When Lawyers Represent Their Adversaries: Conflicts of Interest Arising Out of the Lawyer-Lawyer Relationship

Steven C. Krane
WHEN LAWYERS REPRESENT THEIR ADVERSARIES: CONFLICTS OF INTEREST ARISING OUT OF THE LAWYER-LAWYER RELATIONSHIP

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I. INTRODUCTION: THE PROBLEM

All lawyers have heard the proverb: "He that is his own lawyer has a fool for a client." Regardless of how one may feel about the veracity of that maxim, it is beyond question that lawyers frequently encounter the need for legal services in their own right, and that they often retain other attorneys to provide those services instead of undertaking them themselves. This Article will address the principal ethical issue—the risk of disqualification for conflict of interest—that may arise when a lawyer or law firm chooses to retain an attorney or law firm that happens to be representing a client in an unrelated matter whose interests are adverse to those of a client represented by the retaining lawyer or firm.

There are several contexts in which lawyers may seek out other lawyers to represent them. As discussed below, resolution of the principal ethical issues engendered by the relationship is determined in large part by the factual context in which the relationship arises.

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1. THE QUOTABLE LAWYER § 25.3 (David S. Shrager & Elizabeth Frost eds., 1986) (quoting FACTS ON FILE DICTIONARY OF PROVERBS (Rosalind Fergusson ed., 1983)).

Facile categorization, such as personal versus professional matters, does not provide a sufficient basis on which to analyze the situation. Greater differentiation is required to take into account the subtle distinctions and divergent implications between and among the following situations.

A. Lawyers as People

Lawyers often require the assistance of counsel in their personal affairs. Whether for convenience, or because of a lack of expertise or confidence in the ability to handle the matter pro se, lawyers regularly hire other lawyers to represent them in matters having nothing to do with the area in which they practice or with the "business" of practicing law. Thus, whether for the purchase or sale of a residence, for domestic relations matters, for estate planning matters, or for a variety of other reasons, lawyers often hire other lawyers to provide them with professional services in their individual, private capacities.

B. Lawyers in Their Business Dealings

Lawyers also routinely retain outside counsel to represent them in their business affairs. The practice of law has become a highly competitive business. A lawyer is as much in need of the full range of legal services as any other businessperson. Issues of partnership taxation, real estate leasing, disputes with vendors, and employment litigation are just a few of the business-related matters on which a firm may seek legal guidance. Similarly, outside counsel is often employed to assist in intra-firm disputes, such as litigation arising out of the departure of partners and associated financial and client solicitation issues. While some large law firms may well be able to find

3. It has not always been so perceived, at least by the leaders of the profession itself. For example, Canon 12 of the ABA Canons of Ethics, originally adopted in 1908 and in effect until the adoption of the Code of Professional Responsibility in 1969, admonished lawyers that "the profession is a branch of the administration of justice and not a mere money-getting trade." ABA CANONS OF PROFESSIONAL ETHICS Canon 12 (1967). Any doubts concerning the lack of currency of this view were laid to rest by the United States Supreme Court in Goldfarb v. Virginia State Bar, 421 U.S. 773, 786 (1975), which held that "learned professions," including the practice of law, are engaged in "trade or commerce" within the meaning of the Sherman Act.

this expertise in-house, they also occasionally seek outside advice in complex financial or commercial matters or when other circumstances warrant.

C. Lawyers in Need of Professional Guidance

Lawyers also hire other lawyers when they confront professional quandaries such as client perjury or fraud and other confidentiality concerns, conflicts of interest, and attorney-client disputes. Whether in matters that may give rise to substantial financial exposure or otherwise, the outside counsel they select may be another lawyer in the field or a distinguished ethicist from whom a formal opinion is sought.

D. Lawyers in Trouble

Law firms ordinarily seek outside counsel in times of crisis, such as when charged with malpractice by clients or misconduct by regulatory agencies. Correspondingly, when an individual lawyer is charged with a disciplinary violation (law firms as entities are not subject to professional discipline), the lawyer or the firm may well retain an expert in such matters either to appear as an advocate or to assist through counselling and guidance. Indeed, because most lawyers do not handle such matters on a regular basis, they are more inclined to retain outside counsel given that catastrophic sums of money, their invaluable reputation, or their very right to practice law may be at risk.

E. Lawyers as Co-Counsel

Lawyers also hire other lawyers to assist them in representing their own clients. A lawyer may seek to associate with a practitioner

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7. Cf. Charles W. Wolfram, Modern Legal Ethics § 3.4.1 (Practitioner’s ed. 1986) (discussing right to counsel in attorney disciplinary proceedings); see also Epstein, supra note 5, at 1028-29.
who is more experienced in a particular field of law to counsel or assist the lawyer in specific matters. For example, a lawyer representing a client in the purchase of a business may retain a trademark attorney to help evaluate the strength of the marks being purchased and an environmental lawyer to assess the target company’s exposure with respect to certain of its industrial activities. Doing so is not only good practice, it is often required by fundamental principles of ethics governing lawyer competence. Of course, lawyers whose practice takes them out of their home state regularly retain local counsel to provide a variety of services, including advice on local practices and opinions on issues of state law. Indeed, retention of local counsel in litigated matters is frequently required by local court rule. It is important to bear in mind that, in this context, the retained lawyer does not represent the lawyer, but rather the lawyer’s client. Regardless of who retains the lawyer, or even who pays the bills, the lawyer owes his or her duty of loyalty to the ultimate client.

F. Lawyers as Expert Witnesses

Occasionally, the need arises for lawyers to serve as expert witnesses in judicial proceedings, such as in cases involving the reasonableness of attorneys’ fees, conflicts of interest, malpractice claims, or...
ethical issues. In malpractice cases, for example, the need for expert testimony to establish the standard of care required of a reasonable lawyer is generally recognized. As in the co-counsel context, there should ordinarily be no attorney-client relationship, as such, between the expert witness, who is to opine on factual issues regarding the manner in which lawyers practice law, and the litigant (whether disgruntled client or accused lawyer) on whose behalf the lawyer is to testify.

Various ethical principles are implicated by the retention of lawyers in these factual contexts. For example, by virtue of the need to preserve the confidentiality of information provided by a client to a lawyer, it is generally impermissible to retain or consult with counsel in client-related matters without the client's consent. Additional complications may arise when the hiring lawyer intends to divide the


13. See, e.g., Geiserman, 893 F.2d at 787; Barth, 564 N.E.2d at 1196; Pongonis, 486 N.E.2d at 28; Carlson, 745 P.2d at 1133; Clocker v. Dale, 719 S.W.2d 535 (Tenn. Ct. App. 1986). See generally MALLEN & SMITH, supra note 12, § 27.15, at 668; WOLFRAM, supra note 7, § 5.6, at 211.


15. In the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer.

MODEL CODE, supra note 8, EC 4-2; MODEL CODE, supra note 8, EC 6-3 ("A lawyer offered employment in a matter in which he is not and does not expect to become [competent] should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter." (emphasis added)). See generally MODEL RULES, supra note 8, Rule 1.6(a) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out representation."). Cf. Davis v. York Int'l Corp., No. 92-3545, 1993 U.S. Dist. LEXIS 7137 (D. Md. May 24, 1993) (holding that lawyer lecturing in continuing legal education course did not enter into attorney-client relationship with client of student in course who asked a question regarding a pending matter, as there was no offer or request by the client for legal services).
fee for the matter with the retained counsel. These issues, though of great importance, are ordinarily resolved without significant analytical difficulty. This Article will focus, instead, on a problem that may well give rise to analytical difficulties in certain contexts and that may, unlike associating with an "expert" or dividing a fee, often be perplexing.

Consider the following hypothetical scenario: Louise Lawyer, a solo practitioner, represents plaintiff Modest Industries in a commercial contract litigation against Titanic Enterprises. Titanic is represented in the litigation by Anthony Adversary, who is a member of Megafirm. Lawyer has just been charged by state disciplinary authorities with having mishandled funds she had been holding on behalf of a client (other than Modest Industries). While she insists that she has done nothing wrong and that the charge is groundless, Lawyer recognizes the seriousness of the disciplinary proceedings—the risk of disbarment, suspension or public censure—and seeks to engage, as her attorney, Edward Ethical, a highly respected lawyer in the community who has frequently handled professional responsibility issues raised in litigation. Lawyer's problem is that Ethical is a senior partner in Megafirm.

The answer that has been given by the few authorities that have considered this situation, including ethics committees in New York, New Jersey, Michigan, Illinois, Pennsylvania, Maryland, Iowa, Nebraska, and Kentucky, is that it creates a conflict of interest for both Lawyer and Megafirm, not so much because it would involve them in representing conflicting client interests in the conventional sense, but

16. Model Rule 1.5(e) permits lawyers to divide fees only if:
   (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
   (2) the client is advised of and does not object to the participation of all the lawyers involved; and
   (3) the total fee is reasonable.

MODEL RULES, supra note 8, Rule 1.5(e). New York's disciplinary rules are similar except that: (i) the client must affirmatively consent to the employment of the other lawyer after full disclosure that a division of fees will be made; and (ii) a "written agreement with the client" regarding the assumption of joint responsibility is not required—the lawyers need only give "a writing" to the client confirming that each assumes joint responsibility for the representation. N.Y. JUD. LAW app. DR 2-107(A) (McKinney 1992). The Model Code does not permit a fee division unless: (i) the client consented after full disclosure; (ii) "the division [was] made in proportion to the services performed and [the] responsibility assumed by each"; and (iii) the total fee did not "clearly exceed reasonable compensation for all legal services" provided to the client. MODEL CODE, supra note 8, DR 2-107 (A).
because of the risk that the business or personal interests arising out of the attorney-client relationship between them may somehow impact adversely upon their exercise of independent professional judgment on behalf of their respective clients. These authorities note, however, that the conflict may be cured by obtaining waivers from the affected clients—both of them—reflecting their consent to Lawyer's retention of Megafirm, after full disclosure to each of them of the potential and theoretical risks and disadvantages of the situation.

But Lawyer cannot, as a practical matter, ask Modest for consent. She does not want any of her other clients to know that she has been accused of violating the rules governing the handling of client funds, an ignominious allegation she fully believes she will be able to refute. Must she therefore forego her choice of counsel in these critical circumstances? Is this really the kind of conflict of interest the ethics rules had in mind? Moreover, does it make practical sense? Ethical barely knows Adversary, and he knows even less about Titanic Enterprises or the Modest lawsuit. Adversary and Ethical are in the same room with each other only once a year at the annual firm dinner. Is it reasonable to conclude that Adversary is going to soft-pedal his representation of Titanic because Ethical is serving as Lawyer's counsel in the disciplinary proceeding and Megafirm is receiving a small fee from Lawyer? Is it reasonable to conclude that Lawyer is going to be less aggressive in her advocacy of Modest's rights because of her newly established relationship with the law firm representing Titanic? Is the only real issue whether Lawyer believes that her interests are best served by having Ethical represent her, notwithstanding the fact that Ethical's firm is duty bound to defeat her client's claim? These questions and others will be addressed in this Article. Indeed, there are virtually endless variations on the scenario set forth above. The problem can just as easily arise in a small town, where there only may be a handful of lawyers from which to choose—and all of them adversaries in one setting or another—or where the hiring lawyer is the "megafirm" which could potentially provide a significant income stream to the solo practitioner.

It is the conclusion of this Article that the situation should not be governed by a blanket rule establishing a prerequisite of full disclosure and client consent in all circumstances. Rather, a more flexible approach must be taken that gives due consideration to the reali-

17. See infra part III.A.
ties of the particular circumstances involved. Factors to be weighed would be: (a) the intensity and duration of the relationship between the adversaries; (b) the intensity and duration of the adversaries' relationships with their respective clients; (c) the nature of the lawyer-lawyer representation; (d) the nature of the work currently being performed by the lawyers for their respective clients; (e) the relationship, if any, between the lawyer-lawyer representation and the representation of either client; and (f) the relative importance of the representations to the respective lawyers or firms. Unlike the bright-line test suggested by some authorities, this approach provides for an effective balance between the reasonable expectations of the clients and the legitimate interests of the lawyers.

II. THE ANALYTICAL FRAMEWORK

A. Ethical Paradigms

In resolving any ethical quandary, just as in addressing any other legal problem, a critical step is identifying the issue. Authorities have differed as to the nature of the perceived conflict of interest when a lawyer hires an adversary to provide legal services, and generally choose one of two models. The first is the rule that precludes lawyers from representing a client whose interests conflict with, or differ from, those of another client of the lawyer.\(^8\) The second is the admonition not to represent a client if the lawyer's independent professional judgment on behalf of the client will be affected by the lawyer's own personal or business interests.\(^9\) This Article postulates that only the latter rule is appropriately applied to the lawyer-adversary relationship.

1. Clients with Conflicting Interests

Model Rule 1.7(a) generally prevents a lawyer from representing a client "if the representation of that client will be directly adverse to another client . . . ."\(^20\) Similarly, the Model Code provides, that a lawyer may not accept or continue employment by a client if the lawyer's "independent professional judgment in behalf of [another]

\(^8\) MODEL RULES, supra note 8, Rule 1.7(a); MODEL CODE, supra note 8, DR 5-105(A), (B).
\(^9\) MODEL RULES, supra note 8, Rule 1.7(b); MODEL CODE, supra note 8, DR 5-101(A).
\(^20\) MODEL RULES, supra note 8, Rule 1.7(a).
client will be or is likely to be adversely affected . . . or if it would be likely to involve [the lawyer] in representing differing interests,” which are defined as including “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.”

Both provisions allow the affected lawyer to proceed with the representation, subject to certain limitations, if the consent of the affected clients is obtained.

Although it could be argued that the provisions of the Model Code and the Model Rules differ as to the degree of adversity required to give rise to a disqualifying conflict of interest, there is no dispute that both apply only when one lawyer or firm has two or more clients whose interests differ or conflict. This does not mean that the lawyer must represent both clients in connection with the matter in which their interests differ; indeed, no one would suggest that Megafirm could represent both Modest Industries and Titanic Enterprises in the litigation between them, even with their consent.

Rather, the rules prevent a lawyer from taking action on behalf of one client that is contrary to the interests of another client. That the matters are unrelated is immaterial. Thus, Megafirm could not represent Titanic Enterprises in the Modest Industries suit if, for example, it regularly advised Modest on customs law issues, unless both

21. Model Code, supra note 8, DR 5-105(A), (B). The Model Code also provides: The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of [the] client and free of compromising influences and loyalties. Neither [the lawyer’s] personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute [the lawyer’s] loyalty to [the] client.

Id. EC 5-1.

22. See also Restatement (Third) of the Law Governing Lawyers § 201, (Tentative Draft No. 4, 1991) [hereinafter Restatement Third]. Section 201 provides:

Unless all affected clients consent to the representation under the limitations and conditions provided in § 202, a lawyer may not represent a client if the representation would constitute a conflict of interest. A conflict of interest 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 own interests or by the lawyer’s duties to another current client, to a former client, or to a third person.

Id.


24. Model Rules, supra note 8, Rule 1.7(a); Model Code, supra note 8, DR 5-105(A), (B).
Titanic and Modest consented in the manner provided in the applicable rule.

2. Lawyer's Personal or Business Interests

It is also considered a conflict of interest under Model Rule 1.7(b) for a lawyer to accept or continue representing a client if that representation "may be materially limited by . . . the lawyer's own interests . . . ." Model Code DR 5-101(A) similarly bars a lawyer from "accept[ing] employment if the exercise of his professional judgment on behalf of his client . . . may be affected by his own financial, business, property or personal interests." This rule is designed to protect a single attorney-client relationship from being adversely affected by, broadly speaking, the personal interests of the lawyer. For example, Lawyer would violate these rules if, without properly obtaining Modest's consent after full disclosure, she initiated a substantial lawsuit on behalf of Modest against Little Co., a corporation in which Lawyer had made what to her was a major personal investment. There, the presumed risk would be that Lawyer would have an interest in repressing her zealouslyness on behalf of Modest to avoid jeopardizing her investment in Little Co.

3. Choosing the Right Rubric

In the hypothetical scenario discussed above, Lawyer is not representing two clients with conflicting interests. She is representing a single client, Modest, whose interests conflict with an entity being represented by the same law firm that is representing her in the disciplinary proceeding. The rule prohibiting the representation of two clients with conflicting interests simply does not apply. The only rule even arguably applicable to Lawyer is that based on the lawyer's own personal or business interests. On the other side are Adversary and Ethical who, with their firm, must be considered a single lawyer for conflict of interest purposes. Megafirm would represent both Titan-

25. MODEL RULES, supra note 8, Rule 1.7(b).
26. MODEL CODE, supra note 8, DR 5-101(A).
27. See also RESTATEMENT THIRD, supra note 22, § 206. Section 206 provides:
   Unless the affected client consents to the representation under the conditions and limitations provided in § 202, a lawyer may not undertake or continue to represent a client if a substantial risk exists that a financial or other personal interest of the lawyer will materially and adversely affect the lawyer's representation of the client.
28. MODEL RULES, supra note 8, Rule 1.7(b); MODEL CODE, supra note 8, DR 5-101(A).
29. See MODEL RULES, supra note 8, Rule 1.10(a); MODEL CODE, supra note 8, DR 5-
ic and Lawyer, the attorney representing the party adverse to Titanic. Here, the differences between the Model Code and the Model Rules are of some significance. Model Rule 1.7(a) only applies if the representation of one client "will be directly adverse" to another client.\(^\text{30}\) The Comments to that provision explain that "simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients."\(^\text{31}\) While Megafirm's situation does not quite reach that degree of attenuation, the fact remains that Megafirm is not representing Modest, but only the lawyer for Modest.\(^\text{32}\) The Model Code, in contrast, could be viewed as fixing a lower threshold of adversity. The new representation must only be "likely" to "affect" the lawyer's independent professional judgment on behalf of a client before a conflict arises under DR 5-105.\(^\text{33}\) This hazy language is susceptible to unduly broad interpretations, and has sometimes resulted in unwarranted expansion of the rule to preclude lawyers from accepting matters that have only secondary or tertiary impacts on an existing client.\(^\text{34}\)

In any event, the rule is inapplicable to Megafirm's situation, which is appropriately analyzed under the "lawyer's personal or business interest" rules. Megafirm owes a fiduciary duty and a duty of loyalty to Lawyer, just like any other client.\(^\text{35}\) The firm is also receiving money from Lawyer, which gives Megafirm a financial interest in perpetuating its relationship with Lawyer. Although, as dis-

\(^\text{30}\) Model Rules, supra note 8, Rule 1.7(a).

\(^\text{31}\) Id. at cmt.

\(^\text{32}\) For a discussion regarding the possible need to treat both Modest and Lawyer, for conflict of interest principles, as the "client" in these circumstances, see infra text accompanying notes 100-01.

\(^\text{33}\) Model Code, supra note 8, DR 5-105(A), (B).


cussed below, serious questions can be raised as to whether these facts truly have an effect on the attorney-client relationship, the lawyer's personal or business interest rules provide the proper rubric for analysis.

B. Prior Efforts at Resolution

The ethical issues posed by a lawyer's retention of adversary counsel have been addressed mainly in a handful of bar association ethics opinions. The discussion below will focus on those opinions.

1. The Per Se Prohibition

In 1939, the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York ("New York City Committee") issued the first opinion to confront the issue, opinion number 502 ("New York City 502"). The opinion addressed a situation in which, during the course of litigation, the inquiring lawyer ("A") had become acquainted with the attorney representing the adversary ("B"). B then hired A to perform legal services for B's clients, such as arguing motions and preparing briefs. A, who continued to represent his client in the litigation, inquired as to whether his conduct was proper. The New York City Committee, citing Canon 6 of the ABA Canons of Professional Ethics, ruled that the

36. Research uncovered only one judicial decision that specifically addressed problems associated with the adversary-client. In Zuck v. Alabama, the court held that a criminal defendant had been denied the effective assistance of counsel because his defense attorneys represented the prosecutor in an unrelated matter. 588 F.2d 436 (5th Cir.), cert. denied, 444 U.S. 833 (1979). Voicing the concern that "the defense attorneys were subject to the encumbrance that the prosecutor might take umbrage at a vigorous defense of Zuck and dispense with the services of their firm[,] . . . a conflict [that] could conceivably have infected the entire trial," the court ruled that the defendant's Sixth Amendment rights had been violated. Id. at 439-40.


38. Id.

39. Id.

40. Id.

41. CANONS OF PROFESSIONAL ETHICS Canon 6 (1908) provided as follows:

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

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires
inquirer, A, could not accept employment from his adversary, B, even if all affected clients gave their consent:

It may well be that none of the matters in which A acts for B adversely affect any interest of the clients of A's firm or of A, yet we think that so long as B is actively engaged in any litigation as an opposing counsel to A, A should not accept retainers from B, because to do so might make it difficult for A to represent the client with undivided fidelity. Although A and B may intend to act in the utmost good faith, the natural human impulse of A would be to avoid offending B. Under these circumstances, we think that during any period while A and B are actively engaged in litigation on opposite sides, it would be improper for A to accept retainers from B and for B to offer retainers to A. 42

New York City 502 therefore purported to create a per se ban against lawyers accepting employment from adversary counsel. Curiously, the New York City Committee had reached a conflicting conclusion five years earlier in its Opinion Number 307, albeit in a slightly different factual setting. 43 There, the inquiring lawyer had retained counsel in Chicago to assist in the prosecution of certain claims of his clients. 44 Defense counsel in that case asked the inquirer whether he would be willing to handle some unrelated matters in New York. 45 The New York City Committee, citing no authority, held that the arrangement presented a consentable conflict:

[The Committee sees no objection to the establishment of professional relations between the two attorneys upon new matters that have no connection whatever with litigation in which such attorneys have represented clients with conflicting interests, provided the fact is disclosed to the client, and no objection thereto is raised. 46

This opinion is not cited in New York City 502.

42. New York City 502, supra note 37.
44. Id.
45. Id.
46. Id.
An approach similar to that of New York City 502 was taken by the Committee on Professional and Judicial Ethics of the State Bar of Michigan ("Michigan Committee") over forty years later in its informal opinion, which addressed an inquiry from a lawyer who represented another lawyer in a divorce action. The inquirer wished to represent another client in a divorce action in which his lawyer-client represented the adversary. The Michigan Committee concluded that this would be improper, but based its decision chiefly upon confidentiality concerns:

While attorney Z's divorce action and Mrs. X's divorce action are presumably completely unrelated factually, we believe there is still an ethical difficulty under DR 4-101. It seems inevitable that your representation of attorney Z will make you privy to his views as to appropriate litigation tactics, negotiating techniques, property division, support levels, and the like. We believe such matters would be "secrets" as defined in DR 4-101(A), and accordingly you could not reveal such matters without attorney Z's informed consent, which it would seem attorney Z's obligation to Mr. X would prohibit him from giving.

The Michigan Committee proceeded also to determine that the representation would be improper under DR 5-105, observing conclusorily that it would be "difficult to see how the independence of your professional judgment in the one matter would not be adversely affected by your involvement in the other." Consent was not available to cure this conflict because the preconditions of DR 5-105(C) were not met. In the eyes of the Michigan Committee, because of the "clear appearance of impropriety" that dual representation would create, it was not "obvious that [the lawyer could] adequately represent [each client's] interest."

More recently, the New Jersey Supreme Court Advisory Committee on Professional Ethics ("New Jersey Committee") embraced this rigid approach and branded as unethical a lawyer's representation in a personal injury matter of a client/attorney who was also the

48. Id.
49. Id.
50. Id.
51. Id.
lawyer’s adversary in an unrelated contract case, notwithstanding the fact that both clients in the contract case had consented after full disclosure.\textsuperscript{53} Conceding that the representation would not be improper under the conventional conflict of interest rules embodied in the Model Rules,\textsuperscript{54} the New Jersey Committee relied solely upon the New Jersey ethics rule barring representation "in certain cases or situations creating an appearance of impropriety rather than an actual conflict."\textsuperscript{55} Specifically, the New Jersey Committee felt that the public might conclude "that the inquiring attorney or the client/attorney may obtain unfair advantages and that the inquiring attorney may, in some manner, suppress vigorous representation to preserve his relationship with his client/attorney."\textsuperscript{56}

These opinions stand for a broad, unquestioning prohibition against lawyers entering into attorney-client relationships with their adversaries, even in materially unrelated cases. For the reasons discussed below, such a view ignores the substance of the affiliation and exaggerates—by failing even to evaluate—the minimal reasonably foreseeable risks that the adversary-client relationship poses to clients.

2. The Flexible Approach

At the other extreme are opinions such as Iowa Formal Ethics Opinion 92-28,\textsuperscript{57} which found no impropriety whatsoever in the proposed representation of an adversary:

You state that in your community of 8000 you and lawyer A frequently are adversaries in litigation. A personal injury action has been brought against him in his personal, non-lawyer, part-owner-ship of an apartment building [sic]. His insurance carrier has requested you to defend him.

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\textsuperscript{53} Id.
\textsuperscript{54} See MODEL RULES, supra note 8, Rule 1.7(a), (b).
\textsuperscript{55} N.J. R. PROF. CONDUCT 1.7(c)(2) ("Multiple representation is not permissible \ldots in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients."). The nebulous "appearance of impropriety" standard, which was contained in Canon 9 of the Model Code, was specifically rejected by the drafters of the Model Rules. See MODEL RULES, supra note 8, Rule 1.9 cmt. (noting that disqualification should be based on a "functional analysis," not the "very general concept" of the "appearance of impropriety").
\textsuperscript{56} New Jersey 678, supra note 52, at 3 (1994).
In actual practice lawyers are entitled to be defended by counsel even as nonprofessionals are. The mere fact that the lawyers involved have been adversaries in other, non-related litigation should not affect their professional responsibilities or conduct.

It is the opinion of the committee that there is no impropriety in this proposed representation.³⁸

Opinion 86-45 of the Professional Guidance Committee of the Philadelphia Bar Association ("Philadelphia Committee")⁵⁹ reflects a conclusion almost as stark as that of the Iowa opinion. In its entirety, the Philadelphia opinion states:

INQUIRY: Inquirer represents a minor in a personal injury matter. The defendant is represented by a law firm which represents inquirer and his family in personal matters having nothing to do with this personal injury action. Inquirer wants to know whether there is any conflict.

OPINION: Chairman advised inquirer that there is no conflict. Chairman suggested to inquirer that he might wish to disclose the situation to his client (or the client’s legal representative) to avoid any potential embarrassment should the matter be raised otherwise.⁶⁰

In essence, the Philadelphia Committee viewed the matter as one of client relations, not of ethics.

At least part of the Committee on Ethics of the Maryland State Bar Association ("Maryland Committee") also embraced this more progressive approach. In its Opinion 82-4,⁶¹ the Maryland Committee was presented with the following circumstances: A partner in the inquirer’s law firm was defending Attorney X in a legal malpractice action, while Attorney X was representing a client in an unrelated personal injury claim against a party being represented by the inquirer’s law firm.⁶² The Maryland Committee recognized that the situation was "one step removed" from the conventional problem of having a client as an adverse party (i.e., the circumstance addressed by Model Rule 1.7(a) or Model Code DR 5-105), and expressed the view that "the fact that you represented a fellow member of the bar

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³⁸. Id. (emphasis added).
⁶⁰. Id. (emphasis added).
⁶². Id.
in a legal malpractice action does not necessarily mean that your firm and your client-attorney may not represent clients who have opposing interests in an unrelated matter.\textsuperscript{63}

The Maryland Committee proceeded to address the problem based on the \textit{nature of the matters in question}.\textsuperscript{64} Instead of applying a mechanical rule based solely on structural considerations, i.e., who was representing whom, the Maryland Committee expressed a clear willingness to look at the facts and assess the risks to the respective clients if the representation was permitted to continue.\textsuperscript{65} Opinion 82-4 proceeds with a thoughtful analysis of the facts and circumstances, observing that defense of a client in a personal injury action does not place the lawyer in a position of having to attack the competency or integrity of the client-attorney (which could be disadvantageous to the client-attorney in the malpractice case), and that defending a case in an unrelated matter that the client-attorney is prosecuting does not imperil confidences or secrets of the client-attorney learned in the course of the malpractice case.\textsuperscript{66} The Maryland Committee continued:

Objectively speaking, then, your law firm may competently and vigorously defend Attorney X in a legal malpractice action while at the same time maintain a professional adversarial relationship in matters that are completely unrelated to the malpractice claim. However, depending on the seriousness of the malpractice claim against him and on the degree of personal and professional ego involvement that has developed in the relationship between Attorney X and the partner who represents him, Attorney X may be adversely affected by appearing as opposing counsel against a member of your firm.

Furthermore, even though Attorney X and the members of your firm appearing as opposing counsel may quite honestly believe that their exercise of independent professional judgment may not be adversely affected, either or both personal injury clients may be concerned that their interests will not be as zealously protected or defended as a result of the attorney-client relationship established between Attorney X and your firm.\textsuperscript{67}

The Maryland Committee did not take the logical next step, however, and opine that if, from an objective standpoint, the inde-
Dependent professional judgment of the lawyers was not likely to be compromised, neither disclosure nor consent of the clients was required. Indeed, here the Maryland Committee divided. The majority expressed the view that, in the circumstances, "full disclosure should be made to the personal injury clients" and their consent obtained before the representation could be undertaken. The Maryland Committee was also divided as to whether the nature of the representation of Attorney X needed to be described for the personal injury clients, the view that the clients need only be told "that the representation involves a separate, independent personal matter, without specifying the nature of the representation" having greater support.

A minority of the Maryland Committee expressed the view that "representation of a fellow member of the bar in a legal malpractice action does not necessarily satisfy the standards set forth in DR 5-105(A) and (B) that the independent professional judgment of the lawyer 'will be or is likely to be adversely affected.'" Only if the attorneys determined that there was a potential adverse impact on their independent professional judgment, the minority observed, would the consent provisions be applicable. "The minority believes that the decision of the majority is painted with too broad a stroke and should not be applicable to all factual situations."

More recently, the Ethics Committee of the Kentucky Bar Association ("Kentucky Committee") echoed the reasoning of the Maryland dissent. While strongly suggesting that the affected clients be consulted, at least in cases in which the lawyer-lawyer representation involves litigation, the Kentucky Committee observed:

In both litigation and non-litigation settings the question is whether the representation of any of the lawyer's clients may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests. . . . It is conceivable that a lawyer might reasonably come to the conclusion that the representation of the client or clients will not be materially limited, particularly if the representation occurs in a non-litigation setting. If some concern is presented by the facts and circumstances

68. See infra part III.A.
69. Maryland 82-4, supra note 61.
70. Id.
71. Id.
72. Id.
73. Id.
of the case, then consent may cure the conflict; but only if the lawyer reasonably believes that the representation will not be adversely affected and if the client consents after consultation.75

These opinions reflect a refreshing willingness to look at the substance of the affiliation, instead of strictly its structure, in determining whether and to what extent a conflict of interest exists.76

3. The Travesty of New York State 579

The most prominent and comprehensive opinion on adversary-client relationships is also the most susceptible to criticism. In its Opinion 579, released in 1987 ("New York State 579"),77 the New York State Bar Association Committee on Professional Ethics ("New York Committee") espoused an unfortunate adulteration of the conflict of interest rules, and then misapplied its misbegotten rule to the facts presented.78 The consequence was a ruling that suffered representation of an adversary only when there was no conceivable conflict, and then only with client consent.79

To its credit, the New York State Committee rejected—at least facially—the per se approach of New York City 502 and concluded that a lawyer ("Attorney A") could agree to represent an adversary ("Attorney B") in a personal and unrelated matter, provided all of the clients involved in the litigation consented.80 It did so, however, on the basis of a rule purely of its own construction:

It is the view of this Committee that the Code does not mandate a per se disqualification. In the first instance, both Attorney A and Attorney B must satisfy themselves that the creation of an attorney-client relationship between them will not compromise in any way the representation of their existing clients in the pending litigation in which they represent adverse parties. If there is doubt in the mind of either attorney that the dual representation by Attorney A might affect any settlement recommendation, litigation strategy or

75. Id. (citations omitted).
76. See Cal. R. Prof. Conduct 3-320 ("A member [of the California State Bar] shall not represent a client in a matter in which another party's lawyer is a . . . client of the member . . . unless the member informs the client in writing of the relationship." (emphasis added)). See generally Arthur Garwin, When Lawyers Need Lawyers, A.B.A. J., Mar. 1994, at 97.
78. See id.
79. Id.
80. Id.
other professional judgments either attorney might be called upon to make on behalf of those existing clients, then Attorney A should decline the proffered employment. If, on the other hand, both attorneys are confident that representation of their existing clients will not be compromised in any manner by Attorney A's acceptance of Attorney B as a client in an unrelated matter and if the existing clients in the pending litigation both give their informed consent to the dual representation following full disclosure, then Attorney A may properly accept employment by Attorney B.81

The New York State Committee's analysis, to the extent it is discernible, is open to attack. While the opinion cites both DR 5-101 and DR 5-105, it never states which—if either—provision applies to Attorney A (or to Attorney B, for that matter).82 In fact, the New York State Committee applied neither 5-101 nor 5-105, but instead invented the following test: whether the arrangement will "compromise in any way the representation of their existing clients in the pending litigation in which they represent adverse parties."83

New York State 579 proceeds to require client consent even if "both attorneys are confident that representation of their existing clients will not be compromised in any manner . . . ."84 This requirement is not justified by any provision of the Model Code. In reality, it is contrary to DR 5-101 and DR 5-105, the very provisions upon which it purports to be predicated. DR 5-101(A), the provision that rightfully applies, requires client consent only when a lawyer's professional judgment on behalf of a client will be, or reasonably may be, affected by the lawyer's own interests.85 If the standard of New York State 579 is satisfied, that is, the representation of both clients "will not be compromised in any manner," DR 5-101(A) has not even been violated, and there is no conflict for any client to waive.

Similarly, if the representation of the clients in question "will not be compromised in any manner" by the proposed retention of adversary counsel, it cannot be the case that the independent professional judgment of the lawyers "will be or is likely to be adversely affected," nor would either lawyer be involved in representing an interest that "will adversely affect either the judgment or the loyalty of [the]
lawyer to a client." Hence, if New York State 579's synthetic standard is satisfied, DR 5-105 has not been violated either, and again there is no conflict for any client to waive.

What, then, does New York State 579 mean? The New York State Committee requires the lawyer to decline the proffered representation of adversary counsel if there is any doubt in either attorney's mind that the representation of their existing clients in the pending litigation in which they represent adverse parties could be compromised in any way. The Opinion, in effect, creates a substantially lower threshold for disqualification in cases of attorney-adversary representations by purporting to prohibit such representations outright if either attorney has lingering "doubts." Because indecision alone mandates disqualification without any provision for cure through informed client consent, New York State Opinion 579 purports to apply a per se standard remarkably higher than that required by the New York Code of Professional Responsibility. Thus, the New York State Committee in New York State 579 not only created an ad hoc standard for cases of lawyer-adversary retention, it purported to impose an enhanced and unprecedented burden on lawyers: to obtain the consent of their clients to a proposed representation even in the absence of a conflict of interest.

The New York State Committee was not alone, however, in its approach. One of the opinions it cited was Opinion 822 of the Advisory Committee on Professional Conduct of the Illinois State Bar

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86. New York State 579, supra note 77, at 4; MODEL CODE, supra note 8, DR 5-105(A), (B).
87. New York State 579, supra note 77.
88. Nassau County (New York) Opinion Number 2/88 held that consent was required in similar circumstances because of the "appearance of impropriety" language in Canon 9 of the Code. Nassau County Bar Ass'n, Op. 2/88 (1987). New York State 579, released several months earlier, was not cited. It is generally recognized, however, that unless the proceedings are likely to be tainted, "appearance of impropriety is simply too slender a reed on which to rest a disqualification order." Board of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979). See generally 1 GEOFFREY C. HAZARD, JR. & WILLIAM HODES, THE LAW OF LAWYERING § 1.9:107 (2d ed. 1990). But see Solow v. W.R. Grace & Co., 632 N.E.2d 437 (N.Y. 1994). Similarly, Nebraska State Bar Association Advisory Opinion Number 93-1, citing New York State 579, held "that an attorney may represent another attorney while opposing that attorney in pending litigation only in limited circumstances," and that full disclosure and consent from the client in the affected litigation was a prerequisite. Nebraska State Bar Ass'n, Op. 93-1 (1993). Ultimately, the Nebraska Committee ruled that the inquiring lawyer, who was serving as guardian ad litem for numerous children, was not in the position of an attorney at all, but was deemed to be a parent under the law. Id.
Association ("Illinois Committee"), released in 1983. The question presented to the Illinois Committee was described as follows:

Lawyer A and Lawyer B frequently represent clients adverse to each other and at present are involved in several cases in which their clients are on opposite sides. Lawyer A wishes to engage Lawyer B to represent him in a suit in which A is a party and our opinion is sought as to whether Lawyer B may accept such employment.  

Rejecting a prior opinion that had established a per se ban in analogous circumstances based on the "appearance of impropriety," the Illinois Committee relied instead on DR 5-105 and concluded that:

While it is possible that others may question the propriety of representing a lawyer while, at the same time, representing clients with positions adverse to that lawyer's clients, we find nothing presented in the facts justifying speculation that either A or B's clients will be prejudiced or harmed by such representation. We further see no appearance of impropriety which, standing alone, automatically would preclude Lawyer B from accepting employment by Lawyer A.

Nevertheless, the Illinois Committee concluded that both lawyers were compelled "to make full disclosure of such representation to those clients affected and to obtain consents from each of them." The root of this requirement was not that the lawyers' independent professional judgment would or would likely be adversely affected as required by DR 5-105, but only "[b]ecause of the possibility that such representation could affect Lawyer B's independent professional judgment." As discussed above, DR 5-105 requires at least a likelihood that the attorney's independent professional judgment will be adversely affected, or that a likelihood that the lawyer will be involved in representing an interest that will affect the judgment or loyalty of the attorney to a client.

90. Id.
91. Id. (citing Illinois State Bar Ass'n Advisory Comm. on Professional Conduct, Op. 724 (1981)).
92. Illinois 822, supra note 89, at 3.
93. Id.
94. Id. (emphasis added).
95. MODEL CODE, supra note 8, DR 5-105. Recently, the Illinois Committee revisited the issue in Opinion 92-18. See Illinois State Bar Ass'n Advisory Comm. on Professional Conduct, Op. 92-18 (1993). Following the adoption of the Model Rules in Illinois, the Illi-
III. THE APPROPRIATE STANDARD

The principal observation that can be made, based on the foregoing review of the authorities that have grappled with the conflict of interest issues in the adversary-client context, is that there is no agreement as to either the identity of the proper standard or the manner in which it should be applied. This Article proposes that analysis of tangible fact, and not rigid formalism, is the only sensible method for resolving these matters. Each situation must be evaluated independently in light of its peculiar circumstances. Notwithstanding the appearance of clarity and neatness, and thus the attractiveness, of bright-line rules, their inherent inflexibility is unjustified in the absence of recurring facts and palpable guideposts. Therefore, when a determination must be made based on an interrelated series of judgments and predictions, a bright-line rule is ineffectual, if not pernicious.

A. Developing a Flexible Approach

Let us return to the hypothetical posited above. Louise Lawyer is contemplating entering into an attorney-client relationship with a partner in a law firm that is representing an adverse party in an unrelated litigation she is handling for a client. Because Lawyer is not taking on a new client, there can be no concern that her independent professional judgment on behalf of her client, Modest Industries, will be adversely affected by her representation of another client, as under DR 5-105 or Rule 1.7(a). Those rules are simply inapplicable to her. Reference must instead be made to the rules designed to protect a client relationship from being adversely affected by the personal interests of the lawyer.96

Having identified the proper "pigeon-hole," at least from Lawyer's standpoint, the next step in the analysis is to determine

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96 See MODEL RULES, supra note 8, Rule 1.7(b); MODEL CODE, supra note 8, DR 5-101(A). See generally LAWYER'S INTERESTS ADVERSE TO CLIENT, Laws Man. on Prof. Conduct (ABA/BNA) § 51:401 to :414 (Feb. 28, 1990).
whether the applicable rules are triggered by Lawyer’s retention of Edward Ethical. Model Rule 1.7(b) would prevent Lawyer from continuing her representation of Modest Industries (absent consent) if that representation may be materially limited by her own interests.97 Similarly, Model Code DR 5-101(A) would bar Lawyer from continuing to represent Modest (absent consent) if the exercise of her independent professional judgment on behalf of Modest will be or reasonably may be affected by her own financial, business, property or personal interests.98

What “interest” of Lawyer could have such an impact? Her primary interest is in having the disciplinary charges against her dismissed, and for this reason she has sought out Edward Ethical of Megafirm. The theoretical risk to Modest is that Lawyer will be less inclined to take aggressive positions against Megafirm to preserve her personal business relationship with Ethical. For this risk to be a legitimate one, however, there must also be a corresponding risk that Ethical would be less inclined to fulfill his duty to be a zealous advocate on Lawyer’s behalf because she is being too formidable an adversary in the Modest v. Titanic case. In other words, Lawyer would have no reason to muzzle her representation of Modest unless she reasonably believed that Ethical would be a less effective lawyer on her behalf if she were an aggressive advocate. The risks are interrelated, and cannot be assessed without some evaluation of specific facts surrounding Megafirm’s representation of Titanic, tempered by the reasonableness imparted by the objectivity traditionally brought to bear when assessing conflicts of interest.

Megafirm similarly cannot agree to represent Lawyer unless it also resolves any conflict of interest problems it may have. Megafirm’s financial or business interests theoretically could impinge upon its independent professional judgment on behalf of Titanic if, for example, its interest in preserving the income stream from Lawyer is of a sufficient magnitude that it is tempted to be less aggressive in the course of its representation of Titanic in order to avoid offending Lawyer. This risk may be significant, or it may be laughable. The key assessment is whether the materiality to Megafirm of the income stream from its representation of Lawyer so substantially exceeds the importance of the firm’s relationship with Titanic that the enticement will exist for the firm to violate its ethical duties to the latter. This is

97. See discussion supra part II.A.2.
98. See discussion supra part II.A.2.
not simply an accounting question, but is dependent upon a variety of factors relating to the scope and duration of the attorney-client relationships and the functions being performed by the firm for the respective clients.

Does Megafirm also have a problem by virtue of its representation of clients with differing or conflicting interests? Absent extreme circumstances, it does not. As noted above, Model Rule 1.7(a) prevents a lawyer from representing a client "if the representation of that client will be directly adverse to another client." Model Code DR 5-105 states that a lawyer may not accept or continue employment by a client if the lawyer's "independent professional judgment in behalf of [another] client will be or is likely to be adversely affected... or if it would be likely to involve [the lawyer] in representing differing interests," which are defined as including "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."100

The two clients being represented by Megafirm are not Modest and Titanic, but Lawyer and Titanic. While there most certainly is a relationship between Modest and Lawyer, it can by no means be inferred that Modest and Lawyer have such a unity of interest that they must be considered one and the same for conflict of interest purposes. Indeed, in a variety of contexts, distinctions are made between even more closely related persons or entities for purposes of determining the identity of the client. Most prominent among these distinctions is that between a corporation and its constituents; a lawyer who represents the corporate entity does not automatically also represent its officers and directors, notwithstanding the fact that a corporation can only act through officers, directors, employees, shareholders, and other constituents.101 Similarly, the contract that gives rise to the attorney-client relationship does not merge the two into a single unit.

This is not to say that lawyers and clients can never be considered "the same" for conflict of interest purposes. Although it is not inconceivable, it would only be in an extreme case that the intimacy and intensity of the attorney-client relationship would counsel in favor

99. See discussion supra part II.A.1.
100. See supra note 21 and accompanying text.
101. See MODEL RULES, supra note 8, Rule 1.13 & cmts.; MODEL CODE, supra note 8, EC 5-18; N.Y. JUD. LAW app. DR 5-109(A) (McKinney 1992).
of deeming the lawyer to be so closely aligned with his or her client in certain matters as to make representation of the lawyer tantamount to representation of the client, or vice versa. To illustrate, consider that a lawyer who has devoted seventy-five percent of his time for the last twenty years to the representation of a single client is plainly more closely aligned with the client than a lawyer who represents the client in an isolated short-lived case. More likely, however, the only reason to equate lawyer and client would be if confidential information imparted by the one would be useful in the representation adverse to the other; this would raise concerns wholly apart from any conflict of interest. In any case, as with the other aspects of this analysis, the facts surrounding the attorney-client relationship must be examined; bright-line rules are inappropriate.

Thus, in determining whether it must also look to the concurrent representation rules of the Model Rules or Model Code, Megafirm must first assess whether Lawyer and Modest Industries must be considered a single client for conflict of interest purposes. Even if the concurrent representation rules did apply, Megafirm would still have to assess the degree, if any, to which its representation of Titanic is likely to be adversely affected by its representation of a person deemed to be part of Titanic’s adversary. This, too, is a fact-specific determination. Our hypothetical contains no facts to suggest that the Lawyer-Modest affiliation is anything more than the standard, arm’s-length attorney-client relationship.

In sum, absent some unusual circumstance justifying agglomeration of the represented lawyer and his or her client, it is the connection between the two lawyers that is viewed as the potential contaminant in the pre-existing attorney-client relationships. Several factors, suggested in whole or in part by the ethics committee opinions discussed above, should be taken into account in judging whether the risk of contamination is sufficiently great as to require the consent of the clients to the proposed lawyer-lawyer representation: (a) the

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103. See discussion supra part II.B.
intensity and duration of the relationship between the adversaries; (b) the intensity and duration of the adversaries' relationships with their respective clients; (c) the nature of the lawyer-lawyer representation; (d) the nature of the work currently being performed by the lawyers for their respective clients; (e) the relationship, if any, between the lawyer-lawyer representation and the representation of either client; and (f) the relative importance of the representations to the respective lawyers or firms.

None of these factors should be dispositive; they are not set forth in order of relative importance. They are a means by which an objective viewer can divine the tangibility of a sufficient risk to the representation of an existing client to justify disclosing the lawyer-lawyer affiliation to the clients and conditioning that affiliation upon securing client consent.

B. Practical Applications of the Flexible Approach

Analyzing our hypothetical against this framework results in the conclusion that there is no conflict of interest for either Lawyer or Megafirm. From Megafirm's perspective, its long-standing and highly lucrative relationship with Titanic is far more important to it than the transitory representation of Lawyer. Lawyer and Ethical did not have any relationship with one another prior to the current representation. There is no apparent relationship, either factually or substantively, between the disciplinary charges against Lawyer and the Modest v. Titanic case, thereby substantially eliminating the risk that confidential information received from Lawyer in her capacity as client would be used to her disadvantage or otherwise misused. In addition, even though Adversary and Ethical must be treated as one for conflict of interest purposes,104 the separation between the two attenuates substantially any residual effect the Lawyer-Ethical affiliation might have on the Modest v. Titanic case being handled by Adversary. Hence, the risk that Titanic will be ill-served by virtue of its law firm's retention by Lawyer is negligible.

If any factor points to a different conclusion, it is the nature of the firm's representation of Lawyer. Megafirm's duty to advocate dismissal of the conversion charges against Lawyer may result in a reluctance to make personal attacks against her, including seeking

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104. See Model Rules, supra note 8, Rule 1.10(a); Model Code, supra note 8, DR 5-105(D).
sanctions on behalf of Titanic, for fear of jeopardizing her position before the disciplinary authorities. But this unwillingness does not implicate the merits of the Modest-Titanic dispute. A lawyer's professional responsibilities must take into account the role of professional courtesy in the adversarial process. Lawyers are not required to press every procedural advantage they might obtain against their colleagues, even if their clients might prefer that they do so.\textsuperscript{105} As long as the lawyer and the client agree upon the objectives of the representation, and the lawyer pursues those objectives in a manner consistent with the standards of practice of the legal community, the lawyer is not ethically bound to do more.\textsuperscript{106}

Thus, Megafirm may undertake the representation of Lawyer without having to consult and obtain the consent of Titanic. It is important to bear in mind that, under the applicable rules, even if Megafirm reasonably concluded that it did have a business or professional interest that conflicted with its duty to Lawyer, the only client that would have to consent would be Lawyer herself, and not Titanic. Model Rule 1.7(b) and Model Code DR 5-101(A), only require consent of the client whose representation is likely to be adversely affected. The client presumptively favored has no right, and no reason, to veto the lawyer-lawyer relationship.\textsuperscript{107}

From Lawyer's perspective, the situation is not substantially different. She is perfectly capable of reaching the conclusion that the only client realistically at risk of having a less-than-zealous representation is herself. Any thought that Lawyer's aggressive prosecution of Modest's claims against Titanic is likely to be dampened by her desire not to offend Megafirm and risk having a substandard representation before the disciplinary body is unreasonable because of the realities of the situation at Megafirm. Certainly, such a result cannot and should not be presumed, particularly if counterbalanced by a long-standing and important professional relationship between Lawyer and Modest. Thus, in the absence of objective facts indicating that

\textsuperscript{105} MODEL RULES, supra note 8, Rule 1.2 cmt; MODEL CODE, supra note 8, DR 7-101(a)(1).

\textsuperscript{106} See MODEL RULES, supra note 8, Rule 1.2(c); Kane, Kane & Kritzer, Inc. v. Altugen, 165 Cal. Rptr. 534 (Ct. App. 1980); Johnson v. Jones, 652 P.2d 650 (Idaho 1982); Delta Equip. & Const. Co. v. Royal Indem. Co., 186 So.2d 454 (La. 1966); Martini v. Leland, 455 N.Y.S.2d 354 (Civ. Ct. 1982); WOLFRAM, supra note 7, § 13.3.6; cf. FREEDMAN, supra note 35, at 57-64.

\textsuperscript{107} See RESTATEMENT THIRD, supra note 22, § 206 (stating that only the "affected client" must consent if a lawyer's personal interest affects the representation of a client).
Megafirm is likely to represent Lawyer with less vigor if she is too contentious in her dealings with Adversary, Lawyer need not seek the consent of her client, Modest, to her retention of Ethical in the disciplinary matter.

It would be impossible to attempt to address every conceivable combination of factors and their implications under the conflict of interest rules. Suffice it to say that, viewed objectively, there will be circumstances in which it is clear that there is no conflict of interest for either lawyer, circumstances in which it is clear that both lawyers have a conflict of interest (requiring consent of both clients after full disclosure), and gradations in between. Indeed, it is conceivable that there could be a conflict so severe that any consent would not be effective. Under Model Rule 1.7(b)(1), consent is not available unless the affected lawyer “reasonably believes the representation will not be adversely affected.”

Although Model Code DR 5-101(A), speaks only of obtaining consent after full disclosure, without any limitation whatsoever, that provision, at least in New York, has been interpreted in a manner that engrafts upon it the limitation on consentability contained in DR 5-105(C); i.e., it must be “obvious that [the lawyer] can adequately represent the interests of each” client.

Nonconsentability, however, must be limited to the most extreme of conflicts, those in connection with which an objective lawyer would urge the client to withhold consent.

This Article has focused on the hypothetical setting of Louise Lawyer, who is seeking representation in a disciplinary matter from

108. MODEL RULES, supra note 8, Rule 1.7(b).

While DR 5-101(A) provides that a client may consent to representation by a lawyer whose financial, business, property or personal interests differ from those of the client, thereby waiving the conflict of interest, consent is ineffective if there is a reasonable probability (viewed objectively) that the lawyer's interests will affect adversely the advice to be given or the services to be rendered to the client.

New York State 635, supra.

110. See, e.g., Fleming v. State, 270 S.E.2d 185 (Ga.) (holding that waiver of conflict not permitted in capital case), cert. denied, 449 U.S. 904 (1980); Sapienza v. New York, 481 F. Supp 676, 680 (S.D.N.Y. 1979) (holding that lawyer could not represent two clients with likely claims against one another in a single litigation even with the consent of both); Klemm v. Superior Ct., 142 Cal. Rptr. 509 (Ct. App. 1977) (holding that lawyer could not represent both parties in a contested child support hearing even with consent); In re Kelly, 244 N.E.2d 456 (N.Y. 1968) (holding that law firm could not represent insurer and claimant under an insurance policy even with consent). See generally WOLFRAM, supra note 7, § 7.2.3.
the law firm representing a party adverse to one of her clients. While the framework described herein should be fully applicable in any other context, the nature of the proposed attorney-adversary representation will have a substantial impact on the degree of risk to the clients of the respective lawyers. A return to the six categories of representation discussed in Part I above is therefore warranted.

The least troublesome representation, it would seem, would be the retention of an adversary in a purely personal matter. Lawyer’s retention of a lawyer in Megafirm—even Adversary himself, for that matter—to represent her in the purchase of a condominium apartment, for example, raises concerns no greater than those present if the adversaries also happen to be good personal friends. Presumably, the intensity or intimacy of the relationship could rise to the level of a personal interest sufficient to impact upon client loyalty, but there is no basis for concluding that client loyalty is at all impinged in the routine case of adversaries who happen to like one another or see each other socially. Such should be the conclusion when a lawyer retains an adversary to provide purely personal legal services.11

The result should be no different when the adversary is retained to represent the lawyer in her business dealings. Louise Lawyer’s retention of Megafirm to represent her law office in negotiations over a new office space lease is analytically indistinguishable from the purchase of the residential condominium. Similarly, the rendition of specialized business advice, such as in the tax or labor fields, would seem to pose no threat in itself to the lawyers’ loyalty to their respective clients. It should reasonably follow that representations related to intra-firm disputes, such as those that may arise under the firm’s partnership agreement or that relate to the departure of lawyers, are also not problematic absent some identifiable factual nexus between that matter and the matter in which the lawyer and adversary are representing adverse parties. As in any case, if the financial aspects of the relationship between lawyer and adversary reach a level of materiality to either one, there may be a sufficient business interest to give rise to a conflict of interest and require the clients’ informed consent.

111. But see Michigan Cl-649, supra note 47 (finding the personal matter and the professional matter were too closely related to permit both to be undertaken simultaneously). Unlike the conflict of interest represented above, the problem in the Michigan opinion is the risk of misuse of the attorney’s confidences or secrets on behalf of the adversary’s clients. Id.
Heightened concern may be warranted when the representation relates to difficulties encountered in the actual practice of law. As noted above, an adversary may be less willing to challenge the conduct of a lawyer even in unrelated litigation if that could conceivably impact upon his representation of his client-lawyer in a malpractice or disciplinary case. Whether, as a result, the representation reasonably may affect the adversary’s independent professional judgment on behalf of his client-litigant will be dependent upon the degree to which the conduct at issue in the malpractice or disciplinary case parallels that which has occurred or is likely to occur in the litigation. Less problematic would be the rendition of confidential advice, outside the litigation context, on legal or ethical issues relating to the practice of law, where the risk of overtly prejudicing the client-lawyer through conduct undertaken in the client matter is absent. Conversely, any presumed diminution in loyalty caused by a theoretical reluctance to attack the character of the lawyer for tactical advantage is irrelevant if the client matter is not a litigation.\textsuperscript{112}

The last two categories discussed in Part I of this Article—lawyer as co-counsel or expert witness—are only problematic to the extent that the expectation of future income from their retention reaches a sufficient level of materiality. It is the retained lawyer’s interest in preserving the stream of referral income, and the corresponding ability of the retaining lawyer to direct client dollars to one particular co-counsel, expert, or another that provides the financial interest element here. Consider a situation in which Megafirm routinely hires Lawyer to serve as co-counsel on trademark matters. Over fifty percent of Lawyer’s income during the past three years was derived from Megafirm clients for whom she performed services. Lawyer’s business and financial interest in preserving her relationship with Megafirm could reasonably affect the manner in which she conducts litigation on behalf of Modest Industries against Megafirm’s client, Titanic Enterprises, raising a conflict of interest under Model Rule 1.7(b) or Model Code DR 5-101(A). These circumstances would require disclosure to, and consent from, Modest before undertaking the representation.\textsuperscript{113}

\textsuperscript{112} In any of these circumstances, the client-lawyer should periodically evaluate the remote threat that confidential information relating to the lawyer or the firm may somehow be useful to the adversary in the matter in which they are both representing clients. A dilemma could arise in those circumstances for the client-lawyer, who would have to choose between circumspection in communications with the adversary and providing ammunition for potential use against the client-lawyer’s client. See Model Code, supra note 8, EC 5-15.

\textsuperscript{113} Model Rules, supra note 8, Rule 1.7(b); Model Code, supra note 8, DR 5-
IV. CONCLUSION

The foregoing discussion has urged the restoration of a degree of pragmatism to the application of conflict of interest rules, at least in the limited context of lawyer-adversary professional relationships. There is, however, no reason why such an approach should not be employed in all conflict of interest analyses. An unfortunate trend among many courts and ethics committees has been to treat our ethics codes as inflexible dogma, a propensity that has fueled the often criticized practice of seeking disqualification of adversary counsel for purely tactical or even vexatious reasons.114

We have lost sight of the valid and important principles that our conflict of interest rules were designed to safeguard. Many interpretations of our ethics rules are almost teleological, driven by the desire to reach predetermined results, instead of being deeply rooted in the fundamental principles underlying the attorneys' code of conduct. It is time to reject this empty formalism, and recognize that every case presents its own unique matrix of operative fact that must be analyzed on its merits, giving due consideration to the guiding ethical precepts and the legitimate expectations of clients.

The latter point cannot be overemphasized. We no longer live in a world in which "one lawyer, one client" is the archetype. As the court observed in Artromick International v. Drustar, Inc.:115

> Given the complexity of today's world, and the significance of legal matters in both business and personal endeavors, the manner in which clients use attorneys is both varied and evolving. The concepts of having a "personal attorney" or a "general corporate counsel" are much less meaningful today, especially among sophisticated users of legal services, than in the past. Clients may have numerous attorneys, all of whom have some implicit continuing loyalty obligations. Attorney specialization and marketing have contributed to this fractionalizing of a single client's business.116

101(A).


The legitimate expectations of a client in the 1990s should not be viewed as including absolute and undivided loyalty on the part of any lawyer the client retains for any purpose, regardless of how trivial. Perhaps, in a more innocent time, in a more tranquil and uncomplicated time, a client could reasonably assume that the lawyer he or she retained would never do anything disadvantageous to his or her interests. The 1990s, however, are not innocent, tranquil or uncomplicated, and the tenets of far more ingenuous times cannot continue to be interpreted as if their original intent was not obsolete.

Flexibility, and a willingness to scrutinize the facts of each case, must be the overarching principles by which conflicts are resolved as we approach the millennium. This Article has addressed that precept in one limited context, in the hopes that the remaining barriers to the employment of prudent and rational standards can be overcome.