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DEALING WITH CONFLICTS AND DISQUALIFICATION RISKS PROFESSIONALLY

James B. Kobak, Jr.*

I. INTRODUCTION

A recent article suggests that a perceived increase in tactical disqualification motions, including those based on conflicts of interest, may be illusory.1 On the other hand, large and small firms have recently found themselves on the receiving end of such motions in a number of significant litigations, suggesting that the threat of such motions may be all too real.2 Though results in the cases vary, the consequences of such motions are also very real, potentially extending far beyond the disqualification itself. The consequences potentially include malpractice actions, sanctions, reimbursement of fees previously paid or writing off significant fees not yet received, the time and expense of investigating and litigating the issue, and the loss of client relationships and reputation.3

* General Counsel, Hughes Hubbard & Reed LLP. I would like to thank my colleagues Miles Orton and Lauren Lipari and summer associate Scott Yakaitis for their invaluable research, comments, and general assistance and Susan Fortney for her helpful comments.

2. See infra Part III.
Not all of these consequences are insured, and some can have long-term consequences. In some of these recent cases, the motions seem largely tactical, while in others the lawyers facing disqualification seem to have made fundamental missteps, at least from the perfect vision of uninvolved hindsight. And in others still, revelation of a conflict during litigation arising from work done years before may have come as an unpleasant surprise, triggering a sense of betrayal on one side, and possible loss of chosen counsel in medias res on the other.

This Article seeks to explore the nature of certain conflicts that have arisen in recent cases, the reasons or causes for them, the manner in which the firms or lawyers involved have attempted to deal with them, and the tools and analysis courts have applied to deal with the consequences. The situation is further complicated by the increasing lateral movement among lawyers at firms and even within law firms, as well as by the atomization of legal work. The growth and complexity of intellectual property ("IP") have been particularly fertile sources of conflicts problems, although they are by no means confined to that field alone. Also contributing to the conundrum is the rigor of

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U.S. conflicts rules: first, the concurrent client conflicts rule in all U.S. jurisdictions but Texas, which is out-of-step with the rules of many other jurisdictions in not requiring a substantial relationship between matters as a condition to finding a conflict; and second, the imputation rule.

But surely another contributing factor is the attitude of counsel themselves—not only firms that fail to deal with the issues adequately at the outset or behave with less than complete attention or candor when a problem is identified, but also company counsel who adopt broad guidelines for conflicts that are arguably far more draconian and confining for counsel than the rules of professional conduct themselves. While difficult conflicts problems will always remain—as they should in a profession founded on loyalty to clients and protection of their confidences—a more professional approach would reduce their prevalence, as well as the time and resources spent on satellite litigation about them.

II. TYPE 1 AND TYPE 2 CONFLICTS AND SOME OF THE BASIC RULES

It is useful to divide recent conflicts decisions into two categories. First, some cases (which, for convenience, I shall call “Type 1” conflicts cases) betray counsel’s inattentiveness or spotty due diligence (or in a few cases, simply an unfortunate confluence of circumstances), especially as to matters handled at the same firm long ago, or work done by laterals in the past at other firms. Sometimes this inattentiveness carries over to a failure to react appropriately or promptly after the issue has come to light, either by failing to investigate and engage in meaningful discussions, or by delaying potentially remedial steps such as screens. Even when the blunder is not egregious, the problem is exacerbated by the application of strict imputation rules, including doctrines of infectious imputation beyond a single firm. One can quibble about details and results, but underlying most of these Type 1 cases is a serious concern about access to information, or even “side-switching,” with respect to relevant work done for a former client who is now an adversary.

Second, the somewhat doctrinaire (and what some would say is outmoded) operation of the concurrent client conflicts and imputation rules creates what I shall call “Type 2” conflicts issues. These cases arise, and take up the time of courts and litigants, even when no

7. See infra Part II.A.5.
substantial relationship exists between matters and no fundamental client interest seems to be threatened.

The following discussion of applicable rules and principles provides a foundation for understanding and analyzing cases in each category.

A. Basics of the Relevant Conflicts Rules

1. Concurrent Clients
   The concurrent client conflicts rule in every state but Texas, based largely on the duty of loyalty, prevents a lawyer from acting adversely to a current client on any matter, even with respect to matters wholly unrelated to any work the lawyer is doing for the client, and even when the representation involves no possible use of a client’s confidences. Because the prevailing American rule is predicated on a duty of loyalty, it does not require a substantial relationship between matters, or a risk of misuse of confidential information, as is the case in many other parts of the world.

2. Former Clients
   With respect to former clients, the prevailing rule recognizes a conflict only if a substantial relationship exists between matters or the lawyer had access to confidential information of the client in the former representation that is material to the second representation (where it might be used against the former client or place the lawyer in a position of divided loyalty between the two clients). The former client conflicts rule is based primarily on the duty of confidentiality and only secondarily on the duty of loyalty.

8. MODEL RULES OF PROF’L CONDUCT r. 1.7(a) (AM. BAR ASS’N 2013). The Model Rules of Professional Conduct (“Model Rules”) use a “direct adversity” standard, also favored by the Restatement (Third) of the Law Governing Lawyers (“Restatement”), but New York, for example, uses a potentially more expansive “differing interests” standard. See id.; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121; NEW YORK RULES OF PROF’L CONDUCT r. 1.7(a)(1) (N.Y. STATE BAR ASS’N 2014).

9. For example, Solicitors in England and Wales cannot act, with limited exceptions, for two or more current clients where there is a conflict or significant risk of a conflict where “conflict of interest” is defined to mean any situation where “you owe separate duties to act in the best interest of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict.” See Solicitors Regulation Auth. Code of Conduct 2011, c. 3 (Eng. & Wales) (emphasis added).


11. MODEL RULES OF PROF’L CONDUCT r. 19 cmt. 1. As the courts occasionally note, duty of loyalty does play some role in the treatment of former client relationships as, for example, when a lawyer or firm switches sides in the same case or is in a position of negating or limiting the effect of

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3. Prospective Clients

A somewhat similar, but more flexible, rule applies to prospective clients who do not become clients. A conflict arises if a prospective client disclosed "significantly harmful" confidential information to the attorney with some reasonable expectation that an attorney-client relationship may be formed. This rule, too, is premised on the duty of confidentiality and provides that the conflict may be cured by prompt and effective screening of lawyers who received confidential information with notice to the prospective client. The recognition of screening in the prospective client rule is particularly significant in a state such as New York, which has not adopted a rule to permit screening to cure intra-firm imputation of former client conflicts in other contexts, such as that of lateral hires.

4. Possible Positional Conflicts

A final type of conflict, addressed at best inferentially in the rules, is a positional conflict. Such a possible conflict involves taking a formal position in a matter not involving the client that may nevertheless be contrary to a position important to the client in other matters, including some where the lawyer may work with the client. Apart from the business retention problems they are likely to cause, historically, these situations generally have not been thought to pose true conflicts where different positions are taken before different courts, though in

the lawyer’s or law firm’s own prior work for a client that is now adverse. See SLC, Ltd. v. Bradford Grp. W., 999 F.2d 464, 468 (10th Cir. 1993) (“An individual attorney’s continuing duty of loyalty to his client may prevent him from taking an adverse position, but this would not extend to his new firm as a whole.”). Comment (b) to section 121 of the Restatement observes that the conflicts rules serve some additional purposes such as assuring effective presentation of issues to tribunals. Restatement (Third) of the Law Governing Lawyers § 121 cmt. b.


13. Model Rules of Prof’l Conduct r. 1.18(d).

14. New York Rules of Prof’l Conduct r. 1.10(c) (N.Y. State Bar Ass’n 2014).

15. As noted in a comment, the Model Rules regard this as a conflict only when arguing two sides of a similar issue in different matters will create a significant and material limitation on the lawyer’s advocacy for one of the clients. Model Rules of Prof’l Conduct r. 1.7 cmt. 24. The New York State Bar Association’s version of this comment has a more extensive listing of factors that may reveal a conflict. New York Rules of Prof’l Conduct r. 1.7 cmt. 24.

16. See infra Part V.

some circumstances discernible and concrete harm to a client may mandate disqualification. 18

5. Imputation of Conflicts

The strict imputation rule in the United States exacerbates the effect of the conflicts rules. 19 This rule stipulates that aside from certain personal conflicts that are not the concern of this Article, the conflict of any lawyer in a firm, including a lateral hire, is imputed to every lawyer at a firm. 20 Under the ABA Model Rules of Professional Conduct ("Model Rules"), for which the pertinent rule was adopted in 2009 after considerable debate by its House of Delegates, effective screening under carefully prescribed conditions may be used to cure some lateral conflicts. 21 Many states, such as New York, however, have not adopted this rule; in those states, except in the presence of consent, screening is not an option, though courts, in an exercise of their discretion to control the conduct of lawyers in the proceedings before them, do sometimes permit its use to avoid disqualifying a firm for conflicts of lawyers with peripheral roles in the matter. 22

6. Subsidiary Issues

In part because of their strictness, these conflicts rules raise many subsidiary issues. For example, the question of whether representation of an entity amounts to representation of another part of the entity or the entire entity may be determinative of a disqualification motion. 23 Similarly, because of the difference between the test for concurrent client conflicts compared to that for former client conflicts, much may depend on whether a client relationship has or has not been terminated—an intensely fact-based legal conclusion. 24

18. See Model Rules of Prof'l Conduct r. 1.7 cmt. 24.
19. Id. r. 1.10.
20. Id. r. 1.10(a)(2).
21. Id. r. 1.10(a)(2)(i).
22. See Intelli-Check, Inc. v. Tricom Techns., Inc., No. 03 CV 3706, 2008 WL 4682433, at *4-6 (E.D.N.Y. Oct. 21, 2008). Screening is also endorsed by the Restatement (Third) of the Law Governing Lawyers § 124(b) cmt. d.
23. See Model Rules of Prof'l Conduct r. 1.7 cmt. 34; Restatement (Third) of the Law Governing Lawyers § 121 cmt. d. The New York comments discuss a number of factors beyond those outlined in the ABA comment, dealing with them in three separate paragraphs (34, 34A and 34B) in a very "on the one hand, on the other" fashion. See New York Rules of Prof'l Conduct r. 1.7 cmts. 34A-34D (N.Y. State Bar Ass'n 2014). See generally Kristen Salvatore DePalma & Emily V. Borden, Engaging with the Realities of the Corporate Family, 12 Del. L. Rev. 133 (2011).
7. Consent

All these conflicts can be cured by waiver if the lawyer reasonably determines that she can adequately represent all parties involved and all parties give informed consent.\(^{25}\) Sometimes the consent can take the form of a limitation on the scope of representation to avoid the conflict.\(^{26}\) Waivers, however, are not always panaceas. Even when clients agree to some form of consent—and they do not always agree—questions often arise over whether a waiver, particularly one given in advance, is made with knowledge of all relevant information, as well as to what matters and to what entities it extends. It may be difficult, if not impossible, to identify and discuss all possible future ramifications of the potentially conflicting representations. Additionally, informed consent requires disclosure of meaningful information.\(^{27}\) The interests of one client in keeping a matter or proposed course of conduct absolutely confidential may sometimes preclude the lawyer even from broaching the subject with the other client, thereby preventing the possibility of providing the information necessary for informed consent.\(^{28}\)

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25. Model Rules of Prof'L Conduct r. 1.7(b)(4).
26. Id. r. 1.2(c). An example might include informing the client that a law firm might not be able to bring or defend certain claims for a debtor or trustee in bankruptcy, or might not be able to pursue certain contingent cross claims or contested discovery against certain parties, requiring engagement of separate conflicts counsel. The courts, however, sometimes reject consent when cross-claims seem inevitable. See Zambrotta v. 2935 Equities LLC, No. 18686/03, 2013 WL 676450, at *2-6 (N.Y. Sup. Ct. Feb. 26, 2013) (raising sua sponte disqualification of firm because of possibility of indemnification claims even when parties consented).
27. See Model Rules of Prof'L Conduct r. 1.0(e) (defining “informed consent” as an “agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct”).
28. See Restatement (Third) of the Law Governing Lawyers § 121 cmt b. Unless implicated in cases otherwise discussed, this Article will not deal with personal interest conflicts, Model Rules of Prof’l Conduct r. 1.17(a)(2), 1.8, or lawyer-as-witness issues, Model Rule of Prof’l Conduct r. 3.7. This Article will also not tackle the many issues implicated in joint representations. See, e.g., Gem Holdco, LLC v. Changing World Techs., L.P., No. 650841/2013 (N.Y. Sup. Ct. Jan. 9, 2015), aff’d in part, 14 N.Y.S.3d 14 (App. Div. 2015); N.Y. State Bar Comm. on Prof’l Ethics, Op. 903 (2012). This Article will also not tackle issues from representing co-defendants or co-plaintiffs, or in representing a close corporation and its constituents, an area where the sloppy or non-existent treatment of possible conflicts in engagement letters has led to some unfavorable decisions, including in the New York state courts. See, e.g., Decision and Order at 2-4, Barmash v. Perlman, No. 650417/2013 (N.Y. Sup. Ct. Oct. 3, 2013); Morris v. Morris, 763 N.Y.S.2d 622, 624-25 (App. Div. 2003); In re Greenberg, 614 N.Y.S.2d 825, 827 (App. Div. 1994). This Article will also not discuss conflicts arising from lateral movement of government lawyers, Model Rules of Prof’l Conduct r. 1.11, which involve both state ethics rules and rules or policies of governmental entities. See Restatement (Third) of the Law Governing Lawyers § 131 cmt b. This Article also does not discuss conflicts in criminal representations with their overlay of the Sixth Amendment right to effective assistance of counsel concerns.
III. RECENT TYPE I CONFLICTS CASES—HOT POTATOES, SIDE-SWITCHERS, AND ISSUES THAT FALL THROUGH THE CRACKS

Now let us explore how these basic rules have been applied to some of the more significant and interesting recent cases. I will start with what I consider Type I cases in my taxonomy—those with at least potentially serious consequences.

A. A Sampling of Recent Cases

One such cautionary tale unfolded in Madison 92nd Street Associates, LLC v. Marriott International, Inc.29 In 2013, the well-known firm of Boies, Schiller & Flexner LLP ("BSF"), representing a once bankrupt limited liability corporation that owned several Courtyard Marriott hotels, commenced an action against both Marriott and Host, a hotel chain that had settled a dispute with Marriott more than a decade before.30 The complaint alleged that in their settlement in 2002, the two companies had conspired to ensure that certain hotels owned and operated by Marriott would not be union hotels while other franchised hotels, such as those operated by the plaintiff, would be.31

During discussions among the parties to the 2013 lawsuit, Host pointed out that BSF had represented Host on the very settlement it was now challenging as a conspiracy on behalf of its new client.32 After denying the existence of a conflict for several months, during which time BSF conducted what the court characterized as a lax internal investigation, BSF proceeded to file a complaint against Host, and dribbled out material relevant to the prior representation in a manner that the district court characterized as slow and deliberate.33 Only after being provided with a draft motion to disqualify did BSF admit (or, in the court’s view, focus on the fact) that it was conflicted and agree to take steps to withdraw from the representation.34 Host brought a motion for sanctions, seeking to recover the amount of attorneys’ fees it incurred in persuading BSF to withdraw.35

30. Id. at *1.
31. Id.
32. Id. at *5.
33. Id. at *5-10.
34. Id. at *10-11.
35. Id. at *1.
The district court granted Host’s motion for sanctions, stating that “[a] clearer conflict of interest cannot be imagined. A first year law student on day one of an ethics course should be able to spot it. BSF, which holds itself out as one of the country’s preeminent law firms, did not.” The opinion continued with equally harsh language, titling one section of the opinion, “Oh, THAT Conflict!” and noting that BSF’s conduct was “infinitely more egregious” than conduct that raised conflicts concerns in other cases. BSF, according to the court, rejected Host’s complaint about the conflict before it had even reviewed its files, later failed to properly review files, and dragged its feet in producing the majority of them. The court awarded Host its reasonable attorney fees—over a quarter of a million dollars—from the date when BSF was informed for the third time about the conflict and refused to stop work on the matter.

The sanctions order was appealed and vigorously argued in the Second Circuit. The Second Circuit affirmed the district court’s judgment, stating that “without endorsing all of the tonalities of the district court’s opinion—we affirm for substantially the reasons stated therein.”

The case, as reported, has two lessons for many of us: first, in performing conflicts checks, it may often be necessary to go beyond paper records and engage knowledgeable attorneys in a discussion of what may have been involved below the summary description of a representation in a client intake memorandum; and second, when possible conflicts are brought to one’s attention, they ought to be investigated seriously and acted on diligently at the outset.

*State ex rel. Swanson v. 3M Co.*, is another case involving a well-regarded firm—Covington & Burling—work done a decade before, and the added color of the so-called “hot potato” doctrine. In 1992, 3M Co. (“3M”) engaged the firm to assist in its efforts to obtain approval from the FDA to use perfluorochemicals (“PFCs”), which it manufactured...
between 1995 and 2000 in food packaging.\textsuperscript{43} The firm’s representation on matters relating to the FDA approval lasted until 2000; the firm also represented 3M on a number of different, unrelated matters until December 2010, when it sent a letter terminating the relationship.\textsuperscript{44} Less than three weeks later, the firm was appointed “Special Attorney” to the State of Minnesota and filed suit against 3M related to the release of PFCs into the state’s ground and surface waters.\textsuperscript{45} The firm believed that the prior FDA regulatory matters were not substantially related to the ground water contamination litigation, and did not involve a likelihood of the misuse of confidential information,\textsuperscript{46} since the engagements had different focuses, over a decade had passed since the conclusion of the firm’s PFC work for 3M, and 3M, following a consent order with the state in 2007, had already made public disclosures about the hazards and health and environmental effects of its PFCs (although some documents subject to attorney-client privilege were excluded from the public disclosures).\textsuperscript{47} About fifteen months later, the lawyers representing 3M in the groundwater litigation discovered the firm’s name in documents produced by 3M.\textsuperscript{48} 3M first demanded that its former firm disclose all files on which the firm represented 3M, and subsequently requested that the firm withdraw from its representation of the State, which the firm refused to do.\textsuperscript{49} 3M maintained that it was unaware of the firm’s work on its PFCs matter until March 2012, although the court noted that evidence in the record contradicted this position.\textsuperscript{50} The court found that, although the firm’s former representation of 3M in the FDA matters had a different focus from its representation of the State in the new matter, both matters concerned the risks PFCs pose to human health, and were therefore substantially related for purposes of Minnesota’s version of Rule 1.9.\textsuperscript{51} The record indicated that 3M was, or should have been, aware of the conflict long before it raised the issue of disqualification.\textsuperscript{52} But that delay did not, in the trial court’s view, override the lawyer’s duty to fully inform and obtain consent from the

\textsuperscript{43} Id. at *1.
\textsuperscript{44} Id.
\textsuperscript{45} Id. at *2.
\textsuperscript{46} Id. at *1.
\textsuperscript{47} Id. at *4-6.
\textsuperscript{48} Id. at *3.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at *4.
\textsuperscript{52} Id. at *6.
Moreover, the firm had access to some still confidential and potentially relevant 3M documents and information—the documents previously excepted from public disclosure as privileged—which the court emphasized was the very type of information Rule 1.9 was designed to protect.

The Supreme Court of Minnesota, after deciding that the firm had standing independent of its client to appeal the disqualification order, took a more nuanced approach to the issues. It determined that the district court failed to "meaningfully assess" the firm's claims that the information was no longer confidential, remanding this issue to the district court. The Supreme Court also held that the right to seek disqualification under Rule 1.9(a) could have been waived, but determined that the record of the district's court's analysis of whether waiver took place was incomplete and remanded on this issue as well. On the other hand, the Court determined that Rule 1.9(a) would mandate disqualification if its requirements were found to be met and would not permit any weighing of equities. On remand, after discovery and a six-day evidentiary hearing, the trial court ruled that a conflict existed but had been waived.

The firm in Swanson did send a termination letter, but its timing was regarded as suspect, coming within weeks of the start of the new relationship and giving the appearance of dropping a client like the proverbial "hot potato" in favor of a major engagement. The firm's ethics screen was also held to be of no avail without the former client's consent because of the Minnesota Supreme Court's interpretation of the strictness of the rule and its presumption that significant confidential information would be shared. Although it may not have affected the outcome, the firm's apparent delay in sending a termination letter until the eve of litigation undoubtedly did not make for a friendly ex-client. To prove how unfriendly it was, 3M filed a damages action against the firm.

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53. Id.
54. Id.
55. See State ex rel. Swanson v. 3M Co., 845 N.W.2d 808, 814-21 (Minn. 2014).
56. Id. at 817.
57. Id. at 817-20.
58. Id. at 820-21.
61. 3M Co., 845 N.W.2d at 817.
The absence of any termination letter at all played a feature role in *Parallel Iron, LLC v. Adobe Systems Inc.*63 There, Adobe Systems Inc. ("Adobe") first engaged a partner at a boutique IP firm in April 2006 to provide an opinion letter on whether one of Adobe’s products infringed a patent held by another company.64 The partner was again engaged to provide opinions in May 2009 and August 2010.65 The firm never acted as litigation or trial counsel. Five months after the submission of the partner’s last opinion letter to Adobe, Parallel Iron, LLC ("PI") retained the firm to file suit against Adobe on unrelated patents.66 Adobe asserted that the firm was still serving as opinion counsel for it at the time of suit and moved for its disqualification.67

The court analyzed the situation as a concurrent client conflict of interest, finding it reasonable for Adobe to believe that the firm was still acting on its behalf.68 This was a client-centric analysis. The firm had never refused work from Adobe over its six-year relationship and had never formally terminated the attorney-client relationship.69 Although the role of opinion counsel involves a somewhat limited scope of work, opinion counsel is still counsel with all the duties and professional obligations of counsel under the professional responsibility rules.70 The court gave short shrift to an argument that Adobe must have intended the relationship to terminate when, upon delivering the third opinion letter, the attorney asked whether anything else was required and received no affirmative reply, an incident the court dismissed as a customary gesture.71 The court did not, however, go the giant step further of imputing the conflict to the firm’s co-counsel in the litigation, finding no bad faith or involvement by the client in the boutique’s conflict.72

A less happy outcome, at least for the firm litigating the case—in this case, Latham & Watkins LLP ("Latham")—occurred in *Eon Corp. IP Holdings LLC v. Flo TV Inc.*73 From 1988 to 1995, Latham had represented an entity known as TV Answer, which subsequently became Eon.74 The companies were based in Virginia, and the two lawyers from

64. Id. at *1.
65. Id.
66. Id. at *2.
67. Id.
68. Id.
69. Id. at *2-3.
70. Id. at *2.
71. Id.
72. Id. at *4.
74. Id. at *1.
Latham who represented Eon were based in the firm’s Washington D.C. office.\textsuperscript{75} These attorneys handled corporate and regulatory matters, but not patent prosecution or litigation.\textsuperscript{76}

In 2010, Eon initiated a patent infringement lawsuit against seventeen defendants, including MobiTV, which engaged two Latham attorneys from the firm’s Los Angeles office to represent it in the action.\textsuperscript{77} Neither of the two Latham attorneys engaged for the litigation had worked for Latham during its previous representation of Eon. Nevertheless, Eon moved to disqualify the firm.\textsuperscript{78}

The court found that Latham’s prior representation had been broad in scope, and included familiarity with aspects of Eon’s technologies that were at least partially related to the patent at issue in the litigation, even though Latham had not aided Eon in obtaining the patent.\textsuperscript{79} A central prong of Eon’s defense was patent invalidity, an issue that could have involved a factual inquiry into many of Eon’s activities during the time period in which the two lawyers in Washington represented Eon.\textsuperscript{80} In fact, one of MobiTV’s co-defendants identified two former Latham lawyers as potential witnesses.\textsuperscript{81} Because information about related factual matters could have been shared with Latham attorneys, and any such information might have been detrimental to Eon in the litigation, the court concluded that a conflict existed under Rule 1.9, and that it was to be imputed to the firm as a whole under Rule 1.10.\textsuperscript{82}

The court then discussed Latham’s “ethics wall,” which the firm instituted prior to performing any substantive work on MobiTV’s case.\textsuperscript{83} In an interesting analysis, the court found it conceivable that the two Latham attorneys would be called to testify in the case to be tried by attorneys from the same firm’s Los Angeles office, ethics wall or no ethics wall.\textsuperscript{84} While the court supposed that accommodations could be made to prevent the jury from learning that the Latham attorneys who represented Eon worked for one of the defendants’ law firm during their representation, such accommodations are “the sort of thing that would

\textsuperscript{75.} \textit{Id.}
\textsuperscript{76.} \textit{Id.}
\textsuperscript{77.} \textit{Id.}
\textsuperscript{78.} \textit{Id.}
\textsuperscript{79.} \textit{Id. at *4.}
\textsuperscript{80.} \textit{Id. at *4-5.}
\textsuperscript{81.} \textit{Id. at *4.}
\textsuperscript{82.} \textit{Id. at *5.}
\textsuperscript{83.} \textit{Id.}
\textsuperscript{84.} \textit{Id. at *4-5.}
give rise to the perception by the general public that the rules are designed to avoid.”85

A British decision, *Georgian American Alloys, Inc. v. White & Case LLP*, illustrates how problematic detecting and finding a solution for a serious conflict can be even for a firm as renowned for its ethics standards and expertise, as White & Case LLP.86 In September 2010, a partner working out of the firm’s London and Moscow offices began advising a man named Mr. Pinchuk and his management company, Eastone Group (“Eastone”), in relation to a dispute between Mr. Pinchuk and two men, Mr. Kolomoisky and Mr. Bogolyubov, with respect to a joint venture between them. Mr. Pinchuk claimed that he did not receive his share of the profits from the venture.87 On April 20, 2011, the general counsel of Optima Acquisitions LLC and Optima Industrial Management LLC (collectively, “Optima”) contacted a partner working out of the law firm’s New York office, inquiring whether the firm would represent the Optima entities in implementing a corporate restructuring involving a number of corporate entities, including the creation of a new holding company to be known as Georgian American Alloys, Inc. (“GAA”).88 The general counsel of Optima identified “Mr. Kolomoisky and Mr. Bogolyubov as two of the ultimate owners of the businesses involved.”89

The New York partner carried out a conflicts search and learned of the Eastone engagement.90 He told the partner on the Eastone engagement about the proposed Optima engagement and asked about the nature and status of the Eastone matter. The partner on the Eastone engagement replied that the Eastone dispute had been settled and that he had not heard from Eastone for a number of months, and therefore assumed that the dispute had gone away since Mr. Kolomoisky had paid Mr. Pinchuk $150 million.91 The law firm then took on the Optima engagement with an engagement letter containing fairly standard advance waiver language.92

85. *Id.* at *5. It is interesting to note that, as a pure lawyer-as-a-witness ethics issue, the possibility that two other Latham lawyers might be called at trial would not in itself necessarily have precluded Latham from serving as trial counsel as long as the potential witnesses’ testimony would not be materially adverse to the firm’s present client or involve disclosure of its confidences.
86. [2014] EWHC (Comm) 94 (Eng.). The description of facts is based entirely on the court’s written opinion.
87. *Id.* at [8].
88. *Id.* at [10].
89. *Id.*
90. *Id.* at [11].
91. *Id.* at [11]-[13].
92. *Id.* at [15]-[16].
The plot thickened in May 2012, when the Eastone partner received instructions to evaluate potential additional claims against Mr. Kolomoisky and Mr. Bogolyubov. The Eastone partner waited until research determined the existence of a potential claim to run a check. After conducting the internal check, the firm determined that there was no actual conflict of interest, presumably because it did not represent the two targets of the claim individually. However, at the beginning of March 2013, as the Eastone team was preparing to launch proceedings, further internal discussions took place. The firm decided to establish an "ethical screen" between the firm's representation of Optima and its representation of Eastone and Mr. Pinchuk. The screen implemented was extensive, and utilized state of the art screening software. Apparently feeling that the screen was not required, but an added precaution, the firm did not notify any of the relevant parties.

The firm then filed a claim on behalf of Mr. Pinchuk in Commercial Court in England against Bogolyubov and Kolomoisky (but not GAA or other Optima entities represented by the partner in New York). On August 2, 2013, it served a Request for Arbitration on Mr. Bogolyubov and Mr. Kolomoisky, followed by an application in U.S. District Court in Florida under 25 U.S.C. § 1782 to obtain documents and information relating to the arbitration. The information sought consisted of a large amount of corporate information, including board minutes, organizational charts, financial statements, sales and purchase ledgers, valuations, and trading and distribution records of the Optima companies represented by the New York partners with which Bogolyubov and Kolomoisky were involved. Upon learning of the firm's involvement in this request and its representation of Mr. Pinchuk, the Optima general counsel wrote to several partners at the firm, expressing his concern about the protection of GAA's confidential information, asking for a detailed account of the nature of any information barriers erected, and demanding that the firm cease its representation of Eastone and Mr. Pinchuk. When the firm declined, Optima and related entities in England brought a proceeding to

93. Id. at [25].
94. Id. at [26].
95. Id. at [27].
96. Id. at [28]-[32].
97. Id. at [33].
98. Id. at [35].
99. Id. at [41], [43].
100. Id. at [45].
101. Id. at [48]-[49].
enjoin the firm from acting for Eastone and Mr. Pinchuk in the Commercial Court.\textsuperscript{102}

Justice Field of the Queen’s Bench Division Commercial Court determined that the firm had obtained confidential information relating to Mr. Kolomoisky and Mr. Bogolyubov during its representation of the Optima entities.\textsuperscript{103} The court found that the relationship between Mr. Kolomoisky and Mr. Bogolyubov and the entities they owned was such that a matter adverse to the individuals was also adverse to the entities.\textsuperscript{104} Additionally, the court found a risk that confidential information had been disclosed to the Eastone team due to delay in implementing the ethical screen, as well as the geographic overlap of the Pinchuk, Eastone, and Optima Teams in the New York office for a period of time.\textsuperscript{105} In addition to the state of the art screen, the firm had conducted an extensive investigation to demonstrate the absence of any leakage or misuse of confidential information. Despite this considerable effort, the court determined that the firm failed to discharge its burden, which the court regarded as considerable, and of showing no possibility whatsoever that confidential information may have been disclosed.\textsuperscript{106} Accordingly, the court granted the injunction.\textsuperscript{107} The court virtually ignored the advance waiver language in the engagement letter.\textsuperscript{108}

The law firm involved could scarcely be accused of approaching the opposing relationships cavalierly once they became evident. At least until corporate information was sought in discovery, the conflict, if there was one, was at best indirect since the firm’s actual New York clients were GAA and other corporate entities, not the individual investors. Additionally, once the possibility of adverse actions that might implicate the New York interest was presented, the firm implemented an extensive screen. The proof offered by the firm that no leakage of confidential information had occurred was extensive and compelling,

\begin{enumerate}
\item \textsuperscript{102} \textit{Id.} at \textsuperscript{[51]}, \textsuperscript{[53]}. \\
\item \textsuperscript{103} \textit{Id.} at \textsuperscript{[79]}. \\
\item \textsuperscript{104} \textit{Id.} at \textsuperscript{[80]}-\textsuperscript{[81]}. \\
\item \textsuperscript{105} \textit{Id.} at \textsuperscript{[85]}-\textsuperscript{[86]}. \\
\item \textsuperscript{106} \textit{Id.} at \textsuperscript{[87]}. \\
\item \textsuperscript{107} \textit{Id.} at \textsuperscript{[97]}. \\
\item \textsuperscript{108} The applicable language in the engagement letter read as follows: \\
\textit{[A]s a condition to our undertaking this representation, it is agreed that we may continue to represent or undertake to represent existing or new clients even if those clients’ interests are directly adverse to or different from yours or your affiliates, related entities or persons, including litigation or arbitration and any other related matter regardless of its magnitude or other importance. No attorney or staff member working on this engagement shall be involved in such an adverse representation.} \\
\textit{Id.} at \textsuperscript{[16]}. \\
\end{enumerate}
though the British court put the firm in the position of essentially having to prove a negative.

A fatal flaw, at least as far as the court was concerned, was the failure to inform the clients and seek consent to the screening measures. But it is not clear that the firm would have been permitted by Mr. Pinchuk to reveal the actions he was preparing to take. Another possible error was the assumption—undiscussed and unconfirmed by the client—that the Pinchuk-Eastone engagement had ended at the time the New York engagement began. But probably, the lesson of this and many other cases is the strength of the presumption—irrebuttable in a few jurisdictions, and virtually irrebuttable in others—that once an attorney has had access to material confidential information, it will be deemed to have found its way to every other lawyer with whom that lawyer is associated.

B. The Problems Laterals May Bring

A number of these recent Type 1 cases demonstrate the conflicts issues that lateral hires can raise. As noted above, absent at least prompt screening in some states, but with consent of all affected clients in most others, conflicts from a matter on which a laterally-hired attorney worked at a prior firm are imputed to all the lawyers at the new firm. A case on point is *j2 Global Communications Inc. v. Captaris Inc.* A junior associate at Kenyon and Kenyon LLP ("Kenyon") began working on *j2 Global Communications Inc." ("j2") matters as a part of a team of attorneys in 2004. The record showed that while at Kenyon, during 2004 and 2005, the attorney conducted a significant amount of work for *j2*, including analysis of whether defendants whom *j2* might sue for patent infringement had valid defenses. Thereafter, the attorney left Kenyon and became an associate at Crowell Moring ("CM").

Then, in 2008 and 2011, *j2* filed patent-related lawsuits against Open Text and two of its subsidiaries. Open Text hired an attorney to

109. *Id.* at [33].
110. *Id.* at [13]-[15]. For a somewhat similar outcome involving a more direct former client conflict, albeit one arising from limited pre-litigation work for one of the clients, see *Response of K&L Gates LLP to Motion to Disqualify, Cyber-Switching Patents, LLC v. Easton Corp.,* No. 14-cv-02682 (N.D. Cal. Sept. 29, 2014), ECF No. 30. The firm there withdrew but noted that in its view the matters were not substantially related, an effective screen had been established, and no confidential information had been disclosed. *Id.*
112. *Id.* at *1.
113. *Id.* at *2.
114. *Id.* at *3.
115. *Id.*
serve as lead defense counsel in 2008, and subsequently in 2012, that attorney joined the firm Perkins Coie ("Perkins"). Meanwhile, Open Text asked another of its law firms, CM, to assign one of its attorneys to serve as Open Text’s outside in-house counsel for IP matters. CM selected the attorney who had transferred from Kenyon to fill the role, but did not seek a conflicts waiver from j2. The attorneys at Perkins were unaware that the attorney had previously worked with j2.

The CM attorney worked with Perkins on a number of occasions, including in assisting Perkins in collecting documents to use in responding to j2’s discovery requests. During a deposition, the attorney introduced himself as Open Text’s outside in-house counsel. Following the deposition, j2’s attorneys informed Open Text and Perkins that the attorney had previously represented j2 and filed a motion to disqualify Perkins as trial counsel on the ground that it may have been infected by its exposure to the CM attorney with confidential j2 information.

The record showed that, while working on j2 matters at Kenyon, the attorney had been party to a number of emails that discussed some of the same patents at issue in the Open Text litigation and also discussed some litigation issues that were relevant to the Open Text litigation. Even if this amounted to only de minimis involvement, the court concluded, it still sufficed to establish that the attorney acquired some relevant, potentially confidential information about j2. The court then employed the presumption that when a lawyer has confidential information, that information is available to all lawyers associated with the lawyer on the matter, whether or not in the same law firm.

The court noted that perhaps an effective screen might have saved Perkins from disqualification, but the screen came too late. The

116. Id.
117. Id.
118. Id.
119. Id.
120. Id.
121. Id. at *4.
122. Id.
123. Id. at *5.
124. Id. at *7.
125. See id. at *7-9; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123, cmt. c(iii) (AM. LAW INST. 2000); accord All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc., No. 07-1200, 2008 WL 5484552, at *8-9 (N.D. Cal. Dec. 18, 2008) (holding prior representation of an individual by a lateral hire in price-fixing investigation disqualified firm from suing employer on behalf of that party in an antitrust case arising from the same investigation because the ethical wall was of no benefit to the firm in California, which, like New York, is a non-screening state).
attorney had already worked extensively with Perkins on the relevant matters before Perkins even became aware of his prior work, two firms removed from it, and instituted the screen. Finding the screen too late to be fool-proof, the court disqualified Perkins. This case is thus a stark reminder (somewhat like the Georgian American Alloy case discussed above) of the strictness of the imputation rules when some access to confidential information occurred—even when, as in this case, the access was that of a relatively junior attorney at a different firm many years before.

A clearer example of supposed "side-switching" is In re City of San Bernardino. There, attorneys in the Charlotte office of K&L Gates, LLP ("K&L") represented the California Public Employees' Retirement System ("CalPERS") on matters relating to the bankruptcy of two California cities, Stockton and San Bernardino. Five lawyers from this office were recruited to join Winston & Strawn, LLP ("W&S"), a firm that represented CalPERS's litigation adversary, National Public Finance Guarantee Corp.

W&S constructed an ethical wall around these lateral hires, but CalPERS contended that ethical walls cannot save a firm from disqualification when defecting lawyers have switched allegiances to the firm representing the adversary in the same case. This is because side-switching implicates not only a duty of confidentiality, but also a duty of loyalty to the former client, and because California, like New York, has not adopted the Model Rule permitting screening. In the words of a California Court of Appeals, which was quoted in CalPERS's motion to disqualify in San Bernardino, if a "tainted attorney was actually involved in the representation of the first client, and switches sides in the same case, no amount of screening will be sufficient, and the

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127. Id.
128. See supra notes 86-110 and accompanying text.
130. See Motion of Party in Interest CalPERS to Disqualify Winston & Strawn LLP at 1, In re City of San Bernardino, No. 6:12-bk-28006 (Bankr. C.D. Cal. May 17, 2013), ECF No. 594.
131. Id. at 1-2.
132. Id. at 13-17.
presumption of imputed knowledge is conclusive.” Ultimately, the court issued an order, without opinion, granting the motion to disqualify.

In these days of shifting relationships, lateral issues can be further complicated by changes in client ownership and affiliations, which add further pitfalls for conflicts searches, but also bring into play ameliorating doctrines such as the “thrust upon” doctrine, even if not expressed in those terms. Consider Synopsys Inc. v. ATopTech Inc. Synopsys Inc. (“Synopsys”), a plaintiff in a patent infringement suit, moved to disqualify an attorney characterized as a “core member” of the defendant’s trial team. The attorney, while at another firm more than a decade earlier, had assisted in prosecuting patent applications for approximately ten months on behalf of a corporate entity that subsequently merged with a second company, which was in turn later acquired by Synopsys. These changes in corporate ownership gave Synopsys ownership of four patents challenged in the infringement suit, on one of which the attorney appeared to have worked at his prior firm. Although some potential existed that the attorney or his present firm would in a sense challenge his own work, his present firm argued that the prior client had not been Synopsys and that the attorney did not retain or share any confidential information. The court did not resolve these points because the parties sensibly stipulated to allow the law firm to continue the defense, but without involvement of the attorney in question, who was ethically screened.

134. Motion of Party in Interest CalPERS to Disqualify Winston & Strawn LLP, supra note 130, at 14 (quoting Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 649 (Ct. App. 2010)).
135. See infra Part VII.D.
137. Synopsys, Inc.’s Notice of Motion and Motion to Disqualify Dickstein Shapiro LLC at 5-6, 6 n.2, Synopsys, Inc. v. ATopTech, Inc., No. 3:13-cv-02965 (N.D. Cal. July 11, 2014), ECF No. 128.
139. Fishman Declaration, supra note 138, at 2.
141. See Stipulation Walling Off Mr. Jeffrey Miller and Withdrawing Synopsys’s Motion to Disqualify Dickstein Shapiro LLP, Synopsys Inc. v. A Top Tech. Inc., Case No. 3:13-cv-02965, (N.D. Cal. Aug. 14, 2014), ECF No. 162 [hereinafter Stipulation Walling off Mr. Jeffrey Miller]. The opposite of the “thrust upon” conflict is the conflict caused by a law firm merger such as the Squire Sanders/Parton Boggs merger that led to the firm’s disqualification. See Western Sugar Coop. v. Archer-Daniels-Midland Co., 98 F. Supp. 3d 1074, 1079 (C.D. Cal. 2015). There the firm representing plaintiffs in a false advertising case merged with a firm that represented or had
C. Factors That Limit Identification of Type 1 Conflicts

The situations that give rise to these Type 1 conflicts raise several problems for lawyers and clients, even when they are endeavoring to do the right thing. Identifying some of these conflicts seems easy on paper, but is difficult in practice. Memories of tasks a lawyer did many years ago, sometimes at a different firm early in the lawyer’s career, may be dim at best, and the conflicts checking records that might be consulted even if the work was performed at the same firm may well be lacking in detail about the scope of work performed. Indeed, it is not uncommon that the work may evolve in ways not apparent at the opening of an engagement. Moreover, in some lateral situations, detail may not be achievable at all because of the duties of confidentiality lawyers owe their present and former clients during lateral discussions, and even afterwards. 142

The Model Rules and state analogs, historically, did little either to highlight the confidentiality concerns that attend lateral discussions, or to provide guidance on how to deal with them. In 2012, the ABA adopted a new paragraph (7) to the confidentiality rule (Rule 1.6) to allow some disclosures to detect and resolve conflicts of interest—but not if disclosures would compromise the attorney-client privilege or prejudice the client. 143 In this way, the Model Rules did at least highlight the issue, albeit with minimal guidance.

A committee making recommendations to the New York State Bar Association (“N.Y. State Bar”) recently examined this issue. After choosing not to adopt the ABA’s proposed amendment to Rule 1.6 (which implements a Model Rules definition of confidentiality that differs from New York’s), the Committee proposed a number of comments to New York’s Rules of Professional Conduct Rules 1.6 and 1.10. 144 The proposal, which has now been adopted by the N.Y. State Bar, recognized that lateral movements take many forms and can have different impacts on clients. It also generally endorsed disclosure in stages and the importance of limited access and other precautions, but it

represented two of four defendants in a wide range of matters. The merged firm terminated one of the defendant relationships, but that did not save it from being disqualified under the “hot-potato” doctrine. The terminated relationship also required disqualification under the substantial relationship test. Various innovative steps proposed by the firm to alleviate some of the consequences could not cure the conflict, which was also deemed not to be covered by a broad advance waiver provision.

142. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. b (AM. LAW INST. 2000).

143. MODEL CODE OF PROF’L CONDUCT r. 1.6(b)(7) (AM. BAR ASS’N 2013).

144. See NEW YORK RULES OF PROF’L CONDUCT r. 1.6 cmts. 1-18, r. 1.10 cmts. 13-18D (N.Y. STATE BAR ASS’N 2014).
took a pragmatic approach that emphasized the ethical requirement and practical need to do conflicts checks and other due diligence.\textsuperscript{145}

\section*{D. The Intractable Imputation Rule and Infectious Imputation}

An underlying source of some of the problems of conflicts identification is the strict rule on imputation of conflicts and the frequent unavailability of measures to overcome that imputation. The professional responsibility rules impute one lawyer's conflicts to every "associated" lawyer in a firm, even when the personally conflicted lawyer is in a far different office, has not had contact with confidential information in many years, or is a recent lateral now working on unrelated matters.\textsuperscript{146} The ABA adopted a rule to allow screening for lateral conflicts, and courts (particularly federal courts) have allowed screening to cure relatively minor, technical conflicts with no real risk of transmission of confidences.\textsuperscript{147} But as we have seen in cases of perceived side-switching or where access to arguably significant confidential information seems probable, even if limited and many years in the past, the courts have tended to apply the imputation rule with rigor. This rigorous application of the imputation rule has led to the courts creating an irrebuttable, or virtually irrebuttable, presumption of the transmission of confidential information\textsuperscript{148} or finding small and virtually inevitable glitches in the screening process fatal.\textsuperscript{149}

Nor is disqualification of the firm with the tainted attorney necessarily the end of the matter. As we saw in the \textit{j2 Communications}
case, a breach or presumed breach of confidentiality may extend beyond a firm and infect co-counsel or others "associated" in the representation who were otherwise uninvolved in the circumstances giving rise to the disqualification. 150 This doctrine of infectious imputation creates an added dimension of risk for attorneys and their unsuspecting clients. Knowledge may come too late for potential inoculation or cure through screening, and application can be harsh and mechanical indeed.

Consider the Texas case of In re CMH Homes, Inc. 151 The newly elected County Attorney of Duval County prepared to bring a case involving fraudulent practices against CMH in connection with "land-in-lien" homeowner mortgage financing transactions. 152 The County Attorney had represented CMH in connection with the same issues several years before in his own, non-government practice. 153 To solve any conflicts problem, the County Attorney engaged two private attorneys who had brought many of the suits against CMH, and they filed the County's complaint against CMH on which the County Attorney also appeared. 154 When CMH objected to the County Attorney's appearance on the papers, the County Attorney withdrew. 155 CMH argued that the two outside attorneys should also be disqualified because of their association with the County Attorney in bringing the suit. 156

A Texas appellate court agreed. 157 The record suggested that no confidential information had been exchanged and that any interaction between the County Attorney and the specially retained attorneys had been limited to discussion of fee arrangements. The court nevertheless ruled that an association within the meaning of the rule had existed, and that the presumption of passage of confidential information was irrebuttable. 158

E. The Termination Question

Because the U.S. concurrent client conflicts rule is so much stricter than the former client conflicts rule, applying to broadly defined adverse (or in New York, differing) interests and not requiring a substantial or

150. See supra notes 111-25 and accompanying text.
152. Id. at *2.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id. at *7-8.
158. Id. at *5-6.
indeed any relationship between potentially conflicting matters, a great deal may hinge on the characterization of a client as a former, as opposed to, a current client. But often, as we saw in the Parallel Iron case and to some extent the Swanson case, the issue may be far from clear cut. Lawyers, in this author’s experience, have an almost visceral dislike for sending termination letters, and if they send such letters at all, they may not do so until circumstances virtually compel them to try to do something—making the gesture probably too little, too late and as likely to add fuel to a fire as to quench it.

The N.Y. State Bar sought to address the following almost archetypical question in a recent opinion:

If a law firm represented an entity in a matter and has not performed any legal services for the entity for more than a year, but the law firm has not sent a termination letter to the entity, may the law firm represent new clients against the entity, over the entity’s objection, in a new matter that is related in some ways to the original matter?

The committee concluded that failure to send a termination letter to a client does not, in and of itself, mean that the attorney-client relationship continues. Whether a representation is over can be determined by passage of time, and whether there has been a long-standing pattern of representation by the lawyer or firm of the client over the years. The opinion also emphasizes that a key factor is whether a client may have a reasonable belief that the law firm needs to perform more work to fulfill its obligations. Unfortunately, but not unexpectedly, the committee could not provide a more definitive answer to the question it posed, regarding it as partly a question of law which it could not answer and partly a question of fact which would vary from case to case.

The question of termination is often a crucial one because of the strictness of the concurrent client rule as opposed to the rule for former clients. In the latter situation, but not the former, a substantial

159. See MODEL RULES OF PROF’L CONDUCT r. 17 (AM. BAR ASS’N 2013).
161. 845 N.W.2d 808 (Minn. 2014); see supra notes 42-62.
162. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 1008 (2014). The opinion also notes that even when a representation is formally terminated, the lawyer must understand that all duties to former clients do not end. Id. In such a situation, the conflict might not be treated as a concurrent client conflict, but Rule 1.9(a) prevents a lawyer from representing a client in the same, or a substantially related, matter, or using confidential information learned in the engagement to the detriment of the former client. Id.
163. Id.
164. Id.
165. Id.
166. Id.
relationship between matters is required. Requiring some relationship between matters for concurrent client conflicts would in many cases moot the difficulties and uncertainty of having to decide the termination question. The fact that so much may turn on the question of whether someone who was a client last week is still a client this week highlights how arbitrarily the concurrent client rule may sometimes work in practice. Until and unless the rules change, however, the dichotomy between treatment of present and former clients for conflicts and disqualification purposes calls for diligence and clarity in documenting terminated engagements.

F. Prospective Clients

Similar issues arise from interactions with would-be or prospective clients that never become actual clients. But here, while the standard is still largely client-centric and caution is very much in order, the rule is a good deal more forgiving.

A recent New York appellate decision, Mayers v. Stone Castle Partners, LLC, illustrates the new standards. Stone Castle Partners, LLC ("SCP") fired Matthew Mayers, a member and investor of SCP, after it learned that Mayers engaged in financial transactions that allegedly constituted a breach of his duties to the company. SCP retained Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn") to represent it against Mayers. Mayers commenced an action against SCP for wrongful termination and also sought to disqualify Quinn. Mayers based his disqualification motion on the fact that six months prior to SCP’s retention of Quinn, Mayers called a Quinn attorney and asked that attorney to represent him in transactions relevant to the circumstances of his termination. Though the Quinn attorney declined the representation, he discussed his conversation with another Quinn attorney involved in the SCP representation.

The trial court granted Mayers’s motion to disqualify, emphasizing that details of the conversation were quoted in the complaint. The Appellate Division of the New York Supreme Court reversed, holding that under Rule 1.18 of the New York Rules of Professional Conduct,

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167. Id.
169. Id. at 60.
170. Id.
171. Id. at 60-61.
172. Id. at 61.
“where a prospective client consults an attorney who ultimately represents a party adverse to the prospective client in matters that are substantially related to the consultation,” the attorney should be disqualified “only if it is shown that the information related in the conversation ‘could be significantly harmful’ to the client.174 The court found the information disclosed in the complaint to be no real secret and not significantly harmful.175 The court distinguished a number of prior cases that were decided under the prior rule in New York,176 which, when it was applicable, required only that the information be confidential, but not that it also be “significantly harmful” to the client.177

IV. RECENT TYPE 2 CONFLICTS CASES

In my general taxonomy, Type 2 conflicts issues are those that become issues only because of the rigid nature of the concurrent client conflicts rules and those which arise even in the absence of a substantial relationship between matters. These cases do not involve the potentially significant issues of loyalty and confidentiality that some courts perceive in Type 1 cases. Instead, the conflict exists independent of a substantial relationship and seems, in many cases, to not seriously implicate protection of either professional values or interests of clients. In fact, in many ways, the outcomes seem antithetical to the concerns for client autonomy and choice of counsel that inform much of current ethics thinking. The interests of at least two clients are at stake in every

174. Mayers, 1 N.Y.S.3d at 62 (quoting NEW YORK RULES OF PROF’L CONDUCT r. 1.18(c) (N.Y. STATE BAR ASS’N 2014)).
175. Id.
177. A New York City Bar Opinion contains a useful explication of the balance the new Rule 1.18 strikes. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 960 (July 2015). Restrictions apply to use of information if the attorney does not take steps (as they should and many do) to avoid receiving confidential information in the first place. But if confidences are imparted, a possibly disqualifying conflict occurs only if the information received could be “significantly harmful” to the firm’s client. Id. The restrictions in Rule 1.18 are thus narrower than the restrictions on adverse representation with respect to former and current clients. See N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 1067 (July 2015).

Two important additional exceptions apply. First, if both the prospective client and the affected client give informed consent in writing, the lawyer and the firm may take on the representation that would otherwise be prohibited. Second, even if the individual lawyer is disqualified, the lawyer’s firm may take on the representation as long as the disqualified lawyer took reasonable steps to limit his or her exposure to the disqualifying information and the firm implements an ethical screen, notifying the client and prospective client of the representation and the screening measures that will be implemented. A similar screening mechanism is not available to lawyers in New York (except by consent) for former client conflicts.
disqualification motion, and every decision granting a motion deprives at least one client of its lawyer of choice. Resolution of conflicts issues also poses significant costs for clients and courts. In formulating and applying fair and workable conflicts rules, all these interests should be considered.

An example of this somewhat hyper-technical type of conflict is apparent in McKesson Information Solutions, Inc. v. Duane Morris, LLP.\textsuperscript{178} There, McKesson Corp. ("McKesson") had a number of subsidiaries, including McKesson Automation, Inc. ("MAI"), McKesson Mediation Management, Inc. ("MMM"), and McKesson Information Solutions, LLC ("MIS").\textsuperscript{179} MAI and MIS were part of the same McKesson business segment, known as McKesson Provider Technologies ("MPT").\textsuperscript{180} Duane Morris, LLP ("Duane Morris") undertook to serve as local counsel for MMM and MAI as creditors with claims in a bankruptcy in Pennsylvania.\textsuperscript{181} The representation letter with MMM and MAI contained a broad waiver, which did not identify specific adverse clients or details of adverse representation. Different lawyers in a different office of Duane Morris also represented two individuals named Smith in an arbitration in Georgia filed against MIS. Because MAI and MIS were both part of MPT, the same internal staff monitored both the Smith arbitration and the bankruptcy matter.\textsuperscript{182} MIS moved to disqualify Duane Morris from representing the Smiths, based on its concurrent representation of MAI and MMM.\textsuperscript{183}

The court enjoined Duane Morris from acting as counsel for the Smiths, determining that although the subsidiary McKesson entities were distinct legal entities for contract and liability purposes, they constituted a single entity for purposes of conflicts of interest analysis.\textsuperscript{184} Because Duane Morris's representation of the Smiths was adverse to the interests of MPT, which included MAI, there was technically a conflict of interest. The court determined that the broad, standard advance waiver language contained in Duane Morris's engagement letter did not qualify as a knowing waiver because it did not identify specific adverse clients or details of possible adverse representation.\textsuperscript{185}

\begin{itemize}
\item \textsuperscript{179} Id. at 1-2.
\item \textsuperscript{180} Id. at 2.
\item \textsuperscript{181} Id.
\item \textsuperscript{182} Id. at 4.
\item \textsuperscript{183} Id.
\item \textsuperscript{184} Id. at 5, 7.
\item \textsuperscript{185} Id. at 11.
\end{itemize}
The court admitted that "modern business practices in this age of parent companies with worldwide subsidiaries, mergers and acquisitions makes this conflicts of interest issue one of great importance," but ultimately concluded as a matter of interpreting the ethics rules that the "possibility of breach of loyalty and of possible disclosure of information that may adversely affect MIS in the impending arbitration is too significant to be overlooked..." It enjoined the firm from continuing to represent the adverse parties in the arbitration. Duane Morris subsequently terminated its representation of the McKesson entities in the bankruptcy matter and then moved to vacate the injunction barring it from representing the Smiths on the basis that its representation of the McKesson entities was no longer concurrent. The court granted the motion, noting that "to bar an attorney from representing a client who may have some distant interest in conflict with another current or former client, especially in an era of flourishing companies and multi-office law firms, is inherently unreasonable." This statement seems as clear an indictment of the unnecessary rigor of the parochial U.S. concurrent client conflicts rule as there could be. No substantial relationship or confidential client information was even remotely at stake, and nothing was materially different the day the minor bankruptcy involvement terminated from what it had been the day before.

The characterization of what entity a law firm represents is often determinative, as it was in McKesson Information Solutions, and leads to varied results in the interpretation of engagement letters. In GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C., Johnson & Johnson ("J&J") had engaged Blank Rome, LLP ("Blank Rome") for guidance on privacy and compliance matters. In the original engagement letter, as well as in a later amendment to it, Blank Rome included provisions under which J&J prospectively waived all conflicts arising out of Blank Rome's representation of generic drug manufacturer clients in patent matters adverse to J&J and its affiliates. In 2006, BabyCenter, L.L.C. ("BabyCenter"), a wholly owned subsidiary of J&J, entered into a five-
year agreement with GSI Commerce Solutions, Inc. ("GSI"), pursuant to which GSI agreed to run the day-to-day operations of BabyCenter’s online store. In 2009, BabyCenter closed its online store. GSI accused BabyCenter of wrongfully terminating the agreement and sought mediation in accordance with the agreement, engaging Blank Rome to represent it in the contract dispute. After mediation proved unsuccessful, GSI, again in accordance with the agreement, sought to arbitrate the matter with Blank Rome as its counsel. At this point BabyCenter filed a motion to disqualify Blank Rome, asserting that for purposes of the conflicts analysis, J&J and BabyCenter must be considered essentially the same client and that Blank Rome’s representation of GSI presented a concurrent client conflict with J&J, which it did not consent to waive.

Blank Rome took the position that although it represented J&J, it did not represent BabyCenter—a J&J affiliate. The district court rejected this argument in harsh and rather dogmatic language. The Second Circuit affirmed, though in somewhat more measured tones, concluding that the operational commonality between the affiliated entities was sufficient to establish a corporate affiliate conflict and that Blank Rome’s representation of GSI “reasonably diminishe[d] the level of confidence and trust in counsel held by” J&J. The court further determined that Blank Rome’s waiver language in its engagement letter was insufficient to establish J&J’s consent to the corporate affiliate conflict, because the waiver was limited to matters involving patent litigation. The court rejected Blank Rome’s argument that the client definition in the engagement letter had given Blank Rome carte blanche to accept representation adverse to J&J affiliates that were not separately Blank Rome’s clients, determining that the language “simply is not plain enough or clear enough” to support this argument. In a disturbing aside, it commented that including such language might raise ethical questions in itself.

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193. Id. at 207-08.
194. Id. at 208.
195. Id.
196. Id.
197. Id. at 208-09.
200. Id. at 212-13.
201. Id. at 214.
202. Id.
By contrast, in *Galderma Laboratories, L.P. v. Actavis Mid Atlantic LLC*, Vinson & Elkins LLP’s ("Vinson & Elkins") engagement letter with Galderma Laboratories, L.P. ("Galderma") contained a broad waiver clause, waiving any conflicts except those where: (1) the matter was substantially related to the firm’s representation of Galderma; or (2) there was a reasonable probability that confidential information furnished to Vinson & Elkins could be used to Galderma’s disadvantage.\(^{203}\) Galderma’s general counsel—a lawyer with over twenty years of experience as an attorney and over ten years of experience as a general counsel—signed the engagement letter.\(^{204}\)

Galderma, represented by different counsel, filed an IP suit against Actavis Mid Atlantic, LLC ("Actavis"), a company whose entities Vinson & Elkins had represented in IP matters for six years.\(^{205}\) Vinson & Elkins filed an answer and counterclaim for Actavis, after which Galderma’s general counsel requested that Vinson & Elkins withdraw.\(^{206}\) Instead, Vinson & Elkins withdrew from further representation of Galderma in unrelated matters, relying on the language contained in its engagement letter.\(^{207}\) Galderma then sought to have Vinson & Elkins disqualified, but the court sided with Vinson & Elkins and determined that Galderma had given informed consent to Vinson & Elkins’s future representation in unrelated matters such as the Actavis lawsuit.\(^{208}\) The court acknowledged that its determination rested in part on the level of sophistication of Galderma, which weighed in favor of allowing a more open-ended waiver to suffice as informed consent.\(^{209}\) It is probably worth noting that if the court had not upheld the waiver, Actavis would have been denied the assistance of its regular IP litigation counsel in a case filed against it.

In *Macy’s Inc. v. J.C. Penny Corp.*, a New York appellate court took a similar approach to a remote conflict.\(^{210}\) Jones Day represented Macy’s, Inc. in a lawsuit against J.C. Penney Corp. ("J.C. Penney") relating to a dispute regarding Martha Stewart’s home goods. Jones Day, through separate lawyers, also represented J.C. Penney with respect to IP litigation and trademark registration in Asia.\(^{211}\) J.C. Penney moved to

\(^{203}\) 927 F. Supp. 2d 390, 393 (N.D. Tex. 2013).
\(^{204}\) Id.
\(^{205}\) Id. at 394.
\(^{206}\) Id.
\(^{207}\) Id.
\(^{208}\) Id. at 394, 406.
\(^{209}\) Id. at 401-03.
\(^{211}\) Id. at 65.
disqualify Jones Day on the basis of a concurrent client conflict.\textsuperscript{212} Jones Day’s engagement letter with J.C. Penney contained a provision that informed J.C. Penney about the possibility that Jones Day’s present or future clients “may be direct competitors of [J.C. Penney] or otherwise may have business interests that are contrary to [J.C. Penney]’s interests,” and “may seek to engage [Jones Day] in connection with an actual or potential transaction or pending or potential litigation or other dispute resolution proceeding in which such client’s interests are or potentially may become adverse to [J.C. Penney]’s interests.”\textsuperscript{213} The agreement went on to state that “your instructing us or continuing to instruct us on this matter will constitute your full acceptance of the terms set out above and attached.”\textsuperscript{214}

The court held that the language in the engagement letter, along with J.C. Penney’s decision to continue to engage Jones Day, amounted to a waiver of the alleged conflict.\textsuperscript{215} The court relied in part on the sophistication of the parties and the actions of J.C. Penney’s general counsel. The general counsel had not actually signed the letter but had negotiated other language and gave equivocal testimony about her attitude toward the waiver. The court held that all these factors together were enough to find a knowing waiver for such minor unrelated matters.\textsuperscript{216}

V. AN ASIDE ON POSITIONAL CONFLICTS

Positional or subject matter conflicts present issues of their own, which have also begun to receive court attention, as some litigants more aggressively pursue disqualification motions based on asserted conflicts. Traditionally, it would not necessarily be considered a conflict of interest for a firm to argue a position in one case that might be inconsistent with the position or interests of another client in other matters.\textsuperscript{217} In the case \textit{In re Rail Freight Fuel Surcharge Antitrust Litigation}, Latham represented Union Pacific Railroad Co. (“Union Pacific”), one of the four defendants in a class action antitrust lawsuit for

\begin{footnotes}
\item[212] Id.
\item[213] Id.
\item[214] Id.
\item[215] Id. at 65-66.
\end{footnotes}
conspiracy to raise rail prices for shipping customers.\textsuperscript{218} Separately, Latham also represented Oxbow, an affected shipper, on a variety of transactional matters unrelated to the antitrust suit.\textsuperscript{219} Oxbow was an unnamed plaintiff class member in the antitrust litigation. It filed a separate lawsuit against the railroad companies with virtually the same allegations as made in the class action, but had not yet technically opted out of the class action.\textsuperscript{220} Latham specifically did not represent Union Pacific in this separate litigation. When Oxbow learned of Latham’s representation of Union Pacific in the class action, it moved to disqualify Latham on the ground that the firm would be advocating positions in the class action adverse to the interests of Oxbow in its own parallel suit.\textsuperscript{221} The court refused to disqualify Latham; Oxbow’s status as an unnamed class member in the class action did not create a conflict, and the court regarded Oxbow’s own parallel action as a distinct matter in which Latham was not representing the adverse party.\textsuperscript{222}

In some cases, however, the harm to another client may be seen as more tangible than simply being on the other side of an issue in a different but related case. In \textit{Celgard, LLC v. LG Chem, Ltd.}, Celgard, LLC ("Celgard"), a manufacturer of lithium battery components, brought suit against LG Chem, Ltd. ("LG Chem"), seeking damages and injunctive relief stemming from LG Chem’s alleged infringement of Celgard’s patent.\textsuperscript{223} The injunctive relief would have prevented LG Chem from continuing directly or indirectly to sell its batteries to customers, including Apple, Inc. ("Apple"). Jones Day, which represented Apple in other matters, entered an appearance on behalf of Celgard, representing to the court that it would not represent or counsel Celgard in any matter adverse to Apple, including licensing negotiations. Apple intervened and moved to disqualify Jones Day.\textsuperscript{224} Despite the absence of direct party adversity and Jones Day’s attempt to avoid disqualification by limiting its representation (as Latham had successfully done \textit{In re Rail Freight Fuel Surcharge Antitrust Litigation}),\textsuperscript{225} the Federal Circuit determined in an opinion

\begin{itemize}
  \item \textsuperscript{218} 965 F. Supp. 2d 104, 106-07 (D.D.C. 2013).
  \item \textsuperscript{219}  Id. at 107.
  \item \textsuperscript{220}  Id. at 108-09.
  \item \textsuperscript{221}  Id. at 109-10.
  \item \textsuperscript{222}  Id. at 112-18. Similar issues arise in bankruptcy when a trustee may have similar affirmative claims or claim defenses against a number of parties, one or more of which it may represent in unrelated matters. It is customary to appoint, and for the court to approve, special counsel for those matters despite the overlay of issues.
  \item \textsuperscript{223} 594 F. App’x 669, 670-71 (Fed. Cir. 2014).
  \item \textsuperscript{224}  Id. at 671.
  \item \textsuperscript{225} 965 F. Supp. 2d at 106-07.
\end{itemize}
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labeled “nonprecedential” that Jones Day’s representation of Celgard was directly adverse to the interests of Apple.\(^\text{226}\) According to the court, Apple now faced both the possibility of needing to find a new battery supplier and the possibility that Celgard could use the injunction issue as leverage in licensing negotiations with Apple.\(^\text{227}\) This, in the Federal Circuit’s view, was far more concrete and immediate harm than the ordinary positional conflict. Similar conflicts arguments have been raised in other cases, particularly in the IP area, creating additional uncertainty and complexity to conflicts screening procedures.\(^\text{228}\)

VI. SOME PROBLEMS WITH THE RULES

Two aspects of the conflicts rules, as they exist in most of the United States, seem inordinately strict. First is the fact that any adverse (or in New York, differing) interest creates a disqualifying conflict even when the interests may not be materially adverse, when there is no substantial relationship between matters, and when there is no likelihood whatsoever of misuse of confidential information.\(^\text{229}\) This is a very broad and arbitrary standard. It is made worse by the tendency of some courts to apply this broad rule of disqualification to many affiliates, and the uncertainty that arises from that effort.\(^\text{230}\) In turn, that has led many

\(^\text{226.} \) Celgard, 594 F. App’x at 670-71.
\(^\text{227.} \) Id. at 671-72.
\(^\text{228.} \) On December 26, 2014, the Massachusetts Supreme Court solicited amicus curiae briefs on the following question in a malpractice action:

ANNOUNCEMENT: The Justices are soliciting amicus briefs. Whether, under Mass. R. Prof. C. 1.7, an actionable conflict of interest arose when, according to the allegations in the complaint, attorneys in different offices of the same law firm simultaneously represented the plaintiffs and a competitor in prosecuting patents on similar inventions, without informing the plaintiffs or obtaining their consent to the simultaneous representation.

Supreme Judicial Court for the Commonwealth Case Docket, Chris E. Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP & Others, SJC-11800, SUPREME JUD. CT. & APPEALS CT. MASS., http://www.ma-appellatecourts.org/display_docket.php?dno=SJC-11800 (last updated Feb. 3, 2016). Ultimately, the court concluded that “simultaneous representation by a law firm in the prosecution of patents for two clients competing in the same technology area for similar inventions is not a per se violation” of Massachusetts Rule 1.7. Maling v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, 42 N.E.3d 199, 201 (Mass. 2015) (emphasis added). The court noted that conflicts could arise where conflicting patents would be the subject of an interference, where an attorney was asked to opine on the merits of one client’s patent position vis a vis that of the other client, or where an attorney would “share[ ] the claims pursued for one client because of knowledge or concerns for the claims of the other client. Id. at 202-03 (quoting SWS Fin. Fund A v. Salomon Bros., 790 F. Supp. 1392, 1401 (N.D. Ill. 1992)). Noting that none of these potential conflicts claims was alleged, the Court dismissed the malpractice complaint. Id. at 208-09.

\(^\text{229.} \) See, e.g., NEW YORK RULES OF PROF’L CONDUCT r. 1.7 (N.Y. STATE BAR ASS’N 2014); MODEL RULES OF PROF’L CONDUCT r. 1.7 (AM. BAR ASS’N 2013).

\(^\text{230.} \) Compare Galderma Labs., L.P. v. Actavis Mid Atl. LLC, 927 F. Supp. 2d 390, 394, 406
clients to create guidelines or engagement letters of their own, demanding that a lawyer or firm is to consider virtually every related entity the "client" even though the engagement has nothing to do with the actual client. Additionally, the guidelines or engagement letters clients have created often indicate that the definition of client may go beyond what the law would regard as a sufficient unity of interests to qualify. These letters may—although admittedly some do not—also refuse to waive even the most attenuated conflicts in advance, leaving their decision to a vague expectation that someone will be willing and able to consider them on behalf of the overall corporate entity. This is an expectation too often unfulfilled on a timely enough basis to be useful. This approach also ignores the fact that confidentiality concerns may sometimes prevent the lawyer from seeking a waiver at a later time, even though there is no prospect of a material impact on the existing client's interests.

A second contributing factor is the breadth of the imputation rule, coupled with the strong, if not irrebuttable, presumption that confidential information seen by one lawyer within a firm has been available to every associated lawyer within the same firm. This problem is then further compounded by the failure of the professional responsibility rules to recognize screening as a means to cure conflicts in the absence of consent except for prospective client conflicts, and in some states (but not many others, such as New York) for some lateral conflicts.231

VII. AMELIORATING DOCTRINES

Because their overriding concern is with the proceedings before them and not enforcement or implementation of every technicality in the state professional responsibility codes, courts apply discretion in how they rule on conflicts to assure the fairness and efficiency of proceedings, discourage tactical gamesmanship, and respect client choice of counsel. For convenience, I call these "ameliorating doctrines" and divide them into five categories.232 These doctrines smooth some of the hardest edges of the conflicts rules in some cases, but they are not in any sense a solution to the problems posed by arbitrary rules. The results they produce are uncertain and unpredictable, and are


232. See infra Part VII.A-B.
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achieved only at great cost in terms of additional motion practice and discovery. They represent a useful but ad hoc response to an issue in need of systematic attention.

A. Advance Waivers

As we have seen, broad waivers are sometimes accepted and sometimes not, depending on the severity of the underlying conflict, the sophistication of the client, and other factors such as the timing of the disqualification motion.\(^{233}\) More specific waivers may be respected, but sometimes are interpreted in ways that may not have been anticipated or that actually limit their application for the specific conflict at issue. The utility of advance waivers has also been limited by some clients' blanket refusal to consider them.

B. Screens

Screens may be employed as fail-safes even when the ethics rules do not specifically permit them. The courts may or may not accept them, depending on whether they consider the presumption that confidential information will be shared, rebuttable or not.\(^{234}\) Very small missteps or delays in implementing a screen can also doom its efficacy.\(^{235}\)

C. Delay/Implied Waiver

A long line of judicial decisions decries the use of disqualification motions as a disfavored litigation tactic in many cases.\(^{236}\) As we saw in the Swanson case, for example, the courts may find it possible to waive a conflict from unexplained delay in raising it, even when they will not indulge in a more general balancing of the equities.\(^{237}\)

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233. See discussion infra Part IV.
234. See j2 Global Commc'ns, Inc. v. Captaris Inc., No. CV 09-04150, 2012 WL 6618272, at *9-10 (C.D. Cal. Dec. 19, 2012) ("Once there is a presumption that a firm possesses confidential information, generally that presumption is rebuttable and disqualification is compelled.").
235. See, e.g., id. at *10 (finding the ethical screen unsuccessful because it was implemented too late); Georgian Am. Alloys Inc. v. White & Case LLP, [2014] EWHC (Comm) 94, [85] (Eng.) (finding screen unsuccessful because it was implemented too late).
236. See HLP Properties, LLC v. Consol. Edison Co. of N.Y., No. 14 Civ. 01383, 2014 WL 5285926, at *3 (S.D.N.Y. Oct. 16, 2014) ("Courts in this Circuit show 'considerable reluctance to disqualify attorneys' because . . . 'disqualification motions are often interposed for tactical reasons [a]nd even when made in the best of faith . . . inevitably cause delay.'" (quoting Bd. of Ed. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979))).
D. "Thrust Upon" Conflicts

Courts sometimes invoke the notion of a "thrust upon" conflict to avoid a disqualification that seems unfair to a lawyer. The doctrine of "thrust upon" conflicts proceeds from the premise that a lawyer and her client should not be disadvantaged through conflicts that emerge from corporate actions, such as mergers or acquisitions, that take place after an engagement has begun and over which the lawyer had no control. In Robert Bosch Healthcare Systems, Inc. v. Cardiocom, LLC, for example, the court refused to find that a disqualifying conflict existed because an affiliate acquired by a client after the engagement began had commenced litigation against another established client of the law firm involved. Disqualification based on a situation essentially created by the unilateral action of one client seems fundamentally unfair to the lawyer and the other client.

E. The Catch-All: Courts' Control of Proceedings Before Them

Courts also ameliorate the arbitrariness of the conflicts rules by phrasing the inquiry as one of control of the fairness and conduct of attorneys in proceedings before them and looking to the state ethics rules only as one source of guidance. Even when a conflict is apparent, if no party will be prejudiced by the conflict, the court may find no compelling reason to disqualify a party's counsel of choice. In HLP Properties, LLC v. Consolidated Edison Co. of New York, Inc. for example, attorneys in the New York office of Gibson, Dunn & Crutcher LLP ("Gibson Dunn") represented plaintiffs in a suit against Consolidated Edison Co. of New York, Inc. ("Con Ed NY") involving a parcel of land in New York. Before that representation began, Consolidated Edison, Inc. ("CEI"), Con Ed NY's parent company, had retained a Gibson Dunn corporate partner in the firm's Washington, party had not known of a conflict for two years or more before moving for disqualification and citing delay as one of several factors weighing against disqualification).


239. The District of Columbia Bar Association has a well-known opinion on the subject ("DC Bar Opinion"). See D.C. Bar, Op. 356 (2010). The opinion states that "if a conflict not reasonably foreseeable at the outset of representation arises under paragraph (b)(1) [of Rule 1.7] after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation" unless the representation or the lawyer's professional judgment is likely to be adversely affected by representation of another client. Id. In the example set forth in the DC Bar Opinion, confidentiality concerns prevented the lawyer from disclosing her conflicting representation and obtaining informed consent, but the opinion concludes that continued representation would be proper absent adverse effect on either relationship. Id.

D.C. office with respect to corporate governance matters. The engagement letter defined CEI as the client, and stipulated that "[u]nless expressly agreed, [Gibson Dunn is] not undertaking the representation of any related or affiliated person or entity, nor any family member, parent corporation or entity, subsidiary, or affiliated corporation or entity, nor any of [CEI's] officers, directors, agents, partners or employees." After the corporate secretary of CEI learned that Gibson Dunn represented the plaintiffs in the suit against Con Ed NY, Gibson Dunn sought a waiver of any conflict from CEI, but CEI refused to grant it and moved for disqualification in the New York real estate case.

The court rejected Con Ed NY's argument that Gibson Dunn represented it directly under the engagement letter, even though the work performed for CEI concededly could benefit Con Ed NY indirectly. The court did find, however, that Con Ed NY and CEI had sufficient unity of interests to be considered one for purposes of conflicts analysis. This placed on Gibson Dunn the burden to show no divided loyalty or diminution of the vigor of its representation for either client. The court found it somewhat troubling that Gibson Dunn had not obtained a waiver when it first undertook to represent CEI but still found no reason to disqualify the firm. Risk of trial taint did not exist because the dual representations involved unrelated subjects, different Gibson Dunn attorneys in different departments and different offices, and no inside knowledge relevant to the plaintiffs litigation. The court was also wary that the timing of Con Ed NY's disqualification motion suggested that it was being used to gain a tactical advantage—in this case because it was filed almost immediately, rather than after any discussion or after a long delay, as is typical. The court also feared that plaintiffs would suffer significant prejudice if the disqualification were to be granted, while Con Ed NY would experience scarcely any if it were denied.

241. Id. at *1-2.
242. Id. at *1.
243. Id. at *2-3.
244. Id. at *4.
245. Id. at *4-5.
246. Id. at *5.
247. Id.
248. Id. at *6.
249. Id.
VIII. APPROACHING TODAY’S CONFLICTS RULES PROFESSIONALLY

Some, though not all, of the Type I conflicts cases reveal possible missteps by counsel, albeit sometimes unintentionally given real world, real time information constraints. The rules may sometimes be overly rigid, and courts may be unduly skeptical of curative measures like screening. But no one would tolerate a system of rules that allowed a firm to be cavalier in identifying or investigating serious concerns when they arise or attacking or explaining away a firm’s own prior work for a one-time client that is now an adversary. The duty of confidentiality is real. So is the duty of loyalty when there is serious adversity and a relationship in which a law firm actually switches sides.

Under any set of rules, firms can—and should—exercise greater vigilance and precautions than may have been the case in some of the Type I cases. They must also react with diligence and care when a potentially serious problem is discovered or pointed out to them by an adversary. The interests of the clients on both sides, as well as those of the law firm, suffer when lawyers stonewall or grow too cavalier. Some conflicts are intractable and hard to detect, but serious conflicts problems are a consequence of professional growth and success, and they should be handled diligently and professionally.

The situation with respect to what I have called Type 2 cases is different. For the most part, these cases involve unrelated, sometimes minor work of no significance to the litigation in which the motion is made. These situations do not generally generate significant loyalty or confidentiality concerns and may become an issue simply as a tactical matter, fueled perhaps by the rancor that the litigation process itself may engender. Counsel should still, of course, be vigilant and treat these issues seriously as long as the rules are as they are. If they do act reasonably, some of what I have called the ameliorating doctrines may also come to their aid. There is, however, no guarantee that will necessarily be so, and a problem of the rules for these largely superficial conflicts questions is that it may cost attorneys and clients considerable time and money to learn the answer.

Professionalism considerations apply to lawyers on both sides of these issues—inside counsel confronted with a request for consent and the outside lawyer whose firm may have a potential issue. These considerations should—though they often do not—point lawyers toward developing candid, reasonable, and procedurally efficient approaches to discussing and resolving such issues wherever possible, both after they have occurred and before, in circumstances when they can be anticipated.
Outside lawyers need to conduct serious due diligence and alert clients to potential conflicts, when possible. Firms need to have robust conflicts-checking systems and procedures—systems that not only involve up-to-date software and well-trained reviewers, but also systems or procedures that allow hints or questions about prior work or relationships to be followed up by frank discussion of key lawyers involved. Firms also must ensure that ethical screens and any notifications or other curative steps are implemented effectively and quickly. And to the extent possible, firms should discuss the issues and steps to address them with the affected clients.

On the other hand, clients should also be willing to address issues reasonably and quickly and not stand in the way of representations that are immaterial to their interests. Among other things, they should discuss and provide reasonable waivers and agree to letters describing what a representation is truly about and in which the “client” is not defined more broadly than the ethics rules require. Taking a long view, clients benefit from being represented by successful firms with a range of practices and expertise in their industries and, therefore, have an independent interest in having a wide choice of firms not hampered by conflicts.

Both sides should want a productive, respectful, candid relationship. Both should recognize that taking arbitrary positions scarcely fosters this relationship. In my view, taking hardline, arbitrary positions on both sides may be the reason why so many of the nasty disqualification disputes this Article has discussed have played out in the courts in recent years.

All of this raises the question of what a reasonable approach to conflicts should be. Some contours can be gleaned from the cases examined above. First, counsel should never seek to act without consent when there is a substantial relationship between matters—this is the rule in most jurisdictions in the world. Counsel should not act if doing so would likely involve the misuse of confidential information. Second, counsel should not act if taking a position involves attacking or rendering nugatory the attorney’s or firm’s former work for that client.

IX. A BETTER SET OF RULES?

Given the rules that we have and the unlikelihood that they will change in the near future, lawyers should behave to make their application as reasonable and professional as possible. But, ideally, the

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250. See supra Parts III–IV.
rules themselves should embody the above considerations. Proper attention could then be focused on issues of substance rather than squandered on peripheral matters. Specifically, the concurrent client conflicts rule could be limited, as it is in so many parts of the world, to matters having a substantial relationship to one another. A number of Type 2 conflicts cases would then disappear overnight, saving a great deal of angst, time, and money, and leading to more certain results. No fundamental value would be compromised by this simple change.

A second change would be to limit the imputation rule to knowledge of confidential, material information and to allow reasonable screening measures to defeat imputation and the presumption of leakage. This change would produce more predictable results without seriously jeopardizing any client interest.

Such changes in the rules should not, however, alter the rule that a lawyer or law firm could never represent both clients in a litigation. They should also be drafted in a manner that would prevent the type of side-switching in which a law firm may potentially impugn work the same firm previously performed for the client which is now adverse. Drafters of rule changes might also be tasked with considering having the rules address, more directly than they do now, when or whether significant positional conflicts in areas such as IP should be disqualifying.

Some may criticize this solution as an accommodation to larger firms at the expense of smaller ones. But the argument is actually the other way around. The concurrent client conflicts rule untethered to any substantial relationship surely poses more problems for a solo practitioner or small firm in a small town with one or two banks and a few other repeat users of lawyers than it does for a firm with offices around the globe and a world of potential clients. In either situation, a large institution could unfairly exploit the rule to deny its adversaries access to well-qualified counsel.

Moreover, to the extent that the present current client and imputation rules penalize firms for growth and success or limit the opportunities for both counsel and other users of legal services, they are protectionist and anti-competitive.

In any event, the objective of the

251. Compare Model Rules of Prof'l Conduct r. 1.7 (AM. BAR ASS'N 2013), with Solicitors Regulation Auth. Code of Conduct 2011, c. 3.6 (Eng. & Wales).

252. A body of case law already exists that treats affiliate conflicts as “virtual conflicts” and resolves them by application of the substantial relationship test. See Depalma & Borden, supra note 23, at 135-38.

253. Nor is screening as a fail-safe always a panacea even for the largest firms. It is not costless or easy to implement, and in many fields the very people at the firm that a client would come to a firm to retain in a certain type of matter are those who must be screened.
rules should be to maximize all clients' ability to retain the most effective legal representation they can. The concurrent client conflicts and imputation rules could be revised to better serve that objective. Some suggestions for doing so are set forth below.254

X. TWO POSSIBLE CHANGES

Below, I present two potential changes to the ethics rules, in order to serve the objective of maximizing clients' ability to retain the most effective legal representative they can.

A. Possible Change to Rule 1.7(a)

Rule 1.7(a) currently states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
   (1) the representation will involve the lawyer in representing differing interests; or
   (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.255

I propose changing section (a)(1) of Rule 1.7 as follows:

(a) Except as provided in paragraph (b), a lawyer or law firm shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
   (1) the representation of one client will be directly adverse to another client in a matter
       (i) that is substantially related to a matter in which the lawyer or law firm represents the other client; or
       (ii) either matter has provided or is likely to provide the lawyer or law firm with access to relevant confidential information of one client related to the matter in which the lawyer or law firm represents the other client, and individual lawyers with access cannot be effectively screened under Rule 1.10.

254. See infra Part X.
255. MODEL RULES OF PROF'L CONDUCT r. 1.7 (AM. BAR ASS'N 2013).
B. Possible Change to Rule 1.10(a)

Rule 1.10(a) currently states:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.256

I propose changing it to:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8 or 1.9, unless:

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer’s association with a prior firm or prior work or exposure to confidential information by the disqualified lawyer which, though it may be related to the present representation, is not likely to be adversely and materially affected by any arguments or positions advanced in the present representation, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to any affected former client describing the screening procedures employed; a statement of the firm’s and of the screened lawyer’s compliance with these Rules; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures.

XI. CONCLUSION

Rule changes such as these would not resolve all difficult conflicts questions. They would not presage an end to all disputes, nor would they

256. Id. r. 1.10(a).
prevent all future battles between outside lawyers’ advance waivers and in-house counsels’ guidelines. But, they would avoid arbitrary results in many cases and should significantly reduce the number of litigated disputes, especially those over relatively minor issues. And they could alter the landscape in which future battles are fought in a way that better reflects the long-term interests of both clients and attorneys as a whole.