Disqualification of Counsel for Unrelated Matter
Conflicts of Interest

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INTRODUCTION

Ask any lawyer to identify the most common ethical problem facing practitioners and the answer will almost certainly be “conflicts of interest.” One reason for the pervasiveness of conflicts of interest is that they can arise in so many different ways: for example, multiple representation of clients in a single matter, representation against a former client, and business transactions.

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1. C. Wolfram, Modern Legal Ethics 313 (1986) (“Conflict of interest problems are probably the most pervasively felt of all the problems of professional responsibility that might haunt lawyers.”)


3. The Code of Professional Responsibility does not deal directly with the issue of representation against a former client. Relying principally on the general ethical duty of confidentiality (and to a lesser extent on the duty of loyalty and the obligation to avoid the appearance of impropriety), courts have crafted a common law rule prohibiting representation against a former client when the present representation is “substantially related” to the former representation. The leading case is T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953).

The substantial relationship test is codified in Rule 1.9(a), which provides as follows: “A lawyer who has formerly represented a client in a matter shall not thereafter (a) represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation . . . .”

Model Rules Rule 1.9(a).

Courts are divided over the meaning of the substantial relationship test. Most courts look to see whether the facts of the two matters are similar enough to warrant the presumption that confidential information was disclosed during the former representation that could be used against the former client. Smith v. Whatcott, 757 F.2d 1098, 1100 (10th Cir. 1985); Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980); Carlson v. Langdon, 751 P.2d 344 (Wyo. 1988). The Second Circuit has adopted a narrower view, requiring the relationship between the issues to be “patently clear.” Government of India v. Cook Indus., Inc., 569 F.2d 737, 740 (2d Cir. 1978). The Seventh Circuit employs a three-pronged test that appears to be a combination of these approaches.

Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation. Second, it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters. Finally, it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client.
between lawyer and client.  

This article examines the judicial approach to one type of conflict of interest, referred to in the article as an "unrelated matter conflict of interest." This form of conflict occurs when a lawyer represents one client while that lawyer or another member of her firm is simultaneously representing that client's adversary, not directly against the first client, but in an unrelated matter. For instance, a firm may represent client A in litigation against B, while simultaneously representing B in an unrelated matter. In this article, the matter in which the interests of the two clients are directly opposed (A v. B in this example) is called the "adversity" matter, while the other matter (B v. X) is referred to as the "nonadversity" matter.  

Several cases illustrate the range of unrelated matter conflicts and how they can arise. In some situations a long-time client of a firm may ask that the firm handle a matter on its behalf even though the representation will be adverse to another client of the firm. For example, in Hartford Accident & Indem. Co. v. R.J.R. Nabisco, Inc., a partner in the Boston office of LeBoeuf, Lamb, Leiby & MacRae represented R.J. Reynolds Tobacco Company, a wholly owned subsidiary of R.J.R. Nabisco, in a variety of product liability matters. Hartford, a long-time client of the New York office of the firm, asked the firm to represent it against Nabisco in litigation alleging violation of the federal securities laws in connection with the leveraged buy-out of Nabisco by the investment firm of Kohlberg, Kravis & Roberts. The firm agreed to represent Hartford against Nabisco despite the protests of the Boston partner, who subsequently left the firm because of its decision to take the case.  

Errors in routine conflicts checks can result in a firm confronting an unrelated matter conflict of interest. In Harte Biltmore Ltd. v. First Pennsylvania Bank, the plaintiffs claimed that the defendant bank overcharged them interest on loans made to remodel a hotel. The defendant bank was originally represented by a Philadelphia-based firm. The lawyers with primary respon-

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4. MODEL CODE DR 5-104(A); MODEL RULES Rule 1.8(a). See, e.g., In re James, 452 A.2d 163, 167 (D.C. 1982), cert. denied, 460 U.S. 1038 (1983) (lawyer subject to professional discipline when he purchased property from client without full disclosure to the client of differing interests and of the advantages and disadvantages of the transaction, including the possibility of seeking the advice of independent counsel). See C. WOLFRAM, supra note 1, at 479-485.  
5. Under rules of ethics, when one member of a firm has a conflict of interest, the conflict is imputed to the entire firm. MODEL RULES Rule 1.10(a); MODEL CODE DR 5-105(D). Since the conflict is imputed to the entire firm, this article often refers to the conflict as facing the firm.  
sibility for the case left the firm to join a firm located in Pittsburgh; the new firm became counsel of record for the defendant bank. A short time later the Pittsburgh firm learned that a partner in another office was representing Mr. Harte in an unrelated state court malicious prosecution action. The firm had failed to detect the conflict when it agreed to represent the bank because Mr. Harte’s name was misspelled in the firm’s records.9

Business reorganization of a corporate client can place the client’s law firm in the position of representing conflicting interests. In *Pennwalt Corp. v. Plough, Inc.*,10 a law firm had been representing Pennwalt in a dispute with Plough (a wholly-owned subsidiary of Schering-Plough) about Plough’s comparative advertising of foot remedies. A short time later the firm began representing Scholl corporation in unrelated antitrust litigation. Schering-Plough then acquired Scholl, thus making Plough and Scholl sister corporations. As a result of this acquisition, the firm faced a conflict of interest because it was representing Pennwalt against Plough while simultaneously representing Plough’s sister corporation.11

Law firm mergers, a growing national phenomena,12 can also lead to unrelated matter conflicts of interest. In *Picker Int’l, Inc. v. Varian Associates, Inc.*,13 a law firm represented Picker in certain patent infringement actions against Varian, while a second firm represented Varian in unrelated litigation. The two firms merged, producing an unrelated matter conflict of interest.

Part I of the article discusses two lines of cases dealing with unrelated matter conflicts of interest. The leading cases on the issue are consistent in their approach.14 Relying on the attorney’s duty of loyalty15 and obligation to avoid the appearance of impropriety,16 these courts have ordered disqualification in the adversity matter17 when a law firm has engaged in an unrelated matter conflict of interest. By contrast a second group of cases has adopted a different approach. Applying a balancing test, these courts have

9. *Id.* at 420.
11. *Id.* at 226.
13. 869 F.2d 578 (Fed. Cir. 1989).
14. See cases discussed in Part I(A), infra.
15. MODEL CODE Canon 5; MODEL RULES Rule 1.7.
16. MODEL CODE Canon 9. The drafters of the Model Rules eliminated the appearance of impropriety as a standard of professional conduct because of the vagueness of the concept. Model Rule 1.10 comment (Lawyers Moving Between Firms, para. 3); MODEL RULES Rule 1.7, Legal Background Note 52-54 (Proposed Final Draft May 30, 1981); C. WOLFRAM, supra note 1, at 322.
17. See text at note 6, supra.
refused to order disqualification when the costs of disqualification outweigh the benefits.\textsuperscript{18}

Part II of the article critically examines these two approaches. Section A discusses four possible reasons for a court to order disqualification of counsel: prevention of trial taint in a pending proceeding, promotion of public confidence in lawyers and the legal system, punishment of ethical misconduct and deterrence of future impropriety. The article argues that disqualification is appropriately used only to prevent trial taint. Disqualification is a costly remedy because it deprives a client of the counsel of its choice and disrupts legal proceedings. Moreover, all of these goals except prevention of trial taint can be achieved by either an award of damages or disciplinary action against the offending attorney, remedies which incur fewer costs than disqualification. The analysis presented in this section is supported by several decisions where courts have refused to order disqualification of counsel unless taint of the underlying trial is likely. Section B applies this approach to disqualification orders in unrelated matter conflicts of interest and concludes that the leading cases, which have routinely ordered disqualification of counsel because of an unrelated matter conflict, have erred because such cases rarely involve a significant risk of trial taint.

Part III offers a new framework for courts to use in deciding unrelated matter conflicts of interest. Under the proposed framework courts would consider two questions: First, is dual representation improper? This presents two subsidiary questions: Who is a current “client” and when is client consent sufficient to render dual representation proper? Second, if dual representation is improper, what remedy should the court employ? This section argues that in deciding whether to order disqualification, the courts should distinguish between cases in which the firm is no longer representing the client who is moving for disqualification and those cases in which the firm is still engaged in dual representation. If the firm is no longer representing the moving party, the motion for disqualification should be denied because the possibility of trial taint from representation of conflicting interests has been eliminated. To grant the motion for disqualification in this situation would only impose needless costs on the client against whom the motion is directed and on the legal system. On the other hand, if the firm is still representing both parties, the court should employ a balancing test and order disqualification only if the benefit from granting the order outweighs the costs.

After deciding the issue of disqualification, the court should then consider whether damages should be awarded because the firm acted improperly either in undertaking dual representation or in withdrawing from representa-

\textsuperscript{18} See cases discussed in Part I(B), infra.
tion of one of the clients. In deciding the amount of damages the court should take into account factors such as the firm’s good faith, or lack thereof, and the degree of harm suffered by the client.

The article concludes by applying the proposed framework of analysis to two of the leading cases dealing with unrelated matter conflicts. Had the method of analysis advocated in this article been used, the results in these cases would have been more satisfactory.

I. JUDICIAL RESPONSES TO UNRELATED MATTER CONFLICTS OF INTEREST

A. DISQUALIFICATION OF COUNSEL IN THE ADVERSITY MATTER

The most frequently cited cases dealing with unrelated matter conflicts of interest have ordered disqualification of counsel in the adversity matter.\(^{19}\) This line of cases can be traced to the decision of the United States Court of Appeals for the Second Circuit in Cinema 5, Ltd. v. Cinerama, Inc.,\(^{20}\) in which a partner divided his time between two law firms, one in New York City, the other in Buffalo. Since 1972 the Buffalo firm had represented Cinerama in an antitrust action. In 1974 the New York firm undertook representation of Cinema 5 in an action against Cinerama and others alleging an unlawful conspiracy to monopolize the first-run movie theatre business in New York City. Defendant Cinerama moved to disqualify the New York firm because of the partner’s membership in both firms.\(^{21}\) The New York firm argued that it should not be disqualified because there was no “substantial relationship” between the two cases and, accordingly, no risk that confidential information would be used to the detriment of Cinerama.\(^{22}\) In rejecting this argument, the Court of Appeals for the Second Circuit recognized that the substantial relationship test applied to representation against former clients.\(^{23}\) When the case involved current clients, a different standard applied: “The propriety of this conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients.”\(^{24}\)

\(^{19}\) For a discussion of the “adversity” matter, see text at note 6, supra.
\(^{20}\) 528 F.2d 1384 (2d Cir. 1976).
\(^{21}\) Id. at 1385.
\(^{22}\) Id.
\(^{23}\) Id. at 1386; see note 3, supra.
\(^{24}\) 528 F.2d at 1386. In Cinema 5 the Court of Appeals cited an earlier decision of the Connecticut Supreme Court, Grievance Committee of the Bar v. Rottner, 152 Conn. 59, 203 A.2d 82 (1964), a case that is also often cited for the proposition that it is ethically improper for a lawyer to represent one client while representing that client’s adversary in an unrelated matter. In Rottner, a client named Twible retained a law firm to represent him in a minor collection matter. While this case was pending, O’Brien asked the firm to represent him in an action for assault and battery against Twible. The firm informed O’Brien that it had represented Twible in prior matters and was
While the Second Circuit declined to adopt an absolute rule prohibiting dual representation of clients with adverse interests in unrelated matters,\(^{25}\) it indicated that the attorney bore a heavy burden in such cases.

Where the relationship is a continuing one, adverse representation is prima facie improper, and the attorney must be prepared to show, at the very least, that there will be no actual or apparent conflict in loyalties or diminution in the vigor of his representation. We think that appellants have failed to meet this heavy burden . . . .\(^{26}\)

In a subsequent decision the Court of Appeals stated that under the Cinema 5 test an attorney would have great difficulty avoiding disqualification because the test imposes a "burden so heavy that it will rarely be met."\(^{27}\)

Outside the Second Circuit, the leading case on disqualification of counsel because of an unrelated matter conflict of interest is *International Business Machines Corp. v. Levin*,\(^{28}\) an action under the federal antitrust laws by the currently representing him in the collection case. The firm did not discuss O'Brien's case with Twible, nor did the firm obtain Twible's consent to representation. The firm then filed suit on O'Brien's behalf against Twible. The complaint sought both actual and punitive damages, claiming that Twible's conduct was "wilful, wanton, malicious, premeditated, and vindictive." *Id.* at 62, 203 A.2d at 83. Despite protests from Twible, the firm continued representing O'Brien and even proceeded to attach his home in connection with the case. *Id.*

The county grievance committee instituted disciplinary proceedings against the firm because of its representation of O'Brien against Twible. The superior court found that the firm had engaged in misconduct and the Supreme Court affirmed. *Id.* at 64-66, 203 A.2d at 84-85. In its opinion the Court indicated that its decision was based on the lawyer's obligation of loyalty rather than any relationship between the cases:

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

*Id.* at 65, 203 A.2d at 84.

The Court of Appeals for the Second Circuit extended the analysis used in *Rottner* in two different respects. First, *Rottner* was a grievance proceeding, while Cinema 5 was an action to disqualify counsel. Second, the nature of the conflict in *Rottner* was much more direct and substantial than the one involved in Cinema 5. In *Rottner* the client was an individual and the action brought against the client claimed that the client had committed an intentional tort. By contrast, in Cinema 5 the client was a corporation rather than an individual and different lawyers were involved in the two matters.

25. The Court stated: "Whether such adverse representation without more, requires disqualification in every case, is a matter we need not now decide." 528 F.2d at 1387.

26. *Id.* (emphasis in original) (citations omitted).

27. Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 749 (2d Cir. 1981) (substantial relationship test rather than Cinema 5 test applied when law firm represented plaintiff in breach of employment contract action against member of association that the law firm also represented; Cinema 5 test should be applied only to traditional rather than vicarious clients). The *Glueck* case is discussed in more detail in section III(A)(1), *infra*.

plaintiffs, Levin (individually) and Levin Computer Corporation (LCC). The plaintiffs were represented by a law firm that had represented Levin since 1965. Beginning in 1971 the firm represented Levin and LCC in negotiations with IBM to purchase certain computer equipment on credit. IBM refused to grant purchasers of equipment financing terms as favorable as those offered to lessees. As a result Levin and LCC brought suit, filed in June 1972, claiming antitrust violations.\textsuperscript{29} In the meantime, beginning in April 1970, other lawyers in the same firm had begun representing IBM in unrelated labor matters. On the date when the firm filed the antitrust action, it was not handling a specific matter for IBM, but it did undertake labor work for IBM after commencing the litigation.\textsuperscript{30}

IBM representatives were originally unaware of the firm's dual representation. When they learned of the conflict, almost five years after the antitrust action was filed,\textsuperscript{31} IBM moved to disqualify the firm in the antitrust action. The firm argued that the dual representation would not have an adverse effect on its independent professional judgment. The Court of Appeals for the Third Circuit disagreed, relying on \textit{Cinema 5}:

We think, however, that it is likely that some "adverse effect" on an attorney's exercise of his independent judgment on behalf of a client may result from the attorney's adversary posture toward that client in another legal matter. See \textit{Cinema 5, Ltd. v. Cinerama, Inc.} For example, a possible effect on the quality of the attorney's services on behalf of the client being sued may be a diminution in the vigor of his representation of the client in the other matter.\textsuperscript{32}

The Court of Appeals, however, went beyond the duty of loyalty, focusing also on the appearance of impropriety as an additional basis for disqualification:

An attorney who fails to observe his obligation of undivided loyalty to his client injures his profession and deems it in the eyes of the public. The maintenance of the integrity of the legal profession and its high standing in the community are important additional factors to be considered in determining the appropriate sanction for a Code violation.\textsuperscript{33}

The most recent appellate decision disqualifying counsel because of an unrelated matter conflict of interest is the opinion of the United States Court of Appeals for the Federal Circuit in \textit{Picker Int'l, Inc. v. Varian Associates},

\textsuperscript{29} \textit{Id.} at 276.
\textsuperscript{30} \textit{Id.} at 281.
\textsuperscript{31} The antitrust action was filed on June 23, 1972. IBM's antitrust counsel first learned of the dual representation at a dinner in April 1977. IBM filed its disqualification motion in June 1977. \textit{Id.} at 277.
\textsuperscript{32} \textit{Id.} at 280 (citations omitted).
\textsuperscript{33} \textit{Id.} at 283.
inc. 34 picker involved a consolidated appeal in two patent infringement actions in which picker was represented by one of the two law firms involved in a merger. at the same time the second firm involved in the merger represented varian in certain unrelated litigation. the second firm did not represent varian in the patent infringement action, so there was not a direct conflict of interest. both firms had long-standing relationships with their clients. 35

prior to the merger of the two firms, varian had expressed concern about the conflict that would result from the merger because the newly merged firm would be representing picker against varian. the firm attempted to resolve this problem by seeking varian’s consent to the dual representation, but varian refused to authorize dual representation. the firm then informed varian that it would be forced to withdraw from representation of varian. varian pointed out that the firm could not withdraw without court approval. varian also responded by moving to disqualify the firm from representing picker in the pending cases. both district courts granted varian’s motions for disqualification and certified the disqualification issue for appeal. 36 the court of appeals for the federal circuit consolidated the appeals and in a 2-1 decision affirmed the decisions of the district courts to disqualify the firm from representing picker. 37

the court relied on disciplinary rule 5-105 of the model code of professional responsibility (model code) and cinema 5 for the proposition that the duty of loyalty precludes a firm from representing one client against another client in an unrelated matter absent client consent after full disclosure. 38 since varian had not consented to the dual representation, 39 the court of appeals found that the district courts did not abuse their discretion in ordering disqualification.

the court also discussed the effect of the firm’s attempt to withdraw from representation of varian. it pointed out that under local rules a firm cannot withdraw without court approval. 40 since the firm in varian had not obtained that approval, its attempted withdrawal was ineffective to resolve the conflict:

we recognize that conflicts of interest between clients arising under dr 5-105 may increase as mergers between law firms become more common. to

34. 869 f.2d 578 (fed. cir. 1989).
35. id. at 579-80.
36. id. at 580.
37. id. at 579.
38. id. at 583.
39. when varian realized that the merged firm no longer recognized it as a client, varian agreed by letter to allow attorneys from the merged firm to continue to represent it. the court found that this “consent” was ineffective because varian was acting under duress. id. at 584.
40. id. at 582.
allow the merged firm to pick and choose which clients will survive the merger would violate the duty of undivided loyalty that the firms owe each of their clients under DR 5-105. If clients with conflicting interests do not consent to simultaneous representation, then the newly merged firm must follow the standards in DR 2-110.41

Dissenting Judge Archer criticized the narrowness of the court’s approach. He argued that it was important to recognize that the duty of loyalty applied to both clients. In such situations, he claimed, the interests of both clients required a balancing test, not a per se rule.

I am convinced that the district courts erred in applying what amounted to a per se rule for disqualification under Canon 5 because no consideration was given to the detriment that Picker might suffer. The district court did not balance the duties and responsibilities to both clients and their respective interests.42

A number of other courts, both federal and state, have followed the approach originally adopted by the Court of Appeals for the Second Circuit in Cinema 5, ordering disqualification of counsel in the adversity matter as a remedy for an unrelated matter conflict of interest.43

41. Id. at 583 (citations omitted).
42. Id. at 585. While Judge Archer thought the case should be remanded to the district court to apply this balancing test, it is clear how he thought the balance should be struck:

The continuing representation of Varian now involves only one patent application. [The other Varian matters had been settled by the time of the appeal.] Varian is represented, as it has been from the outset, by competent other counsel in its litigation with the merged firm’s other client, Picker. The district court should determine the detriment each client would suffer by withdrawal. Prejudice to the respective clients is the foremost consideration, the merged law firm having a duty of loyalty to both.

Id. at 584-86.
B. BALANCING THE COSTS AND BENEFITS OF DISQUALIFICATION

A second line of decisions has adopted a quite different approach to deciding disqualification motions based on unrelated matter conflicts of interest. Rather than relying on the duty of loyalty and the appearance of impropriety to order disqualification, these courts have used a balancing test, weighing the benefits of disqualification against the costs that will result if disqualification is ordered. For example, *Bodily v. Intermountain Health Care Corp.* involved a medical malpractice action in which the law firm of Howard, Lewis & Peterson represented the plaintiff. The firm was also handling several other medical malpractice actions against defendant Intermountain. A few months after the firm filed the malpractice action, Rosenbloom, a lawyer in the Los Angeles office of Finley, Kumble, Wagner, Heine, Unterberg, Manley, Myerson & Casey ("Finley, Kumble") contacted Johnson, a partner in the Howard firm. Rosenbloom asked Johnson if the Howard firm would file a motion to admit certain members of the Finley, Kumble firm *pro hac vice* to defend Intermountain in a wrongful discharge action and to "conform documents to the local rules of practice." Johnson informed Rosenbloom that the Howard firm was representing Bodily and other plaintiffs in medical malpractice actions against Intermountain and that the proposed representation of Intermountain created a conflict of interest. Rosenbloom said that he did not think that the representation created a conflict and that if there were any problems with the representation, he would inform Johnson.

The next day Rosenbloom sent materials to Johnson to obtain the *pro hac vice* admission of three Finley, Kumble lawyers; Johnson subsequently obtained a court order admitting them. He also did some minor additional work in the employment discharge case consisting of review of certain documents. Johnson submitted a bill to the Finley, Kumble firm of $195.82 for legal services and costs. Johnson never had any direct contact with Intermountain in connection with the wrongful discharge case, nor was he privy to any confidential information.

Intermountain later learned that the Howard firm had been retained on its behalf. A representative of the company contacted Johnson, told him to perform no further work on the case and terminated the firm's representation of

ters); Gray v. Commercial Union Ins. Co., 191 N.J. Super. 590, 468 A.2d 721 (1983) (law firm disqualified from representing plaintiff in adversity matter involving breach of contract claim against defendant, while concurrently representing defendant insurance company in personal injury case); Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985) (law firm disqualified from representing plaintiff in medical malpractice matter because it was simultaneously representing a limited partnership of which several defendants were partners in unrelated federal litigation).

45. *Id.* at 470.
46. *Id.*
47. *Id.* at 471-72.
Intermountain. Intermountain then moved to disqualify the Howard firm in the *Bodily* case because of the conflict.\(^{48}\)

The United States District Court for the District of Utah first considered whether there was a violation of Canon 4, 5 or 9 of the *Model Code*.\(^{49}\) The Howard firm argued that it should not be disqualified because the two matters were unrelated.\(^{50}\) Relying on the analysis used in *Cinema 5*,\(^{51}\) the court ruled that the standard of conduct was to be measured not by whether the two matters were substantially related, but rather by the lawyer's duty of loyalty.\(^{52}\) The court then turned its analysis to Canon 5. It held that dual representation was proper only if the attorney carried his burden of proving that it was "obvious" that the dual representation was adequate and that both clients had consented after full disclosure.\(^{53}\) The court found that these requirements had not been met. The conflict was an obvious one; indeed, Johnson admitted that he had immediately detected the problem.\(^{54}\) Further, the Howard firm had failed to obtain consent from either Intermountain or Bodily. The court rejected Johnson's argument that he had relied on Rosenbloom's representations that there was no problem with the dual representation: "Mr. Johnson's conduct constituted blind faith reliance upon another and was well below the minimum standards prescribed by the applicable Canon of ethics."\(^{55}\)

Having found a violation of Canon 5,\(^{56}\) the court turned to the sanction of disqualification. Applying a balancing test, the court refused to order disqualification:

This case does not present a situation of one client gaining an unfair advantage over another by means of an attorney's unethical wrongdoing. The small amount of time spent and the very modest fee charged demonstrate that there was certainly no incentive for great reward on the part of counsel. In this case, there was no attempted or actual solicitation or receipt by the Howard firm of any confidential information of any kind. Although not sufficient to excuse the attorney's personal duty under Canon 5 to obtain informed consent after full disclosure, the fact that Johnson dealt with and relied upon a co-attorney rather than a lay person is significant as a mitigating factor. There has been absolutely no prejudice to IHC in this

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48. *Id.* at 472.
49. *Id.* at 473-77.
50. *Id.* at 474.
51. *See supra* text accompanying notes 20-27.
52. 649 F. Supp. at 474.
53. *Id.*
54. *Id.*
55. *Id.* at 476.
56. The Court also analyzed Johnson's conduct under Canon 9. Because of the vagueness of the concept of the "appearance of professional impropriety" as well as the lack of egregiousness of Johnson's conduct, the Court did not find a violation of Canon 9. *Id.* at 476-77.
case, and there would be no prejudice to the ultimate disposition of this case on the merits should the Howard firm be permitted to continue its representation of Bodily. Moreover, disqualification of the Howard firm at this juncture would substantially delay these proceedings and doubtless would work an undue hardship not only on the plaintiff Bodily, but upon plaintiffs in the other cases pending.\textsuperscript{57}

Another case applying a similar approach is \textit{Wong v. Fong},\textsuperscript{58} a dental malpractice action in which a law firm represented the defendant Wong, while at the same time the firm was representing Transportation Lease Hawaii, Ltd. ("Trans Lease") in litigation in which Wong became an adverse party based on a guarantee. When Wong learned of the firm's dual representation, he asked the firm to withdraw from representing Trans Lease. The firm refused to do so and Wong filed a motion to disqualify the firm in that case. The trial judge denied the motion for disqualification but allowed the firm to withdraw from representation of Wong in the dental malpractice action.\textsuperscript{59} Wong petitioned for a writ of mandamus to overturn the trial judge's decision.\textsuperscript{60}

The Hawaii Supreme Court dismissed the writ. Citing \textit{International Business Machines Corp. v. Levin} and \textit{Cinema 5} with approval,\textsuperscript{61} the court agreed that the principal reason for the rule prohibiting unrelated matter conflicts of interest was the duty of loyalty owed to each of the clients. Nevertheless, the court refused to order disqualification. The court referred to the fact that the parties had stipulated that the dental malpractice action had been dismissed. Accordingly, disqualification was inappropriate: "These concerns, particularly those relating to reduction of vigor and independence in representation, are simply no longer applicable to [Wong], for his attorney-client relationship with the Fujiyama firm has terminated."\textsuperscript{62}

The court also referred to the attorney's obligation to avoid even the appearance of impropriety as a basis for disqualification, but it reasoned that disqualification on the facts of the case was unwarranted:

However, we feel that disqualification at this point would be an empty ritual, for the evils which that remedy was intended to cure would have been dissipated. Disqualification of the Fujiyama firm at this point would be wasteful in terms of time and money thus far expended in the firm's preparation for [the representation of Trans Lease].\textsuperscript{63}

The court did not, however, pass judgment on the propriety of the firm's

\textsuperscript{57} Id. at 478-79 (footnote omitted).
\textsuperscript{58} 60 Haw. 601, 593 P.2d 386 (1979).
\textsuperscript{59} Id. at 602-03, 593 P.2d at 388-89.
\textsuperscript{60} Id. at 601, 593 P.2d at 387.
\textsuperscript{61} Id. at 604-05, 593 P.2d at 389.
\textsuperscript{62} Id. at 606, 593 P.2d at 390.
\textsuperscript{63} Id.
conduct, but noted that a separate disciplinary action was then pending.64

Similarly, in Aerojet Properties, Inc. v. New York,65 the Appellate Division of the New York Supreme Court refused to order disqualification of counsel because of an unrelated matter conflict of interest.66 In that case a law firm represented a landlord in an action in the New York Court of Claims against the State Bureau of Leases to recover unpaid rent related to electrical usage. Several years later a casualty insurance carrier retained the firm to represent the State in defending a personal injury action. The State then moved to disqualify the law firm in the rent collection action.67

The Appellate Division affirmed the decision of the Court of Claims denying the motion for disqualification. The court first dealt with the question of whether the substantial relationship test or the stricter standard employed by the Court of Appeals for the Second Circuit in Cinema 5 governed the case. The court decided that the Cinema 5 test should apply. The court ruled, however, that the law firm had met its burden of proving the absence of any conflicting loyalties.68 The court’s opinion focused on several factors as the basis for denying disqualification:

Although not determinative, it is significant that there is absolutely no substantive nexus between the two lawsuits. Nor is there any real potential for the disclosure of confidential information, notwithstanding the Bureau’s involvement in each lawsuit. In essence, [the firm] has not compromised its duty of undivided loyalty to either claimant here or the State in the [personal injury] action. Given the multititudinous nature of the State’s activities, even the appearance of impropriety seems de minimis here. Moreover, to disqualify [the firm] after extensive involvement in this lawsuit for more than four years would prove patently unfair to both the law firm and its client.69

Several other courts have refused to order disqualification of counsel because of an unrelated matter conflict of interest.70

64. Id.
66. Id. at 42, 530 N.Y.S.2d at 626.
67. Id. at 40, 530 N.Y.S.2d at 625.
68. Id. at 41, 530 N.Y.S.2d at 626.
69. Id. at 41-42, 530 N.Y.S.2d at 626 (citations omitted).
70. See Tipton v. Canadian Imperial Bank of Commerce, 872 F.2d 1491 (11th Cir.), reh’g denied, 883 F.2d 79 (11th Cir. 1989) (disqualification unwarranted when firm represented defendant bank in sex discrimination suit brought by plaintiff while also representing plaintiff in unrelated property matter where firm withdrew from latter action and there was no indication that confidential information had been obtained); Hartford Accident and Indemn. Co. v. RJR Nabisco, Inc., 721 F. Supp. 534 (S.D.N.Y. 1989) (disqualification not warranted where firm representing plaintiff in litigation arising out of corporate takeover had previously represented defendant’s wholly owned subsidiary in products liability case since partner in charge of the latter case had left the firm taking the client with him); In re Dayco Corp. Derivative Sec. Litig., 102 F.R.D. 624 (S.D. Ohio 1984) (no disqualification required where firm, representing plaintiffs in derivative action on behalf of corporation,
II. ANALYSIS OF THE TWO APPROACHES TO UNRELATED MATTER
CONFLICTS OF INTEREST

A. THE PURPOSES SERVED BY DISQUALIFICATION ORDERS

Analysis of the two approaches discussed in the first section of this article
raises a more fundamental question: When should a court order disqualification
as a remedy for unethical conduct? Disqualification of counsel can serve
several possible goals: first, an attorney could be disqualified when his ethical
misconduct poses a significant risk of trial taint. For example, trial taint can
occur when the attorney is in a position to use confidential information
against a current or former client or if the attorney’s ability to represent his
client zealously is impaired because of a conflict of interest.71 Second, even
in the absence of a risk of trial taint, disqualification can be ordered as a
remedy for attorney misconduct to promote public confidence in the ethics of
attorneys and the integrity of the legal system. Third, disqualification may
act as a form of punishment for misconduct. If an attorney is disqualified, he
loses the fees that he expected to receive from representing the client. In
deed, the attorney may be forced to disgorge fees already received.72 Finally,
disqualification can function as a deterrent against similar misconduct by
other attorneys.

In many cases a disqualification order serves all of these goals. For exam-
ple, suppose an attorney undertakes representation against a former client in
a matter that is substantially related to the prior representation. Disqualifi-
cation prevents the possibility of trial taint through the attorney’s use of con-
fidential information against the former client.73 Furthermore, public
confidence in the legal system is promoted because the order of disqualifica-
tion stands as a statement to the public that lawyers cannot undertake represen-
tation in matters in which misuse of confidential information is likely.
Similarly, the order of disqualification punishes the offending lawyer for mis-
conduct and acts as a deterrent against similar misconduct by other lawyers
in the future.

In other cases, however, there will not always be such a perfect fit between
the four goals and the remedy of disqualification. Suppose that a conflict of

also represented plaintiff in an unrelated breach of contract action against corporation since firm
withdrew from the latter action); Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264 (D. Del. 1980)
(disqualification not required where firm represented plaintiff in deceptive advertising claim and
simultaneously represented defendant’s sister corporation in unrelated antitrust litigation since
there was no showing of actual prejudice).

71. Board of Education v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979). See infra text accompa-
nying notes 98-119.

72. See cases discussed in Part III(B)(2), infra.

73. But see Goldberg, The Former Client’s Disqualification Gambit: A Bad Move in Pursuit of an
Ethical Anomaly, 72 MINN. L. REV. 227, 230 (1987) (arguing that the former client disqualification
rule is bad law and bad ethics).
interest arises because of circumstances beyond the control of the lawyer—a corporate merger, for example. In such cases disqualification does not serve the goal of punishment since the attorney's conduct is not blameworthy, nor would it serve the goal of deterrence since the conflict arose for reasons beyond the control of the attorney.

In deciding when it is appropriate for a court to order disqualification, it is important to note that disqualification is not the only remedy for ethical misconduct. Damage awards and disciplinary sanctions are alternatives to disqualification. Disqualification differs from these alternatives in two important respects. First, disqualification operates prospectively to prevent harm, while damage awards and disciplinary sanctions operate retrospectively to punish misconduct. Second, damages awards, disciplinary sanctions, and disqualification orders all impose costs on the offending attorney. Disqualification, however, also inflicts costs on both the client and the legal system. The client whose attorney is disqualified may suffer delay, inconvenience and expense. Disqualification may impair the adversarial process if new counsel has great difficulty mastering the nuances of the case. Additionally, judicial inefficiency can result when the court loses time invested in the matter because of the disqualification of counsel.

When the attorney's continued representation of a client poses a substantial risk of taint to the trial, disqualification is an appropriate remedy because neither an award of damages or disciplinary sanction is effective to prevent trial taint. Both serve only to punish the attorney's misconduct after the fact. While an order of disqualification in a case that involves substantial risk of trial taint may well impose costs on the client and the legal system, these costs are unavoidable to maintain the integrity of the trial process.

By contrast, if the attorney's misconduct does not involve a substantial risk of taint to a trial, the use of disqualification as a remedy seems unwise. The other goals mentioned previously—promotion of public confidence, punishment, and deterrence—can be similarly served by either a damage award or disciplinary sanction against the attorney, without the costs associated

75. Id. at 1471-72.
76. In recent years there has been considerable criticism leveled at the effectiveness of the attorney disciplinary process. In 1970 a special Commission of the American Bar Association, chaired by Justice Tom C. Clark of the United States Supreme Court, reported the existence of a "scandalous situation" in the disciplinary system. ABA Special Comm. on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 1 (1970). Recently, the American Bar Association appointed a new commission headed by Professor and former Dean Robert B. McKay of New York University Law School to evaluate the current status of the disciplinary process. While a preliminary report is expected sometime in February of 1991, the Commission's progress has been slowed by McKay's sudden death. Chicago Tribune, July 31, 1990, at C3, col. 1. Some courts may have been more willing to employ disqualification orders
with disqualification. Moreover, the use of either damage awards or the disciplinary sanction has another advantage over disqualification as a remedy for ethical misconduct. Both disciplinary sanctions and civil penalties can be calibrated to reflect the degree of wrongdoing. Disqualification, however, is a blunt instrument for sanctioning attorneys because it does not draw distinctions based on the degree of the attorney's misconduct.

Thus, one may conclude that disqualification of counsel is appropriate as a remedy for attorney misconduct only in cases in which the attorney's continued representation poses a substantial threat of taint to a pending proceeding. A growing body of case law is consistent with this analysis. The leading case adopting this approach is *Board of Education v. Nyquist*.77 *Nyquist* involved a declaratory judgment action brought by the Board of Education of the City of New York and the Chancellor of the City School District to resolve a conflict between contradictory positions of the State Commissioner on Higher Education and the United States Department of Health, Education and Welfare (HEW) regarding seniority systems for male and female health and physical education teachers. The State Commissioner had ruled that it was illegal for the school system to maintain separate seniority systems for male and female teachers for the purpose of layoffs, while HEW indicated that federal law required the use of separate systems. Plaintiffs provisionally merged the systems and then brought the declaratory judgment action to resolve the conflict. Defendants included three male and three female teachers, sued both individually and as class representatives.78

The male defendants were represented by the General Counsel of the New York State United Teachers (NYSUT), an association of approximately 180,000 teachers and other school-related employees in New York State. NYSUT offered a legal services program that allowed members to apply for free legal representation. The General Counsel and his staff could take a case when in their judgment the case was both "job-related and meritorious."79 Through this procedure the male defendants retained NYSUT's General Counsel.

The female defendants moved to disqualify the General Counsel from representing the male defendants, arguing that the representation created an appearance of impropriety in violation of Canon 9 of the *Model Code*. The trial because of perceived ineffectiveness of the disciplinary system. Even if the claimed ineffectiveness of the disciplinary system is accurate, the criticism of the use of disqualification orders made in this article remains unshaken. Damage awards for ethical misconduct, which do not suffer from the problems (whether real or perceived) of the disciplinary process, remain as an alternative to disqualification without the costs that disqualification imposes.

77. 590 F.2d 1241 (2d Cir. 1979).
78. Id. at 1243.
79. Id. at 1243-44.
judge granted the motion and the male defendants appealed.\textsuperscript{80} The Court of Appeals for the Second Circuit reversed, holding that the trial judge erred in ordering disqualification.\textsuperscript{81}

The court began its analysis with a discussion of when it was appropriate for a court to exercise its discretion to disqualify counsel. Reviewing the case law in the Circuit, the court concluded that disqualification was warranted only “where necessary to preserve the integrity of the adversary process.”\textsuperscript{82} The court went on to define more precisely when such action was necessary:

In other words, with rare exceptions disqualification has been ordered only in essentially two kinds of cases: (1) where an attorney’s conflict of interests in violation of Canons 5 and 9 of the Code of Professional Responsibility undermines the court’s confidence in the vigor of the attorney’s representation of his client, see, e.g., \textit{Fund of Funds, Ltd. v. Arthur Anderson & Co.}, \textit{Cinema 5, Ltd. v. Cinerama, Inc.}, or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example, in violation of Canons 4 and 9, thus giving his present client an unfair advantage, see, e.g., \textit{Fund of Funds, Ltd. v. Arthur Anderson & Co.}, \textit{Emil Industries, Inc. v. Patentex, Inc.}\textsuperscript{83}

The court stated that several policy reasons supported a restrained use of disqualification orders: First, “disqualification has an immediate adverse effect on the client by separating him from counsel of his choice.”\textsuperscript{84} Second, “disqualification motions are often interposed for tactical reasons.”\textsuperscript{85} Finally, “even when made in the best of faith, such motions inevitably cause delay.”\textsuperscript{86}

Applying these principles to the facts of the case, the court found that there was no basis for holding that NYSUT’s General Counsel had violated his duty of loyalty: “There is no claim, however, that [the General Counsel] feels any sense of loyalty to the women that would undermine his representation of the men. Nor is there evidence that his representation of the men is anything less than vigorous.”\textsuperscript{87}

Similarly, the court found that there was no evidence that the men had gained an unfair advantage over the women by virtue of their counsel’s access to privileged information. Accordingly, disqualification was unwar-

\textsuperscript{80} \textit{Id.} at 1244.
\textsuperscript{81} \textit{Id.} at 1247.
\textsuperscript{82} \textit{Id.} at 1246.
\textsuperscript{83} \textit{Id.} (citations omitted).
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.} The Court noted that the instant litigation had been at a standstill for close to a year.
\textsuperscript{87} \textit{Id.} at 1247.
ranted because “in no real sense can [the General Counsel’s] representation of the men be said to taint the trial.”

*Nyquist* has been followed by a number of similar decisions both in the Second Circuit and in other jurisdictions. *Armstrong v. McAlpin* concerned a suit by a court-appointed receiver to recover funds allegedly looted by the defendants from certain mutual funds. A member of the firm representing the receiver had previously worked for the SEC where he supervised the investigation and litigation against certain of the defendants, including McAlpin. The defendants moved to disqualify the law firm from representing the receiver, relying on Disciplinary Rule 9-101(B) of the *Model Code*, which prohibits a lawyer from undertaking representation in a matter in which he had substantial responsibility while a government employee. The trial judge denied the motion for disqualification, but a panel of the Second Circuit reversed. The Court of Appeals, sitting *en banc*, affirmed the district court’s decision denying the motion for disqualification. Relying on *Nyquist*, the court decided that a restrained approach to disqualification was appropriate. Noting that the former SEC lawyer had been screened from any participation, the Court of Appeals concluded that there was no threat of taint to the trial.

Courts in other jurisdictions have relied on *Nyquist* to refuse to order disqualification unless there is a threat of trial taint. For example, in *Waters v. Kemp* the United States Court of Appeals for the Eleventh Circuit denied a government motion to disqualify the petitioner’s attorneys in a *habeas corpus* proceeding based on the appearance of impropriety because a partner in the firm acting as local counsel served as a special assistant attorney general. Similarly, in *Wellman v. Willis*, the Massachusetts Supreme Judicial Court held that a law firm was not disqualified from representing the plaintiff in a fraud claim against the principal of a corporation when the law firm had previously represented another officer of the corporation. After finding that disqualification was not required under either Canon 4 or Canon 5, the court, quoting from *Nyquist*, stated that the appearance of impropriety was “simply too weak and too slender a reed on which to rest a disqualification order.”

88. *Id.*
89. 625 F.2d 433 (2d Cir. 1980) (en banc), vacated on other grounds, 449 U.S. 1106 (1981).
90. *Id.* at 435-36.
91. *Id.* at 442.
92. *Id.* at 434.
93. *Id.* at 446.
94. *Id.* at 445.
95. 845 F.2d 260, 265-66 (11th Cir. 1988).
97. *Id.* at 503, 509 N.E.2d at 1190 (citing Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 723 (7th Cir. 1982)). It is also worth noting that the drafters of the *Model Rules of Professional
B. THE RISK OF TRIAL TAINT IN UNRELATED MATTER CONFLICTS OF INTEREST

Two conclusions emerge from this analysis. First, disqualification of a law firm is an appropriate remedy for unethical conduct if the law firm's continued representation poses a substantial threat of trial taint. Second, trial taint can occur either because the firm is in a position to use confidential information to the detriment of a present or former client or because the firm's vigorous representation on behalf of a client is likely to be compromised. In light of this analysis, should courts order disqualification of counsel in unrelated matter conflicts of interest?

1. Trial Taint Through Use of Confidential Information

Unrelated matter conflicts of interest involve two matters: (1) the adversity matter, the case in which the interests of the two clients are directly opposed, and (2) the nonadversity matter, the unrelated case. For example, in *International Business Machines Corp. v. Levin*, a law firm had represented Levin and his company, Levin Computer Corporation, for a number of years until litigation developed with IBM. At the same time the firm had begun representing IBM in certain labor matters. The litigation between Levin and IBM was the adversity matter, while the unrelated labor work was the nonadversity matter.

It is, of course, possible that the adversity and nonadversity matters could be related cases. If the relationship between the nonadversity matter and the adversity matter is a substantial one, the law firm should be disqualified because of the risk of use of confidential information. Indeed, this analysis would have been a more appropriate basis for deciding *Cinema 5* than the duty of loyalty rationale employed by the Court of Appeals for the Second Circuit. In *Cinema 5* it appears that the two matters were substantially related because both were antitrust actions involving the motion picture industry.

Similarly in *Fund of Funds, Ltd. v. Arthur Anderson & Co.* the law firm of Morgan, Lewis & Bockius represented Fund of Funds in securities litigation. It became apparent that suit should be brought against Arthur Anderson, but Anderson was a long-time client of Morgan, Lewis. To avoid the conflict, Morgan, Lewis employed independent counsel to handle the liti-

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*Conduct* eliminated the appearance of impropriety from the Rules because they believed that the concept was too vague to be useful. See note 16, *supra*.

98. See note 6, *supra*.
100. See *supra* text accompanying notes 20-27.
101. 567 F.2d 225 (2d Cir. 1977).
gation against Anderson.\textsuperscript{102} The Court of Appeals for the Second Circuit ruled that associated counsel should be disqualified under Canons 4, 5 and 9.\textsuperscript{103} The case seems most appropriately decided under Canon 4. Because of Morgan, Lewis's long-standing relationship with Anderson and its investigation of the Fund of Funds matter, it was in the position of having confidential information that could be conveyed to associated counsel.

When the two matters are substantially related, disqualification should be ordered in the adversity matter rather than the nonadversity matter because the adversity matter presents the risk of use of confidential information, while the nonadversity matter does not. For example, in the \textit{Cinema 5} case the law firm should have been disqualified from representing \textit{Cinema 5} against Cinerama because of the possibility that the firm gained confidential information through the representation of Cinerama in the unrelated matter that could be used against Cinerama. It would not make sense to disqualify the firm from representation of Cinerama in the unrelated matter because there is no risk that confidential information will be used against \textit{Cinema 5} in that case—\textit{Cinema 5} is not even a party to that proceeding.

In the typical case, however, the adversity and nonadversity matters are totally unrelated. In that situation it is difficult to see how either matter could be tainted by misuse of confidential information. \textit{International Business Machines v. Levin}\textsuperscript{104} again provides a good example. What confidential information could the firm have gained in its labor representation of IBM that would be beneficial to Levin in his antitrust case? How could information that the firm had about Levin be helpful to IBM in its labor matters?

2. Trial Taint Through "Reduced Zealousness" or "Disharmony"

Trial taint can also occur if the law firm's vigorous representation on behalf of its client is undermined due to a conflict of interest. When a firm is representing two clients with opposing interests in a single matter, it is clear that the dual representation poses a risk of trial taint because the firm's ability zealously to represent each of the clients is compromised. Advocacy of the interest of one client will necessarily be harmful to the interest of the other.\textsuperscript{105} In such a case, disqualification of the firm from representing one of the clients protects the other client's interest in zealous representation.

In unrelated matter conflicts of interest, however, the possible impact on

\textsuperscript{102} \textit{Id.} at 227.
\textsuperscript{103} \textit{Id.} at 232.
\textsuperscript{104} See supra text accompanying notes 28-33.
\textsuperscript{105} In some situations even representation of opposing parties in a single matter may be proper when the clients are only nominally opposed to each other. See, e.g., \textit{Brown & Williamson Tobacco Corp. v. Daniel Int'l Corp.}, 563 F.2d 671 (5th Cir. 1977) (permissible for lawyer to represent nominally adverse parties); \textit{Klemm v. Superior Court}, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (Cal. Ct. App. 1977) (lawyer may represent both husband and wife in uncontested divorce hearing).
the firm's duty of zealous representation is less clear than when the conflict arises in a single case. To determine this impact, it is necessary to further examine how the duty of loyalty is implicated in unrelated matter conflicts.\textsuperscript{106}

Both of the clients involved in an unrelated matter conflict of interest have an interest in loyal representation by their counsel. The impact of dual representation and the risk of violation of the duty of loyalty differ, however, for the adversity and the nonadversity clients. The risk that the adversity client faces from dual representation in unrelated matters is the possibility that the firm will “pull its punches”\textsuperscript{107} in representing the adversity client against the nonadversity client. For example, if the nonadversity client is a major client (or potential major client) of the firm, the firm may be reluctant to pursue the adversity matter with total zeal because of the fear of angering the major client.\textsuperscript{108}

The significance of this risk of “reduced zealousness” will vary depending on the firm’s relationship with each of the clients. If the nonadversity client is already a large client of the firm or a potentially large client relative to the adversity client, the risk of reduced zealousness is increased because the law firm will have a greater incentive to curry favor with the nonadversity client. By contrast, if the adversity client is a major client of the firm while the nonadversity client is not, the risk of reduced zealousness is substantially lessened.

The nonadversity client also has an interest in loyal representation, but the nature of the risk faced by the nonadversity client is different from the risk faced by the adversity client. The risk of reduced zealousness faced by the adversity client seems inapplicable to the situation of the nonadversity client. The firm would have almost no incentive to pull its punches in representing the nonadversity client in unrelated matters because this conduct would not directly benefit the adversity client.\textsuperscript{109} Instead, the risk faced by the nonadversity client is of a different nature. Because the law firm is representing the adversity client against the nonadversity client, the aggressiveness of the representation may cause distrust and acrimony to develop in the relationship between the firm and the nonadversity client. For example, if a lawyer is representing an individual in a matter, while vigorously cross-examining that same individual in another case, it may be very difficult for the lawyer and client to maintain a harmonious working relationship.

Like the risk of reduced zealousness, the significance of the risk of “dishar-

\textsuperscript{106} The analysis that follows relies heavily on the discussion in \textit{Developments in the Law—Conflicts of Interest in the Legal Profession}, 94 Harv. L. Rev. 1244, 1298-1303 (1981).
\textsuperscript{107} Id. at 1300.
\textsuperscript{108} Id. at 1298-99.
\textsuperscript{109} Id. at 1300.
mony” also varies depending on the nature of the relationship between the firm and the two clients. If the nonadversity client is an individual rather than a business entity, the risk of disharmony is increased because the attorney-client relationship has a more significant personal element. Similarly, if the same lawyer is involved in representation of both the adversity and nonadversity clients, the risk of disharmony creeping into the relationship between the lawyer and the nonadversity client increases. The nonadversity client may come to view the lawyer as a traitor to his cause. By contrast, if different lawyers in different departments or even different offices of the firm handle the adversity and nonadversity matters, the risk of disharmony is reduced substantially.

In some cases a law firm will respond to the presence of an unrelated matter conflict by withdrawing from representation of one of the clients. Such situations are referred to in this article as “withdrawal” cases. For example in *Harte Biltmore, Ltd. v. First Pennsylvania Bank*, 110 a law firm represented the defendant bank in an action claiming interest rate overcharges. At the same time, the firm represented Harte in unrelated state court litigation. The conflict arose because of a misspelling in the firm’s client records. When the firm learned of the conflict, it obtained court permission to withdraw from representing Harte in the state court action. 111 Similarly, in *Hartford Accident & Indemnity Co. v. R.J.R. Nabisco, Inc.*, 112 the Boston office of a New York firm was representing Reynolds Tobacco, a subsidiary of Nabisco, in product liability matters, when the New York office of the firm undertook representation of Hartford against Nabisco. Nabisco filed a motion to disqualify the firm because of the conflict, but by the time the motion was filed, the Boston partner had left the firm taking Reynolds Tobacco with him as a client. 113

In withdrawal cases the risk of trial taint through either reduced zealousness or disharmony seems extremely unlikely. The client whose firm has withdrawn no longer faces any risk of reduced zealousness or disharmony because the firm’s representation has ended. For example, in *Harte Biltmore* there was no longer a risk that the firm would sacrifice the interests of Harte in the state court action because the firm was no longer representing Harte in that matter.

The client still represented also faces little risk of disloyalty. If that client is the adversity client, the risk of reduced zealousness to the client is no longer present because the firm’s withdrawal from representation of the other client has eliminated the firm’s incentive to “pull its punches.” For example,

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111. *Id.* at 420.
113. *See* note 70, supra.
in *Harte Biltmore*, if the firm's continued representation of Harte might have caused the firm to be less zealous in its representation of the bank, that risk was eliminated when the firm withdrew from representing Harte, thus showing its undivided loyalty to the bank. It is possible that the bank might be wary of the firm because of its previous attorney-client relationship with the adverse party, but if this truly troubles the bank, it can ask the firm to withdraw. Similarly, if the client still represented is the nonadversity client, the risk of disharmony has also been eliminated because the cause of possible disharmony, representation of the other client, has ceased.

It is important that the argument about withdrawal not be misconstrued. The argument is *not* that the firm acted properly in withdrawing from representation. Withdrawal may well have been improper and the firm may in fact be subject to damages or disciplinary action for its improper conduct.\(^{114}\) The point is simply that once withdrawal takes place, whether rightfully or wrongfully, the potential for future disloyalty no longer exists. If, as argued above, the proper basis for disqualification rests on the *prevention* of a substantial risk of future trial taint, disqualification in withdrawal cases is an unwarranted remedy.

In other cases, a law firm will continue to represent both clients despite the existence of an unrelated matter conflict of interest. This was the situation, for example, in both *Cinema 5, Ltd. v. Cinerama, Inc.*\(^ {115}\) and *International Business Machines Corp. v. Levin*.\(^ {116}\) Is disqualification of counsel an appropriate remedy to prevent trial taint in these "dual representation" cases?\(^ {117}\)

A complete analysis must focus on the interests of both the adversity and the nonadversity clients. As noted above, the adversity client does face a potential risk of reduced zealousness because of the firm's continued representation of the nonadversity client. There are two difficulties, however, in always relying on this potential risk to justify granting a nonadversity party's motion to disqualify. First, the degree of risk of reduced zealousness faced by the adversity client depends on the firm's relationship with the two clients. If the adversity client is a major client of the firm, and the nonadversity client is not, it is difficult to imagine the firm pulling its punches to favor a minor client. Second, in these cases the adversity client often has no objection to the dual representation. For example, in the *Levin* case the law firm had

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\(^{114}\) *See infra* text accompanying notes 187-96.

\(^{115}\) 528 F.2d 1384 (2d Cir. 1976).

\(^{116}\) 579 F.2d 271 (3d Cir. 1978). *See supra* text accompanying notes 28-33 for a full discussion of the case.

\(^{117}\) In Board of Education v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) the Court of Appeals referred to *Cinema 5* as one of the two types of cases in which a trial taint was likely to occur. The Court, however, did not analyze how unrelated matter conflicts create a risk of trial taint. The analysis that follows questions whether unrelated matter conflicts necessarily involve a significant risk of trial taint.
informed Levin that the firm represented IBM in unrelated labor work and had obtained Levin’s consent.118 When the adversity client, who is facing the risk of reduced zealousness, is willing to waive any objection to the firm’s continued representation, what basis for objection to the representation does the nonadversity client have? Why should IBM be allowed to obtain disqualification of opposing counsel to protect the integrity of the attorney-client relationship of its adversary? This is an odd form of paternalism indeed. Further, as many courts have pointed out, disqualification motions are often raised for tactical reasons. This danger is particularly acute when the disqualification is sought, not by the client who faces the potential risk of harm, but by its opponent.

This is not to say that the client’s consent to the firm’s representation in the adversity matter should be conclusive. Both the Model Code and the Model Rules of Professional Conduct (Model Rules) prohibit dual representation even with the client’s consent if the attorney cannot adequately represent both clients.119 In some cases a court may be skeptical of the validity of the client’s consent. This risk seems remote, however, when the client is a sophisticated corporate client, especially one with inside counsel who can provide independent advice about the wisdom of representation by outside counsel. In other cases a court may have a systemic concern about the adequacy of representation despite the client’s consent. If inadequate representation leads to a decision that produces bad law, nonparties are adversely affected.120 But to say that a court may sometimes reject the adversity client’s consent to representation is very different from the approach of the first line of cases, which have ordered disqualification on motion of the nonadversity client without giving any significant weight to the desires or consent of the adversity client.

If the interests of the adversity client do not always justify the granting of disqualification on motion of the nonadversity client, perhaps the interests of the nonadversity client are sufficient to do so. It could be argued that the nonadversity client faces the risk of disharmony in its relationship with its firm because of the firm’s continued representation of the adversity client against the nonadversity client.121 For example, in the Levin case it could be argued that the firm’s representation of Levin against IBM is likely to produce disharmony in the relationship between the firm and IBM because it violates IBM’s expectations of undivided loyalty. But this argument is also

118. 579 F.2d at 277 ("CBM obtained Levin’s consent to CBM’s representation of IBM in labor matters and the antitrust suit was filed by Weiss acting for the firm June 23, 1972, one week after the completion of CBM’s fourth opinion letter for IBM.").
119. Model Code DR 5-105(B)-(C); Model Rules Rule 1.7.
120. Developments in the Law—Conflicts of Interest in the Legal Profession, supra note 6, at 478-79.
121. See supra text accompanying note 109.
flawed. First, the strength of this argument is subject to question. If one’s image of the lawyer/client relationship is that of individual lawyer and client, the argument has some appeal. For example, if a lawyer represents an individual client in a matter and then personally represents an adversary in a matter directly adverse to that client, it is hard to imagine that much trust and confidence could remain in the relationship.\textsuperscript{122} Does it make sense, however, to apply this image to the large, multi-office law firm representing the sophisticated corporate client? In the Levin case different lawyers and different representatives of IBM were involved in the antitrust cases and the labor work. IBM as an entity has undoubtedly faced the situation of having a law firm represent it in a matter, only later to be opposed by the firm in another matter. In these cases, the risk of disharmony seems small.

Second, even if one admits that there is a risk of disharmony in the lawyer-client relationship because of representation of an opposing party in an unrelated matter, the question still remains whether the appropriate remedy for the situation is disqualification of the law firm from representing the adversity client. Since two clients are involved, why should preference automatically be given to the nonadversity client (IBM, for example) over the adversity client (Levin, for example)? As between two innocent clients, it seems more appropriate to consider the respective interests of those clients rather than reflexively favoring the interests of one client over the other. On the facts of the Levin case, for example, it seems that Levin rather than IBM had the superior interest in continued representation. The relationship between the firm and Levin predated that of the relationship between IBM and the firm. Further, because Levin’s antitrust case was several years old, disqualification of the firm representing Levin would be highly disruptive to him; to bring in new counsel at such a late date would be costly and impose a substantial delay on both Levin and the court. By contrast, the firm’s labor work for IBM appeared to be relatively routine. Indeed, the firm was not even handling any matters for IBM at the time the antitrust case was filed; any potential harm to IBM appears to be insignificant.

This examination calls into question the approach of cases like \textit{Cinema 5 v. Cinerama} and its progeny. These cases have routinely used disqualification as a remedy for unrelated matter conflicts of interest without considering whether the situation poses a realistic risk of trial taint and without evaluating the impact of disqualification on the interests of the two clients or the legal system. Instead, a balancing of costs and benefits, the approach adopted by the second line of cases discussed earlier in the article, is a wiser way for courts to proceed. The cases that have used balancing, however,

\textsuperscript{122} This was the situation in the Rottner case, \textit{supra} note 24, where the client was an individual who was personally attacked by his lawyers in litigation.
have not articulated a clear framework for application of the test and leave unanswered a number of questions: When is balancing to be used? What interests are to be balanced? If balancing leads a court to the conclusion that disqualification should be denied, is it appropriate for a court to consider some other remedy, such as damages? The next section offers a framework for courts to use in deciding unrelated matter conflict of interest cases.

III. A PROPOSED FRAMEWORK OF ANALYSIS

This part of the article develops a framework for courts to use in deciding whether to order disqualification because of an unrelated matter conflict of interest. The courts should apply a two-part inquiry: First, is dual representation improper? This question raises two subsidiary issues: 1) Who is a current "client"? and 2) When is client consent sufficient to validate dual representation? Second, if dual representation is improper, what remedy should the court order?

A. IS DUAL REPRESENTATION IMPROPER?

1. Who is a Current Client?

The rules of professional ethics dealing with unrelated matter conflicts apply only to current clients; if the client moving for disqualification is a former, rather than a current client, the substantial relationship test is the governing standard. Thus, it becomes important to decide whether the client should be treated as a current or a former client.

The clearest example of a current attorney-client relationship occurs when a law firm is presently handling an active matter for a client. There are, however, two situations in which courts should hold that a current attorney-client relationship exists even though the firm is not currently handling a specific matter for a client. First, when a firm is employed under a general retainer, an on-going attorney-client relationship exists because the client has hired the firm to be available to handle legal matters as needed. Second, even in the absence of a retainer agreement, if the client has employed the firm on a regular basis, courts should hold that a current attorney-client relationship exists because the client has a reasonable expectation of a continuous relationship. This was the situation in the International Business Machines v. Levin case, where the United States Court of Appeals for the Third Circuit held that there was an attorney-client relationship between the law firm and IBM even though the firm was not currently handling a matter.

123. See note 3, supra.
124. C. Wolfram, supra note 1, at 506.
for IBM at the time the firm filed suit on behalf of Levin and Levin Computer Corporation against IBM. The court stated:

Although CBM had no specific assignment from IBM on hand on the day the antitrust complaint was filed and even though CBM performed services for IBM on a fee for service basis rather than pursuant to a retainer arrangement, the pattern of repeated retainers, both before and after the filing of the complaint, supports the finding of a continuous relationship.126

Determination of whether a current attorney-client relationship exists becomes more difficult when the law firm is representing an entity such as a corporation, association or limited partnership. The rules of professional ethics provide that a lawyer employed by an entity represents the entity itself and not any of its constituents.127 However, the case law applying the "entity representation" concept is more refined.

In some cases the law firm’s relationship with a constituent of the entity (i.e. a member of an association; an officer, director or shareholder of a corporation; a limited partner in a partnership) is purely vicarious. For example, in Glueck v. Jonathan Logan, Inc.,128 the plaintiff, a former executive officer of the defendant corporation, brought suit claiming breach of his employment contract. Defendant moved to disqualify the plaintiff’s counsel because one of the defendant’s divisions was a member of an association of dress manufacturers represented by plaintiff’s counsel. The sole function of the association was to negotiate collective bargaining agreements on behalf of its members. The lower court granted the defendant’s disqualification motion.129

The Second Circuit ruled that the strict standard for disqualification adopted by the court in the Cinema 5 case would not apply to suits against members of an association that the firm represents:

That burden is properly imposed when a lawyer undertakes to represent two adverse parties, both of which are his clients in the traditional sense. But when an adverse party is only a vicarious client by virtue of membership in an association, the risks against which Canon 5 guards will not inevitably arise.130

The Court of Appeals held, however, that the defendant was entitled to some protection by virtue of being a member in the association represented

127. MODEL RULES Rule 1.13(a), (e); MODEL CODE EC 5-18; C. WOLFRAM, supra note 1, at 421-24.
128. 653 F.2d 746 (2d Cir. 1981).
129. Id. at 748.
130. Id. at 749.
by the plaintiff’s lawyers. The court reasoned that disqualification should be
determined by application of the “substantial relationship” test:

Disqualification will ordinarily be required whenever the subject matter of
a suit is sufficiently related to the scope of the matters on which a firm
represents an association as to create a realistic risk either that the plaintiff
will not be represented with vigor or that unfair advantage will be taken of
the defendant.\textsuperscript{131}

Applying this test, the Court of Appeals affirmed the lower court’s disqualifi-
cation order. It found the two matters were sufficiently related to warrant disqualification since both involved labor issues.\textsuperscript{132}

In \textit{Pennwalt Corp. v. Plough, Inc.},\textsuperscript{133} the United States District Court for
the District of Delaware applied an approach similar to that used by the
Second Circuit in \textit{Glueck} to an unrelated matter conflict of interest that arose
from a corporate merger. A law firm had been primary litigation counsel for
Pennwalt for over twenty years. In 1977 the firm began representing
Pennwalt in a dispute with Plough (a wholly owned subsidiary of Schering-
Plough) about Plough’s comparative advertising of athlete’s foot remedies.
In June 1978 the firm defended Scholl in unrelated antitrust litigation. In
April 1979 Schering-Plough acquired Scholl. Since Plough was a wholly-
owned subsidiary of Schering-Plough, Plough and Scholl became sister corpo-
ratings. In May 1979 the law firm filed suit on Pennwalt’s behalf against
Plough. Plough moved to disqualify the law firm from representing
Pennwalt because the firm was simultaneously representing its sister corpo-
ration, Scholl. The law firm moved to withdraw from representing Scholl and
this motion was granted; Plough nonetheless pressed its motion to disqualify
the firm from representing Pennwalt.\textsuperscript{134}

Plough argued that a \textit{per se} rule precluding simultaneous representation of
one client against a sister corporation of another client should apply. The
court rejected this approach, pointing out that the firm had never directly
represented Plough or Schering-Plough.\textsuperscript{135} The court also rejected
Pennwalt’s argument that the absence of a formal attorney-client relationship
with Plough precluded disqualification, relying on other decisions which or-
dered disqualification where no formal attorney-client relationship existed.\textsuperscript{136}

The court then proceeded to analyze the case under the principles of the
\textit{Model Code}. Because the Pennwalt and Scholl cases were unrelated to each
other, the court found no violation of the duty of confidentiality set forth in

\textsuperscript{131} \textit{Id.} at 750.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} 85 F.R.D. 264 (D. Del. 1980).
\textsuperscript{134} \textit{Id.} at 265-68.
\textsuperscript{135} \textit{Id.} at 268.
\textsuperscript{136} \textit{Id.} at 268-69.
Canon 4. As to the duty of loyalty expressed in Canon 5, the court stated that the focus of its analysis was "to gauge the degree, if any, to which [the law firm's] representation of either Pennwalt or Scholl may be influenced by a regard for the alternate client's welfare." The court found that the record conclusively showed that the law firm had provided undivided and undiluted loyalty to both clients. In particular, the court recognized that Plough and Scholl did not become sister corporations until some ten months after the firm began representing Scholl and that the firm withdrew from representing Scholl shortly thereafter.

In other entity representation cases, however, the law firm's relationship with a constituent may go beyond the purely vicarious relationship present in cases like Glueck and Pennwalt. The leading case is Westinghouse Elec. Corp. v. Kerr-McGee Corp. In Westinghouse the Washington office of Kirkland and Ellis had been retained by an association of petroleum companies as "independent special counsel" to prepare a report on competition in the uranium industry. The firm planned to use the report to lobby against legislation to break up the oil companies. To collect information for the report, the firm sent a questionnaire to fifty-nine oil companies that were members of the association and interviewed representatives of some of these companies. The firm told the companies that all information divulged to the law firm would be confidential. On October 15, 1976, the law firm released its final report. The report presented facts and arguments to show that legislation to break up the oil companies was unnecessary in light of overall competitive conditions in the energy industry. On that same day Kirkland's Chicago office filed a complaint on behalf of Westinghouse against a number of defendants, four of which were members of the petroleum association, charging violations of the federal antitrust laws. The complaint presented theories diametrically opposed to those set forth in the report that the firm had prepared for the association.

Three members of the association moved to disqualify Kirkland and Ellis from representing Westinghouse in the antitrust case because the firm had prepared the report for the petroleum association. The district court denied the disqualification motion on the ground that no attorney-client relationship existed between the firm and the members of the association. Relying on agency principles, the court reasoned that the members of the association

137. Id. at 270-71.
138. Id. at 272.
139. 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978).
140. Id. at 1313.
141. Id. at 1314.
142. Id.
143. Id.
144. Id. at 1316.
had not given the law firm express or implied authority to act on their behalf.\textsuperscript{145} Rejecting the district court’s agency approach, the Court of Appeals for the Seventh Circuit reversed.\textsuperscript{146} Focusing on the law firm’s status as “independent counsel” and its promise to association members that their responses would remain confidential, the Court of Appeals ruled that an attorney-client relationship existed between the law firm and the members of the association.\textsuperscript{147} The court did not, however, issue an order of disqualification. Recognizing that Westinghouse had an interest in retaining its chosen counsel, the court ruled that Westinghouse would have the option either to retain Kirkland’s services while dismissing the association defendants or to select other counsel to represent it in the suit.\textsuperscript{148}

In \textit{Margulies v. Upchurch} \textsuperscript{149} the Utah Supreme Court relied on the \textit{Westinghouse} court’s analysis in holding that an attorney-client relationship existed between a law firm and limited partners of a partnership represented by the firm.\textsuperscript{150} In \textit{Margulies} a law firm represented the plaintiffs in a state court action for medical malpractice. Fifteen months later the firm filed a complaint in federal court on behalf of a limited partnership against a bank seeking to prevent execution of a note held by the bank. Three of the defendants in the medical malpractice action were investors in the limited partnership. The firm asked these doctors to consent to the dual representation but they refused; subsequently the defendants moved to disqualify the firm in the medical malpractice action.\textsuperscript{151}

The trial court found that the representation involved a conflict of interest to which the defendants had not consented.\textsuperscript{152} Emphasizing that an order of disqualification would delay the malpractice action, however, the trial court ruled that the firm should have the option of withdrawing from either the federal action or being disqualified in the state court action. The firm subsequently withdrew from the federal court action. The defendants in the medical malpractice action appealed the denial of the disqualification order and the law firm cross appealed the lower court’s finding of the existence of a conflict of interest.\textsuperscript{153}

The Utah Supreme Court reversed, finding that the trial court abused its discretion in refusing to disqualify the law firm from representing the plain-
tiff in the medical malpractice action. The law firm argued that disqualification was unwarranted because there was no express attorney-client relationship between the firm and the limited partners. Relying on Westinghouse Electric, the Utah Supreme Court found that an attorney-client relationship could exist even in the absence of express consent. On the facts of the case the court decided that an implied attorney-client relationship existed between the limited partners and the law firm because the limited partners reasonably believed that the firm was representing their interests. Focusing on the fact that the limited partners were exposed to personal liability through letters of credit, the court noted that the mere representation of an entity such as a corporation or limited partnership would not automatically give rise to an attorney-client relationship between the law firm and the shareholders or limited partners. Such a relationship would exist only when the constituent had a personal interest in the litigation:

If the limited partners stand to gain nothing more from the attorney's representation of the limited partnership than the incidental gain which will accrue to them as partners, and not in their individual capacities, no attorney-client relationship should be implied. When, however, the individual interests of the limited partners are directly involved, as they are here, there may be sufficient grounds for implying the existence of an attorney-client relationship.

The distinctions adopted by these cases seem sound as a matter of policy. In Westinghouse and Margulies the law firms dealt directly with the constituents of the entities and by their actions created reasonable expectations that attorney-client relationships had been formed. When a law firm leads a constituent to believe that an attorney-client relationship exists, the firm should be bound by its actions. When the relationship is purely vicarious, as was the case in Glueck and Pennwalt, however, the situation is different in several respects. First, the reasonable expectations of the constituent are less because the dealings with the law firm are less substantial. Second, the possible impact on the firm's duty of loyalty is small because of the insubstantial nature of the vicarious relationship with the constituent. Finally, application of the conflict of interest rules to vicarious relationships would cast too wide a net of conflicts of interest. The rules would apply to the huge number of vicarious relationships that are formed when the activities of large law firms

154. Id. at 1205.
155. Id. at 1200.
156. Id. at 1200-01.
157. Id. But see Original Appalachian Artworks, Inc. v. May Dept Stores, 640 F. Supp. 751, 757 (N.D. Ill. 1986) (recognizing that an attorney for a close corporation will be treated as having an attorney-client relationship with each shareholder, but questioning whether an attorney is deemed to have an attorney-client relationship with every corporation in which a shareholder has a significant investment).
with hundreds of clients are combined with the functioning of associations and other entities with scores of members. An analogy can be drawn to the rules dealing with lawyers moving between firms. In this case the imputed disqualification rules have been relaxed because the risk of harm to the client is small while the possible scope of disqualification is great.158

In summary, courts should find a current attorney-client relationship if the law firm is (1) currently handling a matter for the client, (2) represents the client under a general retainer, or (3) handles matters for the client on a recurring basis. If the client is an entity, constituents of the entity should be treated as current clients only if the law firm deals directly with the constituent in a manner that creates a reasonable expectation that an attorney-client relationship has been formed. When the relationship with the constituent is purely vicarious, the substantial relationship test should be the governing standard.

2. When Is Client Consent Sufficient to Make Dual Representation Proper?

One response that a law firm may make when faced with an unrelated matter conflict of interest is to seek consent of the clients to such representation. Under the Model Rules, a lawyer may represent clients whose interests are directly adverse if two requirements are met. First, the lawyer must reasonably believe that he can adequately represent both interests. Second, both clients must consent to the dual representation after consultation.159 A good example of how these requirements can be satisfied is Unified Sewerage Agency v. Jelco, Inc.160 In Jelco a law firm was representing Teeples & Thatcher, a client that the firm had represented for over ten years, in an embryonic dispute with its general contractor, Jelco, when Jelco asked the firm to represent it in a dispute with an electrical subcontractor. The firm advised Jelco of its representation of Teeples & Thatcher and informed Jelco that it could not undertake representation unless Jelco consented to the firm’s continued representation of Teeples & Thatcher. Jelco’s management, with full knowledge of the firm’s representation of Teeples & Thatcher and with the advice of its general counsel, consented to the law firm’s representation of Teeples & Thatcher.161 Subsequently, the firm indicated to Jelco that

158. Model Rules Rule 1.10(b),(c); Silver Chrysler Plymouth v. Chrysler Motors, 518 F.2d 751 (2d Cir. 1975) (attorney for plaintiff not disqualified merely because he worked for an 80-person firm which represented defendant in current suit since attorney’s role in former case was limited and he was not entrusted with any confidences that could be used against defendant).
159. Model Rules Rule 1.7(a).
160. 646 F.2d 1339 (9th Cir. 1981). Jelco was decided under the Code of Professional Responsibility, but the requirements for multiple representation under the Code are substantially the same as under the Model Rules. See Model Code DR 5-105(C).
161. Jelco, 646 F.2d at 1342-43.
Teeples & Thatcher might file suit against Jelco and again asked Jelco whether it consented to the firm's continued representation of Teeples & Thatcher; Jelco once again gave its consent. A few months later, however, Jelco discharged the firm from handling the matter with the electrical subcontractor and also moved to disqualify the firm in the pending action brought on behalf of Teeples & Thatcher.162

The Court of Appeals for the Ninth Circuit affirmed the trial court's decision denying the motion for disqualification.163 While recognizing the general rule precluding representation against a present client, the court held that such representation was proper provided (1) the client consented after full disclosure, and (2) it was obvious that the representation of both clients was adequate.164

According to the court, to secure consent, the attorney must do more than simply inform the client of the conflict and obtain approval of the representation. The lawyer must explain the implications of the conflict to the client. On the facts of the case the court found that this requirement was satisfied. The court placed particular emphasis on the fact that Jelco's consent had been obtained after Jelco had consulted with its Salt Lake City attorneys about the matter.165

Regarding the second requirement—that it must be obvious that the lawyer can adequately represent the interests of both clients—the court rejected a per se rule precluding representation against a current client because such a rule would emasculate the provision of the Model Code allowing representation with the consent of both clients.166 Instead, the court ruled that the adequacy of representation must be determined on a case-by-case basis by examination of a number of factors:

[T]he nature of the litigation; the type of information to which the lawyer may have had access; whether the client is in a position to protect his interests or know whether he will be vulnerable to disadvantage as a result of the multiple representation; the questions in dispute (e.g., statutory construction versus disputes over facts) and whether a government body is involved.167

The court held that the trial court did not abuse its discretion when it found that the firm's dual representation was adequate. In particular, the court noted that the two matters were quite different and that the firm did not have access to information that would help Teeples & Thatcher in its action

162. Id. at 1343.
163. Id. at 1352.
164. Id. at 1345.
165. Id. at 1345-46.
166. Id. at 1347; see MODEL CODE DR 5-105(C); MODEL RULES Rule 1.7(b).
167. 646 F.2d at 1350.
against Jelco.\footnote{168}

By contrast to Jelco, International Business Machines Corp. v. Levin\footnote{169} illustrates how a law firm can fail to comply with the requirements of obtaining client consent. In that case two partners in the law firm testified that they had independently obtained IBM's consent to the firm's representation of Levin, but representatives of IBM denied that they had given their consent. The Court of Appeals for the Third Circuit rejected the consent argument because it concluded that the law firm had not carried its burden of proving a "full disclosure" to IBM as required by DR 5-105(C). The court noted that the alleged consent occurred during a telephone call that took at most three minutes.\footnote{170}

Cases like Jelco involve what one author has called "specific waiver."\footnote{171} In these cases the clients who are consenting know the specific party and transaction out of which the conflict arises at the time they give their consent. Suppose, however, that a firm attempts to protect itself from an unrelated matter conflict of interest by a "prospective" consent or waiver of the conflict.\footnote{172} For example, the Attorneys' Liability Assurance Society (ALAS), the captive insurer for many of the legal profession's largest firms has recommended the use of the following waiver provision:

\begin{quote}
It is understood that our client for purposes of this representation is [name of trade association or other group-type client], and not any of its individual members or any other entities whose interests in this matter are being represented by those individual members.

Further, it is agreed that this firm reserves the right to continue to represent or to undertake to represent existing or new clients in any matter that is not substantially related to our work for [name of organization], even if the interests of such clients in those other matters are directly adverse to [name of organization] and/or any of its individual members or the entities represented by those individual members, including litigation in which [name of organization] or its members or such entities are parties. We agree, however, that the prospective consent to conflicting representation reflected in the preceding sentence shall not apply in any instance where as the result of our representation of [name of organization] we have obtained sensitive, proprietary or otherwise confidential information that, if known to any such other client of ours, could be used in any such other matter by such client to the material disadvantage of [name of organization] and/or any of its individual members or the entities represented by those individ-
\end{quote}

\footnote{168. Id. at 1351.}
\footnote{169. 579 F.2d 271 (3d Cir. 1978). See supra text accompanying notes 28-33.}
\footnote{170. Id. at 282.}
\footnote{171. Note, Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest, 79 Mich. L. Rev. 1074, 1075-76 (1981).}
\footnote{172. Id. at 1075-76.}
Should courts uphold the validity of such a prospective consent to dual representation?

A blanket waiver like the one recommended by ALAS should not be enforced. Central to the effectiveness of client consent is communication of information sufficient to enable the client to make an informed decision. It is difficult to believe that a client can receive sufficient information to make an informed decision when the client, at the time of the consent, knows neither the nature of the conflict or the person or entity with whom the conflict exists.

Moreover, the argument in support of judicial recognition of a blanket waiver is weak. The argument is based on the policy in favor of selection of counsel; it posits that if such waivers are not valid, a law firm may be unwilling to undertake representation of a new client in a matter because it fears that the new representation may require the firm’s disqualification in a matter on behalf of a more substantial client who has or may have an interest adverse to that of the new client. Thus, clients may be deprived of the opportunity of obtaining the services of law firms with particular expertise.

This argument in favor of the validity of a blanket waiver ignores the economic forces that drive law firms. Suppose that at the time the firm is asked to undertake representation of the new client it is aware of a potential conflict between the new client and an existing client. Such situations involve specific, not general consent. As long as the firm can adequately represent both interests and both clients consent after full disclosure, such representation is proper.

Suppose, on the other hand, that the firm is not aware of any specific conflict, but is concerned that undertaking the representation may in the future bring the prospective client into conflict with one of its existing clients. This situation, however, exists whenever a firm takes on a new client. To say that the firm would refuse to undertake representation in that matter because of some unknown, future conflict is to say that firms will refuse to take on new business because a new client might some day have a conflict with an existing


174. MODEL CODE DR 5-105(C) requires consent after “full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each” client. MODEL RULES Rule 1.7(a) requires consent after “consultation.” The Terminology section of the Model Rules defines “consultation” as “communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.”

175. Note, Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Interest, 79 MICH. L. REV. 1074, 1075 (1981). The author of this student note only argues for a waiver of the presumption against dual representation, not for complete effectiveness of the prospective consent. Id. at 1076-77, 1088-92.
client. While such a conflict might develop, the client also represents new business to the firm. Therefore, the economic drive of firms will give them a powerful incentive to take on such new business.

In response, it could be argued that firms will be reluctant to take on small new matters for fear that a small client may have a conflict with matters being handled for more substantial clients. Here again, however, the argument ignores law firm economics. If the new matter, although small, is offered by a client who has the potential of becoming a major client, most firms will be willing to run the risk of future conflicts because of the prospect of substantial business. If, on the other hand, the client offers little potential for future work, the client interest in obtaining counsel with expertise dwindles in importance.

In summary, the argument in favor of courts’ upholding a blanket prospective waiver or consent to dual representation seems unpersuasive. A blanket prospective consent cannot satisfy the ethical requirement for consent to dual representation because of inadequate information at the time of the consent. In addition, the policy argument in favor of enforcing a blanket prospective waiver, which is based on the interest of prospective clients in being able to obtain counsel of choice, is weak because it ignores the economic incentive that firms have to take on new matters.

While courts should refuse to enforce blanket prospective waivers, it would be appropriate for courts to accept more limited prospective consents. A good example of such a situation is City of Cleveland v. Cleveland Elec. Illuminating Co.176 In that case the law firm of Squire, Sanders & Dempsey had represented Cleveland Electric Company for over sixty-five years when the City asked the firm to handle a bond matter involving the City’s competing utility company. The City was well aware of the law firm’s long-time representation of Cleveland Electric because of numerous prior dealings with the Electric Company; it wished to retain the firm’s services, however, because it was one of the few firms in Ohio that handled sophisticated bond work. Squire, Sanders was willing to take on the bond work only if the City waived any objection to future conflicts. The City had independent advice from its law department and waived its objections to any conflict of interest.177 Subsequently, the City moved to disqualify the firm in an antitrust action brought by the City against Cleveland Electric.178 The United States District Court for the Northern District of Ohio denied the motion for disqualification. In a lengthy opinion the court held that the City had waived any conflict of interest. The court also ruled that the City failed to show that

177. Id. at 198-201.
178. Id. at 202.
the firm was using confidential information against its interests.\textsuperscript{179}

In cases like \textit{City of Cleveland} a prospective consent should be enforced.\textsuperscript{180} The client was a sophisticated corporate entity with independent legal advice about the waiver. The waiver itself was limited to the firm's representation of an identified long-term client rather than a blanket prospective consent. When such factors are present, it seems reasonable to conclude that the client has sufficient information to consent to the dual representation. Moreover, unless the City had agreed to the waiver it would have been unable to obtain representation in specialized bond work. Thus, the policy argument in favor of recognizing a waiver in such a case, which rests on the ability of a client to retain counsel of its choice, seems strong. Finally, the case did not involve the use of confidential information against the client.\textsuperscript{181}

\textsuperscript{179} Id. at 212-13.

\textsuperscript{180} See also \textit{Kennecott Copper Corp. v. Curtiss-Wright Corp}, 584 F.2d 1195 (2d Cir. 1978). The lower court's decision in \textit{Kennecott Copper} denying the motion for disqualification of counsel is unpublished; the decision is summarized in A. Kaufman, Problems in Professional Responsibility 63-64 (1989).

In \textit{Kennecott Copper}, a law firm that specialized in corporate takeovers was asked to represent Curtiss-Wright in a takeover matter. The firm attempted to protect itself against subsequent disqualification by discussing potential conflicts with the president of the company, who was a lawyer, and with its general counsel. Curtiss-Wright signed the following agreement: "Should your corporation or any person affiliated with it seek to acquire or invest in any company which is a client of our office we will be free to represent that client and the same shall not result in a reduction of the retainer." \textit{Id}. Some time later, while still representing Curtiss-Wright, the firm represented Kennecott in a divestiture and acquisition matter. Curtiss-Wright attempted a takeover of Kennecott and the law firm advised Kennecott management in the proxy fight waged by Curtiss-Wright. Curtiss-Wright moved to disqualify the firm from representation of Kennecott, but the district court denied this motion because of the quoted waiver provision.

The validity of the waiver in \textit{Kennecott Copper} is more problematic than the one in \textit{City of Cleveland} because the waiver was not limited to a single existing client of the firm. On balance, however, the Court was probably correct in upholding the waiver because a number of factors present in the \textit{City of Cleveland} case were also present in \textit{Kennecott Copper}: Curtiss-Wright is a sophisticated client; the waiver was signed by a lawyer; and Curtiss-Wright had a substantial interest in obtaining counsel of its choice because takeover work is highly specialized and requires substantial expertise. Moreover, the waiver in \textit{Kennecott Copper} was at least limited to a particular type of transaction rather than a blanket waiver like that recommended by ALAS. See also Interstate Properties v. Pyramid Co., 547 F. Supp. 178 (S.D.N.Y. 1982) (prospective waiver permissible because attorneys informed waiving client of long-standing relationship with other client, gained no confidential information from waiving client which could be used by other client, and waiver was knowing and voluntary).

\textsuperscript{181} If the case had involved the use of confidential information, a waiver should not be enforced because it is unreasonable to believe that a client would consent to use of confidential information against its interests. See Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 229 (7th Cir. 1978). Even the blanket waiver recommended by ALAS does not apply if the representation would involve the use of confidential information.
B. IF DUAL REPRESENTATION IS IMPROPER, WHAT REMEDY SHOULD THE COURT ORDER?

1. Disqualification

The analysis in Part II of this article leads to the conclusion that courts should distinguish “withdrawal” cases from “dual representation” cases. In withdrawal cases the courts should deny motions for disqualification because the firm has eliminated the conflict of interest by terminating its representation of one of the clients. It is important to emphasize that this argument does not imply that the firm acted properly either when it undertook representation of both clients or when it withdrew from representation of one of the clients. The firm may well have acted wrongfully. Disqualification from representation of the remaining client, however, is a needlessly expensive way to respond to such wrongful conduct. The firm can be punished for any misconduct by damage award or disciplinary action without imposing the costs on the remaining client and the system of justice that result from disqualification. Further, to grant disqualification motions in withdrawal cases would encourage the use of these motions for reasons of vindictiveness and strategic advantage, both of which should be discouraged by the courts.

Assuming a firm is improperly engaged in dual representation, when should a court order disqualification? The potential benefit from granting the motion is prevention of trial taint either by avoiding reduced zealousness in the adversity matter or reducing the risk of disharmony in the nonadversity matter. If the motion is granted, however, costs are imposed on both the client who loses the counsel of its choice and the court system through disruption of a pending proceeding. In deciding whether to grant the motion, therefore, courts should not order disqualification based on vague concerns about disloyalty and the appearance of impropriety. Instead, courts should focus precisely on a balance of the prospective benefits and costs. Courts may find the following two questions useful in their analysis:

(1) How substantial is the risk either of trial taint in the adversity matter or disharmony in the nonadversity matter from continued representation?

182. This proposition should be qualified in two respects. Disqualification would be appropriate if the two matters were substantially related to protect the confidentiality interest of the former client. See supra text accompanying note 100. Further, if the remaining client objects to the firm’s continued representation, the firm should, of course, withdraw. Model Rules Rule 1.16(a)(3) (lawyer must withdraw if discharged).

183. See infra text accompanying note 197.


185. See supra text accompanying notes 105-22 for a discussion of the risks of reduced zealousness and disharmony.

186. In assessing the likelihood of trial taint, the court can take into account the strength of interest of the party moving for disqualification. If the moving party is not itself a current client, but is making the motion on behalf of a third party current client which has not itself objected to
(2) How significant are the costs of disqualification to the client against whom the motion is directed and the legal system?187

2. Damages

After the court decides whether to grant or deny a motion for disqualification, it should also consider whether an award of damages is warranted because of ethical misconduct by the firm. Courts can rely on an ample body of authority to deny legal fees or require disgorgement of fees previously paid because of breach of fiduciary duty or other unethical conduct.188 For example, in *Jeffry v. Pounds*,189 a law firm undertook representation of Mr. Pounds in a personal injury action. A few months later the firm agreed to represent Mrs. Pounds in a divorce action against her husband, who was represented by another firm in that matter. When the husband learned that the firm was representing his wife, he terminated the firm's representation in the personal injury matter. After the personal injury action was settled, the firm brought suit against Mr. Pounds for the value of legal services rendered in the personal injury action.190

The California Court of Appeals first found that the law firm had engaged in a conflict of interest when it undertook representation of Mrs. Pounds against Mr. Pounds, its existing client, even though the matters were totally unrelated. Relying on the *Cinema 5* case, the court focused on the "loss of confidence" that a client was bound to feel when an attorney undertakes to oppose him in an unrelated matter.191 Having found a violation of the rules of professional ethics, the court ruled that the firm was barred from recovering compensation for services rendered after the date that the firm undertook

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187. In assessing the costs of disqualification the court can take into account inequitable conduct by the moving party, such as excessive delay. *E.g.*, *Whiting Corp. v. White Machinery Corp.*, 567 F.2d 713 (7th Cir. 1977). Courts sometimes refer to this factor under the standing doctrine. *See Developments in the Law—Conflicts of Interest in the Legal Profession, supra* note 6, at 1479-81.


190. *Id.* at 9, 136 Cal. Rptr. at 374-75.

191. *Id.* at 11, 136 Cal. Rptr. at 376-77.
representation of Mrs. Pounds.192

While Jeffry v. Pounds was an action by lawyers to recover attorney fees, other courts have gone further, requiring lawyers to disgorge legal fees received because of unethical conduct. For example, in In re Eastern Sugar Antitrust Litig.,193 lawyers for the plaintiff in a class action began negotiations with the firm representing the defendants about a possible merger of the firms. The Court of Appeals for the Third Circuit ruled that the lawyers had an ethical obligation to inform the court when formal merger negotiations began.194 The court went on to discuss the appropriate sanction for the misconduct. It noted that judicially ordered return of attorney's fees could be used as a sanction both to discipline specific breaches of ethical obligations and to deter misconduct.195 The court also stated that in appropriate cases the award could extend to fees earned before the date of the misconduct:

We agree that return of fees paid for services rendered before the date of the impropriety may be an appropriate remedy for some ethical violations. Yet, because such a remedy provides the client with a windfall and deprives the attorney of fees earned while acting ethically, we believe such a sanction should be reserved for cases in which the breach of professional ethics is so egregious that the need for attorney discipline and deterrence of future improprieties of that type outweighs the former concerns.196

On the facts of the case the Court of Appeals ruled that the conduct of the attorneys did not justify return of fees prior to the date of the misconduct.197 In cases of intentional misconduct, however, such an award might well be justified. Indeed, such a case might also be appropriate for referral to disciplinary authorities.

Courts can be extremely flexible in their use of damage awards for unethical conduct, varying the award depending on the degree of misconduct and the harm that results. For example, if a law firm has withdrawn from representation of a client because it inadvertently engaged in a conflict of interest, the court might award the former client legal fees sufficient to compensate if for the expense of familiarizing new counsel with the matter. On the other hand, if the firm knowingly engaged in such a conflict, the court might award these expenses and also require the firm to disgorge any legal fees already paid as punishment for intentional misconduct. If disqualification is ordered, the court could adopt a similar approach on behalf of the client who is the victim of disqualification.

192. Id. at 12, 136 Cal. Rptr. 377.
193. 697 F.2d 524 (3d Cir. 1982).
194. Id. at 531.
195. Id. at 533.
196. Id.
197. Id. at 533-34.
C. THE FRAMEWORK APPLIED

How would the framework outlined in this section be applied? Consider two cases discussed in the first section of this article: *International Business Machines Corp. v. Levin* and *Harte Biltmore Ltd. v. First Pennsylvania Bank.*

In *Levin* the law firm was representing Levin and his corporation in an antitrust action against IBM while the firm was also continuing to represent IBM on a regular basis in unrelated labor work. Since the firm was representing both clients when the motion for disqualification was filed, a court should employ a balancing test to decide whether disqualification should be ordered.

1. *How substantial is the risk of trial taint in the adversity matter or disharmony in the nonadversity matter from continued representation?*

The risk of trial taint in the adversity matter seems insubstantial. The labor work for IBM and the antitrust action for Levin are unrelated, so there is little risk of misuse of confidential information. In addition, there is no reason to believe that the firm will be less zealous in representing Levin because some lawyers in the firm are handling labor matters for IBM. Indeed, Levin has consented to the firm's representation of IBM in the labor matters and there is no reason for a court to be skeptical of the validity of this consent.

The benefit to be gained by IBM from disqualification does not seem to be particularly great. Because different representatives of IBM and the law firm were involved in the different matters, the degree of disharmony to the attorney-client relationship is not likely to be as great as would be the case if an individual were sued by his own lawyer.

2. *How significant are the costs of disqualification to both the client against whom the motion is directed and the legal system?*

Granting IBM's disqualification motion would disrupt a long-standing professional relationship between the firm and Levin, one that predates the firm's representation of IBM. By contrast, the firm had handled only a few relatively minor labor matters for IBM, so the strength of that relationship seems a good deal weaker than the relationship with Levin. Moreover, disqualification would derail an antitrust case that had been pending for several years. Levin would no doubt have to incur substantial additional expense to familiarize substitute counsel with this litigation.

On balance, therefore, it seems that disqualification is unwarranted in the *Levin* case. The risk of trial taint in either the adversity or nonadversity matter is small and the costs from ordering disqualification are significant.

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198. 579 F.2d 271 (3d Cir. 1978).
Assuming the court had denied IBM's motion for disqualification, it should then turn to the question of whether the court should award damages because of misconduct by the firm in undertaking dual representation. While the firm did engage in a conflict without obtaining client consent, mitigating factors are present. There is no indication that the firm was acting with bad motive. Indeed, the firm appeared to believe that it had obtained IBM's consent to the dual representation, although the court found that the consent was insufficient. In this situation, a modest financial award seems appropriate. For example, the court might have ordered the firm to disgorge a portion of the legal fees received in labor matters that it handled after the antitrust action was filed.

*Harte Biltmore* presents a different situation. In that case, the law firm had obtained court permission to withdraw from representation of Harte in the unrelated state court action. Because the firm was no longer representing Harte, an order of disqualification is inappropriate; such an order would only punish the firm and the bank without any corresponding benefit to Harte.

The court should then analyze whether a financial sanction should be awarded against the firm. The conflict arose inadvertently because Mr. Harte's name was misspelled in firm records. The firm responded to the conflict by applying to the court for leave to withdraw rather than abandoning its client. Nonetheless, Mr. Harte is an innocent client who has been damaged. A court could compensate him by requiring the firm to pay the legal fees Mr. Harte incurs in order to familiarize new counsel with the case.

In cases of egregious attorney misconduct, a more substantial financial award would be appropriate. For example, in *Picker v. Varian* an unrelated matter conflict arose as the result of a merger of two law firms. The newly merged firm first sought Varian's consent to dual representation. When Varian refused, the firm, without following local rules, attempted to withdraw and refused to acknowledge Varian as a client. Under this pressure Varian agreed to a proposal in which several of the merged firm's attorneys would continue to represent it in their personal capacity. The court found, however, that this agreement was concluded under duress and was therefore unenforceable. On the facts of the case a fairly stiff sanction seems appropriate because the firm's conduct was an outrageous attempt to coerce a client into consenting to dual representation. A court could, for example, order the firm to disgorge legal fees received in all of the Varian matters that it was handling at the time the conflict arose.

200. On the adequacy of consent, see supra text accompanying notes 159-81.
201. 869 F.2d 578 (Fed. Cir. 1989). See supra text accompanying notes 34-42.
202. 869 F.2d at 584.
IV. Conclusion

The growing complexity of law practice has increased the possibility of unrelated matter conflicts of interest. Law firm mergers, corporate reorganizations, honest mistakes in conflict checks can all generate such conflicts. This article has argued that courts should not routinely employ the remedy of disqualification when a law firm confronts an unrelated matter conflict. Disqualification should be used only in cases of significant risk of trial taint; unrelated matter conflicts typically do not pose such a risk. The article has proposed a framework for courts to use in deciding unrelated matter conflict issues. Under the proposed framework, courts would order disqualification only when the benefit from the order exceeds the costs. In addition, courts would make more generous use of civil sanctions to punish attorneys for misconduct in unrelated matter conflicts of interest. Civil sanctions have the advantage of allowing the court to tailor the sanction to the degree of misconduct while avoiding the costs associated with disqualification orders.