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**Ethics: Calling for Disqualification of Opposing Counsel or Responding to a
Disqualification of Counsel Motion**

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An opposing party has moved to disqualify you from a case pending in court based on an alleged conflict of interest, invalid representation of a client against a former client, and engaging in representation that has an “appearance of impropriety.” Ethically, what are your obligations, and to whom?

I. Introduction

If an attorney faces a motion to disqualify, it is most likely because the opposition either perceives that the attorney has a conflict of interest in the matter or, more cynically, believes that it can demonstrate the appearance of a conflict even if one does not exist. A “conflict of interest includes any circumstances in which an attorney cannot exercise his or her independent professional judgment free of ‘compromising interests and loyalties.’”¹ If a conflict is found to exist, the general rule is that disqualification is not only acceptable, it is required.² Therefore, motions to disqualify, when properly interposed, “protect the attorney-client relationship by ensuring that clients receive the undivided loyalty of their legal representative.”³ “On the other hand, it is well-settled that disqualification is ‘a drastic measure which courts should hesitate to impose’ unless absolutely necessary.”⁴ If the opposition could disqualify an attorney based on what is only an arguable ethical violation, one can imagine the damage such a doctrine could render to the legal profession.⁵

Motions to disqualify implicate important interests and obligations on the part of the attorney being attacked. Therefore, the attorney who is the subject of the disqualification motion is in an unenviable position. He must weigh and balance the interests of former clients, current clients and the bar, which has granted him the privilege of practice, whenever a party moves the

court to disqualify him.⁶ When the demands of these interests become incompatible, disqualification becomes a proper remedy. What follows is a discussion of these obligations and the individuals or entities to which they are owed. First, the paper will briefly discuss the sources of the regulations that courts have found applicable in the disqualification setting. Then, the paper will address the duty of loyalty an attorney owes to his current client and the client's interest in counsel of his or her choosing. Following that, the paper will examine various obligations towards third parties, including the former client, the bench and bar, and other particularly relevant entities.

II. Sources of Obligations

The two sources from which most rules of professional conduct are derived are the Model Code of Professional Responsibility ("Model Code") and the Model Rules of Professional Conduct ("Model Rules), which were initially authored in 1983, and then updated in 2002.⁷ Due in part to the fact that rules governing professional conduct are so intertwined with a jurisdiction's public policy, the bench and bar of each jurisdiction often establish unique standards of conduct. However, most states today have adopted, in some form,⁸ the Model Rules.⁹ Even courts in states that have not adopted the Model Rules may still cite to them as authority.¹⁰ For practical reasons, the following discussion will focus on the unadulterated Model Rules¹¹ even though there may exist varying jurisdictional standards.

III. The Present Client

While an attorney owes several obligations to his current client, the one most often implicated by a motion to disqualify is the duty of loyalty. The attorney's duty of loyalty mandates that "an attorney may not do anything which could divert the attorney's attention from

the [current] client's business or lessen the amount of energy the attorney can give to the client's interests."¹²

a. The Duty of Loyalty

Rule 1.7 is the primary source in the Model Rules for an attorney's duty of loyalty to his current client,¹³ and is designed to prohibit an attorney from entering into an attorney-client relationship when it would create a conflict of interest. In 1.7(a) of the 2002 version of the Model Rules, two situations are set forth in which a current-client conflict occurs: (1) where representation of one client is "*directly adverse*" to another; and (2) where there is a "significant risk that the representation . . . will be *materially limited* by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."¹⁴ If a potential conflict does exist, the attorney has a duty to determine whether or not continued representation is proper. The test for propriety is found in rule 1.7(b), described by one set of commentators as follows:

Lawyers may never represent plaintiff and defendant or parties that oppose each other in litigation or before a tribunal. Lawyers must abide by law that would disqualify them from representing clients involved in a conflict. [Otherwise, if a conflict does exist], the lawyer must make an independent determination that the lawyer can competently and diligently represent each affected client. And, each affected client must give informed consent confirmed in writing to the lawyer.¹⁵

However, regardless of the regulatory scheme underlying a jurisdiction's rules of professional conduct, whether it is the Code, Rules or another system, the crucial question an attorney must ask himself is whether the "conflict" alleged in the motion for disqualification is such that it may adversely affect his ability to advocate for the current client.¹⁶ "Conflict" is defined in the Rules as when an outside influence creates a "significant risk" that an attorney's professional judgment will be impaired.¹⁷ Therefore, an attorney does not have the luxury of adopting a "wait and see" attitude as to whether a conflict will actually develop. If some outside

influence is reasonably calculated to affect the attorney's independent judgment or there is a significant risk that the attorney's judgment will be impaired, then he is obliged to withdraw. If he does not do so, the court must grant the motion to disqualify.¹⁸

Both the Rules and the Code do allow an attorney to obtain a client's consent whenever the likelihood for a conflict of interest exists.¹⁹ However, there are limits as to whether a client's consent is valid. The Rules require that a client's consent to the conflict be in writing.²⁰ In addition, as with most waivers, consent to a conflict is only valid if it is voluntary, and made after full consultation.²¹ The comments to the 2002 version of the Rules provides that "[i]nformed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client."²² Informed consent may be impossible, however, when it conflicts with the attorney's ethical obligation to maintain former client confidences.²³

Even if consent is properly obtained, it may not be enough to eliminate a conflict. If the court determines that the conflict poses too grave a threat to the attorney's professional judgment, client consent is ineffective. "[W]hen 'it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients,' the conflict can not be cured by consultation and consent."²⁴ The inquiry into whether the conflict warrants disqualification, even with client consent, is objective, ignoring the attorney's subjective beliefs.²⁵ The specific nature of the inquiry may vary depending on the jurisdiction. For example, as alluded to in the comments to the 1983 version of the Rules,²⁶ and under New York law, the objective inquiry is whether a "disinterested lawyer would advise the client to refuse consent."²⁷ If so, then a client's consent to the attorney's conflict of interest is rendered ineffective.²⁸

The duty of loyalty is a critical one and impacts the manner in which counsel must respond to a motion to disqualify. Such a response must consider whether the duty would be violated by remaining in the case or, rather, whether the duty requires that counsel contest the motion. To the extent that the attorney's ability to loyally protect the client's interests has been hampered as evidenced by the allegations contained in the motion that counsel recognizes are true, the attorneys should almost certainly withdraw from representation. On the other hand, if the motion is unmeritorious and does not properly demonstrate the existence of a conflict, the duty of loyalty likely requires that that attorney continue in the case. Obviously, however, regardless of the attorney's decision as to the requirements of his or her ethical obligation, the decision as to whether an attorney will remain on the case will ultimately rest with the client and, of course, the court.

b. Right of Client to Counsel Chosen

As stated above, it is always the client's decision as to who will represent him or her in a dispute unless the court is forced with deciding a meritorious disqualification matter. In the event that a disqualification motion is filed and prior to its determination, the client may revisit his or her initial decision as to choice of counsel. However, while the client may waive conflicts associated with itself, the client's interest in representation by chosen counsel does not normally usurp the rights of third parties. Nevertheless, an oft-repeated argument by clients seeking to retain their conflicted counsel is that the right of a client to chosen counsel should supersede these third-party interests, including the bar's interest in maintaining the integrity of the profession. Courts faced with this argument note that the matter is essentially a balancing of the competing interests, including the client's right to chosen counsel versus the integrity of the bar.²⁹ As one court noted, “[The client's recognizably important right to counsel of his choice]

must yield, however, to considerations of ethics which run to the very integrity of the judicial process.”³⁰ This is similar to treatment of the argument in most courts; protecting the integrity of the legal profession trumps a client’s right to retain a particular attorney.³¹ However, this is only when the movant has *clearly shown* that a conflict exists. Otherwise, maintaining the client’s choice of counsel is an important public policy and may actually defeat a motion to disqualify if that motion is only based on vague allegations.³²

Counsel should certainly apprise their clients of all of their rights, including the right to counsel of their choosing. However, when facing a motion to disqualify, counsel probably should be mindful of following his duty of loyalty and should avoid simply promoting his continued representation by consistently reminding the client of its possibly tenuous right to retain the counsel of its initial choosing.

IV. Obligations to Others

When faced with a motion to disqualify, counsel may have duties to certain parties that it does not presently represent or for which the existence of representation is not readily apparent. Counsel must identify parties to whom it owes duties associated with the alleged conflict and apprise them accordingly.

a. The Former Client

The termination of the attorney-client relationship does not terminate an attorney’s obligation with respect to maintaining confidentiality.³³ An attorney that represents a new client against a former client in a matter “substantially related” to the subject of the representation of the former client will be burdened with mutually exclusive obligations that may be impossible to completely satisfy. On one hand, the attorney is to maintain the confidences of his former client; however, on the other hand, the attorney must zealously advocate for the best interest of his

present client, which may include the disclosure of confidential information the attorney obtained in the former representation.³⁴

Unlike the Code, the Rules explicitly address the attorney's obligation to maintain a former client's confidentiality. Rule 1.9(a) prohibits counsel from representing a party adverse to the former client "in the same or a substantially related matter."³⁵ The purpose of the "substantially related" portion of the rule is twofold. First, it ensures that only "relevant" confidences will support a motion to disqualify. Secondly, it maintains the integrity of the legal profession by encouraging a current client's full disclosure to his hired advocate.

One of the more influential statements setting forth the "substantially related" standard is found in *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.*³⁶ There, Judge Weinfeld described the test as follows:

[T]he former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation. It will not inquire into their nature and extent. Only in this manner can the lawyer's duty of absolute fidelity be enforced and the spirit of the rule relating to privileged communications be maintained.³⁷

The comments to the 2002 version of rule 1.9 also defines "substantially related." The drafters provide that "[m]atters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." If a movant can show that the subject matter of the opposing attorney's past and present representations are indeed "substantially related," most courts will presume that the attorney obtained confidential

information.³⁸ Otherwise, “the court would be called upon to investigate what, if any, communications had taken place between the parties.”³⁹ Dredging up a client’s confidences would defeat the protective purpose of the duty in the first place.

In addition to the protection of former client confidences, the “substantially related” inquiry also ensures that an attorney maintains a modicum of loyalty to the former client.⁴⁰ Like the “appearance of impropriety” standard under the Code, discussed below, imputing a loyalty component into the substantial-relationship test protects the public perception of the legal system.⁴¹ This prevents an attorney from switching sides, regardless of whether he had access to the former client’s confidential information or not.⁴² Therefore, this component of rule 1.9 alleviates a client’s fears that his friend today will not be his enemy tomorrow. The amount of importance, if any, a court places on the issue of former-client loyalty will vary from one jurisdiction to another.⁴³ For the most part, however, courts applying the “substantial relationship” test focus on the issue of protecting former client confidences.⁴⁴

The issue of consent to a conflict of interest is analyzed identically under both the current and former client contexts. Like current-client conflicts, a former client may waive the right to seek disqualification of their former attorney.⁴⁵

b. Duty to the Practice - The Appearance of Impropriety

Aside from the duty that exists between an attorney and his clients, present or former, there exists a duty to his profession. “A trial court has the inherent authority to supervise members of the bar appearing before it and this necessarily includes the power to disqualify counsel in specific cases.”⁴⁶ Nowhere is this more readily apparent than when courts operate pursuant to the “appearance of impropriety” standard.

The appearance of impropriety standard constituted a mandate from the drafters of the Code, and the subsequently adopting jurisdictions, that the bench and bar are the final word in attorney conduct. Under the Code, protecting former client confidences was only an aspirational goal.⁴⁷ Even so, courts were given the ability to disqualify attorneys when the attorney's conduct, such as the representation of a former client's adversary, created an "appearance of impropriety."⁴⁸

The drafters specifically excluded the "appearance of impropriety" standard from the Rules. The supposed death-knell for the standard was when rule 1.9's comments suggested that the appropriate test for former client conflicts was the objective substantial-relationship test, as opposed to the subjective⁴⁹ "appearance of impropriety" standard.⁵⁰ Aside from the standard's rejection in the Model Rules, several courts disfavored using the appearance of impropriety standard as the sole grounds for disqualification. Courts feared that a subjective analysis was not sufficient in and of itself to justify disqualification.⁵¹ As one court noted, "[d]isqualification if based solely on the appearance of impropriety cannot be justified as long as [the representation] does not pose a threat to the integrity of the trial process."⁵² Nevertheless, the appearance of impropriety standard is still relevant in some jurisdictions even after adopting the Rules.⁵³ As one court in Kentucky opined,

[a]lthough the appearance of impropriety formula is vague and leads to uncertain results, it nonetheless serves the useful function of stressing that disqualification properly may be imposed to protect the reasonable expectations of former and present clients. The impropriety standard also promotes the public's confidence in the integrity of the legal profession. For these reasons, courts still retain the appearance of impropriety standard as an independent basis of assessment.

c. Parties Outside the Paradigm

As a threshold issue, when attempting to show to the court that an opposing attorney should be disqualified, the movant normally must prove that the opposing attorney owes to it an

ethical obligation.⁵⁴ Often, this is done by showing that there was a former or ongoing attorney-client relationship between the movant and opposing counsel.⁵⁵ The question of whether an attorney-client relationship exists can only be answered by examining the relevant jurisdiction's substantive law, which is outside the scope of this paper.⁵⁶ Furthermore, a court may find that some obligation exists apart from a formal attorney-client relationship, which creates a conflict.⁵⁷ The following examines specific relationships that may create such conflicts: (1) Insurance Companies; (2) Sureties; and (3) Business Entities.

i. Insurance Companies

A situation familiar to most legal practitioners is the one where they are hired by an insurance company to represent an insured. Ethically, however, who is the attorney's client? Is it the insurance company, insured, or both? Not surprisingly, the answer depends on the jurisdiction. While it is fairly settled law among jurisdictions that the insured is a client,⁵⁸ the jurisdictions are split as to whether the attorney owes the insurer an obligation as well.

One reason for a jurisdiction's failure to find an ethical duty to the insurer would be to protect the attorney-client relationship with the insured. Tennessee is one jurisdiction that has determined that the potential for conflicts is too great to allow an attorney to represent both the insured and the insurer. In *Petition of Youngblood*,⁵⁹ the Tennessee Supreme Court held that "[t]he employment of an attorney by an insurer to represent the insured does not create the relationship of attorney-client between the insurer and the attorney, nor does that employment necessarily impose upon the attorney any duty or loyalty to the insurer."⁶⁰ Nevertheless, several jurisdictions recognize a dual representation, finding that the mutuality of interest between the insured and the insurer places a dual ethical obligation on the attorney.⁶¹

For the most part, courts examine the existence of an attorney-client relationship with the insured categorically. Therefore, many courts addressing the issue do not look at the attorney's actual relationship with the insurer.⁶² Once it is established that an insured hired the attorney to represent the insured, many courts will automatically deem the insurer either a "client" or "non-client" based on the court's interpretation of the jurisdiction's substantive law.⁶³ This majority approach is unique, compared to most other contexts, where parties seeking disqualification have the burden of proving the formation of an attorney-client relationship.⁶⁴

An attorney that practices in a jurisdiction where both the insured and the insurer are clients should be wary of unforeseen conflicts that may arise.⁶⁵ However, regardless of the jurisdiction's black-letter law on the topic, an attorney-client relationship is contractual in nature.⁶⁶ Therefore, an attorney, the client and the insurance company should, in theory, be able to draft an agreement that establishes the attorney's ethical boundaries.⁶⁷ With that said, an agreement that compromises the attorney's ability to fulfill fundamental duties to one client or the other (i.e. zealously advocate for the insured) may be considered void.⁶⁸

ii. Surety

Similar, but not identical, to the insurance context, is the relationship involved when attorneys represent a surety's principal. There is a dearth of case law addressing this issue. However, it was addressed by a Texas Appellate Court in *Insurance Company of North America v. Westergren*.⁶⁹ There, a general contractor obtained a construction bond in connection with a local public works project. Several subcontractors subsequently filed suit against the general contractor, some of which also naming the surety as a party. The general contractor's attorney signed several pleadings on behalf of both the general contractor and the surety, and, in at least one of the suits, requested that the surety allow him to represent both it and the principal so as to

decrease the amount of attorney's fees for which the general contractor would ultimately be responsible. Disagreements arose between the surety and the general contractor, and the attorney asked to withdraw from representation of the surety. Ultimately, the surety sued the general contractor to recover premiums and the general contractor counterclaimed. The surety sought to disqualify the general contractor's attorney from the proceedings.⁷⁰

The *Westergren* court began its analysis by determining whether an attorney-client relationship had ever existed between the general contractor's attorney and the surety.⁷¹ This approach sharply contrasts from the approach followed in the insurance context, where, as mentioned above, most courts categorically analyze the relationship between the insurer and attorney. In *Westergren*, however, evidence that the attorney had signed several trial documents on which the surety's name was listed as a party established the relationship. Not admitting defeat, the attorney argued that the relationship with the surety was merely *pro forma* because the attorney never received confidential information from the surety, and certainly never treated the surety as a "client."⁷² The court was not persuaded:

We may agree with [the attorney] that it was merely an accommodation or a pro forma relationship, but we find nevertheless that it was indeed an attorney-client relationship. The duties or specifics of the relationship in this instance might well be disputed, but the fact that an attorney-client relationship existed is clear. We find nothing in the disciplinary rules which permits a pro forma representation of a client.⁷³

In *Westergren*, the court granted the motion to disqualify because it found that the attorney's prior representation of the surety was "substantially related" to the matter before the court.⁷⁴ The threshold question was whether the attorney had formed an attorney-client relationship with the surety. The court applied the Rules literally, regardless of the relationship's "true" nature. Therefore, under the *Westergren* analysis, if the jurisdiction's substantive law as

applied to the facts finds such a relationship, regardless if the relationship was merely pro forma, an attorney will owe lingering duties to its “former client.”

iii. Business Entities

Attorneys that represent corporations, partnerships, or other business entities often deal with individual members of those organizations. Additionally, these organizations may have hundreds, thousands, or millions of employees, officers, and shareholders. Does an attorney owe a duty to each one of these individual constituents, which may later constitute the basis of a motion to disqualify? The Model Rules did much to clarify this area of the law through Rule 1.13.

According to Rule 1.13, “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”⁷⁵ The comments to the Model Rules specifically note that the organization’s constituents are not normally considered “clients.” This is known as the “entity” approach, in that the lawyer’s client is the “entity,” not the individual constituents who compose the entity.⁷⁶ As such, the attorney’s obligation of loyalty is limited to the entity itself, and not imputed to its individual constituents.⁷⁷ According to the rule’s comments, Rule 1.13 applies to both corporate and unincorporated entities alike.⁷⁸

Nevertheless, courts faced with a motion to disqualify will still examine whether a relationship existed between the attorney and the constituent. If the courts did not conduct such an examination, inequities would result.⁷⁹ If a constituent can prove, according to the jurisdiction’s laws,⁸⁰ that an attorney-client relationship existed or still exists with the entity’s attorney, the court will disqualify that attorney.⁸¹ Nowhere is a court more likely to unearth an attorney-client relationship with the entity’s constituents than when the entity is a closely held business.

When representing a closely held business, the attorney is in greater danger of being considered the attorney of the individual constituents.⁸² Often times the “will” of the entity is inseparable from the will of the individuals. As the Michigan Court of Appeals in *Fassihi v. Sommers, Schwartz, Silver, Schwartz and Tyler*⁸³ noted, there are “difficulties in treating a closely held corporation with few shareholders as an entity distinct from the shareholders.”⁸⁴ In *Fassihi*, the plaintiff, one of two 50% shareholders in a professional corporation, filed suit, alleging, *inter alia*, breach of the attorney-client relationship.⁸⁵ The plaintiff’s associate in the professional corporation had engaged the corporation’s attorney to oust the plaintiff from the business. The court found that there was not an attorney-client relationship with the individual shareholders.⁸⁶ Nevertheless, the court held that the corporation’s attorney owed *fiduciary duties* to the individual shareholders, which were breached by the attorney’s actions against the plaintiff.⁸⁷

While the court in *Fassihi* did not address whether an attorney’s implied fiduciary duty to the shareholders of a closely held business would support a motion for disqualification, a California Court, using similar reasoning, did disqualify the business’s attorney. In *Woods v. Superior Court*,⁸⁸ the two members in a family corporation were seeking a divorce. The wife sought disqualification of the husband’s attorney, who had, for many years, represented the corporation.⁸⁹ The court held that disqualification was appropriate.⁹⁰ While the court did not explicitly treat the wife as a current client, the court found that the attorney’s representation of the wife’s interest in the family corporation sufficiently conflicted the attorney in the divorce action.⁹¹

V. Conclusion

Despite admirable efforts from the state and federal jurisdictions to unify and codify regulations governing conflicts and disqualification, the relevant law is not black and white. Attorneys must become resigned to the fact that at least a portion of their client relationships will reside in the gray betwixt certainties. Many professional responsibility professors in law school may warn the “soon-to-be” practitioners to play it safe—stay out of the gray areas and remain firmly in the white so as to never be caught in the black. However, to continually do so may be practically impossible or, at least, economically infeasible. And, depending on whether the practitioner’s state has addressed the question, the attorney may never know whether a conflict existed until the motion to disqualify him is heard.

¹ *State v. White*, 114 S.W.3d 469, 476 (Tenn. 2003) (quoting *State v. Culbreath*, 30 S.W.3d 309, 312 (Tenn. 2000)). The California Court of Appeals succinctly stated that, “[o]ne of the principal obligations of every attorney is to protect each of his or her clients in every possible way.” *Gilbert v. Nat’l Corp. for Housing P’ship*, 84 Cal. Rptr. 2d 204, 212 (Cal. Ct. App. 1999). For the most part, the rules governing an attorney’s professional conduct leave much of the responsibility for determining whether a conflict exists on attorneys themselves. See MOD R. PROF. CON. 1.7 (1983). As such, an attorney is required to withdraw if he feels that his obligation to represent his client with zeal and loyalty is compromised. See *id.* 1.7(b) & 1.16(b).

²Section 6 of the Restatement (Third) of Law Governing Lawyers provides a list of judicial remedies appropriate for when a lawyer breaches a duty to a client. Disqualifying the attorney is one of these remedies. “Disqualification of a lawyer . . . from further participation in a pending matter has become the most common remedy for conflicts of interest in litigation.” REST. (3d) L. GOV. L. § 6 cmt(i).

³*Bd. of Mgrs. of Eleventh Street Loftominium Ass’n v. Wabash Loftominium, L.L.C.*, 876 N.E.2d 65, 72 (Ill. App. Ct. App. 2007) (citations omitted); see also *Knight v. Ferguson*, 57 Cal. Rptr. 3d 823, 829 (“The disqualification rule is to keep honest attorneys from having to choose between conflicting duties, or being tempted to reconcile conflicting interests, rather than fully pursuing their clients rights. The loyalty the attorney owes one client cannot be allowed to compromise the duty owed another.” (quotations omitted)).

⁴ *Id.* (quoting *Guillen v. City of Chicago*, 956 F. Supp. 1416, 1421 (N.D. Ill. 1997)).

⁵ *Smith v. Arc-Mation, Inc.*, 261 N.W.2d 713, 715–16 (Mich. 1978).

⁶ See, e.g., *Roush v. Seagate Tech., LLC*, 58 Cal. Rptr. 3d 275 (Cal. Ct. App. 2007) (“Disqualification motions implicate several important interests, among them are the clients’ right to counsel of their choice, the attorney’s interest in representing a client, the financial burden of replacing a disqualified attorney, and tactical abuse that may underlie the motion.” (citations omitted)); *Brooklyn Navy Yard Congregation Partners, L.P. v. PMNC*, 663 N.Y.S.2d 499, 500–01 (N.Y. App. Div. 1997).

⁷ However, “most of the core concepts of lawyer conflicts of interest . . . were already well developed and applied through common-law decisions in disciplinary, disqualification, and legal-malpractice proceedings long before jurisdictions officially adopted lawyer codes stating rules about the same concepts. The drafters of lawyer codes, in turn, have drawn heavily on such decisions in articulating lawyer obligations.” REST. (3d) L. GOV. L. § 1 cmt.

⁸ See http://www.abanet.org/cpr/jclr/rule_charts.html (last accessed on December 28, 2007) (providing several charts that note variations between the states concerning specific rules).

⁹ See Ronald D. Rotunda & John S. Dzienkowski, LEGAL ETHICS-THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1-1(e)(4) (2007–2008 ed.) (noting that “[b]y the end of 1999 over 80% of the states had adopted the 1983 Model Rules” in one form or another).

¹⁰ See *id.*

¹¹ There are two main versions of the Rules: (1) 1983 version; and (2) 2002 version. While minor changes were made to the 1983 version prior to 2002, this paper will designate the pre-2002 version as being drafted in 1983.

¹² *Gilbert v. Nat'l Corp. for Housing P'ships*, 84 Cal. Rptr. 2d 204, 212 (Cal. App. Div. 1999).

¹³ See, e.g., *In re Grand Jury Investigation*, 447 F. Supp. 2d 453, 459–61 (E.D. Pa. 2006); *Coburn v. DaimlerChrysler Servs. N.A., L.L.C.*, 289 F. Supp. 2d 960, 966 n.2 (N.D. Ill. 2003); *Matter of Grimm*, 674 N.E.2d 551, 554–555 (Ind. 1996). Under the Code, DR 5-101(A), 5-105(A) and 5-105(C) were the predecessors to rule 1.7 under the Rules. Collectively, these disciplinary rules under the Code had similar import to their modern analog.

¹⁴ MOD. R. PROF. CON. 1.7(a) (2002) (emphasis added).

¹⁵ Rotunda & Dzienkowski, *supra* note 9, § 1.7–1(c).

¹⁶ See *Intern. Business Mach. Corp. v. Levin*, 579 F.2d 271, 280 (3rd Cir. 1978) (noting, under the Code, that representing a defendant that your firm is suing in a completely unrelated matter creates a conflict that could cloud the attorney's professional judgment); *Gilbert v. Nat'l Corp. for Housing P'ships*, 84 Cal. Rptr. 2d 204, 213 (Cal. Dist. Ct. App. 1999).

¹⁷ See MOD. R. PROF. CON. 1.7 (2002).

¹⁸ See *Coburn v. DaimlerChrysler Servs. N.A., L.L.C.*, 289 F. Supp. 2d 960, 965 (N.D. Ill. 2003) (holding that a motion to disqualify does not require an “actual conflict”); *Bottoms v. Stapleton*, 706 N.W.2d 411, 417 (Iowa 2005) (noting that the idea of a “potential conflict” is foreign to the ethical rules).

¹⁹ MOD. R. PROF. CON. 1.7(b)(4) (2002); CODE PROF. RESP. DR 5-101(A). The Rules, however, explicitly require the attorney, apart from obtaining consent, to make a separate evaluation as to whether he “will be able to provide competent and diligent representation to each affected client.” 1.7(b)(1).

²⁰ The Code does not explicitly require consent to be in writing. See CODE PROF. RESP. DR 5-101(A).

²¹ See, e.g., *Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 739 (Mo. 2004); *In re Kushinsky*, 247 A.2d 665, 666 (N.J. 1968). The 1983 version of rule 1.7 requires consent “after consultation.” The 2002 version is less ambiguous, requiring “informed consent.”

²² MOD. R. PROF. CON. 1.7 cmt. (2002). See also *Paul v. Smith, Gambrell & Russell*, 599 S.E.2d 206, 209 (Ga. Ct. App. 2004) (“[T]he required writing must at least acknowledge the disclosure essential to an informed decision and consent.”).

²³ See *id.*; see also Rotunda & Dzienkowski, *supra* note 9, § 1.7–4(a).

²⁴ *Kendrick*, 142 S.W.3d at 736 (quoting GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 10.8 (3d ed. Supp. 2004)). Both the 1983 and 2002 versions of the Rules impose limits on when client consent is appropriate. Pursuant to the 1983 version consent is allowed only when “the lawyer reasonably believes the representation will not be adversely affected.” MOD. R PROF. CON. 1.7(b)(1) (1983). See also the 2002 version, which provides that “the lawyer [must] reasonably believe[] that the lawyer will be able to provide competent and diligent representation to each affected client.” *Id.* 1.7(b)(1) (2002).

²⁵ See *Whitman v. Estate of Whitman*, 612 A.2d 386, 389 (N.J. Super. Ct. Law Div. 1992).

²⁶ MOD. R. PROF. CON. 1.7 cmt. (1983).

²⁷ *Shaikh v. Waiters*, 710 N.Y.S.2d 873, 876 (N.Y. App. Div. 2000).

²⁸ *Id.*

²⁹ See, e.g., *Crone v. Gill*, 736 A.2d 131, 135 (Conn. 1999) (“[T]he competing interests at stake in a determination regarding the disqualification of an attorney are: (1) the [former client's] interest in protecting confidential information; (2) the [current client's] interest in freely selecting counsel of [his or her] choice; and (3) the public's interest in the scrupulous administration of justice.” (quoting *Bergeron v. Mackler*, 623 A.2d 489 (1993))).

³⁰ *Warrilow v. Norrell*, 791 S.W.2d 515, 523 (Tex. App. Ct. 1989) (alterations in original) (quoting *United Pacific Ins. Co. v. Zardenetta*, 661 S.W.2d 244, 248 (Tex. App. Ct. 1983)).

³¹ See *I.B.M., Corp. v. Levin*, 579 F.2d 271, 283 (3rd Cir. 1978); *Hull v. Celanese Corp.*, 513 F.2d 568, 572 (2d Cir. 1975); *Gilbert v. Nat. Corp.Hous. P'ships*, 84 Cal. Rptr. 2d 204, 213 (Cal. App. Dist. 1999); *Greene v. Greene*, 391 N.E.2d 1355, 1359 (N.Y. 1979). But see *Wilson v. Wilson*, 36 Pa. D. & C 2d 223, 229 (Penn. Ct. Com. Pleas 1964) (refusing to disqualify counsel because the client was not responsible for the conflict and the rights of the defendants were not prejudiced).

³² Cf. *In re Bellsouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003) (“Because a party is presumptively entitled to the counsel of his choice, that right may be overridden only if ‘compelling reasons’ exist.” (citing *Texas Catastrophe*

Property Ins. Ass'n v. Morales, 975 F.2d 1178, 1181 (5th Cir.1992)); *Banque Arabe Et Internationale D'Investissement v. Ameritrust Corp.*, 690 F. Supp. 607, 613 (S.D. Ohio 1988) (“A party's right to select its own counsel is an important public right and a vital freedom that should be preserved; the extreme measure of disqualifying a party's counsel of choice should be imposed only when absolutely necessary” (citing *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 293 (6th Cir.1979))); *Slade v. Ornsby*, 872 N.E.2d 223, 226 (Mass. Ct. App. 2007) (noting that courts should approach motions to disqualify based on a current-client conflict with caution, and grant them only when continued representation would “taint[] the legal system.” (quoting *Borman v. Borman*, 393 N.E.2d 847 (Mass. 1979))

³³ See *Forest Park Assocs., Ltd. P'ships v. Kraus*, 572 N.Y.S.2d 317, 318 (N.Y. App. Div. 1991).

³⁴ See *Paul v. Smith, Gambrell & Russell*, 599 S.E.2d 206, 209 (Ga. Ct. App. 2004).

³⁵ The 2002 version of rule 1.9 is as follows:

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 gives informed consent, confirmed in writing.

³⁶ 113 F. Supp. 265 (S.D.N.Y. 1953).

³⁷ *Id.* at 268–69.

³⁸ See, e.g., *In re American Airlines*, 972 F.2d 605, 614 (5th Cir. 1992) (noting that the presumption is irrebutable); *Knight v. Ferguson*, 57 Cal. Rptr. 3d 823, 827 (Cal. Dist. Ct. App. 2007); *State ex rel. Jefferson County Bd. of Zoning Appeals v. Wilkes*, 655 S.E.2d 178, 187 (W. Va. 2007).

³⁹ *Paul*, 599 S.E.2d at 209–10.

⁴⁰ The comments to rule 1.9 provide the following example: “[A] lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client.” MOD. R. PROF. CON. 1.9 cmt. (2002).

⁴¹ See *In re American Airlines, Inc.*, 972 F.2d 605, 618–619 (5th Cir. 1992).

⁴² See Rotunda & Dzienkowski, *supra* note 9, § 1.9-1(b)(3).

⁴³ See *id.* See also, e.g., *People v. Frisco*, 119 P.3d 1093, 1096 (Colo. 2005) (“Because the use of information from a prior representation to the disadvantage of the former client is separately restricted by Rule 1.9(c), Rule 1.9(a) applies only to situations involving an inherent and substantial risk of violating an attorney's duty of loyalty to former clients.”); *Humco, Inc. v. Noble*, 31 S.W.3d 916, 920 (Ky. 2000); *Briggs v. Wyo. Nat'l Bank of Casper*, 836 P.2d 263, 272 (Wyo 1992).

⁴⁴ See *In re Carey*, 89 S.W.3d 477, 493–94 (Mo. 2002); *Shandralina G. v. Homonchuk*, 54 Cal. Rptr. 3d 207, 214 (Cal. App. Ct. 2007).

⁴⁵ See, e.g., *Paul v. Smith, Gambrell & Russell*, 599 S.E.2d 206, 209 (Ga. Ct. App. 2004).

⁴⁶ *Morgan v. N. Coast Cable Co.*, 586 N.E.2d 88, 92 (Ohio 1992).

⁴⁷ See CODE PROF. RESP. EC 4-6.

⁴⁸ See *NCK Org. Ltd. v. Bregman*, 542 F.2d 128, 130–31 (2d. Cir. 1976); *Baglini v. Pullman, Inc.*, 412 F. Supp. 1060, 1063 (E.D. Penn. 1976); *Mann v. Britt*, 583 S.W.2d 21, 23 (Ark. 1979).

⁴⁹ Some courts rejected the idea that the “appearance of impropriety” was a wholly subjective standard. See *Roberts & Schaefer Co. v. San-Con, Inc.*, 898 F. Supp. 356, 359 (S.D. W. Va. 1995); *Clinard v. Blackwood*, 46 S.W.3d 177, 187 (Tenn. 2001).

⁵⁰ See *Ark. Valley State Bank v. Phillips*, 171 P.3d 899, 908–09 (Okla. 2007); MOD. R. PROF. CON. 1.9 cmt. 5 (1983). Cf. *Lovell v. Winchester*, 941 S.W.2d 466, 468 (Ky. 1997). Rule 1.9, comment 5, to the pre-2002 Rules stated the following:

The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since “impropriety” is undefined, the term “appearance of impropriety” is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

⁵¹ See, e.g., *Pres. Lincoln Hotel Venture v. Bank One, Springfield*, 649 N.E.2d 432, 441 (Ill. Dist. Ct. App. 1994) (noting that the appearance of impropriety standard, by itself, was “‘simply too weak and too slender a reed’ upon which to order disqualification.” (quoting *Index Futures Group, Inc. v. Street*, 516 N.E.2d 890, 894 (Ill. Dist. Ct. App. 1987))); see also Samara L. Kline, *Motions to Disqualify Based on Conflicts of Interest—Identifying the Rules of the Game*, 25 ST. MARY’S L.J. 739, 749–50 (1994).

⁵² *Nemours Foundation v. Gilbane, Aetna, Fed. Ins. Co.*, 632 F. Supp. 418, 427 (D. Del. 1986).

⁵³ See, e.g., *First Am. Carriers, Inc. v. Kroger Co.*, 787 S.W.2d 669 (Ark. 1990); *Lovell*, 941 S.W.2d at 469; *In re Carey*, 89 S.W.3d 477, 496 (Mo. 2002); see also *In re American Airlines, Inc.*, 972 F.2d 605, 618 (5th Cir. 1992) (holding that the “loyalty” component in rule 1.9 implicates the same concerns as the appearance of impropriety standard).

⁵⁴ See, e.g., *Guerrero v. Bluebeard's Castle Hotel Inc.*, 982 F. Supp. 343, 347 (D. Virgin Islands 1997) (“In a motion to disqualify, the moving party has the burden of proof in showing that confidences were shared.” (citing *Cohen v. Oasin*, 844 F. Supp. 1065, 1067 (E.D. Pa. 1994))); *Morgan v. N. Coast Cable Co.*, 586 N.E.2d 88, 90 (Ohio 1992) (“Typically, courts do not disqualify an attorney on the grounds of conflict of interest unless there is (or was) an attorney-client relationship between the party seeking disqualification and the attorney the party seeks to disqualify).

⁵⁵ See *Ex parte Tiffin*, 979 So. 2d 1160, 1165 (Ala. 2003); *In re Penning*, 930 A.2d 144, 156 (D.C. 2007) (“[T]he existence of the [attorney-client] relationship [was] a question of fact’ that needed to be proved.” (quoting *Derrickson v. Derrickson*, 541 A.2d 149 (D.C. 1988) (second and third modification in original))); *Morgan*, 586 N.E.2d at 90.

⁵⁶ In the “scope” section of the Rules, the drafters note that “principles of substantive law external to these Rules determine whether a client-lawyer relationship exists.” For a general discussion of the various approaches from each jurisdiction, see generally George A. Locke, *Existence of Attorney-Client Relationship*, 48 Am. Jur. Proof of Facts 2d 525 (updated June 2007).

⁵⁷ See *Fassihi v. Sommers, Schwartz, Silver & Tyler*, 309 N.W.2d 645, 648 (Mich. Ct. App. 1981) (recognizing that a fiduciary relationship existed).

⁵⁸ See Rotunda & Dzienkowski, *supra* note 9, § 1.7–6(n)(1) (noting that “much of the case law treats the insured as ‘the client.’”).

⁵⁹ 895 S.W.2d 322 (Tenn. 1995).

⁶⁰ *Id.* at 328.

⁶¹ See *Mitchum v. Hudgens*, 533 So. 2d 194, 198 (Ala. 1988); *State Farm Mut. Auto Ins. Co. v. Fed. Ins. Co.*, 86 Cal. Rptr. 2d 20, 24 (Cal. Dist. Ct. App. 1999); *Rogers v. Robson, Masters, Ryan, Brumund and Belom*, 392 N.E.2d 1365, 1371 (Ill. Dist. Ct. App. 1979) (“Ordinarily, since the interests of the insurer and insured are harmonious, there is no conflict and the attorney is able to exercise independent judgment for both clients.”).

⁶² Cf. *Paradigm Ins. Co. v. Langerman Law Offices, P.A.*, 24 P.3d 593, 598 (Ariz. 2001) (noting that the lower appellate court had found the “majority rule” to be that courts will automatically assume an attorney-client relationship with the insurer absent an evident conflict, but refusing to follow the “rule” because of a “host of potential problems.”); *Pine Island Farmers Coop v. Erstad & Riemer, P.A.*, 649 N.W.2d 444, 449 (Minn. 2002) (“A number of jurisdictions [have held] that the insured is defense counsel’s sole client, and prohibiting defense counsel from forming an attorney-client relationship with the insurer.” (citations omitted)).

⁶³ See, e.g., *State Farm*, 86 Cal. Rptr. 2d at 24 (stating without comment as to the facts underlying the case that “the attorney represents two clients, the insured and the insurer.”); *Nat’l Union Fire Ins. Co. v. Stites Prof. Law Corp.*, 1 Cal. Rptr. 2d 570, 575 (Cal. App. Ct. 1991) (“So long as the interests of the insurer and the insured coincide, they are both the clients of the defense attorney and the defense attorney’s fiduciary duty runs to both the insurer and the insured,” but finding that no relationship existed because the insurer did not actually hire the attorney, but merely agreed to reimburse the insured); *Higgins v. Karp*, 687 A.2d 539, 543 (Conn. 1997).

⁶⁴ See, e.g., *In re Penning*, 930 A.2d 144, 156 (D.C. 2007) (“[T]he existence of the [attorney-client] relationship [was] a question of fact’ that needed to be proved.” (quoting *Derrickson v. Derrickson*, 541 A.2d 149 (D.C. 1988) (second and third modification in original))).

⁶⁵ A typical scenario where a conflict may arise is when the attorney uncovers information about the insured that would affect or negate his coverage under the insurance policy

⁶⁶ *Petition of Youngblood*, 895 S.W.2d 322, 328 (Tenn. 1995).

⁶⁷ The attorney is well-advised to draft such contracts with an eye toward risk avoidance. “When an attorney attempts dual relationships without making full and frank disclosure required of him, he is liable to the client who suffers loss caused by the lack of disclosure.” *Rogers*, 392 N.E.2d at 1372.

⁶⁸ See, e.g. *Petition of Youngblood*, 895 S.W.2d at 328 (“The Code prohibits any relationship between the attorney and the insurer, or any other person or entity, which impairs the attorney’s complete loyalty to the [insured]. . . . The terms of the agreement between the insurer and the attorney whereby the attorney agrees to undertake the representation of the insured must respect the attorney-client relationship between the attorney and the insured. . . . Any policy, arrangement or device which effectively limits, by design or operation, the attorney’s professional judgment on behalf of or loyalty to the client is prohibited . . .”). For example, while the Rules allow an attorney to obtain a conflict waiver, the attorney cannot avoid disqualification for a conflict if the attorney cannot “reasonably believe[] that [he] will be able to provide competent and diligent representation to each affected client.” MOD. R. PROF. CON. 1.7(b)(1) (2002).

⁶⁹ 794 S.W.2d 812 (Tex. Ct. App. 1990).

⁷⁰ *Id.* at 813.

⁷¹ *Id.* at 814 (“[W]e must first determine if [the movant] established an attorney-client relationship . . .”). See also, *supra* note 55.

⁷² *Westergren*, 794 S.W.2d at 814. The attorney noted that it was the principal who paid the attorney for his services, not the surety. *Id.*

⁷³ *Id.* at 815.

⁷⁴ See *id.*

⁷⁵ MOD. R. PROF. CON. 1.13 (2003).

⁷⁶ See generally William H. Simon, *Whom (or What) Does the Organization’s Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 Cal. L. Rev. 57, (2003).

⁷⁷ See *Hopper v. Frank*, 16 F.3d 92, 95 (5th Cir. 1994); *Skarbrevik v. Cohen, England & Whitfield*, 282 Cal. Rptr. 627, 634–35 (Cal. Ct. App. 1991); *McCarthy v. John T. Henderson, Inc.*, 587 A.2d 280, 282–83 (N.J. Super. Ct. App. Div. 1991).

⁷⁸ *Id.* 1.13 cmt. (“The duties defined in this Comment apply equally to unincorporated associations.”). Even if the jurisdiction’s law treats the unincorporated organization as an aggregate of individuals, instead of an entity, for other purposes, the attorney’s ethical obligation may still be owed to the business as an entity and not the individual constituents. See *Hopper*, 16 F.3d at 96–97; *Security Bank v. Klicker*, 418 N.W.2d 27, 31 (Wis. App. Ct. 1987) (“Although the aggregate approach to partnerships is generally followed regarding substantive rights and liabilities, we conclude that for purposes of determining attorney-client relationships, it cannot and should not be announced as an absolute rule of law.”); Rotunda & Dzienkowski, *supra* note 9, § 1.13-1(b). But see *Arpadi v. First MSP Corp.*, 628 N.E.2d 1335, 1338 (Ohio 1994). There, the Supreme Court of Ohio held that the substantive law of the state, which designated limited partnerships as an “aggregate of individuals,” as opposed to an entity, was equally applicable in establishing a duty on the part of the attorney toward the individual limited partners. See *id.* at 1338–39. See also *Margulies v. Upchurch*, 696 P.2d 1195 (Utah 1985) (disqualifying lawyers after noting that an implied attorney-client relationship existed between the limited partnership’s partners and the attorneys).

⁷⁹ See, e.g., *Responsible Citizens v. Super. Ct.*, 16 Cal. Rptr. 2d 756, 765 (Cal. App. Ct. 1993) (noting that bright line rules in this area of the law would cause “unjust consequences” and “unfairly penalize third parties.”).

⁸⁰ For example, in *Board of Managers of Eleventh Street Loftominium Association v. Wabash Loftominium, L.L.C.*, an Illinois appellate court held that a law firm, which sued non-client entities that were managed by the same group of individuals managing entities that were clients, must be disqualified. 876 N.E.2d 65, 73–74 (Ill. App. Ct. 2007). This holding was based on an exception to the entity approach, espoused in an Illinois state ethics advisory opinion, which noted that when a “client corporation and the subsidiary [or other constituent] in question have the same management group” the constituent or subsidiary may be considered a client. *Id.* at 72 (quotations and emphasis omitted). The state ethics advisory opinion also noted that (1) direct transmittal of confidential information from a constituent to the attorney and (2) situations where the entity is merely an alter ego of another entity or constituent may also result in an attorney-client relationship not limited to merely the represented “entity.” *Id.*

⁸¹ See *E.F. Hutton v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969); *Hanson, Jones, & Leta, P.C. v. Segal*, 220 B.R. 434, 471 (D. Utah 1998); see also Rotunda & Dzienkowski, *supra* note 9, § 1.13-3 (“[L]awyers do have the obligation to clear up confusion as to whom they represent when the lawyer reasonably should know that the confusion exists.”).

⁸² See generally William H. Simon, *Whom (or What) Does the Organization’s Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 Cal. L. Rev. 57 (2003).

⁸³ 309 N.W.2d 645 (Mich. Ct. App. 1981).

⁸⁴ *Id.* at 649.

⁸⁵ *Id.* at 646.

⁸⁶ *Id.* at 648.

⁸⁷ *Id.*

⁸⁸ 197 Cal. Rptr. 185 (Cal. Dist. Ct. App. 1983).

⁸⁹ *Id.* at 186.

⁹⁰ *Id.* at

⁹¹ *Id.* at 189.