11-21-2007

Three's a Crowd: A Proposal to Abolish Joint Representation

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32 Rutgers L. J. 387 (2001)

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I. INTRODUCTION

The legal profession's ethical rules and guidelines are in a state of adjustment and transition.[1] The American Law Institute recently gave its final approval to the *Restatement (Third) of the Law Governing Lawyers*,[2] and the American Bar Association's Commission on the Evaluation of the Rules of Professional Conduct (the "Ethics 2000" Commission) is in the process of reviewing the *Model Rules of Professional Conduct*.[3] A review of

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I would like to thank my colleagues Rex R. Perschbacher and Kevin R. Johnson for their thoughtful comments on an earlier draft, and Randi Brazier Jenkins of the Class of 2002, University of California, Davis School of Law, for her helpful research assistance. This Article is dedicated to the memory of Professor Pierre R. ("Pete") Loiseaux, University of California, Davis School of Law, whose support and encouragement led me to pursue a law teaching career.

1. The American Bar Association has set forth ethical rules and guidelines in its Model Code of Professional Responsibility and Model Rules of Professional Conduct. Most states have adopted these rules, with the notable exception of California. *See* CAL. RULES OF PROF. CONDUCT (1992). In addition, the American Bar Association, and state, county, and local bar associations, often issue formal and informal opinions concerning ethical issues.

2. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Am. Law Inst., Proposed Official Draft 1998) [hereinafter RESTATEMENT]; *see ALI Completes Restatement on Lawyers, Gives Final Approval to All Sections*, 14 ABA/BNA LAWS. MAN. ON PROF. CONDUCT, No. 8, at 211 (May 13, 1998).

3. *See ABA Starts 'Ethics 2000' Project for Sweeping Review of Rules*, ABA/BNA LAWS. MAN. ON PROF. CONDUCT: CURRENT REPORTS, May 28, 1997, at 140 (describing goal of Ethics 2000 project as "undertak[ing] an in-depth review and assessment of ethics rules during the final years of the second millennium"); *see also* <http://www.abanet.org/cpr/ethics2k.html> (visited June 23, 2000) (noting the 13-member commission includes judges, law professors, government lawyers, corporate counsel, civil and criminal practitioners, and a nonlawyer). The Commission describes its charge as follows:

> The Commission on the Evaluation of the Rules of Professional Conduct, or "Ethics 2000," is charged with: 1) conducting a comprehensive study and evaluation of the ethical and professionalism precepts of the legal profession; 2) examining and evaluating the ABA MODEL RULES OF PROFESSIONAL CONDUCT and the rules governing professional conduct in the state and federal jurisdictions; 3) conducting

these influential reports, however, yields a disquieting discovery. Despite well-publicized public dissatisfaction with lawyers,[4] the most significant proposals for change are aimed at facilitating the business of law rather than the professionalism of lawyers.[5] One area that would benefit from more comprehensive restrictions is that of conflicts of interest.[6]

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original research, surveys and hearings; and 4) formulating recommendations for action.

4. *See* RICHARD ZITRIN & CAROL M. LANGFORD, THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED 3 (1999) ("[N]ever in our country's history have lawyers—and how they think, speak, and act—been as controversial as they are today . . . . Polls show that public confidence in lawyers has never been lower."); Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60 (discussing public dissatisfaction with lawyers and the legal system); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85 (1994) (noting causes of public dissatisfaction with legal profession rooted in billable hours phenomenon, excessive litigation in society as a whole, and the commercialization of the law); John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning From Ohio's Struggle to Reform Its Disciplinary System*, 68 U. CIN. L. REV. 65, 66 (1999) (noting increase in public dissatisfaction with lawyers); *id.* at 116 (noting this is an "age of increased cynicism, competition, complexity, and media attention"); Randall Samborn, *Anti Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 1 (discussing widespread resentment of lawyers); Lisa M. Stern, Note, *Code of Professional Responsibility*, 70 ST. JOHN'S L. REV. 839, 839 (1996) (observing that "the public's lack of trust and confidence in both attorneys and the judicial system has created an overall discontent with the legal profession"). Lawyers have not always labored under such distrust. *See* Paul Simon, *Foreword: Ethics in Law and Politics*, 28 LOY. U. CHI. L.J. 221, 225 (1996) ("Unlike the political realm, the legal profession has not always been viewed with the scorn reserved for it today. In words that may seem strange to us now, Alexis de Tocqueville wrote that 'people in democratic states do not mistrust the members of the legal profession, because it is known that they are interested to serve the popular cause; and the people listen to them without irritation because they do not attribute to them any sinister designs.'"). *But see* Charles Silver & Frank B. Cross, *What's Not to Like About Being A Lawyer?*, 109 YALE L.J. 1443, 1467 (2000) (debunking anti-lawyer myths and noting "[i]n truth, partisan lawyer-bashers are a far greater danger to America than are lawyers. For reasons of ideology and self-interest, they spread misinformation about attorneys and the civil justice system, including unverifiable 'urban legends' and lies that they concoct themselves. Lawyers should not receive these pronouncements as truths but instead should expose them as falsehoods.").

5. *See infra* notes 114-30 and accompanying text. Among the Restatement's changes is a controversial provision condoning lawyer screening, sometimes called the use of "ethical walls," to avoid the disqualification of a law firm when one of its lawyers has a conflict of interest. *See* RESTATEMENT, *supra* note 2, § 124(2) (stating any imputed conflict does not restrict an affiliated lawyer when three requirements are satisfied: (1) "any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter," (2) "the personally prohibited lawyer is subject to screening measures adequate to eliminate participation by that lawyer in the representation," and (3) "timely and

adequate notice of the screening has been provided to all affected clients"); *see also* Monroe Freedman, *Corporate Bar Protects Its Own*, LEGAL TIMES, June 15, 1992, at 20 (critical discussion of lawyer screening provisions); Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541, 545 n.30 (1997) (noting Restatement's "controversial provisions on screening and insurance representation"). *See generally* ZITRIN & LANGFORD, *supra* note 4, at 232 ("Large firms have gotten larger still, and more than ever act like businesses rather than groups of professionals"). Screening has stirred particularly vociferous allegations of attorney self-interest in the literature. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.6 at 402 (1986) ("In the end there is little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer chickens"); Monroe Freedman, *The Corporate Bar Writes Its Own Rules*, CONN. L. TRIB., June 22, 1992, at 19 (questioning the weight courts will give "self-serving" ethics rules, including rules on screening); Susan R. Martyn, *Conflict About Conflicts: The Controversy Concerning Law Firm Screens*, 46 OKLA. L. REV. 53, 56 (1993) (criticizing acceptance of screening in Restatement and noting screening advocates are "blinded by self interest"); *see also* Roberts & Schaefer Co. v. San-Con, Inc., 898 F. Supp. 356, 362-63 (S.D.W. Va. 1995) (disapproving of "trend to liberalize" represented by Restatement and stating that "the court is troubled by the trend to dispose of centuries-old confidentiality rules solely for the convenience of modern lawyers who move from association several times in their careers"). In addition to negative public perception, inadvertent violations are also a concern. *See* Lawrence J. Fox, *The Ethics of Conflicts: Are There Any?*, AM. LAW., Mar. 1993, at 48 (discussing potential inability of lawyers to remember who is being screened from what, particularly when multiple screens are in effect at one time); Susan R. Martyn, *Conflict About Conflicts: The Controversy Concerning Law Firm Screens*, 46 OKLA. L. REV. 53, 57 (1993) ("[E]ven if we trust lawyers, inadvertent leaks in screens [are] inevitable."); Thomas D. Morgan, *Screening the Disqualified Lawyer: The Wrong Solution to the Wrong Problem*, 10 U. ARK. LITTLE ROCK L.J. 37, 54 (1987-1988) (a client "can often never know for sure when or whether his confidence has been abused").

6. Conflicts of interest pose one of the most difficult areas in the professional responsibility arena. *See generally* Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 212 (1982) ("One of the most fertile sources of confusion has been the rules dealing with multiple representation of clients with conflicting interests. In their daily practice of law, many attorneys must determine when they can ethically represent multiple clients who have conflicting interests in the same transaction or proceeding."); *see also* Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1284-85 (1981) ("More attorneys seem to be spending a far greater proportion of their time anticipating and resolving conflict-of-interest problems."). The confusion caused by conflicts of interest has led to an increase in consequences. The number of motions brought to disqualify counsel has increased dramatically, and most disqualification motions are based on conflicts of interest. *See* ABA/BNA LAWS. MAN. ON PROF. CONDUCT § 51:1902 (1997) ("the greatest number of disqualification motions have their roots in conflict of interest issues"); WOLFRAM, *supra* note 5, § 7.1 at 329 ("The motion for a judicial order disqualifying a lawyer in pending litigation because of conflict is a traditional remedy that has come into prominence in recent years."); *see also* Julius Denenberg & Jeffrey R. Learned, *Multiple Party Representation, Conflicts of Interest, and Disqualification: Problems and Solutions*, 27

This Article confronts the profession's use of joint representation, whereby one lawyer simultaneously represents two or more clients in a particular matter. It is very common for an attorney to undertake joint representation. Opportunities arise in virtually every area of legal practice—civil and criminal, transactional work and litigation, and regardless of whether the clients are corporations, partnerships, or individuals.[7]

The lawyer's motivation to undertake joint representation is great. It results in increased revenue,[8] and because joint representation is often suggested by the clients themselves, it presents an opportunity to please both clients. However, despite the benefits that may initially be anticipated by both lawyer and client, clients' interests often are not, in fact, completely aligned. Regularly, joint clients' interests become sufficiently divergent so as to require the lawyer to obtain additional client waivers or to withdraw from the representation.[9] Even when the lawyer is not required to withdraw, joint representation dilutes the lawyer's duty of loyalty, which is the lawyer's ultimate responsibility to a client.[10]

TORT & INS. L.J. 497, 497 (1992) ("Disqualification motions based on alleged conflicts of interest have greatly increased over the past fifteen to twenty years."); Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, *supra*, at 1285 ("[D]isqualification motions based on some alleged violation of a conflict-of-interest principle appear to have become 'common tools of the litigation process.'"). Conflicts of interest can also lead to disciplinary action, legal malpractice actions, and forfeiture of fees. *See* RESTATEMENT, *supra* note 2, § 128, cmt. a:

> The most common remedy [for a violation of section 128] is the lawyer's disqualification from further representation of one or more clients in a matter. A suit for professional malpractice is available if a client has suffered damage as a result of a lawyer's conflict of interest. In appropriate cases, the lawyer is also subject to professional discipline or fee forfeiture.

Id. (citations omitted); WOLFRAM, *supra* note 5, § 7.1 at 328-30 (noting "[t]he array of remedial responses to a detected conflict of interest is wide," including discipline, disqualification, legal malpractice actions, fee forfeiture, and setting aside a judgment); *see also* Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L. REV. 579, 579 (1992) ("To get a conflict-of-interest question wrong may . . . well expose the errant lawyer to a wide range of sanctions, including . . . forfeiture of fees, disciplinary proceedings, and perhaps in extreme cases even criminal sanctions."); Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 435 (1998) (noting remedies may include attorney discipline, malpractice liability, or loss of fees).

7. *See infra* notes 134-94 and accompanying text.

8. *See infra* note 202 and accompanying text.

9. *See infra* notes 131-33 and accompanying text.

10. Loyalty to a client includes both (1) the danger of one client's interests directly conflicting with the interests of the other client, as well as (2) potential inhibitions on the lawyer's ability to suggest certain options, despite the co-clients' aligned position, because a

The enormity of the problem—and of the consequences—are actually just beginning to make themselves felt. Although motions for disqualification on the basis of conflict of interest began rising in the late 1970's and early 1980's,[11] the legal profession's response essentially has been one of denial. Such motions typically are castigated as tactical maneuvering.[12] However, the increasingly egregious situations in which some lawyers have undertaken joint representation—using purported client consent as their shield—have led to recent high-profile disqualification cases,[13] as well as cases involving awards of punitive damages against the

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possible option or consideration for one client is, or might be, undesirable to the other client. *See infra* notes 240-47 and accompanying text; *see also* WOLFRAM, *supra* note 5, § 7.1 at 316-17:

> The principle of loyalty of lawyer to client is a basic tenet of the Anglo-American conception of the lawyer-client relationship . . . . Where choices have to be made between the interest of a client and any other person—whether the lawyer personally or another client, the lawyer must be in such a position that all options that might favor the client can be considered free from the likely impairment of any interest other than those of the client.

11. *See* WOLFRAM, *supra* note 5, § 7.1 at 336 (noting "exponential increase in the number of disqualification motions" in the 1970s); EDNA SELAN EPSTEIN ET AL., CONFLICTS OF INTEREST: A TRIAL LAWYER'S GUIDE vii (1984) ("Ten years ago only a handful of cases could be found on motions to disqualify lawyers for conflict of interest. Today the cases are legion."); Dennis M. O'Dea, *The Lawyer-Client Relationship Reconsidered: Methods for Avoiding Conflicts of Interest, Malpractice Liability, and Disqualification*, 48 GEO. WASH. L. REV. 693 (1980) ("In recent years, motions to disqualify an opposing counsel for violations of ethical obligations have proliferated.").

12. *See* Evans v. Artek Sys. Corp., 715 F.2d 788, 791-92 (2d Cir. 1983) (noting that there is a high burden of proof for disqualification motions because they are increasingly being used for tactical reasons); *see also* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.7:103 at 229 (2d ed. Aspen Law & Business Supp. 1998) ("Lawyers too often gain time or other advantage by moving to disqualify opposing counsel on grounds that are frivolous or nearly so."); ABA/BNA LAWS. MAN. ON PROF. CONDUCT § 51:1901 (1997) (noting that motions to disqualify have "come into use as a tactical tool as well as a legitimate means of remedying one lawyer's unfair advantage over an opponent"); WOLFRAM, *supra* note 5, § 7.1 at 329 (noting courts are "wary" of the "temptations for strategic manipulation that disqualification motions present"); *see also infra* note 258 and accompanying text.

13. *See, e.g.*, Goss Graphics Sys., Inc. v. Man Roland Druckmaschinen Aktiengesellschaft, No. C00-0035 (N.D. Iowa 2000), *reported in* 16 ABA/BNA LAW. MAN. ON PROF. CONDUCT; CURRENT REPORTS 292 (June 21, 2000) (disqualifying Kirkland and Ellis, a prominent Chicago-based law firm, due to conflict of interest caused by dual representation; court rejected Kirkland's argument that prior broad conflicts waiver should supersede subsequent narrower waiver which clearly barred Kirkland from representing the corporation's litigation adversaries); Asyst Tech., Inc. v. Empak, Inc., 962 F. Supp. 1241

offending attorney.[14] In light of the significant attorney self-interest in joint representation,[15] the illusory nature of client consent,[16] and the increased emphasis on profits in legal practice,[17] it is time to reevaluate the idea of joint representation.

Consider the following common example: ABC Company is a client of Attorney Anne. A former ABC employee is suing the company for sexual

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(N.D. Cal. 1997) (disqualifying Wilson, Sonsini, Goodrich & Rosati); Blue Cross and Blue Shield of N.J. v. Philip Morris, Inc., 53 F. Supp. 2d 338, 347 (E.D.N.Y. 1999) (disqualifying Winston & Strawn); Islander East Rental Program v. Ferguson, 917 F. Supp. 504, 506 (S.D. Tex. 1996) (disqualifying Fulbright & Jaworski); Shadow Traffic Network v. Superior Court, 29 Cal. Rptr. 2d 693 (Ct. App. 1994) (disqualifying Latham & Watkins). *But see* Universal City Studios, Inc. v. Reimerdes, 98 F. Supp. 2d 449, 455 (S.D.N.Y. 2000) (although law firm was "acting improperly" and its "breach of ethics cannot reasonably be minimized," disqualification motion denied because "[t]here is substantial reason to believe that the motion to disqualify the Frankfurt firm is motivated at least partly by tactical considerations").

14. *See, e.g.*, Cummings v. Sea Lion Corp., 924 P.2d 1011, 1022-33 (Alaska 1996) (punitive damages awarded where attorney jointly represented both parties to promissory note and creation of limited partnership); Peters v. Hyatt Legal Servs., 469 S.E.2d 481 (Ga. Ct. App. 1996) (punitive damages awarded where firm jointly represented husband and wife in divorce action); Bell v. Clark, 670 N.E.2d 1290 (Ind. 1996) (punitive damages awarded where attorney jointly represented real estate limited partnership and general partner). *See generally* Welty v. Criscio, 2000 WL 728678, at *4 (Conn. Super. Ct. May 22, 2000) ("The lawyer who steals a client's funds, the lawyer who is disloyal to a client, and the lawyer who betrays the confidence of a client all engage in morally reprehensible activity. The assessment of punitive damages in such cases is morally appropriate."); Home Ins. Co. v. Wynn, 493 S.E.2d 622, 628 (Ga. Ct. App. 1997) ("Legal malpractice . . . may warrant the imposition of punitive damages.").

15. *See infra* notes 230-31 and accompanying text.

16. *See infra* notes 223-29 and accompanying text.

17. *See* WALT BACHMAN, LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION 102 (1995) ("It would be hard to overestimate the ascendant importance of billable hours in our legal profession. They are the litmus test of the worth and financial success of a lawyer or law firm"); ZITRIN & LANGFORD, *supra* note 4, at 80-87 (discussing billing pressures and abuses inspired by hourly rate); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 759 (1990) (noting "increasingly competitive and intense" nature of law practice); Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 707 (1998) (noting that lawyers' lives are "dominated by the pursuit of billable hours"); *see also* MARK PERLMUTTER, WHY LAWYERS LIE AND ENGAGE IN OTHER REPUGNANT BEHAVIOR 51-64, 69-77 (1997) (discussing changes and pressures in the legal profession); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 899-900 (1999) ("The market for lawyers' services has become intensely competitive. As the number of lawyers has soared, competition for clients has become ferocious.").

harassment. Also named in the complaint is Supervisor Sam, the alleged perpetrator. No one has yet conducted an investigation into the complaint's allegations. ABC, honestly convinced of Sam's innocence, asks Attorney Anne to represent both Supervisor Sam and the company in the lawsuit. How should Attorney Anne respond?

As this Article will discuss,[18] at a minimum Attorney Anne should not agree to represent Sam until she completes an initial investigation and obtains waivers from both Sam and ABC. Even these initial prerequisites go beyond an attorney's current duties under existing ethical rules.[19] However, this Article will further argue that these protections ultimately are insufficient and Anne must refuse to represent Sam and ABC jointly.[20]

This Article examines the historical background behind the concept of joint representation, the current proscriptions contained within the ethical rules, and various situations in which problems may arise when joint representation is attempted. The Article then reviews the arguments traditionally offered in support of joint representation, and examines the deficiencies in the current guidelines for attorneys contemplating joint representation. Finally, the Article concludes that the dangers inherent in joint representation far outweigh any potential benefits. As a result, the bar should substitute its current rule, which permits joint representation with the consent of both clients, for a per se rule prohibiting joint representation except in class actions.[21]

II. HISTORICAL BACKGROUND OF JOINT REPRESENTATION

Concern over conflicts of interest has existed since the beginnings of the legal profession.[22] Cases have repeatedly noted that "no man shall serve two masters."[23] The reason behind this concern was to preserve client

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18. *See infra* notes 221-22 and accompanying text.

19. *See infra* notes 131-33 and accompanying text.

20. *See infra* notes 271-72 and accompanying text.

21. *See infra* notes 238-39 and accompanying text.

22. 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 16.2 at 689 (5th ed. 2000).

23. *Matthew* 6:24 (King James). *See, e.g.*, Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976); Sun Bldg. & Loan Ass'n v. Rashkes, 183 A. 274 (N.J. Ch. 1936); Alexandria Gazette Corp. v. West, 93 S.E.2d 274 (Va. 1956); Easley v. Brookline Trust Co., 256 S.W.2d 983 (Tex. Civ. App. 1952); Jeffry v. Pounds, 136 Cal. Rptr. 373 (Ct. App. 1977); *see also* ABA/BNA LAWS. MAN. ON PROF. CONDUCT § 51:301 (1987) ("No man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one, and despise the other."); *accord* RAYMOND L. WISE, LEGAL ETHICS 240, 256 (2d ed. 1970).

confidence in attorneys, and thereby, public confidence in the legal system.[24]

> The profession of law makes the attorney a trustee for the client, an unsolicited beneficiary who has placed his property and sometimes his life in the care of his attorney. The responsibility is great and is both a legal and a moral one. It cannot be delegated and demands undivided loyalty and fidelity.[25]

This objective can be traced back to early legal writings.[26]

Historically, however, joint representation was prohibited only under circumstances where, by today's standards, the conflict of interest was obvious and incurable.[27] Just a generation ago, an attorney's decision to represent two or more clients jointly was acceptable legal practice.[28] A 1935 case noted it was a "common practice" for lawyers to represent

> both partners in drawing articles of copartnership or drawing agreements for the dissolution of copartnership, . . . both the grantor and the grantee in the sale of real property, . . . both the seller and purchaser in the sale of personal property, . . . both the lessor and the lessee in the leasing of property, . . . [and] both the lender and the borrower in handling a loan transaction.[29]

Such joint representation was rationalized on the basis of efficiency and the benefits to the clients.[30]

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24. *See* HENRY S. DRINKER, LEGAL ETHICS 104-05 (1953); WISE, *supra* note 23, at 256, 258.

25. WISE, *supra* note 23, at 256.

26. 2 J.B. ATLAY, THE VICTORIAN CHANCELLORS 460 (1908) (crediting Lord Herschell with stating that, "[i]mportant as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it"); *see also* Kramer v. Scientific Control Corp., 534 F.2d 1085, 1091-92 (3d Cir. 1976).

27. *See* DRINKER, *supra* note 24, at 103 ("The injunction against being on both sides of a case goes back to the earliest times, being contained in the London Ordinance of 1280.").

28. 2 MALLEN & SMITH, *supra* note 22, § 16.1 at 688. *See generally* Lessing v. Gibbons, 45 P.2d 258 (Cal. Ct. App. 1935); *see also* Note, *Development in the Law: Conflicts of Interest in the Legal Profession*, *supra* note 6, at 1303 (noting that attorneys "frequently" undertake joint representation "for example, when giving counsel to both buyer and seller in drafting a contract or to both husband and wife in a divorce proceeding").

29. *Lessing*, 45 P.2d at 261.

30. *Id.*

> Were this not the rule, the common practice of attorneys in acting for both partners in drawing articles of copartnership or drawing agreements for the dissolution of

The failure to recognize the dangers of joint representation is attributable, in part, to some of the same reasons responsible for other earlier legal practices. For example, under earlier practices, bar associations often adopted minimum fee schedules[31] and prohibited lawyer advertising.[32] The underlying justifications for these practices were little more than era-specific notions of professionalism,[33] shaped by the customs and practices of the time. The same is true of joint representation. Joint representation has been a longstanding practice in which the potential benefits have been emphasized, while the potential dangers have been downplayed. Thus, the custom of undertaking joint representation justified its practice.[34] In addition, the

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> copartnership, in acting for both the grantor and the grantee in the sale of real property, in acting for both the seller and purchaser in the sale of personal property, in acting for both the lessor and the lessee in the leasing of property, and in acting for both the lender and the borrower in handling a loan transaction, would be prohibited even though done in the utmost good faith and with the full consent of all parties concerned. In each of these circumstances there is the possibility of conflict, if not an actual conflict, in the interests of the persons represented, but it cannot be said as a matter of law that an attorney is prohibited from acting for both parties in such cases with the knowledge and consent of both.

Id; see also Wallace v. Furber, 62 Ind. 103 (1878); Sugarman v. Jayne, 198 N.W. 903 (Mich. 1924); Bloomingdale Bros. v. Hudson, 147 Misc. 759 (N.Y. App. Div. 1933); Deupree v. Garnett, 277 P.2d 168 (Okla. 1954).

This former practice continues to be defended and encouraged in the concept of "lawyering for the situation." *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT 2.2 (1999); *see also* HAZARD & HODES, *supra* note 12, § 2.2:102 at 512 ("The assumption underlying [Model] Rule 2.2 is that two or more clients of the same lawyer can have both adverse interests and overriding common goals."); GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 64-65 (1978):

> [A lawyer for the situation] is no one's partisan and, at least up to a point, everyone's confidant. He can be the only person who knows the whole situation. He is an analyst of the relationship between the clients, in that he undertakes to discern the needs, fears, and expectations of each and to discover the concordances among them.

However, "the Restatement takes the position that adoption of a separate rule governing 'intermediation' was probably a mistake," and treats intermediation as simply the representation of multiple clients. Moore, *supra* note 5, at 554. *See generally* John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741.

31. *See* Goldfarb v. Va. State Bar, 421 U.S. 773 (1975).

32. *See* Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

33. *See id.* at 368-72 (discussing and rejecting the argument that lawyer advertising would have adverse effect on professionalism); *Goldfarb*, 421 U.S. at 786-88 (rejecting argument that "competition is inconsistent with the practice of a profession").

34. *See* HAZARD, *supra* note 30, at 60-61. Professor Hazard discusses 1916 Senate hearings on Louis D. Brandeis as Justice of United States Supreme Court, in which Brandeis

historical, idealized notion of the "lawyer-statesman,"[35] and the belief that the practice of law was a noble calling,[36] contributed to a focus on the lawyer's perceptions of morality or ethics,[37] and a sense that lawyers were

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was accused of representing conflicting interests in, among other things, putting together the bargain between parties to a business deal. Brandeis

> defended his conduct not only on the ground of its being common practice but also on the ground that it was right. In the instances questioned, he said, he did not regard himself as being lawyer for one of the parties to the exclusion of the others, but as 'lawyer for the situation.' Eventually, the charge did not so much collapse as become submerged in concessions from other reputable lawyers that they had often done exactly as Brandeis.

Id.

35. *See* Rufus Choate, *The Position and Functions of the American Bar, as an Element of Conservatism in the State*, *in* 1 THE WORKS OF RUFUS CHOATE, WITH A MEMOIR OF HIS LIFE 429 (1862) ("[W]hile lawyers, and because we are lawyers, we are statesmen. We are by profession statesmen."); *see also* Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555 (1905). Brandeis notes that in an earlier period "[n]early every great lawyer was then a statesman; and nearly every statesman, great or small, was a lawyer," and urges

> by far the greater part of the work done by lawyers is done not in court, but in advising men on important matters, and mainly in business affairs . . . . The questions which arise are more nearly questions of statesmanship. The relations created call in many instances for the exercise of the highest diplomacy. The magnitude, difficulty and importance of the problems involved are often as great as in the matters of state with which lawyers were formerly frequently associated. The questions appear in a different guise; but they are similar.

Id. See also William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 HARV. J.L. & PUB. POL'Y 537 (1986); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 16 (1993) (noting "the appeal of the lawyer-statesman ideal and its wide acceptance within the profession throughout the nineteenth century," and that "the ideal of the lawyer-statesman . . . affirmed the self-worth of lawyers as a group").

36. *See* Tommy Prud'homme, *The Need for Responsibility Within the Adversary System*, 26 GONZ. L. REV. 443, 450 (1991). Before the turn of the century,

> [t]he law was considered a noble calling, entered into in the spirit of public service. Since profits from particular clients were not all that important, both because of the perception of law as a noble calling and because rural lawyers made their living off of a large number of not-too-wealthy clients, the lawyer was relatively independent of the client. The lawyer could, and did, refuse to represent people because of the morality of their cause, and the lawyer could, and did, refuse to do on behalf of the client what the lawyer would not do on the lawyer's own behalf.

Id.; *see also* Barry Sullivan, *Professions of Law*, 9 GEO. J. LEGAL ETHICS 1235, 1235 (1996) ("Many lawyers in this country think of themselves as members of a learned and noble profession, whose history and culture are marked by great deeds and high ideals.").

37. *See* David Hoffman, *Fifty Resolutions in Regard to Professional Deportment*, 2 A COURSE OF LEGAL STUDY 755 (2d ed. 1836), *reprinted in* DRINKER, *supra* note 24, at 340.

somehow above the fray.[38] Perhaps as a natural consequence, lawyers believed they would hold themselves to high moral standards and would not be swayed by self-interest or conflicting loyalties, which permitted them to handle what today would be considered impermissible conflicts of interest.[39]

> My client's conscience and my own are distinct entities: and though my vocation may sometimes justify my maintaining as facts or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go. In civil cases, if I am satisfied from the evidence that the fact is against my client, he must excuse me if I do not see as he does, and do not press it; and should the principle also be wholly at variance with sound law, it would be dishonorable folly in me to endeavor to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day.

Id. at 346 ("I am resolved to make my own, and not the conscience of others, my sole guide."); *id.* at 340 ("I will never plead the Statute of Limitations, when based on the mere efflux of time; for if my client is conscious he owes the debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery.").

> I will never plead or otherwise avail of the bar of Infancy against an honest demand. If my client possesses the ability to pay, and has no other legal or moral defense . . . he must seek for other counsel to sustain him in such a defense . . . . [I]n this, as well as in that of limitation . . . I shall claim to be the sole judge . . . of the occasions proper for their use.

Id.

38. *See* DRINKER, *supra* note 24, at 5, 210-11 (noting that because the practice of law was viewed as a form of public service rather than as a means of earning a living, lawyers viewed themselves as "above" trade); *see also* HAZARD, *supra* note 30, at 64-65. Professor Hazard describes lawyers as intermediaries as

> contribut[ing] historical perspective, objectivity, and foresight into the parties' assessment of the situation. He can discourage escalation of conflict and recruitment of outside allies. He can articulate general principles and common custom as standards by which the parties can examine their respective claims. He is advocate, mediator, entrepreneur, and judge, all in one. He could be said to be playing God . . . . When a relationship between the clients is amenable to 'situation' treatment, giving it that treatment is perhaps the best service a lawyer can render to anyone. It approximates the ideal forms of intercession suggested by the models of wise parent or village elder.

Id. See KRONMAN, *supra* note 35, at 14-16 (describing lawyer-statesman as "a leader in the realm of public life, and other citizens look to him for guidance and advice, as do his private clients," as "distinguished by the exceptional wisdom he displays [in the art of deliberation]," and as "not just an accomplished technician but a distinctive and estimable type of human being—a person of practical wisdom.").

39. Note, for example, that formerly there were no legal or ethical restrictions upon a lawyer having a large financial interest in a corporation which the lawyer represented. *See* DRINKER, *supra* note 24, at 109.

Over time, however, increased awareness of the dangers of joint representation changed some of the profession's practices. For example, although historically it was common for an attorney to represent both parties in the transfer of a property interest,[40] today such a practice is usually considered improper.[41] Similarly, older cases permitted an attorney for one of the parties in a bankruptcy proceeding also to represent the receiver[42]—a practice that generally would not be permitted today.[43] Historically joint representation was also common in criminal defense,[44] a practice which today is disfavored.[45]

The current approach to joint representation has been to authorize such representation so long as the attorney obtains informed consent from both clients.[46] However, a few courts have prohibited joint representation in certain specific, recurring situations despite the clients' informed consent. These situations include the representation of both husband and wife in

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40. *See* Lessing v. Gibbons, 45 P.2d 258 (Cal. Ct. App. 1935); Craft Builders, Inc. v. Ellis D. Taylor, Inc., 254 A.2d 233, 236 (Del. 1969); Kreis v. Block, 75 A.2d 523, 524 (D.C. 1950); Richards v. Wright, 119 P.2d 102, 104 (N.M. 1941).

41. *See* Baldasarre v. Butler, 625 A.2d 458 (N.J. 1993) (announcing per se prohibition of joint representation of buyer and seller in complex commercial real estate transactions); People v. Bollinger, 681 P.2d 950 (Colo. 1984); *In re* Dolan, 384 A.2d 1076 (N.J. 1978) (imposing professional disciplinary sanctions upon attorney for representing buyer and seller in single real estate transaction); Adams v. Chenowith, 349 So. 2d 230 (Fla. Dist. Ct. App. 1977); *see also* Robert H. Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 814 (1977) ("Dual representation is virtually always improper in transactions such as the sale of property because of the very high probability that future conflicts of interest will develop.").

42. *See* J.C. Turner Lumber Co. v. Toomer, 275 Fed. 678 (5th Cir. 1921); Shainwald v. Lewis, 8 Fed. 878 (D. Cal. 1881); Cahall v. Lofland, 107 A. 769 (Del. Ch. 1919).

43. *See In re* Cal. Canners and Growers, 74 B.R. 336 (N.D. Cal. 1987); *In re* Braten, 73 B.R. 896 (S.D.N.Y. 1987). *See generally* Nancy B. Rapoport, *Turning and Turning in the Widening Gyre: The Problem of Potential Conflicts of Interest in Bankruptcy*, 26 CONN. L. REV. 913 (1994).

44. *See* WOLFRAM, *supra* note 5, § 8.2 at 412 (noting joint representation of criminal codefendants was, at one time, a "relatively common practice").

45. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT R. 1.7, cmt. 7 (1999) ("The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant.").

46. *See* Dzienkowski, *supra* note 30, at 758 ("As long as the lawyer could act to protect both parties' interests and obtained their consent, such multiple client representation was considered proper."); *see also* Taylor v. Vail, 66 A. 820, 823 (Vt. 1907) ("The position of an attorney who acts for both parties, to the knowledge of each, in the preparation of papers needed to effect their purpose, and gives to each the advice necessary for his protection, is recognized by the law as a proper one.").

divorce proceedings,[47] and the representation of both buyer and seller in real property transfers.[48] Interestingly, rather than recognizing that the concerns rendering joint representation unethical in these specific situations also applied to joint representation generally, the prohibitions against joint representation were instead limited to specific subject matter areas.[49] Moreover, the ethical rules and most courts continue to permit joint representation—even in these areas recognized as fraught with conflicts—so long as the lawyer obtains the affected clients' consent.

These developments are reflected in the evolution of the professional standards governing lawyers' conduct. Although the concept of "nonconsentable" conflicts of interest is now acknowledged,[50] the underlying concerns have not been applied to joint representation generally, but again, tend to be described by subject matter areas.[51]

III. ETHICAL RULES ADDRESSING JOINT REPRESENTATION

"Every profession and business has its own standards or ideals. These standards or rules we call the ethics of the special business or profession. The ethics of a profession are its rules of conduct. They represent its ideals; they form its character."[52]

The legal profession has several sources of legal ethics. The American Bar Association's Model Code of Professional Responsibility and Model

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47. *See* Dzienkowski, *supra* note 30, at 758-59 ("The courts and the state bar associations . . . began to question multiple client representation in two discrete contexts: the representation of buyers and sellers of real estate and the representation, in a divorce, of both spouses."); *see, e.g.*, MacDonald v. Wagner, 5 Mo. App. 56 (1878); Johnson v. Johnson, 53 S.E. 623 (N.C. 1906).

48. *See* Dzienkowski, *supra* note 30, at 758-59:

> In the context of real estate practice, courts and bar associations initially permitted lawyers simultaneously to represent buyers and sellers of real estate, as long as the lawyer provided the clients with adequate disclosure of the conflict of interest and obtained the clients' consent. Over the years, however, several courts and bar associations strongly discouraged the simultaneous representation of buyers and sellers of real estate because this situation involved such a serious conflict of interest.

49. *See infra* note 51 and accompanying text.

50. *See* WOLFRAM, *supra* note 5, at 337-38 (noting rules "recogniz[e] a category of 'nonconsentable' conflicts"); *see also* RESTATEMENT, *supra* note 2, § 122(2); *id.* § 122, cmt. g(iv) (discussing nonconsentable conflicts).

51. *See* Moore, *supra* note 6, at 213 (noting courts and ethics committees have failed to develop general guidelines, but instead prefer to issue specific guidelines in common situations).

52. ORRIN N. CARTER, ETHICS OF THE LEGAL PROFESSION 13 (1915).

Rules of Professional Conduct set forth ethical rules and guidelines, which form the basis for the ethical rules of most of the individual states.[53] The recently adopted *Restatement (Third) of the Law Governing Lawyers* summarizes the existing rules and case law in this area.[54] In addition, the American Bar Association, and state, county, and local bar associations, often issue formal and informal opinions concerning ethical issues.[55]

There are several overarching considerations underlying the various requirements and proscriptions of professional conduct. The primary considerations include the client's expectation of receiving the attorney's loyalty[56] and the preservation of any confidences communicated by the client to the attorney.[57] Another consideration is preventing harm to

53. *See* MODEL CODE OF PROF. RESPONSIBILITY (1983); MODEL RULES OF PROF. CONDUCT (1999). Thirty-nine states, plus the District of Columbia and the Virgin Islands, have adopted the Model Rules; with the exception of California, the remaining states base their standards on the Model Code. *See* COMPENDIUM OF PROF. RESPONSIBILITY RULES AND STANDARDS 517, at 7-8 and inside back cover (1997); *see also* Zacharias, *supra* note 6, at 411 n.17 (providing a detailed description of the jurisdictions that have adopted provisions identical to Model Rule 1.7 and those that have made minor modifications). California has adopted neither the Model Code nor the Model Rules. *See* CAL. RULES OF PROF. CONDUCT (1992).

54. *See* RESTATEMENT, *supra* note 2.

55. *See* ABA/BNA LAWS. MAN. ON PROF. CONDUCT (1997).

56. *See* Fund of Funds v. Arthur Andersen & Co., 567 F.2d 225, 232-33 (2d Cir. 1977) (client has "absolute right to firm's undivided loyalty"); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976); United States v. Nabisco, 117 F.R.D. 40 (E.D.N.Y. 1987); Glueck v. Jonathan Logan, Inc., 512 F. Supp. 223 (S.D.N.Y. 1981); Matter of Richard's Estate, 602 P.2d 122 (Kan. Ct. App. 1979); McCourt Co. v. FPC Properties, 434 N.E.2d 1234 (Mass. 1982); Acorn Printing Co. v. Brown, 385 S.W.2d 812 (Mo. Ct. App. 1964); Chase v. Sullivan's of Middletown, Inc., 108 A.D.2d 713 (N.Y. App. Div. 1985); Jeffry v. Pounds, 136 Cal. Rptr. 373, 376 (Ct. App. 1977); *see also* MODEL RULES OF PROF. CONDUCT R. 1.7, cmt. 1 (1999) ("Loyalty is an essential element in the lawyer's relationship to a client"); MODEL CODE OF PROF. RESPONSIBILITY Canon 5, EC 5-1 (1983):

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Commentators have noted that loyalty is "the primary, if not exclusive, reason for a rule concerning nonwaivable current client conflicts." Peter R. Jarvis & Bradley F. Tellam, *When Waiver Should Not Be Good Enough: An Analysis of Current Client Conflicts Law*, 33 WILLAMETTE L. REV. 145, 174 (1997); Marc I. Steinberg & Timothy U. Sharpe, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1, 3-4 (1990) ("The rule against simultaneous representation is based principally on the duty of undivided loyalty.").

57. *See* MODEL CODE OF PROF. RESPONSIBILITY Canon 4 (1983); *id.* DR 4-101(B)(2);

clients.[58] These provisions are meant to protect "[b]oth the fact and the appearance of total professional commitment."[59] Still other considerations include preserving the lawyer's obligations to the judicial system,[60] protecting the lawyer's professional reputation,[61] the public interest,[62] and the lawyer's self-interest[63] and protectionism.[64]

MODEL RULES OF PROF. CONDUCT R. 1.6 (1999); Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980); American Dredging Co. v. City of Philadelphia, 389 A.2d 568 (Pa. 1978).

58. *See In re* Pfeffner's Guardianship, 194 S.W.2d 233, 237 (Mo. Ct. App. 1946) (basis of conflicts rule is to prevent harm to clients); Rice v. Davis, 20 A. 513, 515 (Pa. 1890) (conflicts rule designed to effectuate public policy of protecting clients); *see also* ABA MODEL RULES OF PROF. CONDUCT R. 1.15, cmt. 1 (1999) ("A lawyer should hold property of others with the care required of a professional fiduciary."); *id.* R. 7.3(a) ("A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."); *id.* R. 7.3, cmt. 1:

> There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

59. Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980); *see also* American Dredging Co. v. City of Philadelphia, 389 A.2d 568 (Pa. 1978); ABA/BNA LAWS. MAN. ON PROF. CONDUCT § 51:102 (1997).

60. *See* MODEL RULES OF PROF. CONDUCT R. 3.1, cmt. 1 (1999) ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure."); *id.* R. 3.2 cmt. ("Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose."); *id.* R. 3.3(a):

> A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

61. *See* MODEL RULES OF PROF. CONDUCT R. 7.1 (1999) ("A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."); *see also id.*

The case law has described the ethical duties of lawyers in selfless, sweeping terms. "Regardless of the particular language used by the courts and the rules of professional conduct to define the standard, a common principle underlies all of them: the interests of the client are primary, and the interests of the lawyers are secondary."[65] Any doubts as to the existence of a conflict of interest "should be resolved in favor of disqualification."[66]

R. 1.2(b) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

62. *See* MODEL RULES OF PROF. CONDUCT R. 6.1 (1999) ("A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year."); *id.* R. 6.2 ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause . . . .").

63. *See* MODEL RULES OF PROF. CONDUCT R. 1.2, cmt. 6 (1999) ("The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action.").

> A lawyer may reveal such [confidential] information to the extent the lawyer reasonably believes necessary: . . . (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id. R. 1.6(b); *id.* cmt. 18 ("If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge."); *id.* ("A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it.").

64. *See* MODEL RULES OF PROF. CONDUCT R. 5.4(b) (1999) ("A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."); *id.* at cmt. (justifying Rule 5.4 as necessary "to protect the lawyer's professional independence of judgment"); *see also id.* R. 5.5(b) ("A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."); *id.* at cmt. ("limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons"). *See generally* Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1144-45 (2000) (noting purpose of rules against multidisciplinary practice to "protect all lawyers against competition from nonlawyers," and that rules "were transparently motivated by the financial self-interest of the bar's leadership.").

65. Haagen-Dazs Co. v. Perche No! Gelato, Inc., 639 F. Supp. 282, 286 (N.D. Cal. 1986).

66. Westinghouse Electric Corp. v. Gulf Oil Corp., 588 F.2d 221, 225 (7th Cir. 1978); *see also* Int'l Bus. Machs. Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978); Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975).

However, despite these exhortations, these principles have not always been applied to conflicts of interest in practice.[67]

This Part provides a brief history of the development of national professional standards for lawyers, and then examines the three most powerful sources of ethical rules—the Model Code, the Model Rules, and the Restatement—with respect to the rules governing joint representation.

A. Historical Perspective on Professional Standards

As early as 1836, commentators were providing exhortations regarding lawyer conduct.[68] Early writings observed the necessity for faithfulness to clients,[69] and prohibited lawyers from representing in a subsequent matter the opposite side from that previously represented.[70] Although the earliest state ethics code strongly discouraged the representation of conflicting interests, it nevertheless permitted such representation with informed consent.[71]

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67. *See infra* notes 207-09 and accompanying text.

68. *See* David Hoffman, *Fifty Resolutions in Regard to Professional Development*, *in* 2 A COURSE OF LEGAL STUDY 752 (2d ed. 1836), *reprinted in* DRINKER, *supra* note 24, at 338-51 (1953); *see also* GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 109-10 (5th ed. 1854). *See generally* Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992) (describing the influence of Sharswood's writings on the 1908 Canons of Professional Ethics). These early standards, like the Canons of Professional Ethics which followed, were merely aspirational, with no specific consequences for violations. *See* N. Lee Cooper & Stephen F. Humphreys, *Beyond the Rules: Lawyer Image and the Scope of Professionalism*, 26 CUMB. L. REV. 923, 926, 928 (1995-1996).

69. *See* David Hoffman, *Fifty Resolutions in Regard to Professional Deportment*, 2 A COURSE OF LEGAL STUDY 752 (2d ed. 1836), *reprinted in* DRINKER, *supra* note 24, at 342 ("To my clients I will be faithful; and in their causes zealous and industrious.").

70. *See id.* at 339:

> If I have ever had any connection with a cause, I will never permit myself (when that connection is from any reason severed) to be engaged on the side of my former antagonist. Nor shall any change in the formal aspect of the cause induce me to regard it as a ground of exception. It is a poor apology for being found on the opposite side, that the present is but the ghost of the former cause.

See also GEORGE SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW 50 (Philadelphia 1854) ("The criminal and disgraceful offense of taking fees of two adversaries ought, like parricide in the Athenian law, to be passed over in silence in a code of professional ethics.").

71. *See* Alabama State Bar Ass'n, Code of Ethics, 118 Ala. XXIII, XXVIII (1899), *reprinted in* DRINKER, *supra* note 24, at 358:

By the turn of the century, the American Bar Association became a promoter of uniform ethical provisions for adoption by the states, noting, "It is not . . . difficult to crystallize abstract ethical principles into a series of canons applicable to the usual concrete ethical problems which confront the lawyer in the routine of practice."[72] The American Bar Association subsequently adopted its Canons of Professional Ethics in 1908, which was the first formal codification of professional standards on the national level.[73]

The Canons did not expressly address joint representation except in a general conflict of interest provision. Canon 6 provided, in part:

> It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.[74]

> An attorney can never represent conflicting interests in the same suit or transaction, except by express consent of all so concerned, with full knowledge of the facts. Even then, such a position is embarrassing, and ought to be avoided. An attorney represents conflicting interests, within the meaning of this rule, when it is his duty, in behalf of one of his clients, to contend for that which duty to other clients in the transaction requires him to oppose.

See also id. at 359:

> An attorney is in honor bound to disclose to the client at the time of retainer, all the circumstances of his controversy, which might justly influence the client in the selection of his attorney. He must decline to appear in any cause where his obligation or relations to the opposite parties will hinder or seriously embarrass the full and fearless discharge of all his duties.

See generally Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471 (1998) (historical background to Alabama's 1887 Code of Ethics).

72. 1906 ABA ANNUAL REPORTS 604.

73. *See* ABA CANONS OF PROF. ETHICS (1908). Although the ABA's Canons of Professional Ethics constituted the first codification at the national level, the State of Alabama had become the first jurisdiction to create a code of conduct for lawyers nearly two decades earlier, in 1887. *See* DRINKER, *supra* note 24, at 23; Alabama State Bar Ass'n, Code of Ethics, 118 Ala. XXIII, XXVIII (1899), *reprinted in* DRINKER, *supra* note 24, at 352-63. *See generally* Marston, *supra* note 71, at 471 (comparing Alabama's ethics code to earlier writings of George Sharswood and later state ethics codes). Ten states adopted Alabama's Code with minor revisions, and another fourteen states had created codes of ethics from other sources, before the ABA's Canons were adopted in 1908. *See id.*

74. CANONS OF PROF. ETHICS Canon 6 (1908).

Accordingly, Canon 6 authorized the representation of conflicting interests so long as the attorney obtained the clients' informed consent. Nearly one hundred years later, this rule remains basically unchanged.

The Canons of Professional Ethics remained in place for sixty years, growing from the original thirty-two canons to forty-seven.[75] In the mid-1960s, the American Bar Association undertook a comprehensive review of the Canons of Professional Ethics. As a result of this review, the Canons were superseded in 1969 with the adoption of the Model Code of Professional Responsibility.

B. The Model Code of Professional Responsibility

The Model Code clarified that many of a lawyer's obligations were legal, rather than merely aspirational.[76] For example, the duty to avoid conflicts of interest was unambiguously made a matter of legal obligation.[77] The distinction between legal duty and other kinds of ethical obligation was formalized in the Model Code's distinction between "Disciplinary Rules" and "Ethical Considerations." The Disciplinary Rules, indicated by "DR," were mandatory. The Disciplinary Rules stated the minimum level of conduct below which no lawyer could fall without being subject to disciplinary action.[78] In contrast, the Ethical Considerations, indicated by "EC," were aspirational and represented the objectives toward which lawyers should strive.[79] A major source of the Model Code's rules stemmed from judicial decisions in malpractice actions and motions to disqualify.[80]

The Model Code represented disciplinary rules which, for the first time, could result in actual sanctions against a lawyer.[81] The Model Code was

75. *See* Cooper & Humphreys, *supra* note 68, at 928.

76. Older cases noted that codes of legal ethics, as adopted by bar associations, "have no statutory force." However, the courts noted that the codes were "illuminating" and sometimes would incorporate the codes as "an ideal standard of conduct which has been long and well recognized and upheld in theory by both bench and bar." *In re* Cohen, 261 Mass. 484, 487 (1928); *see also* Herman v. Acheson, 108 F. Supp. 723, 726 (D.D.C. 1952).

77. The Bar's ethical rules do not have the force of law until adopted as law by the courts, the legislature, or the regulatory authority charged with the discipline of lawyers in a particular jurisdiction. *See* Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435, 438 (9th Cir. 1983).

78. *See* MODEL CODE OF PROF. RESPONSIBILITY, Preliminary Statement at 3 (1983).

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

80. *See* Lawrence J. Latto, *The Restatement of the Law Governing Lawyers: A View From the Trenches*, 26 HOFSTRA L. REV. 697, 726-27 (1998) ("[T]he text of the [Model Code] was in large part a Restatement of rules established in judicial decisions.").

81. *See* Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1249

adopted by virtually all of the states, and was a significant factor in changing perceptions regarding conflicts of interest.[82] The Model Code, for example, contained a proscription against the appearance of impropriety, which had not appeared in the old canons.[83] This new provision greatly influenced perceptions of conflicts of interest.[84] The courts used this new provision as a heightened ethical requirement and treated public perceptions as controlling.[85]

The Model Code specifically addressed, and generally discouraged, joint representation. However, the provisions were too general to provide a workable standard. The Model Code provided that an attorney could not represent a client if it would be likely to involve the attorney in representing differing interests.

> 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, or if it would be

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(1991) (noting the 1908 Canons, representing "fraternal norms issuing from an autonomous professional society[,] have now been transformed into a body of judicially enforced regulations"); 2 MALLEN & SMITH, *supra* note 22, § 16.4 at 702 ("[T]he Model Code, the Model Rules, or a specific state version not only provides guidance in the area of professional responsibility, but also may carry legal force."); *see also* Nancy J. Moore, *Professionalism Reconsidered*, 1989 ANN. SURV. AM. L. 7, 14-15 (noting most recent professional codes "have been adopted as law in almost every jurisdiction").

82. *See* 2 MALLEN & SMITH, *supra* note 22, § 16.1 at 688; Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, *supra* note 6, at 1249 (noting before issuance of Model Rules in 1983, courts in every state except Maine and Mississippi had followed Model Code).

83. *See* WISE, *supra* note 23.

84. MODEL CODE OF PROF. RESPONSIBILITY Canon 9 (1983) ("A [l]awyer [s]hall [a]void [e]ven [t]he [a]ppearance [o]f [p]rofessional [I]mpropriety.").

85. *See* Deborah L. Rhode, *Conflicts of Commitment: Legal Ethics in the Impeachment Context*, 52 STAN. L. REV. 269, 283-84 (2000). Professor Rhode notes that Canon 9 resulted in a "heightened ethical requirement," and states:

> [a]ll too often in ordinary conflicts cases, courts traditionally treated public perceptions as controlling without specifying whose perceptions matter or how they have been assessed. Such indiscriminate and indeterminate use of the appearance standard led to its exclusion from the ABA's Model Rules of Professional Conduct.

Accord Lee E. Hejmanowski, *An Ethical Treatment of Attorneys' Personal Conflicts of Interest*, 66 S. CAL. L. REV. 881, 903-04 (1993); *see also* WOLFRAM, *supra* note 5, § 7.1-4 at 319 (use of "appearance of impropriety" standard "has both obscured the process by which courts formulate their decisions and, in some instances, has lead to seriously erroneous results").

likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(c).[86]

The Model Code authorized the representation of "differing interests" when it was "obvious" that the lawyer could "adequately" represent the interest of both clients and the lawyer obtained their informed consent.[87] The Model Code defined "differing interests" as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client."[88] However, this test was often misapplied due to a focus on the "loyalty" issue and inadequate consideration of the independent professional "judgment" issue.[89] For example, courts often found no impermissible conflict of interest in the joint representation of criminal codefendants so long as the defenses raised at trial were not inconsistent, without examining whether the joint representation might have constrained the lawyer from presenting other evidence or defenses on behalf of one codefendant due to the potential negative impact on the other codefendant.[90] Moreover, the Model Code did not define "obvious" or "adequate."[91] As one commentator observed, "[I]t is

86. MODEL CODE OF PROF. RESPONSIBILITY, DR 5-105(B) (1983); *see also* MODEL RULES OF PROF. CONDUCT R. 1.7(b) (1999):

> 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 . . . unless . . . 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.

Id.; 1 HAZARD & HODES, *supra* note 12, at 142 (Rule 1.7(b) permits an attorney to continue multiple representation if the attorney obtains client consent and the attorney reasonably believes that the representation will not be adversely affected).

87. *See* MODEL CODE OF PROF. RESPONSIBILITY, DR 5-105(C) (1983):

> In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

88. MODEL CODE OF PROF. RESPONSIBILITY, Definitions 1 (1983).

89. *See* Moore, *supra* note 6, at 217 ("[I]t is not uncommon for lawyers, or even judges, to misapply the test. Often they fail to recognize the existence of a conflict because they are preoccupied with the loyalty issue and thus give inadequate consideration to the independent professional judgment issue."); *id.* at 218 ("The danger of this exclusive focus on loyalty is that it ignores the potential contribution of a lawyer's knowledge, experience and objectivity—his independent professional judgment—in helping the client determine where his best interests lie.").

90. *See id.* at 273-74.

91. *See* Moore, *supra* note 6, at 212-13:

fair to say that what is and is not 'obvious' within the meaning of DR 5-105(c) is not obvious."[92]

Another source of guidance was contained within Canon 5 of the Model Code, which directed the lawyer to "resolve all doubts against the propriety of the representation."[93] As noted by one commentator, "[t]he consent of both clients does not of itself accord complete exoneration. Even if obtained after full disclosure, the consent does not relieve the attorney of searching his conscience to discover any latent impropriety not readily perceptible to the consenting laymen."[94]

Despite its ambitious undertaking, the Model Code did not end the confusion over professional standards, and many viewed the Model Code as ineffectual.[95] A decade later, President Nixon's Watergate scandals—

> The current ABA Code states that . . . multiple representation can be proper if informed consent is obtained, but only if it is 'obvious' that the representation will be 'adequate.' Unfortunately, no disciplinary rule defines 'adequate' and the little guidance provided in the Code's ethical considerations is, at best, ambiguous . . . . Numerous decisions and commentaries have attempted to ease the problem by suggesting specific guidelines in common situations of multiple representation. No consensus on the content of these guidelines has been reached, however; too much confusion and disagreement surround the relative significance of the various policy considerations that underlie the current conflicts of interest rule and its 'adequacy' standard.

92. Laurence S. Fordham, *There are Substantial Limitations on Representation of Clients in Litigation Which Are Not Obvious in the Code of Professional Responsibility*, 33 BUS. LAW. 1193, 1204 (1978); *see also In re* Anonymous Member of the S.C. Bar, 432 S.E.2d 467, 468 (S.C. 1993) (describing "obviousness" requirement of DR-105 as "ambiguous"). Similarly, no disciplinary rule defines "adequate." *See* Moore, *supra* note 6, at 213.

93. MODEL CODE OF PROF. RESPONSIBILITY, EC 5-15 (1983):

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with potentially differing interests . . . .

See also Moore, *supra* note 6, at 221-22 (noting "substantial confusion" surrounding Canon 5's distinction between "actual" and "potential" conflicts and the lack of clarity regarding "the significance of the actual-potential distinction").

94. WISE, *supra* note 23, at 258.

95. *See* L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909, 947 (1980); *see also* Debra Bassett Perschbacher & Rex R. Perschbacher, *Enter At Your Own Risk: The Initial Consultation & Conflicts of Interest*, 3 GEO. J. LEGAL ETHICS 689, 713 (1990) (noting that the Model Code "[swept] very broadly and provid[ed] no guidelines for its application").

frequently involving lawyers—inspired another comprehensive review, which, in 1983, resulted in the American Bar Association's Model Rules of Professional Conduct.[96]

C. *The Model Rules of Professional Conduct*

In the Model Rules of Professional Conduct, the drafters excluded the prohibition against "even the appearance of impropriety" and instead attempted to provide more detailed standards.[97] The Model Rules address conflicts of interest in six sections—Rules 1.7 through 1.12.

Model Rule 1.7 addresses the basic approach to conflicts and discusses simultaneous representation. Rule 1.7 contains two subparts. Subpart (a) generally prohibits a lawyer from representing a client if that representation would be "directly adverse" to another client.[98] An example of a Model Rule 1.7(a) conflict[99] is a lawyer who sues a present client on an unrelated

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96. *See* Heidi Li Feldman, *Beyond the* Model Rules*: The Place of Examples in Legal Ethics*, 12 GEO. J. LEGAL ETHICS 409, 409 (1999); Harry I. Subin, *The Lawyer as Superego: Disclosures of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1093 (1985) (arguing that Watergate inspired comprehensive review of Model Code); *see also* ROBERT H. ARONSON ET AL., PROBLEMS, CASES AND MATERIALS IN PROFESSIONAL RESPONSIBILITY 31 (1985) (asserting that partially because of Watergate, the American Bar Association appointed the Kutak Commission to draft the Model Rules of Professional Conduct).

97. *See* Perschbacher & Perschbacher, *supra* note 95, at 713; *see also* WOLFRAM, *supra* note 5, § 7.1 at 315 ("The framers of the 1983 Model Rules recognized the deficiencies of the Code treatment of conflict of interest problems and undertook to deal with the issues in a more straightforward and complete way.").

98. *See* MODEL RULES OF PROF. CONDUCT R. 1.7(a) (1999) ("A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.").

99. Authorities traditionally have distinguished between a mere "potential" conflict of interest, to which clients may consent, and an "actual" conflict, which requires the lawyer to withdraw from the representation. *See* MODEL CODE OF PROF. RESPONSIBILITY, EC 5-15 (1983); *see also* Sarah Ragle Weddington, *A Fresh Approach to Preserving Independent Judgment—Canon 6 of the Proposed Code of Professional Responsibility*, 11 ARIZ. L. REV. 31, 52 (1969). However, some recent authorities have acknowledged, correctly, that this distinction does not exist. *See* HAZARD & HODES, *supra* note 12, § 1.7:101 at 224:

> When the risk of substantive harm is small, however, or when the risk is high but the harm is likely to be slight even if it occurs, only modest restrictions are imposed, and those may be waived by properly counseled clients. But that does not indicate the absence of a conflict of interest, nor does it mean that the conflict is only a 'potential' conflict, as is sometimes said. Quite to the contrary. The conflict—the risk—already exists in the here and now; what is only 'potential' is the actual harm—the actual

matter, in which the client is likely to feel betrayed by the lawyer.[100] Such conflicts are consentable only if the lawyer obtains the client's informed consent and "reasonably believes the representation will not adversely affect the relationship with the other client."[101] In practice, conflicts coming within subpart (a) are generally understood to be nonconsentable.[102]

Most conflicts arise under subpart (b), which encompasses situations in which the adequacy of the representation is compromised by the lawyer's commitment to other clients, the lawyer's commitment to third parties, or the lawyer's self-interest.

> 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.[103]

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breakdown of the client-lawyer relationship or actual harm to the quality of the representation.

See also Proposed Rule 1.7—Public Discussion Draft, Ethics 2000 Commission at <http://www.abanet.org/cpr/e2k/rule17draft.html> (last visited June 23, 2000) (changing reference in comment 2 from "to determine whether there are actual or potential conflicts of interest" to simply "to determine whether there are conflicts of interest").

100. *See* MODEL RULES OF PROF. CONDUCT R. 1.7, cmt. 3 (1999) ("As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client . . . .").

101. MODEL RULES OF PROF. CONDUCT R. 1.7(a)(1) (1999).

102. *See* MODEL RULES OF PROF. CONDUCT R. 1.7, cmt. 7 (1999) ("Paragraph (a) prohibits representation of opposing parties in litigation."); *see also id.* at cmt. 5:

> [A]s indicated in paragraph (a)(1) with respect to representation directly adverse to a client . . . when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.

See generally HAZARD & HODES, *supra* note 12, § 1.7:201 at 232.12:

> Rule 1.7(a) states the basic rule against *concurrent* representation of clients with *directly* conflicting interests. . . . [T]his subsection is unusually stringent, establishing what amounts to a *per se* rule of disqualification in many situations. Generally, consent will cure most conflicts of interest, but . . . many of the conflicts governed by this subsection are not subject to client waiver.

103. MODEL RULES OF PROF. CONDUCT R. 1.7(b) (1999). The comments provide examples of how an impermissible conflict of interest may arise, including "substantial

Conflicts under subpart (b) are consentable only if the lawyer obtains the client's informed consent and reasonably believes the *representation* (as contrasted with the relationship) will not be adversely affected.[104]

This distinction between an adverse effect upon the "relationship" versus an adverse effect upon the "representation" is significant. Both have an underlying basis in the duty of loyalty; the difference is one of focus. An adverse effect upon the "relationship" focuses on the client's perception of the attorney's loyalty, whereas an adverse effect upon the "representation" focuses on the lawyer's actual ability to treat the two clients with equal loyalty in the course of the represention—in evaluating the claims, the defenses, the available options, the evidence, the strategy, the tactics, and so on. As noted in the comments to Model Rule 1.7, a conflict of interest exists when the "lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client."[105]

Accordingly, the distinction signifies two potential concerns regarding joint representation. First, joint representation may cause problems because the interests of one client may be directly adverse to those of another client. Second, joint representation may cause problems due to the lawyer's duty of loyalty to both clients.[106] This duty of loyalty may limit the lawyer's ability

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discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." *See id.* R. 1.7, cmt.7.

104. *Id.* R. 1.7(b)(1).

105. *Id.* R. 1.7, cmt. 4. Even with client consent, an attorney may not represent

> multiple parties to the same transaction whose interests or positions are fundamentally antagonistic. But [it is ethically] permissible for a lawyer to represent multiple parties whose interests are generally aligned, such as clients with similar lobbying interests or parties to the formation of a corporation. However, should it become evident during the multiple representation that the lawyer cannot adequately represent the interests of each party, or should any party revoke consent, the lawyer must withdraw and may not thereafter represent one party against another on the same matter.

ABA/BNA LAWS. MAN. ON PROF. CONDUCT § 51:301 (1987).

106. *See* Perschbacher & Perschbacher, *supra* note 95, at 712:

> Conflicts of interest encompass both 'objective' conflicts and 'subjective' conflicts. 'Objective' conflicts involve adverse client interests in the litigation or the subject matter, such as when clients take inconsistent legal positions. 'Subjective' conflicts look beyond the clients' interests to whether the representation would violate the attorney's duty of undivided loyalty owed to each client.

to suggest certain courses of action—even though the clients' positions are aligned—because a possible option or consideration for one client is, or might be, adverse to the interests of the other client.[107]

The comments note several subject matter areas in which the simultaneous representation of more than one client may result in a conflict of interest. The areas mentioned include criminal defense, insurer-insured, corporation-employee, and estate planning.[108] However, only with respect to criminal defense do the comments suggest joint representation generally constitutes an impermissible practice[109]—and even then, the rules do not prohibit such representation. Indeed, the Model Rules clearly contemplate joint representation in several areas, including transactional work,[110] organizational clients,[111] settlements,[112] and intermediation.[113]

See also MODEL RULES OF PROF. CONDUCT R. 2.2, cmt. 7 (1999) (noting "a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced").

107. *See* Moore, *supra* note 6, at 216-20 (noting under Model Code judges and lawyers often "fail[ed] to recognize the existence of a conflict because they [were] preoccupied with the loyalty issue and thus [gave] inadequate consideration to the independent professional judgment issue").

108. *See* MODEL RULES OF PROF. CONDUCT R. 1.7, cmt. 7, 10, 13, 14 (1999).

109. *See id.* R. 1.7, cmt. 7 ("The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant."). Instead, the comments indicate that the propriety of joint representation is to be determined on a case-by-case basis. *See* ABA/BNA LAWS. MAN. PROF. CONDUCT § 51:303 (1987).

110. *See* MODEL RULES OF PROF. CONDUCT R. 1.7, cmt. 12 (1999) ("[A] lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.").

111. *See id.* R. 1.13(e) ("A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of rule 1.7."); *id.* at cmt. 10 ("Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.").

112. *See id.* R. 1.8(g):

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated settlement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

113. *See id.* R. 2.2, cmt. 1 ("A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests."); *see also id.* at cmt. 3 ("The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate

In 1997, the Commission on Evaluation of the Rules of Professional Conduct (the "Ethics 2000" Commission) of the American Bar Association was charged with analyzing and evaluating the Model Rules of Professional Conduct.[114] The Commission, whose work is still in progress, has proposed reorganizing Model Rule of Professional Conduct 1.7 for clarification and retitling the rule "Concurrent Conflict of Interest: General Rule." However, the only substantive changes to Rule 1.7's provisions are a definition of conflict of interest,[115] and a requirement that client consent to a conflict be confirmed in writing.[116]

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representation, with the possibility in some situations of incurring additional cost, complication or even litigation.").

114. *See ABA Starts 'Ethics 2000' Project for Sweeping Review of Rules*, 13 ABA/BNA LAWS. MAN. PROF. CONDUCT: CURRENT REPORTS 140 (1997) (describing the goal of the Ethics 2000 project as "undertak[ing] an in-depth review and assessment of ethics rules during the final years of the second millennium").

115. As amended, Model Rule 1.7(a) would provide:

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if (1) the representation of one client will be directly adverse to another client; or, (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's duties to another client or to a former client or by the lawyer's own interests or duties to a third person.

Proposed Rule 1.7—Public Discussion Draft, Ethics 2000 Commission, *at* <http://www.abanet.org/cpr/e2k/rule17draft.html> (last visited June 23, 2000).

116. As amended, Model Rule 1.7(b) would provide:

> Notwithstanding the existence of a conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent in writing and (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; and (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation.

Proposed Rule 1.7—Public Discussion Draft, Ethics 2000 Commission *at* <http://www.abanet.org/cpr/e2k/rule17draft.html> (last visited June 23, 2000).

Although the proposed changes to Model Rule 1.7 are modest, the Ethics 2000 Commission has proposed deleting a related rule that has caused some confusion in the area of joint representation. *See* Margaret Colgate Love, *Update on Ethics 2000 Project and Summary of Recommendations to Date*, ABA SYLLABUS 19 (Winter 2000). The Commission has proposed deleting Model Rule 2.2, which deals with lawyers as intermediaries.

> [T]he Commission was concerned that this rule has been the source of some confusion insofar as it suggests that a lawyer representing multiple clients as 'intermediary' is not fully subject to Rule 1.7. The issues raised by joint representation are now discussed in a series of new comments to Rule 1.7. These new comments discuss the circumstances under which a lawyer may undertake a joint representation in the first place if it appears that the clients' interests potentially

D. Restatement of the Law Governing Lawyers

In the recently adopted *Restatement (Third) of the Law Governing Lawyers*,[117] the American Law Institute attempts to restate and codify the existing case law pertaining to legal ethics.[118] Although the Restatement combines the two types of conflict from subparts (a) and (b) of Model Rule 1.7 into a single section, it does little to clarify issues concerning joint representation.[119]

Sections 121 and 122[120] of the Restatement address conflicts of interest generally. Section 121 provides that unless the lawyer obtains the requisite client consent pursuant to "the limitations and conditions provided in section 122, a lawyer may not represent a client if the representation would involve a conflict of interest."[121] Section 121 then defines the concept of a conflict of interest, tracking the language of Model Rule 1.7.[122]

> conflict; the effect of joint representation on client-lawyer confidentiality and the attorney-client privilege; limits on the scope of representation and advocacy in this context; and the lawyer's options if a conflict unexpectedly arises in the course of the representation and cannot be resolved (the lawyer 'ordinarily . . . will be forced to withdraw from representing all of the clients if the joint representation fails').

Id.

117. RESTATEMENT, *supra* note 2; *see ALI Completes Restatement on Lawyers, Gives Final Approval to All Sections*, 14 ABA/BNA LAWS. MAN. PROF. CONDUCT, No. 8, at 211 (May 13, 1998).

118. *See* Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195, 211 (1987) ("The objective of the restatement is to clarify the law and to provide a text that courts and other legal bodies deciding contested cases can employ confidently as a general statement of relevant legal doctrine."). *But see* Sean Pager, *Caveat Lawyer: The Restatement of the Law of Lawyers' "Invite to Rely" Standard for Attorney Liability of Nonclients*, 34 TORT & INS. L.J. 1121, 1122 (1999):

> While purporting merely to restate and codify existing case law—as befits such a widely relied-on authority-this *Restatement* makes a number of subtle departures. Drafted primarily by academics, the document follows the path of previous *Restatements* that have blended consensus with reform, attempting in discrete nudges to move the state of American law forward in chosen directions.

119. *See* RESTATEMENT, *supra* note 2, § 122(2) (highlighting existence of nonwaivable conflict situations, but failing to tailor rule to reasons why consent should not be honored).

120. The final version of the Restatement changed the section numbers from those used in earlier drafts. Sections 121 and 122 correspond to sections 201 and 202, respectively, of the earlier drafts.

121. RESTATEMENT, *supra* note 2, § 121.

122. *See id.* ("A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."); *see also* Moore, *supra* note 5, at 548 n.45 ("Although the language of the

Section 122 addresses the disclosure and consent necessary to proceed with a representation involving a potential conflict of interest.[123] The Restatement's primary contribution is in this provision, which attempts to clarify that some conflicts of interest are "nonconsentable," meaning that representation is prohibited even if the clients affected are willing to give their informed consent to the representation.[124]

Four other sections of the Restatement have relevance to joint representation:[125] section 128 addresses parties with conflicting interests in civil litigation;[126] section 129 addresses conflicts in criminal cases;[127] section 130 addresses multiple representation in nonlitigated matters;[128] and section 131 addresses conflicts of interest in representing an organization.[129]

Despite the separate sections provided for each of these areas, the content is basically the same. Each section essentially mirrors Model Rule 1.7 and simply applies the general conflicts standard to each area.[130]

[Restatement] definition tracks the language of Model Rule 1.7(b), it is clearly intended to encompass Model Rule 1.7(a) conflicts as well.").

123. *See* RESTATEMENT, *supra* note 2, § 122. The Restatement provides:

> (1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate about the material risks of such representation to that client or former client.
>
> (2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if
>
> (a) the representation is prohibited by law;
>
> (b) one client will assert a claim against the other in the same litigation; or
>
> (c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.

Id.

124. *See id.* § 122(2); *see also id.* § 122, cmt. g(iv) (discussing nonconsentable conflicts).

125. The final version of the Restatement changed the section numbers from those used in earlier drafts. *See supra* note 120. Sections 128, 129, 130, and 131 correspond to sections 209, 210, 211, and 212, respectively, of the earlier drafts.

126. *See* RESTATEMENT, *supra* note 2, § 128.

127. *See id.* § 129.

128. *See id.* § 130.

129. *See id.* § 131.

130. *Compare* RESTATEMENT, *supra* note 2, § 128 (addressing representing multiple clients with conflicting interests in civil litigation and stating lawyer may not represent two or more clients in a matter "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 client in

E. Summary of the Existing Rules

Taken together, the existing and proposed ethical rules continue to approve of the practice of joint representation. Other than the represention of opposing parties in litigation or of criminal codefendants, there is no strong admonition against undertaking joint representation. An attorney may undertake joint representation if the attorney reasonably believes that he or she can adequately represent both clients' interests and both clients consent after full disclosure of the implications of joint representation.[131] If a lawyer represents, for example, multiple defendants, such multiple representation is permissible if each client is fully apprised of the potential for a conflict of interest, is given the opportunity to consult independent counsel, and waives

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the matter"); *id.* § 129 (addressing conflicts in criminal litigation and permitting joint representation in criminal litigation so long as the conflict is consentable and the attorney has obtained the clients' informed consent to the representation); and *id.* § 130, which applies the general conflicts standard to nonlitigated matters, stating that

> [u]nless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent two or more clients in a matter not involving litigation if there is a substantial risk that the lawyer's representation of one or more of the clients would be materially and adversely affected by the lawyer's duties to one or more of the other clients.

Id. § 131, which addresses conflicts in representing organizations and states that

> [u]nless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent both an organization and a director, officer, employee, shareholder, owner, partner, member, or other individual or organization associated with the organization if there is a substantial risk that the lawyer's representation of either would be materially and adversely affected by the lawyer's duties to the other.

Compare with MODEL RULES OF PROF. CONDUCT R. 1.7 (1999):

> 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.

131. MODEL RULES OF PROF. CONDUCT R. 1.7 (1999); *see also* 1 HAZARD & HODES, *supra* note 12, at 128-54 (general discussion of the operation of Rule 1.7); WOLFRAM, *supra* note 5, § 7.1 at 314.

any claims against the other clients.[132] However, should conflicts later develop, the lawyer must withdraw.[133]

IV. SITUATIONS IN WHICH JOINT REPRESENTATION ISSUES COMMONLY ARISE: AN OVERVIEW BY AREA OF THE LAW

The situations in which joint representation issues arise are myriad. An exhaustive review of either the subject matter areas in which joint representation issues arise, or all of the potential examples within a specific subject matter area, are beyond the scope of this, or any single, Article. Instead, this section of the Article provides an overview of some selected topic areas of the law, with illustrations of some of the conflicts of interest that can arise within each of those areas when joint representation is undertaken. Examining joint representation issues by subject matter area is necessary due to the context-specific nature of the decisions issued by courts and ethics committees.[134]

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132. *See* D.C. Bar Op. 140 (no date), *summarized in* ABA/BNA LAWS. MAN. PROF. CONDUCT § 51:309 (1987).

133. *See* MODEL RULES OF PROF. CONDUCT R. 1.16(a)(1) (1999) (requiring attorney to withdraw if "the representation will result in violation of the rules of professional conduct or other law"); Jedwabny v. Philadelphia Transp. Co., 135 A.2d 252, 254 (Pa. 1957), (since an attorney may not serve two masters, the attorney must withdraw from representation); Industrial Indemnity Co. v. Great American Ins. Co., 140 Cal. Rptr. 806 (Ct. App. 1977); Klemm v. Superior Court, 142 Cal. Rptr. 509, 514 (Ct. App. 1977) (once an actual conflict develops, a previous waiver of potential conflicts becomes ineffective); *see also* DRINKER, *supra* note 24, at 112 ("When the interest of clients diverge and become antagonistic, their lawyer must be absolutely impartial between them, which . . . usually means that he may represent none of them."); HAZARD & HODES, *supra* note 12, at 286-94; ABA/BNA LAWS. MAN. PROF. CONDUCT § 51:309 (1987);WOLFRAM, *supra* note 5, § 7.2 at 348.

134. *See* Moore, *supra* note 6, at 213 (noting courts and ethics committees have failed to develop general guidelines, but instead prefer to issue specific guidelines in common situations); *see also In re* Farr, 340 N.E.2d 777 (Ind. 1976) (guidelines in representing driver and guest passenger in action against other driver); Ohio B. Ethics Comm., Formal Op. 30, *reprinted in* 1 FAM. L. REP. (BNA) No. 34 at 3110 (July 15, 1975) (standards for representing spouses in no-fault divorce); John Stewart Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 157-62 (1978) (ethical propriety of representing criminal codefendants); D. Kent Meyers, *Ethical Considerations in the Representation of Multiple Creditors Against a Single Debtor*, 51 AM. BANKR. L.J. 19, 26-30 (1977).

A. Corporate Law

In corporate representation, there are many circumstances in which conflicting interests may arise in joint representations.[135] Conflicts may arise even in the formation stage of a corporation.[136] In particular, attorneys are often asked to represent both the corporation itself as well as the corporation's shareholders, officers, directors, or other employees.[137]

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135. Conflicts potentially may arise between management and shareholders, in the form of a direct action against the corporation, a shareholder derivative suit, tender offers, proxy fights, and direct misconduct by management. The conflict may be between shareholders, management and shareholders, or a lawyer with a personal stake in the litigation. *See generally* 3 MALLEN & SMITH, *supra* note 22, § 25.5 at 722-35; Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, *supra* note 6, at 1334-52.

136. Conflicts are not always anticipated:

> [T]he individuals forming a business often have separate and inconsistent objectives, such as voting control or a veto power over certain acts, a priority return on capital investment, or security for loans. Whether or not the individuals realize it, potential conflicts lurk in many areas, including choice of entity, internal governance, financing, mechanisms for resolving disputes, and exit strategies.

ABA/BNA LAWS. MAN. ON PROF. CONDUCT § 91:2605 (1987); *see also* 3 MALLEN & SMITH, *supra* note 22, § 25.5 at 722-24. *See, e.g.*, *In re* Ireland, 706 P.2d 352 (Ariz. 1985) (lawyer disciplined for failing to disclose that one incorporator had claims pending against it by group of investors); Torres v. Divis, 494 N.E.2d 1227 (Ill. 1986) (refusing to imply duty from lawyer for one incorporator to other incorporators because duty would create potential for conflicts); *In re* Conduct of Bishop, 686 P.2d 350 (Or. 1984) (lawyer representing conflicting interests in representing both partner and partnership); Johnson v. Haberman & Kassoy, 247 Cal. Rptr. 614 (Ct. App. 1988) (law firm sued for fraud for failing to disclose it represented general partners when counseling limited partner). *See generally* Alysa Christmas Rollock, *Professional Responsibility and Organization of the Family Business: The Lawyer as Intermediary*, 73 IND. L.J. 567 (1998).

137. *See* James J. Brosnahan & Carol S. Brosnahan, *Attorney's Ethical Conduct During Adversary Proceedings*, 523 PLI/LITIG. 225, 255 (1995) ("The corporation may want to reduce attorneys' fees or to deal with an attorney that is known. On the darker side the decision makers in the corporation may see joint representation as a way of controlling the employees."). The corporate lawyer's client is the corporation itself rather than the corporation's "constituents," which include the officers, directors, shareholders, and employees. MODEL RULES OF PROF. CONDUCT R. 1.13(a), cmt. (1999); RESTATEMENT, *supra* note 2, § 131 Reporter's Note; *see* Pelletier v. Zweifel, 921 F.2d 1465 (11th Cir. 1991); Rose v. Summers, Compton, Wells & Hamburg P.C., 887 S.W.2d 683 (Mo. Ct. App. 1994); Delta Automatic Sys. Inc. v. Bingham, 974 P.2d 1174 (N.M. Ct. App. 1998); Talvy v. American Red Cross, 205 A.D.2d 143 (N.Y. App. Div. 1994); Lee v. Mitchell, 953 P.2d 414 (Or. Ct. App. 1998); Bowen v. Smith, 838 P.2d 186 (Wyo. 1992). *See generally* HAZARD & HODES, *supra* note 12, § 1.13:100; CHARLES W. WOLFRAM, *supra* note 5, § 8.3 at 421-24; Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011 (1997); Ellen A.

Assuming that all of the actors share the same interests, the attorney may decide joint representation is appropriate. However, all too frequently some inconsistency in the clients' interests becomes apparent at a later date.[138] The most common situations in which the interests of the corporation diverge from those of its constituents are (1) derivative suits and direct actions against the corporation,[139] (2) cases of fraud and self-dealing by corporate management,[140] and (3) battles for corporate control.[141]

Pansky, *Between an Ethical Rock and a Hard Place: Balancing Duties to the Organizational Client and Its Constituents*, 37 S. TEX. L. REV. 1167 (1996); ABA/BNA LAWS. MAN. ON PROF. CONDUCT §§ 91:2001, 91:2403 (1987).

138. Cannon v. United States Acoustics Corp., 398 F. Supp. 209 (N.D. Ill. 1975), *aff'd in part, rev'd in part*, 532 F.2d 1118 (7th Cir. 1976) (conflict of interest for corporate counsel to defend both the corporation and its officers and directors against derivative action); Messing v. FDI, Inc., 439 F. Supp. 776 (D.N.J. 1977); *In re* Kushinsky, 247 A.2d 665, 53 N.J. 1 (N.J. 1968); Wood v. Beacon Factors Corp., 137 A.D.2d 752 (N.Y. App. Div. 1988) (corporate counsel not permitted to jointly defend corporation and shareholder). *See generally* 3 MALLEN & SMITH, *supra* note 22, § 25.5 at 727-28; Robert J. Landry III, *Joint Representation of a Corporation and Director/Officer Defendants in Stockholder Derivative Suit: Is it Permissible?*, 18 J. LEGAL PROF. 365 (1993).

139. *See generally* 3 MALLEN & SMITH, *supra* note 22, § 25.5 at 728-32 (shareholder derivative actions); *id.* § 25.5 at 727-28 (direct actions against the corporation). As is true in other areas of the law, older court cases were more lenient in permitting multiple representation in shareholders' derivative actions. *See, e.g.*, Selama-Dindings Plantations Ltd. v. Durham, 216 F. Supp. 104 (S.D. Ohio 1963), *aff'd*, 337 F.2d 949 (6th Cir. 1964); Otis & Co. v. Pennsylvania R.R. Co., 57 F. Supp. 680, 684 (E.D. Pa. 1944) ("[T]here are many stockholders' suits on record in which the same counsel represented both the individual and corporate defendants."); Jacuzzi v. Jacuzzi Bros. Inc., 52 Cal. Rptr. 147 (Ct. App. 1966). More recent court decisions have recognized the potential for conflicts of interest and, accordingly, have been more willing to grant disqualification motions. *See, e.g.*, *In re* Oracle Sec. Litig., 829 F. Supp. 1176 (N.D. Cal. 1993); Lower v. Lanark Mut. Fire Ins. Co., 448 N.E.2d 940 (Ill. App. Ct. 1983); Messing v. FDI, Inc., 439 F. Supp. 776, 782 n.8 (D.N.J. 1977) ("The need for independent counsel is underscored by the duty of counsel for the corporation in a derivative suit to safeguard the corporation's interest"); Musheno v. Gensemer, 897 F. Supp. 833 (N.D. Pa. 1995); Forrest v. Baeza, 67 Cal. Rptr. 2d 857 (Ct. App. 1997). *See generally* ABA/BNA LAWS. MAN. PROF. CONDUCT §§ 91:2602-03 (1987).

140. *See* Bell Atl. Corp. v. Bolger, 2 F.3d 1304 (3d Cir. 1993) (lawyer cannot represent both corporation and directors when fraud charged); Messing v. FDI, Inc., 439 F. Supp. 776 (D.N.J. 1977) (holding similar to Bell Atl. Corp.).

141. *See In re* Kinsey, 660 P.2d 660 (Or. 1983) (corporation's lawyer reprimanded for aiding majority shareholder, in fight for control, form new corporation to compete with former corporation and for continuing to represent both majority shareholder and corporation after derivative suit filed). *See generally* 3 MALLEN & SMITH, *supra* note 22, § 25.6 at 744-45; Miriam P. Hechler, *The Role of the Corporate Attorney Within the Takeover Context: Loyalties to Whom?*, 21 DEL. J. CORP. L. 943 (1996); Ralph Jonas, *Who is the Client?: The Corporate Lawyer's Dilemma*, 39 HASTINGS L.J. 617 (1988); George D. Reycraft, *Conflicts of*

B. Property Law

Although historically it has been common for an attorney to represent both parties to a transaction involving transferring a property interest,[142] joint representation is rife for conflicts of interest in property law.[143] An attorney's representation of both the buyer and the seller in a transaction has been called the clearest instance of improper representation.[144] Conflicts also may arise between borrowers and lenders,[145] and the type of property transaction may as easily involve a mortgage, lease, title insurance, or trust

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Interest and Effective Representation: The Dilemma of Corporate Counsel, 39 HASTINGS L.J. 605, 609 (1988); Mark I. Steinberg, *Attorneys' Conflicts of Interest in Corporate Acquisitions*, 39 HASTINGS L.J. 579 (1988); Marguerite M. Elias, Note, *Multiple Representation in Shareholder Derivative Suits: A Case-by-Case Approach*, 16 LOY. U. CHI. L.J. 613 (1985); Note, *Independent Representation for Corporate Defendants in Derivative Suits*, 74 YALE L.J. 524, 528 (1965).

142. *See* 4 MALLEN & SMITH, *supra* note 22, § 31.6 at 664; *see, e.g.*, Craft Builders, Inc. v. Ellis D. Taylor, Inc., 254 A.2d 233 (Del. 1969).

143. Examples of cases in which courts have found a conflict of interest include State v. Callahan, 652 P.2d 708 (Kan. 1982); Attorney Grievance Comm'n v. Collins, 457 A.2d 1134 (Md. 1983); Hill v. Okay Constr. Co., 252 N.W.2d 107 (Minn. 1977); *In re* Lanza, 322 A.2d 445, 64 N.J. 347 (N.J. 1974); *In re* Powell, 98 A.D.2d 568 (N.Y. App. Div. 1984); *In re* Robertson, 624 P.2d 603 (Or. 1981); *In re* Nelson, 332 N.W.2d 811 (Wis. 1983); *see also* New Jersey Advisory Committee on Professional Ethics Opinion 243, 95 N.J.L.J. 1145 (1972) (noting that in a real estate transaction "in all circumstances it is unethical for the same attorney to represent buyer and seller in negotiating the terms of a contract of sale"). *See generally* Comment, *Representing Vendor and Vendee in a Single Transaction: A Strict View of Conflicting Interests*, 2 J. LEGAL PROF. 133 (1977); *see also* Aronson, *supra* note 41, at 814 ("Dual representation is virtually always improper in transactions such as the sale of property because of the very high probability that future conflicts of interest will develop.").

144. *See* 4 MALLEN & SMITH, *supra* note 22, § 31.6 at 665; Nilson-Newey & Co. v. Ballou, 839 F.2d 1171 (6th Cir. 1988); *In re* Rockoff, 331 A.2d 609, 611, 66 N.J. 394, 397 (N.J. 1975) (Pashman, J., concurring) (advocating per se prohibition of multiple representation in real property transactions); *In re* Boivin, 533 P.2d 171 (Or. 1975); *see also* Baldasarre v. Butler, 625 A.2d 458, 132 N.J. 278 (N.J. 1993) (adopting bright-line rule prohibiting the joint representation of both buyer and seller in complex real estate transactions; potential conflicts deemed too great to permit such representation even with consent of both parties); St. Paul Title Co. v. Meier, 226 Cal. Rptr. 538 (Ct. App. 1986).

145. *See* Busey v. Perkins, 176 A. 474 (Md. 1935); *In re* Dolan, 384 A.2d 1076 (N.J. 1978); *In re* Chase, 346 A.2d 89 (N.J. 1975). *See generally* MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE 298 (1980):

> The attorney partaking in a real estate transaction may be in a conflicting position not only as between the buyer and the seller, but quite possibly with the lending institution, a title insurance company, a party holding some interest in the property, a party holding interest in the proceeds from the transaction, or any other party not directly involved in the closing.

as the traditional sales setting.[146] According to one authority, "the potential for conflicts necessarily exists in any transaction involving a transfer of property."[147]

C. Criminal Law

Conflicts of interest resulting from joint representation are particularly problematic in criminal law.[148] Pursuant to the Sixth Amendment's

146. *See* 4 MALLEN & SMITH, *supra* note 22, § 31.6 at 673; *see also In re* Opinion 682 of the Advisory Comm. on Prof'l Ethics, 687 A.2d 1000, 1004 (N.J. 1997) ("Attorneys who undertake to represent both clients and title companies place themselves in a position of negotiating for both sides in the same transaction."); *In re* Dolan, 384 A.2d 1076 (N.J. 1978) (involving simultaneous representation of seller, purchaser-mortgagor, and mortgagee); *In re* Lanza, 322 A.2d 445, 448 (N.J. 1974) (noting that it is unethical for the same attorney to represent both the buyer and the seller in negotiating terms of a contract of sale).

147. 4 MALLEN & SMITH, *supra* note 22, § 31.6 at 666-67; *see* WOLFRAM, *supra* note 5, § 8.5 at 434:

> The process by which a buyer and seller of property transact their business is fraught with conflicts of interests . . . . Beginning with such basic elements as determining the price and describing the property to be sold, what one party gets the other must concede. Terms of payment, security for unpaid balances, warranties of quality and of title, date of closing and risk of loss in the interim, tax consequences, and a host of other details should be addressed by each party or the party's adviser in a well-thought-out transaction. When the transaction is a large one—such as the purchase and sale of a residence, commercial property, or a business—the transaction typically becomes further complicated because the additional interests of banks, brokers, tenants, and title insurance companies may intrude.

See also In re Wagner, 599 N.W.2d 721, 726 (Iowa 1999) ("[A] lawyer's simultaneous representation of a buyer and a seller in the same transaction is a paradigm of a conflict of interest."); Homa v. Friendly Mobile Manor, Inc., 612 A.2d 322, 327 (Md. 1992) (finding conflict of interest "inherent" in relationship of buyer and seller); *In re* Opinion 682, 687 A.2d at 1004-05 ("Although dual representation in some conflict-of-interest cases may be possible with full disclosure and consent, that consent is no remedy here because buyers and sellers are typically the least sophisticated players in real-estate transactions."); *In re* Lanza, 322 A.2d 445, 450 (N.J. 1974) (Pashman, J., concurring) ("There exists in every buyer-seller situation an inherent conflict of interests which even though inadvertent, may affect or give the appearance of affecting an attorney's impartiality and professional relationship.").

148. *See generally* 3 MALLEN & SMITH, *supra* note 22, § 26.7 at 831-32; Karen A. Covy, *The Right to Counsel of One's Choice: Joint Representation of Criminal Defendants*, 58 NOTRE DAME L. REV. 793 (1983); Geer, *supra* note 134, at 119; Gary T. Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939 (1978); Peter W. Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075 (1979); Daniel E. Wanat, *Conflicts of Interest in Criminal Cases and the Right to Effective Assistance of Counsel–The Need for Change*, 10 RUTGERS-CAM. L.J. 57 (1978); Current Developments, *Conflicts of Interest: Criminal Representation*, 5 GEO. J. LEGAL

guarantee to effective assistance of counsel,[149] conflicts of interest may rise to a constitutional dimension.[150] Concern over this issue led to the enactment of a specific rule regarding joint representation in the Federal Rules of Criminal Procedure.[151] However, there is no per se ethical rule prohibiting the joint representation of criminal codefendants.[152]

ETHICS 119 (1991); Current Developments, *Conflicts of Interest: Criminal Representation*, 2 GEO. J. LEGAL ETHICS 167 (1988).

149. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

150. *See* Wood v. Georgia, 450 U.S. 261 (1981); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60 (1942); United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978); United States v. Bernstein, 533 F.2d 775 (2d Cir. 1976); United States v. Gaines, 529 F.2d 1038 (7th Cir. 1976); Hudson v. State, 299 S.E.2d 531 (Ga. 1983); State v. Bellucci, 410 A.2d 666 (N.J. 1980). *See generally* ABA/BNA LAWS. MAN. PROF. CONDUCT § 51:304 (1987) ("Joint representation of criminal defendants raises questions of constitutional law as well as questions of professional conduct.").

151. Rule 44(c) provides:

> Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant' right to counsel.

FED. R. CRIM. P. 44(c). A conflict of interest threatens to violate not only the defendant's constitutional rights, but also the attorney's ethical responsibilities. *See* MODEL RULES OF PROF. CONDUCT R. 1.7, cmt. 7 (1999) ("The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant."); *see also* Gendron v. State Bar, 673 P.2d 260 (Cal. 1983) (holding that it was unethical for an attorney to represent multiple criminal defendants when there was evidence of inconsistent defenses.

152. *See* 3 MALLEN & SMITH, *supra* note 22, § 26.7 at 838 ("The representation of multiple defendants in the same or related cases is not per se improper."); MODEL RULES OF PROF. CONDUCT R. 1.7, cmt. 7 (1999) ("The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant."); *see also* JOHN WESLEY HALL, Jr., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 14:1 at 521-22 (2d ed. 1996) (noting "[t]he

The courts have held that there must be full disclosure and informed consent when there is a likely or serious possibility of a conflict of interest due to joint representation of criminal defendants.[153] However, more acutely than in civil proceedings, later developments can create or reveal a conflict of interest.[154] For example, a question may arise as to whether one client should testify,[155] one client's confession may implicate the other client,[156] one client may decide to plead guilty,[157] or one client may be offered a plea bargain in exchange for testifying against the other client or other cooperation with the prosecution.[158] Conflicts may also develop

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potential for a conflict of interest developing in a multiple representation situation is enormous and inevitable[,]" but further noting, "[i]t is recognized that the benefits of a joint defense will sometimes outweigh the potential for conflict and the codefendants will be permitted to proceed with the same attorney").

153. *See Bernstein*, 533 F.2d 775; United States ex rel. Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973); People v. Mroczko, 672 P.2d 835 (Cal. 1983); Millican v. State, 733 S.W.2d 834 (Mo. Ct. App. 1987); O'Dell v. Virginia, 364 S.E.2d 491 (Va. 1988);

154. *See* Moore, *supra* note 6, at 273 (observing "[t]he number of ways in which conflicts of interest can arise during the representation of criminal codefendants is staggering").

155. *See* Morgan v. United States, 396 F.2d 110 (2d Cir. 1968); State v. Bellucci, 410 A.2d 666, 669 (N.J. 1980); *see also* Moore, *supra* note 6, at 274:

> The often crucial decision whether to put a defendant on the witness stand is greatly complicated by one attorney representing multiple defendants. One defendant's testimony might aid him but badly damage a codefendant. One defendant may make an excellent witness but another a very poor one. If both defendants take the stand, the poor witness, or one highly vulnerable to impeachment, may drag down the better witness. Putting on the stand only the defendant who makes a good witness may suggest to the jury that the defendant's own lawyer finds significant differences between them, or at least raise questions in the minds of jurors as to why one defendant refused to testify.

156. *See* Bruton v. United States, 391 U.S. 123 (1968).

157 *See* United States v. Mari, 526 F.2d 117, 119 (2d Cir. 1975) (Oakes, J., concurring).

158. *See* Thomas v. Foltz, 818 F.2d 476 (6th Cir. 1987); Alvarez v. Wainwright, 522 F.2d 100 (5th Cir. 1975); United States v. Truglio, 493 F.2d 574 (4th Cir. 1974); Watson v. District Court, 604 P.2d 1165 (Colo. 1980); State v. Hilton, 538 P.2d 977 (Kan. 1975) (holding a lawyer censured for continuing joint representation when prosecution willing to plea bargain with one client but not the other, and prosecution wanted one client to testify against the other); Utah v. Smith, 621 P.2d 697 (Utah 1980) (denying effective assistance of counsel where lawyer advised one client to plead guilty and testify against other client); People *ex rel.* Younger v. Superior Court, 180 Cal. Rptr. 156 (Ct. App. 1978); *see also Alvarez*, 522 F.2d at 100 (holding ineffective assistance of counsel where lawyer advised against accepting favorable plea bargain because might have adverse effect on co-defendant); Moore, *supra* note 6, at 273 ("A deal offered to one defendant and not to others puts a single

generally in the joint representation of criminal defendants in the course of trial tactics,[159] as a result of testimony,[160] during closing arguments,[161] and during sentencing.[162]

In view of the potential for conflicts of interest to arise,[163] and in light of the potential consequences to criminal defendants, some cases have observed that codefendants should retain separate counsel, but have stopped short of prohibiting the practice.[164] Although a number of commentators

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counsel for multiple defendants in a most difficult, if not untenable, position.") (citation omitted).

159. *See* Burger v. Kemp, 483 U.S. 776 (1987); United States v. Cirrincione, 780 F.2d 620 (7th Cir. 1985); Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975); Holland v. Henderson, 460 F.2d 978 (5th Cir. 1972); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967); State v. Bush, 493 P.2d 1205 (Ariz. 1972).

160. *See* United States v. Abner, 825 F.2d 835 (5th Cir. 1987); United States v. Currio, 694 F.2d 14 (2d Cir. 1982); *In re* Hochberg, 471 P.2d 1 (Cal. 1970); State v. Hilton, 538 P.2d 977 (Kan. 1975).

161. *See* Bush v. United States, 765 F.2d 683 (7th Cir. 1985); Campbell v. United States, 352 F.2d 359 (D.C. Cir. 1965); People v. Chacon, 447 P.2d 106 (Cal. 1968); People v. Gardner, 279 N.W.2d 785 (Mich. 1979); Commonwealth v. Cox, 270 A.2d 207 (Pa. 1970); Commonwealth v. Bracey, 307 A.2d 320 (Pa. Super. Ct. 1973).

162. *See, e.g.*, United States *ex rel.* Hanrahan v. Welborn, 591 F. Supp. 252 (N.D. Ill. 1984); Commonwealth v. Cox, 270 A.2d 207 (Pa. 1970); Commonwealth v. Bracey, 307 A.2d 320 (Pa. Super. Ct. 1973); *see also* Moore, *supra* note 6, at 274 (noting "any unity of interests among multiple defendants will often, inevitably, break down at the sentencing stage. More often than not, each defendant's role in the planning and commission of the crime and each defendant's age, background and prior criminal record will vary significantly."); Aronson, *supra* note 41, at 831:

> In many cases in which the co-defendants' interests and defenses at trial are identical, the individual treatment accorded them at sentencing might create a desire on the part of defense counsel to argue that one is less culpable, more contrite, a better rehabilitative risk, or has a more compelling family situation. In such cases, the attorney has a conflict of interest, because any such argument necessarily suggests that the other defendant deserves a harsher sentence; both defendants cannot be *less* culpable.

(italics in original).

163. *See* FED. R. CRIM. P. 44(c) advisory committee note ("Even the most diligent attorney may be unaware of facts giving rise to a potential conflict.").

164. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (noting "possible conflict inheres in almost every instance of multiple representation"); United States v. Mari, 526 F.2d 117, 121 (2d Cir. 1975) (Oakes, J., concurring opinion) ("[I]nsistence that, except in extraordinary circumstances, codefendants retain separate counsel will in the long run . . . prove salutary not only to the administration of justice and the appearance of justice but the cost of justice . . . ."); Fleming v. State, 270 S.E.2d 185 (Ga. 1980) (holding co-defendants must have separate counsel in capital cases); State v. Bellucci, 410 A.2d 666 (N.J. 1980) (holding joint representation of co-defendants by same lawyer or law office prohibited unless

have proposed a blanket prohibition on the joint representation of criminal codefendants,[165] some have expressed concern that a per se rule prohibiting the joint representation of criminal codefendants would violate the Sixth Amendment.[166]

D. Family Law

In the family law area, joint representation consistently raises conflict of interest issues. The joint representation of husband and wife in a divorce action often results in conflicts,[167] even when the attorney has been assured

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court approval obtained); State v. Land, 372 A.2d 297, 300 (N.J. 1977) ("The inherent difficulty in representing more than one defendant in a criminal proceeding and in steering a course which will promote the interests of each, but which will not be to the detriment of any one, exposes the infirmity of dual representation."). *But see* RESTATEMENT, *supra* note 2, § 129, cmt. c (acknowledging "[t]he representation of co-defendants in criminal cases involves at least the potential for conflicts of interest," and noting potential conflicts issues, but concluding "[c]riminal defendants might nonetheless consider it in their interest to be represented by a single lawyer" due to cost, common position, and decreasing likelihood a co-defendant would cooperate with prosecution against another defendant).

165. *See* Alan Y. Cole, *Time for a Change: Multiple Representation Should Be Stopped*, NAT'L J. CRIM. DEF. 149 (1976); Geer, *supra* note 134, at 119 (proposal to prohibit attorney from representing multiple defendants in criminal matters); Lowenthal, *supra* note 148, at 939; Moore, *supra* note 6, at 271-86 (arguing for ban on joint representation of criminal defendants); *see also* Tague, *supra* note 148, at 1076 ("To achieve [desired] results, courts might ban multiple representations as unconstitutional *per se* by interpreting the sixth amendment to require the assistance of separate counsel."); Wanat, *supra* note 148, at 57; *see also* Nancy Shaw, *Representing Co-defendants Out of the Same Office*, ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER 241 (Robert J. Uphoff, ed., 1995) (noting the "hoped-for per se rule prohibiting multiple representation was firmly rejected" in the Supreme Court's *Cuyler v. Sullivan* decision).

166. *See* WOLFRAM, *supra* note 5, § 8.2 at 416 ("A logical and arguably cost-effective method for dealing with conflicts is entirely to prohibit joint representation in criminal defense. That is clearly not constitutionally required and might even raise concerns in some instances about depriving a codefendant of the right to retain counsel free of state interference."). The Sixth Amendment constitutional issue has been addressed by Professor Moore. *See* Moore, *supra* note 6, at 271-86 (arguing for ban on joint representation of criminal defendants and concluding Sixth Amendment does not prevent a per se rule prohibiting joint representation of criminal codefendants).

167. *See* Steven H. Hobbs, *Family Matters: Nonwaivable Conflicts of Interest in Family Law*, 22 SEATTLE U. L. REV. 57, 68 (1998) ("In a family context, differing or conflicting interests are most evident in a representation of both husband and wife in a divorce.").

that both parties are in agreement on all issues.[168] Although the predominant view remains that lawyers may undertake joint representation with the parties' consent and absent an actual conflict,[169] the reality is that an inherent conflict exists, particularly when there is property or children.[170] For example, "[i]n undertaking a divorce, the attorney should seek to maximize the client's share of the marital property, reduce the tax consequences of the transfers, and protect custody, support, and visitation rights."[171] Obviously, when an attorney represents both sides in a divorce action, it is impossible to attain these goals for both clients. Recognizing this, the State of Iowa has enacted a disciplinary rule forbidding joint representation in a marital dissolution under any circumstances,[172] and a

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168. *See* Blum v. Blum, 477 A.2d 289 (Md. Ct. Spec. App. 1984); Welker v. Welker, 680 S.W.2d 282 (Mo. Ct. App. 1984); Levine v. Levine, 436 N.E.2d 476 (N.Y. 1982); *In re* Marriage of Eltzroth, 679 P.2d 1369 (Or. 1984); Ishmael v. Millington, 50 Cal. Rptr. 592 (Ct. App. 1966); *see also* 4 MALLEN & SMITH, *supra* note 22, § 27.5, at 16; WOLFRAM, *supra* note 5, § 8.6 at 437-38; Aronson, *supra* note 41, at 827 ("Even a seemingly amicable separation or divorce could later result in bitter litigation over property settlement or custody.") Kristi N. Saylors, *Conflicts of Interest in Family Law*, 28 FAM. L.Q. 451, 453-54 (1994) ("Despite the parties' early affirmations that they have reached an agreement, potential conflict lurks in every divorce."). *See generally* Comment, *An Attorney's Conflict of Interest in Divorce and Child Custody Cases*, 7 J. LEGAL PROF. 183 (1982).

169. *See* Klemm v. Superior Court, 142 Cal. Rptr. 509 (Ct. App. 1977); Perry v. Perry, 64 A.D.2d 625 (N.Y. App. Div. 1978).

170. *See* Nathan M. Crystal, *Ethical Problems in Marital Practice*, 30 S.C.L. REV. 321 (1979); Hobbs, *supra* note 167, at 57; Charles P. Kindregan, *Conflict of Interest and the Lawyer in Civil Practice*, 10 VAL. U.L. REV. 423, 438 (1976) (in divorce proceeding, single lawyer should be precluded from advising both husband and wife); Saylors, *supra* note 168, at 453 ("Dual representation of both spouses in a contested divorce is a per se conflict of interest and is prima facie improper regardless of full disclosure by the lawyer and client consent."); Linda J. Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107 (1982); Clara Fryer, Comment, *An Attorney's Conflict of Interest in Divorce and Child Custody Cases*, 7 J. LEGAL PROF. 183 (1982); Note, *Legal Ethics-Representation of Differing Interests by Husband and Wife: Appearance of Impropriety and Unavoidable Conflicts of Interest?*, 52 DENVER L.J. 735 (1975).

171. 4 MALLEN & SMITH, *supra* note 22, § 27.5 at 17; *see also* MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE 242 (1980) ("The attorney seeking to console and comfort both parties and arrange for a fair and equitable property disposition with minimal tax consequences for both husband and wife, can quickly find himself in a difficult and potentially explosive situation."). *See generally* Note, *Legal Ethics—Representation of Differing Interests of Husband and Wife: Appearance of Impropriety and Unavoidable Conflicts of Interest?*, *supra* note 170.

172. IOWA RULES OF PROF. CONDUCT, DR 5-105(A), provides, "In no event shall a lawyer represent both parties in dissolution of marriage proceedings whether or not contested or involving custody of children, alimony, child support or property settlement."

number of courts and state bars have opined that lawyers should not represent both husband and wife in divorce matters, even when both parties have given their informed consent to the dual representation.[173]

Child support and custody,[174] juvenile proceedings,[175] and adoption matters[176] also create the potential for a conflict of interest. California has prohibited joint representation in adoption matters absent informed written consent.[177]

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173. *See* 4 MALLEN & SMITH, *supra* note 22, § 27.5 at 17; Conn. Bar Ass'n Formal Op. 33 (1982); Mississippi State Bar Ethics Comm. Op. 80 (1983); New Hampshire Ethics Op. 1986-712 (1986); Nassau County (N.Y.) Bar Ass'n Formal Op. 90-35 (1990); Or. State Bar Op. 515 (1988); South Carolina Bar Op. 81-13 (1982); Wis. State Bar Op. E-84-3 (1984); *In re* Breen, 552 A.2d 105 (N.J. 1989) (representing husband and wife in divorce is impermissible conflict of interest); *In re* Themelis, 83 A.2d 507, 510 (Vt. 1951) ("Conflict of interest is almost certain in divorce litigation. No type of action involves more confidences or is more susceptible of advantage based on privileged communications"); Walden v. Hoke, 429 S.E.2d 504, 509 (W. Va. 1993) (improper for lawyer to represent both husband and wife at any stage of separation and divorce proceeding, even with full disclosure and informed consent. "[T]he likelihood of prejudice is so great with dual representation so as to make adequate representation of both spouses impossible, even where the separation is 'friendly' and the divorce uncontested."); *see also* Hobbs, *supra* note 167, at 68 (noting although some states strictly prohibit the joint representation of a husband and wife in a divorce, a lawyer may represent a divorcing couple under limited circumstances).

174. *See* Pelham v. Griesheimer, 440 N.E.2d 96 (Ill. 1982); Walker v. Walker, 707 P.2d 110 (Utah 1985).

175. *See In re* Lackey, 390 N.E.2d 519 (Ill. App. Ct. 1979), *aff'd, sub. nom.* People v. Lackey, 405 N.E.2d 748 (Ill. 1980).

176. *See In re* Petrie, 742 P.2d 796, 800 (Ariz. 1987) (concluding "it may be possible for an attorney to represent multiple parties to an adoption, but only after full disclosure and upon consent of the parties" even after acknowledging that "[d]espite the spirit of cooperation often present in an adoption, conflict of interest situations are likely to arise for an attorney involved in the proceedings"); Arden v. State Bar, 341 P.2d 6 (Cal. 1959). At least one court has found joint representation in private adoptions improper per se. Wuertz v. Craig, 458 So. 2d 1311 (La. 1984); *See In re* Adoption of Anonymous, 131 Misc. 2d 666, 668 (N.Y. Surrogate's Ct. 1986) ("In a private adoption, the conflict between the interests of a natural mother and the adoptive parents is clear and unmistakable. Counsel for adoptive parents should avoid any actions which can be construed as joint representation of the adoptive parents and the natural mother.").

177. CAL. FAM. CODE § 8800(d) (West 1994) ("Notwithstanding any other law, it is unethical for an attorney to undertake the representation of both the prospective adoptive parents and the birth parents of a child in any negotiations or proceedings in connection with an adoption unless a written consent is obtained from both parties."); *see also id.* § 8800(c):

> The Legislature declares that in an independent adoption proceeding, whether or not written consent is obtained, multiple representation by an attorney should be avoided whenever a birth parent displays the slightest reason for the attorney to believe any controversy might arise. The Legislature finds and declares that it is the duty of the

E. Estate Planning

Similarly, estate planning is another area in which joint representation raises conflict of interest issues.[178] The representation of a husband and wife, two family members, or cohabitating partners regularly results in conflicting interests.[179] As is true in family law matters, the attorney should seek to maximize the benefits to each client, satisfy each client's wishes fully, minimize the tax consequences of the transfers, and protect each client's rights. Although clients may arrive at the lawyer's doorstep assuming their interests are aligned, they are often mistaken. For example, one spouse may (and the other may not) wish to make a will providing a substantial disposition to a charity. Or one or both spouses may have children from a previous marriage for whom they wish to make different beneficial provisions. Accordingly, for the same reasons that the practice of joint wills is disfavored,[180] joint representation in this area is unwise.[181]

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attorney when a conflict of interest occurs to withdraw promptly from any case, advise the parties to retain independent counsel, refrain from taking positions in opposition to any of these former clients, and thereafter maintain an impartial, fair, and open attitude toward the new attorneys.

178. *See* 4 MALLEN & SMITH, *supra* note 22, § 32.5 at 755-57; Charles M. Bennett, *"Don't Tell My Husband, But . . ."Ethics in Spousal Representation*, 135 TRUSTS & ESTATES 40 (May 1996); *Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct, Report of the Commission on Significant New Developments in Probate and Trust Law Practice*, 22 REAL PROP. PROB. & TR. J. 1, 10-23 (1987); Joel C. Dobris, *Ethical Problems for Lawyers Upon Trust Terminations: Conflicts of Interest*, 38 U. MIAMI L. REV. 1, 70 (1983) (noting lawyer who agreed to represent trust and beneficiary jointly would be required to withdraw from both sides if "true adversity" later developed); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253 (1994); Jeffrey N. Pennell, *Ethics in Estate Planning and Fiduciary Administration: The Inadequacy of the Model Rules and the Model Code*, 45 THE RECORD OF THE ASSOC. OF THE BAR OF THE CITY OF N.Y. 715 (1990).

179. *See* HAZARD & HODES, *supra* note 12, § 1.7:306-1 at 256.18 ("The risks in undertaking representation of a husband and wife are inescapable; there is no fully satisfactory solution."); Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 PROB. LAW. 1, 13 (1994) (stating that the concept of joint representation is "a legal and ethical oxymoron").

180. *See* Sievers v. Barton, 775 P.2d 489, 493 (Wyo. 1989); WILLIAM M. MCGOVERN, JR., ET AL., WILLS, TRUSTS, AND ESTATES § 9.5 (1988); *see also* CAL. RULES OF PROFESSIONAL CONDUCT 3-310(A) (1992) (requiring written waivers for preparation of joint wills). *See generally* JESSE DUKEMINER & STANLEY M. JOHANSON, WILLS, TRUSTS AND ESTATES 274 (4th ed. 1990) ("[J]oint wills are notorious litigation-breeders that should not be used at all."); GEORGE W. THOMPSON, THE LAW OF WILLS § 34, at 69 (3d ed. 1947) ("As a general rule, joint wills are not regarded with much favor by the courts, and are . . . apt to invite

F. Labor and Employment Law

Labor lawyers are often asked to undertake joint representation of employer-officer, employer-employee, union-officer, or union-grievant.[182] These situations may result in conflicts, as evidenced by the significant increase in the number of legal malpractice claims against labor attorneys.[183] For example, the joint defense of a union and its officers and directors may result in conflicts,[184] as may the joint defense of an employer and supervisor[185] or employer and employee.[186] One commentator has also

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litigation."). A joint will is a single testamentary instrument constituting or containing the wills of two or more persons, and jointly executed by them.

181. *See generally* RESTATEMENT, *supra* note 2, § 201; Janet L. Dolgin, *The Morality of Choice: Estate Planning and the Client Who Chooses Not to Choose*, 22 SEATTLE U.L. REV. 31, 36 n.20 (1998) ("[T]he 'potential for harm' . . . in the estate planning context . . . is such that joint representation should only be undertaken in unusual cases."); Hollis F. Russell & Peter A. Bicks, *Joint Representation of Spouses in Estate Planning: The Saga of Advisory Opinion 95-4*, 72 FLA. B.J. 39 (Mar. 1998); John C. Williams, *The Case of the Unwanted Will*, 65 A.B.A. J. 484, 486 (1979).

182. *See generally* Bobbi K. Dominick, *Ethical Issues Presented by Joint Representation of Defendants in Employment Cases*, 43 ADVOCATE (Idaho) 20 (Mar. 2000):

> There are many logical reasons why a corporate defendant would want one attorney to represent all defendants jointly: 1. Joint representation may minimize attorney fees and duplicative preparation and since many corporations pay for the representation of their employees acting in the course and scope of their employment. This avoids requiring the corporation to pay for such duplicate representation [fn. omitted]; 2. Joint representation presents a united front on the defense to the plaintiff and ultimately to the jury; 3. Joint representation facilitates common access to all of the necessary facts; 4. Joint representation enhances the corporate culture of supporting managers and supervisors who are wrongfully accused; and 5. Joint representation can alleviate managers' concerns about being second guessed by supervisors.

183. *See* 3 MALLEN & SMITH, *supra* note 22, § 23.18 at 575; *see, e.g.*, Aragon v. Federated Dep't Stores, Inc., 750 F.2d 1447 (9th Cir. 1985); Weitzel v. Oil Chem. & Atomic Workers Int'l Union, 667 F.2d 785 (9th Cir. 1982); Woodburn v. Turley, 625 F.2d 589 (5th Cir. 1980); White v. Fosco, 599 F. Supp. 710 (D.D.C. 1984); Pedro v. Teamsters Local 490, 509 F. Supp. 83 (N.D. Cal. 1981); Fischer v. Browne, 586 S.W.2d 733 (Mo. Ct. App. 1979); Glamann v. St. Paul Fire & Marine Ins. Co., 424 N.W.2d 924 (Wis. 1988).

184. *See* Yablonski v. United Mine Workers, 448 F.2d 1175 (D.C. Cir. 1971); Milone v. English, 306 F.2d 814 (D.C. Cir. 1962); Teamsters v. Hoffa, 242 F. Supp. 246 (D.D.C. 1965).

185. *See generally* Dominick, *supra* note 182; John J. Doyle, Jr. & Michael L. Blumenthal, *The Defendant's Perspective: Ethical Consideration in Representing and Counseling Multiple Parties in Employment Litigation*, 10 LAB. LAW. 19 (1994).

186. *See, e.g.*, Dunton v. County of Suffolk, 729 F.2d 903, 908 (2d Cir. 1984) (joint representation of municipality and employee resulted in lawyer failing to act as conscientious advocate for employee); Shadid v. Jackson, 521 F. Supp. 87, 90 (E.D. Tex. 1981) (noting that

noted the potential for economic coercion in the joint representation of employer and employee due both to the financial incentive when the employer offers to pay the costs of the legal representation and the employee's obvious fear of a subsequent loss of employment.[187]

G. Insurers and Insureds

Joint representation also results in conflicts of interest when the lawyer represents both the insurer and an insured. Lawyers employed by or hired by insurance companies to represent one of their insureds must represent such insureds with undivided loyalty.[188] In some circumstances it is only the insured who is the attorney's client, not the insurance company.[189] In other circumstances, and indeed the more traditional view, the attorney represents both the insured and the insurer.[190] In either instance, a conflict arises when

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joint representation of municipality and police officer presents a potential for conflicting loyalties, creating nonconsentable conflict of interest; "[t]he potential for abuse is far too serious to permit joint representation to continue, even in the face of an apparent waiver signed by both of these defendants"); *see also* Opinion 552, 552, 1985 WL 150698 (N.J. Adv. Comm. Prof. Eth. 1985) (announcing joint representation of municipality and individual officials or employees of that municipality in civil rights action per se improper), *modified by In re* Petition for Review of Opinion 552 of the Advisory Comm. on Prof'l Ethics, 102 N.J. 194, 507 A.2d 233 (N.J. 1986) (stating propriety of such joint representation to be decided on case by case basis).

187. *See* Lowenthal, *supra* note 148, at 969-70.

188. *See* ABA/BNA LAWS. MAN. PROF. CONDUCT § 51:309 (1987) ("A lawyer hired or employed by an insurance company to represent an insured must represent the insured as his client with undivided loyalty."); MEISELMAN, *supra* note 145, at 294-95 ("[T]he attorney, retained and compensated by the insurance company, must bear in mind that his sole obligation is to the assured. It is the assured who is his client."); *accord* Hawkins v. State Bar, 591 P.2d 524 (Cal. 1979); Wong v. Fong, 593 P.2d 386 (Haw. 1979); Shelby Mut. Ins. Co. v. Kleman, 255 N.W.2d 231 (Minn. 1977); Lysick v. Walcom, 65 Cal. Rptr. 406 (Ct. App. 1968). *See generally* Jeffrey S. Stern, *Dilemmas for Insurance Counsel—Coping with Conflicts of Interest*, 65 MASS. L. REV. 127 (1980).

189. *See* Employers Ins. of Wausau v. Albert D. Seeno Constr. Co., 692 F. Supp. 1150, 1157 (N.D. Cal. 1988) (Cumis counsel represent solely the insured); San Diego Federal Credit Union v. Cumis Ins. Soc'y, 208 Cal. Rptr. 494 (Ct. App. 1984); *see also* CAL. CIV. CODE § 2860 (West 1993); L.A. County Bar Ass'n, Formal Op. No. 439 (1986).

190. *See* MGIC Indemn. Corp.v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986); Ettinger v. Cranberry Hill Corp., 665 F. Supp. 368, 372 (M.D. Pa. 1986); Mitchum v. Hudgens, 533 So. 2d 194, 198-99 (Ala. 1988); Nandorf, Inc. v. CNA Ins. Cos., 479 N.E.2d 988, 991 (Ill. App. Ct. 1985); Aragon v. Pappy, Kaplan, Vogel & Phillips, 262 Cal. Rptr. 646, 654 (Ct. App. 1989); *see also Chapter V Insurance Defense*, 50 BAYLOR L. REV. 671, 671 (1998) ("Traditionally, . . . both insurer and insured are clients of defense counsel."). *See generally* HAZARD & HODES, *supra* note 12, § 1.7:303 at 256.7 n.3.01 ("Everyone agrees that

a particular course of action, which is beneficial to the insured, would be detrimental to the insurer, who is ultimately paying for the lawyer.[191] For example, the insured may wish to settle a matter within the policy limits, fearing a possible verdict exceeding those limits. However, the insurer may prefer to hold out for a lower settlement offer or to litigate the matter in an attempt to avoid liability altogether or to discourage similar lawsuits.[192] When such a conflict arises, the attorney may not continue.[193] As noted by one commentator, "[c]onflicts of interest potentially affecting the quality of the representation are inherent in situations in which an insurance carrier has agreed to provide a defense for its insured."[194]

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the insured is at least *a* client, if not the *only* client. The lawyer must treat the insured accordingly.") (italics in original); 4 MALLEN & SMITH, *supra* note 22, §§ 29.14-29.25 at 312-98 (discussing dual representation in insurance defense matters).

191. *See* Rogers v. Robson, Masters, Ryan, Brumund & Belom, 392 N.E.2d 1365 (Ill. App. Ct. 1979), *aff'd*, 407 N.E.2d 47 (Ill. 1980). *See generally* Ellen S. Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part I – Excess Exposure Cases*, 78 TEX. L. REV. 599 (1999); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583 (1993).

192. *See* Aronson, *supra* note 41, at 822-23. For other examples of conflicts arising in the insurance area, *see also* Denenberg & Learned, *supra* note 6, at 505-08; Eric Mills Holmes, *A Conflicts-of-Interest Roadmap for Insurance Defense Counsel: Walking an Ethical Tightrope Without a Net*, 26 WILLAMETTE L. REV. 1 (1989); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475 (1996).

193. *See* Rogers v. Robson, Masters, Ryan, Brumund & Belom, 392 N.E.2d 1365 (Ill. App. Ct. 1979), *aff'd*, 407 N.E.2d 47 (Ill. 1980); Lieberman v. Employers Ins., 171 N.J. Super 39, 407 A.2d 1256 (N.J. Super. Ct. App. Div. 1979), *modified*, 84 N.J. 325, 419 A.2d 417 (N.J. 1980). *See generally* Jerry Brodsky, *Duty of Attorney Appointed by Liability Insurance Company*, 14 CLEV.-MARSHALL L. REV. 375 (1965); Stern, *supra* note 185, at 127; *see also* Linda R. Beck, *Ethical Issues in Joint Representation Under Subcontract Requirements for Defense and Additional Insured Status*, 15 CONSTR. LAW. 25 (Jan. 1995).

194. HAZARD & HODES, *supra* note 12, § 1.7:303 at 256.5; *see also id.* at 256.7 ("Although both insurer and insured will share the goal of defeating the claim of the plaintiff, they may have different interests with respect to trial tactics, willingness to settle, and so forth."); Stephen L. Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 CONN. INS. L.J. 27, 34 (1997) (stating joint representation does not serve a client's interests; "The insured gains nothing directly from joint representation, and loses access to a lawyer serving only her interests and advising solely from her perspective. Imagine yourself in the insured's situation and it should not be too difficult to understand which option you would most likely choose.").

H. Summary

Although each of these seven subject matter areas presents significant opportunities for joint representation, the case law addressing these areas has recognized significant risks in undertaking such representation. The reasons underlying the admonitions against joint representation are consistent as they include divided loyalties and the impossibility of anticipating all possible ways in which the clients' interests could diverge.

Despite the uniform dangers across subject matter lines, it is interesting to note that the areas in which joint representation is most likely to be found improper, and the only areas in which courts or other regulators have imposed per se rules prohibiting joint representation—real estate closings, divorces, and criminal defense—involve one-shot transactions by noninstitutional clients with relatively low resources. This phenomenon strongly implicates lawyer self-interest as motivating the continuing practice of joint representation. Prohibiting joint representation of a divorcing couple, for example, who are unlikely to conduct ongoing business with the firm and are unlikely to generate future business for the firm, has little, if any, economic impact. Judges and regulators, who are lawyers themselves, understand economic realities and justify narrow per se rules, rather than broader prohibitions, on the basis of client autonomy and informed consent. However, practicing lawyers have more incentive to explain the risks of joint representation clearly and comprehensively in situations where the potential financial loss is relatively minor.[195] With organizational or established individual clients involving the potential of significant financial loss, the attorney will have reduced motivation to explain the risks inherent in joint representation. Accordingly, the few existing per se prohibitions suggest the profession's concern for conflicts is tempered by its stronger concern for economics.[196]

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195. *See* George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 296 n.108 (1998) ("Lawyers have more incentive to overstate legal risks in one-shot transactions, such as real estate closings, wills, divorces, and other consumer transactions.").

196. *See* Brian Close, *Rules Allowing Sale of a Law Practice's Goodwill is Ill-Conceived*, 24 MONT. LAW. 17, 18 (Sept. 1998):

> Some ethical dilemmas are genuine, such as what to do when a client commits perjury. Others, however, are only apparent, and one's duty becomes clear once the attorney's financial incentive is removed. Conflicts such as joint representation . . . are obviously driven by the pursuit of money and not on the merits of one's duty to one's client.

V. JOINT REPRESENTATION: A RISK-BENEFIT ANALYSIS

This Part sets out the traditional arguments offered in support of joint representation. It then analyzes the persuasiveness of these justifications in light of the risks inherent in joint representation, and concludes that the risks far outweigh the benefits.

A. The Justifications for Joint Representation: The Holes in the Reasoning and the So-Called Protection

Three basic policy considerations underlie the conflict of interest rules dealing with joint representation: (1) the interest of clients in certain objectives that are available through joint representation; (2) the need to protect clients from the dangers of joint representation; and (3) the desire to preserve lawyers' reputations by avoiding apparent impropriety.[197] These policies indicate the ethical rules concerning joint representation involve a balancing of the risks of the latter two considerations with the client benefit resulting from permitting the practice. Accordingly, it is appropriate to examine the benefits resulting from joint representation.

Joint representation is desirable from a client's perspective primarily because it is cost-effective.[198] Other proffered justifications include maintaining an amicable relationship with the co-client;[199] the desire to retain a particular attorney – whether due to reputation, prior relationship, or

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197. *See* Moore, *supra* note 6, at 213-14 (noting "[u]nfortunately, these policies are not necessarily harmonious").

198. *See* Zacharias, *supra* note 6, at 414 ("The most obvious justification is cost. Using a single lawyer jointly can save clients the expense of duplicative representation."); Teresa Stanton Collett, *The Promise and Peril of Multiple Representation*, 16 REV. LITIG. 567, 575 (1997) (joint representation "promotes pooling of resources and economies of scale"); *id.* at 576 (joint representation results in reduced legal fees because "unnecessary duplication of legal services is avoided by the use of a single lawyer or law firm"); Dzienkowski, *supra* note 30, at 747 ("[C]lients wish to minimize the cost of legal representation by engaging only one lawyer."); Moore, *supra* note 6, at 214 ("[C]lients may wish to retain a single lawyer in order to save money."). *See generally* 2 MALLEN & SMITH, *supra* note 22, § 16.1 at 689; WOLFRAM, *supra* note 5, § 7.3 at 349.

199. *See* Moore, *supra* note 6, at 214 (clients may wish to retain a single lawyer "to maintain an amicable relationship"); Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, *supra* note 6, at 1310 ("In amiable circumstances in which each party has the same objective, retaining one attorney can reduce artificial hostilities that arise from a contrived adversarial situation."); *see also* WOLFRAM, *supra* note 5, § 7.3 at 349 (stating clients "may deliberately choose joint representation in order to minimize mutual recrimination").

familiarity with the subject of the representation;[200] and the "united front" strategy.[201]

Joint representation also confers benefits upon lawyers. The practice is desirable from the attorney's perspective because, assuming the clients desire joint representation, it permits the attorney to please those clients by agreeing to undertake the representation; it generates more revenue;[202] and it eliminates some of the very real problems that can arise in separate representation concerning communications with a party represented by counsel.[203]

However, joint representation also presents inherent problems. Joint representation reduces the protection available under the attorney-client

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200. *See* RESTATEMENT, *supra* note 2, § 121, cmt. b (noting "uncertainty concerning the successor lawyers' qualifications, usually additional cost, and the inconvenience of separate representation," and also noting "one of the clients might be deprived of the services of a lawyer whom the client had a particular reason to retain, perhaps on the basis of a long-time association with the lawyer"); *see also* Zacharias, *supra* note 6, at 415 (noting the rationale that clients may wish to retain a conflicted lawyer because they know and trust her is "overemphasized"); Dzienkowski, *supra* note 30, at 747 (looking at the lawyer's familiarity with the subject matter of the representation or the parties themselves); Moore, *supra* note 6, at 226-27 (stating, among other reasons, the possibility that the lawyer may have the trust of both clients, the lawyer's possible expertise, and the lawyer's possible familiarity with the subject matter of the litigation, may justify joint representation).

201. *See* Glasser v. United States, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting) ("A common defense often gives strength against a common attack."); United States v. Medel, 592 F.2d 1305, 1312 (5th Cir. 1979) (noting "unified front" strategy); *see also* Collett, *supra* note 198, at 577 ("[T]he ability to present a united front to a common foe presents substantial tactial advantages that cannot be ignored."); Moore, *supra* note 6, at 226-27 (opportunity to present a "united front" in litigation may justify joint representation). *See generally* LEN BIERNAT & R. HUNTER MANSON, LEGAL ETHICS FOR MANAGEMENT AND THEIR COUNSEL § 7-4(c) (1996).

202. *See* Zacharias, *supra* note 6, at 422 ("Lawyers have a vested economic interest in retaining their clients. By sending a client to another lawyer, a lawyer risks losing not only the particular case but also future cases that the client might bring her."); *see also infra* note 217 and accompanying text.

203. *See* Collett, *supra* note 198, at 574-75:

> [J]oint representation involves pooling the information of all clients . . . [providing] a layer of detail and context that would not be available were the lawyer to represent only one client. While the basic information could be made available, either through witness interviews or more formal depositions, in most cases it would be prohibitively expensive in terms of both time and legal fees to develop the informal flow of information that characterizes the joint client-attorney relationship.

See also Felicita Ruth Reid, Comment, *Ethical Limitations on Investigating Employment Discrimination Claims: The Prohibition on Ex Parte Contact with a Defendant's Employees*, 24 U.C. DAVIS L. REV. 1243 (1991).

privilege.[204] Joint representation also compromises confidentiality due to the lawyer's duty to inform all co-clients of all information relevant to the representation.[205]

Moreover, joint representation *always* presents the potential for a disqualifying conflict of interest.[206] When a lawyer agrees to provide joint representation, the lawyer acquires two (or more) separate clients, each of whom is entitled to the lawyer's best efforts and loyalty.[207] The attorney is not permitted to prioritize clients by, for example, treating the corporate employer as the "primary" or "real" client and the employee as an expendable "secondary" client.[208] Thus, if the clients' interests diverge, the

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204. *See* Collett, *supra* note 198, at 572 ("[I]ndividual representation provides the broadest protection under the attorney-client privilege, since only the client can waive the privilege. By contrast, in joint representation, communications with counsel are protected by the joint-client privilege, which can be waived by any of the clients in disputes arising between them."); *see also* Evans v. Blesi, 345 N.W.2d 775 (Minn. Ct. App. 1984) (by representing both a corporation and its majority shareholder, a lawyer had conflicting interests because he was also required to advise minority shareholders; therefore, conversations with the majority shareholder were not privileged).

205. *See* Collett, *supra* note 198, at 571 ("Unlike joint representation, which requires the attorney to inform other clients of all information they need in order to make informed decisions, the attorney for the individual client has only limited disclosure duties which might conflict with the client's desire for confidentiality."); *see also* Allegaert v. Perot, 565 F.2d 246 (2d Cir. 1977) (no reasonable expectation of confidentiality between co-clients because information not privileged).

206. *See* 2 MALLEN & SMITH, *supra* note 22, § 16.2 at 692 ("The potential for conflicts of interest is inherent in the representation of multiple clients."); Hazard, *supra* note 137, at 1057 ("Every joint representation—such as estate planning for husband and wife—entails risk of a subsequent claim of favoritism and nondisclosure."); Stephen Doherty, Comment, *Joint Representation Conflicts of Interest: Toward a More Balanced Approach*, 65 TEMP. L. REV. 561, 585 (1992) ("[D]anger lies in every joint representation that some unanticipated and uncontrollable event will arise and cause a rift in the clients' common interests."); *see also* Eisemann v. Hazard, 112 N.E. 722, 723 (N.Y. 1916) (although it is not always improper for a lawyer to represent conflicting interests, "the cases in which this can be done are exceptional, and never entirely free from danger of conflicting duties."); *In re* Conduct of Johnson, 707 P.2d 573, 579 (Or. 1985) ("[I]t necessarily should occur to practicing lawyers that the simultaneous representation of multiple clients is fraught with professional danger."). *See generally* WOLFRAM, *supra* note 5, § 7.3 at 349.

207. *See* DRINKER, *supra* note 24, at 112 ("When the interests of clients diverge and become antagonistic, their lawyer must be absolutely impartial between them . . . .").

208. *See* ABA/BNA LAWS. MAN. PROF. CONDUCT § 51:303 (1987) (conflict "may not be eliminated by dropping one client in favor of the other"). Nevertheless, attorneys frequently engage in such prioritizing of clients, despite well-established authority forbidding the practice. *See, e.g.*, Unified Sewerage Agency of Washington County, Or. v. Jelco, Inc., 646 F.2d 1339, 1345 n.4 (9th Cir. 1981); Harte Biltmore Ltd. v. First Penn. Bank, 655 F.

attorney is subject to disqualification[209] and must withdraw[210]—usually causing both financial and tactical hardship for the clients,[211] and potentially resulting in a malpractice claim or disciplinary charges against the lawyer.[212] The lawyer's withdrawal requires each client to retain

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Supp. 419 (S.D. Fla. 1987); SWS Fin. Fund A v. Salomon Bros. Inc., 790 F. Supp. 1392, 1399 (N.D. Ill. 1992) (termination invalid if made for purpose of dropping one client in favor of the more lucrative business another client could provide); Strategem Dev. Corp. v. Heron Int'l N.V., 756 F. Supp. 789, 794 (S.D.N.Y. 1991) (law firm "may not undertake to represent two potentially adverse clients and then, when the potential conflict becomes actuality, pick and choose between them"); Picker Int'l Inc. v. Varian Ass'n., 670 F. Supp. 1363, 1365 (N.D. Ohio 1987), *aff'd*, 869 F.2d 578 (Fed. Cir. 1989) ("A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client."); Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 272 (D. Del. 1980) (stating that counsel may not eliminate a conflict "merely by choosing to represent the more favored client and withdrawing its representation of the other").

209. *See* WOLFRAM, *supra* note 5, § 7.1 at 329 ("The motion for a judicial order disqualifying a lawyer in pending litigation because of conflict is a traditional remedy that has come into prominence in recent years."); EPSTEIN, *supra* note 11, at vii ("Ten years ago only a handful of cases could be found on motions to disqualify lawyers for conflict of interest. Today the cases are legion."); *see also* Denenberg & Learned, *supra* note 6, at 497 ("Disqualification motions based on alleged conflicts of interest have greatly increased over the past fifteen to twenty years."); O'Dea, *supra* note 11, at 693 ("In recent years, motions to disqualify an opposing counsel for violations of ethical obligations have proliferated.") (footnote omitted). The greatest number of disqualification motions are based in conflict of interest issues. *See* ABA/BNA LAWS. MAN. PROF. CONDUCT § 51:1901 (1987).

210. *See* ABA/BNA LAWS. MAN. PROF. CONDUCT § 51:301 (1987) ("Should it become evident during the multiple representation that the lawyer cannot adequately represent the interests of each party, or should any party revoke consent, the lawyer must withdraw and may not thereafter represent one party against another on the same matter."); *see also* DRINKER, *supra* note 24, at 112 ("When the interest of clients diverge and become antagonistic, their lawyer must be absolutely impartial between them, which usually means that he may represent none of them."); WOLFRAM, *supra* note 5, § 7.2 at 348. The attorney's failure to withdraw from joint representation after an adverse situation develops has been held to justify punitive damages. *See* Gillespie v. Klun, 406 N.W.2d 547 (Minn. Ct. App. 1987); John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127, 1170 (1988).

211. *See* Zacharias, *supra* note 6, at 419 ("Subsequent replacement of the lawyer often delays prosecution of the matter, to the detriment of both the client and the adversary. When the replacement lawyer enters her appearance near or in the middle of trial, the costs extend to the judicial system."); *see also* Government of India v. Cook Indus., Inc., 569 F.2d 737, 739 (2d Cir. 1978) (disqualifying counsel results in financial loss for client and, perhaps, loss of developed relationship with attorney).

212. *See* RESTATEMENT, *supra* note 2, § 128, cmt. a:

> The most common remedy [for violation of section 128] is the lawyer's disqualification from further representation of one or more clients in a matter. A suit

individual counsel, resulting in duplication of effort and expense for *both* clients.[213] The original lawyer's work product usually cannot be delivered to substitute counsel, for the obvious reason that permitting substitute counsel access to the work product for all practical purposes negates the effect of the original attorney's withdrawal.[214]

Accordingly, the primary justification for joint representation from the clients' perspective—the cost savings—is overshadowed by the burden that will fall on the clients if the attorney is subsequently required to withdraw.[215] In exchange for the possibility of reduced costs, the clients face the possibility of finding two new counsel, perhaps on short notice. The

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for professional malpractice is available if a client has suffered damage as a result of a lawyer's conflict of interest. In appropriate cases, the lawyer is also subject to professional discipline or fee forfeiture.

(citations omitted); *see also* Epstein, *supra* note 6, at 579 ("To get a conflict-of-interest question wrong may . . . well expose the errant lawyer to a wide range of sanctions, including . . . forfeiture of fees, disciplinary proceedings, and perhaps in extreme cases even criminal sanctions."); Zacharias, *supra* note 6, at 435 (remedies may include attorney discipline, malpractice liability, or loss of fees).

213. Earlier drafts of the Restatement noted these costs. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 201, cmt. e(ii) (Tentative Draft No. 4, 1991):

> The costs imposed on a client by disqualification of the client's lawyer can be substantial. At a minimum, the client must incur the costs of finding a new lawyer and educating that lawyer about the facts and issues. The costs of delay in the proceeding are borne by the client in part, but also by the tribunal and society.

214. *See* First Wis. Mortgage Trust v. First Wis. Corp., 584 F.2d 201, 209, 217 (7th Cir. 1978) (en banc) (holding that cases "turn upon whether there exists a reasonable possibility of confidential information being used in the formation of, or being passed to substitute counsel through, the work product in question"); *but see* Behunin v. Dow Chem. Co., 642 F. Supp. 870, 873 (D. Colo. 1986); Chronicle Pub. Co. v. Hantzis, 732 F. Supp. 270, 273-74 (D. Mass. 1990), Edilcentro Int'l, Ltd. v. Porco, No. 75-6488 (S.D.N.Y. Dec. 12, 1978) (denying access to all work product generated by members of disqualified attorney's firm, as well as all work product generated by accountants hired by the firm); *see also* EZ Paintr Corp. v. Padco, Inc., 746 F.2d 1459 (Fed. Cir. 1984); Realco Serv., Inc. v. Holt, 479 F. Supp. 867, 880 (E.D. Pa. 1979). *See generally* John P. Gyorgy, *Access to Work Product of Disqualified Counsel*, 46 U. CHI. L. REV. 443 (1979); Stan Thompson, *Attorney Disqualification and Work Product Availability: A Proposed Analysis*, 47 MO. L. REV. 763 (1982); Letitia Jane Grishaw, Comment, *Access to the Work Product of a Disqualified Attorney*, 1980 WIS. L. REV. 105; Thomas Newman, Note, *Attorney Disqualification and Access to Work Product: Toward a Principled Rule*, 63 CORNELL L. REV. 1054 (1978).

215. Moreover, some clients may agree to waive a conflict without fully understanding the ramifications. *See* Para Tech. Trust v. C.I.R., No. 92-574, 1992 WL 237247 (Tax Ct. 1992) (memorandum opinion rejecting waivers as inadequately informed and reflecting only clients' desire to avoid expense of substitute counsel); *see also infra* notes 224-30 and accompanying text.

clients likely will have to pay new counsel to research some of the same issues the first lawyer was paid to do, and may suffer tactical disadvantages during the time the new attorneys are getting up to speed.[216] The other identified client benefits-maintaining an amicable relationship with the co-client, strategy concerns, and the ability to select a particular lawyer-similarly vanish when subsequent withdrawal becomes necessary.

From the attorney's perspective, joint representation presents a potential loss of two clients. In addition to the loss of income for that particular matter, the lawyer likely has lost any future business from those clients due to the inconvenience caused them by the lawyer's withdrawal. If one of those affected was a large corporate client, the future financial loss to the lawyer may be substantial.[217] The lawyer may also be required to forfeit any legal fees earned before withdrawal.[218] Moreover, if forced to withdraw at a particularly unfortunate time, the lawyer may face legal malpractice or disciplinary charges, which create both financial and reputational concerns.[219] Even absent actual charges, disqualification or withdrawal may result in damage to the lawyer's reputation.[220]

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216. *See, e.g.*, Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 719-20 (7th Cir. 1982); Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121, 1126-27 (N.D. Ohio 1990). *See generally* Craig A. Peterson, *Rebuttable Presumptions and Intra-Firm Screening: The New Seventh Circuit Approach to Vicarious Disqualification of Litigation Counsel*, 59 NOTRE DAME L. REV. 399, 400-01 (1984).

217. *See* HAZARD, *supra* note 30, at 82:

> Withdrawal of a [large client's] business can severely disturb the firm's fortunes, which is a gentle way of saying it can result in loss of employment. Word of the client's dissatisfaction can spread through the corporate grapevine, resulting in permanent damage to the firm's reputation and the reputations of each of its members and associates.

218. *See* Hendry v. Pellard, 73 F.3d 397 (D.C. Cir. 1996) (holding that lawyers who represent clients with conflicting interests can be forced to disgorge their legal fees, even absent any evidence the clients sustained damages from the joint representation); *In re* Prince, 40 F.3d 356 (11th Cir. 1994) (law firm ordered to disgorge all fees and expenses received); *see also* RESTATEMENT, *supra* note 2, at § 37 (permitting forfeiture of some or all of lawyer's "compensation for the matter" for engaging in "clear and serious violation of [a] duty to a client"); *id.* at § 121, cmt. f (citing fee forfeiture among other remedies for lawyer's violation of conflict of interest rules).

219. *See* Steven H. Resnicoff, *The Attorney-Client Relationship: A Jewish Law Perspective*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 349, 359 n.35 (2000) ("[A]n abrupt withdrawal, in certain circumstances, could cause the client to lose, triggering a malpractice judgment—and a possible disciplinary sanction—against the withdrawing attorney."); David M. Siegel, *My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings*, 23 J. LEGAL PROF. 85, 105 (1999) ("Termination of the attorney-client relationship itself imposes obligations on the lawyer to

B. Can the Problems with Joint Representation Be Resolved Short of an Absolute Bar?

In effect, the current rules represent a compromise solution: They make joint representation more difficult by subjecting it to special burdens and conditions, but they do not prohibit the practice altogether. Can the problems of joint representation be accommodated in this manner, thus avoiding the need for an absolute ban? The rules' solution relies on consent to make the compromise work. The current rules require the attorney to ascertain whether the conflict is consentable, and if so, to obtain informed consent from both clients.[221] Both prongs of this approach are inadequate. The first prong, although requiring the lawyer to determine whether the conflict is consentable, imposes no duty to investigate. The second prong, by permitting informed consent to waive a conflict, ignores the inherent limitations of waiver in the joint representation context.

The first inadequacy with the applicable ethical rules is their failure to impose any duty to investigate. A perfunctory conflicts check will not necessarily reveal areas of conflict between co-clients.[222] Some probing is necessary to discover areas of potential inconsistency or disagreement.

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ensure that his or her withdrawal does not prejudice the client. Failure to do so can result in disciplinary action or liability for malpractice."). *See generally* 2 MALLEN & SMITH, *supra* note 22, § 16.1 at 687 ("The representation of conflicting interests portends broad, adverse consequences. For the lawyer, such representation can result in disciplinary proceedings, disqualification, legal malpractice claims and a loss of compensation."); Wendy E. Lehmann, Annotation, *Legal Malpractice in Connection with Attorney's Withdrawal as Counsel*, 6 A.L.R.4TH 342 (1981). Actions for malpractice seem to be a common response when a lawyer seeks his or her fees after withdrawing from a case. *See, e.g.*, Lifschultz Fast Freight v. Haynsworth, Marion, McKay & Guerard, 486 S.E.2d 14 (S.C. Ct. App. 1997), *aff'd in part, vacated in part*, 513 S.E.2d 96 (S.C. 1999); Darby & Darby, P.C. v. VSI Int'l, 178 Misc. 2d 113 (N.Y. Sup. Ct. 1998); *see also* Alan Scott Rau, *Resolving Disputes Over Attorneys' Fees: The Role of ADR*, 46 SMU L. REV. 2005, 2015 (1993) ("Clients also sue lawyers, and whether the suit is denominated as one for malpractice, fraud, or breach of contract, a substantial number of such cases turn on claims by the client that the attorney's fee is unwarranted.").

220. *See* Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1576-77 (Fed. Cir. 1984) ("A disqualification order discredits the bar generally and the individual attorney particularly.").

221. *See* MODEL RULES OF PROF. CONDUCT R. 1.7 (1999).

222. The Model Rules require that the lawyer reasonably believe that the representation will not be affected and that the client consents after consultation. *See* MODEL RULES OF PROF. CONDUCT R. 1.7(b) (1999):

> 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

Second, the current ethical rules and case law ascribe far too much credit to the curative power of waiver. In theory, client consent empowers clients to make informed choices. However, client consent is based on erroneous underlying assumptions, which renders consent illusory. Waiver in the joint representation context suffers from three flaws: client understanding, possible coercion, and lawyer self-interest.

As an initial matter, most individuals simply do not understand the legal significance of conflicts of interest.[223] How could they when lawyer themselves do not? In light of the rampant confusion that exists among practicing attorneys regarding the implications of conflict of interest rules, it is sheer fantasy to assume practitioners are explaining these principles with clarity to laypersons.[224]

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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.

The case law imposes a duty to investigate upon the trial court in criminal cases when the court knows or reasonably should know that an actual conflict exists. *See* Griffin v. McVicar, 84 F.3d 880, 887 & n.5 (7th Cir. 1996) (trial court has duty to investigate when it knows or reasonably should know actual conflict exists); *see also* Wilson v. Morris, 724 F.2d 591, 594-95 (7th Cir. 1984) (stating that trial court's duty to investigate not triggered by the "mere fact of joint representation" nor by a potential conflict of interest, "rather an inquiry need be initiated only when the trial judge 'knows or reasonably should know that a particular conflict exists'"). However, no such express duty exists to investigate before undertaking joint representation. *See* Hart v. Comerica Bank, 957 F. Supp. 958, 982-83 (E.D. Mich. 1997) (facts of situation "should have made [the lawyer] investigate further" to determine potential limits upon representation); Benik v. Lisle Community Unit Sch. Dist. # 202, 1997 WL 566386 at *12 (N.D. Ill. 1997) (noting plaintiffs alleged lawyer failed to investigate for conflicts of interest and this "very language suggests that [the lawyer] was initally unaware of any conflict and that such a conflict could not have been 'direct, personal or substantial'").

223. *See* H. Lee Roussel & Moses K. Rosenberg, *Lawyer-Controlled Title Insurance Companies: Legal Ethics and the Need for Insurance Department Regulation*, 48 FORDHAM L. REV. 25, 46 (1979) ("[I]t is doubtful that the requirement that the [client] be made to actually understand the legal significance of possible future conflicts of interest can be met."); *see also* Griva v. Davison, 637 A.2d 830, 844-46 (D.C. 1994) (holding individual partner of client company inadequately informed with respect to joint representation by a law firm of the partnership and another partner); Kelly v. Greason, 244 N.E.2d 456, 462 (N.Y. 1968) ("[T]he unsophisticated client . . . may not be . . . able to understand the ramifications of the conflict, however much explained to him."); *In re* Boivin, 533 P.2d 171, 174-75 (Or. 1975) (in some situations clients cannot understand lawyer's disclosure and therefore cannot consent).

224. *See A Conflict Isn't Always So Obvious*, NAT'L L.J., February 15, 1988, at 13; *Conflicts of Interest*, TRIAL, Aug. 1986, at 17. *See generally* Moore, *supra* note 6, at 212 ("One of the most fertile sources of confusion has been the rules dealing with multiple

Next, given the vast number of human needs, motivations, and responses, there are necessarily an infinite number of variations in individual legal representations. One of life's realities, frequently overlooked by proponents of joint representation, is the potential for consent based on a sliding scale of persuasion.[225] The wife (or husband) who agrees to joint representation at the request of a spouse;[226] the employee who agrees to joint representation at the request of an employer;[227] the criminal defendant who agrees to joint representation at the request of a co-

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representation of clients with conflicting interests. In their daily practice of law, many attorneys must determine when they can ethically represent multiple clients who have conflicting interests in the same transaction or proceeding."); *see id.* at 238 ("The legal profession itself cannot agree upon the propriety of multiple representation even in the most common situations."); *see also* 2 MALLEN & SMITH, *supra* note 22, § 16.1 at 689 ("Formulae for full disclosure and consent are appealing theoretical solutions to allow multiple representation. Pragmatically, however, few lawyers can foresee all conflicts that arise out of multiple representation, and consent will not avoid for the clients the consequences of actual adversity."); HAZARD & HODES, *supra* note 12, at 221 ("Some of the most difficult problems in the law of lawyering are problems of conflict of interest. These problems are not only pervasive, but intractable; many of them can at best be ameliorated-not 'solved.'").

225. A few commentators have noted the potential for coercion. *See* Moore, *supra* note 6, at 243-44:

> Finally, the lawyer should determine whether there is any evidence to suggest that a client's attempted consent is the result of either psychological or economic coercion (or perhaps simply an attempt to avoid offending either the other client or the lawyer), rather than a voluntary decision to encounter known risks in order to obtain a potential benefit.

See also Nathan M. Crystal, *Ethical Problems in Marital Practice*, 30 S.C. L. REV. 321, 329 (1979) (stating a lawyer should make effort to determine if one client dominates the other); Laurence S. Fordham, *There are Substantial Limitations on Representation of Clients in Litigation which are not Obvious in the Code of Professional Responsibility*, 33 BUS. LAW. 1193, 1205 (1978) (questioning voluntary nature of consent in situations where clients have substantial stake in established attorney-client relationship).

226. *See* Penelope Eileen Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 DENV. U. L. REV. 931, 931-32 (1997):

> Consider first the financial context in which divorcing wives must bargain. Generally the wife and the children are dependent upon the husband. . . . The wife's low or non-existent income also makes it difficult for her to pay attorneys' fees. Many wives proceed without lawyers or agree to joint representation by lawyers their husbands have chosen. . . . [D]ependent persons generally perceive their benefactors as benevolent, and a wife's naïve trust of her husband may encourage her to assume that she will not need her own lawyer and that her husband will treat her fairly at divorce.

227. *See* Lowenthal, *supra* note 148, at 969-70 (noting in joint representation of employer and employee, employee may fear retaliation by employer if employee obtains independent counsel).

defendant[228]—any of these scenarios may involve pressure ranging from subtle understandings to active persuasion to threats of retaliation. Such psychological coercion obviously impacts on a client's free will in consenting to joint representation.

Economic coercion is also a factor impacting on client consent. Cost is often a powerful motivator regardless of a client's actual financial resources. The opportunity to have legal fees paid by, or shared with, another party may result in a decision in favor of joint representation solely due to financial considerations.[229]

Finally, the lawyer's self-interest in representing both clients provides an incentive for the lawyer to encourage clients to waive any conflict. If the lawyer declines the representation, the lawyer may have lost income both from that matter and from any future matters for those clients.[230] Thus, the lawyer will be motivated to explain the situation in such a manner that the clients will waive the conflict and consent to joint representation.[231]

Accordingly, the idea of full disclosure and informed consent regarding conflicts of interest in joint representation is illusory. Clients are not examining the lawyer's disclosures and making an informed decision; they are relying on the lawyer's assurances that the lawyer believes there is no problem and the representation may proceed.

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228. *See id.*:

> Many circumstances surrounding joint representation cases make the voluntary and intelligent waiver of effective assistance unlikely. The social and economic pressures on the individual defendant not to break ranks are formidable. Peer influence will weigh against any inclination of an individual to seek independent counsel, particularly because the defendant who may benefit the most from independent counsel usually is neither the government's principal target nor the person paying the fee.

229. *See* Moore, *supra* note 6, at 244 n.158 ("To some extent any client's decision to purchase less effective representation than he would choose if cost were not a factor could be considered the product of economic 'coercion.'"); Lowenthal, *supra* note 148, at 70 (noting "economic pressures on the individual defendant not to break ranks").

230. *See* Zacharias, *supra* note 6, at 422-23 ("Lawyers have a vested economic interest in retaining their clients. By sending a client to another lawyer, a lawyer risks losing not only the particular case but also future cases that the client might bring her."); *see also id.* at 422 n.79 (noting a lawyer's economic incentives "sometimes may extend beyond a mere desire to keep the client. When the lawyer is implicated in wrongdoing, referring the client elsewhere may result in action being taken against her").

231. *See id.* at 423 ("Thus, the lawyer has an incentive to phrase her explanation in a way that encourages the client to waive the conflict—to believe that the lawyer herself is somehow unique."); *see also* Collett, *supra* note 198, at 580 (describing how joint representation may result in omission of "critical facts").

Moreover, the problem remains that even after conducting an initial inquiry and obtaining consent, situations continually arise where new evidence is uncovered or tactical considerations change. "The fact that the parties are on good terms or appear to be in complete agreement at the time of the transaction does not negate the possibility that future disenchantment will develop."[232]

One practice purporting to solve this problem involves successive waivers, in which the attorney informs clients of any recognized potentially conflicting interests and obtains the clients' consent, despite these potentially conflicting interests, at the outset of the representation. If this anticipated conflict indeed subsequently develops, the lawyer informs the clients and then again obtains their consent in order to continue the representation.[233] This practice does not resolve the problems inherent in client consent. The concerns regarding the clients' genuine understanding of the legal significance of conflicts of interest, possible psychological and economic coercion, and the lawyer's self-interest in representing both clients still exist in the successive waiver situation.[234] Compounding these concerns is additional pressure resulting from a commitment already undertaken and relationships already created. If anything, the potential for coercion is even greater: If a client refuses subsequent consent, both clients must incur the additional expense of finding new counsel. Having already paid the current lawyer to undertake the representation, clients are subject to both psychological and economic pressure. Accordingly, the successive waiver practice presents all of the same problems inherent in joint

232. Aronson, *supra* note 41, at 815; *see also id.*:

> A professionally responsible attorney avoids such conflicts by refusing to represent even potentially adverse interests. In addition to avoiding the appearance of impropriety, he prevents himself from being tempted to act or convince the parties to act in a way which avoids the potential conflict but is not in the best interests of one or both of the parties.

233. *See* Zacharias, *supra* note 6, at 419 (noting "in most jurisdictions, lawyers who have obtained a consent to representation burdened with a potential conflict must obtain a second consent once the potential develops into an actual conflict"); Cal. State Bar Standing Comm. on Professional Responsibility & Conduct, Formal Op. 1989-115 (1989) (approving prospective waivers but requiring new waiver if potential conflict becomes an actual conflict); *see also* Lysick v. Walcom, 65 Cal. Rptr. 406, 413-14 (Ct. App. 1968) (when conflict develops between insured and insurer, the lawyer relying on consent to joint representation must seek an additional waiver to continue the joint representation); Samuel R. Miller, Richard E. Rochman & Ray Cannon, *Conflicts of Interest in Corporate Litigation*, 48 BUS. LAW. 141, 191 (1992) (noting lawyer must obtain new waivers if new or different conflict develops).

234. *See supra* notes 224-31 and accompanying text.

representation waivers generally, together with an enhanced coercion component.[235]

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235. A possible consequence of the successive waiver practice is that one of the co-clients will refuse to agree to the continued joint representation. If this happens, the lawyer may be prohibited from continuing to represent either client. *See* WOLFRAM, *supra* note 5, § 7.2 at 348. Accordingly, a current trend is a blanket "advance" or "open-ended" waiver, in which jointly represented clients agree at the outset of the representation that if a conflict later arises, the lawyer may continue to represent one of the clients against the other. *See* Note, *Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest*, 79 MICH. L. REV. 1074, 1082 (1981) ("Unlike the client issuing a specific waiver, the client issuing a prospective waiver cannot know what confidences he will in the future disclose or in what adverse representations the attorney may engage."). Even one of the Restatement drafts included such a provision. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 202, cmt. d (Proposed Final Draft No. 1 1996):

> A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent. . . . On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.

So far, this idea has been met with some skepticism. *See* Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356 (N.D. Ga. 1998) (rejecting advance waiver); *see also* ABA Formal Op. 93-372 (Apr. 16, 1993):

> [O]ne principle seems certain: no lawyer can rely with ethical certainty on a prospective waiver of objection to future adverse representations simply because the client has executed a written document to that effect. No lawyer should assume that without more, the 'coast is clear' for undertaking any and all future conflicting engagements that come within the general terms of the waiver document.

But see NY COUNTY LAWYER'S ASS'N, Ethics Op. No. 724 (1998):

> A lawyer can seek and a client or prospective client can give an advance waiver with respect to conflicts of interest that may arise in the future. The lawyer must first evaluate whether the future representation is likely to give rise to a non-consentable conflict. If the lawyer determines that the prospective conflict is consentable, he or she can proceed to make full disclosure to the client or prospective client and obtain that person or entity's consent. The validity of the waiver will depend on the adequacy of disclosure given to the client or prospective client under the circumstances, taking into account the sophistication and capacity of the person or entity giving consent.

Again, an advance waiver incorporates all of the same concerns inherent in joint representation waivers generally. *See supra* notes 224-31 and accompanying text.

Lawyers simply are not always able to ascertain whether a conflict will arise.[236] Not all conflicts of interest are easily identified, and some conflicts may not arise until after a case has commenced.[237] The profession has justified joint representation on the basis of informed consent, when in reality most clients do not understand conflicts of interest; many clients are under some form of psychological or economic coercion to agree to the joint representation; and the lawyer has an economic interest in persuading the clients to agree to joint representation. Accordingly, this Article proposes the abolition of joint representation as a general practice. Joint representation should become a rare occurrence, justified only in exceptional circumstances,[238] because the risks inherent in joint representation far outweigh the benefits.[239]

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236. *See* Moore, *supra* note 5, at 555 ("[T]he problem is that disinterested lawyers have been unable to reach consensus on even the most common instances of multiple representation."); Perschbacher & Perschbacher, *supra* note 95, at 713 (noting Model Rules have "relegated the discussion of loyalty to the comments, and even then conflicting loyalties are not well-defined").

237. *See* WOLFRAM, *supra* note 5, § 7.1 at 316 ("[C]onflict of interest problems are pervasive in law practice and can arise early, late, and at intermediate points throughout a representation in a bewildering variety of shapes and sizes.").

238. The "unusual circumstances" contemplated by this Article are class action and public interest lawsuits. The failure to create an exception for class actions would eliminate this procedural tool outright, since by definition class actions involve joint representation. The ethical rules make no mention of class actions: "[T]he rules simply don't take these special kinds of cases into account." ZITRIN & LANGFORD, *supra* note 4, at 215. However, the safeguards inherent in three of the four prerequisites to class certification—commonality, typicality, and adequacy of representation—parallel the ethical rules pertaining to joint representation. *Compare* FED. R. CIV. P. 23(a) ("there are questions of law or fact common to the class, . . . the claims or defenses of the representative parties are typical of the claims or defenses of the class, and . . . the representative parties will fairly and adequately protect the interests of the class") *with* MODEL RULES OF PROF. CONDUCT R. 1.7 (1999) (prohibiting a lawyer from representing a client "if the representation of that client may be materially limited by the lawyer's responsibilities to another client") *and id.* at cmt. 7 (noting joint representation is proper where clients have similar interests, and where there is no "substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question").

Unlike many joinder cases, in which joined parties retain separate counsel, the class members in a class action usually are represented by the same counsel. As one might expect, shortcomings familiar to joint representation generally internal conflicts within the class (such as competing over the allocation of the settlement), external conflicts (such as class members who have an extraneous reason for favoring a settlement that does not truly benefit the interests of all class members), risk conflicts (class members with different tolerances for risk), and conflicts over control of the litigation—exist in the class action context as well. *See*

John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 385-93 (2000); *see also* Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1187 (1982) (noting the "importance, complexity, and protracted character" of class actions "create opportunities for conflict at every stage of litigation").

However, a significant difference exists in class actions as contrasted with traditional joint representation: A neutral judge reviews the question of class representation and must certify the class to make the litigation binding. *Compare* General Tel. Co. v. Falcon, 457 U.S. 147, 157 n.13 (1982) (adequacy of representation includes competency of class counsel and evaluation of conflicts of interest) *and* Vuyanich v. Republic Nat'l Bank of Dallas, 82 F.R.D. 420, 434-35 (N.D. Tex. 1979):

> A court, in assessing a representative's adequacy, must focus initially on the interrelated questions of attorney competence and any conflicts with the interests of the class members. Competency of counsel means more than mere technical competence. Although the class is not the client, the class attorney owes a duty to each member of the class . . . . Thus lack of congruence among the interests of the class representatives and the class members may render the attorney, despite his diligence, unable to counsel the class members and the plaintiffs fully and fairly. . . . The proper inquiry must be whether the facts of a particular case indicate that such fundamental antagonism actually exists or is likely to result from dual representation."

Compare Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 479-80 (2000) (in certifying class, judge reviews adequacy of representation) *with* MODEL RULES OF PROF. CONDUCT R. 1.7, cmt. 15 (1999) ("Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation."). Nevertheless, problems remain in such multiple representation that have led the United States Supreme Court to find global class actions improper twice in the last three years. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (intra-class conflicts); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (adequacy of representation with respect to class representatives).

The class action recently has come under increased scrutiny:

> Where once it was seen as the plaintiff's sword, it is now increasingly recognized that it can be the defendant's shield. Where once it was viewed as empowering class members, increasingly it is seen as entrapping them. Correspondingly, where the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest.

Coffee, *supra*, at 371-72.

These drawbacks are significant and parallel some of the general concerns with joint representation. Although various aspects of the class action are in need of review and reform, this Article does not advocate the elimination of class actions due to their well-documented unique role in enabling individuals to institute legal action to obtain relief that otherwise would be unavailable to them.

239. The legal profession generally has not heeded advice offered long ago, in which the court observed that the cases in which a lawyer may undertake joint representation "are

C. Why Joint Representation Hurts the Profession

The foregoing discussion focused primarily on the economic justifications and concerns implicated by joint representation. Aside from the economic considerations that fail to justify joint representation, however, there exists a more fundamental underlying concern—the lawyer's duty of loyalty.[240] Loyalty remains the cornerstone of a lawyer's core professional obligations and is found in every modern ethical codification.[241] Lofty, poetic descriptions of an attorney's duty of loyalty are not found only in the dusty tomes of yesteryear[242]—courts continue to describe this duty in current cases.

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exceptional, and never entirely free from danger of conflicting duties." Eisemann v. Hazard, 112 N.E. 722, 723 (N.Y. 1916).

240. *See* MODEL RULES OF PROF. CONDUCT R. 1.7, cmt. 1 (1999) ("Loyalty is an essential element in the lawyer's relationship to a client."); *see also* Shaw, *supra* note 105, at 236 ("The centerpiece of the multiple representation analysis is the lawyer's duty of loyalty to his client.").

241. *See* MODEL RULES OF PROF. CONDUCT R. 1.7, cmt. 1 (1999) ("Loyalty is an essential element in the lawyer's relationship to a client."); RESTATEMENT, *supra* note 2, § 16, cmt. b (1998) ("A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. Assurances of the lawyer's competence, diligence, and loyalty are therefore vital."); *id.* at cmt. e ("The responsibilities entailed in promoting the objectives of the client may be broadly classified as duties of loyalty."); *id.* § 121, introductory note ("The prohibition against conflicts of interest reflects the role of a lawyer as the loyal representative of a client's interest .... Lawyers are required to avoid divided loyalties that would harm their principals, their clients."); *id.* § 121, cmt. b ("The prohibition against lawyer conflicts of interest reflects several competing concerns. First, the law seeks to assure clients that their lawyers will represent them with undivided loyalty."); MODEL CODE OF PROF. RESPONSIBILITY, EC 5-14 (1983) ("Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client."); *id.* EC 5-15 ("If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment."); CANONS OF PROF. ETHICS Canon 6 (1908) (noting lawyer's "obligation to represent the client with undivided fidelity"). *See generally* HAZARD & HODES, *supra* note 12, § 1.7:203 at 232.15-233 ("The question is always whether the same lawyer may serve both clients loyally."); DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 142 (2d ed. 1998) ("An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client.").

242. One noteworthy example of the ideals to which lawyers should aspire states:

> Despite the humorist and the cynic, there is probably no profession in the world which makes greater demands upon integrity or presents nicer questions of honor, or

> The duty of loyalty to the client, with which the duty of confidentiality is inherently intertwined, is one of the basic tenets of the legal profession. The obligations of this profession are not 'merely horatory appeals to [one's] conscience,' but enforceable strictures of a lawyer's conduct. . . . These duties—confidentiality and loyalty—serve to fortify the client's trust placed with the attorney and to ensure the public's confidence in the legal system as a reliable and trustworthy means of adjudicating controversies.[243]

Traditionally, the ethical rules have described the lawyer's duty to a client as one of "undivided" loyalty.[244] Joint representation, by definition, results in divided loyalties. Instead of ensuring the "absolute and unfettered loyalty of an attorney to a particular client,"[245] joint representation requires the attorney to share those loyalties with another. Such divided loyalties

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> offers wider opportunity for fairness, than the profession of the law .... No man deserves to be classed as a great lawyer who does not fairly exemplify the noblest aspirations of his calling.

CARTER, *supra* note 52, at 65, *quoting* FREDERICK TREVOR HILL, LINCOLN THE LAWYER 31, 32; *see also* Meinhard v. Salmon, 164 N.E. 545, 546 (1928) (Cardozo, J.) (describing fiduciary duty as "[n]ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior"); SHARSWOOD, *supra* note 68, at 117 ("[T]he great duty which the counsel owes to his client, is an immovable fidelity. Every consideration should induce an honest and honorable man to regard himself, as far as the cause is concerned, as completely identified with his client."); *id.* at 120:

> The practitioner owes to his client, with unshaken fidelity, the exertion of all the industry and application of which he is capable, to become perfect master of the questions at issue, to look at them in all their bearings, to place himself in the opposite interest, and to consider and be prepared as far as possible, for all that may be said or done on the contrary part.

243. Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 369 (5th Cir. 1998) (citations omitted); *see also* Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 586 (1990) ("[T]he lawyer's duty of loyalty long has precluded the representation of conflicting interests.").

244. *See* RESTATEMENT, *supra* note 2, § 121, cmt. b ("The prohibition against lawyer conflicts of interest reflects several competing concerns. First, the law seeks to assure clients that their lawyers will represent them with undivided loyalty."); MODEL CODE OF PROF. RESPONSIBILITY, EC 5-14 (1983) ("Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client."); *id.* at EC 5-15 ("If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment."); CANONS OF PROF. ETHICS Canon 6 (1908) (noting lawyer's "obligation to represent the client with undivided fidelity").

245. Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 271 (D. Del. 1980).

affect a lawyer's efforts, whether consciously or unconsciously.[246] It is impossible for a lawyer to provide his or her utmost loyalty to one client while simultaneously representing another client in the same matter, to whom the lawyer also owes the same duty of utmost loyalty.[247] The lawyer

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246. *See* Stephen Doherty, Comment, *Joint Representation Conflicts of Interest: Toward a More Balanced Approach*, 65 TEMP. L. REV. 561, 563 (1992) ("[D]ivided loyalties might result in the attorney reducing her efforts on one client's behalf, perhaps unconsciously, in an attempt to retain and please a second client."); Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, *supra* note 6, at 1296:

> the danger is that [the lawyer] will be tempted, perhaps unconsciously, to favor the interests of a particularly important client over the adverse or potentially adverse interests of a less favored client. The lawyer's conflicting loyalties might lead him to recommend, for example, that the less favored client forgo a cross-claim in litigation in which the more favored client appears as a codefendant.

See also Estates Theatres, Inc. v. Columbia Pictures Indus., Inc., 345 F. Supp. 93, 99 (S.D.N.Y. 1972) ("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 . . . ."); *In re* Kamp, 194 A.2d 236, 241 (N.J. 1963) (stating that the lawyer's failure to protect co-client's interests "was motivated, consciously or unconsciously, by the conflict of interests that existed").

247. *See also* Gilbert v. National Corp. for Hous. Partnerships, 84 Cal. Rptr. 204, 212 (Ct. App. 1999):

> [A]n attorney may not do anything which could divert the attorney's attention from the client's business or lessen the amount of energy the attorney can give to the client's interests. In this regard, the intention or motives of the attorney are irrelevant. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent. Thus, a conflict of interest exists whenever a lawyer's representation of one of two clients is rendered less effective because of his representation of the other.

(citation and internal quotation marks omitted); People v. McDowell, 718 P.2d 541, 545 (Colo. 1986) (holding joint representation of both buyer and seller of a corporation impermissible even with clients' consent because the lawyer "could not effectively exercise independent professional judgment on behalf of one of them without adversely affecting the interests of the other"); Grievance Comm. v. Rattner, 203 A.2d 82, 84 (Conn. 1964) ("When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and champion."); *see In re* Dolan, 384 A.2d 1076, 1082 (N.J. 1978) (Pashman, J., concurring and dissenting) (noting "the fiction that a lay client can effectively consent to dual representation and perpetuat[ion of] the cruel myth that adequate representation can be provided . . . by an attorney who supposedly can simultaneously protect the inevitably adverse interests of his two masters"). *See generally* WOLFRAM, *supra* note 5, § 7.1 at 316-17:

may be affected by, among other things, a previously established relationship with one client, the anticipation of future business from one client, the greater prestige or wealth of one client, greater personal identification with one client, personal feelings of friendship with one client, prejudice or bias that favors one client over the other, the desire to impress one client on a personal or professional level, or greater agreement with one client's goals, approaches, or methods of problem-solving.

We as a profession have been all too willing to rationalize joint representation's infringement upon the duty of loyalty. We permit clients to "consent" to conflicts of interest on the basis of concern for "client autonomy."[248] We justify joint representation on the basis of "cost savings"

> The principle of loyalty of lawyer to client is a basic tenet of the Anglo-American conception of the lawyer-client relationship. . . . Where choices have to be made between the interest of a client and any other person—whether the lawyer personally or another client, the lawyer must be in such a position that all options that might favor the client can be considered free from the likely impairment of any interest other than those of the client.

See also DRINKER, *supra* note 24, at 104 (duty to avoid conflicts of interest requires "not only the avoidance of a relation which will obviously and presently involve the duty to contend for one client what his duty to the other presently requires him to oppose, but also the probability or possibility that such a situation will develop").

248. *See* RESTATEMENT, *supra* note 2, § 122, cmt. g(iv) ("Concern for client autonomy generally warrants respecting a client's informed consent [to joint representation]."); Zacharias, *supra* note 6, at 412-13:

> Most justifications for client consent provisions are premised on the view that honoring consent exhibits concern for client autonomy. . . . Yet clearly autonomy does not mean that a client can or should be able to do whatever he wishes. A client may not bribe a juror, choose to commit perjury, or insist that his lawyer commit malpractice. The conceptualization of autonomy as client freedom therefore does little to advance the determination of which client choices should be honored.

Moore, *supra* note 6, at 227:

> An ethics rule that prohibited all instances of informed consent to the multiple representation of conflicting interests—thus denying clients these potential advantages—would be detrimental not only to legitimate client interests, but also to that respect for the integrity of the client as an individual which is an important component of the law of professional responsibility.

Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, *supra* note 6, at 1303:

> The importance of the societal interest in conflict-free representation within an adversarial system might arguably support a blanket prohibition of the simultaneous representation of differing interests even if the client consented . . . . Forbidding consent, however, would ignore the important interest of the individual client in choosing his attorney and in controlling the progress of his litigation in light of his perceived self-interest.

to the client.[249] We explain that the impact of joint representation upon confidentiality and attorney-client privilege is beneficial "information sharing" rather than a reduction in client protection.[250] We assert that prohibitions against conflicts of interest impinge on our freedom and professionalism.[251] We are deceiving ourselves.[252]

See also Evans v. Artek Sys. Corp., 715 F.2d 788, 792 (2d Cir. 1983) (disqualifying attorney infringes on client's right to counsel of choice); Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339, 1350 (9th Cir. 1981) (noting client's right to make risky choices); Hill v. Celanese Corp., 513 F.2d 568, 569 (2d Cir. 1978) (explaining that client's right to counsel of choice weighs against disqualification); Zador Corp. v. Kwan, 37 Cal. Rptr. 2d 754, 759 (Ct. App. 1995) (relying on autonomy rationale). *But see* Baglini v. Pullman, Inc., 412 F. Supp. 1060, 1066 (E.D. Pa.), *aff'd mem. sub nom.* Fraboni v. Pullman, Inc., 547 F.2d 1158, 1160 (3d Cir. 1976) (right to counsel of choice is secondary to the paramount importance of maintaining highest standards of professional conduct and scrupulous administration of justice); Comden v. Superior Court, 576 P.2d 971, 975 (Cal. 1978) (noting client's right to representation by counsel of his choice must yield to considerations of ethics that "run to the very integrity of our judicial process").

249. *See* Zacharias, *supra* note 6, at 414 ("The most obvious justification is cost.").

250. *See* RESTATEMENT, *supra* note 2, § 60, cmt. *l:*

> When a conflict of interest exists, as part of the process of obtaining consent, the lawyer is required to inform each co-client of the effect of joint representation upon disclosure of confidential information, including both that all material information will be shared with each co-client during the course of the representation and that a communicating co-client will be unable to assert the attorney-client privilege against the other in the event of later adverse proceedings between them.

(citations omitted); *id.*:

> Moreover, the common lawyer is required to keep each of the co-clients informed of all information reasonably necessary for the co-client to make decisions in connection with the matter. The lawyer's duty extends to communicating information to other co-clients that is adverse to a co-client, whether learned from the lawyer's own investigation or learned in confidence from that co-client.

But see HAZARD & HODES, *supra* note 12, § 1.6:115 at 168.16 (stating a "lawyer who simultaneously represents more than one client . . . must be careful to keep the confidences of the clients separate").

251. *See* RESTATEMENT, *supra* note 2, § 121, cmt. b:

> [A]voiding conflicts of interest can impose significant costs on lawyers and clients. Prohibition of conflicts of interest should therefore be no broader than necessary . . . . [C]onflicts prohibitions interfere with lawyers' own freedom to practice according to their own best judgment of appropriate professional behavior. It is appropriate to give significant weight to the freedom and professionalism of lawyers in the formulation of legal rules governing conflicts.

252. *See* RESTATEMENT, *supra* note 2, § 122, cmt. g(iv) ("[W]hen the representation involves the same matter or the matters are significantly related, it may be more difficult for the lawyer to provide adequate legal assistance to multiple clients.").

From the perspective of society at large, joint representation reflects nothing so clearly as greed[253]—whether economic greed, reputational greed, or mere self-centeredness. As stated by one prominent commentator:

> The temptation to get into an interesting, important, or profitable case is always alluring, and the lawyer is very prone to rationalize himself into the belief that he will be able to steer safely between Scylla and Charybdis . . . .[254]

Each proffered justification for joint representation is tainted by lawyers' self-interest.[255] The lawyer's obvious bias is in favor of a solution that permits the lawyer to undertake the representation.[256] If the representation results in legal difficulties, such as a disqualification motion, lawyers typically argue the clients consented to the representation[257] and then throw stones at the moving party for fostering a "dangerous disrespect for the legal process" by bringing such a motion.[258]

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253. *See* Note, *Developments in the Law: Conflicts of Interest in the Legal Profession*, *supra* note 6, at 1310 n.128 (noting the "very real possibility of public suspicion falling upon the attorney who seeks to represent and charge two clients simultaneously"); *see also* Florida Bar v. Teitelman, 261 So. 2d 140, 142-43 (Fla. 1972):

> For many members of the public, a real estate transaction is one of the few contacts which they have with the law and with attorneys personally. . . . It is therefore important that such transactions be treated on [*sic*] the same high professional standard as litigation. . . . The profession's image and standing are more important than the expediency which supposedly demands mass production procedures.

254. DRINKER, *supra* note 24, at 104-05.

255. *See* WOLFRAM, *supra* note 5, § 7.1 at 318 ("Most importantly, if least appealingly, lawyer's income is threatened by strict conflicts rules . . . ."); *see also* Brosnahan & Brosnahan, *supra* note 137 ("From the attorney's standpoint joint representation means additional fees.").

256. *See* Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 FORDHAM INT'L L.J. 1239, 1291 (1998):

> Lawyers in large firms frequently rale [*sic*] against the rules, arguing that because of structural changes in the marketplace, loyalty is a waning virtue in the attorney-client relationship. They label the prohibition against simultaneous adverse representation a vestige of a distant past in which law firms rarely maintained offices in more than one state and employed only a handful of lawyers.

257. For a discussion of the inherent problems with informed consent in joint representation, *see supra* notes 224-31 and accompanying text.

258. *See* Borman v. Borman, 393 N.E.2d 847, 855-56 (Mass. 1979). It has been widely recognized that disqualification motions are sometimes brought for tactical advantage and thus provide the potential for abuse. *See* Evans v. Artek Sys. Corp., 715 F.2d 788, 792

The "client autonomy" argument is the most popular, and most insidious, of the rationales offered for joint representation. Cast as a competition between "client autonomy" and "professional paternalism," this argument asserts clients should have the freedom to make their own choices, including the freedom to choose unwisely.[259] Despite the validity of the concept of client autonomy in requiring lawyers to provide clients with full information and to counsel clients candidly in order to empower clients to make informed decisions,[260] the idea of client autonomy is not unfettered.[261]

(2d Cir. 1983) (high burden of proof for disqualification motions because increasingly used for tactical reasons); Bd. of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) (disqualification motions have great potential for abuse because of potential use to burden opposition); *see also* HAZARD & HODES, *supra* note 12, § 1.7:103 at 229 ("Lawyers too often gain time or other advantage by moving to disqualify opposing counsel on grounds that are frivolous or nearly so."); Stephen Doherty, *Joint Representation Conflicts of Interest: Toward a More Balanced Approach*, 65 TEMP. L. REV. 561, 577 (1992) ("[D]isqualification motions provide great potential for abuse because movants may use such motions for tactical advantage rather than to preserve client confidences or to promote professional ethics."). However, the reality is that such a motion is sanctionable unless it has some basis. *See* Optyl Eyewear Fashion Int'l Corp. v. Style Cos., Ltd., 760 F.2d 1045 (9th Cir. 1985) (providing sanctions for filing frivolous disqualification motion).

259. *See* Moore, *supra* note 6, at 233-36 ("The term 'autonomy,' however, encompasses more than just this recognition of the client as an individual with subjective goals and desires; it also involves a client's freedom to make his own choices, including the freedom to choose unwisely."); *see also* Zacharias, *supra* note 6, at 414 ("[O]n the surface, it seems inherently unreasonable for a client to accept a lawyer who may exercise less than independent judgment on the client's behalf.").

260. *See* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 57 (1990):

> [T]he attorney acts both professionally and morally in assisting clients to maximize their autonomy, that is, by counseling clients candidly and fully regarding the clients' legal rights and moral responsibilities as the lawyer perceives them, and by assisting clients to carry out their lawful decisions. Further, the attorney acts unprofessionally and immorally by depriving clients of their autonomy, that is, by denying them information regarding their legal rights, by otherwise preempting their moral decisions, or by depriving them of the ability to carry out their lawful decisions.

261. *See, e.g.*, Abraham v. United States, 549 F.2d 236 (2d Cir. 1976):

> Choice of counsel should not be obstructed unnecessarily by the court. We wish to stress, however, that defendants are not entitled to joint representation as a matter of right. If a district judge perceives the strong likelihood of a conflict of interest, he has a duty to assure himself that the accused understands the potential threat to his Sixth Amendment rights. And, in an appropriate case, the court may order that the defendant be represented by independent counsel.

It is already well-established, and widely accepted, that a lawyer may not represent opposite sides in litigation.[262] This prohibition is absolute, despite some potential situations where clients might wish to consent to joint representation despite the risks.[263] Likewise, a client may not waive a conflict of interest caused when the client's lawyer is likely to be a necessary witness whose testimony would be adverse to the client.[264]

See also United States v. Helton, 471 F. Supp. 397 (S.D.N.Y. 1979) (rejecting defendants' argument that because they had given informed consent the trial court could not order separate counsel).

262. *See* MODEL RULES OF PROF. CONDUCT R. 1.7, cmt. 7 (1999) ("Paragraph (a) prohibits representation of opposing parties in litigation."); RESTATEMENT, *supra* note 2, at § 122(2) (forbidding representation with respect to certain nonwaivable conflicts, including when "one client will assert a claim against the other in the same litigation"); *see also* O'Morrow v. Borad, 167 P.2d 483, 486 (Cal. 1946) ("It is contrary to public policy for a person to control both sides of litigation."); O'Bryan v. Leibson, 446 S.W.2d 643 (Ky. 1969); Greene v. Greene, 391 N.E.2d 1355, 1357 (N.Y. 1979) ("Perhaps the clearest instance of impermissible conflict occurs when a lawyer represents two adverse parties in a legal proceeding."); TEX. DISCIPLINARY RULES OF PROF. CONDUCT 1.06(a) (1997) (forbidding consent to multiple representation in cases involving "opposing parties to the same litigation").

263. *See* Zacharias, *supra* note 6, at 418-19 ("Even if a client has made a reasonable decision that the benefits of retaining the lawyer outweigh the costs of the lawyer's inadequacy, the codes reject the representation.").

264. *See* MODEL RULES OF PROF. CONDUCT R. 3.7(a) (1999):

> A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

See also United States v. Hobson, 672 F.2d 825, 829 (11th Cir. 1982):

> We are aware that Hobson has indicated that he would be willing to waive any ethical problems in order to have the benefit of his attorney's continued representation in this case. The defendant is not free to waive the problem presented here, however, because the ethical violation involves public perception of the lawyer and the legal system rather than some difficulty in the attorney's effective representation of Hobson. A defendant also cannot waive the impropriety of his lawyer's testifying in his favor at the trial if it should be determined that such testimony would be desirable for his defense. Under the facts of this case, Hobson's desire to be represented by particular counsel must yield to the need to protect the public's confidence in our system of justice.

See In re Estate of Waters, 647 A.2d 1091, 1098 (Del. 1994) (centrality of lawyer's testimony on contested issues mandated withdrawal as trial counsel); Klupt v. Krongard, 728 A.2d 727 (Md. Ct. Spec. App. 1999) (necessary adverse testimony of client's lawyer poses nonwaivable conflict); 155 North High, Ltd. v. Cincinnati Ins. Co., 650 N.E.2d 869, 874 (Ohio 1995) ("a lawyer cannot be both advocate and witness"); People v. Amato, 173 A.D.2d 714, 715 (N.Y. App. Div. 1992) ("The right to counsel of one's own choosing is not absolute but may be

Similarly, the ethical rules ban the preparation of legal instruments giving the drafting lawyer or certain relatives a substantial gift from the client.[265] The dangers justifying these prohibitions are no more compelling than the dangers inherent in joint representation;[266] in each instance one can imagine situations involving clients willing to waive the conflict and proceed with the representation. However, "client autonomy" is not controlling in these instances due to the inherent dangers of such practices.

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overridden where necessary. One restriction on the right is the so-called 'advocate-witness rule.'"). *But see* Leaseamerica Corp. v. Stewart, 876 P.2d 184, 191 (Kan. Ct. App. 1994) ("Under the general conflict of interest rules, client consent under the Model Rules can remove the adverse-testimony barrier in all but those rare cases in which the lawyer's adverse testimony so sharply conflicts with the client's interests that the client's consent is objectively unreasonable."); *see also* ABA/BNA LAWS. MAN. PROF. CONDUCT § 61:507 (1987) ("Model Rule 3.7(a) disqualifies a lawyer when there is a likelihood that the lawyer will be a 'necessary' witness.").

265. *See* MODEL RULES OF PROF. CONDUCT R. 1.8(c) (1999) ("A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee."); *see also* HAZARD & HODES, *supra* note 12, at 223-24:

> Some situations are so fraught with danger of serious impropriety . . . that a per se rule of disqualification is usually imposed—a prophylactic ban that sometimes is not waiveable, even by a sophisticated and well-counselled client. In these situations (some of which are catalogued in Rule 1.8), the public interest in maintaining public confidence in the legal system outweighs the interest of individual lawyers and individual clients in freely contracting with each other.

266. It has been suggested that independent societal interests outweigh client rights in such instances. *See* Zacharias, *supra* note 6, at 421:

> Even where one cannot point to specific injuries to the process that conflicted representation produces, the codes and courts may conclude that certain kinds of representation 'appear' so unfair as to warrant rejection of a client's choice. A client may, for example, wish the adversary's lawyer to represent him in the same litigation. The client may perceive sufficient benefits in the arrangement to justify the obvious disadvantages of the arrangement. But observers of the litigation may not perceive the benefits, or they may otherwise disagree with the client's calculus. These observers will lose confidence in the merits of a system that seems to afford the client no better representative than the opposing lawyer. For the sake of the system, a court arguably should be able to rely on the 'appearance of impropriety' to reject the consent.

Another potential justification for such prohibitions is the inherent lawyer self-interest in these situations. *See id.* at 422 ("[E]mpirically, client consent to conflicted representation is not unusual. Perhaps regulators and courts are unwilling to honor client choice because they distrust the motives of the lawyers who advise the clients or distrust the explanations that the lawyers give clients on the merits of waiving conflicts.").

The "client autonomy" argument also assumes an unrealistic situation with respect to the bargaining exchange between lawyers and clients.

> [The client autonomy theory] assumes conditions that hardly characterize the market for legal services or the typical relationship between clients and their lawyers when a question of conflict arises. The lawyer possesses much more specialized knowledge of the probable strengths and weaknesses of the claims and position of each client and of the relative merits of joint or separate representations. That knowledge places lawyers in a position of bargaining superiority. The lawyer has interests in maximizing an eventual fee by representing more clients and in minimizing costs of the representation by controlling more facets of it. The lawyer cannot therefore regularly be expected to be altruistic in giving advice to clients about conflicts. Most clients have no other competing legal 'products' for which they can shop or forms of insurance that they can turn to as alternatives or as hedges against an improvident consent to a conflicting representation.[267]

Considering the inherent dangers of joint representation, and the demonstrated inadequacy of waiver,[268] the better approach is to institute a prophylactic, bright-line rule prohibiting joint representation as contrary to public interest.[269]

The benefits of a bright-line rule prohibiting joint representation are undeniable. Although such a rule may be overinclusive if co-clients exist for whom the unity of interests is complete, the potential dangers of joint representation outweigh the possible benefits. A rule prohibiting joint representation eliminates any question or ambiguity as to its propriety, and it is easy to understand and apply.[270] Most importantly, a bright-line rule

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267. WOLFRAM, *supra* note 5, § 7.2 at 339.

268. *See supra* notes 224-31 and accompanying text.

269. *See* Zacharias, *supra* note 6, at 429 n.123 (noting in contract cases, for example, "independent societal interests are implemented through the rubric of separate doctrines of 'public policy.' . . . Unlike the current legal ethics codes, however, contracts and criminal law for the most part implement the independent societal interests directly, rather than under the guise of evaluating the quality of the party's waiver"); *see also* Comden v. Superior Court, 576 P.2d 971, 975 (Cal. 1978) (noting a client's right to representation by counsel of choice must yield to considerations of ethics that "run to the very integrity of the judicial process").

270. *See* Moore, *supra* note 5, at 555 ("[T]he problem is that disinterested lawyers have been unable to reach consensus on even the most common instances of multiple representation."); Moore, *supra* note 6, at 230-32. Professor Moore notes that, under the Model Code, lawyers rarely agree on clients' best interest. She states that

provides every client with an attorney who has a duty of loyalty only to that client; an attorney who is obligated to honor a duty of confidentiality only to that client; an attorney who maintains an attorney-client privilege only with that client; and an attorney who seeks the best solution as defined only by that client.

Returning to the hypothetical at the beginning of this Article,[271] even assuming Attorney Anne has conducted an initial investigation and has found no evidence to indicate Supervisor Sam sexually harassed the former employee, she should not jointly represent Sam and ABC Company. The existence of some conflict in the interests of ABC and Sam is readily apparent. If subsequent discovery supports the former employee's claim, ABC will benefit from distancing itself from Sam. The dangers inherent in obtaining client consent to proceed with joint representation are acute. Sam, ABC, or both may not fully understand the implications of a conflict of interest. Sam is likely to feel psychologically coerced to consent: He is an employee dependent on ABC for his livelihood, and the accusation of wrongdoing may cause him to fear that insisting on separate counsel would suggest his guilt. Sam likely also would feel economic coercion due to the provision of legal services at ABC's expense if he consents to joint representation, as contrasted with the likely significant expense of retaining separate counsel if he does not consent. Anne also has an element of self-interest. ABC is an existing client and a source of current and future business. Anne therefore may have some bias in favor of ABC, which

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> to the extent that any multiple representation decisions may ultimately reflect nothing more significant than the individual decision maker's general preference for either client protection or client autonomy, it is clear that the continued use of a simple balancing test is unlikely to produce clear and consistent guidelines that reflect genuine commitment to both of these fundamental principles.

See also Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195, 198 (1987):

> Many lawyers express amazement at the extent to which some of their clients, including otherwise sophisticated clients who should know better, remain ignorant of the most fundamental legal principles that govern their business and personal lives. Yet some lawyers are equally oblivious to the law concerning professional malpractice and legal norms that circumscribe their own role . . . . In short, many lawyers insufficiently understand the very material with which lawyers work every day—the legal realm itself as it applies to the practice of law.

Id. at 207 (noting in recent years the area of conflicts of interest has "dramatically increased in importance and in the frequency with which it is litigated"); Chris Goodrich, *Ethics Business*, CAL. LAW., July 1, 1991, at 36-37 (the area of conflicts of interest has grown "enormously, geometrically, exponentially").

271. *See supra* note 18 and accompanying text.

impacts upon her ability to provide undivided loyalty to Sam. Even if Anne takes some care to avoid any indication of divided loyalties, her interest in maintaining ABC's business could easily influence her independent professional judgment in making choices during the course of the representation.[272]

"[W]hen a practitioner is in doubt on an ethical question, the best answer is usually 'No.'"[273] We have been reluctant to acknowledge this reality in the joint representation context. However, a prohibition against joint representation enhances professionalism and offers the most effective protection for both clients and attorneys.

VI. CONCLUSION

In evaluating the benefits and risks involved in joint representation, it becomes clear that the risks of this practice—to the clients, to the attorney, and to society—far outweigh the benefits. Joint representation necessarily divides an attorney's loyalties, and the requirement of informed consent provides merely illusory protection to clients. When lawyers do not understand conflicts of interest, they obviously cannot explain the risks of such conflicts to their clients. Lawyers may not recognize all of the situations raising the potential for diverging interests. Lawyers are often unaware of psychological or economic pressures upon clients to proceed with joint representation. And lawyers have a vested self-interest in persuading clients to waive any conflict. The inherent dangers of joint representation resemble those found in several other situations, such as the representation of opposite sides in litigation, where the rules impose an absolute prohibition. The legal profession should similarly modify its ethical guidelines to prohibit joint representation.

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272. *See* Moore, *supra* note 5, at 546 n.35:

> [T]he primary harm of [joint] representation is the extent to which loyalty to one limits the ability of the lawyer to even consider recommending courses of action on behalf of one which are (or might be) adverse to the interests of the other, even when their currently stated positions are totally aligned.

273. John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 709 (1965).