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Charles W. Wolfram

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CORPORATE-FAMILY CONFLICTS

Charles W. Wolfram* 

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reporter for the RESTATEMENT OF THE LAW GOVERNING LAWYERS of the American Law Institute.
Although I discuss and analyze the RESTATEMENT, nothing stated here necessarily reflects the
position of the Institute.
Lawyer represents Parent Corporation. May Lawyer (or another lawyer in her firm), acting on behalf of another client, file suit against
Subsidiary Corporation if Subsidiary is wholly-owned by Parent? In any attempt to answer such a conflict of interest question, one must first identify whom or what is being represented as client of the challenged lawyer. In the example, the question is whether Lawyer, when she undertook to represent Parent, also undertook conflict of interest obligations that extend as well to Subsidiary. For corporate and similar entity clients, that task has proved notoriously difficult. One difficulty that once muddied analysis has now been resolved because of the wide consensus supporting acceptance of the so-called "entity" concept of corporate representation. Under it, a lawyer representing a corporation is deemed to represent only the corporate entity, and not—by force of the originating representation—any constituent of the corporate client, such as a majority shareholder, a high-ranking officer, or the like.

Acceptance of the entity theory has been beneficial on the whole, despite perhaps inevitable difficulties in applying it even when dealing with what is indisputably only one entity. However, it has proved of limited value when the client must be identified among multiple but affiliated corporate entities such as parent and subsidiary corporations and sister corporations. Those problems may exist for purposes of both concurrent-representation conflicts and those involving former clients.

& Hodes ]; Charles W. Wolfram, Modern Legal Ethics § 7.6 (1986) [hereinafter Modern Legal Ethics].

2. The illustration here is of a wholly-owned subsidiary. As will shortly be seen, the problem is more complex, extending to more than parent-subsidiary relationships (see infra text accompanying notes 29-36) and to more than corporations (see infra text accompanying notes 80-90). The cryptic illustration also assumes that there is no basis for finding a direct client-lawyer relationship between Lawyer and Subsidiary. On the need for care in reaching such a conclusion, see infra text accompanying notes 73-79.

3. While the differences between various entities is hardly irrelevant for all conflicts purposes, unless the context requires another term to refer to a particular kind of non-corporate entity, I here use the conventional shorthand in referring generally to "corporate" conflicts. See infra text accompanying notes 80-90 & 91-95.

4. See infra text accompanying notes 37-52.

5. Model Rules, supra note 1, at Rule 1.13(a) (1983) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."); Model Code, supra note 1, at EC 5-18 (1969) ("A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity . . . "). On limitations on the entity theory with respect to the question whether a lawyer also represents constituents, see infra text accompanying notes 52-56.

6. See infra text accompanying notes 57-66.

7. On the possibility, which has proved arresting to some, that one can resolve all corporate-family conflicts problems simply by including all affiliated corporations as among the non-represented "constituents" of a represented entity, see infra text accompanying notes 137-38.

8. Concurrent-representation conflicts are those produced by a law firm's representation, at the same time, of two clients with conflicting interests. See generally Proposed Final
Think of this set of client-identification problems as if the task were that of gathering together for a family portrait all corporate affiliates who are significantly related at any one moment in time. Although the family-portrait metaphor fits only loosely, I will refer to such questions as the "lateral" dimension of corporate family conflicts of interest. Beyond lateral-dimension conflicts, courts have also sometimes differed in attempting to identify the entity client when the entity has transmogrified over time. That can occur, for example, when a corporate client's shares are sold to an acquirer, or when the corporate family picture arguably has been enlarged because of a merger or acquisition and when the transmogrifying event is claimed to have significance for conflict purposes. Think of this as if the problem were to gather together in one album all antecedent and successor corporations that are significantly related for conflicts purposes. Again using the family-album metaphor only loosely, I refer to this second set of corporate-family conflicts as "lineal-dimension" conflicts.

Various theories have been advanced to support one "test" or another for client identification in the case of multiple corporate affiliates, but none has gained common acceptance. Those various theories jostling each other for acceptance are remarkable for their radically different approaches. At the extremes in the lateral-dimension realm are categorical, *per se* theories. At the one-large-picture extreme, one rule posits that a lawyer who represents one member of a multi-member corporate family is always deemed to represent all others as well—what I


9. All jurisdictions now test former-client conflicts of interest by the "substantial relationship" standard. See *Model Rules*, *supra* note 1, at Rule 1.9 (1983); The point of the substantial-relationship formulation is to protect confidential information probably provided to the lawyer in the now-terminated representation. There is no further duty owed the former client. See Charles W. Wolfram, *Former Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677, 687-88 (1997) [hereinafter Wolfram, *Former Client Conflicts*].

10. In an attempt to avoid terminological confusion, I use "affiliates" to refer to members of the same corporate family. "Constituents" will refer to other persons or entities that have an interest in a corporate client, such as shareholders. The same corporation, of course, can be both affiliate and constituent in those senses—as is a parent corporation whose formal legal relationship to the subsidiary is through share holdings.

11. *See infra* text accompanying notes 102-257.
12. *See infra* text accompanying notes 258-68.
14. *See infra* text accompanying notes 262-68.
hereafter term the *all-affiliates* approach. At the small-picture extreme, a competing theory would impose the inflexible rule that a lawyer representing one such member never (by that fact alone), or hardly ever, represents any other affiliated entity—the *no-affiliates* approach. (The foregoing characterizes to some extent. In fact, both the *all-affiliates* and *no-affiliates* positions come in multiple variations, many of which admit more or less expansive exceptions, causing them to converge at least somewhat.) Similarly, although comparatively few decisions have yet analyzed issues of lineal-dimension conflicts, courts have held both that a lawyer who represents a corporate client in its sale to acquirers either may or may not appear adversely to the corporation in subsequent litigation by the sellers against the buyers. Courts and commentators have more uniformly approached the somewhat related lineal-dimension question of the effect of post-representation client mergers and acquisitions on corporate-family conflicts. On the other hand, courts and commentators have not commonly recognized that there are indeed the two different lines of decisions for what I here call the lateral and lineal dimensions of the client-identify problem, and that they ought to be governed by quite different considerations. Rather clearly, theory and the decisions are themselves in conflict and, to some extent, in a state of disarray.

The disarray is partly a function of lack of authoritative guidance. Neither of the ABA lawyer codes written in the latter half of this century addresses the issue. The lawyer codes of Florida and the District of Columbia were recently amended to do so, with varying results. Florida’s

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16. On possible expansion of conflict situations under this theory by operation of the “alter ego” exception to it recognized by some authorities, see infra text accompanying notes 133, 146 & 198-209.

17. See, e.g., Brooklyn Navy Yard Cogeneration Partners v. Superior Court, 70 Cal. Rptr. 2d 419 (Cal. Ct. App. 1997) (lawyer representing one member of corporate family only represents that member and not others, no matter how closely related, except in case of “alter ego” entities); ABA Ethics Committee Formal Op. 95-390 (1995) (similar). For analysis of the “alter ego” aspect of the *no-affiliates per se* rule, see infra text accompanying notes 198-209.

18. See infra text accompanying notes 132-38.


21. See infra text accompanying notes 262-68.
rule merely states that lawyers are not subject to the *no-affiliates* rule, but—other than alluding to an alter ego exception\(^2\) and one dealing with confidentiality\(^3\)—provides no further guidance as to the otherwise unspecified "exceptions to the general proposition" that it also recognizes.\(^4\) The more recent rule of the District of Columbia is much more admirably fine-tuned and is examined below, with very general approval.\(^5\) Indeed, the committee now studying the ABA's Model Rules would do well to follow it, with some alterations, as a model for other jurisdictions.

In this article, I reconsider this double set of corporate-family conflict problems and propound theories and considerations on the basis of which most such issues might be addressed. I examine the issues both in terms of conventional conflict-of-interest analysis, and, perhaps of equal importance, in terms of the practicalities confronted by businesses in setting up and operating affiliated corporations and of law firms in dealing with conflicts problems created by corporate affiliations. Too often, analysis of corporate-family conflicts has proceeded by caricaturing affiliated entities as if they were all mega-corporations with hundreds of affiliates or by *ad hominem* suspiciousness about the motivations of corporations that might object to a law firm's suing an affiliate. While any conflict theory should recognize the potential for confounding complexity in applying conflict rules or outright abuse of them, here as elsewhere, theory can hardly be justified on the overriding notion that either grotesque

\(^2\) On the possible meanings and difficulties with the "alter ego" exception, *see infra* text accompanying notes 198-210.

\(^3\) Even commentators otherwise favoring the *no-affiliates* position concede that a confidentiality basis for objection should be recognized. *See infra* text accompanying note 193.


**REPRESENTING RELATED ORGANIZATIONS**

Consistent with the principle expressed in subdivision (a) of this rule, an attorney or law firm who represents or has represented a corporation (or other organization) ordinarily is not presumed to also represent, solely by virtue of representing or having represented the client, an organization (such as a corporate parent or subsidiary) that is affiliated with the client. There are exceptions to this general proposition, such as, for example, when an affiliate actually is the alter ego of the organizational client or when the client has revealed confidential information to an attorney with the reasonable expectation that the information would not be used adversely to the client's affiliate(s). Absent such an exception, an attorney or law firm is not ethically precluded from undertaking representation adverse to affiliates of an existing or former client.

\(^5\) *See infra* text accompanying notes 231 and following. The District of Columbia comments are reproduced in the Appendix. After completing this paper in substantially its present form, including its approving words about the District of Columbia rule, I learned at the Hofstra conference that my sometimes colleague Robert A. O'Malley of the District of Columbia had served as author of the new D.C. comments.
caricature is systematically sound or that claims of abuse provide all we need to know about motivation. Reality may be, on occasion, both messier\textsuperscript{26} and less chaotic\textsuperscript{27} than caricature might suggest.

As will be seen, no single theory can adequately deal with both lateral and lineal dimensions of corporate-identity conflicts. In the first place, it must be recognized that lateral and lineal conflicts present uniquely different problems. Moreover, both kinds of corporate-family conflicts are best approached in highly individuated ways—ways that, unfortunately perhaps for large law firms in the present state of conflict-checking technology, seem to require a correspondingly fact-intensive, and thus somewhat lawyer-intensive examination of corporate clients and their affiliates. Such an inquiry, although in part well-adapted to computer-driven conflicts checking for “hits” among prospective present and former firm clients, will admittedly be more time-intensive and produce more disabling conflicts than would, for example, the \textit{no-affiliates} rule with its refusal to recognize any, or many, such conflicts. But conflicts analysis is not intended, above all else, to relieve lawyers of the tedious shopkeeper’s\textsuperscript{28} work of checking conflicts or, certainly, of the economic burdens of having to turn away business because the new business will introduce an impermissible conflict. Nor, more substantially, can conflicts law ultimately quail at the thought that an occasional innocent client will be forced by conflicts rules to find new counsel and will thus be denied their first choice of counsel. That is the heavy but accepted price for conflicts rules in general and should also be recognized as the accepted price for conflicts within corporate families.

In the remainder of this Article, I begin with illustrations of the various types of entity families that corporations may create and some of the reasons they do so. I then briefly examine the entity-representation rule itself, for it is the starting point from which much corporation-representation conflicts analysis proceeds. We see the various ways in which the entity-representation rule has been applied, both in the law and in the

\textsuperscript{26} For a survey of the types of affiliated entities and the reasons for proliferating them, see \textit{infra} text accompanying notes 29-36.

\textsuperscript{27} On arguments based on chaos, see \textit{infra} text accompanying notes 220-27.

\textsuperscript{28} I refer here, of course, to Holmes’ disdainful lament about the busywork of law practice: “the laborious study of a dry and technical system, the greedy watch for clients and the practice of shopkeepers’ arts, the mannerless conflicts over often sordid interests . . . .” Oliver Wendell Holmes, Jr., \textit{The Profession of Law, Conclusion of a Lecture Delivered to Undergraduates of Harvard University}, on Feb. 17, 1886, reprinted in \textit{Collected Legal Papers of Oliver Wendell Holmes, Jr.} 29 (New York 1921), \textit{cited in Thomas A. Balmer, Holmes on Law as a Business and a Profession,} 42 \textit{J. Legal Educ.} 591, 592 (1991). If I correctly decipher Holmes’ somewhat obscure syntax, the attribution of greed applies to both the watch for clients and the practice of shopkeepers’ arts.
law of lawyering and specifically for purposes of assessing conflicts of interest in a lawyer's representation of various kinds of entities. It should be no surprise to find that, even at this preliminary point, the law by no means favors mindlessly automatic application of the entity-representation concept. I then turn to examine specifically the problem of lateral-dimension corporate family conflicts—those of parent-subsidiary corporations and the like—in the process examining the several theories that courts and commentators have advanced to resolve corporate-family conflict questions. I reject the absolutism of both the *all-affiliates* and the *no-affiliates* positions. In their place, I propose a functional analysis of such problems—one focusing on protecting the corporate client's reasonable expectations in the confidentiality of its information and its reasonable expectations in a smooth working relationship with its counsel based on the extent of operational proximity between the lawyer's work and the assertedly affiliated entity and its agents who are important in the representation. I then turn in a much more perfunctory way to lineal-dimension corporate-family conflicts problems. In this quite different realm, I argue for a test that is again functional but importantly different—one that focuses upon whether the "before" and "after" family of corporations represents the same or a different community of interests as compared with those that the lawyer undertook to represent. I also applaud the nearly universal answer that courts and commentators have given to another lineal-dimension issue—that concerning conflicts produced by client and opposing-party mergers and similar transactions. I then conclude.

II. A TYPOLOGY OF CORPORATE FAMILIES

It has always struck me as one of the marvels of corporate history that for a time Howard Hughes, the bizarre owner of the mammoth, and immensely profitable, Hughes Tool Company, ran his business as a sole proprietorship.\textsuperscript{29} Only thorough-going eccentrics would do so. There are simply too many reasons (liability-limitation, tax-avoidance, regulation-compliance and other legal considerations) that virtually compel businesses to operate in a more formally structured way. For similar reasons, businesses often proliferate their corporate forms. An obvious instance is a business that began small and grew in substantial part through acquisitions of other corporate businesses. Again for tax and other reasons, including sheer convenience, most such acquisitions take the form of a

\textsuperscript{29} The tale, as with much else about Howard Hughes, may be apocryphal. At least at the time of his death, his company was constructed as a so-called "Subchapter C" corporation, a form that bears resemblance, for all but tax purposes, to a partnership.
purchase of the stock of the business being acquired, rather than simply buying the assets of the acquired business (its machinery, intellectual property and a customer list). The acquired company may itself have previously acquired companies lower down the corporate-acquisition feeding chain, with the result that its acquisition brings more than one additional member to the new corporate family. While such acquisitions may be followed by merger of the acquired into the acquiring entity, there may be a host of legal considerations making it at least equally desirable to leave them formally separate.

Corporate-form growth is particularly common—but by no means invariable—when the corporate family operates different lines of business. Although based on common or related technologies, a company manufacturing and selling lines of meat grinders, knives, and garden machines will, for obvious reasons of limiting liability, consider leaving the various lines of liability-producing business in separate corporations, or organizing them into such separate entities. Highly diversified businesses (typical of the acquisitions binge of two and three decades ago) will often operate through many different corporate entities to reflect the separate operating reality of the businesses involved. Proliferation of corporate forms is also typical of businesses that, no matter how integrated in other ways, conduct in part a business that is subject to intense governmental regulation. Thus, it is common in the commercial banking industry for bank-holding companies to own stock in one or more tiers of either sub-holding companies or bank-operating companies. Speaking very generally, the operating company is intensely regulated, while the ownership structure is less constrained and can operate more freely in its separable business of leveraging and selling participation shares of indirect-ownership interests in the operating entity. The same is true in other areas of the world of financial services, such as insurance and investment banking. Joint ventures, common in the construction industry, will often operate through a separate corporation or other entity that exists only for the single project contemplated by the venturers. The globalization of business has played a significant role in the proliferation of corporate families of large size. In the pharmaceutical industry, a company will often maintain separate foreign subsidiaries simply to comply with the various legal (or legal-political) requirements in different countries. If, for example, a British drug company acquires a French drug company, it will often leave intact the latter's several foreign-country subsidiaries, which will be much more efficient than undertaking to obtain clean transfer of the patent rights in the several different countries.
Proliferating several corporations within the same business structure is not cost-free (separate books and records must be kept, separate taxes must be paid, forms must be filed), but it is hardly cost-intensive. Candid corporate lawyers will readily concede that setting up corporations is not the stuff of corporate-law genius. It is routine legal work performed in most large and small law offices, often by lightly-supervised junior lawyers using office-wide templates for articles of incorporation and by-laws. Several large user-friendly corporate-services companies exist to facilitate the process of paper-work and regulatory compliance (filing incorporation papers, serving as designated corporate agent). The other operational requirements to maintain the separate corporate existence of a non-dormant corporation are minimal. It suffices to hold an annual meeting of the board (whose members may, of course, double as board members, officers or employees of an affiliate) and shareholders. Those meetings can often be conducted on paper only with appropriate signatures.

The degree to which a separate entity within a multi-corporation family will be integrated or operated independently varies enormously. At one extreme are "desk-drawer" corporations—entities that exist only in the most formal sense. They are wholly-owned and fully-controlled by a parent whose officers are also the officers of the subsidiary and whose board members similarly comprise the subsidiary's board. All of its operations and other functions may be contracted or otherwise delegated to an affiliate within the corporate family. In the example, above, of a foreign-country drug subsidiary, its only purpose and function may be to hold formal legal title to a foreign patent. At the other extreme, a subsidiary or other affiliate may have as its only link with the parent the fact of stock ownership. A parent may, for example, own the subsidiary solely for the purpose of investment. The subsidiary may function with a board and officers who are different from and in no way are controlled or influenced in policy-making by the board or officers of the parent. There are, obviously, infinite gradations in between.

There are also endless variations on the degree of ownership linking the corporate family and on the sheer number of members. One quite common form of parent-subsidiary relationship is where the subsidiary is "wholly-owned," with the parent owning 100% of the voting stock of the subsidiary. Sometimes, however, a percentage of voting stock will be owned by others—by executives, for example, who received their stock under executive-compensation arrangements, by business colleagues or simply by the investing public. For the purposes of the SEC, ownership or control of more than 50% of the voting stock of another company
clearly indicates majority control. But one company may control another through control of a percentage of voting stock that is considerably smaller than 50%, through contractual arrangements (voting trusts or the like) or through control of board membership.

With respect to size, two different dimensions should be kept in mind. First is sheer number: a multi-member corporate family can range from two corporate entities to any greater number. A quick and relatively random look through the standard reference work, DUN & BRADSTREET’S AMERICA’S CORPORATE FAMILIES, indicates several corporations consisting of several hundred corporate affiliates. One set of corporate affiliates consists of 1,578 individual entities. Second, a proliferation of corporate affiliates is in no direct way related to measurable wealth or other success of the enterprise. Major American corporations (variously) tend to have larger corporate families, but very small enterprises can have as large or larger numbers of affiliates. The problem of corporate-family conflicts, in other words, is not limited to the vast sprawling mega-corporations as sometimes imagined. Certainly, very small enterprises can consist of two or more corporate family members.

Beyond sheer number, complexity can also be a function of interrelationships between the affiliates within a corporate family. A single “parent corporation” with a single “subsidiary corporation” is quite typi-

30. In general, a financial statement filed pursuant to the federal securities acts must include information about “affiliates.” Securities and Exchange Commission Regulation S-X (1997). Definitions in § 210.1-02 of the Commission’s regulations define such terms as the following: “affiliate” (§ 210.1-02(b)) (“a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified”); “control” (§ 210.1-02(g)) (“the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise”); “majority-owned subsidiary” (§ 210.1-02(n)) (“a subsidiary more than 50 percent of whose outstanding voting shares is owned by its parent and/or the parent’s other majority-owned subsidiaries”); “parent” (§ 210.1-02(p)) (“an affiliate controlling such person directly, or indirectly through one or more intermediaries”); “significant subsidiary” (§ 210.1-02(w)) (very roughly, an interest exceeding 10 percent).

31. See id. at § 210.1-02.

32. 1 DUN & BRADSTREET, AMERICA’S CORPORATE FAMILIES 64 et seq. (1996) [hereinafter DUN & BRADSTREET] (American Express Company, Incorporated—financial-services company with 503 corporate affiliates listed); Listings included Columbia/HCA Healthcare Corporation—nation’s largest operators of psychiatric hospitals and other medical services, with 329 corporate affiliates. See id. at 418 et seq. For purposes of this reference volume, a “subsidiary” is any corporation “whose controlling interest (over 50%) is held by another company.” See id. at vii. Compare SEC Definitions, infra note 103. According to a local Ithaca bookseller, the two-volume Dun & Bradstreet publication sells for $490.00 at full retail. Purchasing a third volume covering international corporations adds $360.00 to the price.

33. See id. at 1148 et seq. (Melville Corporation—diversified consumer-products company, with 1,578 corporate affiliates listed).
cal.\textsuperscript{34} If the parent has two subsidiaries, they are commonly termed \textquotedblleft sister\textquotedblright;\textsuperscript{35} or \textquotedblleft brother-sister\textquotedblright;\textsuperscript{36} corporations. A member of the family may be either a corporation or another form of entity, such as a partnership or joint venture, with the additional partners consisting either of affiliates or outside interests. While one commonly thinks of corporate families in rigidly hierarchical form—for example, with a parent controlling its subsidiary, or with sister corporations commonly controlled by a parent—that arrangement is hardly inevitable. A parent may be a shell organization (such as a parent corporation set up only as the acquisition vehicle in a merger and not yet—or never—dissolved) with no independent managers or operations, and with the subsidiary’s officers setting policy and giving operational direction to the family. Either contracts or custom may distort the picture presented by a description of the family traced only through ownership.

Organizational complexity, however, is not inherently connected only to the corporate or similar entity forms. When there are no compelling reasons to set up and maintain separate corporations within a corporate family (or when they are insufficiently appreciated), even an immense and highly complex business organization can be run within a single corporation. Instead of conducting different lines of business through separately incorporated subsidiaries, for many purposes a company often could just as readily be structured into different \textit{vis-à-vis} the rest of the company. The divisions that are not separate legal entities. There are no legal rules on what a division must comprise, under what conditions it must be maintained, or how it must be operated \textit{vis-à-vis} the rest of the company. The divisions can have \textquotedblleft presidents\textquotedblright; (or vice presidents, or bishops, or whatever) at their head. The divisions can be operational (widget division, real estate division) or functional (accounting division, marketing division)—or simply reflect a more-or-less arbitrary way of dividing up the business,

\textsuperscript{34} On the parent-subsidiary terminology and its possible range, see, e.g., \textit{Camden Iron & Metal, Inc. v. Marubeni America Corp.}, 138 F.R.D. 438 (D.N.J. 1991) (differentiating between parent-subsidiary and sister corporation situations for purposes of determining obligation of corporate party to obtain documents in possession of affiliated corporation over which it could exercise \textquotedblleft control\textquotedblright); \textit{Shinault v. American Airlines, Inc.}, 738 F.Supp. 193, 200 (S.D. Miss. 1990) (noting argument of AMR Corporation for purposes of personal jurisdiction that \textit{it is not the parent of American Airlines, but a sister corporation\textquotedblright} (emphasis in original).

\textsuperscript{35} \textit{See, e.g., Camden Iron & Metal, Inc.}, supra note 34; \textit{see also}, \textit{Shinault}, supra note 34.

\textsuperscript{36} \textit{See, e.g., Holland v. High-Tech Collieries, Inc.}, 911 F. Supp. 1021, 1031 (N.D.W.Va. 1996) (using concept of \textquotedblleft brother-sister corporations\textquotedblright; for purposes of applying regulations under Coal Act to determine liability for contributions to pension plan); \textit{see generally} \textbf{HARRY G. HENN & JOHN R. ALEXANDER, CORPORATIONS § 258, at 697} (3d ed. 1983) [hereinafter \textbf{HENN & ALEXANDER}] (\textit{\ldots} Two or more subsidiaries of a common parent corporation—siblings—are sometimes called \textquotedblleft brother-sister corporations.\textquotedblright;). \textit{See id.}
as among the kids or among colleagues who started the business. Divisions can have entirely separate personnel reporting to a central core of executives, or a highly integrated arrangement of cross-divisional, interlocking persons or committees. Whether a business is conducted through one corporation with five divisions or through a holding company and five subsidiary corporations is often an accident of corporate history or an expression of the whim or management style of the manager, committee or lawyer that served as the chief architect of the corporate family. Or, to a greater or lesser extent, it could be the unconscious product of a series of historical accidents and relatively unplanned smaller events.

It is around that messy picture of business enterprises that one must attempt to frame a workable theory about corporate-family conflicts. But as a useful further stepping stone to that inquiry, it would be best to attempt first to understand what or who it is that a lawyer represents when a lawyer is said to represent a corporation in the situation that is presumably analytically less complex—when a lawyer represents only a single corporation that has no affiliates.

III. THE ENTITY THEORY OF CORPORATE REPRESENTATION

(1) The Entity Theory in General

If the entity theory had not been available to deal with the most elemental of corporate-conflicts questions when the lawyer codes first became serious-minded in the late 1960's, it would have been necessary to invent something like it. For purposes of assessing conflicts as well as many other applications of the law of lawyering to corporate-client representations, it is essential to have a working notion of who it is that a lawyer represents when the lawyer provides legal services to a corporate client. The entity concept first appeared in Ethical Consideration 5-18 of the ABA's 1969 MODEL CODE OF PROFESSIONAL RESPONSIBILITY, from which it was carried fairly intact into Rule 1.13(a) of the ABA's MODEL RULES OF PROFESSIONAL CONDUCT. It is important to note that the rule is quite limited, although all-powerful in its realm. Its essential message at both places was the same: a lawyer who represents an organization as client has a client-lawyer relationship with the entity only, and neither owes client-lawyer duties to any constituent of the entity nor is to accept instructions from any constituent, except as the constituent is authorized to speak for the entity in instructing the lawyer.

37. The ABA's CANONS OF ETHICS (1908), which was the immediate predecessor to the ABA's MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969), said nothing about the identity of a corporate lawyer's client. See MODERN LEGAL ETHICS, supra note 1, § 13.7.2, 732, at note 70.
But it goes no further. It does not, for example, provide that a lawyer may represent only the entity, or that the lawyer may never represent a constituent instead of, or in addition to, the entity when that is the understanding of the parties. The rule, importantly, states the identity of the client once such determinations have been made and it has been concluded that the lawyer represents (only or among others) the corporation itself.

The entity-representation concept was new in the lawyer codes, but the entity concept of corporate existence was hardly new in the law. The entity-representation concept was new in the lawyer codes, but the entity concept of corporate existence was hardly new in the law. Corporations had long since been recognized as entities in many other areas of the law. In contemporary American corporate law (and, in general, Western law) it is well-recognized that a corporation can sue or be sued in its own name, can compute its tax liability separately from that of its owners, and can be looked to separately for the purpose of satisfying a judgment against it. Persons do not by virtue of their roles as owners and managers of a corporation incur liabilities that the law recognizes to be those of the corporation. Indeed, that concept of "limited liability" is undoubtedly the major benefit that the corporate form confers, and concomitantly may be the principal reason why incorporators and shareholders may prefer this form of ownership and control.

Even within the much narrower realm of the law governing lawyers, general acceptance of the entity-representation concept by American courts long predated the first explicit restatement of the entity-representation rule in the ABA's lawyer codes in 1969 and 1983. Thus, well

38. Here, as in so many other instances in the law regulating lawyers, the lawyer codes borrowed heavily from surrounding law. See Restatement of the Law Governing Lawyers § 1 cmt. b (Proposed Final Draft No. 2, April 6, 1998)[hereinafter Second Proposed Restatement].

39. See, e.g., Paul L. Davies, Gower's Principles of Modern Company Law 80-83 (1997) (United Kingdom law of limited liability for companies and corporations); Aldo Frignani & Giancarlo Elia, Italian Company Law 17, 105 (1992) (Italian corporation law limiting liability for "company limited by shares" (società per azioni) and limited liability company (società a responsabilità limitata)).


41. See, e.g., Hamilton, supra note 40, § 13.9.1; see also Henn & Alexander, supra note 36, § 76.

42. See Henn & Alexander, supra note 36, § 230, at 37.

43. An officer or other employee who acts for a corporation may become personally liable for torts committed by, but not for contractual undertakings of, the corporation. Henn & Alexander, supra note 36, § 73, at 131.

44. See, e.g., Hamilton, supra note 40, § 13.6.1; See also Henn & Alexander, supra note 36, § 73.

45. The lawyer codes in most particulars merely formulate for disciplinary application background rules that were already applicable to lawyers for legal purposes that included, but
back into the nineteenth century, courts assumed that corporations enjoyed the benefits of the attorney-client privilege separate and apart from constituents. Twentieth-century courts have held that same thing in pre-lawyer code decisions with respect to the more recently recognized work-product immunity. Courts also uniformly recognized that

extended far beyond, lawyer discipline. See Second Proposed Restatement, supra note 38, §1 cmt. b. As Professor Susan P. Koniak has eloquently argued, the lawyer codes have often attempted to put a "spin" on the formulation of a rule to favor a bar interest. See Susan P. Koniak, The Law Between the Bar and the State, 70 N.C. L. Rev. 1389 (1992); see also Thomas D. Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702 (1977) (lawyer code formulations rather uniformly favor interests of lawyers). With respect to the question of entity-representation, the spin is clearly seen in the battle over the shape of ABA Model Rule 1.13(b) on lawyer whistle-blowing with respect to wrongdoing by corporate insiders. Rule 1.13(a) states that the entity is the client, suggesting that public disclosure in the interests of the entity would clearly be permissible, even required by considerations of competent representation of the entity. However, the rule eventually adopted (rejecting a more permissive rule recommended by the drafting committee) was much more restrictive, thus protecting the interests of wrong-doing managers. They seem clearly to have been motivated by a desire to avoid the possibility that a permissive rule would somehow expose lawyers to liability for failure to make such public disclosures. See ABA Center for Professional Responsibility, Legislative History of the Model Rules of Professional Conduct 90 (1987) (legislative history of Model Rule 1.13(c)); Martin Riger, The Model Rules and Corporate Practice—New Ethics for a Competitive Era, 17 Conn. L. Rev. 729, 739-42 (1985) (describing lobbying process by which Rule 1.13 was developed); Steven Gillers, Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure, 1 Geo. J. Leg. Ethics 289 (1987) (similar).

With respect to the narrow question pursued here—the scope of corporate-family representation for conflicts purposes, the spin is seen in the majority opinion in ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-390 (1995). See infra text accompanying notes 142-148.


47. The assumption that the work-product immunity applies to corporate clients has been accepted as a matter of course and predominantly without explicit mention. Cf. John William Gergacz, Attorney-Corporate Client Privilege 7-1 (2d ed. 1990) ("... Unlike the attorney-client privilege, few work product issues directly concern the corporate client...."). The decision that has defined and still influences the work-product immunity doctrine in the United States, Hickman v. Taylor, 329 U.S. 495 (1947), was itself an attempt to obtain work-product information about a corporate client. See also Upjohn Co. v. United States, 449, 383, 397-400 (1981) (similar assumption that work-product immunity applies to corporate client).
corporations and lawyers could form client-lawyer relationships, thus providing the corporation with the necessary status as "client" to enable it to sue its lawyer for legal malpractice in its own right and otherwise to invoke the rights of clienthood.\(^4\)

No sustainable theory has been able to challenge the supremacy of the entity-representation concept. Possibilities have been bruted about,\(^5\) such as the notion that the client is the person who "controls" the corporate matter on which the lawyer's advice or other services are sought.\(^6\) Such a theory would, to be sure, correspond more closely to the "ordinary" situation of client-lawyer relationships involving human persons and thus to the interpersonal realities of many corporate-client representations. But such a theory would suffer from a high degree of indeterminacy because the representation may be guided by a group of persons in the entity (rather than, as the theory more conveniently would imagine, by one person) or the identity of the "client" person may shift from one aspect of related legal services to another in the relatively common instance of a corporation with more than one person who directs the representation of outside counsel. Such a theory would also be disconnected

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\(^4\) See, e.g., Rosebud Mining & Milling Co. v. Hughes, 64 Pac. 247 (Colo. Ct. Apps. 1901) (trial court improperly granted demurrer to corporation's allegation that lawyer negligently failed to perfect appeal that company had hired lawyer to handle); Humboldt Bldg. Ass'n v. Ducker, 64 S.W. 671 (Ky. Ct. Apps. 1901) (building corporation that hired lawyer to examine titles to property stated cause of action for negligence in examining title in failing to search for liens when lawyer knew that new construction was occurring on property).

\(^5\) Thus, it has long been recognized in judicial decisions that a corporation as client can object to a lawyer's representation of a client with conflicting interests. See, e.g., IBM Corp. v. Levin, 579 F.2d 271 (3d Cir. 1978) (frequently-cited case prohibiting unrelated litigation against existing client and defining what constitutes end of representation); T. C. Theatres, Inc. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953) (decision that gave name to the "substantial relationship" rule in former-client conflicts); Lalance & Grosjean Mfg. Co. v. Haberman Mfg. Co., 93 F. 197, 199-200 (C.C.S.D.N.Y. 1899) (assuming application of former-client prohibition to lawyer for former corporate client, but finding rule not violated here); National Hollow Brake Beam Co. v. Bakewell, 123 S.W. 561, 567 (Mo. 1909) (corporate client can object to lawyer's representation of client with conflicting interests in same litigation).

\(^6\) See generally Modern Legal Ethics, supra note 1, § 13.7.2 (reviewing competing theories). One possible theory is that the lawyer's client is the corporation's board of directors. John C. Taylor III, The Role of Corporate Counsel, 32 Rutgers L. Rev. 237, 241 (1979), critiqued in Modern Legal Ethics, supra note 1, at 732 note 70. During the debates that led to adoption of the ABA's Model Rules of Professional Conduct in 1983, the American College of Trial Lawyers urged that a lawyer for a corporation should be recognized to represent the entity as well as its directors, employees and shareholders. See ABA House Comm. on Drafting, Synopsis of Amendments to Proposed Model Rules of Professional Conduct 42 (Dec. 30, 1982). Thankfully, the proposal did not prevail.

\(^51\) L. Ray Patterson, Legal Ethics: The Law of Professional Responsibility 411 (2d ed. 1984). In an April 1998 telephone conversation, Professor Patterson informed me that this reference is a remnant of a paper that he circulated to me (and doubtless others) in draft form in the early 1980's making the argument referred to in the text.
from the surrounding law of corporations, adding to its potential for maiming in application. In any event, the code-drafters, code-adopters, and courts have spoken. The entity-representation concept reigns supreme.

(2) Limited Reach of the Entity Theory

Despite its dominance, it is important to note that the entity-representation theory has a limited field of operation. It cannot and does not answer all possible questions about corporate clienthood that have arisen in the law of lawyering. There should also be no pretense that the entity theory is uniformly applied to disparate legal questions. Instead, there are ample indications that courts treat entity-constituent questions quite differently when dealing with importantly different issues. A prominent example concerns the question whether a constituent of an entity client (such as a corporate family member or an officer or director) may invoke the corporation's attorney-client privilege. In discussing whether a constituent who reasonably believed that the communication was within a personal client-lawyer relationship, courts have held that the entity-constituent differentiation for this purpose is to be drawn more sharply (and thus less favorably to the individual constituent) than would be the case were the question one of conflicts of interest.52

Another example of differential treatment under the entity concept involves application of the so-called anti-contact rule.53 Under that rule a lawyer acting on behalf of a client is prohibited from contacting a person whom, as the lawyer knows, is currently represented by another lawyer.54 The anti-contact rule presents an inevitable question about the identity of such a prohibited person (or persons) when an opposing lawyer represents a corporation or similar entity. If the entity-representation concept had been held to apply in the case of corporations, the anti-contact rule would be vacuous, since under it the opposing lawyer would be held to represent no person at all. In that view, the inquiring lawyer whose client opposed the corporation could talk to any and all of its officers and employees. The law, of course, is to the contrary. A comment to the ABA's Model Rule 4.2 attempts to trace out the set of pres-

52. A prominent recent example is United States v. International Brotherhood of Teamsters, 119 F.3d 210, 216-17 (2d Cir. 1997) (while reasonable belief in existence of personal client-lawyer relationship may preclude subsequent adverse representation on conflicts grounds, that belief does not create a personal claim in constituent to assert attorney-client privilege after entity has waived privilege).
53. Another equally prominent example is the very different, and limited, way that the entity-representation rule applies to class action representations. See infra text accompanying notes 91-95.
54. See Model Rules 4.2; Model Code DR 7-104(A).
ent officers and employees of an entity client who qualify as persons not to be contacted. Whether successful or not as an intelligible regulation (the rule has proven quite difficult to apply in several areas), the rule as written and as applied clearly and properly is different and divorced from the entity-representation concept.

(3) What Counts as an “Entity” for Conflicts Purposes?—Beyond the Corporate Form

While the entity theory has gained wide acceptance with respect to conflicts questions involving corporations, it is by no means so universally agreed upon whether and how it applies to putative entities other than the paradigm corporation. Even with respect to the corporate form itself, the theory has become attenuated in the case of the corporate form in which most corporations in fact exist—the close corporation. Rules such as ABA Model Rule 1.13(a) obviously assume an organization of some size, significantly complex structure, relatively permanent form, and, in general, some external set of features permitting the “thing” to be identified as something other than a loose aggregation of individuals. In other words, the group must have collective interests of a legal nature for whose collective benefit retaining a lawyer makes practical sense. A group of two people walking down a street or a mob surging through a town, for example, is presumably not an entity. But, of course, it is

55. See ABA Model Rule 4.2 cmt. (4).
57. See infra text accompanying notes 68-79. On the ubiquity of the close corporation, see, e.g., Robert W. Hamilton, Fundamentals of Modern Business § 14.6, at 534 (1989) (citing various studies of sizes of corporations (in number of shareholders and assets) and concluding that “closely held corporations were by far the most numerous”); Harry G. Henn & John R. Alexander, Corporations § 257, at 694, note 1 (3d ed. 1983) (citing U.S. Commerce Department statistics showing numerical dominance of close corporations among corporate entities in existence).
58. Compare Proposed Final Restatement, supra note 1, § 212 cmt. (a):
[A]n organization includes a corporation (whether for-profit or not-for-profit), limited or general partnership (whether formal or informal), labor union, unincorporated association, joint venture, trust, estate, or similar entity with a recognizable form, internal organization, and relative permanence. Many organizations are recognized as entities for other legal purposes, but such recognition is not invariably required for the purposes of this Section

An illustration later in the same section of the Restatement uses as an example a private investment club of individuals who have pooled their individual assets to invest. See id. at cmt. F, illus. 5.
59. For purists, I should clarify that even a mob may have legal significance as a collective. For example, a preexisting plan among its members to violate the law might implicate them in a
probably preposterous to think of such a transitory group (as distinct from more permanent gangs\textsuperscript{60}) acting collectively to retain a lawyer.\textsuperscript{61} Nonetheless, when pushed very hard, it appears that the entity-representation concept is quite plastic and could acceptably include any aggregation of people who, with their chosen lawyer, reach an understanding that the lawyer is to represent the collective as such rather than, or in addition to, its constituent elements. Conversely, a multiplicity of constituents is not a prerequisite to entity representation. If a single individual acts in the legally prescribed way in establishing and operating an entity such as a corporation and a lawyer undertakes to represent the entity, it will clearly qualify as an entity for conflicts and other representational purposes notwithstanding the involvement of only one person in its creation, ownership and management.

Part of the explanation for the wide variability of the entity-representation concept flows from the fact that it is contractual in origin and scope. The concept recognizes that the client-lawyer relationship is one that, for the most part, willing putative clients and lawyers are free to shape as they wish.\textsuperscript{62} For that reason, entity clients could include non-criminal conspiracy. See generally Model Penal Code § 5.03 (1985). See also 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 6.5(g), at 112 (1986) (discussing “plurality” requirement of conspiracy law, under which prosecution must prove combination of two or more persons).

\textsuperscript{60} See, e.g., FRANK RAGANO & SELWYN RAAB, MOB LAWYER (1994) (purported life story of self-styled lawyer for mobsters in Florida and nationally, with purported sensational revelations about who killed Jimmy Hoffa and President Kennedy); THE GOTTI TAPES (1992) (transcripts of government’s secretly tape-recorded conversations involving John Gotti, then reputed head of criminal “family,” replete with references to work by lawyers for family, including one murderous expression of client dissatisfaction (id. at 111)). On occasion a purported lawyer for a criminal family can be accused of conflicts of interest generically similar to those of a more mainstream corporate-family lawyer. See William Glaberson, Prosecutors Dusting Off Old Tactic Against Gotti, N.Y. TIMES, Mar. 28, 1998, at 3, col. 5 (press account of letters sent by federal prosecutors to two lawyers representing alleged head of crime family in criminal prosecution, suggesting that lawyers had conflicts of interest because of their ties to family).

\textsuperscript{61} On the other hand, at least one decision—perhaps fancifully—permitted a class action brought on behalf of an ill-defined group of student demonstrators to obtain a temporary restraining order against allegedly unconstitutional police practices in attempting to break up ongoing demonstrations against the resumption of U.S. bombing in Cambodia. The decision, by federal district judge Earl Larson in the District of Minnesota, was unreported. Under accepted concepts of class-action representation, see infra text accompanying notes 96-98, the lawyer in the case presumably represented all of the demonstrators, at least for purposes of the anti-contact rule.

\textsuperscript{62} See PROPOSED FINAL RESTATEMENT, supra note 1, § 26 cmt. (f) (“... Whether the lawyer is to represent the organization, a person or entity associated with it, or more than one such persons and entities is a question of fact to be determined based on reasonable expectations in the circumstances ...”). Where the parties have clearly expressed that intent, multiple representation may even consist of clients with conflicting interests. Of course, the permissibility of a lawyer entering into such a relationship is an independent matter. Moreover, as the cited comment in the RESTATEMENT goes on to state, when the claimed client-lawyer relationship is not express but
entity entities, or, put differently, aggregations of constituents of a more-commonly recognized entity or others created *ad hoc*. A recurring illustration of that type is the group consisting of the non-insider members of the board of directors of a corporation. In recent years, that group—although it has little other independent legal significance—has come to exercise extraordinary supervisory powers with respect to certain matters, for example to determine whether the company should support litigation claiming that insider members of the board acted wrongfully as charged in a shareholder derivative action. In performing that function, the group obviously will require a lawyer’s assistance. But, it would hardly be optimal for the lawyer to be selected through the corporation’s normal procedures, which likely are subject to influence by those charged in the lawsuit. For similar reasons, the group’s lawyer should usually avoid conflicting representations and represent only the group and not, for example, attempt to represent additional clients such as insider directors with respect to the same matter. While one could certainly view the lawyer as representing each individual member as a co-client of all the others, it is also possible for the lawyer to arrange to assertedly is evidenced by the implicit understanding of the parties, “... due consideration should be given to the unreasonableness of a claimed expectation of entering into a co-client status when a significant and readily apparent conflict of interest exists between the organization or other client and the associated person or entity claimed to be a co-client ...” Id.


On powers of disinterested directors beyond dealing with derivative actions, see e.g., ALI Principles, supra § 5.02(a)(2)(B) & (C) (advance authorization of independent directors ratifying certain transactions between corporation and director or senior executive). See also § 5.03(a)(2) (advance authorization of amount of compensation to director or senior executive); § 5.05(a)(3)(B) (advance authorization of director or senior executive taking advantage of corporate opportunity); § 5.15(b)(3) (advance authorization of transfer in control of corporation in which director or principal senior executive of corporation is interested).

64. See, e.g., *In re Par Pharmaceutical, Inc. Derivative Litigation*, supra note 63, at 647 (lawyers to independent directors had conflict of interest rendering them not the required “independent counsel” where directors retained same lawyers who were already representing company and its board in derivative action); Cf. *In re Consumers Power Co. Derivative Litigation*, 132 F.R.D. 455, 476-79 (E.D. Mich. 1990) (lawyer retained by special committee, although same lawyer defending company in pending derivative action, did not lack independence because committee proceeded on assumption that case had merit and that only question was whether maintenance of suit would be inconsistent with other litigation in which company had substantial stake; while law firm representing individual directors could not properly represent committee in its deliberations, committee and its counsel could permissibly consult with those lawyers, including about merits of derivative claims).
represent the collective interests of the group as a whole and not any of its members individually. Among other things, that arrangement would guard against the possibility that one or more apparently disinterested members of the group themselves were complicit in the charged acts. Should that possibility arise, individual representation could, in the absence of consent, require that a new lawyer be appointed to begin the investigative process anew. A second example of a non-entity entity would be a division of a corporation that has no separate legally-recognized existence—which, in other words, has not been separately incorporated as a subsidiary or other affiliated corporation. While it is hardly customary to do so, a lawyer and corporate client might expressly agree or circumstances might sufficiently indicate that the lawyer's undertaking extended only to the legal interests of the division and not to the corporation as a whole. If that is done, the lawyer would presumably remain free to represent another client in a matter in which the corporation's interests (but not those of the division) were adverse.

(4) The Proliferation of Entity Forms

While not purporting to do so exhaustively, it may be useful to examine somewhat more closely several additional applications of the entity-representation theory that are less than obvious. The exercise will prove useful in later analysis in which several such applications may aid understanding of larger issues. It will also provide an opportunity to assess the ways in which voluntary acts of a lawyer may transform what starts out as an entity representation into much more. That transformative question will be pursued primarily in connection with one of its common areas of application: the close corporation.


66. Cf. Nichols v. United Exposition Serv. Co., 902 F. Supp. 32, 36 (S.D.N.Y. 1995) (when division of corporation was covered by insurance policy issued by carrier different from company insuring corporation's liability, second lawyer, representing division only, would be permitted to participate in certain non-jury aspects of litigation). Distinguishable is the situation in Federal Trade Comm'n v. Exxon Corp., 636 F.2d 1336 (D.C. Cir. 1980), in which the court held that a law firm would not be permitted to represent a division of a corporation due to what the court termed a conflict between the corporation and its "drives division." See MODERN LEGAL ETHICS, supra note 1, § 8.3.2, at 4.2.1, note 56. The court's analysis was hardly based on conventional conflicts analysis, but was more obviously based on the potentially transitory status of the division.

67. See infra text accompanying notes 228 and following.
(a) Close Corporations

Application of the entity-representation concept to a close corporation—a corporation in which ownership and management are largely coextensive—has not been handled entirely satisfactorily in the decisions. Perhaps employing the notion that a close corporation is merely an "incorporated partnership," some courts have intimated that a lawyer who represents a close corporation also ineluctably represents principals of it. But to treat a close corporation as the legal equivalent of a part-

68. In a provocative article, Professor Lawrence E. Mitchell has proposed a new ethics rule of extremely fine detail, based in part on a sub-typology of close corporations. Lawrence E. Mitchell, Professional Responsibility and the Close Corporation: Toward a Realistic Ethic, 74 CORNELL L. REV. 466 (1989). The analysis neglects consideration of consent issues. In Bryan J. Pechersky, Note, Representing General Partnerships and Close Corporations: A Situational Analysis of Professional Responsibility, 73 TEXAS L. REV. 919 (1995), the student author proposes that a lawyer should be held to represent all principal constituents of a partnership or close corporation unless the lawyer obtains the informed consent of each client prior to acting on their behalf.

More likely than any such all-inclusive resolution, the problem will continue to be analyzed under more general rules, with more focused and particularized attention to types of legal representations, types of corporate arrangements for control, and the prior relationships between the lawyer and the various constituents of the organization. See generally PROPOSED FINAL RESTATEMENT, supra note 1, § 212, cmt. e, at 698-99 (where owner-manager of close corporation, small partnership or similar entity takes position that interests of all controlling persons and entity should be treated as if the same lawyer acts reasonably in accepting such direction in good faith). As with so many other issues in this Article, the wisest course will almost always involve a lawyer anticipating the need to confront such issues early in the representation and reaching an explicit understanding with the client. See infra text accompanying notes 213-19, 271-73.

69. See ROBERT W. HAMILTON, FUNDAMENTALS OF MODERN BUSINESS, supra note 57, at § 14.4.1, at 529; HENN & ALEXANDER, supra note 36, at § 257, at 694 (3d ed. 1983); F. HODGE O'NEAL & ROBERT B. THOMPSON, 1 O'NEAL'S CLOSE CORPORATIONS § 1.02 (3d ed. 1992). A common illustration is the mom-and-pop store run by the spouses who (sometimes, for tax or succession reasons, together with additional family members) own all the voting shares and are the only officers of the corporate business. See, e.g., In re Brownstein, 602 P.2d 655 (Or. 1979) (father and son each owned 35% of drapery business with capitalization of $15,000, while friend owned remaining 30%). Somewhat more upscale may be the two-physician medical practice, with the doctors and their spouses again filling all officer positions and owning all of the stock.


71. See supra note 10. See also Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) ("[W]here, as here, the corporation is a close corporation consisting of only two shareholders with equal interests in the corporation, it is indeed reasonable for each shareholder to believe that the corporate counsel is in effect his own individual attorney."); Woods v. Superior Court, 197 Cal. Rptr. 185, 189 (Cal. Dist. Ct. App. 1983) ("We conclude that, absent consent or waiver, the attorney of a family-owned business, corporate or otherwise, should not represent one owner against the other in a [marriage] dissolution action."); In re Brownstein, 602 P.2d 655, 657 (Or. 1979) ("... In actuality, the attorney in such a situation represents the corporate owners in their individual capacities as well as the corporation unless other arrangements are clearly made... "); In re Banks,
nership for this purpose hardly displaces the entity theory. As will be seen, partnerships of all sorts are now routinely regarded as entities under that theory.

A preferable analysis is to view the situation of representation of a close corporation as a particular instance for application of another general theory—one that acknowledges the role of the entity theory, but that also will hold a lawyer to a personal client-lawyer relationship with entity constituents when the circumstances sufficiently indicate that the lawyer undertook to represent the constituent as an individual. That general theory will find a client-lawyer relationship as the result of either an express or implied undertaking. A lawyer enters an express client-lawyer relationship with a constituent when the lawyer and the constituent explicitly agree to do so. An implied client-lawyer relationship comes about when lawyer and client omit to express their agreement in explicit terms, but where the circumstances sufficiently indicate that they have proceeded on that understanding. The relationship may also be created by estoppel, occurring in instances of detrimental reliance in which the client manifests intent that the lawyer provide legal services and the lawyer, reasonably aware that the putative client relies on the lawyer, fails to manifest lack of consent to perform the service. A relationship of client and lawyer formed in any of those ways imposes on the lawyer the duties of avoiding conflicting representations.

Under those theories, one cannot categorically state that a lawyer representing a close corporation does or does not also represent one or

584 P.2d 284, 290 (Or. 1978) (where "closely held family corporation . . . is substantially controlled and operated by one person and where the corporation’s attorneys have been that person’s personal attorneys as well. . . . [i]n such a situation . . . common sense dictates that the corporate entity should be ignored.").

72. See infra notes 83-84.

73. See generally PROPOSED FINAL RESTATEMENT, supra note 1, § 212 cmt. (e), at 696 (reference to general rules on formation of client-lawyer relationship with respect to question whether lawyer for entity also has client-lawyer relationship with constituent).

74. See generally PROPOSED FINAL RESTATEMENT, supra note 1, § 26 cmts. (c) & (e).


76. See generally PROPOSED FINAL RESTATEMENT, supra note 1, § 26(1)(b) & cmt. (e), at 7-9. The principle at work here, of course, is the familiar notion of promissory estoppel. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981). See also PROPOSED FINAL RESTATEMENT, supra note 1, at 7 and § 26 cmt. (e)(citing authorities).

77. Further questions may arise, such as whether the entity client and constituent are co-clients in the representation or, differently, whether the lawyer represents separate clients in separate matters. See PROPOSED FINAL RESTATEMENT, supra note 1, § 112 cmt. (l). Resolution of such follow-on issues are not critical for purposes of this Article.
more principals in the entity until the facts in the particular case are more closely examined. Many judicial decisions announcing that a lawyer categorically represents particular constituents of a close corporation provide sufficient background facts from which it can be seen that the court might have reached the same finding of a client-lawyer relationship on the above analysis, particularly on that part of it involving an implied relationship of client-lawyer with the constituent. In other words, those decisions may simply reflect the reality that—unlike the situation in large corporations in which a client-lawyer relationship with a constituent will be the exception—a constituent in a close corporation who has extensive and personal dealings with the entity's lawyer will often manifest to the lawyer an understanding that the lawyer represents the constituent with respect to the constituent's personal interests in addition to representing the entity. On the other hand, if the constituent in the close corporation and the lawyer sufficiently indicate that the lawyer is to represent only the entity, and not the constituent individually, there seems no sound reason for refusing to give effect to their mutual understanding, and some decision to proceed on that view.

(b) Partnerships, Membership Associations, Joint Ventures and Syndicates, Estates, and Trust

The entity-representation concept clearly extends to more than the corporate form. The wording of the lawyer codes provisions itself indi-

78. See, e.g., Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (on facts, reasonable for both shareholders in close corporation to believe lawyer represented both); In re Banks, 584 P.2d 284, 290-91 (Or. 1978) (while broadly suggesting categorical close-corporation rule that entity is to be ignored, facts of case strongly suggest that legal services were rendered to and for benefit of individual who was dominant owner-manager).

79. See, e.g., Bobbit v. Victorian House, Inc., 545 F. Supp. 1124, 1126 (N.D. Ill. 1982) (representing a close corporation "does not inherently mean also acting as counsel to the individual director-shareholders. Rather the question must be determined on the individual facts of each case.") (footnote omitted); Wayland v. Shore Lobster & Shrimp Co., 537 F. Supp. 1220, 1223 (S.D.N.Y. 1982) (rejecting per se rule that law firm representing close corporation thereby represents all shareholders personally). Cf. In re Brownstein, 602 P.2d 655, 657 (Or. 1979) (dicta) ("clear understanding with corporate owners that the attorney represents solely the corporation and not their individual interests" would make it proper for lawyer to represent interests of third party adverse to those of shareholder).

80. The commentators agree. See, e.g., HAZARD & HODES, supra note 1, § 1.13:103, at 390 (2d ed. 1990); UNDERWOOD & FORTUNE, TRIAL ETHICS § 3.4.1, at 81 (2d ed. 1988); MODERN LEGAL ETHICS, supra note 1, at § 8.3.5, at 427. See generally PROPOSED FINAL RESTATEMENT, supra note 1, § 212 cmt. (a). The reference to corporations naturally extends to all such forms—whether for-profit or not and no matter how large or (with an important qualification for entities such as the close corporation) no matter how small. See id.
cates as much. The Restatement would extend the concept to most imaginable entities. The cases largely agree. Lawyers have been found to have entered into client-lawyer relationships with the following entities: general partnerships, limited partnerships, membership associations such as labor unions and trade associations, joint ventures, etc.

81. The text of ABA Model Rule 1.13 is rather elliptical about the point, but its intended breadth is sufficiently clear from its calculated reference to an "organization" (rather than a "corporation") as client in the rule itself and its explicit (but non-exhaustive) references to unincorporated associations. See Model Rules, supra note 1, at cmts. [1], [10] and [6]. Rules 1.13(d) and (e), in listing constituents of an organizational client, mention "members," a term inapposite to corporations, but relevant to a union or other unincorporated association. See Model Rules, supra note 1, at 1.13.

82. See generally text accompanying note 58. See also supra text accompanying notes 58-67.

83. See generally ABA Comm. on Ethics and Professional Responsibility, Formal Op. 91-361 at 2-3 (1991) (citing authority). See also Responsible Citizens v. Superior Court, 20 Cal. Rptr. 2d 756, 758 (Cal. Dist. Ct. App. 1993) (stating in the case of first impression in California, "We hold here that an attorney representing a [general] partnership does not necessarily have an attorney-client relationship with an individual partner for purposes of applying the conflict of interest rules. Whether such a relationship exists turns on finding an agreement, express or implied, that the attorney also represents the partner."). As has been usefully pointed out, general partners bear personal financial responsibility for obligations of the partnership, and it may thus be appropriate to regard ambiguous situations of a lawyer providing services with respect to such obligations and interacting personally with the partners as instances of a direct client-lawyer relationship with the individual partners. See Pechersky, supra note 68. Properly understood, such an analysis would simply apply the concept of implied client-lawyer relationship alluded to above. See supra text accompanying notes 73-77.


85. See Dana Corp. v. Blue Cross & Blue Shield Mutual, 900 F.2d 882, 889 (6th Cir. 1990) (on facts presented, lawyer who had formerly represented national organization of medical administrative services providers did not represent individual regional members of organization); Board of Educ. v. Nyquist, 590 F.2d 1241 (2d Cir. 1979) (in circumstances presented, lawyer for teachers' membership association could represent male physical education teachers in lawsuit that female teachers opposed); Ocean Club of Palm Beach Shores Condominium Assoc. v. Daly, 504 So. 2d 1377, 1379 (Fla. Dist. Ct. App. 1987) ("[Law firm's] representation of Ocean Club, the condominium association for all of the unit owners, is not impaired by the fact that the association is involved in litigation against one of its members. Were it otherwise, a condominium association could retain counsel in such litigation. In representing the association, counsel represents the corporate entity, not the individual unit owners. Thus, there is no conflict of interest to contend with."). See also Schuler v. Meschke, 435 N.W.2d 156, 162 (Minn. Ct. App. 1989) (members of farm cooperative could not sue for malpractice lawyers who represented only cooperative as entity); See generally ABA Formal Opin. 92-365 (1992) (conflicts issues in representing trade association to be resolved through application of entity-representation rule). Cf. Flamma v. Atlantic City Fire
business trusts, trusts, and estates of decedents. In fact, one who for some reason favored a narrow reading of Model Rule 1.13(a) must be alarmed on consulting the decisions, for there are few decisions holding that most particular forms of entities are categorically incapable of bearing that description.

(c) Exotic Entities—Class Clients

The hopes of those who seek certainty in the law—in the sense of a broad rule uniformly applied across a large number of arguably similar instances—are often frustrated. So is it with the entity-representation concept. While most organizations are treated in a rather straightforward


A special situation is presented when, by reason of her work representing an association, the lawyer learns confidential information from association members, who have imparted the information in the reasonable belief that it would not be used adversely to their interests and where such imparted information could be relevant in the subsequent adverse representation. See Glueck v. Jonathan Logan, Inc., 653 F.2d 746 (2d Cir. 1981) (under "substantial relationship" concept, law firm for trade association disqualified from suing association member); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1318-20 (7th Cir.), cert. denied, 489 U.S. 955 (1978) (similar).


86. See Granite Bay Hotel & Casino, Inc. v. Atlantic City, 624 A.2d 102 (N.J. Super. Ct. Law Div.; April 5, 1993) (because law firm representing unincorporated business trust represented only entity, lawyer may represent opponent of individual member of trust).


88. To be sure, decisions can be found refusing to find that a particular entity was in fact being represented by the lawyer in question. But few of those decisions hold that, on different facts, the court would refuse to find that the entity in question was incapable of being represented separate from its constituents. The decisions refusing to accord entity status are found most commonly in the trust and estates area. See Pennell, supra note 88.
way under the rule, there are exceptions. One will be noted here—a class in a class action, which, chameleon-like, is treated by courts as either an entity or an aggregation of individual clients depending on the precise question being asked.

A class in a modern class action is an apparently unique entity that—at the same time, but for different legal purposes—will be regarded as both extraordinarily unified and extraordinarily disparate. For purposes of internal conflicts of interest between members of the class with respect to accepting or rejecting a settlement, courts very generally treat the class as an entity, but one with quite different client-lawyer features. Recognizing a power otherwise unheard of in client-lawyer relationships,91 certainly including other entity-representation situations, courts in class actions have uniformly held that a lawyer for a class may refuse to follow the wishes of class members with respect to settlement offers,92 and indeed may refuse to follow the unequivocal instructions of the very person who presumably empowered the lawyer to act in the matter in the first instance, the class representative.93 But at the same time a class also possesses other quite weak incidents of entity status. For example, while the normal rule is that the anti-contact rule (prohibiting a lawyer from contacting a person represented by another lawyer) only applies to a narrow circle of persons associated with an entity client,94 the rule generally recognized for a class is that each member of a certified class is within the anti-contact prohibition, in effect each being treated as if he or she were an individual client of the lawyer.95

91. See Model Rules, supra note 1, at 1.2(a) ("... A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. ... "); See generally Proposed Final Restatement, supra note 1, § 33(1) & cmt. (c).

92. See generally Proposed Final Restatement, supra note 1, § 26 cmt. (f).

93. See Parker v. Anderson, 667 F.2d 1204, 1210-11 (5th Cir. 1982) (because duty owed by class counsel is owed to entire class and not to named representative clients, class lawyer acted properly in reaching settlement in which ten of eleven named representatives objected for personal reasons); Kincade v. General Tire & Rubber Co., 635 F.2d 501, 508 (5th Cir. 1981) (due to unique character of class action, lawyer for class can settle class action without authority of client who is class representative). See also Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1078 (2d Cir. 1995) (class lawyers have obligation to all class members and must not allow decisions on behalf of class to rest entirely with named representatives). The extraordinary powers of a class action lawyer have hardly gone without challenge. For a powerful theoretical critique of the class-action institution under theories of democracy, see William B. Rubenstein, Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns, 106 Yale L.J. 1623 (1994).

94. See supra text accompanying notes 53-54.

(5) Client-Lawyer Relationships with "Constituents"—Expanding the Client Base Beyond the Entity

The discussion of close corporations sufficiently indicates that, although the entity concept of corporate representation is now universally accepted, that hardly means that in each instance in which a lawyer represents an entity such as a corporation the lawyer will be held to represent only the entity. That is an appropriate reading of both the lawyer codes and most of the decisions interpreting them. Expansion of the lawyer's conflict base occurs because the lawyer conducts herself in such a way that one or more constituents or affiliates reasonably rely on the lawyer to protect their individual legal interests as well. As a result, a relationship of client and lawyer with the affiliate (or something functionally equivalent for conflicts purposes) can be created. Thus, the entity rule positing that the lawyer represents Corporation A—and not its affiliates—does not preclude a finding that the lawyer, in the circumstances, so conducted herself that officers of Corporation B reasonably concluded that Corporation B was also a client. In other words, the entity rule is merely a rule that displaces what might otherwise be a per se rule compelling the conclusion that a lawyer who represents an entity—by that fact alone—represents one or more constituents. But it has no greater power. It does not by itself preclude a wider set of representations in circumstances sufficiently indicating either that the parties so understood their relationship or that, as the lawyer should reasonably have known, the putative client reasonably relied on the lawyer to protect its interests. Whether such additional representation exists requires a close and detailed examination of the circumstances.

Suppose, for example, that Parent's general counsel calls Lawyer and asks her to represent Parent and Subsidiary in litigation filed against both of them. Lawyer proceeds to do so and, although she enters an appearance for both, her only relationship is with officers and employees

96. Supra text accompanying notes 68-79.
97. Cf. Proposed Final Restatement, supra note 1, § 212 cmt. (e) (stating unless lawyer and constituent enter into client-lawyer relationship, such individual is not client of lawyer).
98. Similarly, it is wrong to read the lawyer codes or substantive law as if it precluded representation of an entity. On the other hand, an occasional authority has proceeded on a contrary assumption, holding, in effect, that a lawyer represents only a constituent or an entity, but cannot represent the other by force of something like a law of physics. See, e.g., D. C. Ethics Opin. 259, Oct. 18, 1995 (because, under local substantive law, lawyer retained by personal representative of estate of incapacitated person or conservator of such a person represents the personal representative or conservator and not the estate, lawyer may not bring action against fraudulent personal representative or conservator on behalf of estate).
99. See supra text accompanying notes 74-75.
100. See supra text accompanying note 76.
of Parent. Does Lawyer have a client-lawyer relationship with Subsidiary, as well as with Parent? May another lawyer in Lawyer’s office file a suit against Subsidiary? May an officer of Subsidiary (who is authorized within the corporate structure to do so) assert the attorney-client privilege if Lawyer is called to testify?\footnote{101} Again, without additional facts no confident answer to such questions can be given. All depends on what the party with the burden of proof on the issue can demonstrate to the satisfaction of the tribunal with respect to the reasonable understandings of the parties.

IV. LATERAL-DIMENSION CORPORATE CONFLICTS\footnote{102}

(1) In General

Lateral-dimension conflicts, as we use the phrase here, are those corporate-family conflicts that can be graphed at any single moment on the basis of the entity’s current SEC filings dealing with affiliate organizations—those in which the corporation owns a significant interest.\footnote{103} The divergent ways in which courts deal with such conflicts questions are nicely illustrated by a pair of 1997 cases decided by different courts—both involving the same core facts, corporate arrangements, and

\footnote{101. See generally John William Gergacz, Attorney-Corporate Client Privilege ¶ 2.02[4] (2d ed. 1990) (analyzing corporate-family issues in the context of the privilege ). See also United States v. United Shoe Machinery Co., 89 F. Supp. 357, 359 (D. Mass. 1950) (on facts, all affiliated corporations were client where all used same in-house and outside counsel, legal affairs were closely related, and, except for convenience in billing and accounting, no effort made to treat one entity as “the client”).}

\footnote{102. See Professor Ronald D. Rotunda, Sister Act: Conflicts of Interest with Sister Corporations, 1 J. INSTITUTE STUDY OF LEGAL ETHICS 215 (1996). This article was republished, in revised form—and notably omitted a Rube Goldberg cartoon. See Ronald D. Rotunda, Conflicts Problems When Representing Members of Corporate Families, 72 NOTRE DAME L. REV. 655 (1997). At several points below, I critique several of what I understand to be Professor Rotunda’s positions in these articles.}

\footnote{103. See generally 17 CFR § 210 (“Form and Content of and Requirements for Financial Statements, Securities Act of 1933, Securities Exchange Act of 1934, Public Utility Holding Company Act of 1935, Investment Company Act of 1940, and Energy Policy and Conservation Act of 1975”). There are definitions provided in these regulations for “affiliate,” “control,” “majority-owned subsidiary,” “parent,” and “significant subsidiary.” See generally supra note 30. See also 17 CFR § 210.1-02(x) (“subsidiary” as “an affiliate controlled by such person directly, or indirectly through one or more intermediaries”); 17 CFR § 210.1-02(y) (“totally held subsidiary” defined basically as entity wholly-owned by parent or parent’s totally-held subsidiaries and with no significant debt to third parties which is not guaranteed by parent); 17 CFR § 210.1-02(aa) (“wholly-owned subsidiary”).}
law firm, but employing very different standards and reaching potentially opposing conclusions.\textsuperscript{104}

Simplifying facts and the parties somewhat,\textsuperscript{105} in 1994 PMNC, a joint venture, entered into an agreement with Brooklyn Navy Yard Cogeneration Partners ("Partners")\textsuperscript{106} to build a congeneration facility\textsuperscript{107} at the yard. One of the three joint venturers in PMNC was Parsons Main of New York, Inc. ("Parsons-NY"), a subsidiary of The Parsons Corporation ("Parsons").\textsuperscript{108} As part of the arrangement, Parsons guaranteed the work of Parsons-NY in a separate guaranty contract. Starting with preliminary legal work performed in 1991 leading to the agreement, Partners was represented throughout by the law firm of LeBoeuf, Lamb, Green & MacRae, L.L.P. ("LeBoeuf"). By February of 1997 the project had collapsed. In a familiar race to the courthouse, each side started lawsuits in California and New York, in both instances in state court. In California, Parsons and PMNC sued Partners for breach of contract and declaratory relief, raising questions about the parties' obligations under the agreement and the guaranty contract. LeBoeuf entered an appearance for defendant Partners. Two weeks after the California action was commenced, Partners, represented by LeBoeuf, sued Parsons in the New York action, seeking very substantial damages.

In both actions, Parsons moved to disqualify LeBoeuf on the ground that Parsons' wholly-owned subsidiary, The Ralph M. Parsons Company


\textsuperscript{106} Partners actually included Brooklyn Navy Yard Cogeneration Partners, L.P. as well as Mission Energy New York, Inc., L.P. However, exactly whom LeBoeuf was representing on that side of the "versus" was not relevant in either decision.

\textsuperscript{107} A congeneration facility is one that produces a form of power—steam- or hydro-power, for example—that can be employed to perform two functions, one of which is generating electricity. Thus, the steam- or hydro-power can be employed to turn a factory’s assembly-line turbines, while also producing electrical energy. Under the Public Utility Regulatory Policies Act of 1978, a local electrical utility can be required to purchase, at terms favorable to the seller, electrical power produced by the cogeneration facility.

\textsuperscript{108} See \textit{DuN & BRADSTREET, supra} note 32, at 1391-92 (For a sketch of the corporate family tree). This reference indicates that at the time of publication there were 46 corporate affiliates in the Parsons corporate family. Parsons Main of New York, Incorporated is listed as a "level 3" subsidiary, meaning that it is a subsidiary of Parsons Main, Incorporated, which in turn is listed as a level-2 subsidiary of Main C T Corporation, which in turn is listed as a level-1 subsidiary of Parsons Corporation.
"RMP"), a long-standing LeBoeuf client and in fact was concurrently being advised by LeBoeuf lawyers on questions of Russian law relating to a U.S. government building project in Moscow in which RMP had an interest. It seems clear that the two LeBoeuf representations were factually unrelated. On the other hand, legal matters for Parsons and its subsidiaries were all centralized in the office of general counsel for Parsons. We are told, but only in the most general terms, that there were some (perhaps many) common officers between Parsons and its subsidiaries, but neither opinion tells us the extent to which there were common officers specifically between Parsons and RMP.

In the California action—Navvy Yard I—the California appellate court reversed an order of the trial court disqualifying LeBoeuf. The trial court had based its ruling on the ground that a "unity of interest" existed between RMP and Parsons and, thus, that LeBoeuf had an impermissible concurrent-representation conflict of interest. The corporate-
family conflict issue was one of first impression in California state courts, but the appellate court was quite content to base its decision almost entirely upon its agreement with an earlier California ethics committee opinion, which in turn had adopted the entity-representation concept as the appropriate unitary test for conflicts in such a situation, subject only to an "alter ego" exception. The California appellate court thus reversed to permit the trial court to determine whether parent Parsons was the alter ego of subsidiary RMP. From all that appears, the appellate court recognized only the alter ego concept as a basis for finding a conflict. From all that appears in the opinion (or in the ethics opinion on which the court relied), a finding of even strong factual relationship between the two representations would have been irrelevant.

On the same set of facts, the New York court in Navy Yard II used a very different approach before it concluded that no conflict precluded LeBoeuf's representation of Partners. Relying entirely on federal decisions sketching out a "taint the trial" test by which they assess a disqualification motion, the court first noted that there was no risk of tainting the trial through misuse of confidential information because the matters in which LeBoeuf represented Parsons' subsidiaries were not factually linked to the matter in which LeBoeuf represented Parsons' adversary here. The court's unmistakable predicate was that the existence of such linkage would have required disqualification. The second situation in which disqualification could be required, in the court's view, was where loyalty considerations were implicated such that "the dual repre-

113. *See id. See also* Truck Ins. Exchange v. Fireman's Fund Ins. Co., 8 Cal. Rptr. 2d 228 (Cal. Ct. App. 1992)(stating the court had accepted without question the parties' concession that representation of a related affiliate would constitute an impermissible conflict)[hereinafter Truck Exchange]. In Navy Yard I, the court's determination that Truck Exchange was not precedent seems clearly correct.


116. The court did note that "this Court is rejecting, *ab initio*, the theory propounded by the defendants that the two corporations should be treated as one entity for conflicts purposes," but on the ground that "no evidence has been submitted to demonstrate that the 'dominion of the parent over the subsidiary is so complete, the interference so obtrusive' as to rebut the presumption that they are separate and distinct legal entities. . . ." Navy Yard II, *supra* note 110, at 663. (quoting American Psych Systems, Inc. v. Options Indep. Practice Ass'n, 643 N.Y.S.2d 901, 902 (N.Y. S.Ct. 1996)). The cited case held, in effect, that a sufficient showing of alter ego relationship had been shown. *See infra* text accompanying notes 198-210 (discussing further the showing of alter ego). The court in Navy Yard II simply did not reach the issue whether it would accept an alter ego exception in addition to the confidential-information exception that it applied.

sentation undermines the attorneys [sic] vigor in pursuing the interests of one of his current clients." The court found that consideration not applicable here, apparently on the notion that LeBoeuf's conflict would not impair its representation of Partners in the case before the court. Navy Yard II stands in vivid contrast to Navy Yard I. Its confidentiality and representation-impairment concepts would apply quite without regard to any alter ego inquiry.

The Navy Yard decisions reflect only some of the divergence among the few reported authorities on lateral-dimension conflicts. Much is at stake in the controversy. Corporate-family clients can legitimately claim a strong interest in ensuring the loyalty of their outside legal counsel, as well as in effectively protecting the corporation's conduct of its legal affairs. At the same time, their corporate and other adversaries (and they themselves on other occasions) will have an interest in the free choice of counsel, including, possibly, long-standing counsel who know their affairs expertly and who can quickly and efficiently focus on the client's particular legal needs. For lawyers, their interests are also double-edged. On the one hand, sheer size of law firms, and concomitant swelling in the size of their client base, has led to increasing constriction of the ability of firms to grow still further through adding to their client base and increasing the number of matters that the firm handles for each client. Tightening or loosenining of corporate-family conflicts rules will increase or relieve that constriction. On the other hand, pushing the envelope of conflicts too fast or too far threatens to undermine the confidence of corporate clients in general in the fair-mindedness and loyalty of their outside legal counsel.

(2) The Approaches

In attempting to accommodate those contending policies in lateral-dimension situations, courts and ethics committees have developed, as mentioned, a plethora of approaches. I next survey several of the major


119. Navy Yard II, supra note 110, at 501, note 5. The court did not consider whether LeBoeuf's dual representation would impair its representation of the firm's other client—the objecting client in the out-of-court representation—perhaps in the belief that such impairment, even if it could be shown, would not "taint the trial." Thus, at a minimum, the Navy Yard II test may be significantly narrower than the test that would be applied in New York for disciplinary purposes. On loyalty-based considerations in corporate-affiliate cases in general, see infra text at notes 160-92 & 250-57.

120. Navy Yard II, supra note 110, at 501, note 5.

121. See infra text accompanying notes 250-58.

122. See Wolf, Former-Client Conflicts, supra note 9, at 689.
approaches briefly. As will be seen, while each surveyed approach can marshal arguments in support, all are, in the end, unsatisfactory. I defer to a later point discussion of more fine-tuned theories, such as that of the newly-amended District of Columbia Rules of Professional Conduct, which to me make more analytical and intuitive sense.

a. The All-Affiliates Position

One variant of per se rules on the corporate-family set of problems takes the corporate-family-loyalty position to an extreme. It posits that at least parent corporations and their wholly-owned subsidiaries must be uniformly treated as a single client for conflicts purposes. That position was also passionately espoused in dissents in an ABA ethics committee opinion. The point was pushed in one federal district court decision as far as holding that a conflict precluded a lawyer's representation of a client against a parent when the lawyer concurrently represented a subsidiary in which the parent owned only a 51% interest. The notion here is straightforward—or at least can be expressed briefly: the

123. See infra text accompanying notes 228-57.
124. See Strategem Dev. Corp. v. Heron Int'l, N.V., 756 F.Supp. 789, 792 (S.D.N.Y. 1991) (stating that a lawyer representing wholly-owned subsidiary is held to be in client-lawyer relationship with parent as well for concurrent-representation conflict purposes); Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121, 1125-26 (N.D. Ohio 1990) (same); Cf. McCourt Co. v. FPC Properties, Inc., 434 N.E.2d 1234 (Mass. 1982) (stating a lawyer who represents parent corporation in pending personal injury cases is disqualified from representing plaintiff in unrelated litigation against both parent and wholly-owned subsidiary). Other courts have given an oblique nod to an all-affiliates position by assuming arguendo that proceeding adversely to an affiliate is the same as proceeding adversely against the client, but finding no conflict on other grounds. See Carlyle Condominium Ass'n, Inc. v. Crossland Savings, FSB, 944 F. Supp. 341, 346 (D.N.J. 1996) (assuming, but refusing, to order disqualification where asserted conflict was created by merger activities of objecting party).

The position of the RESTATEMENT is incomplete on the issue. We do state that the fact that a lawyer represents one corporation does not "thereby" entail that the lawyer represents affiliated entities. See PROPOSED FINAL RESTATEMENT, supra note 1, § 201 cmt. (d), at 548-49. We go on to suggest that the resulting position is clearly not the no-affiliate position. See id. at 549 ("in some situations, however, the financial or personal relationship between the lawyer's client and other persons or entities might be such that the lawyer's obligations to the client will extend to those other persons or entities as well. That will be true, for example, where financial loss or benefit to the non-client person or entity will have a direct, adverse impact on the client."). Id.

125. ABA Comm. on Ethics and Professional Responsibility Formal Op. 95-390, at 19-24 (1995) (dissenting opinion of Lawrence J. Fox); see also id. at 16 (opinion of Deborah A. Coleman, dissenting in part) (objecting that requiring corporate client to make choice between objectionable concurrent representation by lawyer and firing law firm and finding new counsel imposed unacceptable burden on client). See id. at 17-19 (dissenting opinion of Richard L. Amster). See id. at 24 (opinion of Kim Taylor-Thompson, concurring in dissents of Amster and Fox). See infra text accompanying notes 142-48 (discussing the position of the majority).

"client" is the entire corporate family. A lawyer who represents any member of the family is deemed to represent them all for conflicts purposes. Thus, any adverse representation against any other family member is prohibited.

The problem with the all-affiliates position is its sheer exuberance. It does not so much seek to accommodate or explain away the entity-representation concept as to ignore it altogether. 127 Whether admitting it or not, the all-affiliates theory necessarily extends its intra-family conflict prohibition solely because of the relationship between the corporate affiliates. But, at the least, doing so is by some measure hostile to the entity-representation concept. Surely, opponents of the all-affiliates position make an argument worthy of response when they point out that among the corporate constituents whom the entity-representation rules in the lawyer codes explicitly exclude from the definition of entity are its "shareholders." 128

The all-affiliates position is also counter-intuitive in some possible illustrations. Perhaps the strongest situation in which it seems wrong is the admittedly uncommon situation in which a parent corporation owns a subsidiary corporation solely for purposes of investment and plays no part in its management or control (other than through selecting its board as would any shareholder), and where the lawyer’s adverse representation would not significantly threaten the economic value of the client parent’s investment. 129 In such situations, and possibly in other more common situations in which the functional and financial impact of the lawyer’s representation against an affiliate would not materially affect

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127. None of the authorities cited in the two preceding footnotes mentions the entity-representation concept. This is particularly telling in the ABA ethics committee dissents, because, as will be seen, the majority opinion rested its contrary view heavily on that concept. See infra text accompanying note 125 & 145. The ABA dissenters do allude implicitly to the concept in arguing that the "indirect" financial impact on the client-related corporation (through its impact on the balance-sheet of the affiliated non-client entity) will be felt by the client corporation. See infra text accompanying notes 176-77.

128. See Model Rules, supra note 1, at 1.13(e). ABA Model Rule 1.13 implicitly defines an entity's constituents to include its "directors, officers, employees, members, shareholders or other constituents". Id. cmts. (1) & (2) (similar). See Calif. Rules of Professional Conduct, rule 3-600(D) (1989) (similar). See also id. at 3-600(E) (stating "A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to [general conflicts rules]").

On the other hand, the exclusion of "shareholders" from those being represented when the lawyer represents the entity works only one way in parent-subsidiary situations. That is, it may help to explain why a lawyer’s representation of a subsidiary does not necessarily entail representation of the parent, but it does not explain why representation of the parent does not extend to the subsidiary. In the latter relationship, the subsidiary is not a "shareholder" of the parent.

129. See supra text accompanying notes 251-53 (discussing further a lawyer's adverse representation).
the corporate entity that the lawyer represents, many lawyers and judges will feel that the prohibition is overly formal—precluding a representation in the absence of any discernible practical reason why the corporate client would object—no such reason, that is, other than unattractively tactical reasons, such as that of depriving an opponent of the benefit of counsel known to be effective. Finally, the all-affiliates position seems sustainable, if ever, only in the extreme situation of wholly-owned subsidiary and parent. It quickly loses its intuitive and emotive appeal when extended to sister corporations, and, even more clearly, to situations involving more attenuated relationships, such as parent and partially-owned subsidiaries.

On the other hand, the all-affiliates position does have much appeal. As will be seen, an intuitive problem with the opposing, no-affiliates theory is that the latter seems to raise the entity-representation concept to the level of an overriding principle. In the process, the competing no-affiliates theory places overarching importance on legally-discernible features of corporate families that may be merely formal and accidental and have little correspondence with operational reality. To take perhaps the strongest case, an enterprise that is managed and operated on a unitary basis could just as readily be a single corporation or a family of multiple corporations—at least it could just as readily take either form as far as any significance that form could have to the lawyer in the course of the lawyer's work. Why should the corporate family's election of one corporate form or another—by hypothesis an election made for purposes having nothing to do with the retention of lawyers—control entirely the reach of the loyalty owed by a law firm representing one legally-definable “part” of the enterprise?

b. The No-Affiliates Position: Its California Origins

Nonetheless, at a categorical extreme from the all-affiliates position, Navy Yard is typical of three judicial decisions in California state and federal courts embracing the categorical no-affiliates rule. It refuses to extend disabling conflicts further among members of a corporate family than the lawyer's actual representation, narrowly conceived, with a begrudging and presumably narrow exception for alter ego enti-

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130. See infra text accompanying notes 150-59.
131. See id.
ties. No other exceptions are admitted or even discussed. Those decisions accept and build upon an originating California ethics committee opinion, California Opinion 1989-113. For a state ethics opinion, California Opinion 1989-113 has been unusually influential, both with courts there, with ethics committees elsewhere, and, through the latter set of ethics committee opinions, with a scattering of recent decisions in other jurisdictions. California Opinion 1989-113 seems to have originated the no-affiliates approach out of the whole cloth. It is typical of several similar decisions in purporting to find fully sufficient justification for the no-affiliates position in the entity-representation rule itself. At least one commentator apparently agrees. But, as already suggested, and as will be elaborated upon below, the entity-representation concept does not invariably create walls as impregnable as such a usage imagines. In addition, the alter ego exception to the no-affiliates concept is highly problematical. Most importantly perhaps, the no-affiliates concept runs strongly against the grain of standard conflict of interest analysis.

c. ABA Formal Opinion 95-390 Partially Buys Into the California Approach

In 1995, a slim majority of the ABA’s ethics-opinion-writing committee struggled to a position akin to that of California Opinion

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137. See supra text accompanying notes 37-50.

138. See Rotunda, supra note 102, at 678-79. On the other hand, I may misread Professor Rotunda’s published work, or he may have altered his view. Speaking at the Hofstra conference at which the substance of this paper was orally presented, Professor Rotunda indicated his general agreement with rejection of either the all-affiliates or no-affiliates extremes and adoption of something like the approach urged here.

139. See supra text accompanying notes 52-56.

140. See infra text accompanying notes 150-59.

141. See infra text accompanying notes 198-210.

142. The majority opinion, which traditionally is not signed, was, I am informed, written primarily by the committee’s former chair David B. Isbell. It was concurred in by then-chair
1989-113 in the course of construing the conflict of interest demands of the ABA's Model Rules on conflicts. The opinion,\textsuperscript{143} on which the badly-divided committee reportedly worked for two years,\textsuperscript{144} generally accepted the argument that the entity-representation rule permitted lawyers to regard as their client only those members of a corporate family with which the lawyers maintained a direct client-lawyer relationship.\textsuperscript{145} The majority noted two exceptions, in which representation of an affiliate nonetheless would be prohibited. One prohibited situation exists where the objecting affiliate is the alter ego of the corporation directly represented\textsuperscript{146} obviously is derived from the California authority. The second prohibited situation covers instances where the lawyer obtained confidential information from the corporate client that would be relevant to the lawyer’s adverse representation against an affiliate\textsuperscript{147} (where, in other words, the two matters are substantially related). The latter exception is not found in any of the California authorities and, given the ABA majority’s heavy reliance on the entity-representation concept, seems again to be a whole-cloth invention—if an invention with intuitive appeal. The rationale of the ABA majority for adopting its approach, resting as did


\textsuperscript{144}See id. at 17 (Amster dissenting opinion); Cf. id. at 19 (Fox dissenting opinion) (“This Standing Committee on Ethics and Professional Responsibility has wrestled with the issues of conflict of interest in the corporate family context . . . .”).

\textsuperscript{145}See id. at 6-7.

\textsuperscript{146}See id. at 10-11.

\textsuperscript{147}See id. at 10. The majority’s view may be limited to situations in which, as part of the process by which the lawyer acquires confidential information from the subsidiary, the lawyer enters into a direct client-lawyer relationship with the subsidiary. See id. That was only one of the two alternative bases for the decision on which the majority relies. See Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978). As will be later seen, the court there also relied on a theory of derivative fiduciary duty, not involving a finding of such a client-lawyer relationship. See infra text accompanying note 195.
the California ethics committee entirely on the entity-representation concept, is not convincing for reasons that will shortly be examined.\textsuperscript{148} Moreover, the two major exceptions to the ABA’s version of the \textit{no-affiliates} approach raise their own doubts about the analytical soundness of the majority’s approach on its own terms.

\begin{quote}
\textit{(3) Lateral-Dimension Conflicts—Theoretical and Practical Considerations}
\end{quote}

Given the array of approaches, and foregoing, for the present, an attempt to articulate a sounder approach, it would be profitable to examine in greater detail the principle considerations that seem to bear on each of those claimed tests for corporate-family conflicts. Those considerations include the entity-representation concept itself, the loyalty principle that informs all conflicts analysis, considerations of confidentiality such as that causing concern to the ABA majority in Formal Opinion 95-390, and other considerations that have been advanced. In what immediately follows, I am at pains only to address what I consider to be erroneous applications of those concepts. At a later point,\textsuperscript{149} I consider how those concepts, properly understood, lead to a view of corporate-family conflicts that takes a middle position.

\begin{itemize}
\item[a.] Bearing of the Entity-Representation Concept on the Corporate-Family Conflict Problem
\end{itemize}

As already noted, those authorities espousing a narrow rule for corporate-family conflicts rely heavily, if not exclusively, on the entity-representation rule.\textsuperscript{150} On the other hand, those espousing a very expansive rule have ignored entity-representation considerations, perhaps suggesting that it has no bearing at all (although apparently lacking an adequate explanation of why that should be the case).\textsuperscript{151} The entity-representation concept does have a proper function in the debate, but it hardly proves to be of decisive power.

Recall that the entity-representation rule was designed to separate the interests of a corporate entity from the interests of its constituents, such as its officers or employees, and as a corollary to blunt possible illegitimate attempts that might be made by such constituents to control or influence a representation.\textsuperscript{152} Significant for proponents of a narrow

\begin{footnotes}
\item[148.] See infra text accompanying notes 150-59.
\item[149.] See supra text accompanying notes 228-57.
\item[150.] See supra text accompanying notes 137-38.
\item[151.] See supra text accompanying note 127.
\item[152.] See supra text accompanying notes 37-38.
\end{footnotes}
prohibition is the inclusion of "shareholders" among the constituents. That inclusion is, of course, entirely appropriate for the purposes for which the entity-representation concept was devised. While a corporate lawyer speaks with, and receives instructions from, those agents of a corporate client who are lawfully delegated the power to instruct the corporation's counsel, the lawyer generally should not hearken to the possibly dissonant voices of even majority shareholders of the corporate client. Beyond not heeding their actual communications, the corporation's lawyer may not in any other way allow exercise of her professional judgment on behalf of the corporation to be influenced by the aim of furthering the interests of a non-client constituent rather than the interests of the client entity.

Central, therefore, to the entity-representation concept is the law's concern with differing interests between represented entity and non-represented constituents and protecting the entity by prohibiting the risk of impairment of the work of the entity's lawyer that might be caused were the lawyer permitted to heed such differing interests. But, given that purpose for the entity-representation concept, to treat it as if it mandated a narrow corporate-family conflict rule is to carry the concept far beyond its intended reach. For the plain fact about all instances of its claimed application for corporate-family conflicts purposes, in which either the

153. See supra text accompanying note 128.
155. Cf. PROPOSED FINAL RESTATEMENT, supra note 1, § 212 cmt. (e) (unless lawyer for corporation and individual constituent form personal client-lawyer relationship, the individual is not a client of the lawyer).
156. See RESTATEMENT OF THE LAW GOVERNING LAWYERS, supra note 154, § 155 cmt. (b), at 176-77:

A lawyer representing an organization deals with individuals such as its officers, directors, and employees, who serve as constituents of the organization. Such individuals acting under the organization's authority retain and direct the lawyer to act on behalf of the organization. Nonetheless, personal dealings with such persons do not lessen the lawyer's responsibilities to the organization as client, and the lawyer may not let such dealings hinder the lawyer in the performance of those responsibilities ....

Id.
157. The author of the majority opinion in ABA Formal Opinion 95-390 apparently appreciated the force of these considerations. See ABA Comm. on Professional Ethics and Grievances, supra note 143. The formal opinion does not in fact purport to find in ABA Model Rule 1.13(a) any direct answer to the corporate-family conflicts puzzle. See id. at 6. The further observation of the majority, that there is nothing in the rule or its comments indicating support for the all-affiliates position is clearly correct. See id. at 6-7.
158. One wishing to narrow the corporate-family conflict rule might attempt to defend that position on the ground that ignoring the entity-representation rule in this instance would amount to sanctioning a lawyer's representation of conflicting interests (those, for example, of the subsidiary against those of its affiliated parent). The answer to the argument, of course, is that, so long as there
CORPORATE-FAMILY CONFLICTS

lawyer's original corporate client or an affiliate of that client objects to
the lawyer's subsequent representation of an adverse party, is that their
interests do not conflict or differ. That is so with respect to the matter of
the original representation of one affiliate, the matter of the subsequent
representation against the interests of another affiliate, and the specific
question of the propriety of the lawyer's later representation. If a case
arises in which the two affiliates do have differing interests on those
questions, the entity-representation concept should, of course, be given
robust application. Most often, however, there will be an absence of
differing interests between the corporate affiliates with respect to those
questions, and thus the core concern of the entity-representation concept
is simply irrelevant to corporate-family conflicts issues.

Nonetheless, the entity-representation concept is more than a principle. It is a rule, and it is articulated in the lawyer codes in a general form. Observing it even in areas beyond the core policy concerns of the rule serves to further the law's general interest in consistency. As such, it should be respected where doing so does not create a substantial inroad on other principles or rules. That suggests, of course, only a weak office for the entity-representation concept on the question of corporate-family conflicts. In effect, so long as there is no supervening principle or rule suggesting that the entity-representation rule should not apply, its application is defensible. But, as will be seen, there are several considerations that argue persuasively for displacing a concept with such a weak justification for application. At the same time, there are independent and strong reasons for rejecting the all-affiliates position and, accordingly, limiting the reach of corporate-family conflicts.

is no conflict in fact between the affiliated corporations with respect to the question of the lawyer's disqualification, one need have no present concern with the entity-representation concept and its dictates. Should those issues arise in a different context, that context (but not the different context of establishing a corporate-family conflict concept) would be an appropriate point at which to invoke and apply the entity-representation concept.

159. Note that the situation to be imagined is one in which the affiliates' interests differ on the question of the lawyer's representation. Differing interests on other issues do not suggest a need for a narrow corporate-family conflict rule. For example, a regulated subsidiary and a holding-company parent may have differing interests with the parent on a question of the subsidiary's compliance with governmental regulations. But that says nothing about whether a law firm currently or formerly representing the parent on related regulatory compliance issues (and thus, we will imagine, exposed to confidential information about both parent and subsidiary relating to the regulatory-compliance issues involved in a subsequent adverse representation against the subsidiary) could legitimately represent a competitor of the subsidiary in a substantially-related antitrust lawsuit against the subsidiary. See infra text accompanying notes 233-42.
b. Loyalty Considerations and the Corporate-Family Conflict Problem

Myriad authorities have agreed that ensuring that a lawyer remains loyal to a client's interests lies at the heart of conflict of interest rules. Thus, one would expect to see significant discussion of loyalty considerations in attempts to formulate corporate-family conflict rules. On the whole, however, this aspect of the problem has been neglected, or at best it has been handled in an unsatisfactory manner. I trace here only those problematical usages of loyalty dismissed after merely summary mention. A positive theory of client loyalty in the context of corporate-family conflicts will be discussed below.

(i) Loyalty in General

One occasionally encounters assertions in the corporate-family literature that a lawyer who sues the subsidiary of a parent corporation that the lawyer represents in a factually unrelated matter does not offend any duty of loyalty owed to the parent client. The assertion is typically made without any attempt to define what the amorphous concept of "loyalty" might entail in the case of a corporate family. The topic of loyalty in conflicts is a large one that has usefully but not exhaustively been analyzed in general terms. It finds expression in and is the central force that should impel interpretation of both parts of the rule on concurrent-representation conflicts of interest in the ABA's Model Rules, Rule 1.7, the relevant portions of which are as follows:

Rule 1.7 Conflict of Interest: General Rule

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160. Cf. Charles W. Wolfram, supra note 9, at 695 (general irrelevance of loyalty-based, as opposed to confidentiality-based, considerations, in development of law of former-client conflicts).
161. See infra text accompanying notes 250-57.
162. Rotunda, supra note 138, at 679 ("... The law firm, after all, is not suing" the client parent itself, which presumably exhausts the duty of loyalty); See also id. at 674 (similar).
163. See, e.g., HAZARD & HODGE, supra note 1, § 1.7:101; MODERN LEGAL ETHICS, supra note 1, § 7.1.3 at 316-17; Kevin McMunigal, Rethinking Attorney Conflict of Interest Doctrine, 5 GEO. J. LEGAL ETHICS 823 (1992).
164. See ABA Comm. on Professional Ethics and Grievances, Formal Op. 95-390 at 4 (1995) (majority opinion) ("... The touchstone of [Rule 1.7], as the Comments to it make clear, is loyalty to the client."); See also id. cmt. ¶ [1]. "Loyalty is an essential element in the lawyer's relationship to a client..." Id. at ¶ (3). "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..." Id. at ¶ (4). "Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests..." Id.
165. On the application of former-client concepts to corporate-family conflicts, See infra text accompanying notes 243-49.
(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.

(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 consultation.

What each of the two different parts of Rule 1.7 are independently driving at is not entirely clear. The comments to the rule indicate that its central theme is of great importance, stating that "[l]oyalty is an essential element in the lawyer's relationship with a client," and indicating that loyalty is in some unexplained way implicated in both parts of Rule 1.7. Nothing in the rule or comments says anything notably helpful on corporate-family conflicts. Somewhat suggestive (although often overlooked) are the definitions of "consentability" stated in the first of the two conditions to the consent exception to each subpart. Subpart (a)(1) defines consentability in terms of the lawyer's reasonable belief that representation of one client (here, the client opposed to the corporate affiliate) will not "adversely affect the lawyer's relationship with the other client . . . ." That strongly implies that Rule 1.7(a) is primarily a rule protecting the "relationship" with a client, and in that sense includes questions of whether a reasonable client, fully informed

166. See Charles W. Wolfram, Parts and Wholes: The Integrity of the Model Rules, 6 Geo. J. LEGAL ETHICS 861, 886-88 (1993) [hereinafter Wolfram, Parts and Wholes] (critiquing the unexplained separation of concepts in rule 1.7(a) and (b)).
167. MODEL RULE, supra note 1, at 1.7 cmt. (1).
168. See id. at cmts. (3) & (4).
169. Comment (11), although referring to whether a conflict exists and not whether a client-lawyer relationship is present, does indicate that "[c]onflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree." See id. at cmt. (11).

Moreover, comment (8) does refer to a representation involving "an enterprise with diverse operations." See id. at cmt. (8). But I agree with the majority in ABA Formal Opin. 95-390 that the reference is to a single corporation with divisions, and not to a corporation with subsidiaries or other similar affiliates. Thus, the requirement stated in the comment that "both clients consent upon consultation" tells us nothing about corporate-family conflicts. ABA Opinion 95-390, supra note 143, at 6.
about the matter, would have substantial reason to distrust the lawyer should the lawyer or her firm accept the arguably conflicting representation. Seen in contrast to the standard for consentability in subpart (b)(1), which focuses upon adverse effect upon the quality of the lawyer’s work, the standard of Rule 1.7(a) is best understood as concerned with relational as opposed to representational considerations—here the personal client-lawyer relationship between the law firm and, in our inquiry, the law firm’s initial corporate client.

An additional preliminary point to be resolved about ABA Model Rule 1.7 concerns its textually different treatment of the question of who must consent to waive a conflict that would otherwise exist. Under Rule 1.7(a) “each client” must consent, while Rule 1.7(b), in one reading, requires consent only of one person, “the client.” One possible meaning suggested by use of the singular “client” in Rule 1.7(b) is that consent of the other client is not required. Such a reading of the text led the majority in ABA Formal Opinion 95-390 to state, in effect, that corporate-family conflicts, if thought to exist under Rule 1.7(b), could always be cured by consent of only the lawyer’s other client—the client proceeding adversely to the corporate-family affiliate—without obtaining consent of the corporate-family member whom the lawyer indisputably represents. 170

That seriously misreads the rule. Rule 1.7(b) should instead be construed to require the consent of both affected clients, for at least two reasons. First, as a textual matter, the reason for the use of singular and plural in the two sub-rules is clear, and it clearly does not preclude the necessity of obtaining consent from multiple clients under both sub-rules. Rule 1.7(a) pertains only to client-client conflicts, and it correspondingly requires consents of multiple clients (“the clients”) in all instances. However, although Rule 1.7(b) also deals with client-client conflicts (those multiple-client representations in which the lawyer’s work will be impaired), 171 it deals with several other sources of conflict as well—conflicts produced by the lawyer’s own interests and the interests of non-

170. ABA Opinion 95-390, supra note 143, at 5; See also Rotunda, supra note 138, at 684 (apparently agreeing with that reading). As will be seen, the committee’s misreading of the rule proved harmless. See infra note 173.

I note that an illustration in the RESTATEMENT takes a position consistent with that of the majority and at odds with the position I advance here. See Proposed Final Restatement, supra note 1, § 201 cmt. d illustration 8. As stated in the text, I now believe that the more appropriate analysis requires consent of both affected clients, rather than the one who is speculated (stipulated in the illustration) to be the sole client at risk.

171. See infra text accompanying notes 254-57 (for a further discussion of the representation-impairment conflicts under Rule 1.7(b) in the context of corporate-family conflicts).
clients. Thus, a reference in Rule 1.7(b), similar to that in Rule 1.7(a), to consent by plural “clients” would have been inappropriate. Singular reference in Rule 1.7(b) to “the client” is fully intelligible without the further gloss that consent of only one of multiple clients cures all Rule 1.7(b) conflict, including those involving multiple clients.172

Second, even if the text were construed to apply literally only to one client in all applications of Rule 1.7(b), the analysis takes only one of two steps that must be taken. Clearly, no matter how woodenly read, the text requires consent of the client proceeding against the corporate family, based on the risk of material impairment of the lawyer’s representation of that client. That risk, of course, does not foreclose another—that the lawyer’s second representation—of the corporate-family member—will, for similar reasons of confused loyalty, also be impaired, requiring consent of that client under Rule 1.7(b) as well. That client is, obviously, a client as well, and there is no apparent reason for thinking that the rule “exhausts” itself in application to only a single client or, if so, why the client that exhausts the rule should not be the corporate-family client.173

(ii) Measuring Adverseness: The Financial Impact of a “Directly Adverse” Representation

To what extent does ABA Model Rule 1.7(a),174 with its prohibition of “directly adverse” conflicts, bear on corporate-family conflicts? Perhaps the most intuitively obvious objection to the broadly permissive no-affiliates position is that representation against a corporate-family affiliate is disloyal if, as will often be the case, it will have an adverse financial impact on the affiliate that the lawyer directly and indisputably represents. Thus, one well-known decision in the all-affiliates line of decisions, dealing with a situation where a lawyer represented one client in factually unrelated litigation against the subsidiary of a corporate client, has stated that “the liabilities of a subsidiary corporation directly

172. To be sure, the reference to consent in Rule 1.7(b) could have been better expressed if it referred to consent of “the client or clients.” But the fact that one can think of language that would make the rule clearer hardly requires that it be given a distorted reading based on its existing language.

173. That, apparently, in the end is the position of the majority opinion in ABA Formal Opinion 95-390. See ABA Opinion 95-390, supra note 143, at 5. The majority first took a position contrary to that taken here on the literal meaning of the singular reference to “client” in the consent language of Rule 1.7(b), but then concluded that consent of both affected clients may be required as result of the two-step analysis urged in the text. Id. (“... By its terms, Rules 1.7(b) requires the consent only of the client whose representation may be materially limited by the lawyer’s other duties, but the lawyer must consider the effect of the simultaneous representation of two clients on each of them, and obtain consent where required by the Rule.”). Id.

174. For the text of the rule, see text accompanying notes 165-66.
affect the bottom line of the corporate parent." Nonetheless, in rejecting that argument for finding a "directly adverse" conflict under Rule 1.7(a), the ABA committee majority apparently took the view that any financial detriment that could be accurately measured only after passing the numbers through the books of the affiliated entity caused an impact to the client corporation that was (merely) "indirect" and not "direct" as required by the rule:

We conclude, then, that although in situations involving an unrelated suit against an affiliate of a corporate client, the client may be adversely affected, that adverseness is, for purposes of Rule 1.7, indirect rather than direct, since its immediate impact is on the affiliate, and only derivatively upon the client. The phrasing of Rule 1.7(a) is not ambiguous: the reference to a representation that is "directly adverse" clearly draws a distinction between direct and indirect adverseness to a client, and therefore draws a bright line striking a balance between the interests of lawyer and client. . . . [W]e see no principled way otherwise to draw a line short of the point where any discernible economic impact on a client arising from another representation (however slight or remote) must be treated as direct adverseness, requiring application of Rule 1.7(a) rather than Rule 1.7(b).

The direct-indirect-financial-impact position of the majority in ABA Formal Opinion 95-390 is plainly wrong. The majority cited no authority for its position, nor could it have done so. Existing case authority was all to the contrary, including the first decision that apparently confronted the issue and several decisions intervening before the committee majority wrote. The jarring disconnect between judicial authority and the ABA


176. ABA Opinion. 95-390, supra note 143, at 13.

177. Id. (Emphasis in original). Despite the apparent confidence of statement in the quoted passage, the ABA majority displayed some candor at another point in admitting that its view might not be accepted everywhere. See id. at 12 ("... Although there is room for dispute on the point, we believe the better view is that the adverseness in such circumstances is indirect, and not direct."). Id.

178. See North Star Hotels Corp. v. Mid-City Hotel Assocs., 118 F.R.D. 109 (D. Minn. 1987) (ruling in case of apparent first impression, because success by law firm in suit against non-client partner could diminish his assets, to detriment of two clients of law firm whose personal debts he had guaranteed, law firm's representation was "directly adverse" to its two clients) [hereinafter North Star].

179. To be sure, the majority cited North Star along with other authority, as contrary to its own, unsupported reading of Rule 1.7(a). See ABA Opinion 95-390, at 13 note 13. The other cited decisions were Cincinnati Bell, Inc. v. Anixer Bros., Inc., No. C-1-93-0871, 1994 U.S. Dist. LEXIS 21012, at *9 (S.D. Ohio, June 27, 1994); Telestat Cable Television, Inc. v. Opryland USA, Inc., No. 90-137-CIV-ORL-19, 1990 WL 303150 (M.D. Fla. Jul. 25, 1990). The Telestat Cable citation is as given in the formal opinion. However, the cited decision does not involve the point even remotely, and there is no other reported decision by that name that does involve the point.
majority's position is not surprising, as the ABA position makes no sense in terms of the policy that obviously lies behind ABA Model Rule 1.7(a). While all possible meanings of the "directly adverse" standard employed in Rule 1.7(a) are not entirely clear (particularly when compared with the more intelligible representation-impairment concept of Rule 1.7(b)), the rule clearly was meant to cover certain blatant conflicts, such as engaging in litigation with one's own client that would have relational consequences that would be self-evidently improper. Not to put too fine a point on it, such conflicts are "no-brainers"—requiring no thought or explanation beyond the observation that clients will almost certainly and understandably object to such action and lawyers simply do not do that sort of thing. No-brainer conflicts not involving litigation of a kind similar to a sue-your-own-client conflict are also readily imaginable. Suppose, for example, that a parent-subsidiary family is structured so that most or all of the economic value of the family derives from the subsidiary's activities, as where the client corporation is the bank holding company that wholly owns a subsidiary bank. A lawsuit by the same lawyer who represents the parent in an unrelated matter against the subsidiary seeking damages in an amount that would not entirely destroy the subsidiary but would strip it of much of its economic viability presents such a no-brainer conflict. Yet, under the "indirect" analysis of the

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180. See Wolfram, Parts and Wholes, supra note 166, at 886-88.

181. This is the first concrete illustration of a conflict in the comments to Rule 1.7. See Model Rules 1.7, supra note 1, at cmt. [3] ("... Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. ... "). See, e.g., Hazard & Hodes, supra note 1, at ¶ 1.7:209; Modern Legal Ethics, supra note 1, § 7.3.2. Notwithstanding the long and unquestioned line of decisions prohibiting engaging in litigation with one's own client, Professor Thomas D. Morgan has questioned its rationale and argued for exceptions to the rule. See Thomas D. Morgan, Suing a Current Client, 9 Geo. J. Leg. Ethics 1157 (1996). For a somewhat mild response, see Brian J. Redding, Suing a Current Client: A Response to Professor Morgan, 10 Geo. J. Leg. Ethics 487 (1997).

182. Both the colloquial and more elegant usages are referred to in the opinion of Judge Stewart Dalzell in In re Lisa Lambert, 962 F. Supp. 1521, 1546 (E.D. Pa. 1997) (mentioning my expert testimony to the effect that prosecutor's direct telephone call to expert witness retained by defense counsel to discuss experts testimony was a "no brainer" or, as Judge Dalzell more elegantly put it, "the sort of thing that is just not done"), rev'd on other grounds, 134 F.3d 506 (3d Cir. 1998).

183. For example, in Cincinnati Bell, Inc. v. Antixer Bros., Inc., No. C-1-93-0871, 1994 U.S. Dist. LEXIS 21012, at *9 (S.D. Ohio, June 27, 1994), the court met an argument that suing a sister corporation was not adverse to a corporate client with the following dismissive observation: "... We cannot imagine how an attorney can maintain a duty of undivided loyalty to a [corporate] client, while at the same time zealously attempting to extract millions of dollars of damages from a sister corporation. ..." Id.

The example in the text purposefully stops short of positing an economic threat so dire that it threatens the very existence of the subsidiary. While that situation is not mentioned in the majority opinion in ABA Opinion 95-390, supra note 143, from anything stated there it would appear that the majority's same "indirect" analysis would, preposterously enough, apply.
majority, we apparently are to believe that the suit would not be such a direct attack. This apparently flows from the fact that two sets of entries on the books of two different entities—the subsidiary and the parent—would be necessary before the impact would be “felt” by the parent. Extending the same reasoning, a judgment against a client would not be “adverse” because the client would first have to write a check to pay it. But it is entirely unclear why bookkeeping arrangements should even be noticed in making the directly-adverse assessment under Rule 1.7(a), much less exalted over economic reality. The question is whether the financial impact on a reasonable client would cause justifiable outrage and thereby impair the relationship, not the number of bookkeeping entries an accountant would customarily make in toting up the injury.

Finally, the “process” argument of the ABA majority’s position—that its “bright” line was necessary because no other principled line could be drawn ignores what has been the ABA committee’s own preferred way of dealing with line-drawing issues under the Model Rules. Instead, of narrowly construing a rule, the committee—elsewhere, both in other of its opinions and in another portion of ABA Formal Opinion 95-390 itself—has favored a “factors” analysis, setting out considerations that guide whether a rule applies in particular circumstances. As will be seen below, the same sort of approach to assessing whether a conflict exists in a lawyer’s representation adverse to a corporate affiliate would provide an appropriate process for deciding those questions.

(iii) Impaired-Representation Considerations in Corporate-Family Conflicts

ABA Model Rule 1.7(b) states a basis for finding a concurrent-representation objection that is complementary to, but independent of, the “directly adverse” ground stated in Rule 1.7(a). The ground stated in Rule 1.7(b) concerns conflicts caused by the risk that the lawyer’s representation of a client will be materially limited because of, among other

184. See ABA Opinion 95-390, supra note 143, at 13; see also text accompanying note 177.
185. See ABA Opinion 95-390, supra note 143, at 8 (“...When a lawyer is considering whether he can assume the representation adverse to a corporate client, he must consider not merely the terms of his engagement to that client but in addition whether the circumstances are such that the affiliate has reason to believe, on the basis of the nature of the lawyer’s dealings with it, that it has a client-lawyer relationship with the lawyer.”). Id.
186. See text accompanying notes 165-66.
187. In other words, satisfaction of the standard of Rule 1.7(a) does not necessarily absolve a lawyer of a charge of a concurrent-representation conflict. The lawyer must also satisfy whatever additional requirements are imposed by Rule 1.7(b). See generally Wolfram, Parts and Wholes, supra note 166, at 887.
adverse influences, "the lawyer's responsibilities to another client . . . .

The intended reach of that sort of conflict is usefully described in the comment to the rule."188 As is now well-established, the rule deals with probabilities, not certainties, that a representation will be impaired. Thus, a lawyer's protest that, despite her apparently compromised set of representations, she will take or took steps to ensure that neither client suffered harm does nothing to remove the conflict (unless both clients agree by consenting after consultation). Similarly, it is erroneous to assume that the lawyer's compromised position must cause the client actual adverse impact for a conflict to exist. It is enough to create a conflict if entering into representations creates the substantial risk of material impairment of the lawyer's ability to exercise independent professional judgment on behalf of the clients.189 All the conflict rules are prophylactic in that way, prohibiting a lawyer from entering into a risky representation (or other relationship) without any additional requirement of proof of actual injury or prejudice to the client.190

As applied to corporate-family conflicts, Rule 1.7(b) assesses whether the lawyer's representation of another client adverse to a corporate affiliate may materially limit the lawyer's representation of either. The majority in ABA Formal Opinion 95-390 is probably correct in its apparent surmise that the client most likely to be at risk is the new client because of the lawyer's temptation to avoid taking strong action against the corporate affiliate for fear of arousing the ire of the lawyer's corporate client.191 Yet in many such situations, there may be the correlative risk that the lawyer (or another lawyer in her firm) will, in representing

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188. See Model Rules, supra note 1, at 1.7 cmt. ¶ [4]:

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. . . .

Id.

189. See generally Proposed Final Restatement, supra note 1, § 201 (conflict exists "if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by . . . the lawyer's duties to another current client [or] a former client").

190. Of course, a damage remedy will often require such proof. The text refers only to proof of a violation of the lawyer's duty.

191. See ABA Opinion 95-390, supra note 143, at 14. Despite its earlier recognition that "the lawyer must consider the effect of the simultaneous representation of the two clients on each of them," (id. at 5 (emphasis supplied)) the committee's later analysis of Rule 1.7(b) only mentions possible effects on the lawyer's representation of the new client. See id. at 14-15.
the new client, over-compensate by taking overly-aggressive action against the corporate affiliate, to prove that the lawyer is independent of influence of the corporate client.\textsuperscript{192} We are also assuming that the new client in fact is "new," but it could often occur that this is simply a long-standing firm client whose affairs have come into conflict with those of another firm lawyer. In all events, it appears that the constraints of Rule 1.7(b), as a factual matter, will be less often relevant to corporate-family conflicts issues than the adversity standard of Rule 1.7(a).

c. The Confidentiality Prohibition Against Substantially-Related Representations

Even most otherwise hard-line no-affiliates commentators and judges quail at the thought of permitting a lawyer representing a parent to sue a subsidiary if the matter is factually linked to work that the lawyer was doing or had done for the parent.\textsuperscript{193} Acceptance of a confidentiality exception obviously narrows the ground to an extent between the otherwise divergent theories. It is also intuitively appealing. The most obvious danger, of course, (there are others as well) is that use of the client corporation's confidential information against the interests of the affiliated entity works to the disadvantage of the client corporation itself, which is prohibited.\textsuperscript{194} Also objectionable, but for reasons that are somewhat more complex, would be for a lawyer to put herself in the position of being able to use against an affiliate confidential information about the affiliate that the lawyer learned in the course of representing another member of the corporate family. That, too, has been held impermissible.\textsuperscript{195}

\textsuperscript{192} On one variant of the over-reaction problem, see Wolfram, Former Client Conflicts, supra note 9, at 700-01.

\textsuperscript{193} See, e.g., Rotunda, supra note 102, at 661 note 16, 669-74. A confidentiality exception is also recognized in both of the lawyer codes that presently deal with corporate-family conflicts issues. See, e.g., D. C. Rule 1.7 cmt., quoted in Appendix, infra; Florida Rule 1.13 cmt., quoted supra note 24.

The California authorities, see supra text accompanying notes 132-41, with their insistence that only a rigorously-applied alter ego exception is available, may be an exception to this. On the other hand, no California authority explicitly rejects such an exception, and no California case has yet presented facts calling for decision on the point.

\textsuperscript{194} See Model Rules, supra note 1, at Rule 1.6(a); See also Model Rules, supra note 1, at Rule 1.9(c)(1) (prohibition against adverse "use" of former client's confidential information); ABA Model Code of Professional Responsibility DR 4-101(B)(2) (1969) (lawyer may not "use a confidence or secret of a client for the advantage of the lawyer or a third person"). Id.

\textsuperscript{195} Cf. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978) (even if member of trade association was not client of law firm, information learned in confidence from member in course of law firm's work for association formed adequate
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But conceding a confidentiality exception, as does the majority in ABA Formal Opinion 95-390,\(^\text{196}\) presents an analytical anomaly for the no-affiliates position, a problem that is customarily unexamined. The problem, fairly obviously, is that the latter representation is, at least in the standard understanding of the no-affiliates adherents, not "directly adverse" to the parent.\(^\text{197}\) How, then, can it be said that adverse use against the subsidiary violates a duty owed to the parent? It is only by recognizing some community of interests, or, if different, the right of the one affiliate to invoke the confidentiality interests of the other, that a no-affiliates adherent can bridge the entity gap in order to accomplish what transparently needs to be done.

d. Illegitimate Considerations in the Corporate-Family Conflict Debate

The foregoing are the major components of the argument of those authorities that favor a version of the no-affiliates position. Each, in my view, is seriously flawed, either internally or in the context of the position involved. Remaining for consideration in this brief survey are a number of other arguments or positions that have been taken by those questioning whether corporate-family conflicts should be a very robust category.

(i) Asking the Wrong Question: "Alter Ego" Entities

Both the majority in ABA Formal Opinion 95-390 and the California authorities seem to agree in recognizing an explicit exception for affiliates so closely related to the lawyer's corporate client that one is the alter ego of the other.\(^\text{198}\) The exception is acknowledged in other ethics committee opinions and court decisions.\(^\text{199}\) The concept behind the exception is borrowed from the general law of corporations, under which a parent corporation may in stated conditions be held liable for the obli-

\(^{196}\) ABA Opinion 95-390, supra note 143, at 10; see also supra text accompanying note 147.

\(^{197}\) See, e.g., ABA Opinion 95-390, supra note 143, at 11-13.


gations of a subsidiary—despite their formal corporate separateness and despite the law of limited liability for shareholders. Under that body of law, the alter ego relationship will be found if the creditor seeking to pierce the corporate veil carries the heavy evidentiary burden of demonstrating that, among other things, the capitalization of the subsidiary is unreasonably small, given the risks of the line of business in which the subsidiary operates.\textsuperscript{200} Despite its surface appearance of an analogous fit, on further reflection the alter ego exception makes little sense in the corporate-family context. As a conflict of interest concept, it has been wrenched into only a formlessly vague analog to its corporate-law original.

When transported out of the field of corporate liability into the question of corporate-family conflicts, the alter ego notion suffers from at least three serious defects. First, the alter ego concept in its origins is a liability rule to guard against corporate fraud or other shenanigans, under which a court will "disregard the entity when its separateness is used for illegitimate purposes."\textsuperscript{201} Aside from loose and irrelevant usage of the rhetoric of veil piercing,\textsuperscript{202} whether corporations are sufficiently related to require disqualification of a lawyer has nothing to do with the reasons for extending liability of one corporation for the debts of another. Wrenching the alter ego notion out of the fraud-prevention context for purposes of determining whether a client-lawyer conflict exists risks serious distortion. Here, the corporation asserting conflict would be burdened by the potentially ruinous, or at least embarrassing, consequences of arguing that it has not observed corporation formalities and has an under-capitalized subsidiary. Imposing the risk of such obviously serious consequences for a corporate client seems grotesque when the question posed is the degree of loyalty to a current corporate client. It may also provide a strong disincentive so that most corporate clients, for self-protective reasons, will make that assertion only about desk-drawer affiliates.\textsuperscript{203}

\textsuperscript{200} See generally 
\textsc{Henn \\& Alexander, supra} note 36, at § 148; at 355-56 (3d ed. 1983) (separate corporate existence will be observed unless: (1) transactions, property, employees, and bank accounts are intermingled; (2) separate formalities are not observed; (3) subsidiary corporations is inadequately capitalized in view of its reasonably foreseeable financial needs; (4) corporations are not held out to public as separate; and (5) policies of the subsidiary are directed by the parent); \textsc{Larry E. Ribstein \\& Peter V. Lemon, Business Associations § 3.05[E] (3d ed. 1996) (similar).


\textsuperscript{202} The "pierce the corporate veil" rhetoric is commonly found in arguments for a narrow rule of corporate-family conflicts. See, e.g., \textsc{Rotunda, supra} note 102, at 655.

\textsuperscript{203} See \textit{supra} text accompanying notes 29-30. The corporate client's concern, obviously, is that making the argument on a public record that a corporate affiliate is merely an alter ego of the
A second problem is that, in the original setting of the alter ego concept as a liability rule, courts have traditionally been quite reluctant to accept a finding of alter ego status, on the rationale that the doctrine is an attack on the fundamental concept of limited corporate liability.\textsuperscript{204} Thus, in standard applications of the alter ego theory, a creditor asserting the lack of separateness must satisfy a strict burden of proof, meaning that the doctrine is not often successfully invoked.\textsuperscript{205} In the entirely different context of corporate-family conflicts, however, there is no similar consideration urging restraint, for limited corporate liability is not the question directly posed. Indeed, general fiduciary considerations would suggest that the doctrine, quite uncharacteristically, be applied generously.

A third distortion is that the alter ego notion applies in the corporate-family conflicts field, not only to determine when representation of a parent extends to a subsidiary, but also when representation of a brother corporation extends to a sister entity. But veil piercing between brother-sister corporations, although theoretically possible, is hardly ever seen in general corporate law because of the absence in most brother-sister instances of financial dependency of the one on the other (as opposed to such dependency by one or both on their common parent).\textsuperscript{206}

Because the alter ego concept is a vaguely familiar one and the veil-piercing metaphor has an almost colloquial ring, the language of alter ego is frequently used in discussions of corporate-family conflicts to express what is sometimes referred to, as if it were a unitary exception to the no-affiliates position. In fact, however, the alter ego notion has become almost formlessly elastic. California, at one extreme, apparently means the literally same exception as begrudgingly recognized in corporate law—a usage which is unintelligible for conflicts purposes. As client can be used as very persuasive evidence against the client by creditors in future litigation when attempting to pierce the corporate veil.


\textsuperscript{205} See supra text accompanying note 200.

\textsuperscript{206} Cf. Henn & Alexander, supra note 36, at 356 (3d ed. 1983) (listing as separate test for veil-piercing whether "[t]he corporation is inadequately financed as a separate unit from the point of view of meeting its normal obligations foreseeable in a business of its size and character, because of either initial inadequate financing or having its earnings drained off so as to keep it in a condition of financial dependency."). Id.

used in ABA Formal Opinion 95-390, however, the exception is significantly broader. In fact the opinion states that "[i]t is not necessary . . . for one corporation to be the alter ego of the other as a matter of law in order for both to be considered clients . . . ." 208 At a still-more-distant remove, the District of Columbia lawyer code exception uses the term alter ego even more loosely, referring to a large collection of exceptions—most of which would be unintelligible under the general (and strict) corporate-law rules about veil-piercing. 209 Those broader exceptions, while quite intelligible and defensible on other terms, 210 makes little sense under the law of alter ego. As is so often the case with general labels in the law, here also the nomenclature of alter ego can readily obscure much more than it illuminates. There are good reasons for holding that a lawyer who represents one corporation will, under some conditions, be held to have client-like obligations to an affiliate, but alter ego is not one of them.

(ii) The False Allure of Estoppel Considerations

Arguments in support of the no-affiliates approach frequently invoke various arguments that, when not blatantly ad hominem, are at least highly suspicious of the motives of corporations, that might object to conflicts based on their law firm’s representation of an affiliated entity. Most such arguments rather painfully beg the question. Thus, one form of estoppel argument is that a corporation that has "elected" to set up a complex corporate structure should bear the burdens of such a structure as well as the benefits of such arrangements. 211 The force of such arguments, if not their wording, is that the burdens are in some way deserved because the corporation enjoys benefits of multiple-entity structure. But why should we suppose that one specified burden that flows from adoption of a multiple-entity arrangement is rejection of a conflicts

208. See ABA Opin. 95-390, supra note 143, at 10. The majority added that "... A disregard of corporate formalities and/or a complete identity of managements and boards of directors could call for treating the two corporations as one... The fact that the corporate client wholly owns or is wholly owned by, its affiliate does not in itself make them alter egos. However, whole ownership may well entail not merely a shared legal department but a management so intertwined that all members of the corporate family effectively operate as a single entity; and in those circumstances representing one member of the family may effectively mean representing all the others as well..." Id. at 10-11. On the "shared legal department" point, see infra text accompanying notes 254-57.


209. See infra text accompanying note 257.

210. See infra text accompanying notes 254-57.

211. See Rotunda, supra note 102, at 681.
objection? That, plainly, is the question, not the answer. Moreover, the argument assumes some kind of proportionality between the burden and benefits, which may be counter-factual.\(^{212}\)

(iii) The Possibility of Ex Ante Arrangements

The majority opinion in the ABA’s Formal Opinion 95-390 obviously gained some comfort from the fact that some corporate clients were sufficiently sophisticated that, if they hold to a concept of corporate loyalty more generous to the corporation than that reflected in the opinion, they would be free to heighten the lawyer’s duties through agreement.\(^{213}\) While that may be a comfort to throw to sophisticated corporate clients who enjoy significant leverage in bargaining with their lawyers, it introduces a potentially dangerous precedent—at that one that seems entirely inconsistent with the position that the ABA ethics committee took only a year earlier. In its earlier opinion, the committee held that a retainer agreement with a client in which the lawyer agreed not to sue the client in the future, even on a matter unrelated to the lawyer’s representation, was impermissible.\(^{214}\) The decision was placed on the broad ground that such an agreement “would impermissibly restrain a lawyer from engaging in his profession.”\(^{215}\) But such an agreement, of course, is what the majority opinion in ABA Formal Opinion 95-390 proposes to legitimate, indeed welcome.

Talk of the power of a corporate client to expand a lawyer’s responsibilities by agreements at the outset of the representation is dangerous for another reason. It may create the impression that clients themselves are in some important measure responsible for detecting conflict situations, initiating discussions about conflicts and, possibly, obtaining a lawyer’s agreement to abide by negotiated conflicts standards. Such a view, of course, stands on its head the role of consensual arrangements in

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212. A plain example would be the “desk-drawer” subsidiary. See supra this article, at page 304.

213. ABA Opinion 95-390, supra note 143, at 2 & 7-8; Cf. id. at 15-16 (obtaining advance corporate client consent to proceed adversely to represented affiliate). On the legitimacy of the latter use of client-lawyer agreements to limit what would otherwise be the reach of conflicts law, particularly where the client is sophisticated and independently represented on the question of consent, see generally PROPOSED FINAL RESTATEMENT, supra note 1, § 202 cmt. (d); ABA Opinion, supra note 143, at 93-372.

214. ABA Formal Opin. 94-381 (1994).

215. See id. at 3. The opinion could argue only by analogy from rules such as ABA Model Rule 5.6(a) (1983), which prohibits agreements restricting a lawyer’s right to practice law, but only when made in “a partnership or employment agreement,” and Rule 5.6(b), which prohibits such agreements made as an aspect of settling a case.
conflicts law. The persistent position of the ABA ethics committee and of many judicial decisions is that the lawyer, not the client, bears the burden of spotting conflicts and initiating discussions about consent. Indeed, the majority in ABA Formal Opinion 95-390 went out of its way to offer the strong advice that lawyers who represented one member of a corporate family initiate a discussion whenever there was any room for doubt, either about the facts or about the lawyer’s own assessment that no conflict existed.

(iv) Chaos and Complexity

Arguments in support of the no-affiliates approach sometimes express impatience with the “complex, ever-changing and bewildering organization chart” presented by multiple-entity organizations, “using an impenetrable fog of subsidiaries and affiliates when it appears advantageous to do so . . . .” First, one must set aside the “ever-changing” objection, which will be considered at a later point. For the present, simply note that the issue of transformations within the corporate family is discrete, with a discrete solution—and one that does not burden law firms. Second, with respect to the objection of complexity, it surely has bite—but hardly always and rarely incurably so. Complexity, as with much else, can be relative. A parent corporation with but one affiliate, a

216. A similar observation may be made about the majority’s repeated statement that the client cure what the client regards as an objectionable concurrent-representation conflict by firing the lawyer. Id. at 13 (“the client’s only recourse is to fire the lawyer who undertakes a matter that displeases the client”). Id. at 15 (after noting remedy of disqualification where conflict exists in litigation, “[w]here disqualification is not available, of course, a client can simply choose to discharge counsel.”). The perhaps blithe assumption that such a course of action would be costless to the client is, of course, often erroneous.

217. See Model Rules, supra note 1, at 1.7 cmt. [1] (as amended February 17, 1987) (“. . . The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters, the parties and issues involved and to determine whether there are actual or potential conflicts of interest.”); see also IBM Corp. v. Levin, 579 F.2d 271, 278 (3d Cir. 1978); Glidden Co. v. Jandemoa, 173 F.R.D. 459, 480 (W.D. Mich. 1997) “. . . Where dual representation creates a conflict of interest, the burden is on the attorney involved to approach both clients with an affirmative disclosure and a request for express consent. . . . This burden is not met by arguing that the party to whom the duty was owed had constructive knowledge of the conflict. . . .”); ABA Opinion 95-390, supra note 143, at 2 (“the onus is squarely on the lawyer to anticipate and resolve conflicts of interest involving corporate affiliates”).

218. ABA Opinion 95-390, supra note 143, at 15.

219. See id.

220. Rotunda, supra note 102, at 681; Cf. ABA Formal Opinion 95-390, supra note 143, at 2 (noting that corporate-family problems may arise “because there is a change in the identity of the client, through acquisition, mergers and the like”).

221. See infra text accompanying notes 262-68.
wholly-owned subsidiary, can hardly be accused of fomenting complexity. On the other hand, a corporation with hundreds of affiliates well might present a problem of significant difficulty to any law firm that in good faith attempts to comply with any but a no-affiliates rule. As throughout these realms, the highly variable facts should and do matter.

A companion objection to any but a no-affiliates rule is that law firms would otherwise be obliged to keep track of the ever-changing corporate family members of a client-member of such a family.222 (Again, with respect to the impact of merger and similar activity of a client, most courts seem prepared to apply a different rule than the one implied by the complaint.)223 Depending on the client,224 the burdens on a law firm of conflict-checking could be substantial. (Of course, for that reason, law firms with such clients will be impelled to condition representation in minor matters on the client’s willingness to waive what otherwise may be corporate-family conflicts.)225 But the task is hardly undoable. If the question is the identity of all corporate-family members, that information can be readily obtained from the client. Failing or instead of that, reference publications contain the necessary data about corporations of significant size.226 Once the names of all corporate-family members are inputted into the law firm’s conflicts-checking data bank, there will be additional work involved. Conflicts-checking inevitably involves a fair amount of non-mechanical work. At least with respect to corporate-family members of significant size (members of inconsequential size are, obviously, correspondingly less likely to create conflicts problems), there will presumably be computer “hits” in checking new clients or new matters for old clients. Under any version of the corporate-family conflicts rule—including that of California, the most generous to law firms—it will be necessary for a lawyer to examine the facts involving the new matter and, with respect to the “hit” affiliate, make a factual determination whether the company is at least an alter ego of the firm’s client or for some other reason is so situated as to create a conflict with the new client. The only difference between the no-affiliates and all-affiliates

222. See, e.g. ABA Opinion 95-390, supra note 143, at 8 ("[O]utside lawyers who are performing only a limited role for a single aspect of the business [of an affiliate of a corporate family], no matter how well-intentioned, should not be expected to be current on all of the names, relationships and ownership interests among a client’s varied and sometimes far-flung business interests. . ."). Id. See also Rotunda, supra note 102, at 636.

223. See infra text accompanying notes 262-68.

224. On the large numbers of entities in some corporate families, see supra text accompanying notes 32-33.

225. See supra text accompany notes 213-19. See also infra text accompanying notes 269-70.

226. See DUN & BRADSTREET, supra note 32.
tests is that the latter gives definite and quick answers, while the former requires more elaborate examination, as will be true of any test other than the all-affiliates standard. Thus, complaints about the difficulty that a law firm might experience in administering an alternative test should be carefully assessed on a comparative basis. Unless the alternative is either the extreme version of the all-affiliates or no-affiliates positions, all tests (which includes all tests applied by most decisions and adopted in ethics committee opinions) recognize important exceptions that are recurring, fact-intensive and impossible to administer through a computer or a non-lawyer assistant operating a conflicts-checking system.

(4) Lateral-Dimension Conflicts—A Functional Approach

Drawing on the foregoing, it can by this point be seen that a theory other than the absolutes of the all-affiliates or no-affiliates positions is both desirable and available. An appropriate approach should avoid the irrelevant distractions of the alter ego inquiry and should aim to satisfy the legitimate demands of corporate-family clients for loyalty and confidentiality. That better mousetrap has already been constructed, for the most part, in the new comments in the Rules of Professional Conduct of the District of Columbia, although it, too, could be improved. In the analysis that follows, attention will be drawn to the D.C. comments, but the discussion generally is consistent with and fulfils the requirements of the existing lawyer code rules now in force in other jurisdictions as well.

It is important to note that in the discussion that follows, we deal with the difficult cases—those in which there is no sufficient basis on which the affiliate to a corporate client can be said to be a direct client of the lawyer or law firm in question. That may assume a great deal, for in appropriate circumstances, a lawyer—as the result of work being done for the corporate client—may enter into a direct client-lawyer relationship with affiliates. The ways in which that may occur have already been examined. In the discussion that follows, then, we assume that there

227. As noted by the majority in ABA Opinion 95-390, supra note 143, at 15, the law firm is responsible for knowing accurately the facts necessary to make an alter ego assessment, or any other assessment that might create a conflict, a responsibility that in most instances a firm would be well-advised to fulfill by making inquiry of its corporate client. See also supra text accompanying notes 217-19.

228. See supra text accompanying notes 198-210.

229. See supra text accompanying notes 160-92.


231. The relevant District of Columbia comments are reprinted in the Appendix.

232. See supra text accompanying notes 73-77.
are insufficient facts indicating such a direct client-lawyer relationship with the affiliate.

(a) Confidentiality for Corporate Clients and Affiliates

Perhaps the one area on which agreement seems rampant (at least outside California\textsuperscript{233}) with respect to corporate-family conflicts is that involving the protection of confidentiality.\textsuperscript{234} Even here, however, analysis has occasionally been less than satisfactory. The problems will be pursued below with respect to both concurrent-representation situations and those involving former clients. Pursuing the latter inquiry will provide an occasion for assessing how corporate-family conflicts issues should be determined in former-client settings in general.

(i) Concurrent-Representation Situations

As is conventional, we here assume that the question of conflict arises because the lawyer or law firm has undertaken to represent at the same time\textsuperscript{235} both a corporation and, in a factually-related matter, another client who is adverse to an affiliate of the corporate client. No decision or ethics committee opinion has expressly permitted such a representation, and several authorities have condemned them. In analyzing why that result is required, it is useful to separate out situations in which the confidentiality interests of the immediate client and then of the affiliate are at stake.

(1) When a present corporate client provides confidential information to a lawyer, the client clearly is entitled to protection against the risk that the lawyer will use the information in a way that threatens important interests of the client. The standard lawyer code formulations prohibit a lawyer from revealing confidential information about a client against the interests of the client.\textsuperscript{236} While the 1983 ABA Model Rules formulation is limited to a prohibition against "reveal[ing]" such information, courts have not hesitated to construe the rule as if it prohibited adverse "use" of

\textsuperscript{233.} See supra text accompanying notes 132-41; Cf. text accompanying note 193.

\textsuperscript{234.} See supra text accompanying notes 193-97.

\textsuperscript{235.} For sometimes-tricky determinations of when a representation is still ongoing for the purpose of imposing the more-exacting requirements of the concurrent-representation rules, see Wolfram, Former-Client Conflicts, supra note 9, at 703-06.

\textsuperscript{236.} See Model Rules, supra note 1, at 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation. . ."). The former ABA Model Code of Professional Responsibility was clearer on the point. See Model Code, supra note 1, at 4-101(B)(1)-(3) (1969) (except with client consent, "a lawyer shall not knowingly: (1) [r]eveal a confidence of secret of his client[;] (2) [u]se a confidence or secret of his client to the disadvantage of the client[; or] (3) [u]se a confidence or secret of his client for the advantage of . . . a third person"). Id.
such information as well. They have done this by creating an analog to the Rule 1.9 prohibition against former-client conflicts,\textsuperscript{237} by employing the “substantial relationship” formulation stated in that rule to test concurrent-representation situations in which there is a claim that the lawyer is in a position in which the client’s confidential information is at risk of adverse use.\textsuperscript{238} Because the situation involves a current client, those decisions are, if anything, even more demanding than former-client cases (in which the only interest to protect is the former client’s reasonable expectation in confidentiality, and not any other interest in loyalty).\textsuperscript{239} The clearest illustration of that is the willingness of courts to accept that the lawyer’s work for the other client against the interest of a (mere) affiliate of her other, corporate client is “adverse” to the corporate client. While some findings of adverseness could rest on the fact that the corporate client’s material financial interest in the affiliate is at risk because of the lawyer’s work, even in the absence of such an impact, the linkage of substantial relationship (together with adverseness to the affiliate) suffices to create a duty that the lawyer not undertake the representation.

(2) Suppose, however, that the information to which the lawyer has been exposed is not that of the lawyer’s own client, but is that of the corporate affiliate? That shifts the source of the right to claim confidentiality to an organization that we are assuming has no direct client-lawyer relationship with the lawyer. Does that shift remove the basis for objecting to the adverse representation of the other client? It does not, but for somewhat different reasons. Here, by hypothesis, the lawyer’s own corporate client cannot claim an interest in confidentiality of information that it had directly provided to the lawyer. In the strict sense of entitlement that we are entertaining, “its” information is not at risk.\textsuperscript{240} But it has an additional claim that precludes the lawyer’s adverse repre-

\textsuperscript{237} See Model Rules, supra note 1, at 1.9(a) (“[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.”). Id.

\textsuperscript{238} Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 270 (D. Del. 1980); see also Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC, 663 N.Y. Supp. 2d 499, 501 (N.Y. Sup. Ct. 1997); D.C. Comment, Appendix, infra ¶ [14(b)] (representation of additional client prohibited if lawyer has acquired confidential information of “the organization client”).

\textsuperscript{239} On this perhaps-controversial point, see Wolfram, Former-Client Conflicts, supra note 9, at 691-712.

\textsuperscript{240} The corporate client could claim that the affiliate’s confidential information is “its” information, even though provided to the lawyer by the affiliate—on the observation that adverse use against the affiliate would have consequential adverse financial impact on the client. But that is an observation about economic impact, not about confidentiality. On such impacts, see infra text accompanying notes 250-53.
sentation. Courts have permitted the affiliate to make a derivative claim of confidentiality,\textsuperscript{241} on the notion that the lawyer has an implied duty of confidentiality to an affiliate of the lawyer's client from whom, in the course and as a direct result of representing the client, the lawyer learns confidential information.\textsuperscript{242} The notion is not that the lawyer necessarily owes all of the customary client-lawyer fiduciary obligations to the non-client about whom the lawyer learned confidential information. It is the more limited notion that an entity that provides confidential information to a lawyer on the understanding that it will be used for the benefit of an affiliate (the direct client of the lawyer) reasonably believes that the information will not later be employed to the material disadvantage of the entity. In situations where the two representations (the one of the corporate affiliate and the other the assertedly conflicted representation adverse to the non-client entity) are ongoing, the objection would be that the willingness of the non-client entity to provide confidential information to the lawyer would, for obvious reasons, be seriously compromised by the lawyer's undertaking of the adverse representation of the client with the factually-related matter.

(ii) Former-Client Situations

Assume that the lawyer's representation of her corporate client has come to an end. May the lawyer, after a decent interval has occurred,\textsuperscript{243} commence the representation of another client against an affiliate of the former client if the new matter is substantially related to the former matter? Here, too, courts have generously protected reasonable expectations

\textsuperscript{241} D.C. Comment, Appendix, infra ¶ [14(b)] (representation of additional client prohibited if lawyer has acquired confidential information of corporate client "or an affiliate or constituent" of that client).

\textsuperscript{242} See, e.g., Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1321 (7th Cir.), cert. denied, 439 U.S. 955 (1978) (protecting confidentiality interest of affiliate on similar facts). For analogous protection of non-clients under the substantial-relationship formulation employed in former-"client" situations, see PROPOSED FINAL RESTATEMENT, supra note 1, § 213 cmt. (g)(i) ("person about whom lawyer learned confidential information while representing former client").

The D.C. Comment, Appendix, infra ¶ [14], apparently proceeds on a different, and unsatisfactory concept that the lawyer is "deemed" to represent the affiliate, or (apparently alternatively) that there is an "implied" client-lawyer relationship with the affiliate. But the comment goes on to insist that propriety of the questioned representation "must also be tested by reference to the lawyer's obligations" to preserve the confidentiality of information of both the corporate client and the affiliate. An alternative reading of the comment is that it refers to different situations—one in which an implied-in-fact representation of the affiliate is warranted in the circumstances and the other in which no such client-lawyer relationship exists but where a duty of confidentiality (otherwise unexplained) nonetheless exists.

\textsuperscript{243} On decisions in effect requiring such an interval, see Wolfram, Former-Client Conflicts, supra note 9, at 703-08 ("sunset" concept in assessing when concurrent representation has become a former-client representation).
in the confidentiality of information on the part of both the original corporate client and its then affiliates. As with concurrent-representation analogs, the few decisions dealing with the issue in the context of a corporate family have rooted a prohibition against the later representation on the grounds of confidentiality.244 Again in agreement with concurrent-representation analogs, the duty of the lawyer to avoid such conflicted representations applies whether the lawyer is likely to have learned the linking confidential information in the earlier representation from either the corporate client245 or from the non-client affiliate.246

While the foregoing places important conflict limitations on the right of a lawyer to represent an adverse client, it is important to note that protection of confidentiality exhausts the duties of a lawyer to any former client, and certainly to a non-client to whom the lawyer owes confidentiality duties.247 In other words, no matter how adverse the later representation may be, if it is not also factually linked to the earlier representation in the way required under the substantial-relationship standard, the later representation is permissible.248 Recalling, again, that courts are diligent in protecting the reasonable confidentiality expecta-


245. See supra text of note 195.

246. See Westinghouse Elec. Corp. v. Kerr-McGee Corp., supra note 242; see also Proposed Final Restatement, supra note 1, § 201 cmt. (d), illustration 10 (based on facts in Kerr-McGee decision and agreeing with result).

247. The 1996 District of Columbia amendments, Appendix, infra, are defective in failing to identify the very limited extent to which they might apply for former-client conflict questions involving corporate family members. Placement of the new material in the comments to the rule on current-client conflicts will probably serve to limit their operation, leaving open the question of former-client conflicts. Both in the District and elsewhere, former-client conflict questions should be resolved as suggested in the text.

tions of either or both of the original corporate client and its affiliate, it can thus be seen that other considerations in the corporate-family conflicts debate are irrelevant in the context of a former-client question. For example, in a jurisdiction that recognizes the alter ego basis for extending conflicts duties to a lawyer’s representation adverse to a corporate affiliate, the fact that (non-client) Corporation S is found to be the alter ego of Corporation C, the former client, this should not be recognized as a sufficient basis for finding an impermissible former-client conflict. Similarly, the fact that, on a realistic appraisal, the lawyer’s adverse representation against the corporate affiliate will cause substantial financial harm to the former corporate client is also irrelevant, again, in the absence of a substantial relationship between the two matters. In all cases, there must also be a sufficient finding of factual linkage through application of the substantial-relationship standard.

(b) Loyalty and Corporate-Family Conflicts

As a concept considered independently of confidentiality, loyalty is operative primarily in the area of concurrent-representation conflicts. It is within that area that it has played its most important, and most controversial, role in corporate-family conflicts. The question in general terms is the extent to which a lawyer’s obligations of loyalty to a present corporate client precludes the lawyer from accepting representation of another client in a matter adverse to an affiliate of the corporate client. To my mind, the most appropriate way to answer that fundamental question is by paying close attention to the possible negative impacts on the corporate client that such a representation may entail. When a substantial impact of that kind is threatened, the adverse representation should be precluded. When it is not, the representation should be permitted to proceed, and without the consent of either the corporate client or the affiliate.

(i) Loyalty and Material Financial Impacts

The most obvious negative impact on a corporate client is the sort of financial hit to the client’s financial bottom line that was rejected as a sufficient basis for finding a conflict in the ABA’s Formal Opinion 95-390. However, as indicated earlier, the analysis of the majority opinion is both analytically unsound and in conflict with all existing judi-

249. Cf. infra text accompanying notes 250-53 (material financial impact as creating conflict in concurrent-representation setting).
250. See supra text accompanying notes 176-77.
251. See supra text accompanying notes 178-85.
cial authority on the point. In a world of practical reality and common sense, the fact that a lawyer's representation against a non-client affiliate of a corporate client will cause substantial and measurable financial loss to the client fully describes an "adverse" representation. At the same time, to accept the risk of any financial loss—no matter how insignificant or improbable—as sufficient to create a conflict would be untenable. Among other considerations, such an approach would probably require acceptance of the all-affiliates position, with its unexplained and unexplainable rejection of the entity-representation rule.252

The solution of the District of Columbia in its amended comments is to insist on an appropriately high threshold of financial pain before a breach of loyalty will be found. The relevant portion of the new comment requires that the additional adverse representation must be such that it "seeks a result that is likely to have a material adverse effect on the financial condition of the organization client."253 As can be seen, the D.C. standard captures two points. First, the adverse result must be "likely"—which in context clearly means that, measured by objectively reasonable probabilities, the result is more likely than not. Second, the financial impact must be "material"—which in context means that the lawyer's work, if conducted successfully for the new client, must threaten substantial and measurable financial loss to the lawyer's own client.

(ii) Loyalty and Common-Officer Situations

Another common setting in which several corporate-family authorities—including one of the oldest and most-cited254—have found that an impermissible conflict occurs when the law firm representing the corporate client finds that, in the new matter, it will deal with some of the

252. See supra text accompanying notes 124-31.
253. D.C. Comment, Appendix, infra ¶ [14(c)]. The same phrase is repeated in a later comment that is devoted entirely to the situation of material adverse financial impact. Id. at ¶ [16]. There, however, the comment adds the following obscure caution (among other things, not indicating whether the caution is simply one of prudence or has a substantive function as well): "... However, a lawyer should exercise restraint and sensitivity in determining whether to undertake such representation [that is, one not threatening such an impact], particularly if the organization client does not realistically have the option to discharge the lawyer as counsel to the organization client." The client's lack of realistic ability to discharge the lawyer, of course, has nothing to do with either the magnitude of harm to the client or the reasonableness of the client's motives in wishing to fire the lawyer.

On the similar position of the Restatement, supra note 124. In Proposed Final Restatement, supra note 1, § 212 cmt. (d), illustration 6, the test is described, in words quite similar to the District of Columbia comment, as that of "material adverse impact on the value of [the non-client affiliate's] assets and ... on the value of the assets of" the client entity. Id.
same key people in representing the new client adverse to the affiliate.\textsuperscript{255} The reason for creating the prohibition is readily apparent when one considers the operational significance of common personnel in the lawyer's two representations. Suppose, for example, that—prior to the time the question of conflict arose\textsuperscript{256}—Parent had arranged matters so that a single lawyer, functioning as General Counsel for it and all its affiliates, would and did play a substantial, personal and hands-on role in all legal matters involving either the corporation or its affiliates. In the course of Lawyer's work for Parent, she frequently has substantive dealings with General Counsel. Lawyer then undertakes to represent New Client against Subsidiary. If, as would appear nearly certain, Lawyer will confront General Counsel across the table in conducting hostile negotiations or across the courtroom in presenting New Client's case against Subsidiary, the reasons for finding a conflict are clear. General Counsel should not be placed in the position of having to confide in and place entire trust and confidence in a lawyer or law firm that she must encounter as zealous representative of an adversary on other, or nearly-simultaneous, occasions.

The same concept extends to non-lawyer officers of a corporation. For example, the same vice-president for research might be substantially and personally involved in the two representations—on one occasion with a friendly lawyer and on the other facing a hostile lawyer, with both lawyers being either the same person or lawyers from the same firm. Again, the willingness of the officer to function effectively with the "friendly" lawyer will, on obvious and reasonable grounds, be seriously impaired by concern about the overall loyalty of the lawyer or law firm. Whenever an officer or employee who will play an important and personal role in both representations is the same person, the new representation should not be accepted.

On the other hand, the concept is limited to individuals, and then to those with certain kinds of operational functions—personal and substantial involvement in both matters. It should not be enough, for example, that the same office (either legal or non-legal), but not the same personnel from that office, will be involved in the two matters. It should also not suffice if the involvement of personnel is in the role of non-confiden-


\textsuperscript{256} This temporal limitation is important to prevent a corporate family from using the rule manipulatively by reassigning matters to a common lawyer or other officer in order to create a corporate-family conflict.
tial functionary, rather than those of important witness or intermediary with the organization.

The new District of Columbia comment contains a somewhat similar notion, although one that is inexplicably expanded to situations in which either “the two companies have common directors, officers, office premises, or business activities” or in which “a single legal department retains, supervises and pays outside lawyers for both the parent and the subsidiary.” The D.C. comment is both too broad and too narrow. For example, a parent and subsidiary may have an office in the same premises, but if there is no operational connection between them, the common premises alone would seem an entirely insufficient basis for treating the two as one. Similarly, the fact of common legal department is only relevant if that would have some operational significance in the law firm’s dual representation. If in the usual course two different lawyers in the legal department would handle all significant aspects of the two different matters, there is lacking the kind of direct, personal, and substantial commonality of personnel that would impair the organization’s customary way of conducting its business with lawyers. On the other hand, the D.C. comment is too narrow in that it seems to require all its described traits of commonality before recognizing a conflicts problem. As described above, if the only point of commonality is the vital one that the same person has functioned and will function in the new representation as the general counsel for both the parent and the subsidiary, that would seem to be a sufficient reason to recognize a representation-impairment conflict.

V. Lineal-Dimension Corporate Conflicts

There remains for consideration what I have termed lineal-dimension conflicts. Lineal-dimension conflicts encountered in corporate representations are, in the general scheme pursued in this Article, those arising from changes in the internal management, ownership, or control of what is otherwise (or at least initially) a single entity, or at least a different entity that did not present corporate-family conflicts problems. The distinction between such conflicts and those in the lateral-dimension

257. D.C. Comment, Appendix, infra ¶ [15]. The comment seems to have gone astray because of an unnecessary coherence to alter ego considerations.

258. For many years, for example, courts have had to wrestle with conflicts problems presented when a law firm that had traditionally represented a corporation, including advising its board of directors, is retained to defend both the corporation and its directors in a shareholder-derivative action. See Proposed Final Restatement, supra note 1, § 212 cmt. (g); Modern Legal Ethics, supra note 1, § 8.3.4, at 425-27.
realm is to a large extent artificial, but separation serves an important analytical point. As will be seen, lineal-dimension conflict issues should be handled differently from lateral-dimension conflicts, sometimes with a different way of measuring to determine whether a conflict exists, and sometimes with different remedial consequences once a conflict is encountered.

(1) Corporate-Family Transmogrification—In General

The conflicts problems presented to inside or outside corporate counsel when and as a client corporation or its affiliates change ownership or when management are numerous. Key among them is the question who is empowered to direct a lawyer's activities and the required focus of a lawyer's loyalty when a challenge to current management or a management takeover is afoot.259 As interesting and important as such questions are, they are outside the scope of this Article, dealing as it does with multiple-entity situations, rather than multiple-contenders-for-control situations. The form of the question that particularly concerns the identity of the corporate lawyer’s client when multiple entities are involved is that presented when a lawyer has advised management of a company in the course of its sale and is later asked by the sellers of the company to represent it in a subsequent dispute with the purchasers.

The ways in which such a conflict problem can arise is presented in two New York decisions, which reached divergent results. In one, a Southern District of New York decision,260 the federal court refused to disqualify a law firm from representing its long-standing client, a seller of a corporation who was now engaged in litigation with the purchasers. The purchasers, who controlled the shape of the litigation as plaintiffs, had joined as a co-plaintiff the sold corporation, which the lawyer had also represented in the sale. In the other, a decision of the New York

259. The leading case is Financial General Bankshares, Inc. v. Metzger, 523 F. Supp 744 (D.D.C. 1981) (lawyer for corporation must follow instructions of incumbent management in midst of developing battle for control of corporation; return of fees and punitive damages awarded to corporation against its former lawyer for breach of fiduciary obligations, including undisclosed attempt to seek control of corporation, vacated, 680 F.2d 768 (D.D. Cir. 1982) (no pendent jurisdiction in federal court because of novelty of question under local law). See generally PROPOSED FIRST RESTATMENT, supra note 1, § 212 cmt. (h); MODERN LEGAL ETHICS, supra note 1, § 8.3.3.

260. Bass PLC. v. Promus Cos., No. 92 CIV. 0969 (SWK), 1994 U.S. LEXIS 136 (S.D.N.Y. Jan. 10, 1994) (Kram, J.) (under “community of interest” standard, lawyer who represented seller and company whose stock was being sold could represent seller in subsequent dispute with purchaser and former corporation—now under new management—over alleged breach of sales agreement). In the interest of full disclosure, I should note that I served as co-counsel for the prevailing law firm in Bass.
Court of Appeals,261 the state court reached the opposite result on what seem to be indistinguishable facts. The difference proved to be the analysis pursued. In the state case, the court focused—over-much—on the entity-representation concept, holding that the entity represented was the former-client corporation that had been sold. Because the matters were indisputably related in a factual way, the lawyer was disqualified. More realistically, the federal court looked to the realities of the earlier and later representations, noted that the lawyer continued to represent the same community of interests as in the earlier representation, further noted that there could have been no reasonable expectation on the part of either the purchasers or the corporation being sold that the lawyer would keep any information confidential from the sellers, and accordingly refused to disqualify. The “community of interest” view would seem to be highly preferable in a case having those characteristics.

(2) Corporate-Family Conflicts Caused by Client Mergers and Acquisitions

Employing a variety of approaches, courts have generally refused to find that a law firm has violated a duty to a client when it finds itself opposing an existing client due to that client’s merger and acquisition activities.262 One common factual pattern finds a law firm well into its representation of a client against an adversary when the adversary acquires263 or is acquired by264 another client of the firm. While recog-

261. Teckni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663 (N.Y. 1996) (under entity-representation theory, lawyer who represented seller and corporation being sold was disqualified from later representing seller against purchaser and former corporation—now under new management—over alleged breach of sales agreement). For unclear reasons, the court in Teckni-Plex did not cite or otherwise notice the existence of Bass.

262. The leading case is Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264 (D. Del. 1980) (law firm whose client in unrelated matter was acquired as sister corporation of corporation that firm opposed in another representation could elect which representation to resign in order to cure conflict). See also Carlyle Towers Condominium Ass’n, Inc. v. Crossland Savings, FSB, 944 F. Supp. 341, 346 (D.N.J. 1996) (law firm not required to be disqualified where conflict arose because of opposing party’s merger with parent of subsidiary that law firm had represented), citing authorities; In re Wingspread Corp., 152 B.R. 861 (Bankr. S.D.N.Y. 1993) (no disqualification required on grounds that law firm had no role in or control over acquisition, acquisition was “attenuated” in that adversary was acquired by subsidiary of client and client was large with many subsidiaries and holding companies). A leading and frequently-cited decision is Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121, 1126-27 (N.D. Ohio 1990) (Joiner, J., sitting by designation). Occasional decisions to the contrary can be found. E.g., Cincinnati Bell, Inc. v. Anixter Bros., Inc., No. C-1-93-0871, 1994 U.S. Dist. LEXIS 21012 at *7-8 (S.D. Ohio, June 27, 1994) (without emphasizing, beyond noting, that conflict was created by merger activity of client, disqualification ordered because of resulting conflict).

nizing that some curative step is necessary, courts have permitted the firm to withdraw from representation of the acquiring parent, and they have not required disqualification of the firm in the ongoing representation of its other client. The client-merger decisions are clearly exceptional. First, they are exceptions to the general rules prohibiting concurrent representation adverse to a current client. Second, permitting withdrawal as a cure to a conflict is also exceptional, because in many decisions courts have applied the "hot potato" concept under which a lawyer is precluded from curing a conflict by withdrawing from representation of an objecting client.

Nonetheless, the decisions are eminently sensible. The facts of those cases seem not to suggest that the merger activity was motivated by the thought that it would create a basis for a motion for disqualification to benefit the adversary. But for other reasons visiting the consequences of the objecting party's own voluntary merger activities on the client who would be deprived of counsel seems an unwarranted imposition on the latter's right to retain, and continue with, its chosen counsel. Moreover, in most of the cases that client would be seriously prejudiced by the need (were disqualification required) to change counsel a substantial period of time after the representation began. All the decisions to date have been rulings on motions to disqualify, but a similarly flexible and client-protective view should also determine whether a law firm has acted properly in refusing to withdraw should the question ever arise in another remedial context. For example, if the issue were asserted in a disciplinary or legal-malpractice context, the firm's refusal to withdraw should also be held proper.


265. See supra text accompanying notes 162-69.

266. See generally PROPOSED FINAL RESTATEMENT, supra note 1, at § 201 cmt. e(i) & note; See also id. at § 213 cmt. (c) & note.

267. That possibility was suggested by the court, but found not present on the facts before it, in Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121, 1126-27 (N.D. Ohio 1990); see also Carlyle Towers Condominium Ass'n, Inc. v. Crossland Savings, FSB, 944 F. Supp. 341, 349 note 7 (D.N.J. 1996) ("Another reason why it is proper for plaintiff's counsel to choose their client, in a situation where the defendant moving for disqualification created the conflict in the first place, is that this result discourages the possibility . . . where one party creates a conflict . . . .")

268. Until the law is well-settled in a jurisdiction, uncertainty that might exist about the firm's continuing the representation post-merger probably requires that the firm be permitted to withdraw, even if that would cause prejudice to the existing client, in order to avoid any substantial issue about the permissibility of continuing. Indeed, the merger line of decisions proceeds on the assumption that the affected law firm has discretion whether to withdraw from representing the client involved in the merger or the other client. See Carlyle Towers Condominium Ass'n, Inc. v. Crossland Savings, FSB, supra note 267, at 349 note 7; see also Gould, Inc. v. Mitsui Mining & Smelting Co., supra note 267, at 1127.
A final important point is to note that acquisition-induced corporate-family problems are hardly representative of the much more common corporate-family problem of the lateral-dimension kind. The latter are caused by the law firm's own actions in taking on a representation adverse to a longstanding or at least existing affiliate of a client. A conflict caused by the merger or acquisition activity of an existing client or a present adversary, among other things, can often not be anticipated by a law firm (unless, as will occasionally occur, the law firm also represents the corporate client in the merger or acquisition). Even a quite elaborate attempt to detect the resulting conflict would often be futile. The adverse representation may have been undertaken when discussions concerning the merger or acquisition were still private. Even if publicly announced, and unless the law firm was aware of the pending transaction, the law firm in good faith may have undertaken what is now claimed to be a conflicting representation. Thus (and assuming that the two affected clients refuse to consent to the dual representation), the firm will be placed in the position of having to choose between clients. As indicated above, there is no basis on which it could be insisted that the firm always favor the corporate-family client.

VI. CONCLUSION

Two kinds of resolutions are available in dealing with corporate-family conflicts. Both have their appropriate role to play, but neither is a complete solution. First, one apparent point of convergence for adherents of both the all-affiliates and the no-affiliates positions is that a specific contractual arrangement between a lawyer and a corporate member of a larger family should be enforced. In other words, discrete agreements between a lawyer and corporate-family client can define the relationship in such a way as to limit or at least highlight the type of conflict obligations that the lawyer is and is not undertaking. Thus, in the view of the no-affiliates adherents, if a lawyer agrees to "expand" the lawyer's conflicts responsibilities by agreeing not to represent a client against any (or designated) other members of the corporate family, the contract should be enforced. In the view of an all-affiliates adherent, the client can similarly "expand" the exposure of its corporate family to conflicts.

269. On forms for law firm agreements with a corporate client on the limited representation of a corporate-family affiliate, see, e.g., ABA Business Section Task Force on Conflicts of Interest, Conflict of Interest Issues, 50 BUS. LAWY. 1381, 1387-91, 1392-95 (1995) (general discussion and recommended form documents).

270. See, e.g., ABA Opinion 95-390, supra note 143, at 15-16 ("[i]f a lawyer explains the implications of a dual representation and obtains the informed consent of both parties, "the
While doubt still remains about the extent to which advance agreements between lawyers and clients suffice to waive future conflicts, clients who present corporate-family conflicts issues will often be sophisticated in retaining and instructing lawyers. Often such a client will have built-in independent counsel available to advise on such an agreement in the form of in-house counsel. Advance-consent waiver by such a client should be readily upheld, and several decisions have indicated willingness to do so. Under the approach urged here, the burden would be on the lawyer to initiate discussion about such an agreement and to secure it from the client. On the other hand, courts should not rely entirely upon a law firm's ability to self-protect through waiver letters. To adopt an overly-strict conflict rule on the justification that lawyers can contract around it would only encourage broad, preventive required-waiver policies and practices in law firms. Ultimately, the justification may lead to engagement letters that contain such waivers as boilerplate in all instance. It may also encourage "battle of the forms" situations in which the law firm and the prospective corporate client exchange broadly worded and contradictory recitations of waiver and non-waiver.

Second, accordingly, there is an important role left for sound default rules defining and sensibly limiting corporate-family conflicts, regardless of the possibility that many such conflicts could have been the subject of explicit agreement. In addition to the difficulties sometimes encountered in reaching a fair agreement on conflicts waiver, smaller law firms or those in particular lines of legal work may only infrequently encounter the kinds of problems discussed here, and they certainly should not be penalized (or benefitted) because they had not thought to obtain advance consent. Similarly, occasional corporate clients may insufficiently appre-

likelihood of perceived ethical impropriety on the part of the lawyer should be significantly reduced."'); Rotunda, supra note 102, at 672-73.


273. See supra text accompany note 217; Cf. supra text accompanying notes 213-19 (critiquing position that burden is on corporate-family client to secure agreement from lawyer expanding scope of conflict).
ciate the importance of the question of corporate-family conflicts. They similarly should not be penalized (or benefitted) because of the absence of an agreement about advance consent.

Corporate families have existed in the United States certainly for all of this century, yet lawyers, ethics committees, and academics have until recent years neglected the area of corporate-family conflicts. The problems presented are both important and fairly complex. The preferable method for addressing them requires attention to the background law of corporations and conflicts, as well as appreciation of the business world realities of corporate enterprises in which the varying situations in which the questions of law firm loyalty are presented. Quick-fix tests—always or never including affiliated entities along with the main entity that the law firm represents—constitute either over- or under-inclusive standards. Instead, the functional approach suggested and pursued in the better-reasoned decisions seems far preferable in upholding appropriate objectives of conflicts analysis for lawyers while appropriately respecting the practical demands of both corporate and law firm operations.