The Practice and Theory of Lawyer Disqualification

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Lawyer disqualification is commonly feared—as a “strategic,” “tactical,” and “harassing” “potent weapon” depriving clients of their trusted counsel of choice. Although disqualification comes with costs, fundamental misunderstandings fuel this common fear. This Article finds that disqualification is a uniquely effective remedy for lawyer misconduct and makes the following contributions to the law and practice of lawyer disqualification: (1) an exhaustive study surveying disqualification cases and refuting the common misconception that disqualification motions are uncontrollably on the rise and uncontrollably bad; (2) an accessible analysis of lawyer disqualification doctrine that permits lawyers and judges to begin assessing common disqualification questions efficiently and comprehensively; and (3) specific suggestions for practical improvements, including cost-shifting, legal presumptions, and better procedures in disqualification proceedings.

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INTRODUCTION

Many misunderstand disqualification, confusing it for a rapidly spreading “cancer” on the American justice system and labeling it “draconian,” “severe,”

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“drastic,” and “extreme.” For this reason and others, disqualifying lawyers or firms for their conflicts of interest (or other misconduct) is often a heated battle, and the law of disqualification is often ambivalent and occasionally irrational. But judges’ outspoken ambivalence to disqualification and the resulting doctrine’s rather tortured state also make the law of lawyer disqualification attractive, perhaps masochistically.

Notwithstanding this morbid attractiveness, scholarly attention has not responded generally and certainly not recently. This inattention has left the law of lawyer disqualification, as a collection, somewhat inaccessible to lawyers and judges. To my surprise, I discovered that no article had helpfully explained and examined the law and practice of lawyer disqualification in a comprehensive way. One competent treatise exists, however, which perhaps has deterred others from contributing to the field.

Through this admittedly smaller work, I offer lawyers and judges a comprehen-
sive Article to which they could also turn when disqualification questions frequently arise. By aggregating and analyzing the factors bearing on whether a lawyer or firm should be disqualified in light of a conflict of interest, other misconduct, or the appearance of impropriety, this work aims to put the scattered branches of disqualification cases and doctrine into a unifying and accessible framework.5 This work also empirically challenges the widespread (mis)understanding that the number of disqualification motions is uncontrollably growing, and it analytically challenges the similarly widespread understanding that such motions are sinisterly “strategic,” “harassing,” or otherwise malignant.6

This work thus goes on to take normative positions toward and offer solutions for key disqualification problems by (1) examining and critiquing the theories on which disqualification rests and (2) identifying practical improvements that should be swiftly implemented (and argued until then). With respect to the theoretical underpinning of disqualification, a few critics of disqualification have gotten it wrong, or so I conclude below. Critics have argued, for example, that we must first establish a general theory of attorney conduct, that we have not done so successfully, and that until we do so a theory of disqualification “may be beyond reach.”7 My conclusion, in short, is that this general objection is unhelpful.

5. A prefatory and clarifying comment is in order to explain the role of conflicts of interest in this article. This article is “about motions and orders disqualifying lawyers from continuing representation in litigated matters; it is not about conflicts of interest, and it is not about lawyer discipline (for engaging in conflicted representation without client consent).” W. William Hodes, Getting Lawyer Disqualification Straight Book Review, Lawyer Disqualification: Conflicts of Interest and Other Bases by Richard E. Flamm, 17 GEO. J. LEGAL ETHICS 339, 341 (2004) (footnote omitted). That said, conflicts of interest ground both the practical and theoretical discussion because “by far the most common ground for a motion for disqualification is a claim of some form of conflict of interest that either harms the moving party or calls into question the integrity of judicial process at hand.” Id.; see also James Lindgren, Toward a New Standard of Attorney Disqualification, 7 AM. B. FOUND. RES. J. 419, 423 (1982) (quoting 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, 699 (1980)) (“Conflicts of interest were chosen because they are the most common reasons for disqualification and have prompted a literature that has been described as ‘enormous.’”). Indeed, conflicts and disqualification arguably share a symbiotic relationship: “By far, the most work of, and writing by, courts and ethics committees on conflicts involves lawyer disqualification.” William Freivogel, A Short History of Conflicts of Interest. The Future?, PROF. LAW 3 (2010); see also ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT § 51:1905 (noting that conflicts of interest play a “starring role” in disqualification). In short, although this work is intended to apply generally to all disqualification, it frequently focuses on disqualification questions resulting from alleged conflicts of interest.

6. See infra Part III.A.1 (examining the curious and confused way courts deny meritorious disqualification motions because the movants appear to have “strategic” or “tactical” motives, notwithstanding that almost every contested motion in every case is motivated by “strategic” or “tactical” considerations).

Because the ethical rules in the instances below are generally justified, because disqualification provides a unique and effective remedy for violations of those rules, and because disqualification law is already contextually sensitive to the countervailing costs of the disqualification remedy, the arguable lack of a general theory is insufficiently compelling to halt the remedy. The grand theoretical question is thus mostly unhelpful, but a different question is helpful: to what (mis)conduct is disqualification the appropriate remedy? This Article also attempts to answer that question.

With respect to the normative positions and practical solutions argued below, many of these positions or solutions likely hold force no matter where the reader stands in the disqualification controversy. For example, I argue that disqualification is at least necessary at present because we operate under a split system: disciplinary authorities effectively do not regulate conflicts of interest, while courts do regulate conflicts through disqualification.\(^8\) Thus, because disqualification is practically the only available remedy for an aggrieved movant, disqualification should be kept at least until another remedy is actually available.\(^9\) As another example, I argue that disqualified lawyers should be ordered to disgorge earned fees to, and pay certain future fees of, their clients, who often suffer significant prejudice from the disqualification. Although some readers strongly dislike disqualification,\(^10\) they presumably should still accept that disqualification happens and that the disqualified lawyer’s client should usually bear the least harm possible. Measures alleviating that harm, such as cost-shifting, should therefore be generally unobjectionable and encouraged.\(^11\)

In sum, through new empirical and analytical analyses, this article evidences the following theme: Although lawyer disqualification has warts and consequently cannot be applied promiscuously,\(^12\) disqualification should no longer be shunned the way it has been over the last three decades. Disqualification often provides a uniquely effective remedy to lawyer misconduct; no other options compete against it in practice. Disqualification, furthermore, can be framed and adjusted in ways to alleviate, if not eliminate, its costs.

Part I describes and analyzes lawyer and law firm disqualification: (A) the substantive bases for disqualification motions; and (B) the factors informing

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8. See, e.g., Gregori v. Bank of Am., 254 Cal. Rptr. 853, 859 n.6 (Cal. Ct. App. 1989) ("The increase in the use of motions to disqualify counsel, a remedy rarely heard of until fairly recently, may also reflect the failure of the legal profession to use bar disciplinary proceedings to effectively enforce the canons of ethics . . . and the belief that only judicial intervention can insure compliance.") (citation omitted).

9. See infra Part II.

10. See, e.g., Goldberg, supra note 1.

11. See infra Part III.C. To the extent the client is fairly responsible for the negative circumstances, this observation might not apply. See infra Part I.B.

12. Cf., e.g., Int’l Elecs. Corp. v. Flanzer, 527 F.2d 1288, 1295 (2d Cir. 1975) (noting that an appearance-based standard for disqualification "should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules").
courts' decisions to disqualify a lawyer or law firm. Part II addresses the theory of disqualification and concludes that disqualification can be justified, at least generally, from several directions. Finally, Part III prescribes several improvements for the law and practice of lawyer disqualification. These improvements include cost-shifting, burden-shifting, and better procedures in disqualification proceedings. This Part also provides a contemporary analysis of two infamous aspects of this area of law—"strategic" or "tactical" motions to disqualify and the "appearance of impropriety" standard as a basis for disqualification.

I. THE LAW AND PRACTICE OF LAWYER DISQUALIFICATION

This Part explains disqualification by examining both (A) the substantive bases triggering a disqualification question and (B) in more detail, the factors that courts explicitly and implicitly consider in making the discretionary determination to disqualify a lawyer or law firm. Section A thus describes the common bases (typically, alleged ethical rule violations) on which motions to disqualify lawyers or law firms are brought. Section B then unpacks the salient factors bearing on whether a court will, or will not, disqualify the lawyer or law firm. These factors often weigh for or against disqualification depending on the facts, and several examples in both directions are provided in the footnotes.

A. THE SUBSTANTIVE BASES FOR DISQUALIFICATION: AN OVERVIEW

Courts will eject lawyers from cases for many reasons. The common and predictable reasons, however, are certain classes of ethical violations (or at least the appearance of such violations).13 This Section identifies and describes these ten classes: (1) Concurrent Client Conflicts of Interest; (2) Personal Interest Conflicts; (3) Former Client Conflicts of Interest; (4) Lawyers as Witnesses; (5) Receipt of Confidential, Privileged, or Stolen Information; (6) Contact with a Represented Party; (7) Misconduct with Witnesses; (8) "Other Misconduct;" (9) Imputed Misconduct (Including Conflicts of Interest); and (10) the Appearance of Impropriety. Although these categories are not mutually exclusive,14 they each present unique considerations, and for this reason and custom, courts generally address them in these categories.

To illustrate rough proportions, the following chart shows the relative percentage of each category, based on all published federal disqualification cases

13. See Flamm, supra note 4, at § 2.2 (noting not only conflicts of interest but also various other ethical violations as "grounds for disqualification").
14. As one example, when a lawyer has a conflict of interest in accepting or continuing a representation because the lawyer has conflicting duties to a former client, the lawyer's conflict could be classified as both a former client conflict (category 3) and a personal interest conflict (category 2). Because former client conflicts are so prevalent and because the rules specifically account for them, they are treated separately from other conflicts.
in the last ten years (N=276):

![Bar chart showing the percentage of cases involving one or more bases for disqualification motions (N=276) for the years 2003-2012.]

**Chart 1. Bases for Federal Disqualification Motions**

The following sections briefly describe these ten common bases for disqualification motions. These sections are not meant to constitute an exhaustive analysis of the bases. These sections instead introduce the reader to the concepts so that the reader has a working understanding of the contexts in which disqualification is sought.

1. **Concurrent Client Conflicts**

One of the starkest bases for disqualification arises when the interests of one current client conflict with the interests of another current client. Unsurprisingly, when a lawyer sues a current client or otherwise acts adversely to the client,

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15. Because this article is about disqualification—not necessarily the substantive bases on which disqualification rests—an exhaustive analysis of each basis would be unnecessary. The footnotes in each section, however, point the reader to additional analyses.

16. See generally Flamm, supra note 4, at § 3 (discussing conflicts between current clients and conflicts between lawyer and client).
disqualification motions are quickly filed. In the past, disqualification was all but automatic when lawyers sued their current clients—even if different lawyers within the firm were representing the adverse clients and even if the two matters were wholly unrelated. In the present, however, the law firm might be able to avoid disqualification if the two matters are unrelated and if screens are employed, although this remains a minority position. This development serves as an interesting reminder of the difference between the ethical prohibition against suing a current client and disqualification. The representation clearly violates the ethical rules, but the disqualification remedy might not follow because it depends on the balance of equities in the case.

17. See, e.g., Centra, Inc. v. Estrin, 538 F.3d 402, 417-19 (6th Cir. 2008) ("A client’s knowledge that his law firm has, on previous occasions, represented parties that opposed the client in different matters does not provide an adequate foundation for informed consent with respect to a current simultaneous representation of two adverse clients with opposing interests in a specific dispute . . . ."); State Farm Mut. Auto. Ins. v. Fed. Ins. Co., 72 Cal. App. 4th 1422, 1432-33, 86 Cal. Rptr. 2d 20, 27 (Cal. Ct. App. 1999) (granting motion to disqualify even though the case creating the conflict settled before the disqualification hearing); id. at 1431, 86 Cal. Rptr. 26 ("[S]o inviolate is the duty of loyalty to an existing client that the attorney cannot evade it by withdrawing from the relationship[ , thereby converting the current client to a former client]."). Typically, courts also preclude the lawyer or firm from dropping (i.e., firing) a current client like a "hot potato" in order to sue that client. See, e.g., Restatement (Third) of Law Governing Lawyers § 132 cmt. c & Reporter’s Note to cmt. c. (2000). When the contemplated actions are less adverse than suing the current client, the law generally becomes more forgiving. See, e.g., Charles W. Wolfram, "Competitor and Other ‘Finite-Pie’ Conflicts", 36 Hofstra L. Rev. 539, 550-55 (2007) (discussing cases involving lawyers who represented economic competitors).

18. See, e.g., Commonwealth Ins. Co. v. Stone Container Corp., 178 F. Supp. 2d 938, 943, 947 (N.D. Ill. 2001) (finding that "a law firm that is currently representing a client [is not precluded] from accepting a concurrent engagement to act as a testifying expert for a third party who is an adversary of the client in unrelated litigation, when there is no evidence that any confidential communications could or would be shared"); SWS Fin. Fund A. v. Salomon Bros., Inc., 790 F. Supp. 1392, 1399 (N.D. Ill. 1992); Flamm, supra note 4, at § 23.4 ("In recent years, courts have denied motions to disqualify even when counsel acted adversely to the interests of a current client").

19. See, e.g., Model Rules of Prof’l Conduct R. 1.7(a) (2009) [hereinafter Model Rules] ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest."). A concurrent conflict of interest exists if (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client. . . ." Model Rules R. 1.7(a). Although this subsection focuses on concurrent client conflicts of interest, the lawyer’s representation might be "materially limited" by a variety of other sources, such as personal interests or former clients (which are specifically addressed in later subsections).

20. See generally El Camino Res., Ltd. v. Huntington Nat. Bank, 623 F. Supp. 2d 863, 883-88 (W.D. Mich. 2007); Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121 (N.D. Ohio 1990)) ("Those few federal courts that have followed the ‘flexible approach’ have done so only when the conflict of interest arises from an unforeseen merger that impacts a long-pending case, and have made it clear that the approach involves only remedy and not the question whether the firm has a conflict of interest . . . ."); Nathan M. Crystal, Disqualification of Counsel for Unrelated Matter Conflicts of Interest, 4 Geo. J. Legal Ethics 273 (1990) (analyzing courts’ treatment of such conflicts and proposing remedies); Andrew Perlman, The Parallel Law of Lawyering in Civil Litigation, 79 Fordham L. Rev. 1965 (2011) (observing and analyzing this phenomenon, namely, that a court might not disqualify a firm even when it has violated an ethical rule, or a court might disqualify a firm even when it has not violated an ethical rule).
2. PERSONAL INTEREST CONFLICTS

Lawyers find themselves in various forms of conflicts of interest arising from their personal interests. For example, lawyers have their own financial interests (e.g., separate businesses) and legal obligations (e.g., those arising from the lawyer’s service on a board of directors).\(^2\) When those interests or obligations conflict with a current representation, disqualification battles are waged,\(^2\) albeit seemingly infrequently.\(^2\) The outcome often hinges on the degree of the

\[21. \text{See, e.g., Restatement (Third) of Law Governing Lawyers § 125 (2000) ("Unless the affected client consents to the representation . . . , a lawyer may not represent a client if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s financial or other personal interests.")}; Restatement (Third) of Law Governing Lawyers § 135 (2000) ("Unless the affected client consents to the representation . . . , a lawyer may not represent a client in any matter with respect to which the lawyer has a fiduciary or other legal obligation to another if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s obligation.").

\[22. \text{Aleynu, Inc., v. Universal Prop. Dev. & Acquisition Corp., 564 F. Supp. 2d 751, 754, 759 (E.D. Mich. 2008) (granting disqualification because the court concluded that the plaintiff’s attorney, “apparently [choosing] not to sue himself and his wife or the companies he controls, [was] attempting to collect on his client’s behalf the [530,000 loan] he himself failed to repay”); In re Mortg. & Realty Trust, 195 B.R. 740, 745 (Bankr. C.D. Cal. 1996) (disqualifying both the lawyer and the lawyer’s firm because the lawyer was a former member of the debtor’s board of trustees and finding “that the fiduciary duty of loyalty of the trustee continues after his resignation from the board (which happened on the effective date of the [debtor’s] reorganization plan), with respect to matters considered by the board of trustees while he was a member, and that these duties conflict with those owing by the trustee’s law firm as counsel for the defendant”); Schmidt v. Magnetic Head Corp., 101 A.D.2d 268, 276, 476 N.Y.S.2d 151, 156 (N.Y. App. Div. 1984) (affirming disqualification of plaintiff’s attorney and his firm because he attempted to become a director for the defendant corporation and thereby acquire a personal and proprietary interest in the subject of the derivative litigation). But see People v. Perez, 238 P.3d 665, 667 (Colo. 2010) ("[A] district attorney’s or her office’s financial interest is a statutorily authorized basis for disqualification only if the financial interest would render it unlikely that the defendant would receive a fair trial. For a financial interest to implicate the fairness of a trial, it must be outcome dependent or have a substantial impact on the district attorney’s discretionary functions, such that the district attorney’s conduct interferes with, is contrary to, or is inconsistent with her duty of seeking justice."). For several examples of personal interest conflicts in criminal cases, see Mickens v. Taylor, 535 U.S. 162, 174 (2002), noting that the circuit courts have found conflicts when:


Mickens, 535 U.S. at 174.

23. As Chart One above indicates, personal interest conflicts do not comprise a large number of federal disqualification cases. This is facially odd because personal interest conflicts are well-represented as bases for disciplinary action. As Professor Green noted years ago, perhaps the aggrieved clients (and their adversaries) lack the knowledge, ability, or incentives to bring disqualification motions for this misconduct. Bruce A. Green, Conflicts of Interest in Litigation: The Judicial Role, 65 Fordham L. Rev. 71, 81 (1996) ("Other categories of conflict of interest may well be more prevalent in litigation, yet evade judicial review. One example is the conflict between the lawyer’s own business interests and the interests of the lawyer’s client. The client is less likely to be aware of the facts underlying this type of conflict. If the client knows of the conflict and is troubled by it, the client will have no incentive to bring the conflict to the court’s attention rather than simply discharge
perceived conflict between the personal and professional interests and (for imputation purposes) on the ability of another lawyer in the firm to take up the representation adverse to the lawyer’s interests. 24

3. FORMER CLIENT CONFLICTS

While a personal interest conflict is a relatively rare basis for a motion to disqualify, a conflict with the interests of the lawyer’s former client is one of the most frequent bases for a disqualification motion. In addition to the potential violation of Rule 1.9 and other ethical rules, 25 these conflicts risk that the lawyer will (1) use the former client’s confidential information to advance the current client’s cause, (2) pull punches for the former client (and thereby dilute the representation of the current client), or (3) attack her own work product. These risks, and others, frequently cause courts to consider the lawyer’s disqualification. 26 The key question is often whether the former and current matters are the same or substantially related. 27 If so, the lawyer or law firm is usually disqualified (absent significant equitable considerations counseling against disqualifi-

24. See, e.g., MODEL RULES R. 1.10(a) (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless ... the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”).

25. MODEL RULES R. 1.9(a); RICHARD E. FLAMM, LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES § 7.2 (2003) (discussing Rule 1.9 in the disqualification context and citing cases). Although the rules differ in their details, this subsection also generally addresses conflicts of former government lawyers and judges. See MODEL RULES R. 1.11, 1.12.

26. See, e.g., O Builders & Assocs., Inc. v. Yuna Corp. of NJ, 19 A.3d 966 (synopsis) (N.J. 2011) (“[The court held that the] restaurant owner failed to establish that matters disclosed during prior consultation with opposing counsel were the same or substantially related to the present suit, or that the information disclosed was significantly harmful.”); see generally Disqualification of Attorneys for Representing Interests Adverse to Former Clients, 64 YALE L.J. 917, 918-19 (1955) (footnote omitted) (“An attorney may be disqualified from litigation if his participation would violate his ethical duty to a former client. For the last hundred years courts have been expanding the obligation owed former clients, broadening the area of employment prohibited to the attorney. At the same time, developments in legal practice have often made disqualification from even a small area of employment an increasingly severe sanction. The clash of these two trends in a number of recent cases suggests the necessity of reexamining the scope of the duty owed by an attorney to his former client. Disqualification rules were fashioned at common law to assure the public that any information confided in an attorney would never be disclosed or utilized adversely without the client’s permission. Such a guaranty was deemed necessary to encourage maximum disclosure of all relevant facts, a prerequisite to adequate preparation of a client’s case.”).

27. MODEL RULES R. 1.9(a) (prohibiting adverse action against a former client in a matter substantially related to the former client’s matter); see also id. cmt. 3 (“Matters are ‘substantially related’ for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.”).
cation); if not, the motion to disqualify is typically denied because the ethical rules are not violated and the policy concerns listed above are not directly implicated.

4. LAWYERS AS WITNESSES

As a very general rule, lawyers cannot be both an advocate and a witness in the same proceeding. Lawyers, of course, often bear witness to many relevant facts about both their clients and their clients’ causes. It is unsurprising, then, that this potential role conflict not only arises frequently but is a frequent basis for a disqualification challenge. Although the challenge is frequently brought, it might be defeated if another lawyer agrees to represent the client at the eventual hearing or trial. This “other” lawyer generally may be someone inside or outside the lawyer’s firm.

5. RECEIPT OF CONFIDENTIAL, PRIVILEGED, OR STOLEN INFORMATION

Lawyers fairly often receive the other side’s privileged, confidential, or stolen

28. See generally infra Part I.B. (listing the various factors that courts typically consider when weighing whether to disqualify a lawyer or firm for an ethical violation).

29. See generally United States v. Dyess, 231 F. Supp. 2d 493, 496 (S.D. W. Va. 2002) (citation omitted) (“The rule forbidding a lawyer to act as both advocate and witness in the same proceeding acknowledges several important considerations. The most important is that the attorney-witness may not be a fully objective witness or may be perceived by the trier of fact as distorting the truth for the sake of his client. While the danger is greater when matters are tried to a jury, it does not disappear when the lawyer testifies in matters tried to the bench.”); Main Events Prods., LLC v. Lacy, 220 F. Supp. 2d 353, 356-57 (D.N.J. 2002) (citations omitted) (noting that, although another lawyer should be retained for representation during a hearing or trial, “a number of other courts interpreting RPC 3.7 have concluded that an attorney who will testify at trial need not be disqualified from participating in pre-trial matters”); In re Sandoval, 308 S.W.3d 31, 33-34 (Tex. Ct. App. 2009) (concluding that the attorney was erroneously disqualified because the attorney’s testimony about notarizing a choice of conservator document was not “an essential element” in the proceedings); Douglas R. Richmond, The Rude Question of Standing in Attorney Disqualification Disputes, 25 AM. J. TRIAL ADVOC. 17, 18 (2001) (“An attorney who is alleged to be a necessary witness at the trial of a matter is certain to be the subject of a disqualification motion.”).

30. Cf. United States v. Kenney, 911 F.2d 315, 322-23 (9th Cir. 1990) (Kozinski, J., dissenting) (internal citations omitted) (“Having an Assistant U.S. Attorney who worked on the case testify before the jury is almost always an unwise and perilous exercise as it raises serious temptations for prosecutorial overreaching. In this case the temptation proved too great; it denied the defendant a fair trial. There are two things a prosecutor may not do while testifying. The first is vouch for a witness; the second is express a personal opinion on the defendant’s guilt or the strength of the case against him. In this case Assistant U.S. Attorney Bruce Carter did both. A careful reading of the record finds Carter testifying that Silverman, a key government witness, was cooperative, that he never changed his story, and that the U.S. Attorney’s Office routinely verifies the statements of its witnesses. Carter stopped just short of pinning a Boy Scout Merit Badge on Silverman; his accolades could not help but persuade the jury that they ought to believe Silverman because an experienced and efficient prosecutor like Carter found him credible.”); see generally FLAMM, supra note 4, at § 16.7 (discussing the modern trend against imputing disqualification to other members of the lawyer’s firm).

31. See MODEL RULES R. 3.7(b) (“A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.”).
information. The other side might inadvertently send an otherwise privileged email to the lawyer or include privileged documents in disclosure materials; the other side's disgruntled former paralegal might—in an obviously unauthorized act—deliver a privileged document to the lawyer; or the client's former coworker (and mole) might steal documents for the client and turn them over to the lawyer. When these problems come to light, the other side might well move for the lawyer's disqualification—either because the lawyer used unethical means to obtain the information or because the lawyer's exposure to the information raises fairness concerns.

6. Violation of the "No Contact Rule" (Rule 4.2)

When a lawyer contacts a person (typically the opposing party or the opposing party's employees) represented in a litigated matter, the person's lawyer might well respond with a motion to disqualify the lawyer. One concern—as with the preceding subsection—is that the lawyer might have unfairly or unethically gained privileged or confidential information through the improper contact. 

32. Consequently, court rules and many ethics opinions and commentators have generally addressed the inadvertent or unauthorized receipt of such information. See, e.g., FED. R. CIV. P. 26(b)(5)(B); MODEL RULES R. 4.4(b); Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. 01-04 (2001); Andrew M. Perlman, The Legal Ethics of Metadata Mining, 43 AKRON L. REV. 785 (2010); see also infra note 33 (citing cases).

33. See, e.g., Cnty. of Los Angeles v. Superior Ct., 222 Cal. App. 3d 647, 657-58, 271 Cal. Rptr. 698, 705 (Ct. App. 1990) ("We hold that a party may, for tactical reasons, withdraw a previously designated expert witness, not yet deposed. If that expert continues his or her relationship with the party as a consultant, the opposing party is barred from communicating with the expert and from retaining him or her as the opposing party's expert . . . . When an attorney violates this rule, he or she must be recused. Having become privy to an opposing attorney's work product, there is no way the offending attorney could separate that knowledge from his or her preparation of the case."); MMR/Wallace Power & Indus., Inc. v. Thames Assocs., 764 F. Supp. 712, 726-27 (D. Conn. 1991) (granting disqualification in part because attorney presumably obtained confidential information from the moving party's former employee); In re Beiny, 132 A.D.2d 190, 195-96, 522 N.Y.S.2d 511 (N.Y. App. Div. 1987) (affirming disqualification because the firm's receipt, review, and use of privileged information involved "intentional misconduct" and was otherwise warranted by "the resulting prejudice to the trustee against whom the improperly obtained materials were used extensively both individually and en masse, the need to assure the trustee that the wrongfully acquired information would not be used prospectively, the need to sanction adequately the blatant misconduct involved so as to deprive the offending attorney and law firm of any benefit possibly to be deprived therefrom, and the need to deter similar abuses which seriously compromise the integrity of the judicial process"); Merits Incentives, LLC v. Eighth Jud. Dist. Ct., 262 P.3d 720, 725-26 (Nev. 2011) (denying disqualification because attorney promptly notified opposing counsel after receiving its documents on disk from an anonymous source); In re Meador, 968 S.W.2d 346, 351-52 (Tex. 1998) (denying disqualification, noting that "it is impossible to articulate a bright-line standard for disqualification where a lawyer, through no wrongdoing of his or her own, receives an opponent's privileged materials," and noting that in "this exercise of judicial discretion, a trial court should consider, among others, these factors: 1) whether the attorney knew or should have known that the material was privileged; 2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information; 3) the extent to which the attorney reviews and digests the privileged information; 4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice; 5) the extent to which movant may be at fault for the unauthorized disclosure; 6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney").
Although courts will often look for less drastic sanctions against the lawyer, disqualification is a significant possibility.  

7. MISCONDUCT WITH WITNESSES

Lawyers' misconduct toward or with witnesses can lead to disqualification. This misconduct includes (but is not limited to) providing monetary incentives to witnesses, outright bribing witnesses, or soliciting witnesses to become clients.

8. OTHER MISCONDUCT

Although we have exhausted the common bases for lawyer disqualification, an additional category—containing diverse forms of lawyer misconduct and strange circumstances—is worth mentioning. One example is contacting, or even

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34. See, e.g., Camden v. Maryland, 910 F. Supp. 1115, 1124 (D. Md. 1996) (granting disqualification because the attorney contacted a former employee of the moving party and obtained confidential information); Faison v. Thornton, 863 F. Supp. 1204, 1215 (D. Nev. 1993) (noting the various ways courts have dealt with "improper ex parte communications" from excluding evidence to dismissal of pending litigation), overruled on other grounds by 338 F.3d 981 (9th Cir. 2003). But see Ceramco, Inc. v. Lee Pharm., 510 F.2d 268, 271 (2d Cir. 1975) (denying disqualification because it "would be too harsh to rule that the action of counsel in telephoning defendant's employees to obtain non-privileged, relevant, and accurate information as to jurisdiction and venue constituted actual wrongdoing"); Davidson Supply Co., v. P.P.E., Inc., 986 F. Supp. 956, 958 (D. Md. 1997) (denying disqualification of lawyer who contacted a party's former employee and obtained non-privileged information). See generally ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 51:1901 (2013) (noting that courts will occasionally disqualify lawyers for ex parte contacts); FLAMM, supra note 4, at § 15 (discussing disqualification for "unauthorized contacts with parties").


37. See, e.g., W. William Hodes, Getting Lawyer Disqualification Straight Book Review, Lawyer Disqualification: Conflicts of Interest and Other Bases by Richard E. Flamm, 17 GEO. J. LEGAL ETHICS 339, 341 n.6 (2004) (citing FLAMM, supra note 4, at 25-28) (mentioning "several other grounds sometimes advanced as a basis for disqualification, such as temperate public criticism of a judge, charging excessive fees, making improper loans to clients for living expenses, obtaining publicity rights to the subject of the pending litigation, and initiating a sexual relationship with a client"); see also Comuso v. Nat'l R.R. Passenger Corp., 267 F.3d 331, 340 (3d Cir. 2001) (noting that the trial court disqualified the lawyer for verbally and physically threatening opposing counsel, dismissing the appeal for lack of jurisdiction, and denying the lawyer's petition for a writ of mandamus).
bribing, jurors, and another example is contacting, or even bribing, judges.\textsuperscript{39} "Misconduct" could even include providing financial assistance to a destitute client.\textsuperscript{40} Although the misconduct of this category is substantively varied, it is worth noting for context, and it at least shares a common feature with the other categories in that it may be remedied through disqualification.

9. IMPUTATION: DEATH BY ASSOCIATION

A lawyer's associations with other lawyers and staff can cause disqualification issues, even if the lawyer has not personally committed the misconduct.\textsuperscript{41} Although the lawyer might not personally labor under any conflict of interest, for example, the lawyer's association with a conflicted attorney or staff member might cause the conflict to be imputed to the lawyer. When this occurs, disqualification might follow.\textsuperscript{42} Most frequently, two questions must be an-

\textsuperscript{40} Shade v. Great Lakes Dredge & Dock Co., 72 F. Supp. 2d 518, 522 (E.D. Pa. 1999) (denying disqualification and finding no public interest to outweigh the interest of the client in his chosen counsel and that "the danger of public dissatisfaction with the legal process appears to be greater from the last minute disqualification of an attorney who apparently provided housing for a client who was faced with dire financial circumstances"). But see In re K.A.H., 967 P.2d 91, 92 (Alaska 1998) (denying reimbursement from settlement funds "[b]ecause we conclude that Rule 1.8(e) prohibits lawyers from advancing living expenses to clients and does not unconstitutionally interfere with court access"); Waldman v. Waldman, 118 A.D.2d 577, 499 N.Y.S.2d 184, 185 (N.Y. App. Div. 1986) (concluding that trial court did not abuse discretion by granting disqualification because lawyer had provided financial assistance to client, even though the lawyer's sole motivation was "genuine concern for his client's financial plight").
\textsuperscript{41} See generally, e.g., Derivi Const. & Architecture, Inc. v. Wong, 118 Cal. App. 4th 1268, 1276, 14 Cal. Rptr. 3d 329, 335 (Cal. Ct. App. 2004) (quoting Non-Punitive Segregation Inmates v. Kelly, 589 F. Supp. 1330, 1338-39 (E.D. Pa. 1984)) (concluding that lawyer's association by marriage with a previously disqualified lawyer was insufficient to warrant disqualification: "'Lawyers have many close relationships of which marriage is only one. Just as a court will not presume that lawyers will disclose confidences to their close friends, courts will not presume that lawyers will disclose confidences to their spouses . . . . [I]f courts regularly disqualified attorneys and their law firms from representing clients with interests adverse to clients represented by the attorney's spouses' law firms, courts would effectively preclude married lawyers from practicing in the same communities as their spouses"); MODEL RULES R. 1.10(a) (2009) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by" the conflict of interest rules."). For conflicts involving staff, see generally Cecile C. Edwards, Law Firm Disqualification and Nonlawyer Employees: A Proposal for a Consistent Analysis, 26 Miss. C. L. REV. 163 (2007).
\textsuperscript{42} Zimmerman v. Mahaska Bottling Co., 19 P.3d 784, 791 (Kan. 2001) (granting the motion to disqualify after legal secretary moved from plaintiff's firm to defendant's firm, concluding that "nonlawyers [] be treated in the same manner as lawyers when considering confidentiality issues"). But see Hayes v. Cent. States Orthopedic Specialists, Inc., 51 P.3d 562, 569 (Okla. 2002) (declining to follow Zimmerman and holding that "and before being disqualified for having hired a non-lawyer employee from its opponent, the hiring firm should be given the opportunity to prove that the non-lawyer has not revealed client confidences to the new employer and has been effectively counseled and screened from doing so. If such proof is made to the court's satisfaction, the court should deny the motion to disqualify the non-lawyer's new firm"). Even if the disqualified lawyer is not a member of the lawyer's firm, the lawyer might still be disqualified if the lawyer served in a co-counsel role with the disqualified lawyer. See Freivogel on Conflicts, Co-Counsel/Common Interest, http://www.freivogelonconflicts.com/cocounsel/commoninterest.html; Paul R. Taskier & Alan H. Casper, Vicarious Disqualification of
answered: (1) whether the jurisdiction permits the firm or agency to screen the disqualified lawyer; and (2) if so, whether the firm or agency timely implemented adequate screening measures. Misconduct beyond conflicts of interest also can effectively be imputed to other members of the lawyer’s firm or agency, and misconduct that causes a significant appearance of impropriety might also cause the entire firm or agency to be disqualified, as discussed below.

10. THE APPEARANCE OF IMPROPRIETY

Even if the lawyer’s or firm’s conduct does not violate the ethical rules, the lawyer may still be disqualified if the conduct gives rise to an appearance of impropriety. Although many courts leave the standard undefined, courts generally ask, in short, whether the lawyer’s conduct causes “an appearance of impropriety... in the mind of an ‘ordinary knowledgeable citizen acquainted with the facts.’” Many jurisdictions have rejected the appearance of impropriety basis as outdated or vague (or both), but many more still use this basis for disqualification. The states essentially break into three categories: (1) the appearance of impropriety by itself can constitute the sole basis for disqualification; the

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Co-Counsel Because of “Taint,” 1 GEO. J. LEGAL ETHICS 155 (1987). Similarly, a lawyer might be disqualified as a result of a joint defense agreement, unless the agreement explicitly waives the disqualification remedy. See, e.g., In re Shared Memory Graphics LLC, 659 F.3d 1336, 1342 (Fed. Cir. 2011) (upholding advance waiver); United States v. Henke, 222 F.3d 633, 637 (9th Cir. 2000).

43. See infra Part I.B.4 (discussing screening generally and the features of an effective screen).

44. Courts do not necessarily refer to the doctrine of imputation in this context, but to inflict maximum punishment or deterrence for the lawyer’s misconduct, courts occasionally disqualify the lawyer’s entire firm.

45. Bruce A. Green, Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule Be Eliminated in New Jersey—or Revived Everywhere Else?, 28 SETON HALL L. REV. 315, 337 (1997) (quoting In re Onoverole, 511 A.2d 1171, 1178 (N.J. 1986)) (“This guideline would seem to invite—indeed, require—disciplinary bodies, the Advisory Committee, and the courts to make impressionistic, ad hoc decisions, drawing on empirically unfounded, highly personal judgments about how the hypothetical ‘ordinary knowledgeable citizen’ would perceive particular scenarios involving lawyers. In the traditional context involving public lawyers, however—and only in this context—the test has several possible redeeming qualities.”). New Jersey, however, recently jettisoned the appearance of impropriety standard. See infra Part III.A.3 (citing cases and noting also the various interests that courts seek to promote by employing the appearance of impropriety standard).

46. See, e.g., Ark. Valley State Bank v. Phillips, 171 P.3d 899, 909 (Okla. 2007) (quoting in part John W. Castles III & Laurie E. Foster, Conflicts and Lawyer Disqualification, Nat’l L.J., Feb. 6, 1984, at 16, col. 3) (noting that some courts have dropped the appearance of impropriety as a basis for disqualification “largely due to the fact that when the American Bar Association proposed the Model Rules of Professional Conduct, Rule 1.7 was drafted specifically to remove the appearance of impropriety test because the test was deemed ‘too vague’ and presented ‘severe problems’”). See generally FLAMM, supra note 4, at § 18.5 (discussing the history of the appearance of impropriety doctrine in disqualification cases and providing examples of states’ treatment of the standard).

47. See, e.g., United States v. Dyess, 231 F. Supp. 2d 493, 498 (S.D. W. Va. 2002) (disqualifying entire prosecutor’s office in part because “[t]he allegations involve the personal and sexual relationship of an agent of the United States with a key ‘prosecuting’ witness who received lenient treatment as a Defendant when sentenced; alleged misallocation of substantial amounts of money; possible coerced testimony and perjury; and
appearance of impropriety cannot constitute the sole basis for disqualification, but it can be a factor in considering whether to disqualify the lawyer; and (3) the appearance of impropriety cannot constitute the sole basis for disqualification or even a factor. There is a fourth category of states that have not decisively or clearly addressed the treatment of the appearance of impropriety in disqualification proceedings.

Thus, the appearance of impropriety can constitute a basis triggering disqualification proceedings in many jurisdictions. As discussed in depth below, the appearance of impropriety can also be used as a factor when courts attempt to decide whether disqualification equitably is warranted in a particular case. Finally, the appearance of impropriety standard is related to a ubiquitously expressed standard of review: any doubts should be resolved in favor of disqualification.

The ten categories above constitute the most common bases for disqualification motions. The presence or absence of such actual or apparent misconduct is not dispositive, however. Before imposing disqualification, courts typically consider numerous additional factors, as listed and organized below.

B. THE FACTORS OF LAWYER DISQUALIFICATION

As Richard Flamm has observed, disqualification analysis generally uses a "two-step inquiry." Once courts find or suspect a substantive violation, they

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49. Wade v. Nationwide Mut. Fire Ins. Co., 225 F. Supp. 2d 1323, 1331 (S.D. Ala. 2002) ("Both the ABA's Model Rules of Professional Conduct and Alabama's Rules of Professional Conduct, however, have since deleted their provisions concerning the appearance of impropriety in favor of the more precise rules governing client confidences, conflicts of interest and other matters. Thus, disqualification of counsel in this district can no longer be grounded on an appearance of impropriety."); see infra Part III.A.3 (discussing this standard).

50. See infra Part III.A.3.

51. See infra Part III.A.3.

52. See, e.g., Kala v. Aluminum Smelting & Ref. Co., 688 N.E.2d 258, 266 (Ohio 1998) ("A very strict standard of proof must be applied to the rebuttal of this presumption of shared confidences, however, and any doubts as to the existence of an asserted conflict of interest must be resolved in favor of disqualification in order to dispel any appearance of impropriety."); infra Part III.A.2 (discussing this standard).

53. FLAMM, supra note 4, at § 23.3.
then engage in a balancing test to determine whether disqualification is the appropriate remedy for the case. In other words, courts weigh the equities of the circumstances to determine whether disqualification is warranted. Over time, courts have identified several factors to weigh in the balance when present in a particular case.

With few exceptions, these factors are relevant in every disqualification case, no matter which of the ten substantive bases above is alleged. This section articulates and organizes these factors, and it does so in a slightly novel way by focusing on the particular participants whose conduct or interests are scrutinized: (1) the movant, (2) the lawyer, (3) the lawyer's client, (4) the lawyer's firm, and (5) the court or justice system. This organization should assist judges or practitioners deciding or assessing a disqualification question by providing them

54. To complete this first step necessarily requires some fact-finding (or at least suspecting). Although this article does not address every facet of that process, it does offer recommendations as to the burdens of production, proof, and persuasion (infra Part III.A.2) and the process due to the lawyer (infra Part III.B).

55. To be sure, this “two-step inquiry” is not followed in every case. For example, courts have disqualified lawyers even when those lawyers did not violate the ethical rules (but perhaps merely created the appearance of impropriety), and other courts have refused to analyze rigorously whether lawyers violated the ethical rules because the circumstances would not warrant the disqualification remedy in any event. Courts also occasionally announce that certain violations “per se” result in disqualification. See, e.g., Lennartson v. Anoka-Hennepin Indep. Sch. Dist. No. 11, 662 N.W.2d 125, 134 (Minn. 2003) (“We conclude that our rule, unlike the rules in states that have created a judicial equities overlay, specifically articulates under what limited situations screening can rebut the presumption that disqualification is imputed.”). These exceptions are rare and usually confined to a specific ethical rule or actor (e.g., a prosecuting agency). In general, courts explicitly or implicitly follow the “two-step” inquiry.

56. See generally FLAMM, supra note 4, at § 21.3 (noting the following factors: delay in bringing the motion to disqualify, undisclosed knowledge of unethical conduct, tactical motives, whether the movant objected promptly even if not through a formal disqualification motion, whether granting the motion would result in significant delay in the case or the court's calendar, and whether “an earlier filed motion to disqualify would have been inappropriate or futile” and citing cases).

57. For a general discussion of balancing and the factors, see for example:

The Court will assume without deciding that applying a balancing test is appropriate and preferable to automatic disqualification for violation of the ethical rules. See Research Corp., 936 F. Supp. at 703 (examining cases and determining that automatic disqualification for an ethical violation is not preferable). Courts have considered the following factors in such an analysis: (1) the nature of the ethical violation; (2) the prejudice to the parties, including the extent of actual or potential delay in the proceedings; (3) the effectiveness of counsel in light of the violations; (4) the public's perception of the profession; and (5) whether a motion to disqualify has been used as a tactical device or a means of harassment. Id.; see also Richards, 2009 WL 3740725, at *6 (stating that the district court should balance the following factors: “(1) the client's interest in being represented by counsel of its choice; (2) the opposing party's interest in a trial free from prejudice due to disclosures of confidential information; and (3) the public's interest in scrupulous administration of justice”).


58. See generally FLAMM, supra note 4, at § 24 (discussing various disqualification factors under the following headings: “The Factors to Be Balanced,” “Prejudice to The Moving Party,” “Prejudice to the Non-Moving Party,” and “Fault for the Ethical Violation”).
with an efficient and inclusive checklist of considerations.  

1. FACTORS FOCUSING ON THE MOVANT

Disqualification analysis is unusual in part because the movant is scrutinized just as closely as the lawyer whose conduct is at issue. Because many courts and commentators generally disdain disqualification motions and fear that such motions are increasing significantly, courts apply heightened scrutiny to the movant's motivations and conduct. Courts will analyze the movant's:

1. standing to challenge the lawyer's conduct;
2. diligence in bringing the motion;
3. knowledge of the circumstances;
4. fault or misconduct;
5. motive in bringing the motion; and
6. potential prejudice if the motion is denied. These inquiries are addressed in order below.

First, courts scrutinize whether the movant has standing to assert the conflict of interest (or other basis) justifying disqualification. The movant might lack standing if the movant is not a current or former client of the lawyer and the movant cannot show concrete harm to itself or the proceedings. Although

59. This unpacking of the various factors also provides a better look at the actual costs and inefficiencies of disqualification law and practice. These are directly addressed in Part II below.

60. By movant, I mean the party (and if applicable, the party’s lawyer) moving for disqualification.

61. See infra Part III.A; see generally FLAMM, supra note 4, at § 1.6, 16 ("[R]ecent decades have seen an exponential growth in the number of reported disqualification motions."); FLAMM, supra note 4, at § 1.7, 17 (noting that lawyers who utilize disqualification motions may find themselves to be the target of a countering disqualification motion); FLAMM, supra note 4, at 18 (footnotes omitted) ("A court is particularly likely to order sanctions in a situation where the moving party or its counsel declines to withdraw the motion after becoming aware of its evident lack of merit; or where the court finds that the motion was interposed for tactical reasons; such as to harass opposing counsel, delay the proceedings, or escalate the opposing party's costs."); Kenneth L. Penegar, The Loss of Innocence: A Brief History of Law Firm Disqualification in the Courts, 8 GEO. J. LEGAL ETHICS 831 (1995) (analyzing the significant increase starting in the late 1970s in the use of motions to disqualify law firms in the federal court system).

62. See generally Douglas R. Richmond, The Rude Question of Standing in Attorney Disqualification Disputes, 25 AM. J. TRIAL ADVOC. 17, 18, 21-22 (2001) ("To have standing a litigant must have a personal stake in a dispute that compels a court to accept jurisdiction and that justifies the court's exercise of its powers to remedy the litigant’s claimed injury."); id. at 34 (footnotes omitted) ("There are essentially two views. The first, and more restrictive view, is that only a current or former client has standing to seek an attorney's disqualification. The opposing view holds that an attorney-client relationship is unnecessary . . . . Courts that typically require the existence of an attorney-client relationship to confer standing for disqualification purposes recognize certain limited exceptions to the privity requirement. At the same time, those courts that typically do not make privity a disqualification prerequisite still limit the circumstances in which a non-client can move for disqualification."); see also FLAMM, supra note 4, at § 19.2, 363-65 (discussing the split in authority on standing and citing cases). For cases addressing the standing question generally, see for example: S.E.C. v. King Chuen Tang, 831 F. Supp. 2d 1130, 1142-43 (N.D. Cal. 2011) (concluding that movant lacked standing, which was reserved to current or former clients, unless the claimed misconduct was so severe that it might interfere with the administration of justice); In re Appeal of Infotecnology, Inc., 582 A.2d 215, 221 (Del. 1990) ("Simply, a non-client litigant has standing to enforce Rule 1.7(a) when he or she can demonstrate that the opposing counsel's conflict somehow prejudiced his or her rights. The non-client litigant does not have standing to merely enforce a technical violation of the Rules."); FMC Techs., Inc. v. Edwards, 420 F. Supp. 2d 1153, 1156-57 (W.D. Wash. 2006) (citations omitted) (finding that the movant had standing, discussing the split in authority, noting that Supreme Court and Ninth Circuit had not answered the question, and noting that "nonclient litigants may,
courts rarely say so explicitly, a non-client movant might also face a higher burden of proof.63

Second, courts heavily scrutinize the movant's diligence in bringing the disqualification issue to the court's attention.64 Importantly, any significant delay between the time that the movant learns of the lawyer's misconduct and the filing of the motion to disqualify often results in a "waiver" of the movant's right to seek disqualification.65 A key piece of advice for movants (and their lawyers) considering whether to file a motion to disqualify is to do so promptly. Whether courts will consider the motion timely filed "depends on such circumstances as the length of delay from the time when the conflict was reasonably apparent, whether the movant was represented by counsel at relevant times, why the delay occurred, and whether acting now would result in prejudice to the responding party."

Third, courts are also interested, although less frequently, in the movant's preexisting knowledge about the underlying conflict or other misconduct. This knowledge could concern legal services generally, law firm conflicts, and waiver agreements, among other areas.66 If the movant is "sophisticated" in these

under proper circumstances, bring motions to disqualify counsel based on conflicts of interest" as a result of the court's "inherent power to 'protect the integrity of their processes' in the context of ethical disqualification motions.

63. See, e.g., Colyer v. Smith, 50 F. Supp. 2d 966, 971 (C.D. Cal 1999) ("[r]ecognizing the potential abuses of the [ethical rules] in litigation ... the burden of proof must be on the nonclient litigant to prove by clear and convincing evidence (1) the existence of a conflict and (2) to demonstrate how the conflict will prejudice the fairness of the proceedings" (quoting In re Appeal of Infotechnology, Inc., 582 A.2d 215, 221 (Del. 1990))).

64. See generally FLAMM, supra note 4, at § 21.1 (discussing the doctrines of implied waiver, implied consent, laches, and equitable estoppel in this context); ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 51:1908 (2013) (discussing the treatment of delay).

65. Compare, e.g., Conoco Inc. v. Baskin, 803 S.W.2d 416, 420 (Tex. App. 1991) (noting that even a four month delay in filing a motion to disqualify "is probably sufficient to support a waiver finding"), with FMC Technologies, 420 F. Supp. 2d at 1162 (finding no waiver based on six-month gap between start of lawsuit and the filing of the disqualification motion because the disqualification issue was not ripe until near the end of that time period and plaintiff brought motion two weeks after the issue became ripe). See also Murray v. Metro. Life Ins. Co., 583 F.3d 173, 180 (2d Cir. 2009) (noting that disqualification on the eve of trial would harm the defendant and the plaintiff's "lengthy and unexcused delay in bringing its motion to disqualify weighs against disqualification"); Redd v. Shell Oil Co., 518 F.2d 311, 316 (10th Cir. 1975) ("[L]awyer conflict of interest problems ought to be brought up long before the date of trial in an atmosphere which does not cast a shadow over the trial itself."); Hayes v. Cent. States Orthopedic Specialists, Inc., 51 P.3d 562, 566 (Okla. 2002) (denying disqualification because the movant "through his delay of eight months while much was happening in the case, waived any right he might have had to insist on the harsh remedy of disqualifying" the firm); Wells Fargo Bank, N.A. v. LaSalle Bank Nat. Ass'n, No. CV-08-1125-C, 2010 WL 1558554, at *2 (W.D. Okla. Apr. 19, 2010) (denying disqualification in part because an approximately year-and-a-half delay in filing the motion to disqualify "causes the Court to question whether Plaintiff's motion was brought for tactical purposes rather than to address any ethical violations").

66. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 6 cmt. i (2000).

67. See N. Am. Foreign Trading Corp. v. Zale Corp., 83 F.R.D. 293, 296-97 (S.D.N.Y. 1979) (denying disqualification in part because "defendant's counsel knew or should have known that the [disputed] consultation had no connection with this case and that Zale executives had acquiesced in [the lawyer's] dual role"); People v. Shari, 204 P.3d 453, 462 (Colo. 2009) (denying disqualification because "even if some conflict
matters, for example, this factor could weigh against disqualification. Of course, if the movant’s specific state of knowledge rises to the level of informed consent to the alleged conflict, that fact will usually be dispositive, and the motion will fail accordingly.

Fourth, courts will consider whether the movant is at fault or committed misconduct, either in the underlying conflict of interest (or other violation) or in bringing the motion to disqualify. Perhaps, for example, the movant had misled the lawyer as to what entity the lawyer was actually representing, or the movant’s careless handling of privileged emails caused the emails to wind up in...
the opposing counsel’s inbox. Such fault or misconduct on the movant’s part generally weighs against disqualification.

Fifth, the movant’s motive is one of the most salient factors to courts considering disqualification. Courts often try to discern whether the movant is using the disqualification motion as a tool simply to delay the proceedings, harass the lawyer or lawyer’s client, or otherwise seek an unfair advantage in the litigation. Any suggestion of these tactics—no matter how slight or speculative—will usually weigh heavily against disqualification.  

Sixth, and finally, courts consider the prejudice that might flow to the movant

72. See In re Meador, 968 S.W.2d at 351-52 (noting that courts should consider in similar circumstances “the extent to which movant may be at fault for the unauthorized disclosure” of privileged information).

73. See generally FLAMM, supra note 4, at §§ 25.8, 25.9 (footnotes omitted) (discussing the “significance of the moving party’s motivation” and noting that courts are “likely to infer a strategic motivation in a case where the moving party effectively created the ethical problem that provides the basis for the motion; as where the moving party named the challenged lawyer as a party to the lawsuit, imparted confidential information to counsel after becoming aware that he was representing an adversary, of filed a motion for consolidation which, if granted, would inject a conflict issue into the case,” and when the movant delayed in bringing the motion); FLAMM, supra note 4, at § 25.7 (discussing “strategic motivations for seeking disqualification”); ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT § 51:1905 (noting that courts will consider “[w]hether the motion appears to have been filed for tactical purposes”).

74. See, e.g., Vegetable Kingdom, Inc. v. Katzen, 653 F. Supp. 917, 919, 925-26 (N.D.N.Y. 1987) (denying disqualification motion and imposing sanctions because the court did “not harbor a scintilla of doubt that the attorneys . . . brought this motion purely to harass their opponent”); see also id. (“The court is well aware that disqualification motions are often interposed for tactical reasons wholly unrelated to concerns for the maintenance of the ethical standards of the legal profession. Such motions are often designed to harass opposing counsel, cause delay, or needlessly increase the cost of pursuing a cause of action. Because of this, in part, the courts in this circuit have been reluctant to disqualify attorneys on the motion of opposing counsel . . . . The court finds this cynical perversion of the commendable objectives which inspired the promulgation of codes of conduct designed to guide an attorney through difficult ethical dilemmas particularly offensive.”); N. Am. Foreign Trading Corp. v. Zale Corp., 83 F.R.D. 293, 296-97 (S.D.N.Y. 1979) (“The method employed by counsel here certainly supports the oft-expressed public view that lawyers are causing their clients needless expenses in the conduct of litigation. No purpose has been served by the instant motion other than to harass plaintiff and his counsel and to delay these proceedings further . . . . The motion was a ploy and it was designed as a vexatious and oppressive tactic against plaintiff and its counsel.”); Alexander v. Super. Ct., 685 P.2d 1309, 1317 (Ariz. 1984) (denying motion to disqualify in part because movant appeared to be using the motion as a “tactical tool” for the “purpose of harassing”); CenTra, Inc. v. Chandler Ins. Co., 540 N.W.2d 318, 326 (Neb. 1995) (denying disqualification and noting that “[t]he potential to gain an advantage in litigation through collateral attack cannot be lost on applicants. Applicants have raised no objections to the department’s findings on the merits, and yet applicants ask this court to remand this cause for a second bite at the apple versus different opposing counsel.”); Kenneth L. Penegar, The Loss of Innocence: A Brief History of Law Firm Disqualification In the Courts, 8 GEO. J. LEGAL ETHICS 831, 833 (1995) (noting Supreme Court and lower court decisions that sought to discourage such motions on the suspicion that the motions “were made to achieve a tactical advantage in the pending litigation and not for the loftier professional responsibility concerns asserted”); RICHARD E. FLAMM, LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES 16 (2003) (“The proliferation of [disqualification] motions may be explained, in part, by the decreasing reluctance on the part of some counsel to resort to disqualification in an effort to secure a strategic advantage for their client.”). A few courts have resisted considering the movant’s motivation, deeming it to be irrelevant. See, e.g., In re Cendant Corp. Sec. Litig., 124 F. Supp. 2d 235, 250 n.10 (D.N.J. 2000) (denying request to permit conflicted attorney to continue representation and noting that even if the motion was “vexatious,” the movant’s motive was irrelevant). I return to this suggestion in Part III.A.1 below.
were they to deny disqualification. The most common concern is that, but for disqualification, the lawyer would be in a position to use the movant’s confidential information against the movant (who is often a former client).\textsuperscript{75} There are other forms of prejudice (e.g., betrayal), however, and courts will generally consider those as well.\textsuperscript{76} Perhaps obviously, more prejudice means disqualification is more likely; less prejudice means that disqualification is less likely.

2. FACTORS FOCUSING ON THE LAWYER

Both the movant and, more obviously, the challenged lawyer face the most court scrutiny in disqualification analysis. This Subsection contains the specific factors relating to the lawyer and the lawyer’s conduct that courts will examine when making their disqualification determinations. To the extent the following factors are present and discernible in a given case, courts will analyze the lawyer’s: (1) knowledge about the conflict of interest or other misconduct; (2) motives; (3) ethical violation or appearance of impropriety; (4) violation’s severity; and (5) occasionally, potential prejudice (flowing to the lawyer or lawyer’s firm) should the court grant the disqualification motion.\textsuperscript{77}

First, courts consider the state of the lawyer’s knowledge about the conflict or other violation. The lawyer might have inadvertently engaged in the conflict of interest, or the conflict might have been unforeseeable until it was unavoidable.\textsuperscript{78}

\textsuperscript{75} See Derivi Constr. & Architecture, Inc. v. Wong, 118 Cal. App. 4th 1268, 1272, 14 Cal. Rptr. 3d 329, 332 (Cal. Ct. App. 2004) (citations omitted) ("[A] showing of actual possession of confidential information is not necessary [to disqualify a former attorney]. Instead, courts rely on the substantial relationship test . . . . This rule is necessary because the former client does not have the power to prove what is in the mind of the former attorney."); ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT § 51:1905 (noting that a “major consideration” is the potential prejudice to the movant if disqualification is denied).

\textsuperscript{76} Cf Dewey v. R.J. Reynolds Tobacco Co., 536 A.2d 243, 252-53 (N.J. 1988) (The court disqualified the attorney, but not the firm, and considered the prejudice to both the lawyer’s client and the movant: “A condition of that [firm’s continued] representation, however, is that it is to be furnished without compensation for any services to be rendered henceforth, particularly including any services in connection with trial or other final disposition of the matter. It is, after all, the failure of Weiss and his new firm to have addressed the obvious ethical implications of their association that has created the awkward situation now confronting us—a failure that but for the Court’s overriding concern for the firm’s client would result in immediate compelled withdrawal of the firm from this case. We cannot undo the conflict that has preceded our disposition of the matter, nor can we correct the tainted representation without unduly harming the client; but we can prevent those responsible for this sorry state of affairs from profiting from their disregard of the RPCs.”). But see AlliedSignal Recovery Trust v. AlliedSignal, Inc., 934 So. 2d 675, 678 (Fla. Dist. Ct. App. 2006) ("[T]he trial court disqualified Mr. Stewart because of potential prejudice to [the movant] if it called him to testify," but the court of appeals disagreed and held that Stewart may continue representation until there was prejudice to his own client.).

\textsuperscript{77} The lawyer’s position (e.g., managing partner or elected district attorney) in the firm or organization and the extent of the lawyer’s acquisition of the former client’s confidential information might be relevant as well. Because courts usually analyze this factor when determining whether the lawyer’s conflict or other misconduct should be imputed to other attorneys in the firm or organization, it is addressed in that Section below. See infra Part I.B.4 (discussing the lawyer’s firm).

\textsuperscript{78} FLAMM, supra note 4, at § 24.5 (noting that some courts will consider “whether challenged counsel’s conduct was intentional or inadvertent”); see, e.g., Ex parte AmSouth Bank, N.A., 589 So. 2d 715, 722 (Ala.
If so, this will generally weigh against disqualification; if to the contrary the lawyer foresaw the issue and disregarded it, this will generally weigh in favor of disqualification. 79

Second, the lawyer's motives are scrutinized. Courts here will look for evidence of greedy or ethically callous behavior to weigh in favor of disqualification; or conversely, courts will look for evidence that, upon learning of the ethical issue, the lawyer took prompt and appropriate steps to resolve or mitigate the issue. 80

Third, although the ethical rules themselves are not ranked in order of their importance, courts occasionally evaluate the importance of the ethical rule in question. The more important the rule appears to the court, the more likely disqualification will result from a rule violation; the less important the rule appears, the less likely disqualification will result. 81

The relative importance to a
court can be very hard to predict, but some courts have made prediction easier by employing different tests for disqualification for different types of ethical violations; it is at least arguable that the level of difficulty of a particular test tells us how important the court views the underlying ethical rule.\textsuperscript{82} Furthermore, courts will occasionally treat the violation of a particular ethical rule as sufficient cause, in and of itself, for disqualification—disregarding all other factors.\textsuperscript{83} As Richard Flamm has noted, courts will also examine the underlying interests that the ethical rule protects or promotes.\textsuperscript{84} If applying the disqualification remedy would serve those underlying interests, disqualification is more likely. Lastly, even without a clear violation of a specific ethical rule, many courts will disqualify the lawyer if the lawyer’s conduct creates a strong appearance of impropriety.\textsuperscript{85}

Fourth, courts consider the severity of the violation.\textsuperscript{86} A lengthy, planned, or repeated violation is more likely to lead to disqualification; a brief or technical violation is less likely to lead to disqualification.\textsuperscript{87} Courts also effectively treat

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\textsuperscript{82} See, e.g., In re Meador, 968 S.W.2d at 351-52 (refusing to adopt a bright-line rule for receipt of privileged materials). To be sure, the differing tests are also warranted given the differing nature and policies of the underlying ethical rules. Nevertheless, when a particular test for disqualification is easily triggered (i.e., disqualification is more likely for a particular violation), the test logically places a relatively high value on the underlying ethical rule by quickly punishing violations through disqualification.

\textsuperscript{83} See, e.g., Lennartson, 662 N.W.2d at 134-35. Of course, when courts actually treat a rule violation as dispositive of the disqualification question, they are no longer applying a balancing test.

\textsuperscript{84} FLAMM, supra note 4, at § 25.4 (noting that courts will consider the “purpose” or “ends” of the ethical rule and citing cases).

\textsuperscript{85} See infra Part III.A (providing a state-by-state breakdown of the appearance of impropriety doctrine).

\textsuperscript{86} See, e.g., FLAMM, supra note 4, at § 24.2 (noting that courts may consider “the extent and nature of the alleged misconduct”).

\textsuperscript{87} See, e.g., Richards v. Holsum Bakery, Inc., No. CV09-00418-PHX-MHM, 2009 WL 3740725, at *6 (D. Ariz. Nov. 5, 2009) ("Disqualification is an extreme sanction and should only be ordered after careful consideration of the client's rights to be represented by the counsel of her choice, and the nature and extent of the ethics violation.") (internal quotation marks omitted; emphasis added); Collins v. State, 18 Cal. Rptr. 3d 112, 125-26 (Cal. Ct. App. 2004) (citations omitted) ("Mere exposure to the confidences of an adversary does not, standing alone, warrant disqualification. Protecting the integrity of judicial proceedings does not require so draconian a rule. Such a rule would nullify a party's right to representation by chosen counsel any time.
violations by managing or supervisory lawyers as more severe than violations by subordinates. 88

Fifth, and finally, courts consider the prejudice that disqualification would inflict on the lawyer (or lawyer’s firm). 89 This factor is often couched in terms of whether disqualification would ultimately limit lawyer mobility. 90 It is a controversial factor, which courts generally view in one of three ways: some courts view it as persuasive; 91 some view it with ambivalence, 92 and some view it


88. Because this consideration more often presents itself when courts are deciding whether to disqualify the entire firm (not just the affected lawyer), I consider it below. See infra Part I.B.4.

89. See, e.g., FLAMM, supra note 4, at § 25.2 (noting that “courts typically focus on possible prejudice to the parties” but observing that courts have started to consider the financial and other harm to the lawyer). Below I discuss courts’ structural and procedural analysis of the lawyer’s firm, which is an analysis that normally arises when courts are considering whether to impute the disqualification to other lawyers in the lawyer’s firm. See infra Part I.B. To avoid duplication, however, I am treating the lawyer or the lawyer’s firm interchangeably for prejudice purposes.

90. There is arguably some heroic lawyer-worship implicit in the modern moves to shrink conflict-of-interest prohibitions. The idea is that, the larger the prohibition, the more clients who could not retain their “trusted,” “knowledgeable,” “specialized,” or “technically skillful” counsel of choice. See, e.g., Charles W. Wolfram, Former-Client Conflicts, 10 GEO. J. LEGAL ETHICS 677, 688-89 (1997) (discussing costs of the rule against representing clients adverse to former clients in substantially related matters); cf. Wyeth v. Abbott Lab., 692 F. Supp. 2d 453, 458 (D.N.J. 2010) (“Modern litigation, like the instant patent case, often involves multinational companies and multinational law firms among whom conflicts occasionally arise due to the broad reach of their respective businesses. Further, patent cases are more likely to involve intensely complex, specialized issues that require experienced, knowledgeable counsel, and mandatory disqualification may work prejudice to a party by depriving it of its counsel of choice. As such, mandatory disqualification may serve to encourage the use of disqualification motions solely for tactical reasons—a use courts have repeatedly expressed concerns about.”).

91. Some courts give considerable concern to lawyer mobility. See, e.g., In re Cnty. of L.A., 223 F.3d 990, 996 (9th Cir. 2000) (citing GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING § 1.10.207, at 336 (2d ed. Supp.1997)) (“The vicarious disqualification of an entire firm can work hardship and unjust results, particularly in today’s legal world where lawyers change associations more freely than in the past. A rule that automatically disqualifies a firm in all cases substantially related to the tainted lawyer’s former representation could work a serious hardship for the lawyer, the firm and the firm’s clients. An automatic disqualification rule would make firms be understandably more reluctant to hire mid-career lawyers, who would find themselves cast adrift as ‘Typhoid Marys,’ and clients would find their choice of counsel substantially diminished, particularly in specialized areas of law.”).

92. See, e.g., NCNB Tex. Nat’l Bank v. Coker, 765 S.W.2d 398, 399 (Tex. 1989) (“In this day of merging law firms and consolidating businesses... to allow Canon 9, or Canon 4, or a combination of both, to dictate a complete bar to any representation of a former client would not be practical. On the other hand, to allow unrestrained representation of new clients against former clients would stifle the attorney-client communication that was meant to be encouraged by the adoption of Canon 4 and destroy the public confidence in the legal profession meant to be fostered by Canon 9. The trust necessary in any attorney-client relationship is destroyed if the client must be concerned that any information given the attorney may reappear later in an adversarial proceeding in which his former attorney represents his opponent.”).
3. FACTORS FOCUSING ON THE LAWYER'S CLIENT

The factors focusing on the lawyer's client—who faces the loss of the lawyer—are not numerous, but they are extremely important to courts. Courts will analyze the client's: (1) knowledge; and (2) even more critically, potential prejudice should the court grant the disqualification motion.

First, courts consider the knowledge of the lawyer's client. Perhaps, for example, the client knew that the lawyer suffered from a potential conflict of interest and might be disqualified as a result, but the client nevertheless insisted that the lawyer take on or continue with the representation. Such knowledge would generally weigh in favor of disqualification; the lack of it would generally weigh against disqualification.

Second, the more important factor is the level of prejudice that might flow to the client should the lawyer be disqualified. Courts will consider the length and strength of the potentially lost lawyer-client relationship, the legal expertise of the lawyer, and the lawyer's knowledge about the case. Courts will also weigh

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93. Some courts are skeptical or outright dismissive of lawyer mobility. See, e.g., In re Cendant Corp. Sec. Litig., 124 F. Supp. 2d 235, 250 (D.N.J. 2000) (denying request to permit conflicted attorney to continue representation: "Although disqualification in circumstances such as those presented might be viewed as impairing the mobility of attorneys, courts hold that this interest is outweighed by the necessity to uphold rules of professional conduct."); Dewey v. R.J. Reynolds Tobacco Co., 536 A.2d 243, 253 (N.J. 1988) ("[P]roblems of the job market and mobility are not solved by loosening ethical standards required of the profession. The rules of professional behavior are not branches which bend and sway in the winds of the job market and changes in the size and location of law firms. Rather, the rules must be the bedrock of professional conduct.") (quoting Reardon v. Marlayne, Inc., 416 A.2d 852, 860 (1980)).

94. Cf. Kala v. Aluminum Smelting & Ref. Co., 688 N.E.2d 258, 267 (1998) (footnote omitted) ("[A] law firm contemplating hiring counsel who had been directly involved on the opposing side also has a duty to disclose to its own client that such a hiring may place the firm in conflict and could result in disqualification. The law firm may have to subordinate its desire to augment its staff against its duties to its client and avoid placing the firm’s interests above the client’s interests.").

95. See generally In re Meador, 968 S.W.2d 346, 351-52 (Tex. 1998) (noting that "a trial court should consider . . . the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney"); FLAMM, supra note 4, at § 21.4 (noting that "the extent to which the nonmoving party may suffer material prejudice" is a significant factor when a court considers "that party's implied waiver defense" and citing cases).

96. Alexander v. Primerica Holdings, Inc., 822 F. Supp. 1099, 1118 (D.N.J. 1993) (denying disqualification in part because "at this late stage in the litigation, it is doubtful that Primerica could find capable substitute counsel without substantial delay. Not only would Primerica be deprived of its chosen counsel which, Plaintiffs concede, has represented the company since the 1950s, but it is unlikely that substitute counsel could timely become acquainted with the facts, discovery and legal issues necessary to provide Primerica with an effective defense . . . [S]ubstitute counsel would not have the benefit of [firm's] prior work product and would be forced to start from scratch."); Zimmerman v. Duggan, 81 B.R. 296, 301 (E.D. Pa. 1987) (denying disqualification and noting "strong interest" of non-moving party to retain counsel used for last thirteen years).

97. The lawyer's expertise in a specialized area of law can make the lawyer particularly important. See, e.g., Hannan v. Watt, 497 N.E.2d 1307, 1311 (Ill. App. Ct. 1986) (According to the non-moving parties, there were "only four law firms in the country possessing the expertise needed to represent pilots in airline merger cases").
heavily a related question: how much of the client's time and money will be lost by requiring the client to retain new counsel? \(^ {99}\) In criminal cases, furthermore, courts must also consider the potential Sixth Amendment prejudice when separating counsel and client. \(^ {100}\)

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98. See Flamm, supra note 4, at § 24.4 (discussing the factors); id. at 499-500 ("Some motions are filed in the hopes of depriving an adversary of the services of its choice counsel. Often the targeted lawyer is an eminent, capable, and formidable advocate, or one who possesses either unique knowledge of the subject matter, or extensive experience with the case that would be difficult or even impossible to duplicate."); id. at 500 n.6 ("Indeed, disqualification is to be used as a shield and not a sword to prejudice defendant from also obtaining eminent counsel." (quoting Bauere v. Bauerle, 161 Misc. 2d 973, 975 (N.Y. Sup. Ct. 1994)); see also Lee v. Gadsa Corp., 714 So. 2d 610, 612-13 (Fla. Dist. Ct. App. 1998) ("Were we to permit the order to stand, we would effectively be sanctioning the use by a corporate adversary of a disciplinary rule for the improper purpose of securing an advantage over its opponent by depriving the opponent of its counsel of choice, who is intimately familiar with the litigation, and forcing it either to spend additional funds for new counsel or to concede defeat because of financial inability to retain new counsel."); CenTra, Inc. v. Chandler Ins. Co., Ltd., 540 N.W.2d 318, 326 (Neb. 1995) ([A] party may be substantially prejudiced because its new attorney must litigate against an opposing counsel who inarguably is more familiar and more facile with the case.); ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT § 51:1905 (noting that the loss of a long-time, specialized, or knowledgeable lawyer can cause significant prejudice).

99. See, e.g., Weeks v. Samsung Heavy Indus. Co., 909 F. Supp. 582, 585 (N.D. Ill. 1996) ("Disqualifying Mr. Paik would deprive the defendants of a lawyer with substantial knowledge of and involvement in this case and require a substitute attorney to perform work that most likely would duplicate Mr. Paik's. If Mr. Paik is barred from representing Samsung, then Samsung will not receive its full value for the money spent in attorneys' fees for Mr. Paik's legal services and will be obligated to pay the substitute attorney for his or her repetitive work. Thus, an order disqualifying Mr. Paik from this lawsuit at this stage of the litigation would unfairly prejudice the defendants."); Flamm, supra note 4, at 484 n.39 (citing cases that show a client loses time and money when new counsel has to get up to speed on the case). But see Flamm, supra note 4, at 483 n.34 ("Taking into account the many competent lawyers skilled in criminal trial practice, it would stretch the imagination to assume that the defendant could not procure adequate representation at a reasonable cost").

100. See, e.g., Mickens v. Taylor, 535 U.S. 162, 164, 166 (2002) (denying habeas relief because petitioner did not demonstrate that his attorney's conflict of interest affected the outcome of the case, even though "the trial court fail[ed] to inquire into a potential conflict of interest about which it knew or reasonably should have known"); United States v. Alfonzo-Reyes, 592 F.3d 280, 293-94 (1st Cir. 2010) (affirming disqualification for an actual conflict of interest over defendant's claim that the disqualification violated her Sixth Amendment right; noting that "although a defendant may generally waive his Sixth Amendment right to a non-conflicted attorney, 'the essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.'") (quoting in part Wheat v. United States, 486 U.S. 153, 159 (1988))). But see United States v. Gonzalez-Lopez, 548 U.S. 140, 143-44, 152 (2006) (concluding that trial court violated the defendant's Sixth Amendment rights when it excluded defendant's choice of counsel based on an erroneous interpretation of an ethical rule; concluding also that the defendant did not need to show further prejudice). The Gonzalez-Lopez Court summarized several examples of limitations on a defendant's choice of counsel:

\[\text{[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them. Nor may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation. We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar. The court has, moreover, an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. None of these limitations on the right to choose one's counsel is relevant here. This is not a case about a court's power to enforce rules or adhere to practices that determine which attorneys may appear before it, or to make scheduling and other decisions that}\]
4. FACTORS FOCUSING ON THE LAWYER’S FIRM

In many disqualification cases, courts examine various characteristics of the lawyer's firm.\(^{101}\) Courts do so because often the dispute centers not on the disqualified lawyer—but on whether other (or all) lawyers within the lawyer’s firm or organization should also be disqualified from the representation.\(^{102}\) This inquiry frequently analyzes the effectiveness of the firm's screening mechanisms, or in other words, how well the firm isolates the disqualified lawyer from the case.\(^{103}\) Courts have concluded that the following factors might impact the effectiveness of the screen, including the firm's: (1) size; (2) physical layout; (3) hierarchy or structure; (4) knowledge; and (5) screening mechanisms, including their timeliness, strength, and notice.\(^{104}\)

First, many courts consider the size of the law firm.\(^{105}\) Although no particular size is dispositive, courts generally view larger firms as better environments for effective screens than smaller firms.\(^{106}\)

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\(^{101}\) See, e.g., FLAMM, supra note 4, at 16 n.6 ("The proliferation of [disqualification] motions may be explained, in part, by . . . the changing nature of the manner in which legal services are delivered . . . . Certainly, the advent of law firms employing hundreds of lawyers engaging in a plethora of specialties contrasts starkly with the former preponderance of single practitioners and small firms engaging in only a few . . . . In addition, lawyers seem to be moving more freely from one association to another, and law firm mergers have become commonplace. At the same time that the potential for conflicts of interests has increased as the result of these phenomena, the availability of competent legal specialties has been concentrated under fewer roofs. Consequently, these new realities must be at the core of the balancing of interests necessarily undertaken when courts consider motions for vicarious disqualification . . . ." (quoting Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222, 224-225 (6th Cir. 1988))).

\(^{102}\) As noted above, some courts will also consider the prejudice to the lawyer’s firm were they to disqualify it. See supra Part I.B.2.

\(^{103}\) Id. at 140, 151-52 (citations and quotation marks omitted).

\(^{104}\) See generally Penegar, supra note 61, at 890-92 (noting the rapid growth of law firms in the 1970s and 1980s and the increased acquisition of lateral attorneys and noting that “[s]uch a process of growth generates additional conflict of interest claims, more than would have occurred had law firm growth occurred principally or only through additions of fresh law school graduates”); FLAMM, supra note 4, at § 25.6 (discussing the size of the firm as a factor but not necessarily with respect to screening).

\(^{105}\) See Cromley v. Bd. of Educ. of Lockport Twp. High Sch. Dist. 205, 17 F.3d 1059, 1065-66 (7th Cir. 1994) (noting and applying most of these factors).

\(^{106}\) See, e.g., Norfolk S. Ry. v. Reading Blue Mountain & N. R.R., 397 F. Supp. 2d 551, 554-55 (M.D. Pa. 2005) (concluding that screen was ineffective in part because firm had ten attorneys, qualifying as a small firm); Decora Inc. v. DW Wallcovering, Inc., 899 F. Supp. 132, 141 (S.D.N.Y. 1995) (disqualifying both the lawyer and firm in part because the relatively small size of the firm—forty-four lawyers—and the "close working
Second, and relatedly, courts examine the physical proximity of the disqualified lawyer to the other lawyers in the law firm who are working on the case. The closer the disqualified lawyer's work area is to those lawyers or the files, the less effective courts will view attempts to screen the disqualified lawyer.\textsuperscript{107}

Third, courts will scrutinize the firm's hierarchy and the lawyer's position in that hierarchy: if the disqualified lawyer is the managing partner or the chief prosecutor (as opposed to a junior lawyer), the screening is less likely to be effective.\textsuperscript{108} Moreover, courts occasionally examine the broader structure of the

relationship between Mr. Robinson and those who are working on the case against Mr. Robinson's former client indicate screening mechanisms cannot be effective in this case."). Compare Essex Equity Holdings USA, LLC v. Lehman Bros., Inc., 909 N.Y.S.2d 285, 297-98 (N.Y. Sup. Ct. 2010) (citations and footnotes omitted) (granting disqualification on grounds other than size of firm; noting "[n]ow was a contributing factor in the decision[s of other cases cited by Plaintiff] to disqualify, but there were aggravating factors which . . . raised 'grave concerns about both the possibility of unintentional breaches of client confidences and about the appearance of impropriety' . . . . A per se rule against screening for small firms has not been the law heretofore in New York and would be impractical to adopt.")], with Mitchell v. Metro. Life Ins. Co., Inc., No. 01 Civ. 2112 (WHP), 2002 WL 441194, at *9 (S.D.N.Y. Mar. 21, 2002) (noting "[c]ourts have only approved screening mechanisms in the limited circumstances where a conflicted attorney possesses information unlikely to be material to the current action and has no contact with the department conducting the current litigation, which typically occurs only in the context of a large firm" and listing several cases where the small size of the firm was a factor).

107. Stimson Lumber Co. v. Int'l Paper Co., No. CV 10-79-M-DWM-JC, 2011 WL 124303, at *5 (D. Mont. Jan. 14, 2011) (granting disqualification in part because attorney continues to work in the office building and in close proximity to attorneys who may work on the litigation); Hitachi, Ltd. v. Tatung Co., 419 F. Supp. 2d 1158, 1165 (N.D. Cal. 2006) (granting disqualification motion in part because the conflicted attorney works in the same office as the small department handling the litigation); Silicon Graphics, Inc. v. ATI Techs, Inc., 741 F. Supp. 2d 970, 983-84 (W.D. Wis. 2010) (denying motion to disqualify even though the conflicted attorney works in the same practice group as the attorneys working on the litigation because the firm "employs approximately 100 intellectual property lawyers," the physical files and attorneys working the case are located in Minneapolis, the conflicted attorney works in New York, and the firm's promise to exclude attorney from contact with the attorneys handling the case); People v. Conner, 34 Cal. 3d 141, 148-49, 666 P.2d 5, 9 (Cal. 1983) (affirming the recusal of "DA's office from the further prosecution of the case" because the DA was "inextricably involved" in the case and "[h]e disclosed that involvement to a substantial number of his fellow coworkers. Because the felony division of the DA's office is composed of about 25 attorneys, we have no difficulty in assuming that there is a commendable camaraderie which exists among these officials.").

108. United States v. Pelle, No. CRIM. 05-407JBS, 2007 WL 674723, at *7-8 (D.N.J. Feb. 28, 2007) (denying the request to substitute counsel; noting that the substitution would cause an actual conflict because the attorneys previously represented the confidential informant who will be testifying against the defendant in the same matter, and one of the attorneys is the managing partner in a firm of ten attorneys); Kirk v. First Am. Title Ins. Co., 183 Cal. App. 4th 776, 810-14 (Ct. App. 2010) (citations omitted) ("An additional element favorably acknowledged in caselaw is that the disqualified attorney have no supervisory powers over the attorneys involved in the litigation, and vice-versa."); People v. Doyle, 406 N.W.2d 893, 899 (Mich. Ct. App. 1987) ("The general rule is that a conflict of interest involving the elected county prosecutor himself requires recusal of the prosecutor and the entire staff. Since assistant prosecutors act on behalf of the elected county prosecutor and are supervised by him, the policies of fairness to the defendant and the avoidance of an appearance of impropriety require this result. When the conflict of interest involves an assistant prosecuting attorney, as in these cases at bar, recusal of the entire prosecutor's office is not automatic."); cf. Global Van Lines v. Superior Court, 144 Cal. App. 3d 483, 192 Cal. Rptr. 609 (Ct. App. 1983) (noting that it was not attorney's "superior knowledge of the industry which requires his disqualification in this case, but his having been Global's general counsel for 15 years during which he and his subordinates in the office were involved in matters bearing a substantial relationship to issues in the current litigation"); MODEL RULES R. 1.9 cmt. 6 ("A lawyer may have general access
office (e.g., private, public, non-profit), and whether that structure creates financial or other incentives for lawyers with the firm or organization to share or access the movant’s confidential information.  

Fourth, courts heavily scrutinize the firm’s current state of knowledge of the confidential information or, at least, the knowledge it might easily have acquired through a review of its own files. When analyzing a former client conflict of interest—which is typically the most frequent basis for a disqualification motion—courts tend to use several presumptions. If a lawyer participated in a substantially related matter for the former client, that lawyer is presumed—often “conclusively” or “irrebuttably”—to have received relevant confidential information. Another presumption is that the lawyer is presumed to share that information with the lawyer’s partners.  

Once the lawyer has switched firms, however, the presumptions become more complicated and varied. When the lawyer did not individually represent the client, but someone else in the lawyer’s former firm did, the lawyer’s new firm generally has the burden to show that the lawyer received no actual confidential information from the old firm’s client. In a similar vein, when a former firm

to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm’s clients.

109. Green, supra note 23, at 119 & n.178 (citing State ex rel. Romley v. Superior Court, 908 P.2d 37, 42 (Ariz. Ct. App. 1995); People v. Christian, 48 Cal. Rptr. 2d 867, 875 (Ct. App. 1996)) (“Courts make distinctions, for example, between for-profit law offices and government or other not-for-profit law offices.”).

110. See, e.g., Richards v. Jain, 168 F. Supp. 2d 1195, 1209 (W.D. Wash. 2001) (disqualifying law firm because it had access to privileged materials for eleven months and did not disclose the access or stop reviewing the materials). The extent to which the screened lawyer acquired the (former) client’s confidential information matters to the analysis. See, e.g., Human Elec., Inc. v. Emerson Radio Corp., 375 F. Supp. 2d 102, 107 (N.D.N.Y. 2004) (“If the tainted attorney’s involvement was peripheral, the nature of the work performed on the case was such that the attorney was not a ‘strategy-maker,’ or a long period of time has passed since the prior representation, the firm may rebut the presumption of shared confidences.”).

111. See, e.g., MODEL RULES R. 1.9(a). For a good collection of citations, see generally RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 124 cmt. c. reporter’s note (2000). For one approach, see for example Gerald v. Turnock Plumbing, Heating & Cooling, LLC, 768 N.E.2d 498, 503 (Ind. Ct. App. 2002) (“First, we must determine whether a substantial relationship exists between the subject matter of the prior and present representations. If we conclude a substantial relationship does exist, we must next ascertain whether the presumption of shared confidences with respect to the prior representation has been rebutted. If we conclude this presumption has not been rebutted, we must then determine whether the presumption of shared confidences has been rebutted with respect to the present representation. Failure to rebut this presumption would also make disqualification proper.” (quoting Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983))).

112. If the conflicted representation occurred while the lawyer was already associated with the firm, the lawyer is effectively presumed to share confidences with other lawyers in their firm. See, e.g., MODEL RULES OF PROF.’L CONDUCT R. 1.10(a) (1983).

113. See MODEL RULES OF PROF.’L CONDUCT R. 1.9(b) cmt. 5 (“Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of confidential information material to the new matter); MODEL RULES R. 1.9(b) cmt. 5 (“Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.”); MODEL RULES R. 1.9(b) cmt. 6 (When the firm defends on the ground that the lawyer had acquired no confidential information, “the burden of proof should rest upon the
lawyer individually represented a client, but no one else in the firm acquired confidential information about the client, the old firm generally has the burden to show that, in fact, it had not acquired any confidential information.114 If in either scenario the firm meets its burden, it generally will not be disqualified.

Even when the disqualified lawyer received actual confidential information relevant to the matter, timely screening can rebut the presumption that the confidential information has been (or will be) passed to the lawyer’s new partners—but only in certain jurisdictions.115 Even in those jurisdictions that permit screening, courts nevertheless frequently disqualify firms because, for example, many firms erect the screens too late to give the courts confidence that the firm’s lawyers have not already been exposed to confidential information from either the disqualified lawyer or the firm’s files, as discussed further below. If the information from the disqualified lawyer or the firm’s files is stale or generally known, however, the court might consider that fact as militating against disqualification.116
Fifth, and finally, courts examine the screens themselves: their substance and procedure.\textsuperscript{117} For example, the firm might have installed a screen, but the screen might have "holes" in it (e.g., the disqualified lawyer still has electronic access to the files).\textsuperscript{118} To avoid holes, firms must generally employ:

safeguards or procedures which prevent the quarantined attorney from access to relevant files or other information relevant to the present litigation, [including] prohibited access to files and other information on the case, locked case files with keys distributed to a select few, secret codes necessary to access pertinent information on electronic hardware, instructions given to all members of a new firm regarding the ban on exchange of information, and the prohibition of the sharing of fees derived from such litigation.\textsuperscript{119}

Moreover, and related to the firm's knowledge (or at least likely knowledge), these procedures must be timely implemented: screens that were erected before or at the instant the conflict arose are much more effective than those that were erected after—sometimes long after.\textsuperscript{120} In addition, the firm generally must give timely notice of the screen to the affected (former) client, and in its notice, the


\textsuperscript{118} Avoiding holes is particularly important because screens are supposed to give some assurance to the affected client and the world that confidential information is not being improperly shared. Screens are inherently seen as porous, even without mistaken holes. Mitchell v. Metro. Life Ins. Co., Inc., No. 01 CIV. 2112 (WHP), 2002 WL 441194, at *10 (S.D.N.Y. Mar. 21, 2002) ("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. Whether the screen is breached will be virtually impossible to ascertain from outside the firm. On the inside, lawyers whose interests would all be served by creating leaks in the screen and not revealing the leaks would not regularly be chosen as guardians by anyone truly interested in assuring that leaks do not occur." (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.6.4, at 402 (West 1986))).

\textsuperscript{119} Kala, 688 N.E.2d at 266; see also Kirk v. First Am. Title Ins. Co., 183 Cal. App. 4th 776, 810-14, (2010) (citations omitted) ("stress[ing] that the inquiry before a trial court considering the efficacy of any particular ethical wall is not to determine whether all of a prescribed list of elements (beyond timeliness and the imposition of prophylactic measures) have been established; it is, instead, a case-by-case inquiry focusing on whether the court is satisfied that the tainted attorney has not had and will not have any improper communication with others at the firm concerning the litigation").

\textsuperscript{120} Stimson Lumber Co. v. Int'l Paper Co., No. CV 10-79-M-DWM-JC, 2011 WL 124303, at *5 (D. Mont. Jan. 14, 2011) (citations omitted) ("Where screening mechanisms are not immediately implemented, and are instead instituted only after the conflicted attorney's former client asserts the existence of a conflict, the ethical screen is not timely implemented."); Mitchell, 2002 WL 441194, at *10 (citation omitted) ("A screening device implemented only after a disqualified lawyer has joined the firm, in an instance where the firm knew of the problem at the time of her arrival, further diminishes the possibility that screening remedies the conflict . . . ."); Hitachi, Ltd. v. Tatung Co., 419 F. Supp. 2d 1158, 1165 (N.D. Cal. 2006) ("Moving the matter to another office is too late as [the attorney] already has had significant contact with the attorneys handling this matter during the pendency of the litigation. The time to have moved the matter would have been when the ethical conflict was discovered, not after losing a motion to disqualify.").
firm should describe its screening procedures.\textsuperscript{121} The firm typically bears the burden of showing that the screening outlined above was timely and adequately implemented.\textsuperscript{122}

5. FACTORS FOCUSING ON THE COURT OR JUSTICE SYSTEM

The final factors of focus are the court itself and, more broadly, the justice system. Courts consider the following factors when determining whether disqualification would be appropriate: (1) public confidence (and the appearance of impropriety); (2) fairness of the proceedings and the disqualification remedy; and (3) judicial economy.\textsuperscript{123}

First, courts consider to what extent granting or denying disqualification would impact public confidence in the courts.\textsuperscript{124} Courts also consider this concern from a negative perspective—whether the lawyer’s conduct causes an appearance of impropriety and what impact disqualification would have on that appearance.\textsuperscript{125}

\textsuperscript{121} Kirk, 183 Cal. App.4th at 813 (citation omitted) ("Although not discussed in the caselaw, we believe one additional factor, commonly noted in ethical rules governing imputed conflicts, should also be considered by trial courts in their analysis: notice to the former client."); \textit{see also} Model Rules of Prof’l Conduct R. 1.10, 1.11, 1.12, 1.18 (2010) (requiring notice of screening procedures). Generally, in the firm’s notice, the firm should also describe the implemented screening measures. \textit{See, e.g.}, Model Rules R. 1.10(a)(2)(ii) (2010) (stating that the notice shall include a description of the screening procedures employed; a statement of the firm’s and of the screened lawyer’s compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures”).

\textsuperscript{122} \textit{See Dworkin v. Gen. Motors Corp.}, 906 F. Supp. 273, 279 (E.D. Pa. 1995) (noting that "the burden of proof is on the firm whose disqualification is being sought").

\textsuperscript{123} They arguably also consider their relationship with the lawyer or law firm—or all lawyers. \textit{See generally} BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM (2011) (arguing that judges—i.e., former attorneys—systematically favor the legal profession). This factor, however, is rarely listed as an explicit consideration.

\textsuperscript{124} Dewey v. R.J. Reynolds Tobacco Co., 536 A.2d 243, 251-252 (N.J. 1988) (citations omitted) ("[A] motion for disqualification calls for us to balance competing interests, weighing the ‘need to maintain the highest standards of the profession’ against ‘a client’s right freely to choose his counsel.’ . . . We believe, however, that an order disqualifying counsel on the eve of trial would do more to erode the confidence of the public in the legal profession and the judicial process than would an order allowing the firm to continue its representation of the plaintiff."); \textit{Flamm, supra} note 4, at 491-92, 493 n.8 (2003) ("Some [courts] have gone so far as to suggest that, in performing the requisite balancing, the court’s guiding principle, and paramount concern, must be to preserve the highest possible standards of lawyer ethics, as well as public confidence in the integrity of the proceedings, the legal profession, and the legal system as a whole” even to the point that public interest outweighs the risk of prejudice."); \textit{see generally id.} § 25.3 (discussing the interests of the court and public and how disqualification can weigh for and against those interests); ABA/BNA Lawyers’ Manual on Prof’l Conduct § 51:1905 (noting that courts will consider "whether public confidence in the legal profession would be undermined if the lawyer continued as counsel").

\textsuperscript{125} \textit{See, e.g.}, Roosevelt Irrigation Dist. v. Salt River Project Agric. Imp. & Power Dist., 810 F. Supp. 2d 929, 984 n.47 (D. Ariz. 2011) (citations omitted) ("The Arizona Supreme Court identified the following four factors for a court to consider when ruling on a motion to disqualify counsel [on the basis of an appearance of impropriety]: ‘(1) whether the motion is being made for the purposes of harassing the defendant, (2) whether the party bringing the motion will be damaged in some way if the motion is not granted, (3) whether there are any alternative solutions, or is the proposed solution the least damaging possible under the circumstances, and (4)
Under appearance of impropriety tests, of course, courts also regulate lawyers’ untoward conduct. Courts, finally, consider whether disqualification would deter other attorneys from engaging in improper conduct in litigated matters.

Second, as institutions for justice, courts also consider to what extent disqualification bears on the fairness of the proceedings. For example, granting disqualification might result in the client’s permanent loss of competent counsel, or denying disqualification might result in the lawyer’s client being permitted to take unfair advantage of the movant’s confidential or privileged information. Similarly, in recognition of the costs of disqualification, courts generally consider whether less drastic remedies would suffice. The idea is similar to the parsimony clause in criminal sentencing—courts should order the least severe alternative that would still sufficiently remedy the wrong.
excluding the improperly obtained evidence or financially sanctioning the lawyer would sufficiently remedy the violation, for example, courts often will use such less drastic remedies before ordering disqualification.\textsuperscript{132}

Third, in addition to public confidence and fairness, courts are concerned with judicial efficiency. If disqualification will cause additional or duplicative hearings, trials, or other court time—as when the motion to disqualify is filed on the eve of or even during trial—courts are much less likely to order disqualification.\textsuperscript{133} Similarly, the more disqualification is likely to delay the proceedings, the less likely the court will grant the motion.\textsuperscript{134} Indeed, some courts explicitly note that denying disqualification would assist them in efficiently resolving the case.\textsuperscript{135}

\footnotesize{\textsuperscript{132} See Alexander v. Superior Court, 685 P.2d 1309, 1317 (Ariz. 1984) ("When considering a motion for disqualification based upon the appearance of impropriety, [the court] should consider ... whether there are any alternative solutions, or is the proposed solution the least damaging possible under the circumstances ... "); In re Estate of Myers, 130 P.3d 1023, 1025, 1027 ( Colo. 2006) ( citations omitted) ("[A court] is therefore obliged to impose less severe sanctions whenever they would be adequate for that purpose ... Because the disqualification of a party's chosen attorney is an extreme remedy ... it must be supported by a showing not only that the proceedings appear to be seriously threatened, but also by a showing that any remedy short of disqualification would be ineffective."); In re Nitla S.A. de C.V., 92 S.W.3d 419, 423 (Tex. 2002) ( citations omitted) ("In disqualification cases, our analysis begins with the premise that disqualification is a severe measure that can result in immediate harm, because it deprives a party of its chosen counsel and can disrupt court proceedings," noting that movant must show "disqualification is necessary, because the trial court lacks any lesser means to remedy the moving party's harm"). But see, e.g., In re Weinberg, 132 A.D.2d 190, 208-09 ( N.Y. App. Div. 1987) ( citation omitted) ("To have imposed a sanction short of disqualification in this case would have sent a very dangerous message to the Bar. We would in effect have said, you may ignore the rules of discovery and the ethical precepts governing attorney conduct, and thereby, elicit the disclosure of confidential material highly relevant to your case, and if by chance you are discovered and your adversary has the resolve and resources to pursue the matter, we will do no more than suppress the improperly acquired material and require you to pursue discovery in a proper manner ... The offending lawyer or firm is not punished in any way by being directed not to rely on improperly obtained information and to henceforth obey rules which should have been observed all along; he is simply held to the standard applicable to all attorneys. He may, moreover, be in a better position than if he had obeyed the rules because although the improperly acquired materials are suppressed, he will inevitably retain information therefrom which he will be able to use to guide his conduct of the litigation in ways no court can effectively regulate.").

\footnotesuperscript{133} See supra note 4, § 21.5 (footnotes omitted) ("A disqualification motion is particularly likely to be denied, on implied waiver grounds, in a situation where the motion was not filed until the eve of trial.").

\footnotesuperscript{134} See Carbo Ceramics, Inc. v. Norton-Alcoa Proppants, 155 F.R.D. 158, 164 (N.D. Tex. 1994) (denying disqualification because at the time the conflict arose, all that remained in the action was the trial of the case, which would have started before the disputed attorney switched law firms); see CenTra, Inc. v. Chandler Ins. Co., Ltd., 540 N.W.2d 318, 327 (Neb. 1995) ("Given that applicants sat on their rights during the phase of litigation wherein mandamus may have been appropriate, however, this court will not impose that result from appellate review at the costs of greater delay, greater prejudice, and needless waste of judicial resources."); Div. of Youth & Family Servs. v. V.J., 898 A.2d 1059, 1063 (N.J. Super. Ct. Ch. Div. 2004) (noting that movant delayed the proceedings in attempting to disqualify counsel and noting that "further delay caused by a disqualification of the attorneys ... will amount to a 'denial of justice'").

\footnotesuperscript{135} Courts believe this, in part, because the challenged lawyer is often one of the most knowledgeable lawyers about the case and jettisoning that lawyer might mean a delay of months, while another lawyer attempts to gain the lawyer's vast case knowledge. See supra notes 95-99. Moreover, often the new lawyer will have to}
In sum, the factors in this Section can be methodically applied to the five key actors in disqualification cases (namely, the movant, the lawyer, the lawyer's client, the lawyer's firm, and the court). Applying these factors to these actors, lawyers and judges can efficiently estimate the appropriate result in disqualification cases. To be sure, balancing tests do not invariably dictate an exact, universally accepted result, which is why the theory and practice of disqualification are examined below.

II. THE THEORY OF LAWYER DISQUALIFICATION

The previous Part discusses in detail the "is" of disqualification. In other words, courts are routinely asked to evaluate whether disqualification should occur in a particular case, and Part I objectively lists the bases and factors that courts explicitly or implicitly use to answer that question. This Part, in comparison, focuses primarily on the theory of disqualification, disagreeing with the notion that "a theory of disqualification may be beyond reach." This Part's contribution thus addresses whether disqualification ought to occur at all and, if so, how and when.

Section A explores whether balancing equities is an appropriate approach to disqualification. Section B explores whether disqualification is justified in general and in hard cases. Section C, finally, examines more closely disqualification's costs (and how those costs should be appraised and mitigated).

A. DISQUALIFICATION'S IDEAL APPROACH: SOMETIMES, ALWAYS, OR NEVER

To begin to answer the grand question—whether a theory of lawyer disqualification is within (or beyond) reach—provokes a preliminary question. Indeed, it is a question taken for granted until this point: whether the balancing in Part I is appropriate at all; or in other words, whether and why it is appropriate to stray from a "per se" or "automatic" rule of disqualification (or no disqualification). Answering this question helps to triangulate the roughly right foundation of the disqualification remedy.

Life would certainly be simpler under an automatic disqualification regime: violate an ethical rule and disqualification invariably follows. In comparison to the current system, in which "disqualification is never automatic," this new
regime would offer several advantages. The rule would save time in many cases by eliminating the battle over the disqualification remedy, it would increase certainty, and it perhaps would increase deterrence. In addition, to the extent that the system is or should be premised on the Rules of Professional Conduct, the rules do not require a showing of prejudice, and automatic disqualification would more faithfully remedy rule violations.

Furthermore, beyond actual ethical improprieties, the very "appearance of impropriety" still influences most courts, and certain ethical rules and procedures can be seen as prophylactic or intended to boost confidence in the other side or the system, even if no actual impropriety has occurred or will likely occur. A rule of automatic disqualification would more likely quash unseemly appearances than a public airing of the controversy through lengthier disqualification proceedings and (if the motion is denied) through permitting the lawyer who violated the ethical rules to continue to represent the client in court. In sum, to the extent that the ethical rules (and to a certain extent, public confidence) are good, a rule requiring per se or automatic disqualification for ethical

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1.7 by representing a current client against another current client—a cardinal conflicts sin in the absence of consent).

138. See FLAMM, supra note 4, § 23.1 (footnotes omitted) (noting that "[a]t one time disqualification motions were typically decided in accordance with a bright line test: if an ethical rule was violated—particularly the rule forbidding lawyers from acting adversely to the interests of current clients—disqualification would often follow on a per se basis" and observing that "[t]he bright line test provides concrete guidance to practitioners, as well [as] a clear test for disqualification that is often easy to apply"). Conversely, a categorical rejection of all disqualification motions would offer similar benefits of certainty and reduced litigation costs.

139. See, e.g., FLAMM, supra note 4, § 24.3 (noting that "[t]he ethical rules do not require the moving party to show that it will be prejudiced if counsel is not disqualified"). As explained in Part I, much of the current balancing focuses on the relative prejudice to the various constituencies.

140. See infra Part III.A (providing detailed state information on the appearance of impropriety standard). Most courts and commentators would agree that a violation of the ethical rules is more than an "appearance of impropriety"—it is an actual impropriety.

141. The widespread use of screening is often an example of a prophylactic measure: many screens are in place even when the screened lawyer has no relevant confidential information or the chance of the lawyer conveying relevant confidential information is slim-to-none. Some screens, moreover, are not actually required by the ethical rules; rather, they are implemented to pacify a party (e.g., a former client) or to give the appearance to the public, court, opposing counsel or anyone else that nothing untoward will happen in the representation. See generally Lennartson v. Anoka-Hennepin Indep. Sch. Dist. No. 11, 662 N.W.2d 125, 131 (Minn. 2003) (noting that the purpose of screening in Rule 1.10 is "to instill confidence in the legal profession").

142. As some have argued, however, such a rule might create other undesirable appearances. See, e.g., Gregori v. Bank of America, 207 Cal. App. 3d 391, 300-01, 253 Cal. Rptr. 853, 859 (Ct. App. 1989) ("[A]s courts are increasingly aware, motions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent" because "[s]uch motions can be misused to harass opposing counsel, to delay the litigation, or to intimidate an adversary into accepting settlement on terms that would not otherwise be acceptable.") (citations omitted). I argue in Part III that these concerns are overstated, but the court is generally correct as to the following observation: "courts lack both access to reliable facts and a workable method for thinking through, on a case by case basis, the question whether the particular result sought by one or the other of the parties will increase, decrease, or leave unaffected the general level of public or client confidence." Id. at 307, 254 Cal. Rptr. at 863-64 (quoting CHARLES WOLFRAM, MODERN LEGAL ETHICS § 7.1.4. at 322 (1986)).
violations would have much to commend it.

But problems attend this idea of automatic disqualification: it would inevitably result in disqualifications that, on balance, are unjust or unnecessary (e.g., disproportionately harmful to the disqualified lawyer's client or tactically advantageous but only technically meritorious). Few commentators have explicitly noted another downside: technocratic concern. That is, because we now have a functioning, professionalized disciplinary system, that system, its prosecutors, and its adjudicators may well be better at handling ethical violations than private lawyers and trial judges. Although the lawyers and judges involved in the disqualification proceedings will generally have more factual knowledge of the context, the disciplinary system and its adjudicators may have better procedures, legal knowledge, and practical judgment than (on average) generalist judges. The disciplinary system, furthermore, entitles the lawyer to more process and a better record than (again on average) disqualification proceedings. These reasons seemingly counsel for a rule that restricts disqualification, although perhaps the rule should include "automatic" referrals to the disciplinary system.

Near the middle of these extremes, we could (and in a sense do) have a preliminary or permanent injunction standard for disqualification:

A preliminary injunction is an extraordinary remedy never awarded as of right. In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.

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143. See, e.g., Keith Swisher, The Short History of Arizona Legal Ethics, 45 ARIZ. ST. L.J. 813 (2013); Nancy J. Moore, Mens Rea Standards in Lawyer Disciplinary Codes, 23 GEO. J. LEGAL ETHICS 1, 6 (2010).

144. See, e.g., Green, supra note 23, at 87 (noting that the trial judge and the lawyers would generally have more factual knowledge of "the parties and the factual context in which the alleged conflict arose.").

145. Technically, this bookend does not reach the outer extreme: we could further posit a world in which the remedy of disqualification was nonexistent. That is indeed an extreme suggestion because no court to my knowledge has truly embraced it recently. See, e.g., Penegar, supra note 61, at 833 ("It is arresting to note that while [disqualification] doctrine reflects frustration, it does not signify any collective willingness to alter the state of affairs radically or a willingness even to re-examine the stated first principles of the motions to disqualify."). Perhaps more importantly, it would do nothing to halt egregious cases involving the improper passage of confidential information or attack on the lawyer's own work product, as examples. See infra Part II.B (explaining why disqualification is an effective and irreplaceable remedy).

146. As argued in the next Section, discipline in practice is not a suitable substitute for disqualification because (among other reasons) discipline lacks disqualification's effectiveness in stemming the violation and its impact.

147. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008) (internal quotation marks and citations omitted); 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2941 (2d ed. 1987) (listing the three main forms—temporary restraining order, preliminary injunction, and permanent injunction—and noting that each is enforceable by contempt of court). To stop violations occurring outside of pending litigation, the movant can literally file for an injunction. See, e.g., ABA/BNA LAWYERS' MANUAL ON
In other words, certain lawyers might be enjoined (disqualified) from representing their clients. The standard for achieving an injunction is generally considered high. That high standard holds generally true for disqualification proceedings, but it varies greatly from court to court and from violation to violation.

Although disqualification proceedings parallel—and essentially are—preliminary or permanent injunction proceedings, this does not mean that courts follow the same regularity in disqualification proceedings. For example, in granting disqualification, many courts enter short or even one-line orders. These orders do not explain the courts’ reasoning well or at all, and they often do not answer related questions (e.g., to what extent may the now-disqualified counsel share information with successor counsel). This is generally worse than injunction practice, which “requires that every order granting a permanent injunction, preliminary injunction, or a temporary restraining order ‘shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail . . . the act or acts sought to be restrained . . . ’”.

As with the

PROF’L CONDUCT § 51:1903 (citing Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa. 1992); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 121 cmt. f (2000)).

148. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 55 cmt. b (2000) (“Injunctive or declaratory relief are, however, appropriate when warranted by generally applicable legal principles to prevent continuing violations such as misuse of a client’s confidences or engagement in representations creating conflicts of interest.”). To achieve an injunction, the movant “seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter, 555 at 20. “The standard for a preliminary injunction,” which is very similar to the current standard for disqualification relief, also “is essentially the same . . . for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.” Amoco Prod. Co. v. Vill. of Gambell, AK, 480 U.S. 531, 546 (1987). One important distinction follows: “A permanent injunction will issue only after a right thereto has been established at a trial on the merits.” WRIGHT & MILLER, supra note 147. With respect to disqualification proceedings, the lawyer receives, at most, a hearing but certainly not a trial on the merits of the motion (and the merits of the litigated claims beyond the disqualification issues are irrelevant). Perhaps if disqualification resulted only after pretrial and trial proceedings on the disqualification question, the process would be perceived as fairer (at least to the challenged lawyer or law firm).

149. See, e.g., infra Part III.A.2 (noting that courts generally purport to place a heavy burden on the movant).

150. See, e.g., RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 6 cmt. i. (2000) (discussing when it is appropriate to allow a disqualified lawyer to share work product with successor counsel):

A file of the work done on a matter before disqualification by a disqualified lawyer may be provided to a successor lawyer in circumstances in which doing so does not threaten confidential information . . . of the successful moving client. The party seeking to justify such a transfer may be required to show both that no impermissible confidential client information is contained in the material transferred, and that the former and new lawyers exchange none in the process of transferring responsibilities for the matter.

151. 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2955 (2d ed. 1995) (footnotes omitted) (citing in part Int’l Longshoremen’s Ass’n v. Philadelphia Marine Trade Ass’n, 389 U.S. 64, 75 (1967)). Furthermore, “[t]he Supreme Court has indicated that the term ‘injunction’ in Rule 65(d) is not to be read narrowly but includes all equitable decrees compelling obedience under the threat of contempt,” which generally describes disqualification proceedings as well. Id.
technocratic concern mentioned above, the lack of optimal process in disqualification proceedings weighs against the use of disqualification in practice, and remedying the lack of process is a practical improvement that I urge later.152

Anemic process aside, disqualification is an equitable injunction proceeding that attempts to balance many competing interests.153 Although balancing of course has its downsides, that we ought to balance is demonstrated by acknowledging (and fearing) the extremes. Too much disqualification would be unjust at times and could lead to areas of practice in which no lawyers would be willing to operate.154 Furthermore, it might also lead to delayed proceedings and inefficiency. Too little disqualification, in contrast, would likely lead to increased conflicts of interest and other improper conduct.155 Indeed, few should want a world in which no disqualification exists: it would effectively permit instances of very bad conduct to continue through the close of the case. Although the arguably conflicted lawyer is necessarily the first to decide whether to take on the representation, it would be an extreme position to want no external review of that lawyer’s decision—no matter how questionable or prejudicial.156

152. See infra Part III.B.
154. A more remote possibility would be disqualification traps:
A... way to create conflicts involves some clients’ method of selecting an attorney for litigation. Two different practitioners in different cities reported to me how sophisticated clients had shrewdly manipulated conflict of interest rules. In both cities the pattern was the same. Every major firm in town was approached by a client seeking representation; the client told his troubles to each firm and then decided to hire one of the firms. Because of the duty of confidentiality owed to the prospective client, every firm interviewed but not hired was barred from opposing the prospective client. The client had effectively harmed his opponents’ case by eliminating those lawyers most likely to be effective adversaries.

Lindgren, supra note 3, at 435. As the rules have since developed further to prohibit such tactics, this concern has lost its force. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.18 cmt. 2 (2012); ARIZ. RULES OF PROF’L CONDUCT ER 1.18 cmt. 4 (2003) (“Any information obtained from a prospective client who consults the lawyer in an attempt to disqualify the lawyer or make contact for some purpose other than seeking representation is not information relating to representation and disclosure is not prohibited.”). This result is particularly likely because disciplinary authorities have traditionally given too little attention to prosecuting conflicts. See infra Part II.B.
155. Cf. John Leubsdorf, Theories of Judging and Judge Disqualification, 62 N.Y.U. L. REV. 237, 277 (1987) (“Introspection has obvious advantages and disadvantages as a disqualification procedure. The judge hearing a case knows better than anyone else what the real facts are about the parties and issues. She can therefore tell better than others whether she should sit. Yet even honest judges—and disqualification law is not primarily directed at conscious fraud—may be swayed by unacknowledged motives. The most biased judges may be the most persuaded that their acts are just. Moreover, judges need guidance to tell them what tendencies to look for. Hence, though judges should be free to withdraw voluntarily, no sensible judicial system would leave disqualification entirely to the discretion of the judge in question.”). There are, however, some who have gone almost as far as asserting that no disqualification should exist. See, e.g., Steven H. Goldberg, The Former Client’s Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly, 72 MINN. L. REV. 227, 230 (1987) (concluding that “the former client’s disqualification gambit has become obnoxious to the reasonable operation of the civil justice system, clogging it with inappropriate disqualification motions that cause
The preliminary case for a balancing approach thus seems strong, at least to mediate the extremes.

B. PRINCIPLED DISQUALIFICATION, INSTITUTIONAL CHOICE, AND THEORETICAL JUSTIFICATIONS

This Section moves beyond justifying disqualification on extreme cases of lawyer misconduct. Indeed, this Section addresses whether disqualification can be justified even in the weakest cases, which I term "principled" (or "punitive") disqualification cases. After framing principled disqualification, this Section explores possible justifications for, and alternatives to, the disqualification remedy.\(^157\)

1. THE PROBLEM OF PRINCIPLED DISQUALIFICATION

Principled disqualification is, in short, an unnecessary disqualification in the following sense: the lawyer could continue the representation and the misconduct has been, or could be, completely stopped without resort to disqualification. The problem of principled disqualification helps to locate disqualification's theoretical justification (or lack thereof). In light of disqualification's costs,\(^158\) principled disqualification seems heavy-handed at first blush. Courts often could prospectively limit, if not eliminate, ethical violations and resulting prejudice without resorting to disqualification (e.g., by issuing an order not to contact a represented person or an order to return or sequester confidential or stolen information). For these violations, another or softer remedy might be sufficient,\(^159\) the remedy of disqualification arguably is neither necessary nor uniquely effective.

Some violations, however, fundamentally resist this conclusion, including representations creating current client (Rule 1.7) and former client (Rule 1.9) conflicts of interest.\(^160\) If permitted to persist, these representations will necessarily continue to be adverse to the current client or the former client (in a substantially related matter). To deny the motions to disqualify, then, means to authorize an ongoing violation of Rule 1.7 or 1.9 (or by imputation, Rule 1.10). In addition to permitting this lawlessness of sorts, a client's feeling of betrayal will

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157. Although these three concepts have been broken below into three corresponding sections for formatting purposes, they should be considered as a whole.

158. See infra Part II.C.

159. Another remedy might be later discipline, for example. Even if discipline would not likely follow (because, e.g., the disciplinary system under-enforces conflict of interest violations), disqualification might still be a disproportionate remedy under the circumstances.

160. See Model Rules of Prof'l Conduct R. 1.7, 1.9 (2010) (covering conflicts of interest arising from duties to current and former clients, respectively); Model Rules R. 1.10 (imputing many of these conflicts to other members of the lawyer's firm).
likely continue unabated. For these reasons, disqualification appears more justified in ongoing violation cases than in purely “principled” disqualification cases.161

Although the “more justified” case appears strong, we must still explore the alternatives and further explicate the justifications—points to which we turn immediately below.

2. THE PROBLEM OF INSTITUTIONAL CHOICE

In light of the professional disciplinary system coming into its own,162 we should question whether a trial judge and then perhaps an appellate panel should intervene in professional conduct matters through disqualification (even in ongoing violation cases). This Subsection thus explores whether discipline or disqualification should be used to address lawyer misconduct. When undertaking this comparison and drawing conclusions, the two contexts must be accurately described, which some courts and commentators have failed to do;163 in other words, we should not overstate (or understate) disqualification or discipline in practice.

Disqualification’s “intervention” is not always as invasive or unjustified as some have implied. When a court considers disqualification, it invariably means that the issue is already before the court (usually brought by motion). The disqualification thus does not necessarily require court-based conflicts investigation.164 The court, furthermore, has an undeniable and repeatedly declared power

161. Of course, ethical violations come in degrees. Some are worse than others. Perhaps some violations are minor enough to forgo the relatively strong remedy of disqualification. That is, courts do and should have discretion to refrain from disqualifying a lawyer for fleeting or technical violations for which disqualification is a disproportionate remedy. Or perhaps in deference to countervailing costs in particular cases (e.g., added time and expense to the lawyer’s innocent client), even some strong violations nevertheless are inappropriately addressed with the strong disqualification remedy. This point corroborates the wisdom of balancing, even in ongoing violation cases, and suggests that “punitive” or “principled” disqualification should not invariably be inflicted without regard to countervailing costs. See infra Part II.C (discussing costs).

162. See, e.g., Nancy J. Moore, Mens Rea Standards in Lawyer Disciplinary Codes, 23 GEO. J. LEGAL ETHICS 1, 6 (2010) (citations omitted) (“The ... most recent era, which began in the 1970s, has been characterized by a judicial reassertion of authority over lawyer regulation, coupled with the professionalization of disciplinary enforcement, including improvements in disciplinary agency financing, structure, and staffing. In addition, prompted by the ABA Standing Committee on Professional Discipline, most states have included an aspect of public oversight in their disciplinary processes.”).

163. See, e.g., Kusch v. Ballard, 645 So. 2d 1035, 1035-36 (Fla. Dist. Ct. App. 1994) (Farmer, J., concurring) (“I should first admit straightaway to a certain distaste for the practice of judges disqualifying lawyers for parties in civil cases. There has never been a persuasive theoretical basis demonstrated to my satisfaction for such an extraordinary remedy. Nothing in any constitutional provision, statute or rule of practice or procedure purports to repose such a power in civil trial judges. Moreover, the remedy strikes at the heart of one of the most important associational freedoms that a person may have—the right to choose one’s own lawyer... Nor has anyone shown why an ordinary malpractice or other damages action against an offending attorney is not the more appropriate remedy.”).

164. See, e.g., Green, supra note 23, at 95-96 (“[O]nce a court is presented with a conflict issue, it becomes more efficient for the court to determine the propriety of the lawyer’s conduct than for a disciplinary body to
to police its own proceedings. Thus, a court can legitimately take protective action when, at a minimum, the violation before it affects the proceedings or will almost certainly do so in the future. If disqualification is the only remedy that could effectively eliminate or mitigate this negative impact on the proceedings, disqualification is on rock-solid ground. This firm grounding is particularly strong given the historical context: American courts have used the disqualification remedy for over one hundred years. That length of time does not by itself legitimize disqualification, but it should have placed lawyers (although not necessarily their clients) on notice of the disqualification power.

In many cases, however, the lawyer's ethical violation itself does not significantly impact the proceedings or, at least, does not provably impact the
proceedings.\textsuperscript{169} In this category of cases, then, whether "principled disqualification" is appropriate is a vexing question. Because disqualification is a "side-show," which typically does not involve a resolution of the merits of the proceeding, it creates a natural urge to eliminate or limit it. This natural urge is heightened by the availability of another forum in which the underlying violation would indeed be central to the merits of the proceeding: discipline or (to a lesser extent) malpractice.

Discipline is partly attractive when institutional choice and competence are considered. Although trial courts have the authority to enforce ethical rules,\textsuperscript{170} authority does not equal good cause and particularly not when discipline might provide a better forum. At least four types of objections can be raised to the trial court's intervention: substantive, jurisdictional, procedural, and competency. Some of these objections indeed favor discipline, although some do not.

If the objection is a substantive attack on the ethical rule itself, the objection should more helpfully center on the merits of the ethical rule, not the adjudicator; if the objection instead is a challenge to the remedy in general or as applied, the objection should more helpfully address the remedy's merits, as discussed below. If the objection is jurisdictional (because we are stipulating that the violation is not noticeably harming the case), the argument is not particularly strong: the lawyer's ethical violation still concerns the particular case being litigated before the trial court. Although the strength of the connection to the case varies, there is almost always a direct connection. If the objection is procedural, we should (and I later do) examine and critique trial courts' disqualification procedures.\textsuperscript{171} Because procedural protections tend to be better in discipline at present, this fact weighs in discipline's favor. Along a similar but additional vein, the objection might question the relative competence of the adjudicator. Although the lawyers and judges involved in the disqualification proceedings will generally have more factual knowledge,\textsuperscript{172} the disciplinary system's counsel and adjudicators are

\textsuperscript{169} The disqualification motion obviously affects the proceedings in multiple ways, but here I am discussing the underlying violation's effect. Of note, determining the violation's effect often costs time and money, which of course is a harm in itself. Susan R. Martyn, Developing the Judicial Role in Controlling Litigation Conflicts: Response to Green, 65 FORDHAM L. REV. 131, 140 (1996) (citing In re Leslie Fay Cos. Inc., 175 B.R. 525 (Bankr. S.D.N.Y. 1994)) ("The only way to discern whether these conflicts caused harm to [the client] was to duplicate the earlier investigation with independent counsel. This investigation cost a great deal of time and money, which the court found to constitute actual harm to the client."). For a general discussion of cases in which the conflict does not taint the proceedings, see Nathan M. Crystal, Disqualification of Counsel for Unrelated Matter Conflicts of Interest, 4 GEO. J. LEGAL ETHICS 273, 292-98 (1990) (relying on, in part, Developments in the Law—Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1298-1303 (1981)).

\textsuperscript{170} Although some higher courts have suggested limiting lower courts' authority to regulate the bar's ethical norms, most have not—and many have explicitly noted that the lower courts are within their authority to enforce these norms.

\textsuperscript{171} See infra Part III.B.

\textsuperscript{172} See, e.g., Green, supra note 23, at 87 (noting that the trial judge and the lawyers would generally have more factual knowledge of "the parties and the factual context in which the alleged conflict arose"); see also
presumably more competent in their knowledge and application of the ethical rules than private counsel and generalist judges.

Notwithstanding the certain institutional advantages, discipline turns out to be a suboptimal alternative. Perhaps most importantly, discipline on the merits pales in comparison to the disqualification remedy; discipline will not cure the violation in the same way that disqualification could. Disqualification stops (i.e., enjoins) the conflict. Discipline, however, effectively permits the conflict to continue for months or years as the disciplinary investigation ensues (assuming it ensues), and even after the investigation and potential subsequent prosecution conclude, discipline (or a malpractice action) almost never involves an injunction against a specific representation. To be sure, if the disciplinary sanction is disbarment or suspension, all representations are effectively enjoined. Such a substantial sanction for first-time (or even second-time) conflicts of interest is rare, however.

When other, more common sanctions are imposed (e.g., reprimand, admonishment, or censure), this “remedy” is not much of a remedy for continuing-violation cases; it does not retroactively protect the confidential information or restore the lawyer’s loyalty to the client, for example. Furthermore, even with these mild sanctions, the disciplinary process disciplines attorneys only rarely and even more rarely in conflicts cases. It has been credibly said that, as a matter of practice, we have a bifurcated process: certain ethical violations face discipline; and other violations, including conflicts of interest, face disqualification.

See supra notes 143-46 and accompanying text (discussing the possibility that the disciplinary system might offer the technocratic advantage).

173. See, e.g., Lindgren, supra note 3, at 427 n.34 ("A disciplinary agency could presumably order disqualification, although that is not listed as a disciplinary remedy in the Model Rules for Lawyer Disciplinary Enforcement. In fact, at least some disciplinary agencies customarily wait until the litigation has ended before commencing disciplinary proceedings.").

174. See, e.g., In re Petrie, 742 P.2d 796, 804 (Ariz. 1987) (refusing the disciplinary commission’s recommendation to suspend the lawyer for thirty days for a concurrent conflict interest and instead imposing a censure); In re McElholten, 663 P.2d 1330, 1336 (Wash. 1983) (noting that violations of the conflict of interest rules tend “to be treated with relative lenience”). But see In re Egger, 98 P.3d 477, 489 (Wash. 2004) (noting that “knowing” misconduct may warrant a higher sanction, such as suspension).

175. See, e.g., Penegar, supra note 61, at 881 (quoting in part In re Am. Airlines, Inc., 972 F.2d 605, 611 (5th Cir. 1992)) ("Arguably, the Fifth Circuit has the better claim to a certain ‘realism’ when it points out that lawyers have little incentive to bring complaints of ethical violations over conflicts of interest to disciplinary boards and that ‘unless a conflict is addressed by the courts,... it may not be addressed at all.’"). As the Fifth Circuit put it, it is “especially true in cases of alleged conflicts of interest” that “[c]lients and fellow attorneys have little incentive to file formal complaints with disciplinary boards, and the evidence suggests that they in fact do not.” In re Am. Airlines, Inc., 972 F.2d at 611 (citing David B. Wilkins, Who Should Regulate Lawyers?, 105 HARV. L. REV. 799, 827-28 (1992); Note, Developments in the Law—Conflicts of Interest in the Legal Profession, 94 HARV. L. REV. 1244, 1496-1500 (1981)).

176. GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 10.11, at 10-35 (3d ed. 2001) (noting that disciplinary authorities “have largely left enforcement... to the courts, especially when the conflict arises in a litigation context”); see generally RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 6 cmt. l. (2000) ("Disqualification of a lawyer and those affiliated with the lawyer from further participation in a pending matter has become the most common remedy for conflicts of interest in litigation... "). Lawyers might also face fee
We thus should not base theory on a misconception of practice. Certain courts and commentators claim that "there is usually no need to deal with . . . ethical violations in the very litigation in which they surface," "[g]iven the availability of both federal and state comprehensive disciplinary machinery." But the "availability of both federal and state comprehensive disciplinary machinery" is unrealistic: it presumes (1) that the alleged violation will be reported to the disciplinary authority, (2) that the disciplinary authority will discipline violators, and (3) that it will do so in a way that stops and deters lawyers (both generally and specifically). As the above discussion and citations illustrate, however, all of these premises are either false or overstated.

To be sure, another forum—a legal malpractice or breach of fiduciary duty suit—exists. This forum, however, is even less effective than discipline. A later malpractice action necessarily cannot stop the offending conduct, and from the aggrieved movant’s point of view, malpractice is typically worse because the prosecution costs fall on the movant (unlike the disciplinary system, in which the bar, respondent, or court ordinarily covers the cost). These costs might eventually be offset or recovered but only if the movant can prove damages resulting from the lawyer’s misconduct. Even if damages are provable and sufficient to justify the effort of filing suit, the malpractice route results in striking delay and inefficiency in remedying the misconduct, when compared to disqualification.

In sum, discipline or malpractice may not offer a remedy at all, much less a remedy equaling or rivaling disqualification. Given these practical challenges, the court may still need to "perform its role in the internal regulation of the legal profession and disqualify counsel from further representation in the pending litigation." Because disqualification is a unique and effective remedy, discipline cannot fully replace disqualification.
3. TOWARD THEORETICALLY JUSTIFYING DISQUALIFICATION

This Subsection explores the theory of disqualification. Because we arguably "lack a general, coherent theory of professional behavior for lawyers," this Subsection first addresses whether a theory of disqualification is "beyond reach."180 After finding this objection unhelpful and unrestricting, the Subsection then examines the theoretical bases for disqualification in more detail.

We already have a general theory (or at least theories) of attorney conduct to a certain extent,181 but more importantly, we already have something even stronger: a floor below which attorneys' conduct should not sink. That floor is the ethical rules; they apply in generally similar form to every lawyer in every jurisdiction. The rules most frequently implicated in disqualification are generally justified to protect confidentiality, loyalty, and independent professional judgment, and these rules and others are also generally justified to protect the integrity of the adversarial proceedings.182 Although many disagree on the disposition of a particular case or category of cases,183 they generally agree with the preceding justifications. If lawyers are violating these (justified) ethical rules, both ethics and logic suggest that those lawyers (and opponents of disqualification law) should bear the burden of showing why the rules should not be enforced, and the violation effectively ceased, through the unique and effective remedy of disqualification.184 Moreover, although we should strive for a general or unifying theory, a "lack of general theory" objection could be thrown up against every attempt to regulate an attorney (or anyone else), and it is particularly problematic to lodge the objection against effectively remedying prohibited conduct about which we generally agree.

To dig deeper, we must concede that many "unique" and "effective" remedies

180. LINDGREN, supra note 3, at 422 n.2 (internal quotation omitted).
181. For generally applicable theories on the lawyer's role, we could begin with the following: MONROE FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY (2007); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVOCACY IN A DEMOCRATIC AGE (2008); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998); Katherine R. Kruse, Beyond Cardboard Clients in Legal Ethics, 23 GEO. J. LEGAL ETHICS 103 (2010); Stephen L. Pepper, The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities, 1986 AM. B. FOUND. RES. J. 613 (1986); see supra Part II.B (suggesting that disqualification might be warranted when the misconduct impedes the lawyer's ideal role).
183. Of course, the existing floor on which we all agree does not answer hard questions about application at the margins. My argument is that this floor justifies disqualification itself and several direct applications. Whether and to what extent it justifies less direct applications is legitimately disputable but goes beyond the current point.
184. But disqualification law generally has long shifted various burdens to the aggrieved movant, which is another puzzle examined in this Article. See infra Part III.
are nevertheless inappropriate.\textsuperscript{185} To concede disqualification's utility, in other words, is not tantamount to approving its use. We still must ask whether it is justified to disqualify lawyers who have violated (or the easier question, are violating) the ethical rules. To make the question more difficult, we are also considering the cases that do not have a discernible impact on the proceedings themselves;\textsuperscript{186} although the client might feel betrayed or at least surprised and the ethical rule might be denigrated, we are stipulating that the conflict will not noticeably affect the merits or otherwise impact the proceedings.\textsuperscript{187} The question is whether client feelings or the enforcement of the ethical rule, standing alone, indeed justify intervention, particularly when discipline is unlikely to follow. We have, of course, just theoretically juxtaposed the two primary positions in the disqualification cases: that the court should intervene only when its proceedings are impacted; or that the court should intervene to enforce the ethical propriety of its "officers" (perhaps in turn to protect clients' feelings, the rule of law, or other reasons).

But perhaps the adversary system \textit{is} affected in a significant sense—even in principled disqualification cases.\textsuperscript{188} Many forms of conflicts present the risk that lawyers will "pull punches" because of conflicting allegiances to themselves, other current clients, or former clients. For these forms of conflicts, which are numerous, the adversary system's presumption of loyal and "zealous" advocates is, or is at risk of, being diluted.\textsuperscript{189} This dilution is difficult and potentially expensive to prove, counseling toward a more cautious acceptance of such

\textsuperscript{185} Because I do not want to waste the reader's time with numerous or extreme examples, I offer only one: It would likely be both unique and effective to tattoo "cheater" on the forehead of every attorney who engages in a prohibited conflict of interest. But it would also be inappropriate, to say the least.

\textsuperscript{186} It is partially for this reason that some courts have held that trial courts lack authority to order disqualification in these types of cases. If the matter does not affect the trial courts' proceedings, these courts must leave the general regulation of ethics to the state supreme court (or other authority).

\textsuperscript{187} For example, if the conflict means that the lawyer's access to confidential information might affect the merits or that the lawyer might be unable to pursue the litigation as expeditiously as a non-conflicted attorney, this might well matter and would be contrary to our stipulation. Some would argue, however, that the uncertainty and difficulty in proving these nefarious-but-hard-to-prove scenarios militate toward the disqualification remedy.

\textsuperscript{188} \textit{See, e.g., In re Myers}, 130 P.3d 1023, 1025 (Colo. 2006) ("A number of attorney ethical proscriptions, especially those barring representation of conflicting interests, see, e.g., Colo. RPC 1.7-1.11, or acting in conflicting roles, see, e.g., Colo. RPC 3.7 (Lawyer as Witness), have developed precisely to ensure fairness and loyalty to the parties and protect the integrity of the process, and therefore serve as important guides in the exercise of discretion to disqualify."").

\textsuperscript{189} For example, "where an attorney's conflict of interests ... undermines the court's confidence in the vigor of the attorney's representation of his client," courts have acknowledged that disqualification might be appropriate. Bd. of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) (citations omitted); \textit{see also} Keith Swisher, \textit{Prosecutorial Conflicts of Interest in Post-Conviction Practice}, 41 HOFSTRA L. REV. 181, 185-89 (2012) (discussing the various reasons why attorneys are not permitted to challenge their own prior work or to continue representation when their own conduct is in issue).
conflicts in the first place. Conflict of interest norms reflect the profession’s protection of client confidences and client loyalty, which in turn promote competent and diligent representation in the adversary system.

In addition to the effect on the proceeding and the adversarial presumption, disqualification might also be justified on an ultimately related ground: Disqualification might promote the lawyer’s ideal role. This observation is similar to the theoretical underpinnings of judicial disqualification: “To decide when a judge may not sit is to define what a judge is, [and t]o define what a judge is is to decide what a system of adjudication is all about.” We then could, and arguably should, look to the core values or perhaps even skills of attorneys to determine when disqualification would be appropriate. When misconduct significantly jeopardizes a core lawyerly value or skill, disqualification should be seriously considered. Although not without criticism, there are known and partially uncontroversial lists of lawyerly core values and skills. The expressed core

190. To be sure, the presumption of loyal and zealous advocates has always been elusive in practice: some clients have no lawyers, and other clients have overworked public defenders, as two primary counterexamples. In the first example, however, clients representing themselves are still loyal and generally zealous advocates for their positions (technical competence is of course a concern but a separate one), and in the second example, overworked public defenders are a known failure of a subset of the adversary system. Neither example, then, completely destroys this adversarial presumption.


192. See, e.g., American Bar Association Center for Professional Responsibility, Revised Recommendation 1OF (2000), http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom1of.html; American Bar Association Section of Legal Educ. and Admissions to the Bar, Legal Education and Professional Development: An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap 205, 207 (1992) [hereinafter MACCRATE REPORT]. The ABA’s core values statement of 2000 both arose out of controversy and was itself controversial. See generally Paul D. Paton, Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America, 78Fordham L. Rev. 2193, 2193-94 (2010) (“The Resolution provided a non-exhaustive list of ‘core values’ and urged that each jurisdiction responsible for lawyer regulation implement the ‘principles’ set out in the resolution, all of which would function as a bulwark against encroachment on the traditional law firm model. For all intents and purposes, the [multi-disciplinary practice] debate was dead, buried in ‘core values’ rhetoric. That rhetoric served to preserve a regime for the delivery of legal services, which, while anchored in legitimate concerns about conflicts of interest, independence, and preserving privilege, also functioned to prevent competition and to protect lawyers’ turf.”); Nathan M. Crystal, Core Values: False and True, 70 Fordham L. Rev. 747, 748 (2001) (arguing that “reliance on core values of the legal profession in debates about legal ethics has rhetorical appeal but is fundamentally misleading” and “at a deeper level, reliance on the core values of the profession often reflects an anti-market, anticompetitive attitude of the bar that impedes change in rules of professional conduct, including efforts to improve the delivery of legal services to people of moderate means”).

193. See, e.g., Susan Swaim Daicoff, Expanding the Lawyer’s Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law, 52 Santa Clara L. Rev. 795, 818 (2012) (“Empirical evidence [from at least six studies] defines what skills are most important to the practice of law.”). The skills can be divided into eight general categories: intellectual and cognitive, research and information gathering, communications, planning and organizing, conflict resolution, client and business relations, working with others, and character. Id. at 822-23; see also Neil Hamilton & Verna Monson, The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law, 24 Geo. J. Legal Ethics 137 (2011) (defining both professionalism and effectiveness and exploring the relationship between the two).
values might be worthy to support a theory of disqualification in part because these values center on duties to clients (as opposed to simply helping lawyers help themselves): competently exercising independent professional judgment, preserving confidences, and maintaining loyalty, including the avoidance of conflicts of interest. If a violation would impair these core values, the violator arguably is a candidate for disqualification under this theory. And because the "ideal" role of the lawyer is (for better or worse) rooted in the adversary system, failing to encourage this role might affect that system.

In a significant sense, enforcing this "ideal" role through disqualification interestingly guards against the judicial role and judicial disqualification principle: impartiality and the appearance of impartiality. In other words, if something interferes or would likely interfere with a judge's impartiality, she should be disqualified. Conversely, if something interferes or would likely interfere with a lawyer's partiality (toward the client), he should be disqualified. This converse is not completely accurate, but perhaps the essence of the analogy holds: we should disqualify lawyers when something significantly interferes with their ability to be partial—at least when dealing with conflict-of-interest concerns.

These two underpinnings of disqualification—the integrity of the proceedings

194. Am. Bar Ass'n Ct. for Prof'l Responsibility, The House Adopted Revised Recommendation 10F (2000), http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom10f.html; MACCRATE REPORT, supra note 192, at 207; see generally RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 6 cmt. i (2000) ("Disqualification, where appropriate, ensures that the case is well presented in court, that confidential information of present or former clients is not misused, and that a client's substantial interest in a lawyer's loyalty is protected."); MODEL RULES R. 1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").


197. For example, the lawyer's requisite independent professional judgment on a client's behalf mirrors, in some ways, the judge's requisite impartiality, not partiality. See, e.g., MODEL RULES R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.").

198. Cf., e.g., United States v. Bros., 856 F. Supp. 370, 375 (M.D. Tenn. 1992) (quoting in part ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 342 (1975)) ("[P]olicy considerations underlying DR 9-101(B) which militate toward disqualification include 'the treachery of switching sides; the safeguarding of confidential governmental information from future use against the government; the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service; and the professional benefit derived from avoiding the appearance of evil.' "). Note that in either disqualification, the disqualified judge or lawyer (frequently) does not acknowledge the interference with the ideal role; they are disqualified nonetheless. The failure to acknowledge the interference is yet another reason for external review (such as disqualification or disciplinary proceedings).
and the lawyer's role—both hinge on prejudice to some extent. If the lawyer's misconduct does not interfere with the proceedings or does not interfere with lawyerly virtues, this argument suggests that no disqualification should follow. These underpinnings (especially the former) thus represent a somewhat utilitarian approach to disqualification based on ethical violations: if ethical transgressions do not impact the proceedings, then let them be; upholding principle is an insufficient basis for disqualification. This conclusion is arguably underprotective of loyalty, however. For example, the same large firm could probably sue a large corporate client on a wholly unrelated matter (to the matter on which other firm lawyers are representing the client), and the action probably would not interfere with the proceedings or impair the lawyerly virtues of the firm's lawyers. As another example, a lawyer could sue a former client even in a matter that technically meets the substantial relationship test, and if the lawyer actually received no helpful confidential information in the former matter, the action would probably not interfere with the proceedings or impair the lawyer's ideal characteristics. Both examples, however, run contrary to a strong and lengthy duty of loyalty (at least from the client's perspective). These examples have hopefully illustrated the implicit divide in courts' and commentators' views: if strong and lengthy loyalty is really a core characteristic of a (good) lawyer, these situations should also result in disqualification.

But if disqualification is not remedying any noticeable (or even potential) prejudice to the proceedings or any noticeable (or even potential) impairment of the lawyer's performance, what is disqualification doing? Furthermore, because we could use the disciplinary alternative (at least in theory), why should we impose the additional costs to the client and court by using disqualification? The answer must simply be principle. If the lawyer is breaching a duty of loyalty in the two examples above, disqualification would immediately halt the breach, and in principle, the breach might be cause in and of itself for action. Disqualifica-

199. See Goldberg, supra note 1, at 268-69 (advocating that a utilitarian approach, i.e., unethical conduct, such as trading on confidences or breaching loyalty, should matter to the court only to the extent that the conduct will cause a negative consequence to the adversary system).

200. See MODEL RULES R. 1.9 cmt. 3 (discussing the test to determine when the former and current matter are "substantially related").

201. By a "strong" duty of loyalty in this context, I simply mean that the duty would prohibit representation adverse to a current client even when the representation is unrelated and handled by different attorneys within the firm; and by a "lengthy" duty of loyalty, I simply mean that the duty would prohibit representation adverse to a former client in a substantially related matter even when the former representation occurred long ago and even when the lawyer did not actually receive relevant confidential information. Putting aside the somewhat loaded labels of "strong and lengthy," it is beyond this Article's scope to chart the duty of loyalty and make normative arguments to expand or contract the chart.

202. Cf. Andrew Corp. v. Beverly Mfg. Co., 415 F. Supp. 2d 919, 928 (N.D. Ill. 2006) (concluding that, in a case in which the firm violated its duty to avoid conflicting representations, "[t]he only remedy available to enforce adherence to the Rules of Professional Conduct is, to the extent possible, [to] place the parties in the position they would have been in had counsel acted competently in accordance with the Rules of Professional Conduct"). The conflicts rules might be seen as primarily prophylactic (i.e., preventing harm). See, e.g., Ted
tion also might be warranted on slightly more utilitarian grounds vis-à-vis the client: disqualification would likely foster positive (or diminish negative) therapeutic effects in the injured client.\textsuperscript{203} As one possible example, the client might more readily trust, and thus confide in, other lawyers, knowing that the disqualified lawyer's behavior was improper, hopefully anomalous, and effectively remedied. And from the perspective of the ethical rules, the remedy might prevent denigration of the rules by addressing (instead of ignoring) violations.\textsuperscript{204} And once the grounds are established, the remedy is attractive because it is particularly likely to deter violations by hitting the lawyer's pocketbook quickly and directly.

In light of the above discussion, disqualification can be theoretically justified, particularly when the misconduct compromises the fairness of the proceedings or lawyers' core virtues.\textsuperscript{205} But the resonating point should probably remain practical, not theoretical; in the absence of disqualification, discipline is unlikely to follow,\textsuperscript{206} and even if it eventually does, it is very unlikely to stop the conflict in the particular case before the judge. In light of this point, trial judges should feel grounded as a practical matter to order disqualification, although they should proceed cautiously in principled disqualification cases because the basis for disqualification rests on thinner ground.\textsuperscript{207} And like so many legal (and other) decisions, disqualification should not ignore balance or context. If we stipulate that disqualification (and perhaps even only disqualification) could plug the ethical breach, we still must consider disqualification's costs. When high, the

\begin{quote}
Schneyer, From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers, 35 S. Tex. L. Rev. 639, 644-45 (1994) ("Any prophylactic ethics rule that is enforced ex ante—before harm occurs—is apt to be enforced in a non-disciplinary forum, as when a trial court grants a pre-trial motion to disqualify counsel who is unethically exposing her client to a risk that the lawyer will become embroiled at trial in a conflict of interest."). Because breaching the conflicts rules might itself cause harm of the nature discussed above, however, the conflicts rules probably should not be seen as purely prophylactic.

203. Of course, these positive therapeutic effects might need to be offset against the lawyer's current client's negative feelings resulting from the lawyer's disqualification.

204. See generally Fred C. Zacharias & Bruce A. Breen, Rationalizing Judicial Regulation of Lawyers, 70 Ohio St. L.J. 73, 90-97 (2009) (discussing reasons to respect the ethical codes outside of the disciplinary context); cf. Perlman, supra note 20, at 1971 ("These two trends—the development of a separate body of disqualification law and the rarity of discipline for violations of the conflicts rules alone—suggest that the rule has become less law-like and no longer supplies lawyers with adequate guidance regarding their conduct.").

205. Disqualification might be warranted in additional cases, depending on (among other factors) the merits of the underlying ethical rule, the extent of value at issue, and the nature of the breach.

206. See supra notes 173-77 and accompanying text.

207. See Bruce A. Green, Conflicts of Interest in Litigation: The Judicial Role, supra note 23, at 72 (arguing that, for conflicts of interest that do not risk harm to former or current clients, "disqualification seems unnecessary or inappropriate as a remedy, because the risks posed by the lawyer's conflict of interest are slight or because those risks seem to be acceptable ones in light of the countervailing harms that disqualification would cause both to the court and to the litigant who would be deprived of the chosen lawyer's services"). In the context of certain conflicts of interest, Professor Green analyzed a similar dichotomy nearly twenty years ago and put it in terms of "remedy" (for which disqualification would be appropriate) and "sanction" (inappropriate). See id. at 72-73.
\end{quote}
costs could counsel against an otherwise justified disqualification.

**C. DISQUALIFICATION’S COSTS AND DISCOUNTS**

This Section identifies and then critically appraises disqualification’s costs. To be sure, costs have been acknowledged as necessary throughout the Article, but costs have not yet received a spotlight. Disqualification imposes three chief costs: (1) loss of money to the disqualified lawyer’s client;\(^{208}\) (2) loss of time pursuing or defending the underlying matter; and (3) loss of chosen counsel.

1. **LOST MONEY**

When a lawyer is disqualified, that lawyer’s client faces additional fees: money spent educating successor counsel who would have otherwise been unnecessary.\(^{209}\) As discussed below, this cost can and should be largely avoided (technically, shifted) by ordering the disqualified lawyer to bear the cost.\(^{210}\) As practice stands, however, it is a cost that burdens clients in many cases.

2. **LOST TIME**

While Cost 1 is about money, Cost 2 is about time. Disqualification takes time and necessarily delays the pursuit of the underlying matter.\(^{211}\) Although this cost cannot plausibly be avoided or shifted to the disqualified lawyer, this cost is already significantly limited by the doctrine of “waiver,” which requires the movant to seek disqualification promptly or lose the right to do so.\(^{212}\) Moreover, although not currently prevalent, courts could impose conditions on the movant that might expedite the litigation going forward or otherwise mitigate the

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\(^{208}\) To some extent, the moving client suffers a loss as well, in that the time and often the money spent moving for disqualification are gone. This is generally true even if the moving client’s motion is granted, although the moving client might be permitted to request that the court award attorneys’ fees.

\(^{209}\) Under of counsel opinion, appellate-friendly jurisdictions in which interlocutory appeals are generally permitted, an appeal often makes sense. In such circumstances, the client might also be unable to find a new lawyer at the same or lower fees, and therefore the client might spend more money on a higher-priced successor counsel. Even when the disqualification motion is denied, the client faces the risk of having to pay additional legal fees for the lawyer’s work in defending the motion. Of course, this cost is virtually indistinguishable from other legal motions.

\(^{210}\) See infra Part III.C. “The general rule is that an attorney disqualified for violating an ethical obligation is not entitled to fees.” A.I. Credit Corp. v. Aguilar & Sebastianelli, 6 Cal. Rptr. 3d 813, 819 (Ct. App. 2003); cf. Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 236 (2d Cir. 1977) (citing W. T. Grant v. Haines, 531 F.2d 671, 676-77 (2d Cir. 1976)) (rejecting the remedies of dismissal or suppression for the disqualified attorney’s misconduct because “sins of counsel should not be visited upon his client so as to vitiate the latter’s cause of action”).

\(^{211}\) See, e.g., FLAMM, supra note 4, at § 25.7 (“[E]ven when a motion to disqualify is brought in the best of faith, it inevitably causes delay.”).

\(^{212}\) See, e.g., Conoco Inc. v. Baskin, 803 S.W.2d 416, 420 (Tex. Ct. App. 1991) (noting that even a four-month delay “is probably sufficient to support a waiver finding”).
prejudice to the disqualified lawyer's client. Finally, the delay is significantly shorter than it was thirty years ago, when the litigation might be stayed while the disqualification was appealed. These long delays understandably frustrated litigants and courts, which in response issued judicial decisions narrowing disqualification doctrine. This frustrating type of delay is no longer possible in many jurisdictions. The Supreme Court's *Firestone* trilogy and many similar state cases have significantly reduced interlocutory appeals of orders granting or denying disqualification motions. Thus, although delay still results at the trial court level, the litigation is no longer as bogged down in a protracted "standstill" while interlocutory appellate battles are fought.

Unlike Cost 1 (money), however, Cost 2 contains an additional quality: although the litigants most directly bear the brunt of the delay, the courts' docket bears the delay as well. Therefore, courts are also exposed to this cost. From the courts' perspective, however, the cost is typically minimal (barring eve-of-trial

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213. For example, the court could exercise tighter control over the discovery schedule once successor counsel has been retained and educated.

214. See, e.g., Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) ("[E]ven when made in the best of faith, such motions inevitably cause delay. For example, this lawsuit has been at a standstill now for close to a year.").

215. The *Firestone* trilogy consists of *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 370 (1981) (holding that "orders denying motions to disqualify counsel are not appealable final decisions under § 1291"); *Flanagan v. United States*, 465 U.S. 259, 260 (1984) (holding that "a District Court's pretrial disqualification of defense counsel in a criminal prosecution is not immediately appealable"); and *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440 (1985) (holding that "that orders disqualifying counsel in civil cases, like orders disqualifying counsel in criminal cases and orders denying a motion to disqualify in civil cases, are not collateral orders subject to appeal as 'final judgments' within the meaning of 28 U.S.C. § 1291"). See also Leah Epstein, *A Balanced Approach to Mandamus Review of Attorney Disqualification Orders*, 72 U. Chi. L. Rev. 667, 693 (2005); Penegar, *supra* note 61, at 832-33 (footnote omitted) ("One indication of how significant the phenomenon [of increasing disqualification motions] had become by the late 1970s, at least in the federal court system, is evident in the decisions of the Supreme Court to deny immediate or interlocutory appeals first from denials and, four years later, from grants of motions to disqualify counsel. The animating purpose behind these decisions was to discourage these motions on the many occasions that courts had begun to suspect they were made to achieve a tactical advantage in the pending litigation and not for the loftier professional responsibility concerns asserted."). Moreover, "[m]any state courts have followed the federal lead by rejecting the notion of a right to appeal on this issue," and "[t]he parties are left with the cumbersome and procedurally difficult remedy of filing an extraordinary writ of mandamus." Ronald D. Rotunda, *Conflicts Problems When Representing Members of Corporate Families*, 72 Notre Dame L. Rev. 655, 665-66 (1997); see generally Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 111 (2009) (rejecting interlocutory appeal over discovery order potentially violating the attorney-client privilege but noting that "in extraordinary circumstances—i.e., when a disclosure order 'amounts' to a judicial usurpation of power or a clear abuse of discretion,' or otherwise works a manifest injustice—a party may petition the court of appeals for a writ of mandamus").

216. Even in more appellate-friendly jurisdictions in which interlocutory appeals are more readily permitted, an early appeal often makes sense for both grants and denials of disqualification motions. If the motion is granted, the lawyer's current client has lost the right to that lawyer in the litigated matter. The lawyer may have been particularly important to the client (e.g., a longstanding, trusted, and specialized counselor), and proving prejudice for the lawyer's loss in a later appeal from a final judgment tends to be quite difficult. If the motion is denied, the lawyer or firm might be in a position to use confidential information against the movant, for example, and proving prejudice after final judgment will again be quite difficult.
Moreover, courts have plenty of other cases to which to attend during the few weeks or months in which replacement counsel is retained and educated.

3. LOst CONsEL

Cost 3, the loss of the current counsel of choice, is unassailable at its core: disqualification by its very nature separates client and current counsel. Current counsel might be the most knowledgeable about the facts and law of the client’s case, the most technically skilled lawyer in the applicable area of law (or worse but rare, the only competent lawyer in the area), or a long-time or otherwise trusted advisor to the client.

In context, however, courts should be quick to understand that this “loss of chosen counsel” might be an equitable wash. That is, disqualification proceedings often arise because the movant’s (now-former) lawyer has switched sides; the movant thus lost chosen counsel first. Neil Hamilton and Kevin Coan have written persuasively on a related point:

When courts take into account the policy of client choice, at first blush, it appears as though the courts are taking on the noble task of protecting the rights of clients at the expense of attorneys. That effort is not as noble as it seems however. Lurking in the shadows of every policy discussion citing the right of client choice is the fact that the client’s dilemma in this type of conflict problem is caused exclusively by the fact that a lawyer has moved in the first place . . . . These growing . . . motions to disqualify came about principally because of the increase in lawyer mobility that made them necessary, but courts have exhibited an increased willingness to decide against disqualification based on the quality of client choice. The client choice rationale is necessarily a function of the policy of accommodating lawyer mobility.

217. Eve-of-trial motions are typically, but not invariably, denied on the basis of the doctrine of laches or waiver. See supra Part I.B.1, 4. When they are granted, however, they obviously can result in significant “do-overs” of various pretrial proceedings and filings. All disqualification motions (whatever their outcome) also cause the court a certain amount of additional time to consider and adjudicate the motions, but as a general matter, those costs do not necessarily distinguish disqualification motions from other motions.

218. In criminal cases, speedy trial rights or analogous concepts might affect this consideration. If the criminal defendant is the one moving or otherwise supportive of the motion to disqualify, however, the issue might be eliminated or at least mitigated.

219. See, e.g., Richmond, supra note 29, at 33 (“[D]isqualifying a lawyer for violating an ethics rule may unfairly punish a party for his lawyer’s misconduct, which is a problem that can be avoided by separating the attorney disciplinary process from the conduct of litigation.”). As Richard Flamm has noted, the disqualification motion will not necessarily be denied simply because counsel would be lost otherwise: “If the inconvenience the nonmoving party suffers by virtue of being deprived of its chosen counsel was deemed to be sufficient, standing alone, to warrant denying an otherwise valid disqualification motion, such motions would be denied in every case.” FLAMM, supra note 4, at § 24.4 at 481. Of course, disqualification motions are frequently granted even when they will necessarily deprive the lawyer’s client of chosen counsel.

220. Neil W. Hamilton & Kevin R. Coan, Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls, 27 Hofstra L. Rev. 57, 88-89 (1998) (footnotes
Although disqualification will necessarily deprive the lawyer's current client of chosen counsel, the movant may have already been so deprived. This is an important consideration for courts when viewing the overall fairness of the circumstances. Of course, this consideration should not necessarily be dispositive: the movant in many cases has not lost chosen counsel, and in any event, courts still should responsibly consider the balance of equities—including the loss of chosen counsel to the lawyer's current client.

But this loss might be mitigated or eliminated depending on the following factors: (1) the client might have known about the conflict and its implications before entering the relationship; (2) the lawyer might have been new to the client or the case; (3) many competent lawyers might be willing to strike up a replacement relationship with the client; and (4) the disqualification might "protect" the client from future misdeeds of the disqualified lawyer ("once a cheater, always a cheater"). Because courts rarely consider these mitigating factors explicitly in considering the cost of lost counsel, they should do so more often. Because the judge considering disqualification will already have a fair understanding of the relevant facts and (typically) the applicable legal market, the judge sits in a good position to assess these factors. The presence or absence, or the degree, of these four mitigating factors could mean the difference between merely an abstract loss of the "right to chosen counsel" and concrete damage to the client by disqualification.

The above discussion lists the primary costs of disqualification in a particular case. There are other certain and potential costs, both case-specific and systemic. For example, disqualification results in the loss of the disqualified

omitted) (arguing that lawyers have been increasingly moving firms in the last twenty-five years "principally because of the phenomenon that money is increasingly the measure of value in the profession and that firms bid for a lawyer or a group of lawyers with lucrative books of business. The client choice rationale is thus implicitly a policy of giving more weight to lawyers' financial interests and the concept of the profession as a business").

221. See supra Part I.B. Although it is true that lawyer movement (and association) often causes the disqualifying conflict, that observation is not dispositive for present purposes: whether lawyers individually or as a class cause the disqualifying event, the current client is burdened by the disqualification. In the long run, perhaps, courts could decrease the incidence of that burden for future clients: by routinely disqualifying lawyers, lawyers might be less inclined to engage in the behavior in question.

222. Furthermore, being unable to use the offending lawyer, the client might ultimately win more cleanly, which is better than winning dirty. Obviously, to the extent that the client wants "chosen counsel" solely because chosen counsel offers an unfair advantage (e.g., knowledge of the opposing client's confidential information), that desire ought to receive little-to-no consideration.

223. See generally Richmond, supra note 29, at 22 ("A disqualification motion implicates a wide range of interests, including a client's right to counsel of his choice, the hardship suffered by a party whose lawyer is disqualified, the financial burden on a client to replace disqualified counsel, lawyers' mobility, lawyers' interests in representing particular clients, lawyers' ability to trade on their expertise and to market their practice specialties, the preservation of the attorney-client relationship and client confidences, and the maintenance of the legal profession's ethical standards.").
lawyer’s time and money. Because the lawyer ordinarily violated a known ethical rule (and the disqualification remedy is also well-known), however, the now-disqualified lawyer’s cost should generally garner little sympathy. On the systemic level, frequent or prominent disqualification rulings might well deter lawyers from taking certain cases or perhaps even entering certain practice areas. This could impact clients’ access to counsel in those areas. But this concern is hypothetical: we would have to know data we do not currently know, such as whether the disqualifications were unwarranted (e.g., based on de minimus violations), whether lawyers in significant numbers would actually avoid or flee high-disqualification practice areas, whether other lawyers would take the cases following the disqualifications, and more. This potential cost is thus speculative.

Speculation aside, the three concrete costs listed above should be taken into account in considering disqualification. Although they each possess a degree of legitimacy in current practice, courts should carefully—not reflexively—determine their actual weight in any given case in light of the potentially mitigating factors articulated above.

III. THE IMPROVEMENT OF LAWYER DISQUALIFICATION

Great prerogative and freedom [have been given] to any judge faced with a motion to disqualify a law firm, while law firms and their clients are subjected to expensive litigation with no hope for appeal. Instead of broad, unreviewable discretion, there is a need for brighter lines and clearer tests so that firms know what to do. A rule that says that the judge may, or may not, disqualify only after “sifting through] all the facts and circumstances” gives little guidance to law firms and clients who, understandably, would like to know what the rules are so that they can obey them before a disqualification motion is ever filed. It is all right to “weigh the interests” only if the courts first calibrate the scales and inform us how the weight of the different interests is determined.

This Part proposes several key ways to improve unruly disqualification law and practice. Although a few of these suggestions are novel, most are not; courts or commentators may well have used or suggested these improvements before, but they have not been universally implemented. These improvements are directed primarily at three recipients: (A) the law and practice of disqualification

224. In those states that disqualify lawyers solely on the basis of an appearance of impropriety, however, this cost should certainly be considered. See infra Part III.A. Unless the conduct causing the “appearance of impropriety” was already forbidden (e.g., through published opinions in the jurisdiction), the lawyer might not have known about the potential for disqualification in the circumstances. The courts, in that situation, are financing good “appearances” through the costly disqualification of the lawyer; whether the lawyer (and client) should bear the cost of controlling “appearances”—for the good of the public confidence in the courts or the bar—is certainly debatable. At a minimum, courts should consider the lawyer’s costs so that they more fully grasp the ramifications of their actions.

225. Rotunda, supra note 215, at 667-68 (discussing the “death of precedent” in disqualification proceedings and the resulting lack of appellate oversight of disqualification decisions).
generally and courts and commentators specifically; (B) lawyers; and (C) clients.

A. IMPROVEMENTS FOR COURTS AND COMMENTATORS

This Section offers three insights to the law of disqualification: (1) a better understanding of the much-maligned “strategic” or “tactical” disqualification motion; (2) a better burden-allocation in disqualification proceedings; and (3) a better appreciation of how courts view, and should view, the “appearance of impropriety.”

1. UNDERSTANDING AND CORRECTING THE GROWTH AND “STRATEGERY” OF DISQUALIFICATION

For decades, courts and commentators have been seemingly obsessed and irritated with the “strategic” or “tactical” use of disqualification motions. This Section examines whether and to what extent that long-running irritation, and consequent backlash against disqualification doctrine, are justified.

a. Courts and Commentators Decry the Growing Use of “Strategic” Disqualification Motions

Both courts and commentators generally believe that disqualification motions are increasing and increasingly bad. “[W]hile the principles upon which these [motions] are founded are not new, the use of them . . . prior to the 1970s was relatively infrequent, if not novel and isolated.”226 But since then,

the disqualification of law firms has become so frequent (perhaps on the order of two out of every three law suits and less frequently in criminal prosecutions),

and the doctrinal development associated with the phenomenon so complex,

that the field of professional responsibility has become dominated by the topic of conflicts of interest.”227

One examination of all published district court opinions found that, from 1970 to 1990, the average number of motions to disqualify per year rose from one filing to six filings.228 Although that is growth, the number was still trivial compared to the total number of civil cases. With civil cases even back then totaling in the tens of thousands, the author noted, perhaps mistakenly, that motions to disqualify are filed “perhaps on the order of two out of every three [civil] law suits.”229

Even if courts and commentators were wrong about the actual growth, they obviously believed that the cancerous growth was out of control. Even by the

226. Penegar, supra note 61, at 832-33 (footnotes omitted).
227. Id.
228. Id. at 889-90.
229. Id. at 832; see also Edwards, supra note 41, at 164 (“[R]ecently, disqualification motions have become a form of gamesmanship or even harassment that diverts attention from the real cause of action.”).
By 1984 . . . the conflict of interest disqualification motion was infamous. The Court of Appeals for the District of Columbia deplored "[t]he tactical use of motions to disqualify counsel in order to delay proceedings, deprive the opposing party of counsel of its choice, and harass and embarrass the opponent." The tactic was "so prevalent in large civil cases in recent years as to prompt frequent judicial and academic commentary." The United States Supreme Court did not quarrel with the court of appeals' characterization of lawyer disqualification motions as a "dangerous game."^230

Although lawyers' new associations (through larger firms, mergers, lateral movements, and other routes) often caused the conflicts of interest (which in turn caused the filing of motions to disqualify), the problem was reframed to accuse those moving for disqualification of purely "strategic" or "tactical" motives. In this narrative, movants were using "potent" and "formidable weapons" to play their "dangerous game:" "restriction on a lawyer working against a former client in a substantially related matter, coupled with application of that disqualification to all other lawyers in the firm . . . created a formidable weapon for the dangerous game of lawyer disqualification in a world of large firms and mobile lawyers."^232

The motions allegedly "consume an inordinate amount of time, harass litigants and lawyers, and promote intense professional and personal bitterness."^233 For these and other reasons, the judiciary began to "make regular adverse comment, both in and out of court, on the costs to the judicial system in energy and image."^234

The criticism soon merged into a chorus across the courts and commentators. The following list samples the various adverse reactions, which contain a theme of protection of the lawyer's client from the movant (notwithstanding that the

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231. Various reasons have been floated to explain this malignant growth: "The proliferation of such motions may be explained, in part, by the decreasing reluctance on the part of some counsel to resort to disqualification in an effort to secure a strategic advantage for their clients; as well as the changing nature of the manner in which legal services are delivered." FLAMM, supra note 4, § 1.6, at 16 (footnotes omitted). "The increase in the use of motions to disqualify counsel, a remedy rarely heard of until fairly recently, may also reflect the failure of the legal profession to use bar disciplinary proceedings to effectively enforce the canons of ethics . . . and the belief that only judicial intervention can insure compliance." Gregori v. Bank of Am., 254 Cal. Rptr. 853, 859 n.6 (Ct. App. 1989) (citation omitted).

232. Goldberg, supra note 1, at 229.

233. Id. at 262 ("The disputes are often between lawyers and law firms more than between clients and lawyers. Our adversary system, concerned about its image within the society it serves, gains little from what appears as petty professional squabbling. Worse, when a court disqualifies a firm for a technical conflict, the image of the profession is depreciated gratuitously. If the media views the matter as newsworthy, the public only hears conflict of interest. That the disqualification was because of information that an incoming lawyer had, but of which others were unaware, is lost.").

234. Goldberg, supra note 1, at 262.
lawyer or firm often caused the conflict in some sense):

- "Disqualification is harsh because a motion to disqualify easily can be used improperly to harass an opponent, to run up the opponent’s expenses, to force a financially weaker opponent to accept an unfavorable settlement, or to deprive the opponent of representation by a particularly skillful advocate."  

- "Disqualification rules can be abused by clients. A powerful corporation could hire every competent lawyer in the community or in the relevant specialty. A party could discuss a matter with a lawyer, ostensibly seeking a lawyer but actually seeking to make the lawyer unemployable by the opposition."  

- "The cost to clients in time, money, emotional energy, and confidence in the system is even more staggering when a disqualification motion is successful. The client with a disqualified lawyer must start again, no matter how technical the disqualification, and often without the benefit of the work done by the disqualified firm."  

- "The motion to disqualify an adversary’s attorney has become the newest weapon in a litigator’s motion arsenal. Disqualification motions alleging conflicts of interest can result in a great advantage to the movant by denying the opposition their choice of counsel, or by delaying the proceedings for several weeks or months."  

- "If the case reports are any indication, a motion to vicariously disqualify the law firm of an attorney who is himself disqualified as the result of his possession of the confidences of a former client, is becoming an increasingly popular litigation technique. Unquestionably, the ability to deny one’s opponent the services of capable counsel, is a potent weapon."  

- "Motions to disqualify have... been filed with the intention of disrupting, frustrating, hindering, hobbling, or harassing an adversary or its counsel, or in the hopes of complicating, fragmenting, increasing the cost of pursuing, or diverting attention away from the merits of a case. Such motions have also been filed for the purpose of retaliating for perceived wrongdoing by the

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235. John F. Sutton, Jr., Introduction to Conflicts of Interest Symposium: Ethics, Law, and Remedies, 16 REV. LITIG. 491, 502-03 (1997) (“It is [also] harsh because it deprives one litigant of the lawyer of his choice and because the termination takes place not at the outset of the employment but later when harm to client from disqualification is inevitable. Often extensive services have been rendered and the substitution of new counsel results in delay and additional expense.”).  

236. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.18 cmt. 2 (2010); ARIZ. RULES OF PROF’L CONDUCT R 1.18 cmt. 4 (2003).  

237. Goldberg, supra note 1, at 263.  

238. Linda Ann Winslow, Comment, Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest, 62 WASH. L. REV. 863 (1987) (footnotes omitted) (noting also that “[t]he attractiveness of the attorney disqualification motion as a strategic weapon is enhanced by the failure of the courts to impose sanctions against attorneys who bring frivolous disqualification motions”).  

239. Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222, 224 (6th Cir. 1988).
moving party’s adversary, or for similar motions brought against the moving party’s counsel. In other instances, disqualification motions have been utilized as negotiating tools—often with the goal of intimidating an adversary or its counsel into accepting a settlement on otherwise unacceptable terms.\(^\text{240}\)

- Finally, “as courts are increasingly aware, motions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent. Such motions can be misused to harass opposing counsel, to delay the litigation, or to intimidate an adversary into accepting settlement on terms that would not otherwise be acceptable. In short, it is widely understood by judges that attorneys now commonly use disqualification motions for purely strategic purposes . . ..”\(^\text{241}\)

The Supreme Court also expressed its concern explicitly: “the tactical use of attorney-misconduct disqualification motions is a deeply disturbing phenomenon in modern civil litigation.”\(^\text{242}\) Moreover, “[w]e acknowledge that an order disqualifying counsel may impose significant hardship on litigants,”\(^\text{243}\) and “[w]e share the Court of Appeals’ concern about ‘tactical use of disqualification motions’ to harass opposing counsel.”\(^\text{244}\) The courts’ and commentators’ concerns are no longer fully justified (assuming they ever were); today they partially reflect the empirically dubious, but still prevailing, belief that disqualification cases are increasing in frequency.\(^\text{245}\)

And additional negative assumptions abounded (and persist) in this narrative. For example, one early commentator assumed that, once a disqualification motion is filed, it is “more likely [that] the client may want to press ahead while the lawyer wants to settle . . . because once the lawsuit has ended, it is unlikely that anyone will pursue the ethical question in disciplinary proceedings.”\(^\text{246}\) “The lawyer, moreover, can bargain for his opponent’s cooperation in clearing his name” by getting the movant to repudiate the motion in open court or getting the movant to agree to oppose discipline in exchange for some concession from the

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\(^{240}\) Flamm, supra note 4, at § 25.7 (footnotes omitted) (citing cases inferring these motives).

\(^{241}\) Gregorri v. Bank of Am., 254 Cal. Rptr. 853, 859 (Cal. Ct. App. 1989) (citations and internal quotation marks omitted); see also Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721-22 (7th Cir.1982); Charles W. Wolfram, Former-Client Conflicts, 10 Geo. J. Legal Ethics 677, 689 (1997) (footnote omitted) (“Moreover, as with other conflict rules, former-client conflict rules provide opportunities for their burdensome and even predatory use in disqualification motions or damage actions that, could the facts be better known, are hardly necessary to protect the confidentiality of client information.”).


\(^{243}\) Id. at 440 (majority opinion).

\(^{244}\) Id. at 436.

\(^{245}\) See infra Part III.A.3.

\(^{246}\) James Lindgren, Toward a New Standard of Attorney Disqualification, 1982 Am. B. Found. Res. J. 419, 432. Although the article’s key insight is strong (i.e., that a disqualification motion can cause conflicts between the challenged lawyer and client), the degree and frequency of this conflict seems significantly overstated. Moreover, disqualification halts the conflict (and then the client can determine whether a malpractice action is warranted to remedy past harm).
lawyer's client. But this reasoning ignores lawyers' legitimate and other reasons to fight disqualification motions—to fight weak motions and to earn more fees, for example. To avoid this scheming, the author proposed foreclosure of the disqualification remedy: "If disqualification motions were seldom granted, litigants (taking into account their probability of success) would be less likely to move for disqualification, and lawyers would be less likely to be intimidated into withdrawing to avoid disqualification." But this result is just postponed, or possibly mitigated but not eliminated, by channeling all would-be disqualification motions into bar complaints. A pending bar investigation imposes pressure on lawyers to consider their personal interests over their clients' interests in the litigation, including pressure to consider how bar counsel will view the continued representation. A better solution would likely be for lawyers not to violate the ethical rules in the first place and to be deterred from doing so through the weighty and more reliable financial sanction of disqualification. This reasoning was not en vogue (and admittedly a bit unrealistic on the front end), however.

In sum, negative assumptions provoked fear of disqualification and its potential growth: "[W]hen disqualification motions succeed, they encourage not only other disqualification motions but also efforts to manipulate the litigation to infect opponents with conflicts of interest that will lead to disqualification," and thus "[t]he remedy of disqualification is a weapon in the arsenal of lawyers who manipulate litigation in order to create conflicts of interest." The fears and negative assumptions sampled above soon translated into a judicial rebellion of sorts against disqualification.

b. Disqualification Doctrine Demoted

The above fears and assumptions weakened, and seemingly continue to weaken, review of disqualification motions. Moreover, commentators argued,

247. Id. ("[The lawyer] can try to get the movant to repudiate the motion by stating in open court that he has investigated more fully and concluded that the accusations he originally made are groundless. The movant could also agree to oppose discipline, if it should be pursued. A challenged lawyer who is seeking these terms for himself in a settlement may give up something of his client's in return.").

248. Id. at 433 (footnote omitted).

249. Id. at 434 (footnote omitted).

250. See, e.g., Vegetable Kingdom, Inc. v. Katzen, 653 F. Supp. 917, 919, 925-26 (N.D.N.Y. 1987) (denying disqualification motion and imposing sanctions because the court did "not harbor a scintilla of doubt that the attorneys . . . brought this motion purely to harass their opponent"); see also id. ("The court is well aware that disqualification motions are often interposed for tactical reasons wholly unrelated to concerns for the maintenance of the ethical standards of the legal profession. Such motions are often designed to harass opposing counsel, cause delay, or needlessly increase the cost of pursuing a cause of action. Because of this, in part, the courts in this circuit have been reluctant to disqualify attorneys on the motion of opposing counsel"); Penegar, supra note 61, at 857 ("The strength and pervasiveness of this judicial skepticism, so frequently repeated now as to become conventional wisdom among lawyers, judges, and scholarly commentators, has led very directly to highly visible and symbolic adjustments in the way in which such motions are processed in the courts. Moreover, this attitude may account for less explicitly connected but equally important modifications in the
and continue to argue, that this weakening was and is justified.\textsuperscript{251} This Section shows several examples of disqualification’s demotion.

The judicial concerns over disqualification motions, and the motives behind them, have become remarkably pervasive.\textsuperscript{252} The concerns infiltrate the doctrine at every stage. For example, courts conclude that (1) to permit unfettered standing in disqualification cases would lead to tactical havoc,\textsuperscript{253} (2) to permit imputed disqualification would similarly lead to tactical havoc,\textsuperscript{254} and (3) as noted above, to permit interlocutory appellate review would invariably lead to “tactical appeals.”\textsuperscript{255}

Indeed, the Supreme Court itself expressed its concern with “tactical” disqualification motions explicitly, as noted above,\textsuperscript{256} but also implicitly by banning interlocutory appeals of orders both granting and denying motions to

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\item Matthew F. Boyer, \textit{In the Wake of Infotechnology: Stricter Scrutiny of Attorney Disqualification Motions}, \textit{Del. Law.}, 16, 18 (Winter 2004-2005) (“Over the last 20 years, we have gone from a time when the appearance of a conflict would result in disqualification to a time when an actual conflict is not enough to obtain disqualification. Underlying this fundamental shift is a concern that the integrity of judicial proceedings is more likely to be threatened by counsel’s use of the ethics rules as ‘procedural weapons’ than by the public’s perception of an appearance of impropriety. We have met the enemy, and (in many cases) he is us.”).
\item See, e.g., GEOFFREY C. HAZARD, JR. \textit{et al., The Law of Lawyer in} § 10.11, at 34-37 (3d ed. 2001) (lamenting that “too often” lawyers frivolously (or “nearly so”) move for or resist disqualification “as a tactical or strategic weapon . . . [to] gain time or other advantage”; arguing that movants who are not current or former clients of the lawyer in question should not have standing; and noting further that if the conflict results in damage to the lawyer’s client, the conflict could be later addressed in a disciplinary proceeding or malpractice action); Steven H. Goldberg, \textit{The Former Client’s Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly}, 72 Minn. L. Rev. 227, 279-80 (1987) (“The time and energy consumed, the delay in the courts, the monetary costs to clients, the rule’s documented potential for abuse by lawyers, the added fuel that the motion brings to an already overheated adversary system, and the possible devastating effect on the client’s ability to continue with the litigation outweigh any positive effect of the successive conflict rule.”).
\item See generally Randall B. Bateman, \textit{Return to the Ethics Rules as a Standard for Attorney Disqualification: Attempting Consistency in Motions for Disqualification by the Use of Chinese Walls}, 33 Duq. L. Rev. 249, 256 (1995) (footnotes omitted) (“In recent years, attorneys have learned that they can use the disqualification rules to their tactical advantage. By using the motion strategically, an attorney can drive up an opponent’s litigation costs, delay a case from being resolved, embarrass the opposing attorney or that attorney’s client, and even force an opposing party to settle. By the early 1980s, the courts and scholars began to recognize that many motions to disqualify were being made for such tactical purposes rather than for the protection of client confidences. To discourage this practice, courts began to provide stricter standards for disqualification.”); supra note 250.
\item See supra Part I.B.
\item In re Cnty. of L.A., 223 F.3d 990, 996 (9th Cir. 2000) (rejecting imputed disqualification and permitting screening in part because the opposite result “raises the specter of abuse: A motion to disqualify a law firm can be a powerful litigation tactic to deny an opposing party’s counsel of choice”).
\item See Shurance v. Planning Control Int’l, Inc., 839 F.2d 1347, 1349 (9th Cir. 1988) (“Allowing [interlocutory] appeal of disqualification motions would greatly enhance their usefulness as a tactical ploy. Accordingly, even if we found this appeal met the requirements of [the interlocutory appeal statute], we would nonetheless exercise our discretion to deny leave to appeal.”). The court was heavily influenced by Supreme Court precedent that had previously denied the right to an interlocutory appeal under different statutory bases, and the Supreme Court in turn reached its results, in part, out of concern for the growing and tactical use of disqualification motions. See supra note 254; supra note 215 (explaining the Supreme Court trilogy).
\item See supra notes 242-45.
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disqualify. And because these concerns are also incorporated into the doctrine of standing, these concerns over tactics often get double-counted in a sense.

In addition to the erosion of standing, appellate review, and the bases for disqualification, courts occasionally take aggressive countermeasures against the movant. Of course, if the disqualification motion is actually frivolous, aggressive countermeasures (e.g., sanctions) are warranted. But when "frivolous" is often confused with "strategic" or "tactical" in this context, moving for disqualification becomes a "dangerous game" for the movant. This backlash against tactical motions to disqualify is based, in part, on the empirically unproven premise that "many, if not most, motions for disqualification are offered merely to gain a tactical advantage over an opponent." Even if the premise is empirically sound, it is analytically trivial, as explained below.

257. See supra note 215 (explaining the Supreme Court trilogy). As Ron Rotunda has noted, this maneuver has not necessarily reduced disqualification motions, but it has succeeded in reducing appellate oversight over federal disqualification law. In Professor Rotunda's words:

The consequence of the dearth of appellate court rulings since Risjord has led to what might be called the death of precedent in attorney disqualification cases. In the pre-Risjord era, there were many disqualification motions, and lower courts found themselves reversed with some regularity. A body of law was developing, and—because the Courts of Appeal were developing it—there were various bright lines and clear tests emerging to guide the lower courts in disqualification motions. A lower court that made up its own rules would be promptly reversed. In the post-Risjord era, trial court judges have almost carte blanche to disqualify or not to disqualify as they see fit. While the U.S. Supreme Court is properly concerned about a conflict among the circuits, and will typically grant review to resolve such a conflict, a conflict among the district courts in attorney disqualification cases is now standard operating procedure. Risjord and the cases in its wake have not reduced the number of disqualification motions, but they have reduced the uniformity in the way they are resolved.


258. RICHARD E. FLAMM, LAWYER DISQUALIFICATION: CONFLICTS OF INTEREST AND OTHER BASES § 1.7, at 17 (2003) (footnotes omitted) ("[L]awyers who file such motions [to disqualify] sometimes find themselves to be targets of motions seeking their own disqualification . . . . Counsel should also consider the fact that, in some jurisdictions, an order denying a disqualification motion may sometimes be accompanied by an order sanctioning the moving party or its counsel for bringing the motion."); id. at 18 (footnotes omitted) (citing cases) ("A court is particularly likely to order sanctions in a situation where the moving party or its counsel declines to withdraw the motion after becoming aware of its evident lack of merit; or where the court finds that the motion was interposed for tactical reasons; such as to harass opposing counsel, delay the proceedings, or escalate the opposing party's costs."); ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 51:1911, 1915 (noting that lawyers have been sanctioned both for using disqualification motions as "purely tactical weapons" and for violating Rule 11 of the Federal Rules of Civil Procedure and state equivalents). See also generally Alex B. Long, Attorney Liability for Tortious Interference: Interference with Contractual Relations or Interference with the Practice of Law?, 18 Geo. J. Legal Ethics 471, 518 (2005) (arguing that a tortious interference claim should be available in limited circumstances against lawyers who file motions to disqualify in bad faith).

c. "Strategic" Considerations Are Irrelevant and "Growth" Concerns Are Unfounded

This Subsection challenges two persistent errors in disqualification analysis: (1) the analytical error that "strategic" or "tactical" considerations are particularly cancerous to our adversarial system; and (2) the empirical error that disqualification motions are significantly increasing.

2. STRATEGIC OR TACTICAL MOTIONS RECONSIDERED

The angst against the "strategery" supposedly motivating disqualification motions is largely unfounded. Here is why: Meritless disqualification motions face both denials and sanctions; and meritorious disqualification motions deserve to be granted or at least seriously considered. As one commentator and one court have footnoted, lawyers of course file motions to disqualify with "tactical or strategic" reasons in mind—they file almost all motions with tactical or strategic reasons in mind.260 Thus, inquiring into the movant's motivations could reveal a strategic advantage nearly every time, and this error-prone inquiry distracts courts from the underlying ethical violations and the appropriate remedy in the circumstances.261

Moreover, disqualification doctrine already controls for actual "strategic" abuse, such as intentional delay, using the threshold devices of standing and waiver. For example, if a movant cannot make a concrete showing of potential harm to itself or at least the proceedings, many courts will deny the movant standing.262 Furthermore, if a motion is delayed unnecessarily (or even delayed at

260. See Reed v. Hoosier Health Sys., Inc., 825 N.E.2d 408, 413 n.4 (Ind. Ct. App. 2005) (distinguishing "harassment" from "tactical advantage": "If moving to disqualify an attorney for a tactical advantage were not allowed, there would not be the hundreds of cases disqualifying attorneys—as litigants would not waste expenses if disqualification were not to their tactical advantage. Although we are not unmindful of Reed's claim and Judge Barnes' concern in this regard, 'harassment' implies something more, which Reed has failed to establish."). Professor Rotunda has succinctly made this point:

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

Ronald D. Rotunda, Resolving Client Conflicts by Hiring "Conflicts Counsel", 62 HASTINGS L.J. 677, 678 n.2 (2011). But see Ronald D. Rotunda, Conflicts Problems When Representing Members of Corporate Families, 72 NOTRE DAME L. REV. 655, 665 (1997) (noting that "the ethics rules look with disdain on conflicts raised for strategic purposes [in motions to disqualify], the fact remains that the implications of such stratagems are hard to ignore").

261. See In re Am. Airlines, 972 F.2d 605, 611 (5th Cir. 1992) ("We recognize of course that disqualification motions may be used as 'procedural weapons' to advance purely tactical purposes. But we do not believe that a priori assumptions concerning the motivations underlying disqualification motions in general justify a more relaxed ethical rule."); cf. FLAMM, supra note 4, at § 25.9 (noting the "formidable task" of discerning the movant's motivation and noting that "such motivation must ordinarily be surmised").

262. See supra Part I (discussing standing doctrine in disqualification cases).
all), courts often hold that the movant has waived the disqualification remedy; in other words, the statute of limitations for disqualification motions is already exactly short.\textsuperscript{263} And, as described above, courts should recognize that disqualification motions are generally much less "strategically" effective today. In federal courts and many state courts, lawyers may no longer take interlocutory appeals over disqualification decisions, preventing many of the yearlong delays that used to follow disqualification motions.\textsuperscript{264}

In light of these abuse-preventing mechanisms, perceived strategy or tactics are potentially penalized twice in the balance: once as a threshold matter in considering standing or waiver and then again as a factor weighing against disqualification. And it is not always fair to do so. For example, courts often consider it "tactical" or "strategic" because the movant did not promptly file the motion to disqualify; instead, the movant chose to avoid incurring the added cost and time required to move to disqualify opposing counsel and to avoid ruffling opposing counsel's feathers on a potentially personal level because the movant had believed that the matter was on the brink of settlement. Simply because the movant waited to file the motion to disqualify until the unsuccessful conclusion of settlement talks or alternative dispute resolution, the movant later is not necessarily acting nefariously or inefficiently, if perhaps tactically or strategically in some sense, by filing the disqualification motion.\textsuperscript{265}

Finally, one clarifying caveat is important before leaving this topic. Certain courts call frivulous motions "strategic" or "tactical." In other words, these courts often deny motions with weak merits as "tactical," "strategic," or "harassing,

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\item[263.] See supra Part I (discussing waiver doctrine in disqualification cases).
\item[264.] See, e.g., supra Part III.A.1.b; In re Am. Airlines, 972 F.2d 605, 611 (5th Cir. 1992) (citations omitted) ("[W]e believe that today there is less reason to suspect tactical motivations behind disqualification motions . . . . This is not due to any moral transformation of the bar, but to the relative absence of tactical advantages that might be secured by disqualification orders under today's law. At that time, disqualification orders were immediately appealable; the greatest tactical advantage offered by these motions was delay, as the trial proceedings were halted while the motion went up on appeal. Under the Firestone regime, however, disqualification motions are not appealable prior to final judgment, thus severely limiting any advantages a party might have achieved through delay."). See generally Shurance v. Planning Control Int'l, Inc., 839 F.2d 1347, 1349 (9th Cir. 1988) ("Allowing [interlocutory] appeal of disqualification motions would greatly enhance their usefulness as a tactical ploy. Accordingly, even if we found this appeal met the requirements of [the interlocutory appeal statute], we would nonetheless exercise our discretion to deny leave to appeal."); In re BellSouth Corp., 334 F.3d 941, 965-66 (11th Cir. 2003) (refusing to issue a writ of mandamus because, "[w]hile we have noted several shortcomings in the decision of the district court, we cannot conclude that Petitioners have demonstrated a clear and indisputable right to relief or demonstrable injustice"). When parties do seek mandamus relief from the trial court's disqualification ruling, however, significant delay can result. See generally In re Shared Memory Graphics LLC, 659 F.3d 1336, 1340, 1342 (Fed. Cir. 2011) (issuing a writ of mandamus nine months after an order disqualifying counsel because the "right to issuance of the writ is 'clear and indisputable'" under the circumstances and because otherwise the party would be "required to proceed through the litigation without counsel of its choice").
\item[265.] See FLAMM, supra note 4, at § 21.7 (explaining that some courts are willing "to overlook the moving party's failure to have sought disqualification more expeditiously in a situation . . . where at least part of the delay is attributable to the pendency of good faith settlement negotiations between the parties").
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while they often grant motions with strong merits. Thus, the strength of the merits—not the movant’s cunningness or deviousness—is actually and correctly the determinative point for these courts.266 Although these courts are taking a hyper-inclusive interpretation of the terms “strategic” and “tactical,” the results are proper. These courts should simply clarify their terminology; other courts, however, should rethink their inquiries to deemphasize “strategery.”

3. THE RISE OF DISQUALIFICATION MOTIONS RECONSIDERED

The wrongful focus on “strategery” has been fueled in part by the questionable assumption that disqualification motions are significantly increasing (and consequently must be stemmed). In actuality, however, published federal disqualification decisions have declined slightly over the last decade.267 This decline is doubly notable because—while the number of lawyer disqualification proceedings was seemingly dropping or holding constant—the total number of federal cases was increasing.268 The following two line charts track the last decade of

266. For example, observe how the court, perhaps inadvertently, blends the tactical factor with the merits:

The final factor, whether the motions to disqualify have been used as a tactical device or a means of harassment, does not weigh against disqualification. Moving Defendants filed their motions roughly one month after [the plaintiff] filed its complaint, and they also have a legitimate concern—they revealed to current [opposing] attorneys confidential information regarding the extent of their potential liability and strategies for dealing with that liability. There is a very real risk that the confidential information at issue could be used against Moving Defendants in the instant proceedings. Roosevelt Irrigation Dist. v. Salt River Project Agric. Imp. & Power Dist., 810 F. Supp. 2d 929, 985-86 (D. Ariz. 2011). Thus, the “very real risk” that the lawyers might use material confidential information against the former client rendered the motion “legitimate,” as opposed to a “tactical device” or “means of harassment.” See id. The Texas Supreme Court gave us another example, stating that
to prevent a motion to disqualify counsel from being used as a dilatory tactic, trial courts must strictly adhere to an exacting standard when considering such motions[:] When contemplating whether disqualification of counsel is proper, the court must determine whether the matters embraced within the pending suit are substantially related to the factual matters involved in the previous suit.

NCNB Texas Nat’l Bank v. Coker, 765 S.W.2d 398, 399-400 (Tex. 1989). The substantial relationship test went directly to the heart of the merits in that case, not “strategery.”

267. For federal cases over the decade (2003 to 2012; N=270), the number of published disqualification decisions has not risen each year. Although the number of unpublished decisions is higher, it too has held relatively constant since 2007. The spike in unpublished decisions seems just as likely the result of Westlaw’s publishing prowess as the result of changes in disqualification practice. Without a full study of unpublished decisions, however, we must view the results with caution. But even combining published and unpublished decisions, the total number of lawyer disqualification proceedings comprises only approximately one-hundredth-of-one-percent of all federal cases.

The published decisions by case type and year were as follows:

**NUMBER OF REPORTED FEDERAL DISQUALIFICATION DECISIONS: 2003-2012**

![Chart showing the number of reported federal disqualification decisions by year from 2003 to 2012.](chart.png)

**CHART TWO:** The Number of Reported Federal Disqualification Decisions by Year

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269. To be counted, the cases had to concern and adjudicate a motion to disqualify. Thus, non-dispositive or merely analogous cases were not counted. See, e.g., Lambright v. Ryan, 698 F.3d 808, 826 (9th Cir. 2012) (finding disqualification motion moot); United States v. Scruggs, 691 F.3d 660, 669 (5th Cir. 2012) (raising ineffective assistance of counsel claim based on alleged conflict). Motions for *pro hac vice* admission or class certification were not included. See, e.g., Keiholtz v. Lennox Hearth Prods. Inc., 268 F.R.D. 330, 338 (N.D. Cal. 2010); P.G. Oil Corp. v. Motiva Enters., LLC, 397 F. Supp. 2d 1359, 1363-64 (S.D. Fla. 2005). *Pro hac vice* revocation cases, however, were included in the count in circumstances in which they were the functional equivalent of a disqualification motion. See, e.g., Rubio v. BNSF Ry. Co., 548 F. Supp. 2d 1220, 1221 (D.N.M. 2008) (revoking *pro hac vice* admission after attorneys provided financial assistance to clients). Although bankruptcy cases involving motions to disqualify existing counsel were obviously included, bankruptcy cases
Because these charts rely exclusively on reported federal decisions, they cannot definitively answer the question whether disqualification motions are still (if ever) significantly rising. These charts and comparisons, however, should give one pause before assuming the sky is falling under the weight of disqualification motions.

In sum, today’s courts generally should not waste their time searching for “strategic” or “tactical” motives; little reason exists to hyper-scrutinize and rough-guess movant’s motives, contrary to the approach to almost all other motions. Courts should instead look for frivolousness or unfairness. And they should change their orientation and terminology to reflect this better approach. Finally absent further and contrary empirical data, they should not assume that disqualification motions are unhealthily numerous and increasing.

that discussed conflicts in connection with applications for employment or fees were not included. See, e.g., In re El Comandante Mgmt. Co., 395 B.R. 807, 818 (D.P.R. 2008) (affirming request for compensation); In re JMK Constr. Grp., Ltd., 441 B.R. 222, 225 (Bankr. S.D.N.Y. 2010) (denying application to represent multiple debtors).

270. Cf., e.g., In re Am. Airlines, 972 F.2d 605, 611 (5th Cir. 1992) ("[W]e do not believe that a priori assumptions concerning the motivations underlying disqualification motions in general justify a more relaxed ethical rule.").
4. Disqualification as the Presumption, Not the Burden

Courts state that they should review disqualification motions with “extreme caution” and “strictly adhere” to an “exacting standard” of review.\(^{271}\) They also state that the movant carries a “heavy burden,”\(^{272}\) and the movant “must meet a ‘high standard of proof’ before a lawyer is disqualified.”\(^{273}\) But without any specific metrics, these statements mean little.\(^{274}\) Furthermore, this burden is theoretically cancelled out by an equally well-recited maxim: Any doubts should be resolved in favor of disqualification.\(^{275}\) Moreover, courts never explicitly justify why the aggrieved current or former client (or other target of alleged misconduct) should bear the burden of persuasion or perhaps even production to disqualify the allegedly unethical lawyer.\(^{276}\) In addition to placing less work on the lawyers who allegedly violated the ethical rules, placing the burdens on the movants might mean that the movants have to expose or otherwise jeopardize their confidential or privileged information to prove up and prevail on their motions to disqualify.\(^{277}\)

Interestingly, but discretely, the ethical rules already hint at a better approach to disqualification than the traditional approach. Putting aside irrelevant exceptions, the ethical rule banning lawyers as witnesses suggests this better approach:

\(^{271}\) In re Nita S.A. de C.V., 92 S.W.3d 419, 422 (Tex. 2002) (“[T]he trial court must strictly adhere to an exacting standard to discourage a party from using the motion as a dilatory trial tactic.”); Wyeth v. Abbott Labs., 692 F. Supp. 2d 453, 457 (D.N.J. 2010); Freeman v. Chi. Musical Instrument Co., 689 F.2d 715, 722 (7th Cir. 1982) (Disqualification “motions should be viewed with extreme caution for they can be misused as techniques of harassment”); Flamm, supra note 4, at § 23.2 (footnotes omitted) (noting that “courts have frequently been reminded that disqualification motions deserve serious, conscientious, and conservative treatment” and “that courts should approach such motions warily—with skepticism and extreme caution—if not outright suspicion”).


\(^{273}\) Bennett Silvershein Assocs., 776 F. Supp. at 802 (quoting Evans v. Artek Sys. Corp., 715 F.2d 788, 791 (2d Cir.1983) and citing Gov’t of India v. Cooks Indus., Inc., 569 F.2d 737,739 (2d Cir. 1978)).

\(^{274}\) Although the following opinion is poorly reasoned and empirically incorrect in parts (e.g., it overstates the trend to jettison the “appearance of impropriety” standard and understates the number of states continuing to use the standard in some form), it does contain one of the most detailed discussions of burdens: Ark. Valley State Bank v. Phillips, 171 P.3d 899 (Okla. 2007).

\(^{275}\) See Flamm, supra note 4, at §§ 18.2, 23.2; Bennett Silvershein Assocs., 776 F. Supp. at 802; Coffelt v. Shell, 577 F.2d 30, 32 (8th Cir. 1978) (per curiam) (quoting Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975)).

\(^{276}\) Although many examples exist, I do not mean to imply that all courts place every burden on the movant. See, e.g., Hayes v. Cent. States Orthopedic Specialists, Inc., 51 P.3d 562, 569 (Okla. 2002) (holding “that before being disqualified for having hired a non-lawyer employee from its opponent, the hiring firm should be given the opportunity to prove that the non-lawyer has not revealed client confidences to the new employer and has been effectively counseled and screened from doing so. If such proof is made to the court’s satisfaction, the court should deny the motion to disqualify the non-lawyer’s new firm.”). On burdens and presumptions generally, see Fleming James Jr., Burdens of Proof, 47 VA. L. REV. 51 (1961), for example.

\(^{277}\) Cf. Model Rules of Prof’l Conduct R. 1.9 cmt. 3 (2009) (“A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter.”).
“A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless . . . disqualification of the lawyer would work substantial hardship on the client.” To apply this rule to all disqualification cases, then, a lawyer would be disqualified for violating the applicable ethical rule “unless disqualification of the lawyer would work substantial hardship on the client.” This approach suggests a better (or at least clearer) burden-allocation. With respect to the burden as to whether the lawyer’s conduct violates the applicable ethical rule (or if relevant in the jurisdiction, creates the appearance of impropriety), the burden of production could stay on the movant, but the burden of persuasion should fall on the lawyer—who should stand ready to defend against professional misconduct allegations once the movant has lodged a material allegation. If the court concludes that the lawyer transgressed the ethical rule, the lawyer (or the lawyer’s firm) should then bear the burdens of production and persuasion to avoid disqualification by showing sufficient client (or other) prejudice. This approach seems better than the status quo for two reasons.

First, disqualification would be the default remedy. This change would effectuate the analogous and well-rehearsed maxim that doubts should be resolved in disqualification’s favor. The change would also eliminate or reduce the heavy and somewhat ambiguous burden on the movant, while possibly increasing deterrence and certainty. At a minimum, the players would more clearly know the starting point. Second, although the substantial hardship test is already more than explicit in the current disqualification balancing test, it is worth highlighting in this form, which suggests an equitable failsafe to an otherwise warranted disqualification. In a situation in which the lawyer could show that disqualification would work a “substantial hardship” on the client—and one that is relatively weightier than the movant’s hardship—disqualification...
might have to be avoided. If courts would more readily order the disqualified lawyer to pay, waive, and disgorge the various fees and costs of the client resulting from the disqualification, however, a showing of "substantial hardship" would be rare.

Although it would and should be rare, it would be possible. For example, if the lawyer had taken the case pro bono or on a contingency fee basis, the client might be unable to retain another lawyer on the same (or any) terms. For indigent or perhaps even most clients, this inability might mean that these clients would be left without an attorney. Thus, the client would suffer a substantial hardship and, on balance, probably should not lose the lawyer. In such situations, the judge should (1) mitigate the continuing conflict in whatever way possible and proportionate (e.g., excluding from evidence confidential information improperly derived from the should-have-been-disqualified lawyer) and (2) in the event of a substantial violation, submit a detailed letter or order to the disciplinary authorities at an appropriate time to deter the lawyer from future violations.

283. See generally FLAMM, supra note 4, at § 17.3 (footnotes omitted) (observing that "a majority of the reported cases . . . have declined to deny disqualification motions on substantial hardship grounds" and to prevail "a party typically must show that the prejudice it alleges is substantial—if not extreme"); cf. In re Dresser Indus., Inc., 972 F.2d 540, 545 (5th Cir. 1992) (noting that the disqualified lawyer "might have been able to continue his dual representation if he could have shown some social interest to be served by his representation that would outweigh the public perception of his impropriety").

284. See infra Part III.C (proposing increased cost-shifting).

285. Cf. FLAMM, supra note 4, at § 24.4 (noting that courts are more likely to grant disqualification when the lawyer's client has already retained substitute counsel or when the client "is known by the court to have the financial resources to do so"); id. at § 24.4 (noting courts' concern if the client will face "difficulty" finding "suitable" substitute counsel).

286. As noted above, this comment assumes for the moment that the court will not order the disqualified lawyer to pay successor counsel's future fees. This assumption runs contrary to the cost-shifting recommendation in Part III.C below.

287. See, e.g., Dresser, 972 F.2d at 545 n.12 ("We are mindful, however, that the Texas rules' allowance of some concurrent representation is based, in part, on a concern that concurrent representation may be necessary either to prevent a large company, such as Dresser, from monopolizing the lawyers of an area or to assure that certain classes of unpopular clients receive representation. Although we do not now reach the matter, our consideration of social benefit to offset the appearance of impropriety might allow such a representation if the balance clearly and unequivocally favored allowing such representation to further the ends of justice.").

288. See, e.g., MODEL CODE OF JUDICIAL CONDUCT R. 2.15(B), (D) (2007) (requiring judges either to inform the disciplinary authority of lawyers who significantly violate the rules of professional conduct or, at a minimum, to take other "appropriate action" against those lawyers). For additional authority on taking a flexible approach to mitigate harm in the case and reporting the lawyer to the disciplinary authority, see Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121, 1127 (N.D. Ohio 1990) (concluding that, although disqualification was not warranted in the circumstances, the firm must "choose how to extricate itself from a conflict which it did not create, but to which it was unethically slow in responding" and reporting the firm to the disciplinary authorities); John F. Sutton, Jr., Introduction to Conflicts of Interest Symposium: Ethics, Law, and Remedies, 16 REV. LITIG. 491, 493 (1997) ("The appropriate action for a court, upon learning during a disqualification hearing of a violation of disciplinary standards, is to notify the disciplinary authority, which should then determine fault and punishment."). As Bruce Green has argued, the trial court alternatively could refrain from disqualifying the lawyer but could otherwise directly sanction the lawyer (using, e.g., monetary sanctions). See generally Bruce A. Green, Conflicts of Interest in Litigation: The Judicial Role, 65 FORDHAM L. REV. 71 (1996).
This judicial report to the disciplinary authorities not only deters future violations but also discharges the courts’ duty to report. 289 The duty is not hard to discharge: forwarding a copy of the well-written order denying disqualification on hardship grounds to the disciplinary authority should suffice to prompt and assist an investigation. Moreover, in my and others’ experience, a disciplinary complaint receives more thorough attention when the complainant is a judge. 290 These influential referrals would be a needed improvement; 291 courts rarely make them today. 292 Indeed, rather than refer the matter to the disciplinary authority, courts occasionally immunize the attorney to the extent possible by stating that the issue was “close” or that the disqualification order does not reflect on the “integrity,” “honesty,” or “competence” of the disqualified attorney. 293 Of course, my referral recommendation applies only to disqualification based on substantial

289. See Model Code of Judicial Conduct R. 2.15(B), (D) (2007). I do not want to imply that the deterrence rationale would always work. For example, some attorneys in these matters seem completely oblivious to ethical consequences; others seem firmly (albeit unreasonably) convinced in the correctness or justness of their actions.

290. James Lindgren, Toward a New Standard of Attorney Disqualification, 1982 AM. B. FOUND. RES. J. 419, 436-37 (1982) (“[A] disciplinary agency is not likely to ignore a complaint (1) where the complainant is a judge, obviously someone who understands the intricacies of practice, (2) where a judge, familiar with the facts of the particular case, thinks that a disciplinary rule was (or may have been) violated, and (3) where the potential wrongdoing is a conflict of interest, a situation traditionally handled by an ethical code.”). Although it is rarely mentioned or appropriate to mention, the prestige and authority of the judge also might influence disciplinary authorities’ increased attention to judges’ complaints.

291. See, e.g., Linda Ann Winslow, Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest, 62 WASH. L. REV. 863, 874 (1987) (“Because the federal courts generally do not sanction attorneys for violations resulting in successful disqualification motions, the potentially inherent risks in ignoring conflicts are significantly lessened. The gamble is that the firm will lose money, not that an attorney with the firm will be disbarred.”).

292. For example, in the last decade of published federal disqualification decisions, courts made only a single disciplinary referral. See Reese v. Virginia Int’l Terminals, Inc., 894 F. Supp. 2d 665, 676 (E.D. Va. 2012) (noting that, because the concurrent conflict of interest did not cause “articulable prejudice” to the movant, the appropriate remedy was referral to the state bar, not disqualification); cf. Parker v. Pepsi-Cola Gen. Bottlers, Inc., 249 F. Supp. 2d 1006, 1013 (N.D. Ill. 2003) (declining to disqualify counsel but “encouraging him” to seek ethical and professional responsibility training outside his law firm at the earliest possible opportunity”). It is possible, however, that courts made additional referrals without noting those referrals in the published decisions.

293. Advanced Messaging Techs., Inc. v. EasyLink Servs. Int’l Corp., 913 F. Supp. 2d 900, 903 (C.D. Cal. 2012) (ordering law firm’s disqualification but finding it “unfortunate, because there is not a molecule of evidence that [the firm] did anything other than act with integrity and in a manner consistent with the highest traditions of the legal profession”); HealthNet, Inc. v. Health Net, Inc., 289 F. Supp. 2d 755, 763 (S.W. Va. 2003) (disqualifying lawyer and firm but noting that “[n]othing in this opinion should be read to call Mr. Guthrie’s character into question, or the character of anyone at the Allen firm” who are all “lawyers of the highest integrity”); United States v. Bros., 856 F. Supp. 370, 379-80 (M.D. Tenn. 1992) (“The Court notes, however, that Mr. Strianse’s disqualification from this matter does not reflect on his integrity or competence as a lawyer. Honest and competent lawyers can and do disagree on close questions regarding the interpretation of the Canons of legal ethics which are ‘not drawn for Holmes’ bad man’ who wants to know just how many corners he may cut without running into trouble with the law. They are drawn rather for the ‘good man,’ or the ethical man, as buoys to assist him in charting his professional conduct.”) (quoting in part Irving K. Kaufman, Comment, The Former Government Attorney and the Canons of Professional Ethics, 70 HARV. L. REV. 657, 657 (1957)).
ethical violations. If the disqualification occurred on another basis, such as the appearance of impropriety, referral generally is inappropriate.\textsuperscript{294}

In sum, the presumption of disqualification, with a "substantial hardship" safety valve, offers a better approach to disqualification cases.

5. THE APPEARANCE OF IMPROPRIETY STANDARD IN ACTUALITY

Many courts will consider whether the lawyer's representation creates an appearance of impropriety. The appearance of impropriety standard has itself gained an appearance of impropriety, being frequently dismissed as "nebulous and now largely disfavored."\textsuperscript{295} Furthermore, it is highly interesting that some courts believe that disqualification is necessary to avoid or mitigate the appearance of impropriety, while other courts believe the exact opposite: that disqualification would cause an appearance of impropriety. These fully contradictory conclusions are a testament to the standard's variable interpretations: It means different things to different courts.\textsuperscript{296} This Section offers two contributions to the controversial standard: (a) a description of how courts actually treat the standard; and (b) a justification of the standard.

a. Appearance of Impropriety in Practice

In 1983, the ABA removed the appearance of impropriety standard from the ethical rules.\textsuperscript{297} Many courts and commentators have since stated or assumed that the appearance of impropriety would likewise be removed from disqualification analysis.\textsuperscript{298} Those assumptions have turned out to be mostly false. Many states

\textsuperscript{294} With respect to the appearance of impropriety, for example, it is no longer a basis for lawyer discipline. Of course, many courts still inquire into the appearance of impropriety for disqualification analysis, as discussed in Part I and below.

\textsuperscript{295} W. William Hodes, Getting Lawyer Disqualification Straight Book Review, Lawyer Disqualification: Conflicts of Interest and Other Bases by Richard E. Flamm, 802, 17 GEO. J. LEGAL ETHICS 339, 341 n.6 (2004).

\textsuperscript{296} Some courts have done a decent job of articulating when, in their opinion, an "appearance of impropriety" warrants disqualification. See, e.g., In re Polypropylene Carpet Antitrust Litig., 181 F.R.D. 680, 697 (N.D. Ga. 1998) (recounting two-part test for disqualifying appearances: "First, there must be at least a reasonable possibility that some specifically identifiable impropriety did occur, even if no evidence exists of actual wrongdoing. Second, the likelihood of public suspicion or obloquy [must] outweigh the social interest that would be served by a lawyer's continued participation in a particular case") (internal quotation marks omitted); Kathleen Maher, Keeping Up Appearances, PROF. LAW., 2005, at 1, 12.

\textsuperscript{297} The standard still, however, remains very much a part of judicial ethics. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 1.

\textsuperscript{298} See, e.g., ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 51:1906 (noting a "trend" in the states of rejecting the appearance of impropriety standard and stating that "most states do not regard the appearance of impropriety as a sufficient ground for disqualification"); 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, 228 n.93 (1982) ("Nevertheless, since the reasons for rejecting the appearance of impropriety test in disciplinary actions apply with equal if not greater force in disqualification actions, it is likely that courts will also reject disqualification motions based solely on a potential for improper appearances.").
fully retain the standard, and many more states retain the standard “as a factor” (but not as a sufficient basis for disqualification). To the extent discernible, this Subsection breaks down what states in fact do.

The following chart shows how the states actually use the appearance of impropriety standard in disqualification cases.

The states fall into four camps. Sixteen states have concluded that an appearance of impropriety can be sufficient, by itself, to justify disqualification of a lawyer or law firm. These states are Alaska, Arkansas, Hawaii, 

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299. See generally FLAMM, supra note 4, at § 18.5 (discussing the history of the appearance of impropriety doctrine in disqualification cases and providing examples of states’ current treatment of the standard).
300. Griffith v. Taylor, 937 P.2d 297, 302 (Alaska 1997). But see id. at 306 n.18 (“We note, however, that the law frowns upon imposing disciplinary action based solely on the appearance of impropriety.”).
301. Sturdivant v. Sturdivant, 241 S.W.3d 740, 745, 747 (Ark. 2006); Weigel v. Farmers Ins. Co., 158 S.W.3d 147, 153 (Ark. 2004); First Am. Carriers, Inc. v. Kroger Co., 787 S.W.2d 669, 671 (Ark. 1990) (“The fact that Canon 9 is not in the Model Rules does not mean that lawyers no longer have to avoid the appearance of impropriety.”).


307. This placement is an estimation based on the available authority. See People v. Davenport, 760 N.W.2d 743, 748-50 (Mich. Ct. App. 2008) ("Our caselaw does not offer a wealth of guidance about the trial court's inquiry with regard to a conflict of interest, . . . The trial court erroneously focused on whether defendant could prove actual prejudice arising from the conflict of interest, instead of requiring the prosecutor to prove the absence of impropriety."); id. at 748 n.3 (quoting People v. Doyle, 406 N.W.2d 893, 899 (Mich. Ct. App. 1987)) ("The general rule is that a conflict of interest involving the elected county prosecutor himself requires recusal of the prosecutor and the entire staff. Since assistant prosecutors act on behalf of the elected county prosecutor and are supervised by him, the policies of fairness to the defendant and the avoidance of an appearance of impropriety require this result."); Ackerman v. Miotke, 2006 No. 265004, at *4 n.3 (Mich. Ct. App. 2006) ("The Model Rules, unlike the Judicial Canons of Ethics, do not include a prohibition against the appearance of impropriety. However, while the conduct at issue here does not technically violate any Rule, it does make us uneasy. We note that where, as here, there is an appearance of impropriety, inquiry is almost sure to follow, and attorneys are well advised to avoid conduct that comes so near to the line.").


309. State v. Van Dyck, 827 A.2d 192, 193-95 (N.H. 2003) (reversing trial court's disqualification of an attorney because he would not be a "necessary witness"); Rogowicz v. O'Connell, 786 A.2d 841, 844 (N.H. 2001). But see N.H. RULES OF PROF'L CONDUCT R. 1.7 (Rule 1.7 was amended in 2005 and appearance of impropriety was not included).


311. In re Estate of Pedrick, 482 A.2d 215, 218 n.3 (Pa. 1984); City of Philadelphia v. Dist. Council 33, Am. Fed'n of State, County & Mun. Employees, AFL-CIO by Stout, 469 A.2d 1051, 1053 (Pa. 1983); see also Caracciolo v. Ballard, 687 F. Supp. 135, 160 (E.D. Pa. 1988) (internal citations omitted) ("Under DR9-101(B), a lawyer is prohibited from accepting private employment 'in a matter in which he had substantial responsibility while he was a public employee.' The prohibition applies even if the lawyer is guilty of no impropriety, because accepting employment under such circumstances can give the appearance of impropriety. Moreover, the Pennsylvania courts have concluded that if a lawyer is disqualified from representing a particular litigant under this rule, his or her entire firm is barred from participation in the suit."). But see Griffin-El v. Beard, CIV. A. 06-2719, 2009 WL 2929802, at *10 (E.D. Pa. Sept. 8, 2009) ("Therefore, to the extent that this Court has discretion to disqualify attorneys for failing to avoid the appearance of impropriety even where there has not been a violation of an ethical rule, the imposition of such a sanction on the facts of this case would be excessive and inappropriate. Defendants have not presented the Court with any case law from this District where a court disqualified an attorney for failing to avoid the appearance of impropriety in the absence of an ethical rule
Washington, and West Virginia. Thus, contrary to courts and commentators' pronouncements and predictions, the appearance of impropriety is still a viable standard in approximately one-third of the states.

Twenty states have decided that, although an appearance of impropriety is insufficient by itself to warrant disqualification, courts may consider it as a factor weighing in the disqualification balance. These states are Arizona, Califor-
nian, Connecticut, Georgia, Illinois, Iowa, Maryland, Massa-
chusetts, Missouri, Nevada (for public lawyers), North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Utah, Vermont, Virginia,

Villalpando v. Reagan, 121 P.3d 172, 177 (Ariz. Ct. App. 2005); Amparano v. ASARCO, Inc., 93 P.3d 1086, 1094 (Ariz. Ct. App. 2004); Turbin v. Superior Court, 797 P.2d 734, 738 (Ariz. Ct. App. 1990) (“We hold today that the appearance of impropriety ... still has a definite place in the balancing test the trial court must apply in resolving the question of disqualification.”).


318. Bergeron v. Mackler, 623 A.2d 489, 494 (Conn. 1993) (“Although considering the appearance of impropriety may be part of the inherent power of the court to regulate the conduct of attorneys, it will not stand alone to disqualify an attorney in the absence of any indication that the attorney’s representation risks violating the Rules of Professional Conduct.”); State v. Cummings, No. CR0816223840, 2010 WL 937209, at *3 (Conn. Super. Ct. Feb. 16, 2010).


324. This is an estimation based on the available authority. See In re Carey, 89 S.W.3d 477, 494 (Mo. 2002) (noting that the appearance of impropriety must be rational rather than fanciful); Polish Roman Catholic Saint Stanislaus Parish v. Hettenbach, 303 S.W.3d 591, 602-03 (Mo. Ct. App. 2010); see also Sakalowski v. Metron Serv., Inc., No. 4:10CV02052 AQF, 2011 WL 2838129, at *5 (E.D. Mo. July 18, 2011) (citation omitted) (“The Court also believes that allowing Counsel to represent Plaintiffs here has the appearance of impropriety that might undermine public confidence in the judicial system,” citing two Missouri state cases, one criminal and one civil). It appears, however, to be sufficient alone in criminal cases. State ex rel. Burns v. Richards, 248 S.W.3d 603, 605 (Mo. 2008) (“In this situation, the appearance of impropriety, without more, requires disqualification, and respondent abused his discretion in failing to order it.”); State ex rel. Horn v. Ray, 325 S.W.3d 500, 511 (Mo. Ct. App. 2010) (“Even if no scheme exists here, counsel’s attempt to represent both the defendant and the victim in the State’s prosecution of the defendant for assaulting the victim threatens the integrity of our judicial system and undermines public confidence in the system because of the appearance of impropriety.”).

325. As applied to private attorneys, an appearance of impropriety is insufficient to warrant disqualification. For public lawyers, however, it can be sufficient in extreme cases. See Liapis v. Dist. Court, 282 P.3d 733, 737 (Nev. 2012); Brown v. Eighth Judicial Dist. Court ex rel. County of Clark, 14 P.3d 1266, 1270 (Nev. 2000).


327. This placement is an estimation based on the limited authority. See Cont’l Res., Inc. v. Schmalenberger, 656 N.W.2d 730, 738 (N.D. 2003) (quoting Heringer v. Haskell, 536 N.W.2d 362, 366 (N.D. 1995)) (“Although the North Dakota Rules of Professional Conduct ‘do not use the language, the ‘appearance of impropriety’ standard has not been wholly abandoned in spirit.’”).
Virginia, Wisconsin, and Wyoming. Thus, these twenty states, the plurality, conclude that an appearance of impropriety may be considered in disqualification analysis and “in extreme cases” may even warrant disqualification by itself. To be sure, many of the opinions express distaste for the standard, and these states rarely disqualify attorneys on the sole basis of an appearance of impropriety. They do, however, explicitly consider it.

Only eight states, in comparison, have explicitly rejected the standard. These


329. This placement is an estimation based on the limited authority. See State ex rel. Bryant v. Ellis, 724 P.2d 811, 814 (Or. 1986); In re Jans, 666 P.2d 830, 833 (Or. 1983) (internal citation omitted) (“Finally, although the existence of an ‘appearance of impropriety’ is not, of itself, a basis for discipline, such conduct by a lawyer, if known to others, adversely affects public confidence in the legal profession.”).


331. This placement is an estimation based on the limited authority. See State v. McClellan, 216 P.3d 956, 961 (Utah 2009) (“The rebuttable presumption of shared confidences which we adopt today avoids the drastic result of disqualifying an entire county attorney’s office based on only the appearance of impropriety, without regard to whether any confidence was actually breached or any prejudice to the defendant actually resulted, while at the same time ensuring the rights of the accused are protected.”); Featherstone v. Schaerrer, 34 P3d 194, 200 (Utah 2001) (“In fact, even when there are concerns that such disqualification motions are being ‘misused for tactical advantage in litigation,’ those concerns may be outweighed by the ‘appearance of impropriety... coupled with violations of the Code of Professional Responsibility’ present in the case.” (quoting Margulies ex rel. Margulies v. Upchurch, 696 P.2d 1195, 1204-05 (Utah 1985))).


335. This placement is an estimation based on the limited authority. See Bolin v. State, 137 P.3d 136, 145 (Wyo. 2006); Johnson v. State, 61 P.3d 1234, 1243 (Wyo. 2003) (“We decline to adopt an “appearance of impropriety” standard and adopt instead a ‘function approach,’ which focuses on preserving confidentiality and avoiding positions adverse to the client.”); id. at 1243 n.8 (“We are aware that there are prosecutorial offices where there is only a single prosecutor and many may be no larger than two or three persons. Two universal guidelines should apply: (1) The essential goal is to avoid actual conflicts, as well as the appearance of impropriety; and (2) the record should clearly reflect what precautions were used to attain that goal.”); Hart v. State, 62 P.3d 566, 572-73 (Wyo. 2003); Bevan v. Fix, 42 P.3d 1013, 1030 (Wyo. 2002) (quoting Carlson v. Langdon, 751 P.2d 344, 349 (Wyo. 1988)); Engberg v. Meyer, 820 P.2d 70, 84 (Wyo. 1991) (“Furthermore, in Wyoming, we require something more than simply assertions of impropriety.”); Carlson v. Langdon, 751 P.2d 344, 349 (Wyo. 1988) (noting that an “irrebutable presumption with respect to the individual attorney offers greater assurance that confidential information will be protected and assists in avoiding any appearance of impropriety.”)
states are Alabama, Colorado (arguably), Kansas, Mississippi, Nebraska, New Jersey, Oklahoma and South Carolina. Thus, only fifteen percent of the states actually follow the "common understanding" that the standard is dead.

Finally, six states escape reliable categorization. They have either not issued


337. This placement is an estimation based on limited civil case interpretations and recent criminal case interpretations. See, e.g., Food Brokers, Inc. v. Great W. Sugar Co., 680 P.2d 857, 858 (Colo. Ct. App. 1984) (refusing to apply the appearance of impropriety standard to a former client conflict of interest allegation). Because of a 2002 statutory amendment, the appearance of impropriety standard is no longer a viable factor when the defendant seeks to disqualify the prosecution. People v. Loper, 241 P.3d 543, 546-47 (Colo. 2010). But see People v. Shari, 204 P.3d 453, 464-65 (Colo. 2009) (Bender, J., dissenting) (arguing that the disqualification statute does not eliminate the court's "inherent power to ensure both the reality and appearance of integrity and fairness in proceedings before them; and to that end, they necessarily retain the discretion to disqualify attorneys from further representation."); People ex rel. E.L.T., 139 P.3d 685, 688 (Colo. 2006) (Bender, J., dissenting); People ex rel. N.R., 139 P.3d 671, 678 (Colo. 2006) (Bender, J., dissenting). In other contexts, however, the standard appears viable. Osborn v. Dist. Ct., 619 P.2d 41, 45 (Colo. 1980) (disqualifying defense attorney on the basis of an appearance of impropriety because she had previously participated in the prosecution); cf. Murphy v. People, 863 P.2d 301, 305 (Colo. 1993) (["D]ue to the inherent conflict of interest as well as the appearance of impropriety, we hold that the district court erred in appointing the public defender who represented Murphy in the trial below to assist in the litigation of Murphy's post-conviction proceedings.").


339. This placement is an estimation based on available authority. See Wilbourn v. Stennett, Wilkinson & Ward, 687 So. 2d 1205, 1216-17 (Miss. 1996); Aldridge v. State, 583 So. 2d 203, 205 (Miss. 1991).


341. O Builders & Associates, Inc. v. Yuna Corp. of NJ, 19 A.3d 966, 981 (N.J. 2011); In re Supreme Court Advisory Comm. on Prof'l Ethics Opinion No. 697, 911 A.2d 51, 53 (N.J. 2006) (footnote omitted) ("In light of the 2004 amendments to the Rules of Professional Conduct that eliminated New Jersey's long-standing prohibition against the appearance of impropriety and the contemporaneous adoption of R.P.C. 1.8(k), we hold that the appearance of impropriety standard no longer retains any continued validity.").

342. Ark. Valley State Bank v. Phillips, 171 P.3d 899, 909, 911 (Okla. 2007); Prospective Inv. & Trading Co., Ltd. v. GBK Corp., 60 P.3d 520, 523 (Okla. Ct. App. 2002); see also In re Application of Oklahoma Bar Ass'n to Amend Oklahoma Rules of Prof'l Conduct, 171 P.3d 780 (Okla. 2007) (approving amendments to Oklahoma Rules while striking the language in the comment on the "question begging" status of appearance of impropriety). But see Faulkner v. State, 2011 OK CR 23, 260 P.3d 430, 431-32, 433 ("This Court analyzes the circumstances of an attorney prosecuting a former client under the rules of professional conduct, and under case authority discussing the appearance of impropriety on the part of an attorney . . . . This Court found that '[w]here the appearance of a conflict of interest arises, the appellant bears the burden to show actual harm.");

any decision at all or issued only vague or conflicting decisions. These states are Delaware, Florida, Indiana, Montana, New York, and Texas.

344. It appears to be insufficient alone in criminal cases. Seth v. State, 592 A.2d 436, 443 (Del. 1991) ("Absent the existence of a conflict, we further will not bar the Lend-A-Prosecutor program based on an unarticulated concern for the ‘appearance of impropriety.’"). It appears to be undecided in civil cases, however. See J.E. Rhoads & Sons, Inc. v. Wooters, CIV.A. 14497, 1996 WL 41162, at *5 (Del. Ch. Jan. 26, 1996) ("However, if a conflict between the parties arises which involves the documents from the original transaction, then that law firm best serves the legal system if it heeds Canon 9 and avoids ‘even the appearance of impropriety.’"); Deemer Steel Casting Co. v. E. Coast Erectors, Inc., No. CIV.A. A.10593, 1990 WL 143840, at *5 n.1 (Del. Ch. Sept. 28, 1990) (denying disqualification but noting ‘I am constrained to add that were I free to decide the instant motion solely on the basis of appearances, the motion would be granted. . . . However, the Comment to Rule 1.10 makes it clear the possible ‘appearance of impropriety’ is not an appropriate criterion by which to evaluate imputed disqualification. The disqualification motion is denied in this specific instance, but only because of the clear state of the record. The result reached here should not be misread to suggest that in future disqualification motions, this Court will not seriously and intensively scrutinize the conduct of attorneys practicing before it."); Emerald Partners v. Berlin, 564 A.2d 670, 679 (Del. Ch. 1989) (‘‘Although Kramer’s per se rule mandating disqualification may not now be controlling inasmuch as it was based on the now superseded Canon 9 of the Code of Professional Responsibility, the same policy concerns expressed in it are present here.’’). But see Deptula v. Steiner, No. CIV.A.02C09006RFS, 2003 WL 23274846, at *1 (Del. Super. Ct. Dec. 15, 2003) (‘‘Although the Court must protect against the appearance of impropriety, the Court must also be cautious when deciding motions to disqualify when the facts are not clear. A litigant should, absent a genuine conflict of interest, be able to choose his counsel. The Court must be wary so as to prevent motions to disqualify from being used as just another weapon in the litigation arsenal.’’ (quoting Bowman v. Bank of Delaware, No. CIV.A. 87-44-CMW, 1988 WL 54669, at *3 (D. Del. May 24, 1988))); Cramer v. Pepper ex rel. Estate of Pepper, No. 83C-JN-10, 1985 WL 635619, at *4 (Del. Super. Ct. June 24, 1985) (internal citations omitted) (‘‘The appearance of impropriety alone is not enough to justify disqualification of counsel.’’).

345. Compare State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 633-34 (Fla. 1991) (‘‘[W]e do not believe that a different standard now applies because the specific admonition to avoid the appearance of impropriety does not appear in the Rules of Professional Conduct. . . . Accordingly, we disagree with the court below that actual proof of prejudice is a prerequisite to disqualification under these circumstances.’’), with Armor Screen Corp. v. Storm Catcher, Inc., 709 F. Supp. 1309, 1320 (S.D. Fla. 2010) (noting the split in authority and finding that ‘‘[s]ubsequent courts interpret the State Farm decision as establishing Florida’s retention of the appearance of impropriety standard despite the change in rules. This interpretation, however, does not follow. The State Farm reference to appearance of impropriety was made only in the context of affirming the same two-prong test, and particularly the irrebuttable presumption, that was applied prior to Florida’s adoption of the new rules. This Court does not read the decision as retaining the appearance of impropriety standard and respectfully disagrees with those courts that do.’’); see also Baybrook Homes, Inc. v. Banyan Const. & Dev., Inc., 991 F. Supp. 1440, 1444 (M.D. Fla. 1997) (‘‘The Supreme Court of Florida removed the express requirement to avoid the appearance of impropriety when it modified the Rules Regulating the Florida Bar . . . . Nevertheless, according to the Supreme Court of Florida and the United States District Court for the Middle District of Florida, Florida law retains a requirement to avoid even the appearance of impropriety.’’); McWatters v. State, 36 So. 3d 613, 636 (Fla. 2010) (internal citations omitted) (‘‘This Court has stated that ‘disqualification is proper only if specific prejudice can be demonstrated. Actual prejudice is ‘something more than the mere appearance of impropriety.’’ (quoting Farina v. State, 680 So.2d 392, 395-96 (Fla.1996)); Rogers v. State, 783 So. 2d 980, 991 (Fla. 2001) (‘‘[A]lthough we have stated that the appearance of impropriety created by certain situations may demand disqualification, we have evaluated such situations on a case-by-case basis.’’ (quoting Bogle v. State, 655 So.2d 1103, 1106 (Fla.1995)); Stewart v. Bee-Dee Neon & Signs, Inc., 751 So. 2d 196, 199 (Fla. Dist. Ct. App. 2000).

Attorneys in New York, citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of public disservice to either the public interest, or the interest of one of the parties.

347. There is little authority on point, and the placement is consequently unclear. See In re Rules of Prof’l Conduct & Insurer Imposed Billing Rules & Procedures, 2 P.3d 806, 808, 813-14, 816 (Mont. 2000) (mentioning appearance of impropriety in several instances and stating “[w]e decline to recognize a vast exception to the Rules of Professional Conduct that would sanction relationships colored with the appearance of impropriety in order to accommodate the asserted economic exigencies of the insurance market”); Schuff v. A.T. Klemens & Son, 16 P.3d 1002, 1032, 1034 (Mont. 2000) (Gary Day, J., dissenting) (“The Rules of Professional Conduct do not use [the words appearance of impropriety] but the standard should not be wholly abandoned in spirit. Certainly concerns about the public’s perception of the legal profession bears some relevance when this Court views attorney conduct. While appearance of impropriety as a principle of professional ethics may be vague and open-ended, in this case it has meaning and weight . . . . For a law firm to represent a client in one file, and sue it in another, creates an unsavory appearance of impropriety that is difficult if not impossible to dispel in the eyes of the public—or for that matter the bench and bar—by simply denying that prejudice will exist. Prejudice must be presumed . . . . This case is an example of situations in which an ordinary, knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of public disservice to either the public interest, or the interest of one of the parties.”).

348. Shira Mizrahi, Up Against the Wall: A Guide to the Effective Screening of Former Government Attorneys in New York, 10 CARDozo PUB. L. POL’Y & ETHICS J. 131, 148 (2011) (“The appearance of impropriety standard as it relates to ethical rules is unique to the New York Rules, as it is not included in the Model Rules . . . . It remains unclear how New York judges will interpret this language.”); id. at 154 (“The current New York Rule is young, having been enacted in 2010. Additionally, the New York Rules of Professional Conduct ‘provide guidance, but are not binding authority, for the courts in determining whether a party’s attorney should be disqualified during litigation.’”); Soares v. Herrick, 981 N.E.2d 260, 263, 265 (N.Y. 2012) (internal citations omitted) (“The majority observed that ‘[t]he appearance of impropriety, standing alone, may not cause the disqualification of a district attorney’ and concluded that the defendants here have failed to ‘demonstrate[ ] that petitioner’s continued prosecution of their cases would result in actual prejudice’. . . . In sum, while we refrain from concluding that a civil lawsuit commenced by a criminal defendant against a duly elected district attorney in the midst of a pending prosecution will never warrant the disqualification of such district attorney, we see no basis for petitioner’s disqualification here.”); Essex Equity Holdings USA, LLC v. Lehman Bros., Inc., 909 N.Y.S.2d 285, 296 (N.Y. App. Div. 2010) (“Although there is some foundation to Petitioners’ suspicions, without more, the Court is unwilling to make the finding, on the claims here, that an appearance of impropriety standing alone prevents the remaining lawyers in the firm, if properly screened, from continuing to represent Respondents.”).

349. In re EPIC Holdings, Inc., 985 S.W.2d 41, 48 (Tex. 1998) (noting that an appearance of impropriety is an argument outside of the disciplinary rules); Anderson Producing Inc. v. Koch Oil Co., 929 S.W.2d 416, 426 (Tex. 1996) (Philips, C.J., dissenting) (“Moreover, Justice Owen’s focus on the mere appearance of impropriety, while laudable, ignores our previous pronouncement that a lawyer should not be disqualified under Rule 3.08 unless the complaining party can demonstrate actual prejudice.”); Phoenix Founders, Inc. v. Marshall, 887 S.W.2d 831, 835 & n.1 (Tex. 1994) (“We need not decide whether Petroleum Wholesale [decided in part on Canon 9] itself was correctly decided, or whether it remains viable under the new Disciplinary Rules.”); NCNB Texas Nat. Bank v. Coker, 765 S.W.2d 398, 399 (Tex. 1989) (“Canon 9 of the Texas Code of Professional Responsibility mandates that lawyers, through the exercise of their personal, professional and ethical judgment, avoid any activity that might give rise to an appearance of impropriety.”); In re Seven-O Corp., 289 S.W.3d 384,
The above taxonomy provides the first fully nationwide picture of the way in which states actually treat the appearance of impropriety standard. The last chapter, however, has certainly not been written on the states' treatment of the standard. Six states have not addressed the standard or have addressed it in only confusing ways. Perhaps more importantly, many other states are not perfectly describable for essentially two reasons. First, several states have not directly revisited the standard since 1983 (when the ABA rejected the appearance of impropriety standard in the ethical rules). It is difficult, if not impossible, to guess reliably as to what these states will do when they eventually address the standard again. The states that have directly addressed the standard since 1983 have affirmed the standard, rejected the standard, or failed to answer. Second, many states use the appearance of impropriety standard in criminal cases but not in civil cases, and a few others have rejected the standard in certain criminal cases but not in civil cases. For purposes of the above categorization, I used civil disqualification cases, which significantly outnumber criminal cases, as the determinative class. In other words, if a state's opinions treated criminal and civil cases differently, I generally let the civil opinions control the categorization. Thus, to some extent, the above categorization understates the enduring strength of the appearance of impropriety standard in criminal law.

In sum, the appearance of impropriety weighs in favor of disqualification in a supermajority of the states; this Section thus rebuts the common understanding of the standard. The next Section asks whether the standard is justified or justifiable.

b. The Appearance of Impropriety in Theory

Courts have an interest in the appearance of justice. And the appearance of

350. See generally Bruce A. Green, Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule Be Eliminated in New Jersey—or Revived Everywhere Else?, 28 SETON HALL L. REV. 315, 337 (1997) (noting flaws in the appearance of impropriety standard as applied to private lawyers, but noting its "redeeming qualities" as applied to public lawyers).

351. See, e.g., Susan R. Martyn, Developing the Judicial Role in Controlling Litigation Conflicts: Response to Green, 65 FORDHAM L. REV. 131, 149 n.42 (1996) Nathan M. Crystal, Disqualification of Counsel for Unrelated Matter Conflicts of Interest, 4 GEO. J. LEGAL ETHICS 273, 286-90 (1990); 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, 227-28 (1982) ("Most agree that the standard should not be used in conflicts cases.").

352. "That image, however, is not coextensive with the image of the legal profession." Steven H. Goldberg, The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly, 72 MINN. L. REV. 227, 270 (1987) ("Despite the round rejection of an appearances theory, the adversary system does have a legitimate interest in how it appears to the public. The system's continuation depends on public acceptance. The
impropriety might harm that appearance and the appearance of the legal profession. Guarding against the appearance of impropriety might also serve as a proxy "to protect the reasonable expectations of current and former clients." 353 The appearance of impropriety standard thus might protect the image of justice, the image of the legal profession (at least to the extent the two images intersect), and the reasonable expectations of clients. These reasons seem weighty in theory, but we have little-to-no empirical data showing that the standard actually protects these appearances and expectations. 354 This lack of corroborating data is particularly concerning because disqualification (as currently applied) imposes significant costs on the client and others.

Three additional reasons, however, call for consideration of the standard in disqualification cases. First, the standard actually implements the well-rehearsed maxim that doubts should be resolved in disqualification's favor. 355 In close cases—in terms of whether the conduct occurred, whether that conduct violates ethical norms, and whether the equities favor disqualification—the appearance of impropriety is used to tip the balance in favor of disqualification. More speculatively, the standard might also counteract certain judges' biases in lawyers' favor. Judges might be naturally disinclined to disqualify lawyers (and thereby cause them financial harm, embarrassment, and alienation), and the

Second Circuit distinguished ethics from adversary propriety in rejecting the familiar assertion that disregard for the bar was the equivalent of lost credibility for the adversary system. Society's continuing low esteem for lawyers and its increasing reliance on the adversary system to correct all ills provide some support for the Second Circuit's view. If the adversary system's image is relevant, courts arguably should never hear successive conflict disqualification motions. These often visible motions, charging unethical conduct, bring matters to public attention that would otherwise escape notice. Further, the motions ask courts to help clients keep secrets, something that in most contexts the public considers distasteful.

353. Mark I. Steinberg & Timothy U. Sharpe, Attorney Conflicts of Interest: The Need for a Coherent Framework, 66 NOTRE DAME L. REV. 1, 7-8 (1990) ("Although the appearance of impropriety formula is vague and leads to uncertain results, it nonetheless serves the useful function of stressing that disqualification properly may be imposed to protect the reasonable expectations of former and present clients. The impropriety standard also promotes the public's confidence in the integrity of the legal profession. For these reasons, courts should retain the appearance of impropriety standard as an independent basis of assessment. This standard should be sparingly invoked by itself, but more often used in conjunction with the substantial relationship standard.").

354. Cf. Dmitry Bam, Making Appearances Matter: Recusal and the Appearance of Bias, 2011 B.Y.U. L. REV. 943, 973 (citing in part James L. Gibson & Gregory A. Caldeira, Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of Courts Be Rescued by Recusals?, (Oct. 19, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1428723) (observing that judicial recusal "fails to foster an appearance of impartiality . . . because the focus on appearances comes too late . . . . This means that by the time the recusal decision is ultimately made and publicized, the public has already observed the conduct and the events that negatively affect its perception of the judiciary and formed its own, often negative, opinions about judicial impartiality.").

355. In criminal cases, the standard often guards due process and impartiality in prosecutions. See, e.g., Douglas R. Richmond, The Rude Question of Standing in Attorney Disqualification Disputes, 25 AM. J. TRIAL ADVOC. 17, 63 (2001) (quoting John Wesley Hall, Jr., Professional Responsibility of the Criminal Lawyer § 11:36, at 443 (2d ed. 1996)) ("A prosecutor may be disqualified based on the appearance of impropriety, or 'because of such factors as close personal friendship, political rivalry, and the display of personal antagonism and animosity toward the accused.'").
standard might well help to overcome that bias.\textsuperscript{356}

Second, the rejection of the standard in the disciplinary rules does not necessarily require rejection in disqualification cases. The standard is arguably more appropriate in disqualification than discipline if only for the simple fact that disqualification is not as severe as discipline. In other words, courts will be protective of their reputation in either context, but it would typically be better for them to support that reputation through disqualification over discipline.\textsuperscript{357} Third, and finally, the flexibility of the standard permits courts to consider conduct that the ethical rules have failed to address, and the flexibility of the balancing test permits courts to counterweigh other important factors to reach the just resolution of disqualification motions.\textsuperscript{358}

The standard thus presents reasons to support it, although writing clearer rules to achieve the same ends would generally be better.\textsuperscript{359} Instead of employing the

\textsuperscript{356} Almost all American judges are also (former) lawyers, and therefore they naturally favor the interests of the legal profession. See Benjamin H. Barton, The Lawyer-Judge Bias in the American Legal System (2011). With respect to particular lawyers or law firms, the judge might be sympathetic of them for any number of reasons, such as sharing a friendship with or receiving judicial campaign contributions from the lawyers or their firms. See, e.g., Keith Swisher, Legal Ethics and Campaign Contributions: The Professional Responsibility to Pay for Justice, 24 Georgetown J. Legal Ethics 225 (2011). The primary disqualification standard for judges (i.e., whether their impartiality might reasonably be questioned) works in similar ways. See id. at 271 n.191. By declaring that a judge’s impartiality might reasonably be questioned, the recusing judge or the judge’s colleague forced to disqualify the judge is not declaring that the judge is actually biased—just that it might appear that way to the world. Similarly, using the appearance of impropriety standard, the judge does not have to declare that the attorney or firm was actually behaving unethically—just that it might appear that way to observers.

\textsuperscript{357} Discipline, of course, can be embarrassing (e.g., public censure), costly (e.g., lost time and potential disciplinary cost reimbursement), and professionally fatal (e.g., suspension or disbarment). Of course, if the violation is significantly blameworthy, not just court-reputation-jeopardizing, then discipline should indeed follow. For disqualifications based solely (or perhaps even primarily) on the appearance of impropriety, however, courts should not refer the disqualified lawyers to the disciplinary authorities because the ethical rules no longer prohibit the appearance of impropriety.

\textsuperscript{358} See, e.g., In re Polypropylene Carpet Antitrust Litig., 181 F.R.D. 680, 699 (N.D. Ga. 1998) (“[T]he Court [must] balance the likelihood that Plaintiffs’ counsel’s conduct will generate distaste or outrage among the public against the social interests to be served by the continued participation of Plaintiffs’ counsel in this case.”); cf. In re Dresser Indus., Inc., 972 F.2d 540, 545 n.12 (5th Cir. 1992) (“We are mindful, however, that the Texas rules’ allowance of some concurrent representation is based, in part, on a concern that concurrent representation may be necessary either to prevent a large company, such as Dresser, from monopolizing the lawyers of an area or to assure that certain classes of unpopular clients receive representation. Although we do not now reach the matter, our consideration of social benefit to offset the appearance of impropriety might allow such a representation if the balance clearly and unequivocally favored allowing such representation to further the ends of justice.”).

\textsuperscript{359} On the benefits of clearer rules in this area generally, see Ronald D. Rotunda, Conflicts Problems When Representing Members of Corporate Families, 72 Notre Dame L. Rev. 655, 668 (1997) (“[T]he vague test for a conflict rule and the unreviewability of the courts’ orders involving disqualification are two factors that give a competitive advantage to the less ethical lawyer, the more risk prone lawyer, the lawyer who is willing to play the lower court lottery. Such lawyers care less about their reputation, and realize that the risk of being disqualified is tempered by the reality that the lawyer who turns down business because of possible disqualification will lose the client for sure, but the lawyer who takes the case might not be disqualified: vague rules mean that judges may not disqualify when they should. However, ethics rules should not be interpreted to
unfortunately vague "appearance of impropriety" language, disqualification rules should more specifically address the positive rationales listed above and the types of conduct offending those rationales to the fullest extent possible. Once previously declared rules cover the specific area of concern, the justification for the standard loses much of its force over the covered area.

B. IMPROVEMENTS FOR LAWYERS

More regular, and often just more, process is due in disqualification proceedings. Disqualification is a strong remedy. Although courts and commentators often exaggerate disqualification's costs, the costs can be very real. For this reason and others, courts call the remedy "draconian," "severe," "drastic," and "extreme." Minimal procedural due process, therefore, is and should be required. This brief Section raises certain minimum protections that courts should (but do not always) employ before imposing disqualification. These include: holding hearings; providing written factual and legal bases supporting the decision to grant or deny a disqualification motion; implementing measures to protect against unnecessary intrusions into the attorney-client relationship, confidentiality, and privilege; and examining whether the remedy is necessary and proportionate under the circumstances.

Perhaps obviously, a court should typically hold a hearing on the motion.

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360. See, e.g., RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 6 cmt. i. (2000) ("The costs imposed on a client deprived of a lawyer's services by disqualification can be substantial. At a minimum, the client is forced to incur the cost of finding a new lawyer not burdened by conflict in whom the client has confidence and educating that lawyer about the facts and issues. The costs of delay in the proceeding are borne by that client in part, but also by the tribunal and society."); see supra Part H.C (discussing disqualification's avoidable and unavoidable costs).

361. Univ. Patents, Inc. v. Kligman, 737 F. Supp. 325, 329 (E.D. Pa. 1990) (internal quotation marks omitted) (calling disqualification a "draconian measure"); In re Nitla S.A. de C.V., 92 S.W.3d 419, 422 (Tex. 2002) (noting that disqualification is a "severe remedy" and that "the trial court must strictly adhere to an exacting standard to discourage a party from using the motion as a dilatory trial tactic"); Wyeth v. Abbott Laboratories, 692 F. Supp. 2d 453, 457 (D.N.J. 2010) (quoting In re Cendant Corp. Securities Litigation, 124 F. Supp. 2d at 249) ("Because disqualification during pending litigation is an extreme measure, courts must closely scrutinize the facts of each case to avoid injustice."); Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 721-22 (7th Cir. 1982) ("[D]isqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary."); see FLAMM, supra note 4, at § 23.3 (observing that "many [courts] have opined that disqualification may be a harsh, drastic, extreme, extraordinary, and even draconian sanction for what may, in some instances, be an inadvertent rule violation") (footnotes omitted).

362. Cody v. Cody, 889 A.2d 733, 737 (Vt. 2005) ("[W]e conclude that the court abused its discretion in granting the motion to disqualify because it ignored relevant facts and failed to hold an evidentiary hearing to resolve material factual disputes."); Kala v. Aluminum Smelting & Ref. Co., 688 N.E.2d 258, 267 (Ohio 1998) ("[T]he court should hold an evidentiary hearing on a motion to disqualify and must issue findings of fact if
The court should also create an adequate record for appellate review. The record should specifically reflect the factual and legal bases for granting or denying the motion to disqualify. This is particularly important if a court is contemplating disqualification on the basis of an appearance of impropriety; the court should articulate, as clearly and specifically as possible, the reasons for disqualification.

Although lawyers targeted for disqualification deserve adequate, consistent process along or above the minimum lines mentioned above, courts should proceed cautiously in this context to mitigate the amount of confidential and privileged information at risk. Disqualification questions often require inquiry into the attorney-client relationship and confidential or even privileged communications. Judges therefore should generally grant both requests to submit materials for in camera review, particularly when another judge can or will preside over the trial, and requests to seal the proceedings. Even when the movant is permitted requested based on the evidence presented.

363. United States v. Bolden, 353 F.3d 870, 880 (10th Cir. 2003) ("stressing that the district court must make attorney-specific factual findings and legal conclusions before disqualifying attorneys"); In re Myers, 130 P.3d 1023, 1027 (Colo. 2006) (remanding for further proceedings because "justification for this extreme remedy will often require particularized factual findings," which the lower court failed to make); Garlow v. Zakaib, 186 W. Va. 457, 461, 413 S.E.2d 112, 116 (1991) (concluding that trial court had authority to order disqualification but because trial court failed to make an adequate record, remand was necessary).

364. More or different process might be due in criminal proceedings, owing in part to the Sixth Amendment. See generally Bruce A. Green, "Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers, 89 COLUM. L. REV. 1201, 1252 (1989) ("This Article proposes three general guidelines for ruling on disqualification motions. First, courts should not undertake unnecessary or unduly intrusive inquiries into defense counsel's potential conflict. In determining the likelihood and dimensions of a potential conflict, courts should give weight to defense counsel's own assessment. Second, courts should seek procedural alternatives to disqualification. Finally, when the trial court concludes that a conflict is likely to occur, it should decide whether to disqualify defense counsel based on an ad hoc balancing of the countervailing interests of the accused and the judiciary."); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 6 cmt. i. (2000) ("[C]oncerns about the fairness of the processes of tribunals may require that tribunals in some cases raise conflicts issues on their own motion or permit a party who otherwise lacks standing to raise the issue. Particularly in criminal prosecutions . . . . a court may intervene where necessary to protect a defendant against the ineffective assistance of counsel that may result from a conflict of interest."). In a later work, I will address what, if any, specific procedural differences are warranted in criminal matters in light of the Sixth Amendment and related constitutional concerns.

365. See, e.g., Charles W. Wolfram, Former-Client Conflicts, 10 GEO. J. LEGAL ETHICS 677, 720-21 (1997) (footnotes omitted) ("One common device in disqualification hearings is the examination of documents or even witnesses by the court in camera, without the presence of the later client or that client's counsel. Similarly, documents, including the transcript of testimony in a hearing before the court, can be submitted under seal-preventing the later client from exposure to confidential information of the former client. Submittal under seal seems particularly appropriate when the former lawyer in question is conducting the hearing and arguing the absence of substantial relationship. While the matter is pending, the sealing order prevents communication of information to that lawyer's new client. Should a substantial relationship be found, the lawyer can be disqualified, with the sealing order made permanent. A third, related device is that of permitting submission of redacted documents, often under circumstances in which an unredacted version of the document is submitted for in camera review in order to ascertain that the redaction has fairly retained the purported essence of the


to learn these communications, courts should limit the scope of the examination to matters directly relevant to the motion. Although that advice should hold for all cases, not just disqualification cases, it is more important to follow that advice in the latter.\textsuperscript{366}

Courts, finally, should apply the parsimony principle. Thus, courts should recognize (and most do) that disqualification is a heavy remedy and should impose it only when necessary; in other words, when lighter remedies would suffice, those should be used.\textsuperscript{367} Lighter remedies tend to be more appropriate when the misconduct does not involve a conflict of interest.\textsuperscript{368} The cases do not reveal a mass problem of overreacting upwardly (that is, of using disqualification when a lighter remedy would suffice), but even one case is too many in light of disqualification's costs.

The points of the Section are relatively simple. Disqualification is a serious remedy that deserves the following prerequisites: at least minimum procedural protections, such as hearings, records, and reasons; measures to protect against unnecessary intrusions into the attorney-client relationship, confidentiality, and privilege; and a thorough analysis to determine whether the remedy is necessary and proportionate under the circumstances.

C. IMPROVEMENTS FOR CLIENTS

In this Section, I propose two improvements on behalf of disqualified lawyers' clients: (1) that courts should shift the cost of disqualification from the clients to the disqualified lawyers; and (2) that courts or bar associations should create disqualification panels or committees whose members will be willing to represent clients on favorable terms after the clients' first lawyers have been disqualified.

\textsuperscript{366} The movant's disqualification motion should not give it carte blanche to discover attorney-client confidential or privileged communications, and a narrower limitation on the scope of examination would more likely preserve the policies underlying client confidentiality and privilege. Merely because one facet of the relationship has been placed in issue in the disqualification proceeding should not mean that the many other facets of the relationship should be exposed and questioned.

\textsuperscript{367} See, e.g., Wyeth v. Abbott Laboratories, 692 F. Supp. 2d 453, 457 (D.N.J. 2010) (noting that "disqualification is considered a 'drastic measure which courts should hesitate to impose except when absolutely necessary.'" (quoting Carlyle Towers Condo. Ass'n, Inc. v. Crossland Sav., FSB, 944 F. Supp. 341, 345 (D.N.J. 1996))); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 6 cmt. i. (2000) (noting that disqualification "is appropriate only when less-intrusive remedies are not reasonably available").

\textsuperscript{368} See supra Part II (discussing "continuing violation" cases, such as conflicts of interest).
1. **Equitable Cost-Shifting**

When disqualification is ordered, courts should stop punishing the disqualified lawyer’s client by effectively imposing increased legal costs and should instead shift the costs of disqualification to the offending attorney.\(^{369}\) The disqualified lawyer, whose ethical violation caused the disqualification, generally should fairly shoulder the resulting financial burden of disqualification, and the financial burden may well have a deterrent effect on would-be future violations.\(^{370}\) Courts can achieve this shift in most cases through an order requiring the payment of fees and costs, waiver or forfeiture of earned attorneys’ fees, and disgorgement of paid attorneys’ fees. Although such orders have been infrequent,\(^{371}\) precedent supports cost-shifting.\(^{372}\) Cost-shifting should thus become the presumption (with perhaps a possibility for the disqualified attorney to rebut the presump-

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\(^{369}\) For situations in which the disqualified lawyer previously disclosed the potential for disqualification to the client and the client gave informed consent (and perhaps even insisted) that the lawyer continue, courts ought to consider whether this proposed default rule of “lawyer pays” should apply to these situations. Courts ought also to consider any agreement struck between the lawyer and client over the lawyer’s fees in these situations.

\(^{370}\) See, e.g., Susan R. Martyn, *Developing the Judicial Role in Controlling Litigation Conflicts: Response to Green*, 65 FORDHAM L. REV. 131, 141, 146 (1996) (“When disqualification is called for by the conflicts rules, . . . sanctions [should] automatically follow in the form of fee-forfeiture. The amount would be calculated by determining the sum necessary to restore both the moving and the non-moving client to the status quo.”); Nathan M. Crystal, *Disqualification of Counsel for Unrelated Matter Conflicts of Interest*, 4 GEO. J. LEGAL ETHICS 273, 311-12 (1990); Lee A. Pizzimenti, *Screen Vertie: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?*, 52 U. MIAMI L. REV. 305, 346-47 (1997) (“Thus, as soon as conflict has been shown, a past client should be entitled to recoup fees earlier paid. Both the Restatement (Second) of Agency and the Restatement (Third) of Law Governing Lawyers support this view. The penalty of surrendering fees long since earned may provide lawyers and firms incentive to take more care in avoiding conflicts of interest.”).

\(^{371}\) For example, in the published federal disqualification decisions over the past decade, the court ordered counsel to disgorge or forfeit fees only three times (and all three of those times involved bankruptcy cases). See *supra* Part III.A Charts. Of course, this study does not address state or unreported federal decisions.

\(^{372}\) See, e.g., *In re Prince*, 40 F.3d 356, 361-62 (11th Cir. 1994) (vacating district court’s award of $200,000 in attorneys’ fees and ordering that the conflicted law firm “be denied all fees and expenses for services it rendered in connection with Prince’s bankruptcy proceedings and that any such fees or expenses received by the firm to date be disgorged in toto”); *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1270 (7th Cir. 1983) (affirming the district court’s order requiring a law firm to pay $25,000 in attorney fees and expenses for resisting a meritorious disqualification motion); cf. *Dewey v. R.J. Reynolds Tobacco Co.*, 536 A.2d 243, 252 (N.J. 1988) (refusing to disqualify firm because it was the eve of trial and the firm had put approximately 2000 hours into the case but requiring that the firm continue to trial “without compensation for any services to be rendered henceforth, particularly including any services in connection with trial or other final disposition of the matter”); RESTATEMENT (THIRD) OF LAW GOVERNING LAW, § 37 (2000) (“A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer’s compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer’s work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.”); FLAMM, *supra* note 4, at § 26.6 (discussing disgorgement of fees and courts’ differing approaches to the issue); Susan R. Martyn, *Developing the Judicial Role in Controlling Litigation Conflicts: Response to Green*, 65 FORDHAM L. REV. 131, 142-47 (1996) (discussing policy and precedent in this context).
Experts in disqualification have put attorneys on notice for years that it often is better to forgo representations that will likely provoke a motion to disqualify: "Even if one succeeds in opposing a motion for disqualification, the expense [of doing so, not to mention the disruption of the attorney-client relationship, is likely to be more damaging than declining the engagement in the first instance." Under all of the circumstances (including this notice), it is better to place the costs of disqualification on the ethically transgressing attorney, and courts can and should make this shift the norm.

2. Disqualification Panels

Recognizing disqualification's costs to innocent clients, the profession arguably has a responsibility to address the situation. Furthermore, if we assume that an otherwise justified disqualification might be defeated in light of the disproportionate prejudice to the lawyer's client, we have cause to examine ways to alleviate that prejudice so that disqualification might be fairly imposed in the first place. To avoid these suboptimal situations—in which the client is left without a lawyer or the lawyer who violated the ethical rules is permitted to continue the representation—the applicable court or bar should create a disqualification panel or committee. The panel members would be generally willing—subject of course to a conflicts check—to take the case pro (or "low") bono after the client's first lawyer has been disqualified. The "self-regulated" profession and the court obviously bear some responsibility for the breach of ethical duties and the resulting disqualification; it is not asking too much for them to solicit a volunteer panel to alleviate the prejudice to the potentially stranded clients.

Moreover, precedent exists for similar ventures. For example, the panel is analogous to a client protection fund, which many states have laudably

373. See, e.g., Susan R. Martyn, Developing the Judicial Role in Controlling Litigation Conflicts: Response to Green, 65 FORDHAM L. REV. 131, 143-44 (1996) ("By definition, the law firm has breached a fiduciary duty to that client. It therefore seems fair that the firm or lawyer should bear the burden of minimizing the amount of the fee refund attributable to the breach."). Making cost-shifting the presumption (instead of a rarity) does present a possible risk: perhaps judges would be less inclined to grant disqualification if they then have to address occasionally difficult questions concerning the appropriate amount of fee disgorgement, forfeiture, and payment. Of course, courts deal with attorney-fee issues regularly, and without some concrete counterexamples, we need not assume that courts will fear dealing with fees in this area.

374. Ellen A. Pansky, Recent Developments in Conflicts of Interest and Exposure to Court Orders Disqualifying Counsel, 717 PLI/Lit 191, 206 (2005).

375. See, e.g., supra Part III.A.2 (noting that disqualification might be inequitable, on balance, because the client might be left without an attorney).

376. Large corporations or other organizations presumably will likely have plenty of lawyers to whom to turn, and the corporations will presumably have more confidence in those lawyers based on previous relationships or other sources. Smaller organizations, however, might take advantage of the panel.
created. And the panel is not much different in function or form from lawyer referral services or volunteer legal services programs. As with these precedents, the panel’s creators could place eligibility requirements on both the panel lawyers (e.g., high experience) and clients (e.g., low income).

This solution, however, is obviously a longer-term fix; because no such panels currently exist in the disqualification arena, they must first be built before clients will come. Of course, the more that courts implement the important recommendation to make the disqualified lawyer pay or reimburse the client for the monetary costs caused by the disqualification, the less a pro or low bono panel would typically be needed. The panel would still be needed, however, in cases in which the disqualified lawyer had taken the case pro bono or on a contingency fee, for example.

CONCLUSION

Disqualification will never be loved; to consider disqualification means that a lawyer might have violated the ethical rules, that a client might lose a trusted counselor, and that the merits of the case will not be reached until the disqualification questions are resolved. As this Article reveals, however, disqualification can at least be better understood, if not appreciated. Lawyers can see the types of misconduct and equitable considerations involved in disqualification questions, and they can make more informed predictions about the likely results. Judges can see the holistic picture of factors that influence disqualification decisions, that disqualification motions are not uncontrollably on the rise, and that movants’ motivations (should) matter little. Moving forward, judges can also adopt or adapt several specific improvements to make disqualification law better for clients, lawyers, and the administration of justice.