52 A.D.2d 597, 382 N.Y.S.2d 111 (1976).

45. Writing ten years later, Professor Wolfram asserted that "it seems doubtful that the [possibility of rebutting the *prima facie* standard] was ever meant to be realized. . . . The professional rule is that clients are entitled to rely upon a lawyer's 'undivided allegiance and faithful, devoted service.' For a lawyer to sue a present client simply clashes too harshly with that requirement." C. Wolfram, *Modern Legal Ethics* § 7.3.2 (1986). Hindsight is a wonderful advantage for Professor Wolfram, and for me, but I find little at the time of *Cinema 5* to suggest that the *prima facie* standard did not mean to permit lawyers to show there was no material risk the problems the rule was designed to prevent would occur.

46. 67 Cal.App.3d 6, 136 Cal.Rptr. 373 (1977).

retained Jeffry's firm to sue for damages. Meanwhile, Pounds retained a different firm to represent him in his divorce. At that point, Mrs. Pounds hired the Jeffry firm as her divorce counsel.⁴⁷ When he learned that, Pounds fired the Jeffry firm as his lawyers in the accident case, but when that case settled, the firm claimed \$500 for work it had done before it was fired. It argued that it had not misused any client confidences or failed to vigorously pursue Pounds' interest in the case as long as it was representing him, but — citing both *Cinema 5* and *Rottner* — the Court said:

Professional responsibility rules seek the objective of public confidence, as well as internal integrity. A lay client is likely to doubt the loyalty of a lawyer who undertakes to oppose him in an unrelated matter. . . . [The basis of the conflict] is the client's loss of confidence, not the attorney's inner conflicts.⁴⁸

A categorical approach to these issues was found to be even less justified where what was challenged was not the act of filing suit against

47. The fact pattern of a business lawyer filing suit for divorce has come up several times. *E.g.*, *Teel v. Teel*, 400 So.2d 357 (La.1981) (lawyer for wife in divorce disqualified; principal asset was the husband's corporation for which the lawyer was also counsel of record; corporation's secrets could be used to the advantage of Mrs. Teel); *Woods v. Superior Court of Tulare County*, 149 Cal.App.3d 937, 197 Cal.Rptr. 185 (1983) (lawyer for family business disqualified from representing husband); *E.E.O.C. v. Orson H. Gygi Co.*, 749 F.2d 620 (10th Cir.1984) (lawyer for a firm charged with sex discrimination disqualified after it had sought annulment of marriage on behalf of one of the complainants; complainant said she feared she might have given the lawyer confidential information that could now be used against her); *Committee on Legal Ethics v. Frame*, 189 W.Va. 641, 433 S.E.2d 579 (1993) (lawyer whose firm had filed a personal injury action against a company managed and majority owned by Ms. McMillen contacted by her to handle her divorce action; firm cross-examined her in the personal injury case; court found that although she was not a formal party to the personal injury action, her status as a majority shareholder "created a potential, if not actual, conflict of interest"); *Matter of Sexson*, 613 N.E.2d 841 (Ind. 1993) (lawyers shared office space; one of the lawyers represented couple in a personal injury case, another represented wife in divorce; when settlement check came in, personal injury lawyer gave it to the husband and divorce lawyer handed him a court order forbidding him to cash it; Court found lawyers were a firm because they shared a phone line, office staff, letterhead, and had access to each other's confidential information; thus, Sexson was reprimanded).

In such divorce cases, the adverse impact on the client's need for a personal sense of loyalty is probably most clear. Further, the lawyer will often have learned enough confidential information in the business representation that the cases could be considered to be "substantially related" and challenged even under that standard. Thus, these will ordinarily be appropriate cases for finding a prohibited conflict of interest.

48. 136 Cal.Rptr. at 376-77. However, suggesting some sensitivity to the competing interests involved, the Court allowed fees for the period *before* the lawyers agreed to handle the divorce rather than imposing a punitive fee forfeiture. *Id.* at 377.

See also, *In re Hansen*, 586 P.2d 413 (Utah 1978) (lawyer representing new owner of an auto dealership against a suit for an accounting by the former owner also represents former owner on an unrelated criminal charge of receiving stolen property; lawyer not disbarred but ordered to refund client's retainer).

a current client, but rather some other kind of work the lawyer did for the client. *City Council v. Sakai*⁴⁹ was part of a series of events in which the city council had investigated the mayor of Honolulu. It had hired a law firm to conduct the inquiry and it had to file suit to get the firm paid. The law firm had other clients on whose behalf it had filed suit against the city, so the city treasurer said the firm was entitled to no fee.⁵⁰ The Court, however, found no conflict of interest:

The critical question is whether . . . [the firm's] independent professional judgment would be or was likely to be adversely affected by the existence of their professional obligations to their private clients. There is nothing to suggest that the investigation with respect to which they were employed would touch in any way upon the subject matter of the pending actions.

As is pointed out in EC 5-15, a lawyer may properly serve multiple clients having potentially differing interests more freely in matters not involving litigation.⁵¹

The Court thus distinguished cases like *Cinema 5*, *Rottner*, and *Jeffry v. Pounds* and awarded the firm the agreed upon fee.⁵²

In other cases, however, the rhetoric was substantially more inflamed. Indeed, courts sometimes seemed to stretch to impose a categorical principle in cases that could have been decided more simply. In 1977, the same year *Jeffry* and *Sakai* were decided, the Second Circuit considered *Fund of Funds, Ltd. v. Arthur Andersen & Co.*⁵³ There, Mor-

49. 58 Haw. 390, 570 P.2d 565 (1977).

50. Other cases involving lawyers for public bodies during this period include *Perillo v. Advisory Comm. on Professional Ethics*, 83 N.J. 366, 416 A.2d 801 (1980) (city's law department prohibited from bringing cases against municipal employees, including police officers, with whom they worked regularly in other cases); *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982) (lawyer who successfully sued to have the city's privilege taxes declared unconstitutional denied fees because, at the same time, he was representing the city in a suit against the police); *Matter of Lantz*, 442 N.E.2d 989 (Ind. 1982) (part-time prosecutor, while in private practice, filed civil complaints on behalf of a couple; later, husband was in jail for disorderly conduct and when he said he had gotten a job and had to go to work, prosecutor said he would not object to release on his own recognizance; husband then did not appear for trial and Court found the lawyer's "representation of clients with opposing interests merited a public reprimand").

51. 570 P.2d at 572-73. EC 5-15 is quoted in n. 37, supra.

52. The distinction between suing a present client and handling other kinds of transactions is also seen in *In re Ainsworth*, 289 Or. 479, 614 P.2d 1127 (1980). There, a lawyer represented a lienholder in the sale of a parcel of land to Buyer. While that negotiation was going on, the lawyer closed an unrelated transaction on behalf of Buyer with a different seller. The Court found no violation of professional standards. There was no likelihood of effect on the lawyer's "independent professional judgment" in either matter; in so finding, the Court implicitly rejected the Trial Board's categorical finding that "To represent adverse parties, even on unrelated matters, is prima facie a conflict of interest and is improper." 614 P.2d at 1130-31.

53. 567 F.2d 225 (2d Cir. 1977).

gan, Lewis & Bockius represented Fund of Funds in a suit alleging that King Resources fraudulently sold assets to the Fund at inflated prices. Arthur Andersen had been Fund of Funds' auditor and it allegedly had negligently failed to warn its client. Morgan, Lewis had been long-time counsel to Arthur Andersen and one could have argued that this case was "substantially related" to work it had done for Andersen.⁵⁴

Morgan, Lewis concluded that it could not be the one to file suit against Andersen on the Fund's behalf, and it tried to erect a "Chinese Wall" between its Andersen lawyers and those working for Fund of Funds. Morgan, Lewis got a lawyer named Robert Meister to serve as its "understudy" in the case and when a suit against Andersen became inevitable, Meister filed it. The District Court had refused to disqualify Meister, but the Second Circuit reversed, saying in sweeping dicta:

It is clear that . . . Morgan Lewis would have been disqualified had it sued or attempted to sue Andersen. As a current and actual client at the time Morgan Lewis accepted the retainer from Fund of Funds, Andersen had an *absolute right* to the firm's undivided loyalty.⁵⁵

Saying that Morgan, Lewis may not "violate by indirection those very strictures it cannot directly contravene,"⁵⁶ the Court concluded that Meister should be disqualified as well.

The principle was also extended to criminal cases. *Zuck v. Alabama*⁵⁷, for example, was a case seeking habeas corpus for a prisoner sentenced to 40 years for murder. The law firm Zuck had retained to represent him was simultaneously representing the prosecutor in an unrelated civil matter. The prosecutor and trial judge both knew about the

54. Other cases which could have been decided the same way even under a "substantial relationship" standard include *Kentucky Bar Association v. Roberts*, 579 S.W.2d 107 (Ky. 1979) (Dr. Jackson had contracted to build an office building; contractor had dispute with Jackson who hired Roberts; then, building supervisor had dispute with Jackson as well and asked Roberts to take that case; Bar's theory was that cases arose from common facts and competed for Dr. Jackson's limited funds); *Sapienza v. New York News*, 481 F.Supp. 676 (S.D.N.Y. 1979) (Tarnow represented Cohen in his distribution contract with the New York News; Tarnow then filed antitrust action against Cohen on behalf of newsboys with whom Cohen deals; great commonality of facts in the two cases, so Tarnow was disqualified from representing the plaintiffs); *In re Hersherberger*, 288 Or. 559, 606 P.2d 623 (1980) (lawyer reprimanded who, while he represented a couple in their bankruptcy, filed suit to foreclose on the property from which they conducted their business); *People ex rel. Cortez v. Calvert*, 200 Colo. 157, 617 P.2d 797 (1980) (lawyer had become involved in disputes involving three people, two of whom wanted to marry the third; multiple conflicts); *Financial General Bankshares, Inc. v. Metzger*, 523 F.Supp. 744 (D.D.C. 1981) (breach of fiduciary duty for lawyer to help Client 2 secretly buy a 20% interest in Client 1).

55. 567 F.2d at 232 (emphasis added).

56. *Id.* at 233.

57. 588 F.2d 436 (5th Cir.1979).

other matter, but no one thought to tell Zuck or get his consent to what was said to be a conflict of interest. The Court rejected the argument that the *Cinema 5* principle was not involved because the prosecutor was not a "party" to the criminal case.

The prosecutor and the defense attorneys here were adversaries for the purpose of this trial. It is sufficient to establish a constitutional violation that the defense attorneys owed a duty to Zuck to endeavor to refute the prosecutor's arguments and impeach his witnesses. . . . [T]he defense attorneys were subject to the encumbrance that the prosecutor might take umbrage at a vigorous defense of Zuck and dispense with the services of their firm.⁵⁸

An appellate record would be insufficient to detect an actual conflict, the Court said.

For this reason, the mere existence of a temptation in the abstract is sufficient to preclude duality of representation. A defense attorney must be free to use all his skills to provide the best possible defense for his client. Despite the noblest of intentions, the defense attorneys here may have been tempted to be less zealous than they should have been in the presentation of Zuck's case. This possibility is sufficient to constitute an actual conflict of interest as a matter of law.⁵⁹

58. *Id.* at 439.

59. *Id.* at 440. *See also*, *United States ex rel. Miller v. Myers*, 253 F.Supp. 55 (E.D.Pa.1966) (lawyer who advised his client to plead guilty found to have been representing the victims of the robbery in an unrelated civil matter; court granted habeas corpus, saying:

It takes no great understanding of human nature to realize that the individuals who had been burglarized might be less than happy and might go so far as to remove the attorney from their good graces if this defendant were acquitted or received a light sentence or were placed on probation. Moreover, if the case had gone to trial it might have meant an investigation involving the Carpenters and even cross-examination of them on the stand. The entire situation could be very embarrassing for the lawyer who is naturally interested in having the legal business of the Carpenters, especially when they are much more able to compensate him for his services than the defendant. The circumstances here are such that an attorney cannot properly serve two masters.

See also, *People v. Stovall*, 40 Ill.2d 109, 239 N.E.2d 441 (1968) (burglar defended by a lawyer in a firm that had long represented the victim of the crime in civil matters; court says not even consent by defendant could overcome conflict); *People v. Castro*, 657 P.2d 932 (Colo. 1983) (murder conviction reversed because appointed defense counsel was also acting as lawyer for the District Attorney in a challenge to a recall petition and a criminal prosecution accusing him of overspending his budget); *Matter of Garber*, 95 N.J. 597, 472 A.2d 566 (1984) (lawyer represented eyewitness to alleged gangland murder; represented the accused in other matters; Court holds eyewitness and murderer are "adversaries," so representation of both was a conflict of interest); *Okeani v. Superior Court for Maricopa County (Romley)*, 178 Ariz. 180, 871 P.2d 727 (1993) (case where one public defender represented the defendant in a sexual assault case and another represented the victim in a different juvenile matter; first lawyer wanted victim's file to help impeach her when she testified in the criminal case; trial court barred that and held public defender's office could not represent both perpetrator and victim). *But see*, *State of Arizona v. Carpenter*, 1 Ariz.App. 522, 405

However, the key case helping to develop the perception of a categorical principle against suing a present client was certainly *I.B.M. v. Levin*.⁶⁰ It was an antitrust case filed in 1972 by Carpenter, Bennett & Morrissey (CBM) on behalf of Levin Computer Corp. (LCC) who wanted to compel IBM to deal with LCC. Five years later, in 1977, IBM moved to disqualify CBM. It turned out that in 1970, IBM had asked CBM to write an opinion letter for it in a labor matter; CBM got two other assignments in 1970 & 1971. In 1972, when the fourth request came in, CBM says it told IBM of the pending antitrust case and was told IBM would waive the conflict. IBM denied the conversation. CBM clearly did get consent from LCC and it filed the case a week after writing the fourth opinion letter. Even after the case was filed, IBM sent CBM four more requests for opinion letters to CBM without raising an objection to its representation of LCC.⁶¹

CBM tried to rebut the *prima facie* approach taken in *Cinema 5*. It argued that no adverse effect on its independent professional judgment in its opinion letters for IBM could possibly arise from its work for LCC, nor would the fees generated from a few letters cause the firm to soft pedal its prosecution of the antitrust claim. The Court's response, however, treated the *prima facie* test as if it were an irrebuttable prohibition.

We think . . . it is likely that some "adverse effect" on an attorney's exercise of his independent judgment on behalf of a client may result from the attorney's adversary posture toward that client in another legal matter. For example, a possible effect on the quality of the attor-

P.2d 460 (1965) (in prosecution of husband and wife for abuse and neglect of their child, lawyer represented both; same lawyer also represented the wife in seeking a divorce from the husband; Court said it did "not approve the conduct of trial counsel" but the conduct was not prejudicial to either defendant and did not justify setting aside their convictions). Cf. *Matter of Cohn*, 46 N.J. 202, 216 A.2d 1 (1966) (in a license revocation hearing, lawyer represents both underage drunk driver in accident case and the tavern that sold him the liquor).

60. 579 F.2d 271 (3d Cir. 1978).

61. Other cases during this period found waiver or lack of standing.

Melamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979), was an antitrust action filed by Winston & Strawn on behalf of Laub Baking Co. Continental alleged Winston & Strawn also represented two of Continental's competitors that it should also have sued but could not because of this ethics rule. Thus, in the interest of Laub (who was not complaining), it asked that Winston & Strawn be disqualified so that the competitors could be sued as well. The Court found full disclosure to Laub, plus consent, and refused to disqualify on the complaint of someone who was not a client in the proceeding.

United Nuclear Corp. v. General Atomic Co., 96 N.M. 155, 629 P.2d 231 (1980), was an antitrust suit against, inter alia, Gulf Oil Co. Some of the charges involved Gulf's allegedly delaying production from its reserves in New Mexico. For ten months of the case, United's counsel was representing Gulf perfecting mining rights and settling title claims there. The Court said the simultaneous representation raised an "ethical question of serious dimensions." However, delay in filing the disqualification motion warranted denying it.

ney's services on behalf of the client being sued may be a diminution in the vigor of his representation of the client in the other matter. A serious effect on the attorney-client relationship may follow if the client discovers from a source other than the attorney that he is being sued in a different matter by the attorney. The fact that a deleterious result cannot be identified subsequently as having actually occurred does not refute the existence of a likelihood of its occurrence, depending upon the facts and circumstances, at the time the decision was made to represent the client without having obtained his consent.⁶²

Indeed, the Court noted approvingly, some have said "doubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification."⁶³

62. 579 F.2d at 280. The Court found that CBM had failed to get IBM's consent; the fact that IBM knew about the representation was not enough. "[F]ull and effective disclosure of all the relevant facts must be made and brought home to the prospective client." *Id.* at 282.

Restatement, § 202, Comment *c*, states an abbreviated requirement of informing the client in most cases within the subject of this essay:

Where the conflict arises solely because a proposed representation will be adverse to an existing client in an unrelated matter, knowledge of the general nature and scope of the work being performed for each client normally suffices to enable the clients to decide whether or not to consent.

The impossibility of getting consent doomed the lawyer in *Chateau de Ville Productions, Inc. v. Tams-Witmark Music Library, Inc.*, 474 F.Supp. 223 (S.D.N.Y. 1979), an antitrust class action by musical theaters against a multiple copyright licensor. A member of the class also was general partner in the owner of one of the key copyrights at issue. Class counsel thus also represented a co-conspirator and potential defendant. The Court held the representation improper. A class was in no position to consent to a conflict.

Cf., *United Sewerage Agency v. Jelco*, 646 F.2d 1339 (9th Cir. 1981). Jelco, a prime contractor, was represented in a dispute with Sub 1 by the law firm that long had represented Sub 2. There was then a dispute between Jelco and Sub 2 and Jelco argued that the firm was disqualified. The Court found Jelco knew about and consented to the firm's representation of Sub 2 in any such litigation and the question became whether it was "obvious" the firm could adequately protect the interest of each client.

In determining whether it is obvious that an attorney can represent adverse parties, the court should look at factors such as: the nature of the litigation; the type of information to which the lawyer may have had access; whether the client is in a position to protect his interests or know whether he will be vulnerable to disadvantage as a result of the multiple representation; the questions in dispute (e.g., statutory construction versus disputes over facts) and whether a government body is involved.

The Court held that the substance of these cases was completely different and there was no danger of a leak of confidential information, so the motion to disqualify was denied.

63. *Id.* at 283. A much different view of disqualification was taken in *Board of Education of New York City v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979). That case was filed by the City to determine if it had to maintain separate seniority lists for male and female teachers. Female teachers said yes and had their own counsel; the men said no and had as their counsel the firm used by the union that represented both men and women in collective bargaining. The women sought to disqualify that firm on the ground that it was opposing women who were its clients in bargaining matters. However, the Court said disqualification was required only if "necessary to preserve the integrity of the adversary process" before the Court. 590 F.2d at 1246. "With rare exceptions" those

Just a year later, in *Pennwalt v. Plough*,⁶⁴ the suit was not against the lawyer's client, but a member of the client's corporate family. Dechert, Price & Rhoads' long-time client Pennwalt made DESENEX. Defendant Plough made AFTATE, a competing product whose advertisements were allegedly unfair. A year after presenting Pennwalt's initial complaint about the advertising to Plough, Dechert undertook to defend Scholl, Inc., in a clearly unrelated antitrust action alleging resale price maintenance in shoe sales.

Ten months after assuming that defense, Scholl became a wholly-owned subsidiary of Schering-Plough; Plough already was such a subsidiary, so Plough and Scholl had become sister corporations. The month after Scholl's acquisition, Pennwalt (through Dechert) filed suit against Plough on the unfair competition claim. Dechert made no disclosure to and sought no consent from Pennwalt, Scholl or Plough.⁶⁵ Thereupon, Schering-Plough asked Dechert to withdraw from representing Pennwalt and to continue representing Scholl. Because it had represented Pennwalt much longer, Dechert sought to withdraw from representing Scholl instead. The Court appropriately approached the case "with caution".

The proliferation of national or multi-national public corporations owning or partially owning subsidiaries which may also be national or multi-national, the spawning of varied types of corporate affiliates, and the creation of joint ventures yield an infinite variety of potential disqualification problems. The potential for inadvertent unethical conduct is exacerbated by the pronounced trend toward national and international law firms.⁶⁶

The urged prophylactic rule for disqualification where there is concurrent dual representation of sister corporations cannot be accepted for

were two kinds of cases: "(1) where [the conflict] . . . undermines the court's confidence in the vigor of the attorney's representation of his client [citing *Fund of Funds & Cinema 5*], or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation . . . thus giving his present client an unfair advantage." *Id.* The "appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases." In this case, the appearance "is not very clear" so disqualification was not ordered. *Id.* at 1247. *See also*, *Whiting Corp. v. White Machinery Corp.*, 567 F.2d 713 (7th Cir. 1977) (*per curiam*), declining to disqualify a law firm from representing the plaintiff, or from representing the Hendrickson Co., a 20% shareholder in defendant, who elected 40% of defendant's board.

64. 85 F.R.D. 264 (D.Del.1980).

65. In fact, at the time the cases were pending, Scholl was itself considering marketing an athletes' foot powder like the AFTATE about which Dechert was complaining in the Pennwalt suit, but Dechert was not involved in that work.

66. 85 F.R.D. at 267.

the simple factual reason that [Dechert] has never represented Plough or Schering-Plough.⁶⁷

The fundamental issue, in the court's view, was the risk to confidential information. It found no such risk.⁶⁸ However, the Court said, loyalty to one's clients is also an important value. Thus,

[T]he court properly may examine the relationship between the sister corporations. The object of this inquiry is not to determine whether Plough can be affixed with the label "client." Rather, it is to gauge the degree, if any, to which DP&R's representation of either Pennwalt or Scholl may be influenced by a regard for the alternate client's welfare.⁶⁹

The Court found no such effect and refused to second-guess the firm's choice which client to represent.⁷⁰

Finally, a combination of a relatively broad reading of the *Cinema 5* prohibition but substantial caution before invoking disqualification is seen in *Glueck v. Jonathan Logan, Inc.*⁷¹ The defendant sought to disqualify Phillips Nizer from representing the plaintiff in an action for wrongful termination of an executive. Phillips Nizer also represented the Apparel Manufacturers Association, of which the defendant was a large member, so the issue was whether a lawyer could file suit against a member of an incorporated association. The District Court noted that the Association's principal function was negotiation of a collective bargaining agreement. In that work, the firm clearly represented the interests of the defendant, Jonathan Logan, and possibly worked with Logan's confidential information.⁷²

67. Id. at 268-69. The Court acknowledged, however, that representation "has been prohibited . . . even though the attorney-client relationship never existed."

68. "[I]t is unrealistic to conclude that any of the confidential information provided by Scholl is relevant to any issue in this Lanham Act litigation involving the relative merits of athlete's foot remedies." Id. at 270-71.

69. Id. at 272.

70. The Court expressly found that Dechert had not been merely "choosing to represent the more favored client and withdrawing its representation of the other. Such conduct is expressly disfavored." Id.

Representation of sister corporations will be the subject of another paper at this conference, so I will not deal with it directly, but some examples of cases include *Original Appalachian Artworks, Inc. v. May Department Stores*, 640 F.Supp. 751 (N.D.Ill.1986); *In re Wingspread Corporation*, 152 B.R. 861 (S.D.N.Y. 1993); *Apex Oil Co. v. Wickland Oil Co.*, 1995 WL 293944 (E.D.Cal. 1995).

71. 512 F.Supp. 223 (S.D.N.Y.), affirmed 653 F.2d. 746 (2d Cir. 1981).

72. The key case earlier requiring disqualification where an association member's confidential information might be used against it was *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978).

The issue is not solely whether Phillips Nizer has acquired confidential information concerning defendant, but . . . whether defendant's representatives (even if simultaneously acting as AMA officials) must be on guard in their discussions with Phillips Nizer to avoid disclosures having any possible consequence in this action. Such is not the environment contemplated for an attorney-client relationship by the drafters of Canon 5.⁷³

The Court of Appeals agreed that Phillips Nizer must be disqualified on these facts, but drew an important distinction.

We do not believe the strict standards of *Cinema 5* are inevitably invoked whenever a law firm brings suit against a member of an association that the firm represents. If they were, many lawyers would be needlessly disqualified because the standards of Canon 5 impose upon counsel who seeks to avoid disqualification a burden so heavy that it will rarely be met. That burden is properly imposed when a lawyer undertakes to represent two adverse parties, both of which are his clients in the traditional sense. But when an adverse party is only a vicarious client by virtue of membership in an association, the risks against which Canon 5 guards will not inevitably arise. A law firm that represents the American Bar Association need not decline to represent a client injured by an automobile driven by a member of the ABA. Moreover, if Canon 5 were applicable to all suits against association members, there would be a temptation to water down the strict standards of Canon 5 and find them met more easily than in cases where the adverse parties are really clients of the same lawyer. . . . We think the standards of Canon 5 should be left as strict as *Cinema 5* announced them. We also believe those standards should apply to suits against association members only when the risks against which Canon 5 protects are likely to arise.⁷⁴

Scholarly articles on these developments were of little significance in the law's development.⁷⁵ An important exception may have been the *Developments Note* published by the Harvard Law Review in 1981.⁷⁶ The Note ignored the *prima facie* language of *Cinema 5* and spoke instead of a "prophylactic rule." It saw two quite different rationales for

73. *Id.* at 227.

74. 653 F.2d at 749.

75. Indeed, excellent articles on conflicts of interest written during this period seem not to have acknowledged the issues at all. E.g., Aronson, Conflict of Interest, 52 Washington L.Rev. 807 (1977); Moore, Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy, 61 Texas L. Rev. 211 (1982).

76. Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1296-1303 (1981).

prohibiting “serving two masters in two matters” that had not sufficiently been distinguished.

The primary danger is that an attorney who represents adverse interests may develop a “sense of loyalty” to one client that will “undermine” his representation of the other. . . . [In other cases, however, the prohibition] should instead be viewed as reflecting in addition the need to protect certain client expectations and thereby to promote a trusting and harmonious attorney-client relationship.⁷⁷

Putting the *Note*'s argument in terms of our original illustration, Able & Baker might be tempted to “outright betray[]” Marlene Wilson so as to stay in General Manufacturing's good graces. “More likely,” the firm might represent her “less vigorously in order to avoid antagonizing” the larger client.⁷⁸ General Manufacturing would not fear a loss of vigor, but it could fear that concurrent representation “jeopardizes the good will and trust that are vital to the proper functioning of the attorney-client relationship.”⁷⁹

This essay has agreed that the distinction drawn by the *Note* is very important, but its application to the illustration suggests why a *per se* prohibition makes no sense. Able & Baker's incentive to pursue Ms. Wilson's contingent fee case to a large settlement or verdict is obvious and unlikely to be affected by its representation of General Manufacturing. And, the “relationship” Able & Baker has had with General Manufacturing has been so modest as to leave almost nothing to impair.

D. *The Surprise Appearance of Model Rule 1.7(a)*

The next major development of these principles, however, came not from the courts but from adoption of the ABA Model Rules. Although case law involving filing suit against a present client had developed under both the language of Canon 6 of the Canons of Ethics and Canons 5 & 9 of the Code of Professional Responsibility, it was not until adoption of Model Rule 1.7(a)'s prohibition against taking a position “directly adverse” to a present client that a categorical prohibition seemed to be officially endorsed. That impact of Rule 1.7(a) has been unfortunate, because far from reflecting a careful choice to create a categorical standard, Rule 1.7(a) seems largely to have been a last-minute, backdoor addition to the Model Rules.

77. *Id.* at 1297-98.

78. *Id.* at 1298-99.

79. *Id.* at 1303.

The first Discussion Draft of the Kutak Commission's proposed Model Rules was dated January 30, 1980.⁸⁰ At that time, present Rule 1.7⁸¹ took a very traditional, general approach to conflicts.

In circumstances in which a lawyer has interests, commitments, or responsibilities that may adversely affect the representation of a client, a lawyer shall not represent the client unless:

- (a) The services contemplated in the representation can otherwise be performed in accordance with the rules of professional conduct; and
- (b) The client consents after adequate disclosure of the circumstances.

Suits against current clients were addressed solely in the Comment to the Rule:

Ordinarily a lawyer may not act as advocate against a person the lawyer represents in some other matter, even if the litigation is wholly unrelated. For example, a lawyer could not properly prosecute a breach of contract action against a person for whom the lawyer is preparing an estate plan. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer engaged in a suit against a large corporation may accept employment by the corporation in an unrelated matter if doing so will not affect the lawyer's conduct of the suit and if both the litigant and the corporation's counsel consent upon adequate disclosure. Whether concurrent representation is proper can depend upon the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for declaratory judgment concerning statutory interpretation.

In short, the Commission recognized the general principle embodied in the earlier cases, but it did not take a position in the black letter. Indeed, even the Comment said only that "ordinarily" the prohibition applied, and that a lawyer should be able to consider the "nature of the litigation," the effect on "the lawyer's conduct of the suit," and whether there was "consent upon adequate disclosure."

In the extensive, often intense, debates over adoption of the Model Rules. Few issues escaped public contention, but one that largely escaped serious challenge was Rule 1.7 on conflicts of interest. The text did become more elaborate, but even as late as June 1982, in the first

80. The Commission was universally known by the name of its energetic chairman, Robert J. Kutak. Its official name was the Commission on Evaluation of Professional Standards. It began work in the late 1970s and the Model Rules were adopted in February 1983.

81. At the time this rule was proposed, it was numbered Rule 1.8. Shortly thereafter, it was renumbered 1.7 and remains so today.

draft sent for debate by the ABA House of Delegates, Rule 1.7(a) & (b) taken together read almost exactly as Rule 1.7(b) does today:

- (a) A lawyer shall not represent a client when the representation will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.
- (b) When the courses of action on behalf of the client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, the lawyer shall not represent the client unless:
 - (1) The lawyer reasonably believes the representation will not be adversely affected; and
 - (2) The client consents after consultation.⁸²

Rule 1.7 was not debated at the August 1982 annual meeting, but the Commission's *final* version for consideration at the February 1983 meeting, published in the ABA Journal for November 1982, was quite different. Rule 1.7(a) as proposed and ultimately adopted without amendment read:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.⁸³

82. The unrelated matter issue remained a subject for the Comment. That Comment largely tracked the original version quoted above, but there were some differences:

Ordinarily a lawyer may not act as advocate against a person the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer engaged in a suit against an enterprise with diverse operations may accept employment in an unrelated matter if doing so will not affect the lawyer's conduct of the suit and if both clients consent upon disclosure. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for declaratory judgment concerning statutory interpretation.

83. What was in the earlier drafts as Rules 1.7 (a) and (b) became Rule 1.7(b):

- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after disclosure. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The reason for the change was not explained.⁸⁴ One might suspect that it reflected a compromise with ATLA,⁸⁵ but ATLA's own proposal had not addressed the issue at all.

Additional language in the Comment purported to reflect the new text.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interest are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients.⁸⁶

84. There seems to be no published explanation about the change in language, and even members of the House of Delegates were apparently puzzled. The new language appeared to some to authorize representing plaintiff and defendant in the *same* case. Instead, Delegates were told that: [T]he provision was intended to cover a situation of 'technical adversity'. The Rule was not intended to generally allow a lawyer to represent both sides of a particular matter. Rather, it was intended to allow a lawyer to represent a client in one matter and be engaged in representation adverse to that client in a different matter, if both clients consent. It was observed that this kind of situation most often arose in small communities where the choice of lawyers was more limited.

American Bar Assn, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the House of Delegates* 56 (1987).

Not cited by the Commission, but a parallel and possibly related development within the ABA was Informal Opinion 1495 (December 9, 1982). A lawyer wanted to file suit on a commercial claim against a corporate client it represented in a personal injury case. Representation would be improper, the Committee held, even if the corporation had employed the services of every firm in town in minor matters.

The Committee views [DR 5-105(A) and EC 5-1] as clearly prohibiting a lawyer from representing one client in litigation against another client the lawyer simultaneously represents, without, at the least, the consent of both the clients after a full and frank disclosure of the possible consequences of the dual representation. . . . The duty of loyalty . . . demands that the client not be concerned about who in the business organization the lawyer may come into contact with, what the lawyer may learn or be told, or whether the lawyer may subconsciously be influenced by the differing interests of another.

That inquiry and result were almost identical to *McCourt Co., Inc. v. FPC Properties, Inc.*, 386 Mass. 145, 434 N.E.2d 1234 (1982). The trial court had refused to disqualify because there would be no adverse effect on the lawyer's independent judgment in either case, the interests represented were different but not "differing," and there was no showing either client would fail to get good service. The Massachusetts Supreme Court had reversed, citing the cases discussed earlier in this essay.

85. The Roscoe Pound-American Trial Lawyers Foundation had been among the most intense critic of the proposed Model Rules and had prepared an alternative document, *The American Lawyers Code of Conduct*, published in 1982, and reprinted in T. Morgan & R. Rotunda, 1995 *Selected Standards on Professional Responsibility*, at 244-75.

86. The rest of the relevant Comment was changed only slightly from the previous draft: Ordinarily a lawyer may not act as advocate against a person the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are

The "legal background" memorandum that accompanied the final proposal reflected most of the policy and history discussed earlier in this essay,⁸⁷ but the actual text of Rule 1.7(a) tried to sum everything up in the words "directly adverse." I respectfully suggest that "directly adverse" does not communicate the relevant policies well at all. "Directly" implies that the question should be how the parties are aligned; in fact, the issues should be whether the breach of loyalty is real or the impact on professional judgment substantial.⁸⁸ Both of those gen-

circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for declaratory judgment concerning statutory interpretation.

87. That memorandum was later published as the "legal background" in American Bar Assn. Annotated Model Rules of Professional Conduct (1984).

88. Hazard & Hodes' excellent treatise on the Model Rules tries bravely to explain Rule 1.7(a), but the discussion largely serves to demonstrate how poorly the "directly adverse" language works. The writers suggest that the terms "direct" and "indirect" adversity as used in the Rule and Comment describe the ends of a spectrum.

The prohibition in Rule 1.7(a) against representation of client whose interests are "directly" adverse implies that concurrent representation of clients whose interests are only "indirectly" or "generally" adverse is not prohibited (at least by this subsection). The Comment adopts this interpretation, and gives as an example the case of clients whose "adversity" is simply that they are competing businesses. At the other end of the spectrum, there is no more direct a conflict than between plaintiff and defendant in the same lawsuit.

Many intermediate levels of "directness" of conflict are possible, quite apart from the level of animosity involved. A manufacturer and its supplier are in more direct relationship with each other than two competing businesses, for example, but their relationship is normally one of reciprocity rather than conflict The direct-remote distinction . . . calls attention not simply to the clients' general economic interests, but specifically to the transactions in which the clients employ the lawyer's services.

The question is always whether the same lawyer may serve both clients loyally. At one end of the continuum of conflict situations are those where the lawyer may serve the respective clients without their individual consent because the transactions are quite distinct. At an intermediate point are situations where the lawyer may represent both clients only with the consent of each because the legal aspects of the transactions are substantially related and entail client interests that are adverse. At the other end of the continuum are situations where concurrent representation is impermissible even with client consent

G. Hazard & W. Hodes, *The Law of Lawyering* §1.7:203 (2d Ed. 1990).

Even after working through the above explanation, I respectfully suggest one is left with no real clue when and why a *per se* conflict should or should not be found and consent must or need not be sought.

uine concerns were already the subject of Rule 1.7(b). Thus, Rule 1.7(a) is not only surplusage; it is distracting and misleading.

E. The Period Since Adoption of the Model Rules: 1983 to 1995

For better or worse, we have to live with Rule 1.7(a) until it is amended. At the very least, however, we should not make its effects worse by reasoning primarily from the words "directly adverse" to apply the rule to concrete cases. We should try to keep the focus on the rule's underlying purposes.

Approximately 70 reported cases and ethics opinions have been issued on the subjects of this essay since adoption of the Model Rules. Some show hopeful signs of being decided on the right grounds. Others, however, represent the kind of wooden application of the principles to which I believe the language of Model Rule 1.7(a) contributes.

Harte Biltmore Ltd. v. First Pennsylvania Bank,⁸⁹ for example, disqualified counsel for the bank that was defending a suit brought by some borrowers who alleged interest had been improperly calculated and charged on their loans. Bank counsel was a Pittsburgh firm. Because of an error in its index of client names, the firm failed to discover that its Florida office was concurrently representing one of the plaintiff borrowers in a completely separate malicious prosecution action against the condominium where he lived. When the firm realized the situation, it tried to withdraw from the malicious prosecution case. The court said disqualification from representation of the bank could not be mooted by the withdrawal; otherwise, the firm could "always convert a present client into a 'former client' by choosing when to cease to represent the disfavored client." The Court did not find any significant sense of "betrayal" of the individual client, Mr. Harte; there was no possibility of misuse of the confidential information of either client and no likelihood the firm would "soft pedal" its defense of the bank's interest. Nevertheless, the court found a "likelihood of public suspicion or obloquy" from failing to represent Mr. Harte and continuing to represent the firm's bank client.⁹⁰

89. 655 F.Supp. 419 (S.D.Fla. 1987).

90. The patent field has produced a number of cases where the representation seems wholly unrelated and the "loyalty" demanded by corporate clients seems unreasonable, particularly in a field where costs imposed by the rule are high because the number of available patent firms is relatively less than in other fields of law. *See, e.g., Ransburg Corporation v. Champion Spark Plug Co.*, 648 F.Supp. 1040 (N.D.Ill. 1986) (infringement action in which Plaintiff represented by the Chicago office of the William firm, its long-time counsel; the same firm also had opened a Toledo office, an "of counsel" member of which prosecuted unrelated patents on behalf of Champion; Court "concurred" there was an adverse effect on Champion without a showing of what the effect might be); *Kabi Pharmacia AB v. Alcon Surgical, Inc.*, 803 F.Supp. 957 (D.Del. 1992) (infringement

*Strategem Development Corp. v. Heron International N.V.*⁹¹ was a suit for alleged breach of a contract to form a joint venture to build a building. Defendant moved to disqualify plaintiff's counsel because the firm also represented a wholly-owned sub of the defendant in a dispute with security guards at another building. The plaintiff's firm had been dealing with Defendant in all the negotiations over the new project; no one suggested there was anything wrong with that. The objection came when litigation threatened. The firm offered to withdraw from handling the guard dispute for the sub, but that was not accomplished before the breach of contract suit was filed. The court held the duty of loyalty extended to subs of a client, and citing *Fund of Funds*, it said:

Because Epstein Becker had not clearly terminated its representation of FSC and fixed the parameters of its representation of FSC by the time preparations for the instant litigation were begun, Epstein Becker is *per se* ineligible to represent Strategem in this matter. . . . Epstein Becker may not undertake to represent two potentially adverse clients and then, when the potential conflict becomes actuality, pick and choose between them. Nor may it seek consent for dual representation and, when such is not forthcoming, jettison the uncooperative client.⁹²

action; defendant's law firm continued to advise one of the plaintiff in an infringement case involving other parties and completely different patent; disqualification held "primarily justified as a vindication of the integrity of the bar"; Cf. *Henry Filters, Inc. v. Peabody Barnes, Inc.*, 82 Ohio App.3d 255, 611 N.E.2d 873 (1992) (suit for breach of contract in delivering defective goods; counsel for plaintiff had represented both firms in pursuing a patent application that had not been denied before this suit filed; Court found that confidential information had been exchanged during the application process that was not intended to be confidential but also was not intended to be used against either client; Court acknowledged that disqualification would cost one client increased attorney's fees, but "the issue here is not attorney fees but attorney ethics."

91. 756 F.Supp. 789 (S.D.N.Y. 1991).

92. *Id.* at 793-94. The court accepted the defendant's characterization of such a withdrawal as dropping a client "like a hot potato." *Id.* at 794.

See also, *Manoir-Electroalloys Corp. v. Amalloy Corp.*, 711 F.Supp. 188 (D.N.J. 1989). The Borin Group, represented by the Hannoch firm, acquired U.S. assets and sold 80% of them to a French company. Mr. Iacono, President of the company being acquired and sold, was present in some negotiations. He noted that the Hannoch firm "are my lawyers"; indeed, they had done his will and tax planning, and gave him advice on his employment contract. There later were charges the seller had deceived the buyer, so the buyer filed suit. The answer, filed by the Hannoch firm on behalf of The Borin Group included a count against Iacono alleging fraud & conspiracy. Iacono moved to disqualify the Hannoch firm. Citing "the well-established rule that an attorney may not represent one client in a lawsuit against another," the Court said "the conflict of interest was anything but subtle." *Id.* at 195. Accusing one's own client of fraud and conspiracy and seeking substantial damages from him is disloyal. The Court also noted that Hannoch had offered to drop the claim against Iacono and said that the offer illustrated the need for the rule: lawyers would sell out one client to stay in the case.

*Truck Insurance Exchange v. Fireman's Fund Ins. Co.*⁹³ was a suit for contribution from insurers to a central fund to pay asbestos claims. It was discovered that the central fund (TIF) lawyer also represented Fireman's Fund's Credit Union in wrongful termination cases. The firm sought consent to pursue the contribution claim, but the insurance company denied consent. There clearly was no relevant confidential information at stake. There was no threat of any failure to pursue the separate claims of both clients vigorously, and the idea of "disloyalty" in the *Rottner* sense seems nonsense. The real concern seemed to be Fireman's Fund's desire to delay the inevitable day when its payment would be ordered. Nevertheless, the Court said a per se rule of disqualification had to be applied, and however calculating the denial of consent, the law firm could not continue to represent TIF.⁹⁴

*Image Technical Services v. Eastman Kodak Co.*⁹⁵ tested the limits of physical and substantive separation of the cases subject to the rule. Coudert Brothers had represented Eastman Chemical, a division of Eastman Kodak, in commercial sales of fibers in China. The firm then appeared on behalf of plaintiffs in a Supreme Court case involving repair of sophisticated Kodak microphotography equipment. Consent to involvement in the Supreme Court case was obtained from Kodak representatives in Hong Kong — the persons whose sense of "loyalty" was apparently at risk — but not from Kodak's home office. The District

93. 6 Cal.App.4th 1050, 8 Cal.Rptr.2d 228 (1992).

94. Other cases involving lawyers retained by insurers filing suit in unrelated matters against the insured include *Ettinger v. Cranberry Hill Corporation*, 665 F.Supp. 368 (M.D.Pa. 1986) (lawyer suing developer on behalf of building lot owners also represented the developer's bonding company in pursuing reimbursement from an employee of the developer who had embezzled funds; in latter case, firm had seen confidential financial records of the developer; even though firm had represented only the insurer, it owed a duty of confidentiality to the developer and thus could not file suit against it); *Buyse v. Baumann-Furrie & Company*, 448 N.W.2d 865 (Minn. 1989) (effort to collect judgment against insured from insured's carrier; there was both a coverage issue and a question whether the insurer's parent was liable; firm joined plaintiffs' team on the coverage issue while another office of firm represented other insureds of the carrier in other matters; Court found representation not improper where confidential information of the insurer not an issue); *Florida Insurance Guaranty Assn v. Carey Canada, Inc.*, 749 F.Supp. 255 (S.D.Fla. 1990) (firm defended asbestos claims; same firm had also represented FIGA on many matters; when client's insurer became insolvent, it made a claim on FIGA; Court said claim was directly adverse to FIGA, the firm's other client, so disqualification was ordered); *Smiley v. Director, Office of Workers Compensation Programs*, 984 F.2d 278 (9th Cir. 1993) (appeal from denial of benefits for harassment of Navy whistleblower; claimant's lawyer accepted another case from the Navy's insurance carrier (a named defendant) while the claim was pending and without telling whistleblower; Navy argued that it, not the carrier, handled the negotiations, so lawyer was not dealing with the entity he was representing in the unrelated matter; Court found potentially divided loyalty, however, and reopened the harassment case).

95. 820 F.Supp. 1212 (N.D.Cal. 1993).

Court considered on remand from the Supreme Court what law applied and found it to be California's. The consent had neither been "informed" nor in writing as required by the California rules⁹⁶, the Court said, so Coudert was barred from further participation in the matter.⁹⁷

*British Airways, PLC v. Port Authority of New York*⁹⁸ was an effort to disqualify the plaintiff airline's lawyer in a suit for damage to an aircraft at JFK Airport. The plaintiff's law firm also represented the Port Authority in personal injury actions for accidents at JFK under lease terms that obliged the airlines to provide representation to and indemnify the airport for awards in such actions. Largely ignoring the policies underlying *Cinema 5*, the Court equated its *prima facie* rule with a *per se* rule, saying that "courts in this circuit apply the 'per se' or 'prima facie' rule to disqualification motions when the attorney whose disqualification is sought is actively suing his client in other related, or non-related actions."⁹⁹ The Port Authority was the firm's nominal client in the per-

96. California has its own formulation of the Rule 1.7(a) principle in its Rule 3-310:

(C) A member shall not, without the informed written consent of each client:

(3) Represent a client in a matter and at the same time in a separate matter except as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

97. Another recent California decision, *Flatt v. Superior Court of Sonoma County (Daniel)*, 9 Cal.4th 275, 885 P.2d 950, 36 Cal.Rptr.2d 537 (1994), examined what a lawyer may do when he or she is barred from acting on behalf of a client against another client. Mr. Daniel consulted attorney Flatt who told him he had a good claim for legal malpractice arising out of his marital dissolution proceeding. Ms. Flatt then learned that her firm represented the prospective defendant's firm in an unrelated matter, so she withdrew from the representation. The Court approved.

[I]n all but a few instances, the rule of disqualification in simultaneous representation cases is a *per se* or "automatic" one. . . . The reason for such a rule is evident, even (or perhaps especially) to the nonattorney. A client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter wholly unrelated to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship. 885 P.2d 955.

Ms. Flatt did not tell the prospective client the statute of limitations on his claim, however, and he waited 18 more months to file it. By then, it was too late, so he sued Flatt. The Court (4-3) held that a lawyer who withdraws from representing Client 1 because of a need to avoid breaching a duty to Client 2 has no duty to tell Client 1 the statute of limitations on the claim. That would be disloyal to Client 2.

98. 862 F.Supp. 889 (E.D.N.Y. 1994).

99. See also, *Molina v. Mallah Organization, Inc.*, 804 F.Supp. 504 (S.D.N.Y. 1992) (class action by union members against employer; law firm also represented union who was not a party to the action; however, Court said this was case in which Union might properly be sued later on, so lawyers had continuing division of loyalties to which the class was in no position to consent; disqualification ordered); *In re American Printers & Lithographers*, 148 B.R. 862 (N.D.Ill. 1992) (petition by debtor to retain a law firm for bankruptcy; firm currently represented creditor of debtor in unrelated matter; Court held creditor and debtor have adverse interests in bankruptcy, so the petition denied, saying "A *per se* rule is not relied on. Rather, this ruling is an exercise of discretion . . .").

sonal injury cases.¹⁰⁰ Thus, the Court said, a duty of undivided loyalty was owed and all doubts were to be resolved in favor of disqualification.¹⁰¹

However, given the rigidity of cases such as those just discussed, it has been fascinating to observe that many courts have largely ignored the rule, or at least have wisely disregarded the categorical approach.

Bodily v. Intermountain Health Care Corporation,¹⁰² for example, was a motion to disqualify plaintiff's counsel in medical malpractice cases. While seven of its cases were pending against Intermountain, the

100. It was important to the Court that the Port Authority had retained the right to direct or fire the law firm tendered by the airline to handle the cases. The Court's mistake was in transmuting that right into a right to disqualify the airlines' regular law firms in all *other* cases against the Port Authority.

See also, *Harrison v. Fisons Corp.*, 819 F.Supp. 1039 (M.D.Fla. 1993) (law firm denied right to represent defendant in personal injury case; First Union Bank was guardian for minor plaintiff in case, and the law firm represented that bank in unrelated matters; Court said Rule 1.7(a) "provides no possible exception when the clients do not consent" and fact that bank was only acting as fiduciary did not change the result); Illinois State Bar Assn Opinion No. 93-2 (1993) (lawyer for collection agency that collected claims both for bank and a creditor seeking to garnish an account of a debtor at that bank; Committee said issue whether bank itself had interest that would be adversely affected by the action; only way to know would be to ask, so lawyer should do that and get consent in each such situation).

101. Cases involving governmental or quasi-governmental entities have asserted particular concern about appearances of impropriety, but by no means all have reached the same result. *See, e.g.*, *Guthrie Aircraft, Inc. v. Genesee County*, 597 F.Supp. 1097 (W.D.N.Y. 1984) (law firm defending county against tort claim for negligent design and maintenance of a road is also suing county in a case where key issue involved construction of snow fence near airport; Court says firm cannot sue its own client, but also notes that the key witness in snow fence case likely to be highway superintendent being defended in other case, so possibility of divided loyalties was real); *In re Kentucky Bar Ass'n Amended Advisory Opinion E-291*, 710 S.W.2d 852 (Ky. 1986) (examines whether county attorney or his partners can represent defendant in unrelated civil case; citing *Cinema 5*, the Court said no because feared public would think the defendant would get special treatment because of the private representation); *In re Vrdolyak*, 137 Ill.2d 407, 560 N.E.2d 840, 148 Ill.Dec. 243 (1990) (Chicago alderman represented city employees in workers' compensation cases against city; Court holds lawyer-legislator subject to legal ethics codes even though has no lawyer-client relationship to city; thus, he was in effect suing his present client and warranted censure).

But see, *In re Executive Commission on Ethical Standard re: Appearance of Rutgers Attorneys*, 116 N.J. 216, 561 A.2d 542 (1989) (professor employed by state university in clinical teaching program permitted to sue state agency on behalf of a clinic client; Court distinguishes clinical teachers from other lawyers employed by the state); *Matter of Advisory Committee on Professional Ethics Opinion 621*, 128 N.J. 577, 608 A.2d 880 (1992) (holds lawyer who is a part-time legislative aide may not represent private parties before legislature, before any state agency as to a matter for which she had substantial responsibility as an aide, or in any other matter that would raise an appearance of impropriety, but may be involved in commercial land-use and zoning cases if legislative duties do not involve such matters); *Gieseke v. State Dept of Transportation*, 145 Wis. 206, 426 N.W.2d 79 (1988) (lawyer who acted as county corporation counsel permitted to defend farm owner against condemnation action filed by the state; county held not to be a party to the case and it would not have to pay the condemnation award).

102. 649 F.Supp. 468 (D.Utah 1986).

firm got a request from a Los Angeles firm to act as local counsel for Intermountain in a wrongful discharge case filed by an employee. The firm said it had a conflict, but the L.A. firm said there was no problem and sent the file. The firm did only ministerial work and learned no confidential information. When the local Intermountain people heard who was local counsel, however, they fired the firm and tried to get it disqualified from handling the malpractice cases. Judge Greene agreed there was a conflict and that reliance on the L.A. firm's grant of consent was inadequate. However, the court found no prejudice to Intermountain and refused to disqualify the firm.¹⁰³

103. Other cases where courts have refused to suspend their judgment and have not applied a categorical prohibition include *Kaminski Bros. v. Detroit Diesel Allison*, 638 F.Supp. 414 (M.D.Pa. 1985) (suit against a GM division filed by lawyer who had represented GM as local counsel in 15 cases; GM had ceased retaining the lawyer for new cases, but one of the old ones was still open; Court found no confidential info would be used, and lawyer's offer to withdraw as local counsel before motion to disqualify was filed was enough to require denying motion); *Tipton v. Canadian Imperial Bank of Commerce*, 872 F.2d 1491 (11th Cir. 1989) (sex discrimination suit defended by firm who at the time case was filed was handling unrelated property dispute for the plaintiff; because the firm had immediately offered to withdraw from property dispute and there was no threat of misuse of confidences, firm not required to be disqualified); *Aerojet Properties, Inc. v. State of New York*, 138 A.D.2d 39, 530 N.Y.S.2d 624 (App.Div. 1988) (applying *prima facie* test but finding it rebutted; lawyer had represented client for four years in the Court of Claims trying to get unpaid rent from State on offices it leased and was also hired by the state's insurer to defend a suit for personal injuries suffered on state property; Court holds

[T]here is absolutely no substantive nexus between the two lawsuits. Nor is there any real potential for the disclosure of confidential information In essence, [the firm] has not compromised its duty of undivided loyalty to either claimant here or the State in the Bauer action. Given the multitudinous nature of the State's activities, even the appearance of impropriety seems de minimis here.)

More recent cases include *Ex Parte AmSouth Bank, N.A.*, 589 So.2d 715 (Ala. 1991) (Arnold & Porter represented AmSouth in interest rate swaps; it also represented Drummond in a minority shareholder's objection to way Drummond handled a merger; AmSouth intervened in the latter case on behalf of some trusts it handled; when AmSouth would not consent to its continued involvement, firm withdrew from AmSouth matters and continued to represent Drummond; Court said Arnold & Porter had not created the conflict, i.e., it had not behaved strategically to bring it about, and harm from disqualification would be high, so the Court refused to order it); *Siroty v. Nelson*, 200 A.D.2d 617, 606 N.Y.S.2d 728 (1994) (motion to disqualify plaintiff's counsel in case to determine liability for loss of funds. The firm represented the defendant bank in an unrelated action. The Court said the firm "has met its burden of demonstrating the absence of any conflict in loyalties or impediments to a vigorous representation of each client"); *Parkinson v. Phonex Corp.*, 857 F.Supp. 1474 (D.Utah 1994) (suit against corporation and named individuals; one defendant then came to firm for estate planning; no mention of suit was made and no conflicts check was done; within a month, firm realized conflict, ceased doing the estate planning, and dismissed that person from case; Court said disqualification not per se required; little risk of misuse of confidential information, and no prejudice to the defendants caused by the brief overlap in the representation, so disqualification was denied); *Chemical Bank v. Affiliated FM Insurance Co*, 1994 WL 141951, 1994 U.S. Dist LEXIS 5120 (S.D.N.Y. 1994) (effort to disqualify Affiliated's counsel in suit to obtain insurance proceeds; firm also represented Chemical's interest among others in a pool of insurers trying to rehabilitate yet another company; Court goes carefully through the three lines of cases — *Cinema 5*, *Glueck* & the

*In re Appeal of Infotechnology, Inc.*¹⁰⁴ involved a challenge by Avacus to the merger of Infotech with WNW. Avacus was represented by Skadden Arps, who had not represented either Infotech or WNW but had represented the author of the fairness opinion, Prudential-Bache, in other matters. Infotech tried to disqualify Skadden, and the lower court said it had jurisdiction to protect the honor of the bar against a breach of Skadden's duty to Prudential-Bache. The Delaware Supreme Court, however, held that a non-client has no standing to enforce a lawyer's duty of loyalty to a stranger; otherwise, there might be no end to such claims.¹⁰⁵

*Gould, Inc. v. Mitsui Mining & Smelting Co.*¹⁰⁶ was filed for Gould by Jones Day alleging unfair competition, unjust enrichment & RICO, against Pechiney, a company long represented in patent matters by the McDougall firm. While the suit was pending, Jones Day merged with the McDougall firm and got consent from Pechiney to continue to act as counsel for Gould. Then, Pechiney bought IG Technologies whom Jones Day also represented in unrelated matters. The Court found there had never been consent by IG to the suit against its parent Pechiney, but there was no showing Jones Day had misused any IG secrets or that Pechiney had been prejudiced, so Jones Day was allowed to choose whether to continue to represent IG or Gould.¹⁰⁷

former client cases — and holds this was attenuated representation; thus, substantial relationship test of *Glueck* was applicable and because the cases were not related the firm was not disqualified).

Finally, yet other cases seem to have strained, but found consent to the conflict. *Bankers Trust of South Carolina v. Bruce*, 283 S.C. 408, 323 S.E.2d 523 (1984); *Fisons Corp. v. Atochem North America, Inc.*, 1990 WL 180551 (S.D.N.Y. 1990).

104. 582 A.2d 215 (Del. 1990).

105. This result is criticized in G. Hazard & W. Hodes, *The Law of Lawyering* § 1.7:203 (2d Ed. 1990). They see the case as one in which the client who had drafted the opinion was clearly a potential defendant and thus a case that should have required consent.

106. 738 F.Supp. 1121 (N.D. Ohio 1990).

107. *But see*, *Picker International v. Varian Associates*, 869 F.2d 578 (Fed. Cir. 1989) (patent infringement actions in which Jones Day represented Picker, its long-time client; McDougall firm with which Jones Day merged had long represented Varian although not in this case; Varian moved to disqualify Jones Day in the Picker cases because Jones Day now represented Varian in the former McDougall matters; on appeal, Federal Circuit held that disqualification does not follow automatically from a violation of DR 5-105, but courts presume an adverse effect when a lawyer litigates against a present client. Further, "To allow the merged firm to pick and choose which clients will survive the merger would violate the duty of undivided loyalty that the firms owe each of their clients under DR 5-105.").

United States v. Nabisco, Inc., 117 F.R.D. 40 (E.D.N.Y. 1987) (action filed by EPA for cleanup costs. Lawyers for one defendant (Sag) also represented Standard Brands, Inc., in unrelated matters; Nabisco had purchased Standard Brands in 1982; another of Nabisco's subs had been a prior owner of the site so it had potential liability on the EPA claim; when Sag sued Nabisco for contribution, Nabisco said Sag's law firm was suing a present client; Court said Nabisco counsel would have to cooperate with the firm in Standard Brands cases and oppose it in the EPA case: "[T]he cumulative

*Artromick International, Inc. v. Drustar, Inc.*¹⁰⁸ examined when a lawyer-client relationship is at an end. The Schottenstein firm represented Drustar in this action and they had represented Artromick in unrelated matters. The question was whether they still represented Artromick. There was limited contact after 1988; the firm did a little work but the client didn't pay the bill. It sent Artromick a regular firm newsletter. The Court found that Artromick sent work it used to send to this firm to other firms instead and said receiving a firm newsletter did not a client make, so disqualification was not ordered.¹⁰⁹ The Court noted:

[T]he manner in which clients use attorneys is both varied and evolving. The concepts of having a "personal attorney" or a "general corporate counsel" are much less meaningful today, especially among sophisticated users of legal services, than in the past. Clients may have numerous attorneys, all of whom have some implicit continuing loyalty obligations. Attorney specialization and marketing have contributed to this fractionalizing of a single client's business. Such matters make it more difficult to define the nature and duration of any particular attorney-client relationship that cannot accurately be characterized as a "one-time-only" deal or a general counsel arrangement.¹¹⁰

Finally, *SWS Financial Fund A v. Salomon Brothers, Inc.*¹¹¹ was a suit by limited partnerships of securities traders charging fraud in transactions in Treasury Notes. Salomon moved to disqualify Schiff Hardin as counsel for plaintiffs because Schiff was concurrently giving advice to Salomon's commodities futures operation. Judge Duff found that Salomon was indeed a current client and that Rule 1.7(a) forbade the concurrent representation. However, he then looked to the purpose underlying Rule 1.7(a) to determine whether disqualification was required rather

weight of each of these factors, and the direct, adverse positions of Sag Harbor and Nabisco in the instant case creates a risk of diminution in the vigor of [the firm's] representation of Nabisco." The firm was not permitted to try to rebut the "apparent" conflict of loyalties).

Supreme Court of Texas Professional Ethics Committee Opinion 423 (November 30, 1984) considered the case of a law firm who did most of the legal work for Bank A and had filed suit on behalf of someone else against Bank B. Then, the holding company that owned Bank B acquired Bank A. The Committee said that the holding company was the real party in interest in both representations and thus that the law firm must withdraw from one of them, although it gave the firm the choice of which withdrawal it would prefer.

108. 134 F.R.D. 226 (S.D.Ohio 1991).

109. See also, *Heathcoat v. Santa Fe International Corp.*, 532 F.Supp. 961 (E.D.Ark. 1982) (15-year period since last activity for client was sufficient to find the relationship terminated).

110. *Id.* at 232.

111. 790 F.Supp. 1392 (N.D.Ill. 1992).

than some other sanction such as professional discipline, legal malpractice or fee forfeiture. He concluded disqualification was not appropriate.

This case is at the polar extreme from the case in which an individual has a personal relationship with a particular attorney who provides for all or substantially all of that client's legal needs. In such a case, were the attorney to "turn on" his client and sue him, disqualification would be appropriate. . . . A court deciding a motion to disqualify in a case involving mega-firms (like Schiff) and mega-parties (like Salomon Brothers) should not be oblivious to "the way that attorneys and clients actually behave in the latter part of the twentieth century." . . . Clients of enormous size and wealth, and with a large demand for legal services, should not be encouraged to parcel their business among dozens of the best law firms as a means for purposefully creating the potential for conflicts.¹¹²

In my view, Judge Duff's analysis is right but should go to the question of whether there is a conflict at all, not just what the remedy should be. Many cases present neither a realistic threat to the lawyer's sense of mission or the client's perception of loyalty. The *prima facie* approach should be — and it turns out sometimes is being — returned to its rightful meaning and central place in the analysis.¹¹³

112. 790 F.Supp. at 1402.

113. So many cases present particular issues that it is hard to know where to footnote them. *E.g.*, *Conduct of Thorp*, 296 Or. 666, 679 P.2d 857 (1984) (lawyer representing businessman in various matters had partner who was owed a personal debt by the client; partner had the firm file suit over the accused lawyer's apparent objection; Court dismisses charge against the accused); *Curtis v. Radio Representatives, Inc.*, 696 F.Supp. 729 (D.D.C. 1988) (suit to collect fees; client alleged firm had been disloyal in concurrently representing business competitors of the client in unrelated matters; Court recognized conflicts could arise representing competitors in a specialized field, but said no absolute bar and no showing of any conflict here); *Santa Clara County Counsel Attorneys Ass'n v. Woodside*, 7 Cal.4th 525, 869 P.2d 1142, 28 Cal.Rptr.2d 617 (1994) (suit by a union of lawyers in county counsel's office against the county to assure compliance with duty to bargain; County said this constituted suing a present client; Court acknowledged fiduciary duty but said it did not supersede the rights of public employees to organize and bargain).

In addition, there is a body of developing ethics opinions dealing with lawyers who defend other law firms in professional liability matters and who then file or defend a suit involving a client of one of their law firm clients. In short, the opposing law firm — not its client — is the client. Opinions have said that every client of both firms in matters where the firms oppose each other must consent before the liability representation of the other law firm may be undertaken. Also, every client in every new such case that comes to the firms must consent before the firms may accept the new cases. *E.g.*, New York State Bar Assn Committee on Professional Ethics, Opinion No. 579 (March 20, 1987); Illinois State Bar Assn Advisory Opinion on Professional Conduct No. 822 (April 9, 1983), modifying Opinion No. 724 (April 30, 1981); Maryland State Bar Assn Committee on Ethics, Docket 82-4 (December 3, 1981). See also, State Bar of Michigan, Opinion CI-649 (December 29, 1981) (consent insufficient to cure the conflict).

F. The ABA Corporate Client Opinion

It is in this context that ABA Formal Opinion 95-390 recently took up the issue whether a lawyer who represents a corporate client may undertake unrelated representation adverse to an affiliate of the client without obtaining consent. The committee noted the obvious — good client relations will dictate discussing the issue with the client and getting the necessary consent — but it concluded there was no absolute bar to proceeding without consent.¹¹⁴ The majority of the ABA Committee saw that sometimes a corporate affiliate should be treated as a client but sometimes that makes no sense. Whether a corporate affiliate is also a client of the corporate lawyer “depends not upon any clearcut per se rule but rather upon the particular circumstances.”¹¹⁵

First, the Committee said, a corporate affiliate should be treated as a client if the lawyer has agreed to treat it as a client or if the affiliate reasonably believes it is a client. The Committee cited its Opinions 91-361¹¹⁶ and 92-365¹¹⁷ for some of the factors to be considered in making that determination.

114. ABA Formal Opinion 95-390 (January 25, 1995), “Conflicts of Interest in the Corporate Family Context,” ABA/BNA Lawyers’ Manual on Professional Conduct 1001:258, 259.

115. *Id.* at 1001:262.

116. ABA Formal Opinion 91-361 (July 12, 1991), “Representation of a Partnership,” ABA/BNA Lawyers’ Manual on Professional Conduct 1001:110.

In a number of cases, a lawyer for a partnership has tried to bring suit against one or more of the partners. *See, e.g., Margulies by Margulies v. Upchurch*, 696 P.2d 1195 (Utah 1985) (firm represented plaintiffs in a medical malpractice action claiming damages above policy limits against a group of doctors; at same time, the firm represented limited partnership engaged in drilling for energy; 3 of the 19 limited partners were the defendant doctors and each had had to submit detailed financial records and co-sign personal letters of credit for their partnership contributions; the firm’s work for the partnership included defending against forced collection on those guarantees; Court held work for partnership was really work on behalf of the individual partners; thus, attorney-client relationship could be implied); *In re Liberty Music & Video, Inc.*, 54 Bankr. 799 (1985) (disqualifies lawyers for tenant seeking declaration it was not in default on its lease; defendant a limited partnership in which Bernstein was general partner; members of tenant’s law firm were limited partners in another entity where Bernstein was general partner; the firm had also represented another group of limited partners that included Mr. Bernstein’s wife); *North Star Hotels Corp. v. Mid-City Hotel Associates*, 118 F.R.D. 109 (D.Minn. 1987) (suit by hotel management firm against partnership that owned hotel; firm that was counsel for management company also represented two other partnerships both formed and largely owned by owner of defendant; Court saw question as whether firm could seek to impair financial condition of one of its clients, the owner of the partnerships, for the benefit of another client; Court recognized that firm represented the partnerships, not the general partner, but said that the individual was the real party in interest so the firm was disqualified); *Responsible Citizens v. Superior Court (Askins)*, 16 Cal.App. 4th 1717, 20 Cal.Rptr.2d 756 (1993) (firm represented non-profit group in a suit to oppose gravel mining by Askins; firm was also asked to represent general partnership in which Mrs. Askins was member; firm asked Mrs. Askins for a waiver but she said there was no conflict since the businesses were separate; Court said representation of a partnership does not necessarily constitute representation of each partner, but it might).

Second, the affiliate may be a client because it has imparted confidential information to the lawyer.¹¹⁸

Third, the affiliate is a client if it is an alter ego of the client, although sole ownership is not necessarily enough.¹¹⁹

But see, *Jesse v. Danforth*, 473 N.W.2d 532 (Wis. 1992) (firm that filed medical malpractice action filed against a neurologist and a neurosurgeon was also counsel to a group of doctors (including the malpractice defendants) who had formed a Subchapter S corporation to buy an MRI machine; this case involved a CAT scan, not an MRI; issue was whether in forming the entity the firm represented the doctors individually; Court said no; when people consult lawyers to form an entity and that is the lawyers' only connection with them, the "entity rule" retroactively applies to say the lawyer does not represent them individually); *Grete Bay Hotel & Casino, Inc. v. City of Atlantic City*, 264 N.J.Super. 213, 624 A.2d 102 (1993) (effort to disqualify firm intervening to object to an action to have the city buy land for the casino's benefit; firm was also counsel to trusts established by groups of casinos to run things like computerized management of progressive slots; trusts were run by boards of representatives from the member casinos; Court held trusts were unincorporated legal entities distinct from their members, so no conflict to participate in suit against the members); *Ocean Club of Palm Beach Shores Condominium Association, Inc. v. Estate of Daly*, 504 So.2d 1377 (Fla.App.1987) (wrongful death action against condominium association; it joined owner of condominium the decedent was visiting; owner said he was a member of the Association, so the Association's law firm could not sue him; Court held firm represented the entity, not the members, and the disqualification order was reversed).

Cf. *Arpadi v. First MSP Corporation*, 68 Ohio St.3d 453, 628 N.W.2d 1335 (1994) (holds the lawyer for a limited partnership is also lawyer for the limited partners for purposes of allowing a malpractice action); *Rose v. Summers, Compton, Wells & Hamburg*, 887 S.W.2d 683 (Mo.App. 1994) (another case holding that for purposes of the right to sue for malpractice, a limited partner is not the client of a lawyer for a limited partnership); *Bowen v. Smith*, 838 P.2d 186 (Wyo. 1992) (lawyer for a corporation is not lawyer for minority shareholders. They can't sue him for malpractice when later have a disagreement with majority holders about what to do with proceeds of settlement).

117. ABA Formal Opinion 92-365 (July 6, 1992), "Trade Associations as Clients," ABA/BNA Lawyers' Manual on Professional Conduct 1001:129.

118. Several cases support disqualification where the real concern seems to be protection of confidential information and Rule 1.6 alone would seem to justify disqualification. See, e.g., *Duca v. Raymark Industries*, 663 F.Supp. 184 (E.D.Pa. 1986); *Phoenix Electrical Contracting Corp. v. New York Telephone Co.*, 155 Misc.2d 250, 587 N.Y.S.2d 485 (Sup.Ct. 1992); *Stanley v. Richmond*, 35 Cal.App.4th 1070, 41 Cal.Rptr.2d 768 (1995); *Metro-Goldwyn-Mayer v. Tracinda Corporation*, 1995 WL 435349 (Cal.App. 1995).

119. The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1989-113 (1989), had earlier asked whether a lawyer could represent a client against the wholly-owned subsidiary of another client of the lawyer. Citing Rule 3-600, the California version of Model Rule 1.13, the Court said the corporate boundaries must be respected, i.e., the lawyer represented the parent not the sub. Clearly, the suit could have an important effect on the parent, but not every indirect affect on another client (including a decline in the value of its stock or assets) would be a violation of the duty of loyalty. An exception to this rule would arise, however, where the sub were an alter ego of the parent (percentage of stock ownership being not the only test). The lawyer also may not use against the sub confidential information of the sub that it had gotten in the course of representing the parent. Further, the lawyer should tell the parent of the planned suit where it is not secret so that the parent can decide whether to fire the lawyer.

See also, *Sackley v. Southeast Energy Group, Ltd.*, 1987 WL 12950 (N.D.Ill. 1987) (purchasers of limited partnership interests alleged they had been defrauded; firm proposed to represent the defendants, but plaintiffs objected because the firm represented a corporation in which one of the

But finally, the Committee had to come to grips with the question whether a suit against a corporate affiliate is “directly adverse” to the client the lawyer represents. The Committee’s answer was “no”, the adverseness is only “indirect” and thus Rule 1.7(b) governs, not (a).¹²⁰

Applying the language of Rule 1.7(a) as a matter of plain English, that answer is not satisfying. As we have seen, however, the problem lies in the language of the rule, not the Committee’s ultimate result. The principal effect of the majority’s holding was that proof of a violation of the rule would require that the effect on the representation of either or both clients would have to be found to be “material.” That is certainly a move in the right direction, a move that should now be extended beyond the corporate context.

As the Committee correctly observes, the corporate affiliate may be offended, and “the lawyer’s concern for remaining in the good graces of client A was likely to impair the independence of judgment or the zeal

plaintiffs owned 1/6 of the shares and had personally guaranteed over \$3 million in loans; the Court recognized that there may be cases where the corporate form will be ignored, but it said this was not a case where the corporation and shareholder were one; “A party has a right to choose its counsel, and that choice should not be disturbed unless absolutely necessary,” so the firm was not disqualified); N.Y. County Bar Opinion 684 (July 8, 1991) (explores whether a lawyer may take a case against a sub of a firm representing in unrelated matter; finds no necessary bar; however, says that if subsidiary reasonably thinks the parent’s lawyer represents it, the result is different, citing *Pennwalt* and *Hartford v. RJR Nabisco*, where the parent and sub had a common legal department; degree of ownership of sub is relevant, as is whether the decision will compromise the lawyer’s relationship with the parent); *Teradyne, Inc. v. Hewlett-Packard Co.*, 1991 WL 239940 (N.D.Calif. 1991) (applying California alter ego exception to a wholly-owned sub and a retirement plan, both being separate corporations; parent’s general counsel’s office supervised work for entities and indeed had hired both firms aligned against the entities in this case; parent, sub and plan were treated as a single client, so the plaintiff’s firms were disqualified); *Hilton v. Barnett Banks, Inc.*, 1994 WL 776971 (M.D.Fla. 1994) (suit against a bank holding company and its operating units filed by firm that represented a sub, Barnett Pinellas, in other matters; the sub was not a defendant, but any injunction entered would run against it, so its interest was found to be adverse; Court held that Rule 1.7(a) prohibits “simultaneous representation of two clients with adverse interests without consent by both clients”).

Cf. Vanderveer Group v. Petruny, 1993 WL 308720 (E.D.Pa. 1993) (effort to disqualify firm from representing plaintiff in a case because firm also represented a 51% subsidiary of the defendant in labor matters; parent and sub had same in-house lawyer who did not complain until very late; Court refused to read Rule 1.7(a) to permit one corporation to enforce the firm’s duty of loyalty to another; even if there were standing, it said, “there was no obvious direct adversity of interest” between the plaintiff here and the sub represented elsewhere). However, the next year, in *Vanderveer Group v. Petruny*, 1994 WL 314257 (E.D.Pa. 1994), the Court said that it now had more information about the interconnection of the firms and the issues in the cases, so it granted disqualification.

120. The Committee cited its Formal Opinion 92-367 (October 16, 1992), “Lawyer Examining a Client as an Adverse Witness or Conducting Third Party Discovery of the Client,” ABA/BNA Lawyers’ Manual on Professional Conduct 1001:149; and Formal Opinion 93-377 (October 16, 1993), “Positional Conflicts,” ABA/BNA Lawyers’ Manual on Professional Conduct 1001:203.

that the lawyer could bring to bear on behalf of client B.”¹²¹ But “[i]t is only when there is a threat of *material* limitation on the lawyer’s ability properly to represent a client because of his responsibilities to another client that the Rule requires the lawyer to seek consent.”¹²²

III. CONCLUSION

There is no question that in the vast majority of cases in which a lawyer may be asked to file suit against a current client, the lawyer should send the client to a different firm to handle the matter or should discuss the request in advance with each affected client and determine whether each is willing to consent.¹²³

What this essay has asked is (1) what the lawyer must do if one or more clients refuses to consent, typically to make life difficult for the other clients, and (2) when a sanction is warranted where the lawyer forgets or otherwise fails to seek consent.

I have suggested that the rule against suing a current client has been a “stealth” rule. It snuck up on the bar — appearing clear and simple — but ultimately causing courts and rule drafters alike to lose sight of the conflict of interest issues they were trying to address.

The present rule addresses two quite different problems as if they were one.¹²⁴ First, it deals with a perceived threat to the relationship between the lawyer and the client who is being sued by its own lawyer. Second, it deals with the possible risk to the client on whose behalf suit

121. ABA/BNA Lawyers’ Manual on Professional Conduct at 1001:267.

122. *Id.* at 1001:268 (emphasis added). The dissenters were indignant at the result the Committee reached. Richard Amster wrote:

It may very well be that in the rarified Fortune 500 world, a suit against a subsidiary might be considered as having only a derivative impact upon the parent, but outside those elevated precincts most parent companies would view such a suit as outrageous and a clear conflict of interest. *Id.* at 1001:269.

Lawrence Fox added: “[C]orporate families are financially totally inter-dependent. . . . [F]or members of a corporate family the location of a corporate family’s losses are totally irrelevant to the bottom line.” *Id.* at 1001:271. What the dissenters seemed to ignore was that neither the Committee — nor this essay — argues that a conflict could *never* be found; we simply argue that the finding should be based on the substance of a situation rather than its form.

123. Even consent is not enough, of course, if the lawyer does not “reasonably believe[] the representation will not adversely affect her representation of the other client [in the unrelated matter]. ABA Model Rule 1.7(a)(1).

124. By definition, the rule is inappropriate for dealing with one problem it superficially might seem to address, namely, a failure to look out for the interests of the client being sued. This essay assumes that client has counsel, or access to counsel, in the current matter whose job will be to look out for its interests. Further, if the now-adverse lawyer were to use Client A’s confidential information on Client B’s behalf, the matters would not be “unrelated” within the meaning of this essay, and Client A’s remedy would be for a violation of Model Rule 1.8(b), not Rule 1.7.

is brought, a risk that the lawyer will be less vigorous in pursuit of the matter so as to avoid offending the client being sued.

Each of these concerns could have been reached by the existing language of Model Rule 1.7(b): "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client . . . or by the lawyer's own interests." The adoption of Rule 1.7(a) was not a positive development. What it did was remove the requirement that the effect of the lawyer's conduct be "material" and transform a reasonably balanced rule into a tactical weapon for litigators.

The *prima facie* test used in *Cinema 5* reflected a sense that materiality of the conflict was indeed important. It properly placed on the lawyer the burden of showing both a lack of material adverse effect and a lack of the appearance of such adverse effect to a reasonable person, but it allowed that case to be made. Indeed, it was the kind of rule toward which a surprising number of courts have been pushing — whether by finding consent, by not finding standing, by asking whose fault it was that the situation arose, by concluding that the matters did not overlap in time, or even by engaging in relatively uncivil disobedience of the rule.

The kinds of issues the lawyer would have to address under a properly functioning *prima facie* rule would likely be quite similar regardless of which of the two concerns of the rule is involved. For example:

1. How high are the stakes in the lawsuit? Is this "bet the company" litigation? Our initial illustration posited a product liability case — something far from trivial — but only one of dozens of what are for the most part simply a cost of doing business. We also posited a contingent fee that would tend to make "soft pedalling" unlikely, and modest enough work on behalf of General Manufacturing that if Able & Baker were fired altogether, its loss of fees would not be substantial.

The stakes were also relatively modest in the other illustration where Marlene Wilson was one of General Manufacturing's suppliers.¹²⁵ It surely would not reasonably be seen as "disloyal" to GM to answer Ms. Wilson's question about a form of purchase order that Able & Baker did not draft. Nor would Able & Baker likely fail to ask for the terms

125. I will not take on here whether Model Rule 1.7(a) applies to representation other than litigation directly adverse to a current client. Suffice it to say here that in the dozens of cases on the subject, virtually all involved litigation. The few that have addressed the possibility the rule is broader have tended to reject the idea, see text at n. 49 - 52, and I believe cases like *Financial General Bankshares, Inc. v. Metzger*, 523 F.Supp. 744 (D.D.C. 1981) (breach of fiduciary duty for lawyer to help Client 2 secretly buy interest in Client 1), were extreme cases that could have been resolved the same way on other grounds. For an articulate statement of the opposing position, see G. Hazard and W. Hodes, *The Law of Lawyering* §1.7:203 (2d Ed. 1990).

Ms. Wilson prefers out of a fear General Manufacturing will take offense.¹²⁶

2. How personal is the attack on the client being sued? The court was probably right in *Rottner*; it could indeed be personally hurtful to the already disturbed Mr. Twible to have his lawyer allege intentional conduct, seek punitive damages, and attach his home. There is typically no comparable sense of personal loyalty, however, that describes the pragmatic relationship between a large corporation and its local counsel in a remote city.

To be sure, General Manufacturing in illustration will not want to be sued in the product liability case and some such cases might well involve direct personal attacks on the corporation or its managers. More likely, however, the word "disloyal" would be hurled as a weapon to distract attention from the reality as reasonably understood. General Manufacturing has plenty of lawyers to defend its interest in dealing with Ms. Wilson, and the use of ethics rules to harass Ms. Wilson's lawyer arbitrarily should not be available as part of their arsenal.

3. Is the client being sued one with which the lawyer has worked closely, over a long period, or both? If so, the likelihood of reasonably seeing the suit as disloyal may be greater, as may be the threat that the client bringing suit may get a reduced level of service. In this context, the test should involve more than a temporal dimension. Filing assessment protests for 20 years, for example, would likely involve less interaction with the client than two years of handling labor relations with a contentious union. Even in the case of the labor representative, however, the proposed call about language in the purchase order would be unlikely to be sufficiently material to either client's interests to justify saying that the failure to obtain consent requires sanction.

4. Is the remedy being sought professional discipline, disqualification, or civil liability? A suit against a present client will rarely create unfairness in the litigation process, for example, except insofar as the lawyer for the client bringing the suit has an incentive not to pursue it vigorously. Disqualification should largely be limited to that class of cases. If the client thinks he can show genuine harm of either kind to itself, however, it should be entitled to try to do so in a malpractice

126. The stakes faced by the lawyer are also relevant. If the fees earned from a client so substantial that the firm could not afford to offend the client, however unreasonable the client's reaction, there could indeed be a danger of soft peddling to avoid giving offense.

action, request for fee forfeiture or other remedy where harm is an element of the proof.¹²⁷

The point in such cases, including those seeking professional discipline, should be to focus the inquiry again on the questions that properly underlie the now-unitary rule. If those questions once again becomes central, I believe the rule will not be categorical and materiality will once again become an element of the test. Further, when the courts once again openly start to ask the right questions, I believe we will start to see more consistent decisions, and consents being granted, and ultimately fewer challenges being filed.

127. In such cases, the burden of persuasion should continue to be on the lawyer to show that the conduct was proper, i.e., that there was no reasonable risk of adverse effect on the client that rendered the lawyer's conduct intentional or negligent. The client should only bear the burden of showing that the adverse consequences occurred.

