Florida Law Review

Volume 51 | Issue 3 Article 1

January 1999

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Florida Law Review

VOLUME 51 JULY 1999 NUMBER 3

CHOOSING SIDES: ISSUE OR POSITIONAL CONFLICTS OF INTEREST

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I. INTRODUCTION

Conflicts of interest are a perpetual source of attorney liability and they routinely threaten or impair clients' representations in almost all practice areas.[1] Conflict of interest allegations are especially troublesome when coupled with claimed violations of ethics rules, for it is there that they most resonate with judges and juries. Some of the most serious professional responsibility problems with which lawyers now struggle are attributable to actual and potential conflicts of interest.[2]

In the last few years, lawyers and law firms have been subjected to complaints alleging conflicts of interest by current and former clients who are not directly opposed to one another in a pending matter.[3] Instead, these current and former clients contend that the lawyer or firm, in representing another client, is taking a position in an unrelated matter adverse to the complaining client's or former client's interests.[4] This situation is perhaps best understood by way of a litigation example.

Assume that Law Firm represents insurance companies in coverage and bad faith litigation. Tapping into its expertise, one of Law Firm's corporate clients asks it to represent the company in litigation with the company's liability insurer. The insurer has refused to pay the company's environmental response costs incurred from cleaning up pollution on the company's property. The company contends that its response costs are "damages" for purposes of its liability insurance policy.[5]

Because Law Firm has never represented its corporate client's insurer, it sues the insurance company for breach of contract and bad faith for its refusal to pay the environmental response costs at issue. One of Law Firm's largest insurance company clients learns of the suit and demands that Law Firm withdraw. The insurability of environmental response costs is an issue of great concern to all property and casualty insurers; a verdict or judgment for the corporate client in this case could result in disastrous precedent. What is Law Firm to do?

Our hypothetical law firm has landed itself in what is commonly

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1. Conflicts of interest may, for example, give rise to malpractice claims or suits; require attorneys' disqualification or withdrawal from one or more representations; exacerbate malpractice claims based primarily on other conduct; generate adverse publicity; or impair lawyers' relationships with clients. *See* Robert E. O'Malley et al., *Selected Conflict of Interest Issues*, ALAS LOSS PREVENTION J., Jan. 1992, 2, 16 (on file with author).

2. *See* John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 458 (1993).

3. *See id.* at 459.

4. *See id.*

5. This is a recurring dispute between liability insurers and commercial insureds. *See, e.g.*, Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505 (Mo. 1997).

described as an "issue" or "positional" conflict of interest. An issue or positional conflict of interest arises when clients have opposing interests in unrelated matters.[6] Though the clients' interests do not directly conflict, they differ on what the law or public policy ought to be.[7] The clients' common lawyer is stranded between them, facing a representation at odds with another position or interest that he represents.[8] Issue or positional conflicts are especially sensitive if the parties confront the issue repeatedly or routinely, and thus have long-term stakes in the subject.

The principle that lawyers may be prohibited from accepting new matters or from continuing in representations because of issue or positional conflicts of interest derives from a view of the law as something other than deductive science. In other words, lawyers must be seen as shaping the law, rather than simply aiding courts, clients and legislatures in arriving at independent judgments or interpretations. A lawyer who advocates a position for one client and the opposing position for another client in unrelated matters necessarily does so to the clients' detriment.[9] The lawyer's divided obligations may neutralize his effectiveness for one or both clients by causing him to change his advice, unreasonably concede positions, or underplay otherwise strong strategic hands.[10] At least one client seems sure to be harmed in such a situation.[11]

The potential for issue or positional conflicts of interest is greatest in litigation. Such a conflict arises in litigation when a lawyer argues for an interpretation of the law on behalf of one client that is adverse to another client's interests. Some substantive litigation areas seem predisposed to issue or positional conflicts of interest, including antitrust law, insurance, labor and employment law, products liability and professional liability. This list certainly is not exhaustive, however, for evidentiary and procedural issues of interest to many litigants transcend particular substantive areas. An issue or positional conflict may arise in the transactional context where a lawyer negotiates a deal or drafts a document for one client that another client considers to be improper in whole or part. For example, a law firm might include "poison pill" arrangements in a

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6. *See* Dzienkowski, *supra* note 2, at 460. Issue or positional conflicts are separate and distinct from "procedural" conflicts, such as where two clients with congruent interests insist that their common lawyer try their respective cases in different courts at the same time. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.3, at 355-56 (1986).

7. *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.7:104, at 232.1 (2d ed. Supp. 1998).

8. *See* Norman W. Spaulding, Note, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro-Bono Publico*, 50 STAN. L. REV. 1395, 1400 (1998).

9. *See* HAZARD & HODES, *supra* note 7, § 1.7:105, at 232.5-.7 (discussing hypothetical positional conflict of interest).

10. *See id.* § 1.7:105, at 232.5.

11. *See id.* § 1.7:104, at 232.3.

client's corporate documents that make the subject company less attractive to potential purchasers, but which the firm's clients who typically look to acquire companies consider illegal or improper.[12] In the lobbying context, an issue or positional conflict may arise where a lawyer argues for a change in the law on behalf of one client that will detrimentally affect another client. In fact, these areas frequently overlap, and it is difficult to segregate issue or positional conflicts by practice area. Where these areas overlap the common element usually is litigation.

Issue or positional conflicts of interest pose difficult practical and philosophical questions. A lawyer's job is to advocate or promote any viable interpretation of the law that benefits his client. This is the essence of what lawyers do.[13] Clients' ability to insist on fidelity to their views under threat of disqualification or the loss of business restricts lawyers' freedom to practice.[14] Giving clients unlimited veto power over their lawyers' choice of other clients and matters eliminates the concept of professional independence. Such conflicts may force practitioners to unreasonably narrow their fields of expertise. A broad view of issue or positional conflicts also penalizes those clients who may see their lawyers disqualified or forced to withdraw because it deprives them of counsel of their choosing. Clients seeking personal or competitive advantages should not be allowed to subvert ethics rules related to conflicts of interest by wielding them as procedural weapons.[15]

Despite the potentially serious problems they pose for lawyers and clients alike, issue or positional conflicts of interest have received relatively little scholarly attention. This Article represents a modest attempt to explore this unappreciated and misunderstood ethics area. Part II examines legal ethics rules as they relate to issue or positional conflicts, focusing on Rules 1.7 and 1.9(a) of the *Model Rules of Professional Conduct*.[16] Part III discusses cases dealing with issue or positional conflicts

12. Poison pill arrangements essentially give a company's shareholders the right to purchase a new type of preferred stock upon the occurrence of a specified event. *See* Dzienkowski, *supra* note 2, at 468 n.42. For a discussion of conflicts of interest and the ethical implications of poison pills, see Catherine R. Phillips, Comment, *Ethical Conflicts in the Recommendation of Poison Pills*, 65 WASH. U. L.Q. 273 (1987).

13. *See* Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 89-27 (1990) (discussing issue or positional conflicts in litigation).

14. *See* Spaulding, *supra* note 8, at 1408-09 (noting that clients' market power gives them a powerful mechanism for enforcing their concepts of positional loyalty).

15. *See* Berry v. Saline Mem'l Hosp., 907 S.W.2d 736, 739 (Ark. 1995) (recognizing this problem generally); Adam v. MacDonald Page & Co., 644 A.2d 461, 464 (Me. 1994) (discussing ethics rules related to confidentiality and noting that motions to disqualify counsel can be abused as a litigation tactic).

16. MODEL RULES OF PROFESSIONAL CONDUCT (1999) [hereinafter MODEL RULES].

of interest. There are, unfortunately, few cases on point.[17] Finally, Part IV approaches issue or positional conflicts of interest from a practical standpoint.

II. ETHICS RULES AND ISSUE OR POSITIONAL CONFLICTS OF INTEREST

Ethics codes for lawyers are a relatively recent creation.[18] Alabama adopted the first ethics code in 1887.[19] The American Bar Association (ABA) first adopted a code of ethics in 1908.[20] The *Canons of Professional Ethics*, as they were known, guided lawyers until 1969, when the ABA adopted the *Model Code of Professional Responsibility*.[21] The Model Code took effect January 1, 1970,[22] and all states adopted it in some form shortly thereafter.

Unfortunately, the Model Code was deficient in a number of respects and the ABA began work on new ethics guidelines less than seven years after the Code took effect.[23] In 1983, after several years of effort, the ABA adopted the *Model Rules of Professional Conduct*.[24] The Model Rules are now the predominant ethics standards for lawyers.[25] At least forty states and the District of Columbia have adopted the Model Rules in some form.[26]

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17. *See* WOLFRAM, *supra* note 6, § 7.3, at 355.

18. *See* Douglas R. Richmond, *Associates as Snitches and Rats*, 42 WAYNE L. REV. 1819, 1824 (1997).

19. *See* Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 707 (1998).

20. *See* MODEL RULES, *supra* note 16, Preface.

21. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1986) [hereinafter MODEL CODE].

22. *See id.*

23. *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 4-5 (5th ed. 1998).

24. *See* MODEL RULES, *supra* note 16, Preface.

25. In contrast to the Model Code, which states adopted with little or no modification, many states disagreed with various provisions of the Model Rules. As a result, some states continue to follow their versions of the Model Code. *See* LEN BIERNAT & R. HUNTER MANSON, LEGAL ETHICS FOR MANAGEMENT AND THEIR COUNSEL 12 (1997). For example, New York, with about 10% of America's lawyers, still follows the Model Code. *See* GILLERS, *supra* note 23, at 5. Some states have crafted their own ethics rules. *See* Adam v. MacDonald Page & Co., 644 A.2d 461, 463 n.6 (Me. 1994) (suggesting that as of 1994, seven states employed their own standards). California, with about one-sixth of the nation's lawyers, has borrowed modestly from the Model Rules, but its ethics rules are largely its own. *See* GILLERS, *supra* note 23, at 5.

26. *See* GILLERS, *supra* note 23, at 5 (indicating that forty states had adopted the Model Rules in some form as of January 1998); Richmond, *supra* note 18, at 1822 n.12 (stating that the District of Columbia has adopted the Model Rules).

A. *Conflicts of Interest Involving Current Clients*

The Model Rules recognize that loyalty is essential to attorney-client relationships.[27] The principle that client loyalty is paramount is embodied in Rule 1.7,[28] which provides:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
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> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.[29]

Rule 1.7 clearly addresses conflicts involving current clients. That is, it addresses the balancing of interests required in concurrent representations. The Rule applies both when the representation of a client is directly adverse to another client,[30] and when a client's representation would be materially limited by the lawyer's responsibilities to another client or to a third person.[31] Rule 1.7 thus recognizes the basic principle

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27. *See* MODEL RULES, *supra* note 16, Rule 1.7 cmt. 1.

28. *See* Lawrence J. Fox, *Litigation Conflicts: Is it Time to Revive the Appearance of Impropriety?*, PROF. LAW., Feb. 1998, at 1, 8 (arguing that Rule 1.7 and related rules "are the way the profession has chosen to embody the principle of client loyalty").

29. MODEL RULES, *supra* note 16, Rule 1.7.

30. *See, e.g.*, Smiley v. Director, Office of Workers Compensation Programs, 984 F.2d 278, 282 (9th Cir. 1993) (finding concurrent workers' compensation representations were directly adverse to one another); Florida Bar v. Mastrilli, 614 So. 2d 1081, 1082 (Fla. 1993) (suspending lawyer for violating Rule 1.7(a) by suing a current client); *In re* Horine, 661 N.E.2d 1206, 1207 (Ind. 1996) (reprimanding lawyer for violating Rule 1.7(a) by negotiating the sale of a client's car to another client without first obtaining the purchaser's consent to the representation).

31. *See, e.g.*, Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987) (disqualifying lawyers

that a lawyer's duty of loyalty is indivisible.[32]

Although Model Rules 1.7(a) and (b) both address current client conflicts, meaning concurrent representations, they impose different standards. Rule 1.7(a) deals with clients' direct adversity; hence, this subsection is especially stringent.[33] In many cases it amounts to a per se disqualification rule,[34] or an absolute ban on accepting a second representation. Rule 1.7(b), on the other hand, applies where a lawyer's representation of a client *may* be "materially limited" by competing interests.[35] This requires more subtle inquiry. Thus, while Rule 1.7(b) may be broader than Rule 1.7(a), it also is more flexible and forgiving.[36]

In order to accept or continue a representation in the shadow of Rule 1.7, a lawyer must reasonably believe that he can fulfill his professional obligations to the client notwithstanding his competing obligations or interests. The "reasonable belief" requirement in Rules 1.7(a) and (b) makes clear that the standard by which a lawyer must measure his fidelity or loyalty is an objective one.[37] Consistent with the employment of an objective standard, a lawyer's belief may be inferred from the circumstances.[38]

Conflicts of interest under Rule 1.7, of course, can be cured or avoided. A lawyer may ask both clients to consent to the dual representation.[39] Client consent may be requested only after "consultation," however, which Rule 1.7 contemplates as full disclosure by the lawyer of all advantages, risks and implications attending the dual representation.[40] Just as a court or ethics authority might infer from the circumstances that a lawyer's belief about his ability to represent a client unimpaired by competing obligations or interests is unreasonable. A fact finder also may infer that a client's consent is the product of inadequate information.[41]

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who represented classes with differing interests relative to state property and expenditure of state funds); People v. Ginsberg, 967 P.2d 151, 153 (Colo. 1998) (suspending lawyer who prepared loan documents in transaction in which both borrower and lender were his clients).

32. *See Smiley*, 984 F.2d at 282 (stating that an attorney owes a client a "duty of undivided loyalty"); Flatt v. Superior Court, 885 P.2d 950, 953 (Cal. 1994) (stating that "[a]n attorney's duty of loyalty to a client is not one that is capable of being divided").

33. *See* 1 HAZARD & HODES, *supra* note 7, § 1.7:201, at 232.12.

34. *See id.*

35. MODEL RULES, *supra* note 16, Rule 1.7(b).

36. *See* 1 HAZARD & HODES, *supra* note 7, § 1.7:301, at 250-51.

37. *See* People v. Mason, 938 P.2d 133, 136 (Colo. 1997).

38. *See* 1 HAZARD & HODES, *supra* note 7, § 1.7:206, at 238.

39. *See* MODEL RULES, *supra* note 16, Rules 1.7(a) & 1.7(b) (providing for client consent).

40. *See* Florida Ins. Guar. Ass'n, v. Carey Canada, Inc., 749 F. Supp. 255, 259 (S.D. Fla. 1990) (discussing Model Rule 1.7(a)); Griva v. Davison, 637 A.2d 830, 845 (D.C. 1994) (stating that "[a]fter full disclosure of the differing interests, all potentially affected clients must consent to the representation").

41. *See* 1 HAZARD & HODES, *supra* note 7, § 1.7:206, at 238.

Any analysis of issue or positional conflicts of interest intuitively begins either with the "directly adverse" language of Rule 1.7(a) or with the "materially limited" qualifier in Rule 1.7(b). But courts' and lawyers' intuition may be wrong, for the comment to Rule 1.7 appears to treat issue or positional conflicts separately, if not haphazardly. A comment to the Rule states:

> A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.[42]

The comment's language is troublesome for several reasons. First, it suggests that issue or positional conflicts are restricted to litigation. Though such conflicts are most acute in litigation, they are not so limited.[43] Second, the comment misapprehends the problem even within the confines of litigation. The comment implies that disqualifying or otherwise serious conflicts occur only when a lawyer handles concurrent cases in a single appellate court.[44] The comment's distinction between trial and appellate courts apparently turns on notions of stare decisis.[45] In the federal system, however, trial court decisions are routinely reported and are cited as persuasive authority in other district courts, and in federal and state appellate courts around the country. Even state trial court decisions may influence other courts in the same jurisdiction. The trial-versus-appellate court distinction, therefore, is fundamentally flawed.[46] The single appellate court approach also is flawed, for courts often look to other jurisdictions for precedent. Third, the "adversely affect" qualifier does not track the language of either Rule 1.7(a) (which applies in instances of direct adversity) or Rule 1.7(b) (which speaks of material limitations). This ambiguity arguably vests greater discretion in lawyers when it comes to determining their professional obligations vis-á-vis effects on clients and

42. MODEL RULES, *supra* note 16, Rule 1.7 cmt. 9.

43. *See generally* Dzienkowski, *supra* note 2, at 466-69.

44. According to the comment, "it is ordinarily not improper" for a lawyer to take antagonistic legal positions in different trial courts, but it may be improper to do so "in cases pending at the same time in an appellate court." MODEL RULES, *supra* note 16, Rule 1.7 cmt. 9.

45. *See* WOLFRAM, *supra* note 6, § 7.3, at 355 n.41.

46. At least one state ethics authority has recognized that issue or positional conflicts of interest can arise out of trial court representations. *See* State Bar of N.M., Advisory Opinions Comm., Advisory Op. 1990-3 (1990).

consent than the Rule itself allows.[47]

The ABA analyzed issue or positional conflicts of interest in a 1993 ethics opinion.[48] In Formal Opinion 93-377, the ABA's Standing Committee on Ethics and Professional Responsibility was presented with the following question:

> [W]hether a lawyer can represent a client with respect to a substantive legal issue when the lawyer knows that the client's position on that issue is directly contrary to the position being urged by the lawyer (or the lawyer's firm) on behalf of another client in a different, and unrelated, pending matter.[49]

The Committee limited its inquiry to issue or positional conflicts involving *current* clients.[50] The Committee reasoned that *former* clients are not affected by, nor can they be instigators of, issue or positional conflicts of interest because they are not threatened by a lawyer's potentially diluted advocacy in the eyes of a court, stare decisis, or divided loyalties.[51] All of these issues may be of great concern to current clients.[52]

The Committee first looked to Rule 1.7 to answer the question posed, and then examined the comment discussed above.[53] The Committee saw no reason to distinguish between trial and appellate courts as the comment requires, reasoning that trial court precedent and trial judges' perceptions are significant concerns.[54] The Committee thus concluded that if two matters are being litigated in the same jurisdiction, and the lawyer's representation of one client will create legal precedent (even if non-binding) which is likely to "materially undercut" the legal position being urged on behalf of a second client, the lawyer must either decline the second representation or withdraw from the first unless both clients consent to the concurrent representation.[55]

If the two conflicting matters are not being litigated in the same forum, the lawyer still must determine "fairly and objectively" whether his representation of one client will be materially limited by his representation

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47. *See* Dzienkowski, *supra* note 2, at 473.

48. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-377 (1993) [hereinafter Formal Op. 93-377].

49. *Id.* at 1 (footnote omitted).

50. *See id.* at 1-2.

51. *See id.* at 2. The Committee did not clearly express this reasoning, instead preferring a simple citation to Rule 1.9 cmt. 2. *See id.*

52. *See* Formal Op. 93-377, *supra* note 48, at 2.

53. *See id.* at 2-3.

54. *See id.* at 3.

55. *Id.* at 3-4.

of the other.[56] In making that determination, the lawyer must consider (a) whether the issue is of such importance that its determination is likely to affect the ultimate outcome of at least one of the cases, and whether its determination actually will have that effect; or (b) whether the lawyer will be inclined to alter his arguments for one or both clients, or de-emphasize or "soft-pedal" certain arguments or issues which he would otherwise vigorously pursue so as to avoid affecting or impairing the other case.[57]

If the lawyer determines that the issue or point of contention impairs his concurrent representations either because it will affect the ultimate outcome of one or both cases, or because his dual representation will impair his effectiveness as an advocate, he should decline the second representation.[58] In such a situation the representation of at least one client would be "adversely affected" if the lawyer were to proceed with both.[59] If, on the other hand, the lawyer reasonably believes that the issue being debated will not determine the ultimate outcome in the second case and that his concurrent representation will not diminish the quality or effectiveness of his services, he may continue to represent both clients.[60] In order to continue his dual representation, however, the lawyer must obtain both clients' consent. This requires the lawyer to fully disclose to both clients all potential ramifications of the joint representation.[61]

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56. *Id.* at 4.

57. *Id.* The Committee divided these two general elements into four questions which, when paired, become quite close.

> (a) Is the issue one of such importance that its determination is likely to affect the ultimate outcome of at least one of the cases?
> (b) Is the determination of the issue in one case likely to have a significant impact on the determination of that issue in the other case? (For example, does the issue involve a new or evolving area of the law, where the first case decided may be regarded as persuasive authority by other courts, regardless of their geographical location? Or: is the issue one of federal law, where the decision by one federal judge will be given respectful consideration by another federal judge, even though they are not in the same district or state?)
> (c) Will there be any inclination by the lawyer, or her firm to "soft-pedal" or de-emphasize certain arguments or issues—which otherwise would be vigorously pursued—so as to avoid impacting the other case?
> (d) Will there be any inclination within the firm to alter any arguments for one, or both clients, so that the firm's position in the two cases can be reconciled—and, if so, could that redound to the detriment of one of the clients?

Id.

58. *See id.*

59. *Id.* at 4-5.

60. *See id.* at 5.

61. *See id.*

Recognizing that its analysis and discussion was predicated on the assumption that the issue or positional conflict of interest is immediately apparent to the lawyer when he is asked to represent the second client, the Committee went on to state that the same approach should guide a lawyer when a conflict emerges after he accepts the second representation.[62] If the lawyer concludes that he cannot proceed with both representations after accepting the second, he must withdraw from one of them.[63] If possible, the lawyer should determine which client will suffer the least harm as a result of his withdrawal and then withdraw from that representation.[64]

In reaching its conclusions, the Committee disregarded Rule 1.7(a) and instead focused on Rule 1.7(b).[65] The Committee reasoned that Rule 1.7(a) does not apply to issue or positional conflicts of interest because by referring to "directly adverse" representations it contemplates the simultaneous representation of opposing clients.[66] The test under Rule 1.7(b), however, is whether the representation of a client in one matter may be "materially limited" by the lawyer's responsibilities to another client in another matter.[67] The Committee viewed the impairment of a representation by way of an issue or positional conflict as a material limitation within the meaning of Rule 1.7(b).

Formal Opinion 93-377 is significant because the Committee broadened issue or positional conflicts of interest to cover litigation at the trial court level and to encompass cases in different jurisdictions. The opinion also is significant because the Committee offered a workable framework for analyzing issue or positional conflicts.

At least one state has rejected the ABA approach to issue or positional conflicts,[68] although the related ethics opinion may not travel well. The Professional Ethics Commission of the Maine Bar was posed this general question:

> The lawyer represents one client who is a party in Lawsuit A, and a second client who is a party in Lawsuit B. The two lawsuits are unrelated except that they present the same legal issue. The clients' interests are conflicting in the sense that they desire opposite resolutions of the same issue. The lawyer proposes to represent both clients, thereby causing the lawyer simultaneously to advocate opposing positions on the

62. *See id.*
63. *See id.*
64. *See id.* at n.6.
65. *See id.* at 4 n.4.
66. *See* MODEL RULES, *supra* note 16, Rule 1.7(b).
67. *See* Formal Op. 93-377, *supra* note 48, at 4 n.4.
68. *See* Board of Overseers of the Bar, Prof'l Ethics Comm'n, Op. No. 155 (Me. 1997) [hereinafter Maine Op. No. 155].

> common legal issue.
>
> Bar Counsel inquires into whether and under what circumstances the representation could create a conflict of interest under the [Maine] Bar Rules.[69]

In formulating its answer, which it offered in Opinion No. 155, the Commission looked first to its definition of "conflict of interest" found in Maine Bar Rule 3.4(b)(1). That Rule provides:

> Representation would involve a conflict of interest if there is a substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to another current client, to a former [client], or to a third person, or by the lawyer's own interest.[70]

The question, then, was whether the issue or positional conflict described was in fact a conflict of interest within the meaning of Bar Rule 3.4(b)(1).[71]

The Commission concluded that "an 'issue conflict,' without more, is not a conflict of interest" under Maine Bar Rules.[72] It rejected the ABA's view of issue or positional conflicts because the Maine Bar Rules do not include a comment similar to that accompanying Model Rule 1.7.[73] A note to a Maine Bar Rule specifically states that a conflict should not be found to exist solely because a lawyer might be required to advance clients' contradictory positions in unrelated proceedings.[74] Finally, the Commission believed that recognizing issue or positional conflicts posed an unreasonable burden on practitioners, especially in light of the perceived rarity of such conflicts.

> [A]doption of the ABA position would necessarily imply that

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69. *Id.* at 1.
70. *Id.* (quoting Maine Bar Rule 3.4(b)(1)).
71. *See id.*
72. *Id.* at 4.
73. *See id.* at 3. Comment 9 to Model Rule 1.7 states:

> A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

MODEL RULES, *supra* note 16, Rule 1.7 cmt. 9. This comment is discussed in the text accompanying *supra* notes 42-47.

74. *See* Maine Op. No. 155, *supra* note 68, at 4.

> law firms must use the conflict screening procedures for "issue conflicts" that are used for customary direct conflicts. Development of such an issue conflict warning system is, however, a far more formidable task, even for a firm of moderate size, than determining whether a prospective opponent is also a client in an unrelated matter. We decline to interpret [Maine] Bar Rule 3.4(b)(1) in such a way as to require the bar to adopt screening procedures for issue conflicts which experience tells us are, in any event, extremely rare.[75]

The Maine approach seems unlikely to influence other jurisdictions. Maine Bar Rules differ appreciably from the Model Rules. States that have adopted Rule 1.7 and the comments in whole or substantial part are unlikely to be persuaded by the Commission's reasoning, inasmuch as the absence of a like rule or similar commentary so influenced it. The Commission arguably afforded excessive weight to the potential burden on lawyers that screening issue or positional conflicts among current clients might pose, or it at least ascribed such a burden without sufficient analysis.[76] Many law firms claim to successfully screen potential issue or positional conflicts of interest.[77] Finally, the Commission noted that an issue or positional conflict might become an actual conflict of interest under Maine law given the correct facts and circumstances.[78] In other words, the general question posed to the Commission might be answered differently if the lawyer caught in an issue or positional conflict found his effectiveness on his clients' behalf impaired as a result.[79]

B. *Former Clients and Conflicts of Interest*

Because former clients freely voice their concerns about issue or positional conflicts of interest, courts and lawyers must consider the application of Model Rule 1.9. Rule 1.9 concerns loyalty in successive

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75. *Id.*

76. Similarly, a California ethics committee concluded that even sophisticated conflict checking systems in law firms are unable to identify issue or positional conflicts, such that established conflict of interest principles should not apply in this context. *See* State Bar of Cal., Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. 1989-108 (1989).

77. My support for this statement is anecdotal. It is drawn mainly from communications with lawyers whose firms are insured by the Attorneys' Liability Assurance Society, Inc. (ALAS). These lawyers' claims and statements may or may not be accurate or reliable. My point, quite simply, is that the California and Maine assumptions of practical impossibility are not necessarily accurate. I believe that it is practically impossible to screen issue or positional conflicts in successive representations. *See infra* Part IV.A.

78. *See* Maine Op. No. 155, *supra* note 68, at 4.

79. *See id.*

representations; it is intended to protect former clients.[80] The Rule embodies the principle that loyalty to a client survives the termination of the attorney-client relationship.[81] Were it otherwise, a lawyer might be tempted to terminate a representation and use his former client's confidences to make himself more valuable to a new client who is adverse to the first. The primary aim of Rule 1.9, then, is preventing the use of former clients' confidences to their detriment.[82]

Rule 1.9(a) provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.[83]

"[A]nother person" as used in Rule 1.9(a) means "another client."[84]

The scope of a "matter" for Rule 1.9(a) purposes depends on the facts of the particular situation or transaction.[85] Similarly, determining whether matters are "substantially related" requires an analysis of the facts, the circumstances, and the legal issues involved.[86] The test for a substantial relationship has sometimes been honed in practice to require a lawyer's disqualification or withdrawal only where the issues in the current and former representations are identical or essentially the same, or where the relationship between the issues is patently clear.[87] Such a narrow view of whether matters are substantially related, however, is not universal.[88] Many

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80. *See* 1 HAZARD & HODES, *supra* note 7, § 1.9:101, at 289.

81. *See* GILLERS, *supra* note 23, at 303.

82. *See* Griffith v. Taylor, 937 P.2d 297, 301 (Alaska 1997) (stating that the Rule 1.9(a) substantial relationship test is a prophylactic rule obviating the former client's need to demonstrate the disclosure of confidential information in the prior representation); Flatt v. Superior Court, 885 P.2d 950, 954 (Cal. 1994) (stating that "the chief fiduciary value jeopardized [in successive representations] is that of client confidentiality"); State *ex rel.* Wal-Mart Stores, Inc. v. Kortum, 559 N.W.2d 496, 500-502 (Neb. 1997) (discussing substantial relationship test and confidentiality).

83. MODEL RULES, *supra* note 16, Rule 1.9(a) (1998).

84. *See* Wood's Case, 634 A.2d 1340, 1342-43 (N.H. 1993).

85. *See* MODEL RULES, *supra* note 16, Rule 1.9 cmt. 2; *see also, e.g.*, Misemer v. Freda's Restaurant, Inc., 961 S.W.2d 120, 122-23 (Mo. Ct. App. 1998).

86. *See* Schwartz v. Cortelloni, 685 N.E.2d 871, 878-80 (Ill. 1997); State v. Crepeault, 704 A.2d 778, 783 (Vt. 1997) (quoting State *ex rel.* McClanahan v. Hamilton, 430 S.E.2d 569, 572-73 (W. Va. 1993)).

87. *See* Bergeron v. Mackler, 623 A.2d 489, 493-94 (Conn. 1993) (quoting Government of India v. Cook Indus., 569 F.2d 737, 739-40 (2d Cir. 1978)).

88. *See* Chrispens v. Coastal Ref. & Mktg., 897 P.2d 104, 111 (Kan. 1995) (asserting that "[t]his approach has not been a view widely adopted"); Sullivan County Reg'l Refuse Disposal Dist. v. Town of Acworth, 686 A.2d 755, 757 (N.H. 1996) (noting that "[t]his approach has been rejected by a majority of . . . courts").

courts take a broader view by blending fact and issue comparisons.[89] Regardless of the approach chosen, or the view selected, the party claiming a conflict of interest bears the burden of proving that the representations are substantially related.[90]

Once matters are determined to be substantially related, Rule 1.9(a) requires that the current client's and the former client's interests be "materially adverse" in order to force the lawyer's disqualification or withdrawal, or to require him to decline the second representation. The materiality requirement suggests a conflict of interest continuum, with some conflicts intense or severe and others minor or insignificant.[91] It is perhaps more accurate to say that not all competing interests amount to a conflict of interest; an actual conflict does not arise unless the material adversity requirement is met. Of course, the difficulty for practitioners lies not with recognizing and resolving obvious conflicts, but with those close cases that present tough judgment calls and that test lawyers' discretion.[92] Such cases are generally best resolved by erring on the side of caution.[93]

At first glance it appears that the "substantially related matter" and "materially adverse" language found in Rule 1.9(a) may apply to issue or positional conflicts of interest. A comment to Rule 1.9, however, restricts the rule's application by defining the term "matter" so that "a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client."[94] Thus, Rule 1.9(a) as it is now interpreted does not apply to claimed issue or positional conflicts of interest involving former clients.[95] This result should not be a surprise, for Rule 1.9(a) is intended to be narrowly applicable.[96]

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89. *See Chrispens*, 897 P.2d at 111 (citing and quoting Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 225 (7th Cir. 1978)); *see, e.g.*, State *ex rel.* Wal-Mart Stores, Inc. v. Kortum, 559 N.W.2d 496, 501 (Neb. 1997); West Virginia Canine College, Inc. v. Rexroad, 444 S.E.2d 566, 570-71 (W. Va. 1994).

90. *See* State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 633 (Fla. 1991); Schwartz v. Cortelloni, 685 N.E.2d 871, 877 (Ill. 1997); Richers v. Marsh & McLennan Group Assocs., 459 N.W.2d 478, 481 (Iowa 1990).

91. *See* 1 HAZARD & HODES, *supra* note 7, § 1.9:202, at 306.5.

92. *See id.*

93. *See id.*

94. MODEL RULES, *supra* note 16, Rule 1.9 cmt. 2.

95. *See* Dzienkowski, *supra* note 2, at 480; *see also* 1 HAZARD & HODES, *supra* note 7, § 1.9:202, at 306.5 (stating that representations presenting mere positional conflicts of interest "should almost never be barred in the serial context").

96. *See* Kansas Bar Ass'n Legal Ethics Op. 94-11, at 3 (1994); *see also* Casco N. Bank v. JBI Assocs., 667 A.2d 856, 861 (Me. 1995) (interpreting equivalent Maine Bar Rule and explaining need and reason for narrow construction).

III. ISSUE OR POSITIONAL CONFLICTS OF INTEREST IN THE CASE LAW

Courts, commentators and disciplinary authorities typically view but four cases as dealing with issue or positional conflicts of interest: *Estates Theatres, Inc. v. Columbia Pictures Industries, Inc.*,[97] *Westinghouse Electric Corp. v. Kerr-McGee Corp.*,[98] *Fiandaca v. Cunningham*,[99] and *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*.[100] These cases are discussed in order below.

Estates Theatres[101] was an antitrust action in which the conflict of interest was judged under the Model Code. In *Estates Theatres*, the plaintiff, which owned the Utopia theater, sued a number of defendants for allegedly conspiring against it in the distribution and exhibition of movies.[102] Estates Theatres was represented by Joseph A. Ruskay, who was also representing United Artists Theatre Circuit (UATC) in two consolidated antitrust actions in the same judicial district.[103] The claims in the Utopia and UATC actions were quite similar.[104] UATC operated a competing theater called the Roosevelt.[105]

Some of the defendants in the Utopia case moved to disqualify Ruskay. They argued that the interests of the Utopia and the Roosevelt were antagonistic because the defendants were allegedly discriminating against one of Ruskay's clients to the benefit of the other.[106] If the Utopia's owners were to prevail in their case, they would be entitled to an injunction preventing the defendants from engaging in any illegal conduct benefitting the Roosevelt.[107] This conflict was accentuated by an antitrust suit brought by the government against UATC.[108] Among other things, evidence unearthed in the Utopia action could hurt UATC in its defense of the government action.[109] Finally, UATC would not consent to Ruskay's continued representation of Estates Theatres.[110]

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97. 345 F. Supp. 93 (S.D.N.Y. 1972).
98. 580 F.2d 1311 (7th Cir. 1978).
99. 827 F.2d 825 (1st Cir. 1987).
100. 602 A.2d 1277 (Pa. 1992).
101. *Estate Theatres*, 345 F. Supp. at 93.
102. *See id.* at 95-96.
103. *See id.* at 95.
104. *See id.* at 96.
105. *See id.*
106. *See id.*
107. *See id.*
108. *See id.* at 96-97.
109. *See id.* at 97.
110. *See id.* UATC originally consented to Ruskay's joint representation. *See id.* Since that time, however, he had named UATC as a con-conspirator in the *Estates Theatres* case, although he never named UATC as a defendant. *See id.* Ruskay had led UATC to believe that he would not in

Ruskay contended that there was no conflict of interest.[111] More particularly, he contended there was no *substantial* conflict of interest because the alleged conspiracies in the different cases (including the government actions) involved different periods of years.[112]

The *Estates Theatres* court analyzed the conflict under Disciplinary Rule (DR) 5-105(B) of the Model Code.[113] The version of DR 5-105(B) in effect at the time provided in pertinent part that a lawyer "'shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client . . . '" except in certain consensual circumstances.[114] The court reasoned that Ruskay could not continue to represent Estates Theatres.

> [C]onsiderations of public policy, no less than the client's interests, require rigid enforcement of the rule against dual representation where one client is likely to be adversely affected by the lawyer's representation of another client and where it appears he cannot exercise independent judgment and vigorous advocacy on behalf of the one without injuring the interests of the other. A lawyer should not be permitted to put himself in a position where, even unconsciously he will be tempted to "soft pedal" his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another, at least in the absence of the express consent of both clients. Such is the case here.[115]

Moreover, to allow the plaintiff's lawyer to take the conflicting positions sure to arise from the facts presented would impair the community's confidence and respect in the bench and bar.[116]

There is some question as to whether *Estates Theatres* involved a true issue or positional conflict of interest, or whether it was a case of direct adversity.[117] UATC's status as an alleged co-conspirator seems to

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any way allege or suggest that it was involved in a conspiracy. *See id.*

111. *See id.*

112. *See id.* at 98.

113. *See id.* at 95. The Model Code includes aspirational standards expressed as "Ethical Considerations," and "black letter" requirements stated as "Disciplinary Rules." *See* Richmond, *supra* note 18, at 1824-25.

114. *Estates Theatres*, 345 F. Supp. at 95 (quoting DR 5-105(B)). The ABA amended DR 5-105(B) in 1974 to add the requirement that a lawyer could not continue multiple employment where "it would be likely to involve him in representing differing interests." MODEL CODE DR 5-105(B) & n.38.

115. *Estates Theatres*, 345 F. Supp. at 99 (footnotes omitted).

116. *See id.*

117. *See* Maine Op. No. 155, *supra* note 68, at 2 (arguing that the *Estates Theatres* decision

strengthen the argument that the two clients had directly opposing interests in the same action or closely related actions. Regardless, the court's sweeping language has diminished the value of the case; most scholars consider it weakly grounded in professional responsibility law.[118]

Westinghouse Electric Corp. v. Kerr-McGee Corp.[119] has been described as a "classic example" of an issue or positional conflict of interest,[120] although the court treated it as a test of the bounds of the attorney-client relationship.[121] Regardless of description, the underlying ethics and conflict questions horribly frustrated the law firm involved.[122]

In 1976 the prominent national law firm of Kirkland & Ellis (Kirkland) filed an antitrust suit for Westinghouse, a major manufacturer of nuclear reactors, against a number of domestic and foreign corporations interested in various aspects of the uranium industry.[123] The suit was handled by lawyers from Kirkland's Chicago office. Among the defendants were Gulf Oil Corporation (Gulf), Kerr-McGee Corporation (Kerr-McGee) and Getty Oil Corporation (Getty). Gulf, Kerr-McGee and Getty also were members of the American Petroleum Institute (API).[124] Their API membership was significant because lawyers from Kirkland's Washington, D.C. office were representing API in sensitive, high-stakes antitrust matters at the same time that the firm's Chicago office was prosecuting the uranium antitrust action for Westinghouse against Gulf, Kerr-McGee and Getty.[125] API had employed Kirkland to help it lobby against Congressional attempts to break up its members, and to prohibit their ownership of alternative energy sources in addition to oil and gas.[126]

In the course of its API representation, Kirkland received confidential information from API members which it used to prepare a detailed public report.[127] The report devoted considerable attention to the uranium industry.[128] In particular, the report asserted that increased uranium prices were the result of increasing demand, that oil companies' entry into uranium production had stimulated competition, that the oil companies had

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rests on "traditional conflict analysis resulting from the clients' directly opposing interests in the outcome of a representation").

118. *See* Dzienkowski, *supra* note 2, at 471-72.

119. 580 F.2d 1311 (7th Cir. 1978).

120. Dzienkowski, *supra* note 2, at 466 (describing *Westinghouse* as a "classic example of a hybrid lobbying positional conflict" of interest).

121. *See Westinghouse*, 580 F.2d at 1312.

122. *See* JAMES B. STEWART, THE PARTNERS 152, 186-97 (1983).

123. *See Westinghouse*, 580 F.2d at 1313.

124. *See id.* at 1312.

125. *See id.* at 1313.

126. *See id.*

127. *See id.* at 1313-14.

128. *See id.*

no incentive to act in concert, and that the energy industry was generally competitive.[129]

Kirkland's conflict of interest was, or should have been, obvious. To begin with, the firm was prosecuting Westinghouse's antitrust action against the oil companies.[130] In that suit, Westinghouse charged that the oil companies' unfair and anticompetitive practices had altered uranium prices to the point that it was commercially impracticable for Westinghouse to honor many of its utility contracts.[131] At the same time, Kirkland was advocating API's position that oil companies' entry into alternative energy markets was pro-competitive and that the uranium price increases that Westinghouse deemed ruinous were merely the result of market forces.[132] If the court hearing the antitrust action were to adopt the API report, Westinghouse would surely lose its case. And, API's lobbying efforts certainly would be undercut—and the accuracy and truthfulness of its report questioned—were Congressional staffers to learn of the allegations made in the Westinghouse suit. API's interests and Westinghouse's interests clearly were adverse, even though API's forum was the halls of Congress and Westinghouse was making its arguments in a federal district court.

Gulf, Kerr-McGee and Getty moved to disqualify Kirkland in the antitrust action, arguing that their membership in the API and their disclosure of confidential information to Kirkland created an attorney-client relationship with the firm.[133] Kirkland contended that it never shared an attorney-client relationship with individual API members.[134] It also argued that the oil companies were aware that it was representing Westinghouse at the same time it was representing API,[135] and that its construction of a "'Chinese wall,'" or wall of insulation, between the Chicago attorneys representing Westinghouse and the Washington attorneys representing API cut against disqualification.[136] Perhaps recognizing the diametrically opposing positions asserted in the Westinghouse suit and the API report, Kirkland did not dispute the oil companies' charges that the firm had taken inconsistent positions on competition in the uranium industry.[137]

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129. *See id.* at 1314.

130. *See id.* at 1313.

131. *See id.*

132. *See id.*

133. *See id.* at 1312, 1314-22.

134. *See id.*

135. *See id.* at 1321. Kirkland contended that the oil companies had to know of the firm's Westinghouse representation because it propounded discovery to them. *See id.*

136. *Id.*

137. *See id.* at 1314 (quoting Westinghouse Elec. Corp. v. Rio Algum Ltd., 448 F. Supp. 1284, 1296 (N.D. Ill.), *rev'd*, 580 F.2d 1311 (7th Cir. 1978)).

The district court declined to disqualify Kirkland and the oil companies appealed. The Seventh Circuit Court of Appeals reversed. The *Westinghouse* court found that Kirkland's representation of the API created a fiduciary relationship or implied professional relationship between the law firm and the oil companies.[138] This relationship was largely (if not exclusively) the product of the oil companies' disclosure of confidential information to Kirkland in the firm's API representation.[139]

The Seventh Circuit concluded that Westinghouse should have the option of dismissing Gulf, Kerr-McGee and Getty from the antitrust suit, or dismissing Kirkland as its counsel in that case.[140] The court apparently gave Westinghouse this option in order to avoid or mitigate any hardship that it would likely suffer were Kirkland simply disqualified.[141]

Westinghouse evidences the practical problems that issue or positional conflicts pose for lawyers. The Kirkland lawyer who opened the API matter, Frederick Rowe, circulated a firm-wide memorandum in an attempt to detect potential conflicts of interest, but none of his Chicago partners representing Westinghouse recognized the conflict.[142] The case also illustrates the personal toll that conflicts of interest sometimes take. Kirkland made Rowe a scapegoat for the conflict and forced him to resign his firm leadership position under threat of partnership expulsion.[143]

The Seventh Circuit's approach to Kirkland's dual representation is interesting, because the court did not decide *Westinghouse* as an issue or positional conflict of interest. The court must have assumed that issues or positional conflicts do not exist, or at least do not warrant offending lawyers' disqualification, as indicated by its decision to stretch the definition of "client" to allow the oil companies to claim a conflict between current clients in substantially related matters.[144] Some scholars have understandably accepted the Seventh Circuit's characterization of *Westinghouse* as a simultaneous representation of directly adverse interests as a result.[145] For those who choose to view the case as an issue or positional conflict, it demonstrates quite clearly the danger that such conflicts pose. Treating *Westinghouse* as an issue or positional conflict

138. *See id.* at 1319-21.

139. *See id.* at 1321.

140. *See id.* at 1322.

141. *See id.*

142. *See* STEWART, *supra* note 122, at 187.

143. *See id.* at 194.

144. *See Westinghouse*, 580 F.2d at 1320-22. By representing an association a lawyer does not necessarily enter into an attorney-client relationship with each member. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-365, at 2 (1992). That having been said, the ABA accepts the *Westinghouse* position that an association member may become a client of the association's lawyer if the member shares confidential information with lawyer. *See id.* at 2-3, 6.

145. *See* 1 HAZARD & HODES, *supra* note 7, § 1.10:204, at 329.

case makes for better professional responsibility law, inasmuch as repeated stretches of the terms "client" and "matter" to resolve claimed conflicts in clients' favor will leave those definitions so loose as to create an unreasonable and undesirable number of conflicts of interest.[146] Thus, while the case was rightly decided without regard for its characterization, the *Westinghouse* court's approach has a negative glare not seen if the case is viewed as an issue or positional conflict.

Fiandaca v. Cunningham[147] involved a class action brought by female inmates in the New Hampshire prison system.[148] The female inmates challenged the state's failure to establish a facility for female inmates with programs and services equivalent to those provided to male inmates.[149] They were represented in their challenge by New Hampshire Legal Assistance (NHLA).[150] NHLA was, at the same time, representing a class of plaintiffs (the *Garrity* class) challenging the conditions and practices at the Laconia State School and Training Center (Laconia), New Hampshire's sole facility for the care of its mentally retarded citizens.[151]

The state ultimately offered to settle the female inmates' class action. As part of the settlement, it proposed to establish a temporary correctional facility on the grounds at Laconia.[152] The inmate class plaintiffs rejected the settlement offer because they did not want to accept an offer which they considered to be contrary to the stated interests of the *Garrity* class plaintiffs.[153] The state immediately moved to disqualify NHLA as plaintiffs' counsel in the inmate class action "due to the unresolvable conflict of interest inherent in the NHLA's representation of two classes with directly adverse interests."[154] The district court declined to disqualify NHLA and the state appealed.[155]

The First Circuit Court of Appeals found "considerable merit" in the state's conflict of interest argument.[156] The court observed:

> As [inmate] class counsel, NHLA owed plaintiffs a duty of undivided loyalty: it was obligated to present the [state's settlement] offer to plaintiffs, to explain its costs and benefits, and to ensure that the offer received full and fair

146. *See* Dzienkowski, *supra* note 2, at 467 n.38.
147. 827 F.2d 825 (1st Cir. 1987).
148. *See id.* at 826.
149. *See id.*
150. *See id.*
151. *See id.* at 826-27.
152. *See id.* at 827.
153. *See id.*
154. *Id.*
155. *See id.* at 828.
156. *Id.* at 829.

> consideration by the members of the class. Beyond all else, NHLA had an ethical duty to prevent its loyalties to other clients from coloring its representation of the [inmate] plaintiffs in this action and from infringing upon the exercise of its professional judgment and responsibilities.
>
> NHLA, however, also represents the [Laconia] residents . . . who are members of the plaintiff class in *Garrity* . . . . [T]his group vehemently opposes the idea of establishing a correctional facility for female inmates anywhere on the grounds of [Laconia]. As counsel for the *Garrity* class, NHLA had an ethical duty to advance the interests of the class to the fullest possible extent and to oppose any settlement of the [female inmate class action] that would compromise those interests. In short, the combination of clients and circumstances placed NHLA in the untenable position of being simultaneously obligated to represent vigorously the interests of two conflicting clients. It is inconceivable that NHLA, or any other counsel, could have properly performed the role of "advocate" for both [the inmate] plaintiffs and the *Garrity* class, regardless of its good faith or high intentions.[157]

The *Fiandaca* court analyzed NHLA's alleged conflict of interest under the New Hampshire equivalent of Model Rule 1.7(b).[158] The court concluded that NHLA's representation of the female inmate class "could not escape the adverse affects" of its loyalties to the plaintiffs in the *Garrity* class.[159] The court thus held that NHLA had to be disqualified as counsel for the inmate class.[160]

Fiandaca is not a pure issue or positional conflict because the two class actions in which NHLA found itself entangled were not unrelated. At the same time, NHLA's clients were not directly adverse, and the court therefore properly looked to Rule 1.7(b) as a conduct measure, rather than looking to Rule 1.7(a). The court's reasoning and analysis directly apply to issue or positional conflicts of interests in litigation. For this reason, *Fiandaca* is a significant case.

The plaintiff in *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*[161] was a Philadelphia-based transporter of petroleum products operating along the East and Gulf coasts.[162] Maritrans competed in a marine transportation business with other tug and barge companies, some of which

157. *Id.* (footnote omitted).
158. *See id.* at 829-30.
159. *Id.* at 830.
160. *See id.* at 831.
161. 602 A.2d 1277 (Pa. 1992).
162. *See id.* at 1280.

were based in New York.[163] Pepper, Hamilton & Scheetz (Pepper) was Maritrans' long-time labor counsel.[164] Pepper also handled Maritrans' corporate and securities work.[165] Maritrans' chief labor attorney at Pepper was Anthony Messina (Messina).[166]

During the course of its labor representation of Maritrans, Pepper became intimately familiar with Maritrans' operations and financial information.[167] Messina obtained this information for the purpose of developing Maritrans' labor goals and strategies.[168]

> Pepper and Messina . . . came to know the complete inner-workings of the company along with Maritrans' long-term objectives, and competitive strategies in . . . the area of labor costs, a particularly sensitive area in terms of effective competition. In furtherance of its ultimate goal of obtaining more business than . . . its competition, including the New York-based companies, Maritrans analyzed each of its competitors with Pepper and Messina. These analyses included an evaluation of each competitor's strengths and weaknesses, and of how Maritrans deals with its competitors.[169]

Pepper and Messina subsequently began representing Maritrans' New York competitors in their labor negotiations with a different union.[170] The New York companies sought wage and benefit reductions in order to compete more effectively.[171] One of their competitors, of course, was Maritrans. In September 1987, Maritrans learned from independent sources that Pepper and Messina were representing four of its New York competitors.[172] Maritrans objected to Pepper's representation of its competitors. Pepper and Messina took the position that the situation presented "'a business conflict, not a legal conflict,'" and that they owed Maritrans no ethical or fiduciary duty prohibiting their representation of the New York companies.[173]

Pepper proposed to Maritrans that it would continue as Maritrans' counsel, but that it would not represent any more New York companies

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163. *See id.*
164. *See id.*
165. *See id.*
166. *See id.*
167. *See id.*
168. *See id.*
169. *Id.*
170. *Id.*
171. *See id.*
172. *See id.*
173. *Id.* at 1281.

beyond the four it already represented.[174] Messina would act as counsel for the New York companies while two other Pepper attorneys would counsel Maritrans. The Pepper attorneys on one side of the "Chinese Wall" would not discuss their respective representations with the attorneys on the other side.[175] Maritrans agreed to this arrangement because it believed that it was the only way to prevent Pepper from representing yet more of its competitors, and especially its largest competitor, Bouchard Transportation Company (Bouchard).[176] Without Maritrans' knowledge, Messina then "parked" Bouchard and another New York competitor, Eklof, with Vincent Pentima (Pentima), a friend and labor lawyer at another firm.[177] Messina was simultaneously negotiating Pentima's lateral move to Pepper.[178]

On November 5, 1987, Maritrans' executives met with Pepper attorneys to discuss Maritrans' plans and strategies in the event of a strike against the New York companies.[179] On December 2, 1987, Pepper terminated its representation of Maritrans in all matters.[180] Pepper began representing Maritrans' remaining New York competitors later that month.[181] In January 1988, Pentima joined Pepper as a partner, bringing his clients Bouchard and Eklof with him.[182] In February 1988, Maritrans sued Pepper and Messina in a Pennsylvania state court.[183]

Maritrans alleged Pepper's misappropriation of its trade secrets, breach of contract and breach of fiduciary duty, and sought injunctive relief as well as money damages.[184] The trial court entered a preliminary injunction and Pepper appealed.[185] An intermediate appellate court reversed, concluding that Pepper's conduct was not actionable. The Superior Court held that Rules 1.7 and 1.9 of the Pennsylvania Rules of Professional Conduct on which Maritrans and the trial court relied did not create a cause of action.[186]

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174. *Id.*

175. *See id.* If Pepper truly meant to erect a "Chinese wall" or a "wall of insulation," it forgot to read the blueprints. The wall Pepper built placed Messina on the side with the New York companies, instead of on Maritrans' side where he rightly belonged.

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.*

181. *See id.*

182. *See id.*

183. *See id.*

184. *See* Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 572 A.2d 737, 739 (Pa. Super. Ct. 1990), *rev'd*, 602 A.2d 1277 (Pa. 1992).

185. *See id.*

186. *See Maritrans*, 602 A.2d at 1282. This would appear to be the general rule. *See, e.g., Ex Parte* Toler, 710 So. 2d 415, 416 (Ala. 1998) (interpreting Alabama statute); Davis v. Findley, 422 S.E.2d 859, 860-61 (Ga. 1992); OMI Holdings, Inc. v. Howell, 918 P.2d 1274, 1288 (Kan.

The Pennsylvania Supreme Court reversed the Superior Court.[187] The *Maritrans* court first observed that attorneys owe fiduciary duties to their clients, and that their failure to perform these duties is actionable.[188] Threatened failure to perform a fiduciary duty gives rise to a claim for injunctive relief to prevent the threatened breach.[189] The court reasoned that the lower appellate court "emasculated these common law principles, in effect turning the ethical or disciplinary rules governing lawyers into a grant of civil immunity" for reprehensible conduct.[190] Adherence to attorneys' fiduciary duties is necessary to ensure "that clients will feel secure that everything they discuss with counsel will be kept in confidence."[191]

Pepper and Messina argued that the trial court's order enjoining them from representing Maritrans' competitors was an abuse of discretion.[192] At the time the injunction was entered there was no evidence that they had revealed Maritrans' confidences to its competitors, or even that any revelations were threatened.[193] The *Maritrans* court rejected this argument.

> Whether a fiduciary can later represent competitors or whether a law firm can later represent competitors of its former client is a matter that must be decided from case to case and depends on a number of factors. One factor is the extent to which the fiduciary was involved in its former client's affairs. The greater the involvement, the greater the danger that confidences (where such exist) will be revealed . . . . Pepper and Messina's involvement was extensive as was their knowledge of sensitive information provided to them by Maritrans. We do *not* wish to establish a blanket rule that a law firm may not later represent the economic competitor of a former client in matters in which the former client is not also a party to a law suit. But situations may well exist where the danger of revelation of the confidences of a former client is so great that injunctive relief is warranted. This is one of those situations.[194]

The court concluded that Pepper and Messina could be enjoined from

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1996); Vallinoto v. DiSandro, 688 A.2d 830, 837 (R.I. 1997); Archuleta v. Hughes, 969 P.2d 409, 414 (Utah, 1998).

187. *See Maritrans*, 602 A.2d at 1288.
188. *See id.* at 1283.
189. *See id.*
190. *Id.*
191. *Id.*
192. *See id.* at 1286.
193. *See id.*
194. *Id.* at 1286-87.

representing the New York companies because their representation "would create too great a danger" that Maritrans' confidences would be divulged.[195] Such disclosures would "irreparably" injure Maritrans' competitive position, and any damages award would be an inadequate remedy.[196]

Whether *Maritrans* was correctly decided is a matter of perspective.[197] From Maritrans' perspective, its labor practices helped it succeed in a highly competitive business. Maritrans was probably pleased by the prospect of its competitors enduring a long strike. At the very least, it would not want to reduce the chance of the New York union striking its competitors. Pepper's and Messina's representation of Maritrans' competitors at a crucial time was the equivalent of treason. "Parking" Bouchard and Eklof with Pentima was dishonest. From Pepper's and Messina's perspective, Maritrans' complaints must have appeared to be an attempt to bully them, or to hold the firm hostage. They were entitled to market their marine labor law expertise. Indeed, all law firms rely on their reputation and expertise in particular practice areas to lure new clients. They did not divulge client confidences.[198] The New York companies were not dealing with the same union.

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195. *Id.* at 1287.

196. *See id.*

197. Professor Thomas D. Morgan, an ethics scholar who has studied *Maritrans*, essentially shares my analysis of the parties' perspectives, though he deemphasizes Messina's decision to "park" two competitors with an attorney who his firm intended to hire. *See* Thomas D. Morgan, Maritrans v. Pepper, Hamilton & Scheetz, ALAS LOSS PREVENTION J., Sept. 1993, at 2, 2 (on file with author).

198. The problem with this perspective is that courts seldom inquire into whether the attorney has actually used the confidential information to the client's detriment or disadvantage. Such an inquiry would reveal the very information for which protection is sought. *See* Cole v. Ruidoso Mun. Sch., 43 F.3d 1373, 1384 n.8 (10th Cir. 1994); H.F. Ahmanson & Co. v. Salomon Bros., 280 Cal. Rptr. 614, 618 (Cal. Ct. App. 1991); Chrispens v. Coastal Ref. & Mktg., Inc., 897 P.2d 104,115 (Kan. 1995); Sullivan County Reg'l Refuse Disposal Dist. v. Town of Acworth, 686 A.2d 755, 757-58 (N.H. 1996); State v. Crepeault, 704 A.2d 778, 783 (Vt. 1997); State *ex rel.* McClanahan v. Hamilton, 430 S.E.2d 569, 573-74 (W. Va. 1993). It would also be very difficult for a former client to demonstrate that the attorney revealed the client's confidences to the client's detriment. *See* Henderson v. Floyd, 891 S.W.2d 252, 254 (Tex. 1995). Therefore, once the potential for disclosure of confidential information is shown, a breach of confidence is presumed. *See* Griffen v. East Prairie, Mo. Reorganized Sch. Dist., 945 F. Supp. 1251, 1254 (E.D. Mo. 1996); Henriksen v. Great Am. Sav. & Loan, 14 Cal. Rptr. 2d 184, 186 (Cal. Ct. App. 1992); Bergeron v. Mackler, 623 A.2d 489, 494 (Conn. 1993); State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 634 (Fla. 1991); Richers v. Marsh & McLennan Group Assocs., 459 N.W.2d 478, 481 (Iowa 1990); *Chrispens*, 897 P.2d at 114; *Sullivan County*, 686 A.2d at 758; *Crepeault*, 704 A.2d at 783; *McClanahan*, 430 S.E.2d at 573. Some courts go further to impute the disclosure of the former client's confidences to other lawyers in the subject lawyer's firm, thus disqualifying the entire firm. *See, e.g.*, Flatt v. Superior Court, 885 P.2d 950, 954 (Cal. 1994); Bechtold v. Gomez, 576 N.W.2d 185, 190 (Neb. 1998); National Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 131 (Tex. 1996).

There are several problems with *Maritrans*. First, the court reasoned that clients have a right to "feel secure" that their confidences will be safeguarded.[199] This is at best an imprecise standard.[200] Second, if a client can effectively prevent a lawyer from representing a competitor because of what the lawyer *might* tell the competitor, it becomes extraordinarily difficult for a lawyer to have multiple clients in the same industry. That flies in the face of modern legal specialization.[201] Third, the more rights an existing client has to object to its attorneys' representation of new clients, the greater its control over its attorneys.[202] Theoretically, an existing client can effectively extort concessions (perhaps by way of fee arrangements) from its attorneys in exchange for the client's consent to new engagements. This threatens lawyers' professional independence. Fourth, Pepper and Messina did not violate Rule 1.7(b). Whether they violated Rule 1.9(a)[203] is an open question, resolved against them by assuming that once they stopped representing Maritrans, their representation of the New York companies was a substantially related matter and was materially adverse to Maritrans. While ethics rules should not be turned "into a grant of civil immunity,"[204] they afford a more reasonable standard of conduct than a client's subjective feeling of security. Even then clients should not be able to wield them as procedural weapons in order to gain a personal or competitive advantage.

Maritrans is a curious decision best limited to its facts,[205] as evidenced by subsequent courts' careful scrutiny of the case.[206] Nevertheless, it should cause attorneys to consider and evaluate issue or positional conflicts of interest. Pepper ultimately settled *Maritrans* for $3,000,000.[207]

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199. *Maritrans*, 602 A.2d at 1283.

200. *See* Morgan, *supra* note 193, at 6.

201. *See id.*

202. *See id.*

203. *See* MODEL RULES, *supra* note 16, Rule 1.9(a). Rule 1.9(a) provides: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." *Id.*

204. *Maritrans*, 602 A.2d at 1283.

205. For another discussion of *Maritrans*, see Geraldine Rowe, Comment, Maritrans G.P. Inc. v. Pepper, Hamilton & Scheetz: *Is Economic Competition Enough to Create a Conflict of Interest?*, 8 GEO. J. LEGAL ETHICS 1171 (1995).

206. *See, e.g.*, Commonwealth Ins. Co. v. Graphix Hot Line, Inc., 808 F. Supp. 1200, 1207-1208 (E.D. Pa. 1992) (discussing client consent).

207. *See* Morgan, *supra* note 193, at 6.

IV. A PRACTICAL ANALYSIS OF ISSUE OR POSITIONAL CONFLICTS OF INTEREST

Lawyers must be able to recognize issue or positional conflicts of interest, analyze them, and avoid them. This Part starts with the proposition that former clients should not be permitted to raise issue or positional conflicts of interest, i.e., such conflicts should not be recognized in successive representations. It next analyzes issue or positional conflicts in concurrent representations, and takes up the issues of disclosure and client consent. Finally, this Part combines the test for issue or positional conflicts with a discussion of client consent, packaging the analysis as a practitioner must.

A. *Former Clients and Successive Representations*

In order for competing interests to become an actual "conflict of interest" as that term is used in the Model Rules or understood by lawyers and courts, they must "materially limit" or "materially interfere" with a lawyer's representation of a present client.[208] That should not happen in successive representations when the claimed conflict is of an issue or positional nature. Stated most simply, former clients should not be permitted to claim the existence of true issue or positional conflicts of interest. Such conflicts should not be recognized in successive representations for both practical and policy reasons.[209]

First, from a practical perspective, successive representations do not in and of themselves threaten client confidences. The preservation of clients' confidences is, of course, the paramount concern in successive representations. Second, absent the use of client confidences or the use of client information, successive representations do not offend principles of loyalty. Service to a client in a single matter or several matters does not bind client and lawyer forever. Clients are free to change lawyers, and lawyers are similarly free to take on new clients in their areas of specialization.[210] Third, taking opposing positions in successive representations does not impair a lawyer's effectiveness for the present client. If anything, the present client benefits from the lawyer's first-hand knowledge of the opposing position. This is true without regard for whether the lawyer obtains specialized or confidential information in the

208. MODEL RULES, *supra* note 16, Rule 1.7(b) & cmt. 4.

209. Not all commentators and scholars share this opinion. *See, e.g.*, Dzienkowski, *supra* note 2, at 526-27 (noting limited instances in which positional conflicts can arise out of successive representations); Spaulding, *supra* note 8, at 1406.

210. *But see* Daniel J. Pope & Stephanie J. Kim, *Switching Sides: May a Lawyer Ever Represent Someone Against a Former Client?*, 65 DEF. COUNS. J. 553, 554 (1998) (asserting that "although clients may be less than loyal at times, lawyers must not").

first representation. In the litigation context, a lawyer's change of position should not render him less effective in the eyes of a court or judge; courts and judges understand that lawyers are advocates for their clients, and that clients and interests change.[211] In the lobbying context, legislators and governmental bodies surely understand that the lawyers who lobby them are advocating their clients' interests rather than their own. Finally, screening for issue or positional conflicts involving former clients is a formidable task even for large and sophisticated law firms. If it is difficult for firms to screen issue or positional conflicts among or between current clients,[212] it is practically impossible for them to do so when former clients' interests are implicated. Given the myriad of other reasons that issue or positional conflicts should not be credited in successive representations, it is unreasonable to require lawyers and law firms to go to the considerable time and expense of trying to develop systems for their detection, especially since those systems are probably going to be unworkable.

From a policy standpoint, allowing former clients to raise pure issue or positional conflicts gives them unreasonable and unjustifiable control over the attorneys who once served them. Giving former clients veto power over lawyers' choices of new clients and new matters absent threats to confidentiality or the exploitation of information obtained from the former client robs lawyers of their professional independence. Attorneys can be forced to forego new representations, and suffer financially as a result, while former clients pay nothing to maintain a perceived advantage or favored position. Allowing former clients to raise issue or positional conflicts, and thus allowing them to restrict lawyers' acceptance of new cases, interferes with the strong social policy favoring persons' right to counsel of their choice by limiting the number of available lawyers. This is particularly true where the pool of available lawyers is already quite small because the challenged representation is especially complex or demanding, because it requires lawyers with special skills or expertise, or because the parties reside in a smaller community with few practicing lawyers.

If issue or positional conflicts of interest can be credited in successive representations, it is in those states that require attorneys to conduct themselves so as to avoid even an "appearance of impropriety." The appearance of impropriety standard is found in Canon 9 of the Model

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211. The ABA's Standing Committee on Ethics and Professional Responsibility impliedly acknowledged this in its analysis of issue or positional conflicts. *See* Formal Op. 93-377, *supra* note 48.

212. *See* State Bar of Cal., Standing Comm. on Prof'l Responsibility and Conduct, Formal Op. No. 1989-108 (1989) (branding the detection of issue or positional conflicts of interest by law firms "virtually impossible").

Code.[213] Under EC 9-6, a lawyer should "conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety."[214]

The appearance of impropriety standard obviously remains a measure of attorneys' conduct in those states that still follow the Model Code,[215] but it may be found elsewhere. Some states have written the requirement that lawyers avoid the appearance of impropriety into their versions of the Model Rules.[216] A few states have superimposed the standard onto the Model Rules[217] even though a comment to Rule 1.9 expressly rejects the appearance of impropriety as a rubric for resolving attorney disqualification debates.[218]

The appearance of impropriety standard is seriously flawed. First, even those jurisdictions that employ the standard acknowledge that it "is vague and leads to uncertain results."[219] Because the term "impropriety" is undefined, embracing the "appearance of impropriety" as a basis for judging lawyers' conduct is "question-begging."[220] Second, the appearance of impropriety standard does not adequately consider the relationship between the subjects of the current and former representations.[221] Third, the appearance of impropriety standard may be so broad as to include any new representation that may "make a former client feel anxious."[222] If so, lawyers may be disqualified from subsequent representations or may be forced to forgo new representations based on nothing more than a former client's subjective belief, judgment or perception.[223] For these reasons and perhaps others, the appearance of impropriety is "'too weak and too slender a reed'" upon which to premise attorneys' disqualification in

213. *See* MODEL CODE, *supra* note 21, Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety.").

214. *Id.* EC 9-6.

215. *See, e.g.*, State *ex rel.* Creighton Univ. v. Hickman, 512 N.W.2d 374, 378 (Neb. 1994).

216. *See* State v. Irizarry, 639 A.2d 305, 314 (N.J. Super. Ct. App. Div. 1994) (quoting New Jersey Rule of Professional Conduct 1.7(c)(2)).

217. *See, e.g.*, First Am. Carriers, Inc. v. Kroger Co., 787 S.W.2d 669, 671-72 (Ark. 1990); Lovell v. Winchester, 941 S.W.2d 466, 468-69 (Ky. 1997).

218. *See* MODEL RULES, *supra* note 16, Rule 1.9 cmt. 5.

219. *Lovell*, 941 S.W.2d at 469.

220. MODEL RULES, *supra* note 16, Rule 1.9 cmt. 5.

221. *See* Schwartz v. Cortelloni, 685 N.E.2d 871, 878 (Ill. 1997).

222. MODEL RULES, *supra* note 16, Rule 1.9 cmt. 5.

223. *See id.* The Kentucky Supreme Court reasons that the appearance of impropriety standard serves the "useful function" of protecting both current and former clients' "reasonable expectations." *Lovell*, 941 S.W.2d at 469. Though the use of the qualifier "reasonable" suggests that a client's reasonable expectations are objectively determined, the standard is still too dependent upon former clients' subjective beliefs, judgments or perspectives to be valid or useful.

successive representations.[224]

The fundamental question in Model Code states and in those jurisdictions that otherwise enforce the appearance of impropriety standard is whether successive representations can spawn issue or positional conflicts of interest. Is there something about the standard that changes the analysis? The answer should be no. The practical and policy reasons for rejecting issue or positional conflicts in successive representations discussed earlier remain valid. The appearance of impropriety standard, amorphous though it may be, is linked in the Model Code to improper judicial or public influence,[225] and to the preservation and protection of clients' funds and property.[226] Pure issue or positional conflicts do not implicate these concerns. Former clients cannot reasonably expect lawyers to forever obey their wishes. There is, in sum, no reason to acknowledge or recognize issue or positional conflicts of interest in successive representations under the Model Code, or under any other regulatory framework that considers the appearance of impropriety.

B. *Current Clients and Concurrent Representations*

Issue or positional conflicts of interest can only arise out of concurrent representations. It is in this context that issue or positional conflicts may diminish lawyers' effectiveness[227] and materially limit one or both clients' representations. Rule 1.7(b), which provides that a lawyer generally "shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or . . . by the lawyer's own interests,"[228] must be read as prohibiting issue or positional conflicts of interest in concurrent representations.[229] Such an interpretation is necessary to protect clients.[230]

The problem with applying Rule 1.7(b) is the language of the rule itself. It is neither specific nor directive, and it arguably allows lawyers such broad discretion that issue or positional conflicts can easily be rationalized away.[231] It is therefore important to develop an analytical framework for recognizing and understanding issue or positional conflicts. Scholars have proposed two tests: one by Professors Hazard and Hodes, and another by

224. *Schwartz*, 685 N.E.2d at 878 (quoting Index Futures Group, Inc. v. Street, 516 N.E.2d 890, 894 (Ill. App. Ct. 1987)).

225. *See* MODEL CODE, *supra* note 21, DR 9-101.

226. *See id.* DR 9-102.

227. *See* Formal Op. 93-377, *supra* note 48.

228. MODEL RULES, *supra* note 16, Rule 1.7(b) (1983).

229. *See* Dzienkowski, *supra* note 2, at 475.

230. *See* 1 HAZARD & HODES, *supra* note 7, § 1.7:104, at 232.4.

231. *See* Dzienkowski, *supra* note 2, at 475.

Professor Dzienkowski.[232]

Professors Hazard and Hodes identify four factors that can affect the seriousness of an issue or positional conflict under Model Rule 1.7(b): (1) whether the lawyer has "special knowledge" of the first client's business that is detailed and specific to that client;[233] (2) whether the subject of the alleged conflict is "central" or critical to both clients;[234] (3) whether the issue is purely legal, or whether the representations turn on factual distinctions;[235] and (4) whether the clients frequently litigate the issue, such that they have long-term interests in how it is decided in any particular case.[236] Professor Dzienkowski also advocates a four-part test for evaluating issue or positional conflicts. He would examine (1) the directness of the legal conflict and its importance to the representations of both clients; (2) the existence of confidential information obtained from the first client that may be relevant to the second representation, and the likelihood that the lawyer will have to reveal or use the confidential information to that client's detriment; (3) the likelihood and magnitude of the injury to the clients from their common lawyer's concurrent representations; and (4) the existence of special factors that may affect the clients' expectations of loyalty on a particular legal issue.[237]

These approaches are interesting because their sponsors attempt to factor in the possible use of a client's information or confidences to its detriment or disadvantage. Of course, the use of client information and the disclosure of client confidences are generally prohibited.[238] But the existence of an issue or positional conflict does not depend on client confidences being jeopardized.[239] Such conflicts can arise without regard for and wholly apart from the improper use of client information. How critical, then, is this element? Is it truly a factor in conflict of interest analysis, or does it simply alert lawyers scrutinizing concurrent representations to other possible ethics violations?

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232. *See id.* at 479, 508-509.

233. 1 HAZARD & HODES, *supra* note 7, § 1.7:105, at 232.6.

234. *Id.*

235. *See id.* § 1.7:106, at 232.9.

236. *See id.*

237. *See* Dzienkowski, *supra* note 2, at 509.

238. *See* MODEL RULES, *supra* note 16, Rule 1.8(b) (stating that a lawyer "shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3"); MODEL RULES, *supra* note 16, Rule 1.6(a) (providing that a lawyer "shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in [Rule 1.6(b)]").

239. This is true even though issue or positional conflicts often overlap with confidentiality concerns. *See, e.g.*, Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978); Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa. 1992).

There are no clear answers to these questions.[240] In certain circumstances a lawyer's knowledge of one client's confidences may materially limit his representation of another client, while in others the impermissible use of or disclosure of client information will be a separate violation of the lawyer's professional duties. In still other representations a threat to a client's confidences or special information may simply be an aggravating factor that causes the client to claim an issue or positional conflict of interest where it would not otherwise. Because the existence of an issue or positional conflict does not depend on the involvement of confidential information, however, this factor will seldom be a primary consideration. If and when client confidences or information are a consideration, they will almost always be secondary. For example, once a lawyer determines that an issue or positional conflict exists, the question may become whether it can be cured by client consent.[241] A lawyer's knowledge of a client's confidences may prohibit the disclosures necessary to obtain consent,[242] or it may make the conflict so acute that the lawyer cannot request consent.[243]

Professor Dzienkowski would have lawyers weigh "the existence of special factors" that may affect their "expectations about loyalty to a particular legal issue."[244] Such factors may include "whether the client notifies the lawyer that the client feels very strongly about [this] legal issue" and "the client's right to know that the lawyer has advanced or is advancing inconsistent legal positions. . . ."[245] These factors are essentially meaningless for professional responsibility purposes. The strength of a client's feelings may cause a lawyer to decline a representation for business or personal reasons, but it has little to do with a lawyer's duties under Rule 1.7(b). A client's "right to know" is an independent concern. A lawyer has an ethical obligation to reveal to a client possible issue or positional conflicts at the outset of the representation.[246]

The test for whether an issue or positional conflict of interest exists

240. The scholars who advocate consideration of client confidentiality issues offer no clear guidance. *See* Dzienkowski, *supra* note 2, at 512-14; 1 HAZARD & HODES, *supra* note 7, § 1.7:105, at 232.6.

241. *See* MODEL RULES, *supra* note 16, Rule 1.7(b) (1983).

242. *See id.* cmt. 5 (asserting that "there may be circumstances where it is impossible to make the disclosure necessary to obtain [client] consent").

243. *See* 1 HAZARD & HODES, *supra* note 7, § 1.7:301, at 250 (stating that even under the more forgiving analysis of Model Rule 1.7(b) there are some cases in which client consent should not even be sought).

244. Dzienkowski, *supra* note 2, at 509.

245. *Id.* at 519.

246. *See* MODEL RULES, *supra* note 16, Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

requires affirmative answers to three questions, of which the first two are closely related and must be considered together. First, is the issue critically important to both representations? Second, will the determination of the issue in one case affect its determination in the other representation? These first two questions and their answers are sure to be intertwined. Third, will the competing important interests materially limit the lawyer's representation of one or both clients? This test tracks the current ABA approach to issue or positional conflicts.[247]

1. The Importance of the Issue and Its Determination

Not every set of contrary or contradictory legal arguments can be seen as creating an issue or positional conflict of interest. Not all competing interests require lawyers to decline or withdraw from representations. Lawyers must be free to argue or advance divergent positions.[248] Clients must not be able to veto other representations out of groundless fear, or based on mere disapproval. At the same time, clients must enjoy some protection. They must have some right to veto their lawyers' ability to speak with different voices. The balance is thus one of importance and effect.

There is no uniform standard for measuring the importance of an issue. An issue may be dispositive in a single case, or it may grow in importance because a client has a long-term stake in the subject. Measuring an issue's importance, and evaluating the effect that its determination in one representation will have on another, require analysis of the conflicting legal principles and the factual similarities of the two representations.[249]

Using litigation as an example, it may be that the two representations involve very close or nearly identical factual situations with legal arguments that are directly contrary. If so, and if the cases are pending in the same jurisdiction, the potential conflict should be obvious. If the cases will be litigated in different jurisdictions the conflict may be less apparent, but it may be no less serious. Courts often look to other jurisdictions to decide difficult issues or issues of first impression. A lawyer who finds himself in such a situation must study the law in both jurisdictions to assess the importance of the issue and its potential impact on the representations.[250]

If there are significant factual differences between the two

247. *See* Formal Op. 93-377, *supra* note 48, at 4-5. *See generally supra* text accompanying *supra* notes 48-67.

248. Indeed, the ability to argue both sides of the same proposition may be the hallmark of detached professionals. *See* 1 HAZARD & HODES, *supra* note 7, § 1.7:106, at 232.7-.9.

249. *See* Dzienkowski, *supra* note 2, at 510.

250. The same principle applies regardless of whether the cases are pending in federal or state courts.

representations, there may be no conflict at all. Factual differences may make an issue critical to one representation irrelevant in the other. Factual differences may mean that an issue, while important, ought to be decided differently in the two representations. Alternatively, factual differences may actually create an issue or positional conflict if they force a lawyer to recharacterize a legal issue to the detriment of one or both clients.[251]

Potential lobbying conflicts require similar analysis. There, as in litigation, lawyers must be concerned about decisions made by third-parties.

In the transactional context, it may matter that the lawyer actually conceived the document or provision at issue, as compared to using a form document or standard clause. A lawyer's originality and ingenuity surely increase the actual or potential importance of his work. Certainly, the lawyer should not attack a similar arrangement in an unrelated representation. Where transactional work and litigation overlap, particular concepts may be declared invalid across the board, thereby increasing the importance of the issue while affecting multiple representations. Negotiations with different groups in the same industry may affect several representations, dulling competitive edges or reducing clients' perceived business advantages.[252]

The fact that the clients face an issue repeatedly undoubtedly increases its importance. Clients with long-term stakes in an industry or area of law cannot afford continuing threats to their positions. This is true in litigation, in transactional work, and in the lobbying context.

2. Material Limitation

The great concern about issue or positional conflicts is that they will impair the effectiveness of the lawyer involved—the conflict will materially limit the lawyer's representation of one or both clients.[253] Lawyers must be careful not to underestimate this threat.[254]

An issue or positional conflict may cause a lawyer to "soft-pedal" the issue in one or both representations, or it may force the lawyer to alter his arguments to one or both clients' detriment.[255] A lawyer may be unable or unwilling to advance the issue for both clients with equal zeal. A lawyer

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251. *See* 1 HAZARD & HODES, *supra* note 7, § 1.7:106, at 232.7-.9.

252. *See, e.g.*, Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa. 1992). *See supra* text accompanying notes 158-203.

253. *See* Formal Op. 93-377, *supra* note 48, at 4-5.

254. *See* Dzienkowski, *supra* note 2, at 515; *see also* 1 HAZARD & HODES, *supra* note 7, § 1.7:105, at 232.6 (arguing that "any lawyer who claims he would be wholly uninfluenced by [issue or positional conflicts] is deluding himself and his clients").

255. *See* Formal Op. 93-377, *supra* note 48, at 4; *see also* 1 HAZARD & HODES, *supra* note 7, § 1.7:105, at 232.5-.7 (providing an example of issue or positional conflict in the present context).

might urge a client to settle a matter that he typically would counsel the client to try were it not for the conflict. It does not matter whether lawyers make such decisions consciously, or arrive at them subconsciously. What matters is the material limitation on one or both representations.

Consider the situation where Lawyer *L* regularly represents a number of insurance companies. The general counsel of a local corporation calls *L* and tells him that the corporation's insurer wrongly refused to defend it in a close case. The corporation wants *L* to sue the insurer for breach of contract and bad faith. *L* does not represent the subject insurer. He believes that a sound argument can be made to expand the scope of insurers' duty to defend in the jurisdiction.

L's current insurance company clients probably are indifferent with respect to the outcome of this particular matter, but they undoubtedly have set positions on the law surrounding the duty to defend. *L* may subconsciously favor his insurance clients' interests over the corporation's interests. He may urge the corporation to pursue only its contract claims rather than any related tort claims, thus reducing its potential recovery. *L* may counsel the corporation to prematurely settle the case, or he may negotiate a lower settlement than is reasonable under the circumstances. He may not pursue certain avenues of discovery for fear that his innovative approaches or theories will expose his insurance company clients to similar inquiries in subsequent cases.

Such risks cannot be underestimated. Though *L* may downplay it, there is no denying his interest in maintaining his relationships with his insurance company clients. A disinterested observer could reasonably conclude that *L*'s representation of his insurance company clients will materially limit his representation of the corporation.

A material limitation may not be so obvious. Suppose, for example, that a lawyer drafts a particular document or a key provision, or structures a transaction in an especially creative way. Might not the lawyer's pride of authorship, or his pride in his transactional creation, prevent his critical analysis of similar situations for other clients in unrelated representations?[256]

C. *Disclosure and Client Consent*

An attorney may have a duty to disclose potential issue or positional conflicts of interest to prospective clients. A lawyer's duty to disclose may first be found in Model Rule 1.4. Model Rule 1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[257] Rule

256. *See* Dzienkowski, *supra* note 2, at 511.

257. MODEL RULES, *supra* note 16, Rule 1.4(b).

1.4(b) imposes a positive duty to communicate. A lawyer has a duty to volunteer information, and to provide the client with all information necessary for the client to make informed decisions concerning the objectives of the representation and the means by which they will be pursued.[258] A lawyer must disclose and explain information in a way that fulfills the client's reasonable expectations for information, and must do so consistent with his duty to act in the client's best interests.[259]

"A client may consent to representation notwithstanding a conflict," as Rule 1.7(b) makes clear.[260] But such consent can only come after "consultation," which requires the lawyer to explain the matter with such thoroughness and clarity that the client can appreciate and understand the significance of the potential conflict.[261] The lawyer must disclose the implications and risks of the concurrent representations.[262] Where there is no consultation there can be no consent.[263] Moreover, a lawyer facing a potential issue or positional conflict of interest cannot limit his disclosure and consultation to the newest client. The lawyer must consult with *both* clients so that each can determine whether it should consent to the lawyer's dual representation.[264]

There are, of course, circumstances in which clients should not consent to lawyers' dual representation. Perhaps more importantly, a lawyer sometimes may be prohibited from seeking client consent. Under Rule 1.7, a lawyer cannot ask for client consent "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances. . . ."[265]

Lawyers may try to head off potential issues or positional conflicts of interest by way of advance consent. A lawyer might advise all clients that he will in the future represent clients with divergent views, and request that the clients waive any potential issue or positional conflicts. Indeed, the impetus for prospective conflict waivers has grown as law firms have opened multiple offices and corporate clients increasingly spread their business among several firms.[266]

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258. *See id.* at cmt. 1.

259. *See id.* at cmt. 2.

260. *Id.* at Rule 1.7(b).

261. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-372, at 2-3 (1993) [hereinafter Formal Op. 93-372].

262. *See* MODEL RULES, *supra* note 16, Rule 1.7(b)(2).

263. *See, e.g.*, Griva v. Davison, 637 A.2d 830, 845 (D.C. 1994); Conrad Chevrolet, Inc. v. Rood, 862 S.W.2d 312, 314 (Ky. 1993).

264. *See Griva*, 637 A.2d at 845; *see also* MODEL RULES, *supra* note 16, Rule 1.7 cmt. 5 ("When more than one client is involved, the question of conflict must be resolved as to each client.").

265. MODEL RULES, *supra* note 16, Rule 1.7 cmt. 5.

266. *See* Formal Op. 93-372, *supra* note 261, at 2.

The ABA's Standing Committee on Ethics and Professional Responsibility tepidly approved prospective waivers in a 1993 opinion.[267] In Formal Opinion 93-372, the Committee held that "a lawyer may ask for, and a client may give, a waiver of objection to a possible future representation presenting a conflict of interest. . . ."[268] A prospective waiver must, however, meet all the requirements of a contemporaneous waiver and it must contemplate the particular future conflict "with sufficient clarity so [that] the client's consent can reasonably be viewed as having been fully informed when it was given."[269] This may be an exacting standard, as *Worldspan, L.P. v. Sabre Group Holdings, Inc.*,[270] demonstrates.

In *Worldspan*, the plaintiffs moved to disqualify defense counsel in active tort litigation.[271] The defense attorneys' law firm represented the plaintiffs in state tax matters in Georgia and Tennessee for several years.[272] The case at bar and the tax matters all involved in different ways and degrees the plaintiffs' computer airline reservations operation.[273] The critical issue presented to the *Worldspan* court was whether the plaintiffs had given their informed consent to the law firm's simultaneous, dual representation.[274]

The attorneys argued that the court should not disqualify them because the plaintiff had prospectively consented to the representation by way of the firm's standard engagement letter sent in 1992, some five years earlier.[275] That engagement letter provided:

> "As we have discussed, because of the relatively large size of our firm and our representation of many other clients, it is possible that there may arise in the future a dispute between another client and WORLDSPAN, or a transaction in which WORLDSPAN's interests do not coincide with those of another client. In order to distinguish those instances in which WORLDSPAN consents to our representing such other clients from those instances in which such consent is not given, you have agreed, as a condition to our undertaking this engagement, that during the period of this engagement we will not be precluded from representing clients who may have

267. *See id.*
268. *Id.* at 1.
269. *Id.*
270. 5 F. Supp. 2d 1356 (N.D. Ga. 1998).
271. *See id.* at 1357.
272. *See id.*
273. *See id.*
274. *See id.* at 1358.
275. *See id.*

> interests adverse to WORLDSPAN so long as (1) such adverse matter is not substantially related to our work for WORLDSPAN, and (2) our representation of the other client does not involve the use, to the disadvantage of WORLDSPAN, of confidential information of WORLDSPAN we have obtained as a result of representing WORLDSPAN.
>
> "We have advised you that we have served as special counsel to Delta Air Lines for certain types of matters, including state and local tax matters. We do not view our work for Delta to be in conflict with our representation of WORLDSPAN, and Delta . . . has consented to our representation of WORLDSPAN. We have also advised you that we have represented American Airlines. We do not believe our representation of American Airlines is in conflict with our representation of WORLDSPAN. We have also represented various other airlines from time-to-time on limited matters . . . we do not view our representation of any of these carriers to be in conflict with our proposed representation of WORLDSPAN."[276]

The engagement letter concluded with an invitation to the plaintiffs to call the lawyer who wrote it if the representations in the letter were inconsistent with the plaintiffs' understanding of the terms of the engagement.[277]

There was disagreement over the response to the engagement letter.[278] The attorneys contended that the plaintiffs did not respond, such that the representation proceeded in accordance with the letter's terms.[279] The plaintiffs contended that their house counsel immediately objected, but that the lawyer responsible for their matters at the law firm refused to alter the terms of the engagement.[280] The firm's representation of the plaintiffs simply continued notwithstanding plaintiffs' apprehension.[281]

The court resisted the litigants' invitations to weigh the credibility of the plaintiffs' house counsel and the firm's lawyer involved, finding such a determination unnecessary.[282] The court focused instead on the language of the engagement letter, which it found to be ambiguous.[283] Nothing in the letter foreshadowed the directly adverse litigation at issue.[284]

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276. *Id.* at 1359 (quoting engagement letter).
277. *See id.*
278. *See id.*
279. *See id.*
280. *See id.*
281. *See id.*
282. *See id.*
283. *See id.*
284. *See id.* at 1359-60.

> [F]uture directly adverse litigation against one's present client is a matter of such an entirely different quality and exponentially greater magnitude, and so unusual given the position of trust existing between lawyer and client, that any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information.[285]

The *Worldspan* court believed that this reasoning carried extra weight where, as in the case before it, the future conflict is caused by undertaking the representation of a client with whom a law firm has no present relationship.[286] The court disqualified the defense attorneys,[287] denied their motion for reconsideration, and refused to certify the matter for an interlocutory appeal.[288]

Worldspan may not be persuasive in the case of issue or positional conflicts because it involved direct adversity. The case does, however, point out certain problems or risks attending advance consent. First, a client cannot be deemed to consent to a representation without a complete appreciation and understanding of the risks involved. A client's consent will rarely be fully informed where the conflict waiver is prospective.[289] Second, prospective conflict waivers reduce clients' trust in their lawyers and diminish public trust in the legal system.[290] For these reasons they are suspect and are subject to strict judicial scrutiny. Third, the reasonableness and validity of a client's consent must be judged on a case-by-case basis. Circumstances may change between the time a lawyer secures a prospective waiver and the time he accepts the second representation. Even if they do not, the lawyer still must determine whether accepting the second representation will adversely affect the first client's representation.[291] These problems or risks are present in the context of issue or positional conflicts;[292] they are not limited to cases of direct adversity.

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285. *Id.* at 1360.
286. *See id.*
287. *See id.*
288. *See id.* at 1360-64.
289. *See* Formal Op. 93-372, *supra* note 261, at 6.
290. *See Worldspan*, 5 F. Supp. 2d at 1360, 1363.
291. *See* Formal Op. 93-372, *supra* note 261, at 5.
292. *See* Dzienkowski, *supra* note 2, at 528-29.

D. *Concurrent Representations, Conflicts and Consent: Putting It All Together*

If a lawyer reasonably believes that the concerning issue is not critically important to both representations, or if its determination in one case will not affect its determination in the other, there is no conflict of interest.[293] Must the lawyer volunteer to his clients that he has considered the issue and determined that there is no conflict? In a word, no. To impose such a disclosure requirement on lawyers would strain Rules 1.4 and 1.7 beyond reason. If one of the clients asks the lawyer whether he has considered possible conflicts, however, the lawyer must respond truthfully.[294]

If the issue is critically important to both representations, or if its determination in one case will affect its determination in the other, the lawyer must then determine whether the clients' competing interests will materially limit the representation of either client. If so, the lawyer must decline the second representation.[295] If the lawyer makes this determination after both representations are underway, he must withdraw from at least one of them.[296] In this situation the lawyer cannot ask the clients to consent to the dual representation; this conflict cannot be waived.[297]

If the lawyer believes that his representation of either client will not be materially limited notwithstanding the importance of the issue or the possible impact of its determination, the lawyer may proceed with both representations.[298] In order to so proceed, however, both clients must consent to the dual representation after full disclosure and consultation.[299]

It may be possible for lawyers to avoid issue or positional conflicts by way of advance consent. First, any prospective waiver should be in writing.[300] The writing requirement is important because it is the only way for the lawyer to demonstrate that the client's consent to the ultimate dual representation was unequivocal. Second, the client's consent should be specific.[301] The document granting consent should specifically refer to litigation if consent is to be effective there, and it should also specifically refer to any other context in which a conflict may arise. The document should identify potential opposing parties with respect to whom consent is

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293. *See* MODEL RULES, *supra* note 16, Rule 1.7(b).

294. *See* MODEL RULES, *supra* note 16, Rule 1.4(a) (requiring a lawyer to comply with a client's reasonable requests for information); MODEL RULES, *supra* note 16, Rule 1.4 cmt. 4 ("A lawyer may not withhold information to serve the lawyer's own interest or convenience.").

295. *See* Formal Op. 93-377, *supra* note 48, at 4.

296. *See id.* at 4.

297. *See id.*

298. *See id.*

299. *See id.*

300. *See* Formal Op. 93-372, *supra* note 261, at 7.

301. *See id.* at 5.

sought, or it at least should identify the class of potential competing clients.[302] The document should also express the potential effect on the client attributable to future issue or positional conflicts.[303] Third, it may help to periodically review the engagement letter or other written waiver. The staleness of the engagement letter in *Worldspan* apparently influenced the court's decision to reject its terms.[304] Finally, and critically, the lawyer must fully satisfy his disclosure and communication obligations under Rules 1.4 and 1.7 when obtaining the original client's advance consent.

V. CONCLUSION

Issue or positional conflicts of interest pose a serious professional responsibility threat to lawyers in all practice areas, although they are most likely to arise in litigation. Unfortunately, these conflicts have received scant scholarly attention and courts have seldom been called upon to analyze them. Practitioners thus have little guidance in this area.

Issue or positional conflicts of interest should be recognized only in concurrent representations. In order to determine how to proceed when presented with a potential conflict of this sort, a lawyer must analyze: (1) whether the issue is critically important to both representations; (2) whether the determination of the issue in one case will affect its determination in the other; and (3) whether the competing important issues will materially limit the lawyer's representation of one or both clients. Under certain circumstances clients may waive issue or positional conflicts, and they may even be able to do so prospectively.

Lawyers must learn to recognize, analyze and avoid issue or positional conflicts of interest in order to prevent disqualification, disciplinary charges and litigation with aggrieved clients. Clients must be sensitive to issue or positional conflicts so that they can avoid the hardship that accompanies the disqualification of trusted counsel and, more importantly, so that they can protect their interests before they are ever threatened.

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302. *See id.*

303. *See id.*

304. *See* Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356, 1358 (N.D. Ga. 1998).