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Resolving Client Conflicts by Hiring “Conflicts Counsel”

RONALD D. ROTUNDA*

A general principle of legal ethics is that a law firm may not represent a client suing someone who is also a client of the law firm (1) even though the two matters are unrelated, (2) a different law firm represents the client in that law suit, and (3) there is no risk that the lawyer would violate the confidences of any client. Other ethics rules magnify the significance of this rule by imputing the disqualification of every lawyer in the law firm to every other lawyer in the same firm. Courts enforce these rules by disqualifying the offending law firm.

In general, sound reasons support these ethics rules. Yet, there are situations where these rules require disqualification although there is no legitimate client expectation of loss of loyalty or confidence. There is nascent case law in the lower courts that recognizes this problem and offers a solution: using what I call “conflicts counsel,” meaning that the client retains a new lawyer from a different law firm to handle a discrete, severable matter—the matter that created the conflict. Although these cases—typically in the area of discovery and bankruptcy—do not discuss their rationale, their instincts are correct: using conflicts counsel in certain situations mitigates the burden of disqualification while protecting the underlying reasons behind disqualification. Courts should follow these decisions, which are typically unpublished.

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INTRODUCTION

The general rule of legal ethics is that a law firm may not represent a client who is suing someone who is also a client of the law firm, even though (1) the two matters are unrelated, (2) a different law firm represents the client in that lawsuit, and (3) there is no risk that the lawyer would violate the confidences of any client.¹ This rule has bite, because courts routinely enforce it in the course of litigation by disqualifying the law firm.

A party’s successful disqualification motion not only protects the client, but also imposes costs on the adversary because the adverse party must now hire and educate new counsel.² Courts should not

1. *E.g.*, RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 1.7-3 (2009).

2. Some argue that some lawyers make strategic disqualification motions—where the primary motive of the movant is to impose costs on the adversary. *See, e.g.*, *Laryngeal Mask Co. v. Ambu A/S*, No. 07-CV-1988-DMS (NLS), 2008 WL 558561, at *6 (S.D. Cal. Feb. 25, 2008) (“The Court has in mind the legitimate interests of Defendants Ambu to oppose a strategic disqualification motion of its counsel of choice . . .”); *see also* Rebecca Dean, *Practical Ethics for the Employment Lawyer & Corporate Employment Law Counsel*, in 35TH ANNUAL INSTITUTE ON EMPLOYMENT LAW 477 (PLI Litig. & Admin. Practice, Course Handbook Ser. No. 8878, 2006) (“Strategic disqualification motions are hardly unheard of.”); Linda Ann Winslow, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest*, 62 WASH. L. REV. 863, 878 (1987) (“Denial of third party standing would limit unmerited strategic disqualification motions without permitting violations by attorneys to go unchecked.”).

Initially, the ABA Model Rules acknowledged this position, when an older version said that a charge of conflict of interest “should be viewed with caution . . . for it can be misused as a technique of

unnecessarily impose these costs if they can protect client interests through other means.

Other ethics rules magnify the significance of this rule by routinely imputing the disqualification of every lawyer in the law firm to every other lawyer in the same firm.³ The impact of the imputation rule has grown over the years, as law firms have increased in size and spread in geography—it is no longer unusual for law firms to consist of hundreds of lawyers spread throughout the United States and other countries. In addition, lawyers have become more mobile over the years. In the old days, it was common for lawyers to join a law firm for life. It was like marriage.⁴ Now, joining a law firm is more like a marriage in Hollywood: It is not for life. When lawyers move, they take their disqualifications with them;⁵ when lawyers move with greater frequency, they can become a modern-day Typhoid Mary, infecting one law firm after another with their disqualifications.

Moreover, states often impute disqualification even when the ABA Model Rules would allow the law firm to avoid it by creating a screen to wall off the disqualified lawyer from his or her colleagues in the firm.⁶ States are concerned that the screen will be translucent, not opaque, and that confidences will leak from the lawyers who are supposed to be walled off from their partners.⁷

harassment.” MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. (1983). The post-2002 version does not include this comment, *see* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2010), though some states continue to retain it, *see, e.g.*, TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06 cmt. 17 (2005).

We should recognize that a motion to disqualify is either frivolous or it is not. If it is frivolous, the court should obviously reject it. If it is not frivolous, the court should rule on the merits without regard to the motive of the movant. Should a judge say, every time a lawyer objects to hearsay, “Aha, a hearsay objection—I should be careful in ruling, because the lawyer might be making it for tactical reasons”? No party makes any motion that it regards as strategically disadvantageous.

Courts often require that only a party who has standing may raise a conflict of interest in a motion to disqualify. *See, e.g., In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 84 (5th Cir. 1976); *FMC Techs., Inc. v. Edwards*, 420 F. Supp. 2d 1153, 1156 (W.D. Wash. 2006). Another concern is laches. *See Jackson v. J.C. Penney Co.*, 521 F. Supp. 1032, 1034–35 (N.D. Ga. 1981); Robert C. Hacker & Ronald D. Rotunda, *Standing, Waiver, Laches, and Appealability in Attorney Disqualification Cases*, 3 CORP. L. REV. 82, 84–87 (1980); Douglas R. Richmond, *The Rude Question of Standing in Attorney Disqualification Disputes*, 25 AM. J. TRIAL ADVOC. 17, 54 (2001).

3. *See* MODEL RULES OF PROF'L CONDUCT R. 1.10 (2010). The prior ABA Model Code of Professional Responsibility had a similar provision: Disciplinary Rule 5-105(D). MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(D) (1980).

4. *See generally* ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY (2d ed. 1998) (describing and analyzing the complex law that has developed as lawyers leave firms and take—or try to take—their clients with them). The future promises increased lawyer mobility. Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirements and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199, 200–02 (2007).

5. MODEL RULES OF PROF'L CONDUCT R. 1.10(a), (b) (2010).

6. THOMAS D. MORGAN & RONALD D. ROTUNDA, SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY app. B (2009) (charting the states' screening provisions).

7. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 10.20 (3d ed. 2004).

As discussed below, sound reasons underlie the ethics rules that prevent a lawyer representing one client from simultaneously taking a position adverse to another current client, even though a different law firm represents that other client. And, there are equally sound reasons supporting the general rule that imputes one lawyer's disqualification to all the other lawyers in the same firm. Yet, situations arise when the simultaneous representation rule and the imputation rule impose costs that greatly exceed their benefits.

One would think that it would be easy for the courts simply to adopt a new rule to deal with problems as they occur. After all, rules governing the practice of law are found in the ethics rules that the state supreme courts (or the federal courts) adopt to govern lawyers admitted to practice before them.⁸ These rules, like the rules of evidence or civil procedure, are real law with real-life consequences. And, while courts have no power to change statutes, it is easy for the courts to change their own rules.

Nonetheless, the ethics rules do not presently provide a solution where the simultaneous disqualification rule and the imputation rule disqualify a law firm even when there is no legitimate client expectation of loyalty and confidentiality. What makes this situation unusual is that there is nascent case law in the lower courts that recognizes the problem and then suggests a solution: using what I call "conflicts counsel," meaning that the client retains a new lawyer from a different law firm to handle a discrete, severable matter—the matter that created the conflict. Yet, these cases typically do not discuss *why* they allow use of conflicts counsel; they simply embrace the idea without exploring the rationale behind it.

This Article will investigate the rationale for, discuss the case law that appears to implement the concept of, and explain why the use of conflicts counsel in certain situations is a useful and valuable solution that respects legitimate client concerns. This Article concludes by arguing that the ABA House of Delegates should legitimize the use of conflicts counsel by enacting a Model Rule of Professional Conduct that codifies it and clarifies its limits. These Model Rules are the basic template that nearly every jurisdiction uses when courts adopt the Rules of Professional Responsibility to govern lawyers who practice before them,⁹ so the ABA's recognition of conflicts counsel is vital.

First, let us briefly turn to the underlying justification and reach of the rule disqualifying a lawyer from simultaneously representing

8. THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* 31 (10th ed. 2008).

9. In fact, the Tenth Circuit has instructed lawyers that the ABA Model Rules reflect the "national standard" that courts should use in ruling on disqualification motions. *See Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1383 (10th Cir. 1994).

conflicting interests. Then, we will look at the rationale for the rule imputing this disqualification to all members of the same law firm. These two basic rules—prohibiting simultaneous representation and imputing disqualification—create the problem. Finally, we will look at the emerging case law that supports the use of conflicts counsel, even though the courts routinely do not explain the *raison d'être* for what they have intuited.

I. SIMULTANEOUS REPRESENTATION OF CONFLICTING INTERESTS

The rule prohibiting simultaneous representation of conflicting interests derives from two basic principles of legal ethics: the duty to respect client confidences and the duty of client loyalty. The reach of these two principles is extended by yet two other principles: the routine imputation of a lawyer's disqualification to everyone else in the same firm, and the rule prohibiting a law firm to convert a present client to a former one by dropping that client in order to accept another, more favored client. Clients can waive their protections but often do not do so. Let us now consider each of these principles.

A. THE DUTY TO RESPECT CLIENT CONFIDENCES

Two rationales justify the prophylactic rule that prohibits a lawyer from suing or being adverse to a current client. First, there is the lawyer's duty to protect the client's confidences and secrets.¹⁰

It is easy to understand why a lawyer may not represent a client in one case while being adverse to the client in another case, if the lawyer has learned confidences in one case that would be useful or relevant in the other. Lawyers have a duty to keep their client's confidences;¹¹ this duty applies forever.¹² It applies to protect the confidences of former clients,¹³ so it surely should apply to protect the confidences of current clients.

The factual matters, the nature, or the subject matter of the two cases may look dissimilar to a lay person: The touchstone is relevant confidences. For example, assume that a lawyer representing a businessperson who is creating a corporation learns extensive private financial information about that person.¹⁴ She may not simultaneously represent the spouse of that businessperson in seeking a divorce, because the lawyer's confidential knowledge of the businessperson's finances

10. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) & 1.9 cmt. 1 (2010).

11. *Id.* R. 1.6(a) & 1.7 cmts. 18 & 19.

12. *Id.* R. 1.9(c).

13. *Id.* R. 1.9.

14. *See id.* R. 1.9 cmt. 3.

would be relevant to the spouse's efforts to divide the estate.¹⁵ Representing Client Alpha, who is creating a corporation, does not look similar to representing Client Beta, who is seeking a divorce, but in context, the lawyer for Alpha will learn confidential financial information relevant to the divorce of Client Beta. Because the lawyer's duty to keep confidences outlasts the attorney-client relationship, the lawyer cannot avoid the duty by dropping Client Alpha like a hot potato.¹⁶

B. THE DUTY OF LOYALTY

In addition to the duty to respect clients' confidences, the lawyer owes a duty of loyalty to current clients.¹⁷ The general principle is that the lawyer's duty of loyalty only applies to current clients, not former ones.¹⁸ The lawyer may not be adverse to a current client—even if she learned no confidence that would be relevant in the other case—because of this fiduciary duty. Even if the matters are “wholly unrelated,” the client is “likely to feel betrayed” because of the lawyer's disloyalty.¹⁹ For example, a lawyer breaches her duty of loyalty if she represents a wife in a divorce suit against the husband while simultaneously representing the husband seeking to collect on his worker's compensation claim. We can assume that there are no breaches of confidences, and the cases are completely unrelated. But the lawyer still violates her duty of loyalty to a current client.²⁰ This prohibition goes back at least 700 years.²¹

A leading case is *Grievance Comm. of the Bar of Hartford County v. Rottner*.²² In that case, the law firm accepted an assault and battery case for a client, O'Brien, against another client, Twible.²³ At the same time,

15. See, e.g., *id.* R. 1.6(a) & 1.8(b). Indeed, because the requirement to preserve client confidences extends beyond the current representation—the duty to keep the client's secrets is essentially forever—the lawyer cannot represent the spouse even if she no longer represents the businessperson. *Id.* R. 1.9 cmt. 3.

16. See, e.g., Ronald D. Rotunda, *One Potato, Two Potato, Three Potato, Four*, LEGAL TIMES, Aug. 12, 1991, at 23, available at 1991 WLNR 4818941.

17. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (2010).

18. There are a few instances where the lawyer cannot be adverse to a former client, even where there may be no breaches of confidentiality. For example, a lawyer may not rescind, on behalf of a new client, a contract that the lawyer drafted for a former client. *Id.* R. 1.9 cmt. 1. To that extent, the duty of loyalty outlasts the attorney-client relationship.

19. *Id.* R. 1.7 cmt. 6.

20. *Memphis & Shelby Cnty. Bar Ass'n v. Sanderson*, 378 S.W.2d 173, 182–83, 186 (Tenn. Ct. App. 1963) (disbarring a lawyer because, in addition to other infractions, he was representing a man in a worker's compensation case, while being adverse to him in a divorce case).

21. Jonathan Rose, *The Ambidextrous Lawyer: Conflict of Interest and the Medieval and Early Modern Legal Profession*, 7 U. CHI. L. SCH. ROUNDTABLE 137, 139 n.11, 146–47 (2000) (noting that the London Ordinance of 1280 forbid a lawyer from simultaneously representing conflicting parties).

22. 203 A.2d 82 (Conn. 1964). For a thorough discussion of *Rottner*, see Thomas D. Morgan, *Suing a Current Client*, 9 GEO. J. LEGAL ETHICS 1157, 1165–68 (1996).

23. *Rottner*, 203 A.2d at 83.

the firm was representing Twible in a collection matter against a third party.²⁴ The cases were not at all related, but the court still disqualified the lawyer.²⁵ The lawyer was representing Twible in one case while suing him in another:

When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion. If, as in this case, he is sued and his home attacked by his own attorney, who is representing him in another matter, all feeling of loyalty is necessarily destroyed, and the profession is exposed to the charge that it is interested only in money.²⁶

In *IBM Corp. v. Levin*, the court disqualified a law firm that represented Levin in an antitrust case against IBM, because the law firm was also occasionally writing labor law opinion letters for IBM.²⁷ When an IBM representative sought out the law firm, the firm told IBM that it had filed suit against IBM.²⁸ The IBM representative did not object.²⁹ It is obvious that IBM was neither a callow youth nor a befuddled widow, yet the court still disqualified the law firm.³⁰ The court was unwilling to simply assume that IBM impliedly waived because it had constructive notice was what was going on. In other words, it was clear that one part of IBM (the IBM labor lawyers) knew it was hiring a law firm that another part of IBM (the IBM lawyers handling IBM's defense of the antitrust action) knew was adverse to it in the antitrust case. This constructive notice was insufficient to prevent disqualification because the law firm did not bring home to IBM the significance of what it is doing.³¹

When an attorney represents one client in a suit against another, "some 'adverse effect' on an attorney's exercise of his independent judgment on behalf of a client may result from the attorney's adversary posture toward that client in another matter."³² The attorney's efforts to

24. *Id.*

25. *Id.* at 84–85.

26. *Id.* at 84. The lawyer is a fiduciary and, as such, has the typical fiduciary obligation not to breach the duty of loyalty owed to the principal. See Laurence S. Fordham, *There Are Substantial Limitations on Representation of Clients in Litigation Which Are Not Obvious in the Code of Professional Responsibility*, 33 *BUS. LAW.* 1193, 1204 (1978); Ronald D. Rotunda, *Professional Responsibility*, 45 *SW. L.J.* 2035, 2036 (1992).

27. 579 F.2d 271, 275–76 (3d Cir. 1978); see also *In re Dresser Indus.*, 972 F.2d 540, 544–45 & n.7 (5th Cir. 1992) (citing MODEL RULES OF PROF'L CONDUCT R. 1.7 (1992)) (holding that no exceptional circumstances allow a law firm to represent the plaintiffs in a class action antitrust suit against one of the law firm's current clients, whom the firm was simultaneously representing in two pending lawsuits).

28. *IBM*, 579 F.2d at 276.

29. *Id.* at 276–77.

30. *Id.* at 281.

31. *Id.* at 281–82.

32. *Id.* at 280.

please client A (or client B), might cause a “diminution in the vigor of his representation of the client in the other matter.”³³ The attorney owes both clients “undivided loyalty.”³⁴

C. IMPUTING THE LAWYER’S DUTIES OF RESPECTING CLIENT CONFIDENCES AND CLIENT LOYALTY

Imputation magnifies the reach of the lawyer’s duty to respect client confidences and the lawyer’s duty of client loyalty. The basic principle is that the ethics rules impute the lawyer’s individual disqualification to every other lawyer in the same law firm.³⁵

The leading case illustrating the reach of imputation and simultaneous representation of adverse interests is *Cinema 5, Ltd. v. Cinerama, Inc.*³⁶ The issue arose because a lawyer, Manly Fleischmann, was a partner in two different law firms, one in New York City and one in Buffalo.³⁷ Through him, the court imputed all the conflicts of the Buffalo firm to the New York City firm.³⁸ The Buffalo law firm

33. *Id.*

34. *Id.* (quoting *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976)).

35. Prior to 2009, the ABA Model Rules did not provide a screening option for attorneys moving between private firms. MODEL RULES OF PROF’L CONDUCT R. 1.10 (2008). Under the old Rules, there are various exceptions to imputed disqualification, none of which are applicable here. *Id.* R. 1.10. There are also special provisions that apply to the revolving door between private practice and government service. *Id.* R. 1.11. Under the pre-2009 rule, the law firm could remove the disqualification by screening the disqualified lawyer from all participation in the matter in question, *id.*, but this rule did not apply in the case of lawyers moving from one private law firm to another. *See id.* R. 1.10(d). The rationale was that public policy encourages the revolving door between the private and the government spheres, but the same justifications do not apply to lawyers moving between private law firms. *See, e.g.*, Ronald D. Rotunda, *Ethical Problems in Federal Agency Hiring of Private Attorneys*, 1 GEO. J. LEGAL ETHICS 85 (1987) (explaining that the government wants to encourage lawyer mobility between private practice and government service, wants its government lawyers to bring to the world of private practice the government’s interest in effective law enforcement, wants its lawyers to have experience in the private world, and recognizes that the profit motive that fuels the private world does not apply to government decisionmaking).

In 2009, the ABA approved a new rule allowing limited screening in the case of lawyers whose disqualification relates to association with a prior law firm. *See* MODEL RULES OF PROF’L CONDUCT R. 1.10(a)(2) (2010); Cassandra Melton, *Model Rule 1.10: Imputation of Conflicts and Private Law Firm Screening*, ABA LITIG. NEWS, http://www.abanet.org/litigation/litigationnews/trial_skills/pretrial-model-rule-110.html (last visited Feb. 2, 2011); *see also* ABA Comm. on Ethics & Prof’l Responsibility, Revised Recommendation 109 (2009) [hereinafter ABA Resolution 109], available at <http://www.abajournal.com/files/109Revised.pdf>. This Rule does not deal with the problem that is the focus of this Article. The ABA changes only deal with the issue of a lawyer’s duty to a former client when moving from one law firm to another. Conflicts counsel focuses on the conflict caused by a law firm *simultaneously* representing clients with conflicting interests. Whether this new ABA Rule will have influence is unclear. The revised Rule 1.10(a)(2) “departs substantially from the rules in thirty-nine jurisdictions,” as the Minority Report to the ABA Resolution makes clear. *Id.* at 9.

36. 528 F.2d 1384 (2d Cir. 1976).

37. *Id.* at 1385.

38. *See id.* at 1387.

represented Cinerama, which was a defendant in an antitrust action in upstate New York.³⁹ Several theater operators were suing Cinerama.⁴⁰

Later, several plaintiffs retained the New York City firm to sue several companies, including Cinerama, for alleged attempts to take over theater companies in New York City as part of an effort to restrain competition in New York City's first-run motion picture theater market.⁴¹ Hence, one law firm (where Fleischmann was a partner) was suing Cinerama in New York City, while the other law firm (where Fleischmann was also a partner) was defending Cinerama in upstate New York.⁴² Because Fleischmann was the common partner in the two firms, the court followed the standard imputation rule and treated the situation as though it were a single law firm representing its client in one case while suing it in a different case.⁴³

Cinema 5 (whom Fleischmann's upstate New York law firm represented), appealed the disqualification, arguing that two different cases in two completely different markets were involved and thus, that the cases were not "substantially related," in other words, that the law firm did not learn confidences from one client that it could use against another current client.⁴⁴ The Second Circuit assumed that the cases were not substantially related,⁴⁵ but still, it ordered disqualification.⁴⁶ Even though there was no breach of client confidences, there was a breach of "the duty of undivided loyalty which an attorney owes to each of his clients."⁴⁷

The court concluded that Cinerama was "entitled to feel that at least until that litigation was at an end, it had his undivided loyalty,"⁴⁸ and that its lawyer would "accept no retainer"⁴⁹ adverse to its interests. Fleischmann's New York City law firm owed similar duties to Cinema 5. The court treated the two firms as one, because of the common partner.⁵⁰ Because the law firms were a single "firm" for imputation purposes, the

39. *Id.* at 1385.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 1387.

44. *Id.* at 1385.

45. *Id.* at 1386.

46. *Id.* at 1387.

47. *Id.* at 1386. The court conceded that the "substantial relationship" test is indeed the one that we have customarily applied in determining whether a lawyer may accept employment against a former client." *Id.* But, the court noted that this "suit is not against a former client, but an existing one." *Id.*

48. *Id.* (citing Grievance Comm. of the Bar of Hartford Cnty. v. Rottner, 203 A.2d 82, 84 (Conn. 1964)).

49. *Id.* (quoting Loew v. Gillespie, 153 N.Y.S. 830, 832 (Sup. Ct. 1915), *aff'd*, 157 N.Y.S. 1133 (App. Div. 1916)).

50. *Id.* at 1387.

“firm” was in a conflict requiring disqualification, because a firm cannot be loyal to competing clients.⁵¹ As the court said, “no man can serve two masters.”⁵²

D. THE HOT POTATO DOCTRINE

One might think that the lawyer could solve the *Cinema 5* problem by converting the current client into a former client, and that Manly Fleischmann and his law firm could have withdrawn from representing Cinerama (the client who complained). However, the court rejected that alternative, without offering any explanation.⁵³ It noted, enigmatically, at the end of its opinion that “after learning of the conflict which had developed, the Jaeckle firm, through Mr. Fleischmann, offered to withdraw its representation of Cinerama in the Western District actions. However, that offer was not accepted, and Mr. Fleishmann continued, albeit reluctantly, to have one foot in each camp.”⁵⁴

Lawyers can be adverse to *former* clients.⁵⁵ *Cinema 5*, however, did not explain why lawyers cannot convert a current client into a former client by firing the client.⁵⁶ The court simply did not allow it.⁵⁷ The court therefore disqualified the law firm that had its foot reluctantly stuck in each camp.⁵⁸

The court’s instincts were correct, though it failed to explain its rationale. This ethics rule flows from the law of agency: The lawyer is the agent of the client, and therefore is a fiduciary. Lawyers, like all agents, are fiduciaries of their principals. Agents cannot profit from violating their fiduciary duties, so they cannot profit by picking a favored client and firing the disfavored one, as that would breach the agent’s obligation of loyalty to the principal.⁵⁹ “A fiduciary should not be able to profit from its breach of the fiduciary obligation of loyalty.”⁶⁰

51. *Id.* at 1386.

52. *Id.* (quoting *Woods v. City Nat’l Bank & Trust Co.*, 312 U.S. 262 (1941); *In re W.T. Byrns, Inc.*, 260 F. Supp. 442, 445 (E.D. Va. 1966); *Matthew* 6:24).

53. *See id.* at 1387.

54. *Id.*

55. *See* MODEL RULES OF PROF’L CONDUCT R. 1.9 (2010). Model Rule 1.7 is not as lenient as Model Rule 1.9. A lawyer may not sue a current client, but, in general, a lawyer may sue a former client subject to a few restrictions (such as not using confidential information against the former client). *Compare id.* R. 1.7 (dealing with current clients), *with id.* R. 1.9 (dealing with former clients).

56. *Cinema 5*, 528 F.2d at 1387.

57. *Id.*

58. *Id.*

59. *Kelly v. Greason*, 244 N.E.2d 456, 460 (N.Y. 1968) (“[W]ith rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship.”); Robert C. Hacker & Ronald D. Rotunda, *Attorney Conflicts of Interest*, 2 CORP. L. REV. 345 (1979); *see also* *Airgas, Inc. v. Cravath, Swaine & Moore LLP*, No. 10-612, 2010 WL 3046586, at *6 (E.D. Pa. 2010). In *Airgas, Inc.*, the court refused to dismiss a former client’s allegation that its former lawyer breached its

As we have seen, the basic conflicts rule is that a lawyer may not sue Client A on behalf of Client B while simultaneously representing Client A, even in a completely unrelated matter. This rule exists in a world where law firms are ever-changing. When law firms metamorphose by merger or acquisition, their client lists may contain two clients who are directly adverse to each other. Some law firms erroneously conclude that the firm should pick the favored client, continue to represent it, and withdraw from representing the other. However, the ethics rule is to the contrary: If the firm withdraws from further representation of Client A, it still may not ethically represent Client B.⁶¹

If a law firm finds itself simultaneously representing two adverse clients in two different law suits, it may not avoid the problem simply by dropping the less lucrative client like a “hot potato.”⁶² If the parties do not consent to the conflict, the law firm must withdraw from representing both parties in the two cases,⁶³ unless there are special circumstances showing that the client, and not the law firm, caused the conflict.⁶⁴

The “hot potato” metaphor probably derives from *Picker International Inc. v. Varian Associates Inc.*⁶⁵ In that case, a large national law firm merged with a smaller firm based in Chicago.⁶⁶ When client lists were compared, it turned out that the merging firms were representing opponents in current, albeit separate, litigation and that the newly-merged firm was thus in the position of suing a current client.⁶⁷ The larger firm was suing B on behalf of A, its longtime client; the smaller firm—now part of the larger law firm—was representing B in various matters, but not in the case of A versus B.⁶⁸

The newly-merged firm sought to withdraw from representing the smaller firm’s client while continuing to represent the longtime client of

fiduciary duty when it dropped the client “like a hot potato” in an effort to cure a conflict of interest by converting a current client into a former client. *Id.*

60. Ronald D. Rotunda, *Conflicts Problems When Representing Members of Corporate Families*, 72 NOTRE DAME L. REV. 655, 664 (1997); *see also* Rotunda, *supra* note 16.

61. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. c (2000); MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(1), (b)(4) & cmt. 6 (2010) (stating that a lawyer may not represent a client adverse to another client unless the affected client gives informed consent).

62. *See, e.g.*, Rotunda, *supra* note 16.

63. *Picker Int’l, Inc. v. Varian Assocs., Inc.*, 670 F. Supp. 1363, 1364 (N.D. Ohio 1987), *aff’d*, 869 F.2d 578 (Fed. Cir. 1989).

64. For example, *Pennwalt Corp. v. Plough, Inc.* accepted the “hot potato” doctrine but still did not require disqualification, because the client caused the conflict through a client merger. 85 F.R.D. 264, 272 (D. Del. 1980). In addition, given the timing of the merger, the court found that it was highly unlikely that there could be a misuse of confidential information or any adverse effect on the representation. *Id.*

65. *Picker*, 670 F. Supp. at 1365.

66. *Id.* at 1364–65.

67. *Id.* at 1365.

68. *See id.* at 1364.

the larger firm.⁶⁹ The court held that the firm could not do so without the consent of all affected clients.⁷⁰ Failing such consent, the new firm had to withdraw from representing both parties: “A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client.”⁷¹ From such colorful images the law of conflicts develops.

The general principles that the *Picker* court articulated are not unusual, but the particular case was, and the trial court’s strict application of the conflict rules was hardly self-evident. While the large firm was representing Client A in a suit against Client B, none of the lawyers, from either the new or the old law firms, had ever been involved in that particular litigation on behalf of Client B.⁷²

Moreover, there may be a different result if we assume that the rearrangement of the two law firms followed a different order. Assume that the smaller firm had first disbanded and then withdrawn from further representation of B, on the grounds that the law firm no longer existed. Then, assume that the larger firm hired all—or most—of the lawyers from the now-disbanded smaller firm. In that situation, it could be said that the larger firm never had B as a client. Hence, there never was a client to drop.

The *Picker* court did not credit that formalistic argument.⁷³ Nor did it credit the argument that the representation of Client A should be allowed to go forward because the larger firm did not merge with the smaller firm *for the purpose of* dropping the smaller client.⁷⁴ There was no claim that the lawyers ever had any intent to impose any extra costs on the smaller client, or that there was ever any danger of a breach of Client B’s confidences. The court was similarly unmoved by the contention that a strict hot-potato rule reduces lawyer mobility and impedes efficient restructuring in the legal profession.⁷⁵ Although some courts have been sensitive to such arguments in other contexts, the case law before and after *Picker* remains unsympathetic in this context.⁷⁶ Thus, it

69. *Id.*

70. *Id.*

71. *Id.* at 1365.

72. *Id.* at 1364. The Jones Day law firm represented *Picker* in this case. *Id.* The law firm of McDougall, Hersh & Scott had represented *Varian* on various matters over the years (“including five that [were] on-going”) but not in the current case. *Id.* For this litigation, Squire, Sanders & Dempsey and Fish & Neave represented *Varian*. *Id.*

73. *Id.* at 1366.

74. *Id.*

75. *Id.* at 1366–67.

76. *See, e.g.,* *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386–87 (2d Cir. 1976); *Harte Biltmore Ltd. v. First Pa. Bank, N.A.*, 655 F. Supp. 419, 421–22 (S.D. Fla. 1987); *see also* *Pioneer-Standard Elecs., Inc. v. Cap Gemini Am., Inc.*, No. 1:01CV2185, 2002 WL 553460, at *2 (N.D. Ohio Mar. 11, 2002) (“Shearman’s termination of its relationship with Pioneer is ineffective because Shearman terminated its attorney-client relationship with Pioneer only after it was asked to represent Cap Gemini in this litigation and Pioneer refused to waive the conflict.”).

is clear that a law firm cannot avoid its obligation to disqualify itself by dropping the disfavored client.

E. WAIVER

The basic scenario we are discussing involves only a violation of duty of loyalty, not a violation of the duty of confidentiality. The question is whether the law should disqualify the law firm from representing the new client when the two matters are unrelated, and there is no confidence in either case that is relevant to the other. That is, Law Firm represents Client #1 in one case while representing Client #2 in another case that is completely different and unrelated. Law Firm does not know any confidences or secrets of Client #1 that are relevant to Client #1's litigation adverse to Client #2.

In general, a party can waive the duty of loyalty that a law firm owes it.⁷⁷ Parties can even waive a conflict in advance.⁷⁸ If *both* parties do not mind that the law firm is representing each of them in different litigations, the problem virtually disappears. The parties have consented.⁷⁹ No one is complaining, and it is rare that the court will hold, *sua sponte*, that the clients cannot waive the conflict.⁸⁰

But, that is not what often happens in reality. In practice, Client #2 does not consent to that situation. Client #2 may be quite reasonably concerned that Law Firm, in an effort to please Client #1, may reduce the vigor of its representation of Client #2.⁸¹ Client #2, who is separately represented by its own counsel, may not consent, because there are advantages in litigation for forcing the other side to retain new counsel. That imposes expenses on the adversary and often leads to delay, which may well favor Client #2. Or, Client #1 may discover, as the litigation proceeds, that she must question a witness who is also a client of the Law Firm. A partner, in the Law Firm, while representing Client #1, may be less likely to argue that the witness she is cross-examining is lacking in candor, if that witness is also a client of the same Law Firm. Client #1 is concerned but is also reluctant to change law firms so close to trial. Or, Client #1 will decide to waive the conflict, but Client #2 may not.

77. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1.7-4(a).

78. This issue is carefully discussed in, Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289 (2000); *see also* ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1.7-4(b).

79. MODEL RULES OF PROF'L CONDUCT R. 1.7 (b)(4) (2010). There are a few situations where even consent would not cure a conflict—when no disinterested lawyer would believe that the lawyer can competently represent the interests of each. *See id.* R. 1.7(b)(1)–(3). Rule 1.7(b)(3) does prevent the same lawyer from suing the current client in the same litigation, even with client consent, but that is not happening here because Law Firm #2 will be handling that matter. *See id.* R. 1.7(b)(3).

80. *See* Hacker & Rotunda, *supra* note 2, at 85 & n.16; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) & cmt. 18 (2010).

81. *IBM Corp. v. Levin*, 579 F.2d 271, 280 (3d Cir. 1978).

Nonetheless, in such a scenario, we know that the Law Firm must disqualify itself, unless both clients consent to the conflict.⁸² The Law Firm cannot avoid this conflict by having a different law partner cross-examine Client #2. Nor can the Law Firm avoid this problem by dropping the disfavored client like a hot potato.⁸³

In short, longstanding ethics rules, case law, and policy concerns justify these disqualification requirements. Yet, there is one class of cases where the law requires disqualification, but the sound policy reasons do not. Let us now turn to that topic.

II. CONFLICTS COUNSEL

In various decisions, often unreported, courts are approving a client's retention of conflicts counsel in order to avoid disqualifying the law firm for one of the parties. We see this development primarily in cases where the law firm that is the subject of the disqualification is involved with cross-examination of an adverse witness, or discovery of a third party, or efforts to collect assets on behalf of a bankruptcy estate. In each of these instances, using conflicts counsel protects the interests of one current client while avoiding disqualification of the law firm that represents another current client.

A. INTRODUCTION

Let us reconsider the basic scenario that we have been discussing, but with a caveat. Law Firm represents Client #1, which finds herself adverse to Client #2. Law Firm represents Client #2 in other, unrelated matters, but a different law firm represents Client #2 in the particular matter that leads to the adversity. For example, Law Firm represents Client #1 in a patent dispute with Client #2, and that same Law Firm represents Client #2 in a real estate dispute with a third party. Client #1 and Client #2 are both clients of Law Firm, which must therefore disqualify itself if the clients do not waive the conflict. That is the standard rule. But there is a coda or addendum to this basic scenario.

Assume that Law Firm is representing Client #1 in a matter, but only a portion of that matter is adverse to Client #2. Assume further that this portion of the matter that involves Client #2 is discrete and separable from the rest of the matter. For example, in the course of representing Client #1 in a case adverse to a third party, the Law Firm may decide that

82. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. c (2000) ("If a lawyer is approached by a prospective client seeking representation in a matter adverse to an existing client, the present-client conflict may not be transformed into a former-client conflict by the lawyer's withdrawal from the representation of the existing client. A premature withdrawal violates the lawyer's obligation of loyalty to the existing client and can constitute a breach of the client-lawyer contract of employment." (internal citation omitted)).

83. *See supra* Part I.D.

it is necessary to depose or cross-examine Client #2. Client #2 is not a party to this lawsuit but would be an adverse witness. The question is whether Law Firm can avoid disqualification if Client #1 hires separate counsel to represent it in this discrete portion of the case. The conflicts rules do not talk about dividing cases into discrete, severable parts, but that does not mean that severability is a bad idea.

Disqualifying counsel places burdens on the judicial system, for there is typically a delay when the party has to hire another law firm to handle the matter. In addition, disqualification places burdens on the client not able to retain counsel of choice. Disqualification also imposes financial costs on the client who must reeducate the new lawyer who replaces the old one.⁸⁴ If there are good reasons to disqualify counsel, then we accept the burdens that disqualification imposes. But there should be good reasons. If the legal system can respect the client's legitimate expectation of loyalty without disqualifying the law firm, then disqualification becomes unnecessary and expensive.

If a way exists to protect a client's legitimate expectation of loyalty without disqualifying the law firm, then the law should disfavor disqualification, because it would impose burdens without the compensating benefits. Emerging case law implements what I call "conflicts counsel."⁸⁵ This new counsel would represent the client on a discrete, easily severable matter. The courts do not always label what they are doing, and often do not discuss why they are doing it. Yet, a few courts sometimes allow law firms to use conflicts counsel to comply with the ethics rules while protecting a client's expectation of loyalty and reducing, rather than exacerbating, litigation costs. Other courts do not even talk about the issue. Advisory ethics opinions acknowledge that a law firm, in its engagement letter, can limit its representation to a discrete issue.⁸⁶ However, conflicts counsel is a little different because the

84. *White v. BAC Home Loans Servicing, LP*, No. 3:09-CV-2484-G, 2010 WL 2473833, at *3 (N.D. Tex. June 15, 2010) (noting that courts must consider additional factors, including whether disqualification would impose a financial burden on the client if it were necessary to find new counsel).

85. We find evidence that some public defenders are using conflicts counsel to take care of cases where the public defender's office cannot represent a criminal defendant. Humboldt County, California has created a "conflict counsel." See HUMBOLDT COUNTY CONFLICT COUNSEL, <http://co.humboldt.ca.us/confcsel/> (last visited Feb. 2, 2011). While the use of conflicts counsel in this situation, generally, flies under the radar of court decisions, it has not escaped the attention of private criminal defense lawyers who are objecting to the potential loss of business. See Gideon, *Lawyers at War over Conflict Counsel*, PUBLIC DEFENDER STUFF, <http://pdstuff.apublicdefender.com/2007/09/18/lawyers-at-war-over-conflict-counsel> (last visited Feb. 2, 2011) (noting that the Florida Association of Criminal Defense Lawyers urged Florida's Attorney General to block a July 1, 2007 law that established five Regional Conflict Counsels who would act as public defenders for indigent criminal defendants when the regular Public Defender had a conflict).

86. The D.C. Bar Legal Ethics Committee also concluded that a lawyer, in order to avoid a client conflict, may limit the scope of an engagement to a discrete legal issue or to a stage in litigation:

[B]y agreeing only to represent a client as to a discrete legal issue or with respect to a

decision to use a conflicts counsel comes later, when the possible conflict manifests itself—*after* the client approved of the engagement letter.

B. ADVERSE WITNESSES AND DISCOVERY

One situation that invites the use of conflicts counsel involves the case where the lawyer on behalf of one client cross-examines a current client as an adverse witness. Assume that a lawyer, “Law Firm #1,” represents Client #1 in a matter. Law Firm #1, in the course of litigation, cross-examines another individual, Client #2, who is another client of the same firm, as an adverse witness. Because Client #2 is a material witness, Law Firm #1 will ordinarily face a disqualifying conflict of interest unless there is appropriate client consent, even if the law firm’s representation of Client #1 is completely unrelated to the law firm’s representation of Client #2.

The general rule is that this situation is a conflict that disqualifies the lawyer.⁸⁷ This general rule is certainly justified. There is a risk that the lawyer may have secret information that she could use in cross-examining her client, even if the cases are unrelated.⁸⁸ The lawyer may know, for example, that the witness will become extremely nervous and embarrassed if asked about her medication, so that the witness will look like she is lying even when telling the truth. Moreover, even if there is no risk of a loss of confidentiality, there is a risk of a breach of loyalty. The lawyer’s pecuniary interest in possible future business from Client #2 may cause her to avoid vigorous cross-examination that might embarrass or offend the witness. If the lawyer does engage in vigorous cross-examination, that witness will feel betrayed, because her own lawyer is the one who is challenging her recollection.

Yet, there is an alternative that avoids disqualification without compromising the legitimate expectations of either client. The ABA Model Rules of Professional Conduct allow a lawyer to “limit the scope of the representation if the limitation is reasonable under the circumstances, and the client gives informed consent.”⁸⁹ In our witness

discrete stage in the litigation, a lawyer may be able to limit the scope of the representation such that the new matter is not substantially related to the prior matter. Restrictions on the scope of the representation that effectively ensure that there is no substantial risk that confidential factual information as would normally have been obtained in the prior representation would be useful or relevant to advance the client’s position in the new matter may, under certain circumstances, be sufficient to avoid a conflict of interest.

D.C. Bar Legal Ethics Comm., Op. 343 (2008), available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion343.cfm.

87. See MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 6 (2010); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 92-367 (1992); see also ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1.7-6(c).

88. See *Chugach Elec. Ass’n v. U.S. Dist. Court*, 370 F.2d 441, 443-44 (9th Cir. 1966).

89. MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2010); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (2000).

scenario, if the lawyer, in representing Client #1, learns that she may have to depose and cross-examine Client #2, the lawyer can agree with Client #1 that her representation will exclude a discrete and severable issue: the questioning of Client #2. Client #1 would hire another law firm to handle this discrete matter. If Client #1 agrees to that limitation, Client #2 could not force the disqualification of the Law Firm, because the Law Firm will not be adverse to Client #2, even if Client #2 does not consent.

Over thirty years ago—before the ABA Model Rules even existed—Judge (later Justice) Stevens suggested this approach in *United States v. Jeffers*.⁹⁰ This case may be the first case to use a conflicts counsel. Stevens acknowledged that “ethical considerations inhibited” the lawyer’s ability “to interrogate the witness thoroughly, or his willingness to permit another member of his firm to do so,” but then said, without any discussion, that the lawyer should have “made an offer to have some other lawyer retained for this limited purpose.”⁹¹

While he offered no reasoning to support his suggestion, his proposal was not merely formalistic. Client #1 would not, and could not, consent to any limitation that he believed would cause his lawyer to act incompetently. Client #1 simply hires two law firms. Law Firm #1 would be responsible for most of the case and Law Firm #2 (the conflicts counsel) would be responsible for cross-examining the witness. Client #2 does not want Law Firm #1, her lawyer on other matters, to use secrets against her or be disloyal to her. However, Law Firm #1 will not be revealing any secrets of Client #2 or breaching any duty of loyalty to Client #2, because it will not handle the discrete matter that involves Client #2. Instead, a different law firm—Law Firm #2—will be handling that discrete matter. Because Law Firm #1 has nothing to do with this discrete matter, it will not be disloyal to Client #2. Remember, that Client #2 is not a party in the case involving Client #1; she is just a witness. Client #2 will have her own lawyer representing her,⁹² and the

90. 520 F.2d 1256, 1264–66 (7th Cir. 1975) (Stevens, J.) (analyzing the ethical implications of counsel’s failure to cross-examine a former client).

91. *Id.* at 1266. Similarly, the court in *United States v. Agosto* approved of using what it called “backup” counsel to avoid the conflict in criminal cases. 675 F.2d 965, 974 & n.7 (8th Cir. 1982) (citing *Jeffers*, 520 F.2d at 1266; Peter W. Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075, 1115 (1979)).

92. The courts will not impute to the conflicts counsel the knowledge that Law Firm #1 has. *Akerly v. Red Barn Sys., Inc.*, 551 F.2d 539, 541–43 (3d Cir. 1977) (refusing to disqualify main counsel following the disqualification of his local counsel); *Am. Can Co. v. Citrus Feed Co.*, 436 F.2d 1125, 1126, 1130 (5th Cir. 1971), *superseded by rule*, MODEL RULES OF PROF’L CONDUCT R. 1.9(b) (1982), *as recognized in* *Wade v. Nationwide Mut. Fire Ins. Co.*, 225 F. Supp. 2d 1323, 1332 (S.D. Ala. 2002) (reversing a trial court order imputing local counsel’s disqualification to a co-counsel firm serving as trial counsel); *see also* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 92-367 (1992) (approving of the *Jeffers* proposal of using conflicts counsel).

lawyer examining Client #2 will not be Law Firm #1 but a different lawyer, not at all connected with Law Firm #1.

A related issue deals with discovery. A lawyer who represents Client #1 may well have to conduct third-party discovery of Client #2. This raises a conflict even if the lawyer is searching for documents and does not expect to cross-examine her client.⁹³ The trial judge might also join multiple cases for purposes of discovery only, or for all purposes, because of efficiency and consistency. The lawyer for one client may find that she is engaged in discovery of another client, who is separately represented in the matter.

An unpublished case that focuses on this issue is *Sumitomo Corp. v. J.P. Morgan & Co.*⁹⁴ Paul, Weiss, Rifkind, Wharton & Garrison (“Paul Weiss”) was representing Sumitomo in investigating an employee who was responsible for losses from copper trading.⁹⁵ Later, Sumitomo received demands for payment from over forty banks with respect to transactions of which it was unaware.⁹⁶ Paul Weiss realized that it represented some of those banks.⁹⁷ Hence, it told Sumitomo that—with respect to those banks who were Paul Weiss clients—it could not evaluate or litigate the bank claim on Sumitomo’s behalf.⁹⁸ In other cases where the banks were not clients, Paul Weiss would represent Sumitomo.⁹⁹ Thus, Paul Weiss represented Sumitomo in filing suit against J.P. Morgan.

But Paul Weiss could not represent Sumitomo in its suit against Chase Manhattan (“Chase”), because Chase was a Paul Weiss client in other matters.¹⁰⁰ Paul Weiss sought a limited waiver from Chase to permit Paul Weiss to evaluate Sumitomo’s potential claims against Chase and to discuss any valid claims with Chase before Sumitomo commenced litigation.¹⁰¹ Chase refused. Sumitomo then retained a different law firm to represent it in evaluating that claim and filing a separate suit against Chase.¹⁰²

93. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-367 (1992) (“It will . . . frequently be the case that a lawyer’s taking discovery, whether testimonial or documentary, on behalf of one client, of a third party who is also a client, will present such direct adverseness, so as to be disqualifying under Rule 1.7(a).”).

94. *Sumitomo Corp. v. J.P. Morgan & Co.*, Nos. 99 Civ. 8780(JSM), 99 Civ. 4004(JSM), 2000 WL 145747 (S.D.N.Y. Feb. 8, 2000).

95. *Id.* at *1.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at *1-2.

100. *Id.* at *2.

101. *Id.*

102. *Id.*

Paul Weiss continued to represent Chase in other matters, but not in the case that Sumitomo brought against Chase.¹⁰³ Thus, out of the two cases (one against J.P. Morgan and one against Chase), Paul Weiss was involved in only the first. At that point, the two lawsuits were separate.¹⁰⁴ However, the judge, at Chase's request, consolidated the two cases for pretrial discovery.¹⁰⁵ Thus, the two cases became one.¹⁰⁶ As a result, Chase moved to disqualify Paul Weiss from representing Sumitomo and from suing J.P. Morgan.¹⁰⁷

The Court rejected the motion and refused to disqualify Paul Weiss.¹⁰⁸ There was no conflict, because Sumitomo had employed special conflicts counsel:

Paul Weiss is not representing Sumitomo against Chase in this litigation in violation of [New York Code] DR 5-105. Instead, Paul Weiss is representing Sumitomo against Morgan, a non-client, while [a different law firm] Kronish Lieb is representing Sumitomo against Chase, Paul Weiss' current client in an unrelated matter. Thus, the per se rule against simultaneous representation articulated in *Cinema 5* and other decisions does not require the Court to disqualify Paul Weiss.¹⁰⁹

Again, the court did not explain its reasoning or offer any further detail, but its conclusion is sound. This second law firm, Kronish Lieb Weiner & Hellman LLP ("Kronish Lieb"), became the conflicts counsel—the lawyer that the client retains to avoid a disqualification of the client's other lawyer.

The court's rule protects the interests of both clients. First, there is Sumitomo. Sumitomo surely did not believe that Paul Weiss would not represent its interests vigorously out of a desire to please its other client, Chase. If it had, it would not have hired Paul Weiss.

Chase, the other client, had two interests worth protecting. First, it had its interest in client confidentiality. Kronish Lieb, a different law firm, representing Sumitomo in the sub-matter, served to protect Chase's interest in confidentiality, because Kronish Lieb was never a lawyer for Chase and was not privy to its secrets. However, one might argue that

103. *Id.*

104. *Id.* at *1 (noting that Sumitomo brought two actions, one against Chase Manhattan and the other against J.P. Morgan).

105. *Id.* at *1 n.1.

106. *See id.*

107. *Id.* at *2 ("Chase moved for disqualification of Paul Weiss, advancing two arguments. First, . . . upon consolidation of the Morgan action and the Chase action, disqualification is appropriate because . . . Paul Weiss' representation of Sumitomo would involve Paul Weiss representing one client who was suing another client in a consolidated action. Second, Chase contended that even if the cases were not consolidated, disqualification is warranted because although Chase was not a party to the litigation in which Paul Weiss was representing Sumitomo, Paul Weiss' representation would adversely affect Chase.").

108. *Id.* at *1.

109. *Id.* at *4.

Paul Weiss could violate its ethical duties and leak secret information to Kronish Lieb. That argument, if accepted, may prove too much: If Paul Weiss wanted to violate its duties of confidentiality, it need not be counsel of record in the J.P. Morgan matter to do so.

On the other hand, telling Chase that there are other ways for Paul Weiss to act improperly is cold comfort. More significantly, the court explained, Paul Weiss did not have any relevant privileged information concerning Chase obtained through its prior representation of Chase.¹¹⁰ The lack of relevant confidential information is pivotal: Paul Weiss could not be giving Sumitomo an unfair advantage by using confidential information from Chase, because it had no such information.¹¹¹ Chase did not have an interest in confidentiality. It only had an interest in loyalty; that is, it had an interest that its own lawyer not be adverse to it.

The judge's ruling protected that second interest—that Chase has a right to expect loyalty from its lawyer, Paul Weiss. Chase had every right to expect Paul Weiss not to represent a party against it, but Paul Weiss was not doing that. Paul Weiss was representing Sumitomo against other banks, not against Chase. Sumitomo hired a separate law firm to bring that case. And, to make the point that the issues were clearly severable, consider the following: The only reason the two cases were treated as one is that the court consolidated them for convenience—at the request of Chase.¹¹² In *Sumitomo*, for example, there were suits against dozens of banks, and the new counsel simply handled one discrete law suit against Chase.¹¹³

Of course, Sumitomo had the expense of hiring Paul Weiss, and the additional expense of hiring Kronish Lieb. But Sumitomo was not complaining; only Chase was complaining. Still, because of that problem, when a law firm plans to divide the case in this way, it should document what it is doing very clearly so that the client understands she is paying for separate counsel due to a problem the law firm has, not a problem inherent to the client's case. Sumitomo could certainly replace Paul Weiss entirely, but that is not what it wanted to do, and the court correctly allowed the alternative that Sumitomo chose.

C. BANKRUPTCY AND CONFLICTS COUNSEL

Bankruptcy offers another opportunity for the use of conflicts counsel to lessen the costs of litigation. The economic cycle of boom and bust is an inevitable byproduct of capitalism. And matching the cycle is countercyclical behavior for anyone engaged in economic activity,

110. *Id.* at *3 n.3.

111. *Id.* at *3.

112. *See id.* at *1.

113. *Id.* (referring to Sumitomo's possible disputes involving over forty major banks and financial institutions).

including lawyers. While many law firms are laying off¹¹⁴ partners and associates in some areas of the law, other areas are booming. Bankruptcy is one such area.

Lawyers representing the bankrupt business operate with the happy knowledge that their fees are more secure than the most secured creditor. The bankruptcy judge is supposed to make sure of that.¹¹⁵ While the lawyers' fees are certain, we know by the iron law of mathematics that every dollar that goes to the lawyer is one less dollar to pay to a creditor.¹¹⁶ Hence, the law should not impose rules that unnecessarily increase lawyers' fees. That would hurt creditors.

Costs associated with hiring new counsel are certainly justified when disqualification serves important purposes. Typically, disqualification protects a client's legitimate expectations of client loyalty and client confidences.¹¹⁷ However, it is incorrect to think that ethics is like money, and that more is better than less. More is better than less at zero cost. So it is with professional responsibility. More is better than less, unless the costs exceed the benefits.¹¹⁸ One circumstance where the costs do not justify the disqualification in bankruptcy is when the firm that is subject to the disqualification motion has not violated any legitimate client expectation of loyalty or confidence.

Let us focus on a primary issue of legal ethics related to conflicts of interest and bankruptcy representation. There are various scenarios, and they can be complex. But, in each one, a law firm, "Law Firm," represents a party, "Party #1," in connection with a bankruptcy. Party #2 is an unsecured or secured creditor of the estate or a prospective lender to the estate. Party #2 is also a client of Law Firm, but Law Firm represents Party #2 only in unrelated matters, that is, matters that do not

114. "Laying off" is the common term used in the news reports, and I adopt it, although it is a misnomer. Lawyers are not like members of the pipefitters union; we do not expect the law firms to call back its laid-off partners when the economy improves.

115. The judge must approve fee awards, which may be contested, and on occasion, a judge will independently view the amount requested as too high and reject the request. 11 U.S.C. § 330(a)(2) (2006) (authorizing the bankruptcy court "on its own motion" to "award compensation that is less than" that requested); *see, e.g., In re Recycling Indus., Inc.*, 243 B.R. 396, 402-05 (Bankr. D. Colo. 2000) (holding that billing for work of summer associates was excessive as to time spent and as to hourly rate).

116. *See* Nancy B. Rapoport, *Rethinking Professional Fees in Chapter 11 Cases*, 5 J. BUS. & TECH. L. 263, 266 (2010) ("[T]here's significant overstaffing and duplication of effort—especially in the larger bankruptcy cases. What's worse is that there's no easy way to pinpoint just where the overstaffing is occurring in each case and no easy way to tell when the duplication of effort is necessary to represent the clients' interests and when it's just simple 'me, too' make-work." (footnote omitted)).

117. *See, e.g., ROTUNDA & DZIENKOWSKI, supra note 1, §§ 1.6-1(b), 1.6-5, 1.8-3.*

118. For example, the American Bar Association, in February 2009, amended its rules regarding imputed disqualification, because it found that the costs outweighed the benefits. *See* ABA RESOLUTION 109, *supra note 35*. One can certainly dispute the weighing of the competing interests, but the important point is that all the parties concerned recognized that they must weigh the costs and benefits. *See* ROTUNDA & DZIENKOWSKI, *supra note 1, § 1.10-4.*

involve the bankruptcy litigation. Party #2 uses a different law firm in the bankruptcy litigation—not an uncommon occurrence when major corporations hire various law firms to represent them on different matters.

There are four major variations, all of which raise possible conflicts under the ABA Model Rules of Professional Conduct:

- Law Firm is the attorney for the debtor or trustee in a U.S. bankruptcy.
- Law Firm is the attorney for a Creditors' Committee in a U.S. bankruptcy.
- A member of Law Firm is the trustee of a liquidating trust created because of a U.S. bankruptcy, or a plan administrator under a plan of reorganization.
- Law Firm represents one creditor in its claims against the bankruptcy estate, while other law firms represent other creditors. One or more of these other creditors are also clients of Law Firm in unrelated matters.

In each situation, Party #2 is an unsecured or secured creditor of the estate or a prospective lender to the estate. And, in each of these situations, Law Firm would not be taking positions adverse to Party #2 (its client in unrelated matters) because, in each case, a different law firm (Law Firm #2) would be representing the debtor or trustee in a U.S. bankruptcy, or a Creditors' Committee in a U.S. bankruptcy, and so on.

In other words, Law Firm represents Party #1 in various matters. Sometimes, the interests of Party #1 may conflict with the interests of Party #2. In those cases, Law Firm does *not* represent Party #1. Instead, Law Firm #2 represents Party #1 in the portion of the matter or negotiation that is adverse to Party #2.

The question is whether Law Firm may ethically represent Party #1 (its client), provided that Law Firm #2 represents Party #1 in any situation where Party #1 has an interest adverse to Party #2 (a client of Law Firm in unrelated matters). Law Firm will not assist Law Firm #2 in these matters. In that way, Law Firm will never be in a position where it is adverse to a current client.

In addition to the ethics rules, which courts routinely enforce by disqualifying the law firm, there is also the issue of the propriety of the representation under bankruptcy law. If Congress enacts a law—such as a bankruptcy law—that prohibits representation for reasons that Congress deems sufficient, the ethics rules, which are rules of the court, do not override the legislative determination. Obviously, state and federal courts must follow valid federal statutes, even if those statutes are inconsistent with state ethics rules.¹¹⁹

119. See, e.g., *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 384 (1963). Although state ethics rules

Bankruptcy law incorporates, to some extent, the rules of ethics.¹²⁰ If there is an ethical violation, the courts are more likely to find a violation of the bankruptcy laws, and if there is no violation of the ethics rules, the bankruptcy court is more likely to find no violation of the bankruptcy laws.¹²¹ Hence, it is doubly important to determine whether there is a conflict under the ethics rules governing lawyers.

As discussed above, one's first view of the basic law governing disqualification is that there is a conflict of interests in each of these various scenarios. But, if one looks more closely, a law firm can avoid the disqualification if it uses a conflicts counsel in the situations listed. In those circumstances, public policy, legitimate client expectations, and the emerging case law indicate that there is no valid conflict of interest.

In several cases, the bankruptcy courts have noted the use of conflicts counsel and apparently approved of the idea, though they often do not discuss the rationale.¹²² *Daido Steel Co. v. Official Comm. of Unsecured Creditors*¹²³ is one such case. The official committee of unsecured creditors asked the bankruptcy court to approve retaining a law firm in a Chapter 11 bankruptcy, even though the law firm was simultaneously representing (on unrelated matters) one of the purchasers of the debtor's assets.¹²⁴ *Daido*, the single largest creditor,

did not allow nonlawyers to appear before various agencies, including the Patent Court, federal law did allow nonlawyers to appear before the Patent Court. *Id.* Because of the federal law authorizing an appearance by a nonlawyer, *Sperry* held that the Supremacy Clause overrode state rules to the contrary. *Id.* at 384–85; see also 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 3.1–3.3 (4th ed. 2007).

120. *E.g.*, *In re GHR Energy Corp.*, 60 B.R. 52, 61 (Bankr. S.D. Tex. 1985) (“In deciding whether the McCabe/Gordon firm, by hiring Christie, holds an interest adverse to the estate [for bankruptcy law purposes], the Court has looked for guidance to the Code of Professional Responsibility.”); see also *In re Enron Corp.*, No. 01-16034(AJG), 2002 WL 32034346, at *12 (Bankr. S.D.N.Y. May 23, 2002) (quoting *In re Caldor, Inc.*, 193 B.R. 165, 178 (Bankr. S.D.N.Y. 1996)), *aff'd*, No. 02 Civ. 5638(BSJ), 2003 WL 223455 (S.D.N.Y. Feb. 3, 2003); *In re Caldor, Inc.*, 193 B.R. 165, 178 (Bankr. S.D.N.Y. 1996) (“Courts look to the Code of Professional Responsibility in analyzing conflicts under the Bankruptcy Code.”).

121. *See, e.g.*, *Enron*, 2003 WL 223455, at *9 (“This Court concurs with the bankruptcy court that, having found both that Milbank is not involved in any matter in which it has an adverse interest and that the use of conflicts counsel and ethical walls are appropriate, there is no basis for a violation of the Code of Professional Responsibility.”).

122. *See* *Calpine Corp. v. Rosetta Resources Inc. (In re Calpine Corp.)*, 377 B.R. 808, 810 (Bankr. S.D.N.Y. 2007); *In re Delta Air Lines, Inc.*, 370 B.R. 552, 553 (Bankr. S.D.N.Y. 2007); *In re Rockaway Bedding, Inc.*, No. 07-14890, 2007 WL 1461319, at *2, *4 (Bankr. D.N.J. May 14, 2007); *Bayou Superfund, LLC v. WAM Long/Short Fund II, L.P. (In re Bayou Grp., LLC)*, 362 B.R. 624, 639 (Bankr. S.D.N.Y. 2007); *In re Adelpia Commc'ns Corp.*, 359 B.R. 54, 55 (Bankr. S.D.N.Y. 2006); *In re Mirant Corp.*, 354 B.R. 113, app. A, at 149 (Bankr. N.D. Tex. 2006); *In re Winn-Dixie Stores, Inc.*, 326 B.R. 853, 855 (Bankr. M.D. Fla. 2005); *In re Global Crossing Ltd.*, 295 B.R. 726, 728 (Bankr. S.D.N.Y. 2003). As discussed below, the law does not limit the use of conflicts counsel to bankruptcy cases.

123. 178 B.R. 129 (N.D. Ohio 1995).

124. *Id.* at 130.

objected based on a conflict of interest.¹²⁵ The Brouse & McDowell law firm (“B&M”) represented the Committee.¹²⁶ Later, Hamlin Holding, Inc. (“HHI”) “entered into negotiations with the debtors for the purchase of substantially all of their assets.”¹²⁷ B&M also represented HHI, but on matters unrelated to the bankruptcy.¹²⁸ Separate counsel represented HHI on the bankruptcy matter.¹²⁹ The court found that the bankruptcy statute¹³⁰ did not prohibit representation of the committee by the law firm that also represented the purchaser of debtor’s assets on matters unrelated to bankruptcy.¹³¹ The court specifically did not consider the legal ethics issues, although it did find that the law firm did not have an “adverse interest” within the meaning of the relevant bankruptcy statute.¹³²

*In re Rockaway Bedding, Inc.*¹³³ also approved of using conflicts counsel to avoid the conflict. However, that case considered the ethics rules.¹³⁴ The *Rockaway Bedding* court found no violation of either the bankruptcy law or the ethics rules governing the practice of law.¹³⁵ It also used the term “conflicts counsel.”¹³⁶ Again, it offered little by way of discussing the rationale.¹³⁷

The law firm in question, Duane Morris LLP, “agreed not to assert any claim of fraud, misrepresentation or dishonest conduct against PNC Bank in connection with the Debtors’ Chapter 11 proceedings.”¹³⁸ If a claim should arise, Duane Morris LLP offered to “retain separate conflicts counsel to pursue such claims or allow the Official Committee of Unsecured Creditors to assert such claims on the Debtors’ behalf. In the event that a dispute arises between the Debtors and Mr. Potamkin, all parties will be represented by counsel other than Duane Morris LLP.”¹³⁹ The waiver excluded “[m]atters relating to misrepresentations and fraud,” which would “be assigned to either conflicts counsel or the Official Committee of Unsecured Creditors to prosecute on the Debtors’ behalf.”¹⁴⁰ Given this arrangement, the court found no conflict: “Given

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. 11 U.S.C. § 1103(b) (2006).

131. *Daido Steel*, 178 B.R. at 131–32.

132. *Id.*

133. No. 07-14890, 2007 WL 1461319 (Bankr. D.N.J. May 14, 2007).

134. *Id.* at *4.

135. *Id.* at *5.

136. *Id.* at *2, *4.

137. *See id.* at *4–5.

138. *Id.* at *2.

139. *Id.*

140. *Id.* at *4.

the prophylactic provisions in place, this Court also believes that Duane Morris LLP's representation is in accordance with New Jersey Rule of Professional Conduct 1.7."¹⁴¹

In re Enron similarly found no violation of the bankruptcy law or legal ethics.¹⁴² A creditor, Exco, moved to disqualify a law firm, Milbank, Tweed, Hadley & McCloy LLP ("Milbank"), from representing the unsecured creditors' committee in Enron's Chapter 11 cases.¹⁴³ Milbank argued that it was not simultaneously representing the Committee along with any other party to the Chapter 11 case with an interest adverse to the bankruptcy estate.¹⁴⁴ The client had hired separate counsel for that.¹⁴⁵ The Court agreed and used the term "conflicts counsel."¹⁴⁶

Two of the members of the official committee of the unsecured creditors were significant clients of Milbank.¹⁴⁷ Milbank also represented numerous other creditors on matters unrelated to the Enron bankruptcy case.¹⁴⁸ Another committee member, a surety, was a plaintiff in a lawsuit alleging that the two committee members who were alleged clients of Milbank conspired with others to defraud the surety.¹⁴⁹ Prior to the Chapter 11 filing, Milbank represented entities who had arranged for a billion dollar structured finance offering on behalf of a debtor affiliate.¹⁵⁰ This offering included issuance of the debtor's stock and an agreement to sell that stock.¹⁵¹ In the five years prior to the Chapter 11 filing, Milbank represented several of the debtors in 125 transactions and collected almost \$18 million in legal fees.¹⁵² Additionally, the debtors had paid nearly a half-million dollars in fees to Milbank during the preference period.¹⁵³ Milbank did not voluntarily repay the preference, but it did agree not to defend a preference action and to abide by the findings of a court-appointed examiner.¹⁵⁴ Still, there was no conflict, because on all relevant issues, Milbank used a separate conflicts counsel.¹⁵⁵ The

141. *Id.* at *5.

142. No. 01-16034(AJG), 2002 WL 32034346, at *13 (Bankr. S.D.N.Y. May 23, 2002), *aff'd*, No. 02 Civ. 5638(BSJ), 2003 WL 223455 (S.D.N.Y. Feb. 3, 2003).

143. *Id.* at *1.

144. *Id.* at *2.

145. *Id.* at *9.

146. *Id.* at *11 ("There is no basis in this record to question the adequacy of this procedure or the internal ethical walls established at Milbank. Conflicts counsel, limited engagement agreements, and ethical walls have been acceptable procedures to address conflict of interests issues.").

147. *Id.* at *2.

148. *Id.* at *8.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at *10.

153. *Id.* at *9-10.

154. *Id.* at *10; see also Michael P. Richman, *Mega-Case Conflict Issues: Enron Committee Counsel*, AM. BANKR. INST. J., Sept. 2002, at 20, 32.

155. *Id.* at *10-11.

creditors' committee used this second law firm, the conflicts counsel, to handle matters that Milbank or its clients on other matters might have a conflict of interests.¹⁵⁶

Consider another scenario, where Law Firm represents one creditor in its claims against the bankruptcy estate, while other law firms represent other creditors. One or more of these other creditors are also clients of Law Firm in unrelated matters. The ABA Model Rules of Professional Conduct do not regard this situation as raising what it calls "directly adverse" conflicts.¹⁵⁷ The comments do not really offer any litmus test to determine what is "direct" versus "indirect," but the ABA does give a few examples.¹⁵⁸ If a lawyer represents clients who are competing economic enterprises in unrelated litigation, that "does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients."¹⁵⁹ In other words, a law firm may represent a water utility in its efforts to raise its rates although that representation, if successful, disadvantages all of Law Firm's other clients who use water.¹⁶⁰ Or, Law Firm may represent the local Toyota car dealer in buying some real estate while simultaneously representing the local Mercedes dealer in a contract matter.¹⁶¹ "The representations and the clients have nothing to do with each other, even though the clients are competitors in the business world."¹⁶²

In the same sense, the creditors are all competitors for the assets of the estate, but that does not mean that they will be suing each other. Law Firm will be representing its client, while other creditors will have their own counsel to represent their interests. There is no disqualifying conflict merely because members of a Creditors Committee assert claims in differing amounts and subject to differing potential setoffs.¹⁶³

156. The district court approved this resolution of the issue. *Exco Resources, Inc. v. Milbank, Tweed, Hadley & McCloy LLP (In re Enron Corp.)*, No. 02 Civ. 5638(BSJ), 2003 WL 223455 (S.D.N.Y. 2003).

157. See MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (2010).

158. See *id.* R. 1.7 cmt. 6.

159. *Id.*

160. ROTUNDA & DZIENKOWSKI, *supra* note 1, § 1.7-3(c).

161. *Id.*

162. *Id.*

163. The court in *In re Rusty Jones, Inc.* concluded, on the facts of that case, that the law firm may represent both the creditors' committee and individual creditors unless there is a showing of actual conflict of interest. 107 B.R. 161, 165 (Bankr. N.D. Ill. 1989). The court added:

Individual members of this Creditors Committee assert claims in differing amounts and subject to differing potential setoffs. However, that does not create an adverse interest which would prohibit one counsel from representing individual members of the committee and also the committee as a whole when all members of the committee share claims of a similar nature. In short, no adverse interests have been demonstrated here between individual members of the Committee represented by Hinshaw and the Committee as a whole.

Id.

Thus, *In re National Liquidators, Inc.* held that concurrent representation of an unsecured creditors' committee and individual unsecured creditors is permissible unless there is an actual dispute:

It simply exceeds rational bounds to rule that an adverse interest exists merely because a committee member's or a creditor's transactions with the debtor will be investigated, or because a remote, speculative, hypothetical possibility exists that, in the future, the estate or the Committee may dispute the creditor's claim or bring a cause of action against the creditor.¹⁶⁴

However, there may be other cases where one creditor takes an adverse action against another creditor in the same matter. If there is an actual dispute, then there should be a conflict. As the court in *National Liquidators* explained:

[S]ection 1103(b)'s bar to attorney representation includes a requirement that there exist some allegation or evidence suggesting the likelihood of some actual dispute, strife, discord, or difference between the committee and its constituent or member. The Court is not establishing a high threshold. For example, should any evidence suggest the existence of possible challenges to a creditor's claim, the existence of a possible recovery action against the creditor, or the existence of any possible dispute between a committee and one of its constituents or members, then a disqualifying adverse interest exists under the Bankruptcy Code. Undoubtedly, actual disputes or actual allegations of the need for a recovery action engender adverse interests. Speculation and hypothesizing, however, will not carry the day.¹⁶⁵

Thus, an impermissible conflict would exist if the lawyer who had previously represented Chapter 11 debtors-in-possession then defended fraudulent transfer claims against the corporation. If the lawyer learned confidential information disclosed during his prior representation, then the lawyer would be "in a position to take advantage of information previously revealed to him by the debtors as debtors-in-possession in an effort to frustrate and hinder the duties of the trustee and former debtors-in-possession to administer the bankruptcy estate for the benefit of all creditors therein."¹⁶⁶ The fraudulent transfer claims that the lawyer then attempted to defend would be the same fraudulent transfer claims that the Chapter 11 debtors-in-possession were obligated to assert prior to the conversion to Chapter 11.¹⁶⁷

164. 182 B.R. 186, 192 (Bankr. S.D. Ohio 1995)..

165. *Id.* at 192-93 (citing *Badami v. K.E. Joy, P.C. (In re Joy)*, 175 B.R. 303 (Bankr. D. Neb. 1994)).

166. *Badami v. K.E. Joy, P.C. (In re Joy)*, 175 B.R. 303, 306 (Bankr. D. Neb. 1994)

167. *E.g., id.* at 305 ("This interest and duty to prosecute claims against K.E. Joy P.C. on behalf of the estate is adverse to the interest of K.E. Joy P.C. in retaining funds transferred to it by the debtors.").

Consider these various cases. Law Firm #1 is the attorney for the debtor or trustee in a U.S. bankruptcy. Or, Law Firm #1 is the attorney for a Creditors' Committee in a U.S. bankruptcy. Or, a member of Law Firm #1 is the trustee of a liquidating trust created because of a U.S. bankruptcy.¹⁶⁸ Or, Law Firm #1 is the attorney for a debtor or trustee in a pending U.S. bankruptcy proceeding where there is a proposed Debtor-in-Possession financing.

In each of these cases, there should be no conflict of interest when a law firm uses conflicts counsel in the situations discussed here. Law Firm #1 may ethically represent Party #1 (its client), provided that conflicts counsel, Law Firm #2, represents Party #1 in any situation where Party #1 has an interest adverse to Party #2, who is also a current client of Law Firm #1 on unrelated matters. Law Firm #1, of course, will not assist Law Firm #2 in these matters.

By using conflicts counsel, Law Firm #1 will never be in a position where it is adverse to a current client. Law Firm #1 will not be representing a bankruptcy client against a current client of Law Firm #1, in violation of ABA Model Rule 1.7. Instead, Law Firm #1 will be representing the bankruptcy client against various nonclients, while conflicts counsel will be representing the bankruptcy client against any current client of Law Firm #1 in unrelated matters. Thus, the per se rule against simultaneous representation articulated in *Cinema 5*¹⁶⁹ and other decisions does not require the court to disqualify Law Firm #1.¹⁷⁰

III. PRÉCIS AND RECOMMENDATIONS

The use of conflicts counsel routinely arises in cases involving cross-examination, discovery, and bankruptcy, but it need not be limited to these areas. There are other matters where the use of conflicts counsel will protect the legitimate interests of the various clients without imposing unnecessary expenses on the parties. For example, an issue on appeal may come up for the first time, and it will raise a conflict for the lawyer. Rather than disqualifying the law firm from all work on the matter, the court may approve of conflicts counsel if the particular issue is severable.¹⁷¹

168. In such a case, the debtor or trustee, on the advice of Law Firm #1, will retain a different law firm to represent its interests on the discrete matter. The debtor or trustee will not retain Law Firm #1 in any case in which it would be adverse to any current client of Law Firm #1. It is not wrong for a lawyer to recommend that an individual or entity retain another lawyer to vindicate its interests. In fact, that is what the ethics rules provide. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2010) ("The lawyer shall not give legal advice to an unrepresented person [the debtor or trustee], other than the advice to secure counsel.").

169. 528 F.2d 1384, 1386 (2d Cir. 1976).

170. See *Sumitomo Corp. v. J.P. Morgan & Co.*, Nos. 99 Civ. 8780(JSM), 99 Civ. 4004(JSM), 2000 WL 145747 (S.D.N.Y. Feb. 8, 2000) (using similar language).

171. See, e.g., *Buyse v. Baumann-Furrie & Co.*, 448 N.W.2d 865, 869 (Minn. 1989). The lawyer

Prospective litigation is another area where conflicts counsel will be useful. Let us say that a Client has a distribution contract with a Manufacturer. It is certainly foreseeable that disputes may arise under this contract. Let us assume that Law Firm represents Client in connection with this distribution contract, while simultaneously representing Manufacturer in a local real-estate matter, completely unrelated to Client's business. Client and Law Firm should be able to agree between themselves that Law Firm will not represent Client if there is any dispute with Manufacturer. Client would use a separate conflicts counsel if that contingency occurs.

This agreement eliminates the potential conflict without imposing the opportunity cost of Law Firm refusing to represent Client merely because of the possibility of the conflict. This agreement would not require Manufacturer's consent. In the event of a lawsuit, conflicts counsel would represent Client while Manufacturer would retain its own counsel. But Law Firm could continue to represent Client and Manufacturer on the unrelated issues.¹⁷²

The use of conflicts counsel need not be limited to litigation. It may also be appropriate in negotiations in multiparty business. Law firms, of course, cannot use this procedure as a sham, where the otherwise-conflicted firm becomes a behind-the-scenes manager of the matter that it has undertaken not to pursue. And the law firm itself may not take actions that hurt its other clients. But with those caveats, the presence of one or two areas of conflict that can be severed would mean that the law would not disqualify the lawyer altogether.¹⁷³ In all such cases, a law firm

permissibly withdrew from preparing a portion of an appellate brief, thus avoiding a conflict. *Id.* The court ruled that it would not require the lawyer for the judgment creditors to withdraw. *Id.* However, the court said, conflicts counsel should have filed a separate brief, rather than merely take responsibility for a portion of one brief. *Id.* This would have served to highlight the severability of the issue. The court explained that the work of the conflicts counsel on appeal "was limited to representation of the judgment creditors in the determination of the coverage question." *Id.* On appeal, the original counsel and the conflicts counsel "filed a joint brief in which there is no discernible line of demarcation between insurance coverage issues and other issues involved in this litigation." *Id.* The court assumed that "the lawyers in question confined their activities on appeal to their respective spheres of representation," but went on to say that "*separate briefs would have been a more fitting way to carry out the undertaking* to separate representation on the coverage issues from representation on all other issues." *Id.* (emphasis added).

172. The Restatement (Third) of the Law Governing Lawyers supports the use of "conflicts counsel," but it does not use this term. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. c(iii), illus. 4 (2000). Instead, it speaks of the law firm limiting the scope of its engagement: "Such an agreement would not require the consent of Manufacturer." *Id.*

173. See Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2001-3 (2001) (addressing this issue, approving of using conflicts counsel, and citing *Sumitomo* with approval). The opinion said that it was appropriate for another firm to bring the case against the client that the principal firm cannot bring. *Id.*; see also *Lawyers May Limit Scope of Representation to Dodge Looming Conflict Between Clients*, [Dec.-Jan. 2001] 17 *Laws. Man. on Prof. Conduct* (ABA/BNA) 455 (Aug. 1, 2001) (discussing the opinion).

would be limiting the scope of its representation to avoid conflict with a current or former client, Party #2, if the client whose representation the law firm limits, Party #1, will consent after full disclosure and if that limitation does not so restrict representation as to render it incompetent.

Careful lawyers should also consider asking their clients to waive, in advance, any objection to using conflicts counsel to handle issues that are discrete and severable, and do not involve risk of misusing the client's confidences. Clients, in other words, may waive *in futuro* breaches of loyalty if the lawyer uses conflicts counsel to handle a discrete matter. But, we would not reasonably expect clients to waive *in futuro* breaches of confidentiality, because one cannot know *now* the significance *in the future* of the breach of confidentiality.

A law firm that represents a client in a matter should not be forced to disqualify itself simply because it represents another client in a completely unrelated matter if the first client can hire a different law firm to represent her in a discrete, severable part of that matter. In other words, if Law Firm #1 represents Client #1 in a case adverse to Client #2, Law Firm #1 should be disqualified if it simultaneously represents Client #2 in other matters. However, if that case is severable into discrete parts, Client #1 can avoid the need to disqualify its lawyer (Law Firm #1) by hiring a different law firm to represent it in those parts of the case that are adverse to Client #2.

In addition, lawyers and clients should be permitted to agree in advance that conflicts counsel will be used, and that this agreement should be enforceable. They should also be able to make a commitment in advance as to what types of matters or parts of matters are discrete and severable, such that use of conflicts counsel makes sense. Alternatively, clients who do not like using the conflicts counsel approach should be permitted to agree in advance with their lawyers not to use this approach. Then, the lawyers will know the real opportunity cost of representing a client who objects to using conflicts counsel.

CONCLUSION

Conflicts counsel is a useful tool to ameliorate the costs of disqualifying a law firm, while protecting legitimate client interests in confidentiality and loyalty. A few cases—typically unreported and conclusory—embrace this technique but do not discuss its rationale. This Article explains the justification. Additionally, courts should acknowledge the direction of recent case law and adopt a rule that formalizes and regularizes a procedure for using conflicts counsel. In those cases where the matter causing the conflict is severable and distinct and the risks of loss of confidentiality are minuscule, the courts should allow conflicts counsel.