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No Such Thing as ‘Attorney Estoppel’:  
Ethical Conflicts and Attorney Prior  
Publications

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Ethical Conflicts and Attorney Prior Publications

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## **ABSTRACT**

Law school graduates today are increasingly freighted with Internet-accessible and readily searchable publication records. Can these publications create actionable conflicts of interest for attorneys later on? Assessing the relevance of attorney publications requires balancing clients' entitlement to adequate and zealous representation against the rights of lawyers to express opinions and participate freely in social discourse. The Model Rules offer little guidance, and academics have largely skirted the issue. This paper presents the Publication Conflicts test, a framework for inquiry to assess the impact of prior publications. Then, informed by interviews with judges, ethics experts, law professors and practitioners, this paper presents the view that in general, an attorney's prior publications lie outside the 'bounded exclusivity' that attorneys owe their clients, and thus, do not amount to meaningful conflicts of interest.

## **I. INTRODUCTION**

This paper will examine whether material conflicts of interest can arise from an attorney's prior publications, and argue that unless the specific facts or parties involved in the representation are featured in a publication, the positional clash generated by conflicting opinions does not rise to the level of actionable conflict of interest. Furthermore, although attorneys may wish to disclose potentially objectionable prior writings to prospective clients in accordance with what they view to be good business practice, this paper will also argue that informed consent in general is not required in such cases, examine the factors defining a conflict of interest, and present the Publication Conflicts Test – a tripart analysis designed to draw out potential conflicts arising from prior publications. Increasingly, law schools are graduating young attorneys freighted

with an Internet-accessible and readily searchable publication record. Nonetheless, such publications should for the most part not create conflicts. The rights of the lawyer to express opinions and participate freely in social discourse should not be construed to transgress the carefully delineated duty of loyalty to a client.

### **1. Can Prior Writings Create Conflicts of Interest?**

The ABA Model Rules of Professional Conduct state that attorney conflicts of interest are grounds for disqualification,<sup>1</sup> but it is not clear precisely what constitutes a conflict in most cases. The Model Rules, which practicing attorneys must know and obey,<sup>2</sup> state that a current client conflict exists if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”<sup>3</sup> The Restatement (Third) of the Law Governing Lawyers offers this definition: “A conflict of interest is involved if there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person.”<sup>4</sup> But as Professor Stephen Gillers points out, much turns on the definition of

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<sup>1</sup> Model Rule of Prof’l Conduct 1.7 (2001) [hereinafter Model Rules]. The Model Rules were proposed in 1983 by the American Bar Association and have been adopted by most states, either wholly or substantially.

<sup>2</sup> “The United States Supreme Court has stated that a federal court can charge attorneys with knowledge of, and hold them accountable to, state ethics rules in the state where the court sits.” *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1323 (11th Cir. 2002), citing *In re Snyder*, 472 U.S. 634, 645 n.6, (1985) (“The Court of Appeals was entitled . . . to charge petitioner with the knowledge of and the duty to conform to the state code of professional responsibility. The uniform first step for admission to any federal court is admission to a state court. The federal court is entitled to rely on the attorney’s knowledge of the state code of professional conduct applicable in that state court . . .”).

<sup>3</sup> Model Rules, *supra* note 1, R. 1.7(a)(2).

<sup>4</sup> Restatement (Third) of the Law Governing Lawyers (2000), § 121 [hereinafter Restatement].

“materially,” “adversely,” “substantial,” and “significant,” and thus, these definitions are inherently imprecise.<sup>5</sup>

Whereas most conflicts that satisfy the above criteria are tangible (for instance, an attorney owns property that a client wishes to purchase, or already represents a client on the other side of the same issue), prior publications are most likely to present a positional conflict: a clash of opinions or beliefs between attorney and client. Some scholars have argued that positional conflicts are “not a per se ethical violation, but may become a conflict of interest if the issue is important enough to the client and there is a risk that one representation will materially limit the other.”<sup>6</sup>

This paper will address the issue of prior attorney publications to examine whether and how these rise to the level of a material conflict of interest actionable under the Model Rules. Section II sets forth a hypothetical and discusses the major ethical issues it raises. Section III examines the rationales underlying the conflict of interest doctrine and presents factors useful in assessing whether a given publication presents a conflict; this section also covers informed consent, which can effectively immunize the attorney from disqualification in many conflict of interest scenarios. Section IV gathers these factors into the Publication Conflicts test, a ten-part assessment designed to help uncover potential conflicts in prior publications. Section V applies this test to the hypothetical. Section VI presents policy arguments why attorney publications should not constitute grounds for conflicts of interest, and Section VII concludes.

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<sup>5</sup> STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 185 (Aspen, 7th Ed. 2005).

<sup>6</sup> Helen A. Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: A “Foolish Consistency”?*, 111 PENN. ST. L. REV. 1, 3 (2006).

## **II. PRIOR ATTORNEY PUBLICATIONS: ATTORNEY ESTOPPEL?**

### **1. Hypothetical: Adam and PharmaJon**

Adam is an attorney, working at an intellectual property law firm.<sup>7</sup> Before graduating from law school, Adam completed a Ph.D. in genetics at a major research university. Adam personally believes that human genes should not be subject to patent protection in any form.<sup>8</sup> During his near-decade of postgraduate education, Adam wrote several articles supporting this view to different degrees. First, while in graduate school Adam published a peer-reviewed scientific article (co-authored by his Ph.D. supervisor) revealing the high extent of genetic variability between individual humans.<sup>9</sup> While a law student, Adam published an opinionated law review article in which he argued that gene sequences should not be protected as intellectual property because they are products of nature, as are any human-made duplicates or copies. Finally, before taking employment with the firm, Adam published a 700-word opinion piece in a national newspaper arguing for an end to patent protection on human gene sequences.

Adam has since been asked to represent a large drug company, PharmaJon, arguing for the validity of a patent it holds for a disease assay tied to a specific human gene sequence. Adam approaches a colleague, a self-described ethics guru, with his concern. Given the current state of the law, the PharmaJon patent is probably valid; all policy arguments aside, Adam is well versed in the field and could represent the PharmaJon position well. “I try not to let my personal views affect my advocacy,” he

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<sup>7</sup> Here, we will not concern ourselves with imputed conflicts – those conflicts created by co-workers at a law firm and ascribed to the protagonist. In general, if an actionable conflict exists with respect to one attorney in a firm, it is possible that this conflict may disqualify the entire firm.

<sup>8</sup> Obviously any issue could be chosen here. In selecting the patenting of human genes, I have selected one that allows for a range of deeply held personal opinion and for various types of articles credibly to be published. Adam’s objection is to the patenting not only of the genes themselves, but also of any component DNA, cDNA, EST or other complementary sequences.

<sup>9</sup> This fact suggests that no single sequence could adequately represent the diverse range of actual human DNA sequences constituting a given gene.

says. “But if I take this case, do I need to inform PharmaJon that I’ve written in direct opposition to the type of thing it wants to do? What if opposing counsel cites one of my articles – or worse, mentions it in court? The law says gene sequences can be patented, though I still personally believe this should not be so. Do my past publications preclude me from taking this case? It certainly seems like a conflict of interest. Is it?”

## 2. The Issues

### *Publications are common, and today, often available online*

The problem Adam faces is an increasingly important one. Law students are encouraged to write (and where possible, publish) papers on issues that interest them, and these law review articles or notes often adopt a clear stance arguing for legal or policy reform. In fields such as intellectual property (IP), the leading boutique firms (as well as IP departments in general practice firms) routinely hire lawyers with graduate degrees in technical and scientific fields.<sup>10</sup> To earn these degrees, students must typically publish at least one peer-reviewed article, and many publish considerably more.<sup>11</sup> Moreover, students at all levels can publish opinion pieces in campus and other newspapers. Law firms today likely employ a substantial population of lawyers who have published one or more of these types of articles.

In days past, an attorney might plausibly escape the radical views of her youth by omitting early and unwanted publications from her C.V. Unless she were very famous, it is unlikely that her colleagues in the legal profession would know of her articles or spend

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<sup>10</sup> Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P. is a leading intellectual property law firm based in Washington DC. At the time of writing the Finnegan Web site listed 111 attorneys with advanced degrees, 44 of whom had a Ph.D., as well as 32 student associates with advanced degrees, 22 of whom held the Ph.D. degree. <http://www.finnegan.com/lawyers/>, accessed Apr. 20, 2008.

<sup>11</sup> This observation comes from the author’s experience; for an example of a publication requirement for the Ph.D. degree, see: Bulletin of Yale University, Molecular Biophysics and Biochemistry. Available online at <http://www.yale.edu/bulletin/html/grad/mbb.html>.

time to unearth them; in the case of newspaper opinion pieces, it is less likely still that potential clients or adversaries would comb print indexes or microfiche records of national and local papers in search of offending commentary. Today, however, the simplicity and ubiquity of Web publishing has led countless newspapers, journals and other publications to publish and archive material online, and these collections are easily accessible with Web search engines. As such, material published within the past decade is likely to be found quickly via trivial Web searches. For new articles, near-instantaneous linking via blogs and news digests can dramatically increase the potential impact of a well-placed commentary, and can give even small college newspapers worldwide readership (if only in passing). These advances also make it difficult to suppress prior articles. For students in university or law school today, the material we publish is not only accessible worldwide via the Web, but can linger indefinitely online. Law schools are thus beginning to mint new attorneys already freighted with a ballast of published and easily accessible views, some of which may well express opinions on issues of interest to a future client.

***Published Material Presents Three Types of Potential Conflict: Factual, Legal and Opinion-Based***

When considering prior published material in light of client positions, three types of potential conflicts exist.

First, the discrepancy may be factual. For instance, an attorney may have conducted research and published the findings in a peer-reviewed journal. Such material could easily be cited as factual support for a client position, and with substantial opportunity for disagreement on basic scientific facts, expert witnesses on either side may choose to invoke different academic articles addressing a given issue. It is thus

conceivable that, perhaps during a prior life as a graduate researcher, an attorney helped generate factual material that will one day be used to support the opposing side.<sup>12</sup>

Next, the conflict could be legal in nature. An attorney who, while a law student, published a law review note may find that his interpretation of a particular legal issue – carefully developed and argued with hundreds of supporting sources – may lend support to the opposing side and leave him in the unenviable position of refuting his own thoroughgoing academic treatise.<sup>13</sup> This is nonetheless perhaps the least worrisome of the three types of conflict, because lawyers are expected to marshal legal arguments as needed to further the interests of their client. It is neither uncommon nor prohibited for a lawyer to argue opposite sides of the same issue (say, the appropriateness of capital punishment to a given crime) for different clients and at different times in their career, although limitations do exist on concurrent representation of opposing interests, or consecutive representations involving the same parties or facts.<sup>14</sup>

Finally, a publication could reveal personal opinions and beliefs that conflict with the position (ideological, political or policy) of the client. These opinions could form the substance of the article (as in the case of short commentaries or opinion pieces) or an underlying message (for instance, an ancillary argument in a longer academic paper). This type of conflict raises potential problems not just for the author – whose views may limit the clients she is willing to represent – but also for clients, who may reject an attorney they feel does not support their position. Other expressed opinions that may conflict with client views are blog postings, online message board comments, and similar electronic emissions captured and preserved in cyberspace. Although the longevity of such online postings is certainly sobering, they are unlikely to create the type of

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<sup>12</sup> This seemingly unlikely occurrence is in reality not so farfetched: it is very likely that this particular attorney would be drawn or assigned to this matter specifically because of her specialized expertise in that area.

<sup>13</sup> Potentially conflicting legal arguments could also be presented in an amicus brief.

<sup>14</sup> Model Rules, *supra* note 1, R. 1.7 and 1.9.

positional conflict discussed here.<sup>15</sup> Thus, this paper will focus on opinions expressed in traditionally published articles and commentaries.

***Stakeholders' varied concerns: Clients, firms, lawyers and the public***

Four key stakeholders in the legal process might each react differently to positional conflicts arising from an attorney's prior publications.

First, clients hire lawyers to represent their interests, and may understandably hesitate to retain an advocate who has publicly expressed contrary views. Even if the lawyer is willing to represent the client, the client may nonetheless feel that the lawyer is either duplicitous -- an unprincipled hired gun willing to betray his own views for a paycheck -- or that his advocacy will be less effective because his own personal wishes might well be furthered if the client were to lose. Thus, the presence of contrary prior publications threatens the sense of client loyalty that, together with the protection of confidential information, undergirds many of the Model Rules of Professional Conduct.<sup>16</sup>

Second, public perception of the legal profession could suffer if lawyers are seen personally supporting one view while professionally arguing another. Such behavior might not only provoke public distaste, but also diminish the impact of the attorney's prior publications: readers are unlikely to weigh seriously an impassioned commentary

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<sup>15</sup> Some blogs contain long and well-reasoned positions by authors, but without the weight of editorial approval most are unlikely to be taken seriously or cited as authority. Moreover, personal blogs and Web sites are under the author's control and generally can be taken down at will. These are therefore to be distinguished from traditional articles, which once published are both widely accessible and outside the author's control. Hiring committees search blogs and other online writings for writings by prospective hires, but mainly to screen for offensive content. See Eileen P. Gunn, *8 Ways to Buff Your Professional Image—Online*, USNEWS.COM Oct. 24, 2007, <http://www.usnews.com/articles/business/careers/2007/10/24/8-ways-to-buff-your-professional-image--online.html>. See also, PEW INTERNET & AMERICAN LIFE PROJECT REPORT: DIGITAL FOOTPRINTS (Dec. 16, 2007), [http://www.pewinternet.org/pdfs/PIP\\_Digital\\_Footprints.pdf](http://www.pewinternet.org/pdfs/PIP_Digital_Footprints.pdf). There may come a time when the 'total picture' of an attorney's online footprint generates positional conflicts that rise to the level of conflicts of interest under the Model Rules, but these remain beyond the scope of this paper.

<sup>16</sup> For an interesting discussion of the rationale underlying the conflict of interest rules, see Lee E. Hejmanowski, Note, *An Ethical Treatment of Attorneys' Personal Conflicts of Interest*, 66 S. CAL. L. REV. 881 (1993).

pleading reform on a given issue when its author voluntarily represents the opposing side in court. As such, positional conflicts arising from past publications threaten the integrity not only of the client representation, but also of the publications themselves.

Third, if an attorney's past publications potentially unsettle clients, law firms might avoid hiring candidates with a record of opinionated publishing for fear of potential clashes. Many firms already conduct extensive conflict screens, both upon hiring new lawyers and for each new client; if law firms were to demand ideological congruity between attorneys and clients, lawyers could be held to every opinion piece or online comment they had produced and conflicts would often occur.

Finally, some lawyers themselves might wish to eschew clients whose views or interests differ dramatically from their own – particularly those views about which they care deeply enough to commit to writing. Such attorneys are said to display thick positional identity, a trait associated with so-called 'cause lawyering.'<sup>17</sup> These attorneys prefer to represent a client whose positions (or causes) align closely with their own, and for this group the problem of conflicting prior publications largely solves itself (assuming the attorney doesn't later change her mind and renounce earlier writings). Note, however, that in refusing to represent clients with differing interests, these lawyers in a sense elevate these positional conflicts to the level of full-blown conflicts of interest; the result – the client must look elsewhere for representation – is equivalent to a forced withdrawal mandated by the Model Rules. In the extreme case, such unwillingness to represent clients across ideological lines could leave those with unpopular views unable to find legal representation.

The hypothetical situation involving published attorney Adam and would-be client PharmaJon raises many interesting issues, some of which have been set forth

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<sup>17</sup> Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 17 (2003).

above. This paper will focus on whether Adam's conundrum rises to the level of a conflict of interest pursuant to the Model Rules.

### **III. RATIONALES AND IMPUTED RULES – ARE PUBLICATION-BASED CONFLICTS TRUE CONFLICTS OF INTEREST?**

Section III will cover the main rationales underlying the conflict of interest rules, the informed consent doctrine, and factors to consider in determining whether a given conflict crosses ethical boundaries.

#### **1. Three Rationales – Loyalty, Client Confidentiality, Appearance of Impropriety**

This section explores the three main rationales underlying the conflict of interest rules, as laid out by Lee Hejmanowski in 1993.<sup>18</sup>

##### ***The Duty of Loyalty***

Loyalty to the client is a foundational principle underlying the model rules. Comment 1 to Model Rule 1.7 begins, “[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client.”<sup>19</sup> Comment 4 to Model Rule 1.9, which discusses duties to former clients, states that lawyers moving between firms “must be reasonably assured that the principle of loyalty to the client is not compromised.”<sup>20</sup> Courts, too, use the language of loyalty<sup>21</sup> to describe the lawyer's duties: “A lay client is

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<sup>18</sup> Hejmanowski, *supra* note 16 at 899-905.

<sup>19</sup> Model Rules, *supra* note 1, R 1.7 cmt 1.

<sup>20</sup> *Id.*, R 1.9 cmt 4.

<sup>21</sup> See, e.g., *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 232-33 (2d. Cir 1977) (“[the client] had an absolute right to the firm's undivided loyalty”), and *Cinema 5, Ltd. v. Cinerama, Inc.*, 528

likely to doubt the loyalty of a lawyer who undertakes to oppose him in an unrelated matter.”<sup>22</sup>

It is tempting initially to consider publicly expressed differences of opinion as ‘opposition’ to the client, and thus conflate loyalty with ideological parity – but the two are unrelated in this context. Loyalty in the Model Rules sense is chiefly recognition of the fact that no lawyer can properly serve two masters.<sup>23</sup> Thus, loyalty to the client dictates that lawyers should not represent competing clients, disclose confidential information to outside parties, or otherwise act in a way that favors a competing interest.

Although the principle of loyalty is central to the ethical guidelines of the legal profession, it is also difficult to delineate in a bright-line manner and thus tricky to enforce. As such, courts have generally moved to focus instead on the duty to preserve clients’ confidential information.<sup>24</sup>

In the hypothetical presented in Section II, the principle of loyalty is attorney Adam’s main stumbling block, and will play an important role in the analysis of that situation. It is worth remembering, however, that an attorney’s loyalty to a client is difficult to measure and enforce – and in the case of an attorney balancing multiple professional obligations against his own personal beliefs and private life, loyalty is likely to be measured not in absolutes but in terms of degree.

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F.2d 1384, 1386 (2d Cir. 1976) (stating that lawyers owed their client a “duty of undivided loyalty and allegiance”).

<sup>22</sup> *Jeffry v. Pounds*, 67 Cal. App. 3d 6, 11 (Cal. Ct. App. 1977).

<sup>23</sup> “No man can serve two masters; for either he will hate one, and love the other, or he will cling to one, and slight the other.” Matthew 6:24. This has been cited in several relevant cases. *See* *In re W. T. Byrns, Inc.*, 260 F. Supp. 442, 445 (D. Va. 1966), *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976), *Sun Bldg. & Loan Ass'n v. Rashkes*, 183 A. 274, 277 (N.J. Ch. 1936).

<sup>24</sup> Hejmanowski, *supra* note 16 at 899-900, citing Steven H. Goldberg, *The Former Client’s Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227, 234-41 (1987).

### *The Duty to Preserve Confidential Client Information*

Confidentiality of client information is a key ethical precept. It is widely known ('attorney-client privilege' is routinely invoked on popular television programs) and protected by the Federal Rules of Civil Procedure.<sup>25</sup> The Model Rules address client confidence in the preamble<sup>26</sup> and devote several rules to its discussion.<sup>27</sup> The Restatement of The Law Governing Lawyers takes a slightly more liberal view than the Model Rules, permitting certain disclosures so long as they do not adversely affect the material interests of the client.<sup>28</sup> Confidentiality is also a main ground for imputed conflicts of interest among lawyers at the same firm.<sup>29</sup>

Despite its central position underpinning the principles of legal ethics, however, client confidentiality is unlikely to be a driving factor in the hypothetical situation presented above. Prior publications cannot divulge information a current client would deem confidential, and there is no reason to assume an attorney who has published in the past would be any more likely to divulge client information than one who had not. Confidentiality is chiefly a concern in cases of lawyers representing multiple clients whose interests conflict,<sup>30</sup> whether concurrent<sup>31</sup> or consecutive.<sup>32</sup> As such, this paper will not focus on this issue, though it is of course central to many other conflict of interest cases.

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<sup>25</sup> Fed. R. Civ. P. 26(b)3.

<sup>26</sup> "A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law." Model Rules, *supra* note 1, Pmb1 [4].

<sup>27</sup> *Id.* at R 1.6, R 1.7(c), R. 1.8(b).

<sup>28</sup> Restatement, *supra* note 4, at §60(1)(a).

<sup>29</sup> Model Rules, *supra* note 1, R 1.10. See also *Id.* at R 1.8(k) and R 1.9b.

<sup>30</sup> This is a common situation, covered extensively in legal ethics casebooks. See generally Gillers, *supra* note 5.

<sup>31</sup> Model Rules, *supra* note 1, R 1.8.

<sup>32</sup> *Id.*, R 1.9.

### *The Appearance-of-Impropriety Standard*

Lawyers are integral to the justice system, and it is important to maintain public confidence in the fairness of this legal system.<sup>33</sup> This is reflected in Canon 9 of the Model Code, a precursor to the modern Model Rules, titled “A Lawyer Should Avoid Even the Appearance of Professional Impropriety.”<sup>34</sup>

An obvious problem with prohibiting the appearance of impropriety is the subjective nature of the assessment. There are two main standards by which the appearance of impropriety is assessed: the perspective of the client, and that of the general public.<sup>35</sup> Both, however, require courts to “perform the inherently subjective task of considering how uneasy” the public or former clients feel.<sup>36</sup> Consequently, courts have moved away from disqualifying lawyers on these grounds<sup>37</sup> and instead focus on whether representing a given client is likely to lead to inequity.<sup>38</sup> The Model Rules as well have moved away from this standard by explicitly laying out the lawyer’s duties to former clients in Rule 1.9 and eschewing the language of Canon 9. (Interestingly, it is possible that removing rules in this manner may do more to preserve public perception of lawyers than do the rules themselves. One scholar has argued that public perception of impropriety is in effect reflexive: If we do away with the rules against positional conflicts of interest, the public will perhaps not think worse of lawyers who engage in them.<sup>39</sup>)

The appearance of impropriety could nonetheless be an important consideration in the case of an attorney’s prior publications. In the extreme case, a high-profile attorney who previously advocated a position in a high-circulation newspaper might well suffer a

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<sup>33</sup> *Id.*, Pmbl.

<sup>34</sup> Model Code of Prof’l Responsibility (1983), Canon 9.

<sup>35</sup> Hejmanowski, *supra* note 16, at 903.

<sup>36</sup> *Id.* at 904.

<sup>37</sup> *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 609 (8th Cir. 1977) (rejecting the “appearance of impropriety” analysis in favor of a confidential disclosure analysis).

<sup>38</sup> Hejmanowski, *supra* note 16, at 904.

<sup>39</sup> Anderson, *supra* note 6, at 5.

loss of credibility if she then advocated for the other side in a case that was also widely covered. On the other hand, positional conflicts stemming from prior publications may not qualify as impropriety at all. Hejmanowski suggests “more people would presumably find an attorney’s actions to be improper when the attorney opposes a client to protect a large economic interest than when the attorney advocates views through public speech that oppose a client’s interests on an issue,”<sup>40</sup> while Anderson goes still further to argue that positional conflicts are not true conflicts of interest and should not be the subject of ethical prohibitions at all.<sup>41</sup>

Conceptually, the appearance of impropriety presupposes actual *perception* of improper behavior. The public is unlikely to perceive such behavior unless the case (or the prior writing) is particularly well known; and while the client is likely aware of the attorney’s behavior, they are unlikely to be concerned with appearances as such and more with the underlying impropriety itself. This in turn is better dealt with through the ethical principles of loyalty and confidentiality, discussed above. As such, the appearance of impropriety is a useful shorthand that upon inquiry distills to other component rationales.<sup>42</sup>

## 2. The Informed Consent Vaccine

Although the Model Rules are vague in setting out precisely what constitutes a conflict of interest, they do explain that a willing client through informed consent can waive most conflicts.<sup>43</sup> Thus, even if an attorney’s prior publications rise to the level of a

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<sup>40</sup> Hejmanowski, *supra* note 16, at 898.

<sup>41</sup> Anderson, *supra* note 6, at 5.

<sup>42</sup> Hejmanowski, *supra* note 16, at 898.

<sup>43</sup> A client through informed consent (sometimes with a written consent requirement) can waive: Its right to attorney-client confidentiality, Model Rules *supra* note 1, R 1.6 (a); a conflict of interest between current clients, *Id.*, R 1.7 (b) 4, so long as the attorney does not represent both sides in a single transaction, *Id.*, R 1.7 (b) 3, and believes he can provide “competent and diligent representation,” *Id.*, R 1.7 (b) 1; a conflict arising when a lawyer acquires or possesses a financial interest adverse to a client, *Id.*, R 1.8 (a) 3, uses

prohibited conflict of interest, this conflict could be waived by obtaining informed consent. Some conflicts cannot be waived, but these are fairly egregious and are clearly set forth in the Model Rules.<sup>44</sup>

At first glance, it might seem as though law firms – which, through their Web sites, routinely disclose each attorney’s prior publications – would not need to obtain separate consent on this matter, since clients could reasonably be assumed to be familiar with (and to consent to) the public biographies of their attorneys. However, this ‘caveat emptor’ approach does not satisfy the Model Rules definition of informed consent, which is “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”<sup>45</sup> Thus, to obtain satisfactory informed consent to a problematic prior publication, a lawyer must explicitly and affirmatively explain not only its existence but also its relevance to the matter at hand, including any difference of position and the various ways it may weaken the representation.<sup>46</sup> The lawyer may also of course present her own opinion on the matter, arguing why the publication is not relevant or why the conflict should be waived.

Since informed consent effectively immunizes the lawyer against disqualification on account of prior writings, it appears to be an effective tool to combat such conflicts. Rather than engage in complicated inquiries as to whether a particular attorney’s corpus of prior publications amount to a conflict of interest with respect to a given

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information related to a representation to the disadvantage of the client, *Id.*, R 1.8 (b), accepts compensation for representation from someone other than the client, *Id.*, R 1.8 (f) 1, aggregates claims for multiple clients, *Id.*, R 1.8 (g), represents another client in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of a former client, *Id.*, R 1.9, or accepts prospective clients with competing interests to current clients, *Id.*, R 1.18 (d) 1.

<sup>44</sup> *Id.*, R 1.7(b) 1, 3.

<sup>45</sup> *Id.*, R 1.0 (e). The comments to this rule explain that the lawyer must make “reasonable efforts” to ensure the client possesses information “reasonably adequate” to make an informed decision. *Id.*, R 1.0 cmt 5.

<sup>46</sup> See *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 398 (S.D. Tex. 1969) (holding that attorney disclosure must be explicit for informed consent to be valid).

representation, an attorney can simply disclose her prior writings, explain their positions and their relevance to the representation, and put the matter to the client.

However, although informed consent can immunize an attorney against positional conflicts presented by prior publications, and many believe that seeking such consent in this situation is good business practice,<sup>47</sup> it is not a panacea: Clients may not appreciate paying large sums to a law firm only to have its individual lawyers turn against them;<sup>48</sup> it may be difficult for the client to understand fully the possible ramifications of the potential conflict, even after being informed; moreover, attorneys might not seek consent and clients might not grant it, and in either case it is useful for attorneys to know where they stand in situations where it is not sought.

### 3. Factors Defining Conflicts of Interest

Section I outlined the difficulty in pinning down precisely what constitutes an actionable conflict of interest, either under the Model Rules or the Restatement definition. This subsection presents a list of factors to consider when evaluating a given positional conflict, to ascertain whether it rises to the level of a prohibited conflict of interest. No hard and fast rule exists for these factors; rather, “the application of conflict rules is a matter of judgment and degree.”<sup>49</sup> Others have presented different lists of factors to consider when weighing whether a particular situation constitutes a conflict of interest, including, for example, the attorney’s economic and property interests and the

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<sup>47</sup> Interview with Judge Guido Calabresi, 2d. Cir. in New Haven, CT (Apr. 8, 2008); E-mail from Stephen Gillers, Emily Kempin Professor of Law, New York University School of Law, to author (31 March 2008, 18:19 ET) (on file with author); Telephone Interview with James Henderson, Frank B. Ingersoll Professor of Law, Cornell Law School (Apr. 14, 2008); Interview with Anthony Kronman, Sterling Professor of Law, Yale Law School, in New Haven, CT (Apr. 17, 2008); Telephone Interview with Jerome Kurtz, Former Professor, New York University School of Law (Apr. 7, 2008).

<sup>48</sup> Hejmanowski, *supra* note 16, at 909.

<sup>49</sup> E-mail from Stephen Gillers, *supra* note 47.

involvement of the attorney's relatives.<sup>50</sup> The factors listed here have been chosen for their applicability to the issue of conflicts arising from an attorney's prior publications and are not meant to be exhaustive for all potential conflicts.

### ***Timing***

Assuming the attorney's prior publications express opinions or facts contrary to the position of the client, the timing of those publications is relevant. If a senior lawyer published the material many years before – for instance, while an undergraduate – then he will find it easier to distance himself from the views expressed therein.<sup>51</sup> Further, publications from a previous occupation are less likely to raise suspicion; for example, it is common for attorneys to move from positions in government to private practice (and vice versa) and as a consequence to adopt near-orthogonal views. Attorneys 'change sides' in this manner quite frequently, moving from criminal prosecution to defense, say, or from government environmental enforcement to private practice environmental defense. The fact that a new hire previously has been on the other side of these legal issues is generally seen as a strong positive by firms and, presumably, by clients as well. Firms should thus be willing to accept a certain degree of conflicting publication from the past, particular when the attorney in question is made even more attractive and effective by her prior exposure to the opposing camp.

Recent publications may raise more suspicion, calling into question the attorney's dedication to the client's cause. The extreme case would be the attorney publicly taking a policy position adverse to that of a client that the lawyer is currently representing. According to the Restatement, even this is permissible so long as it does not "materially

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<sup>50</sup> Hejmanowski, *supra* note 16, at 891-898.

<sup>51</sup> Interview with Guido Calabresi, *supra* note 47.

and adversely affect the lawyer's representation of the client in the matter,"<sup>52</sup> again invoking imprecise terms. Who is to say whether publishing an op-ed in a major newspaper adversely affects the lawyer's representation? The client, the public, the court and the lawyer himself might all have different views on this. The Model Rules are somewhat clearer, establishing a bright line rule that prohibits an attorney from acquiring an adverse financial or property interest after he has agreed to represent the client, unless that client consents.<sup>53</sup>

The timing of conflicting publications is thus an important factor that can either mitigate or aggravate the severity of a potential conflict. According to the Restatement, it is apparent that the expression of general policy views unlikely to materially or adversely affect a client are always permitted; however, to do so might still make poor business sense and could be discouraged or prohibited by law firms.

In summary, the key questions to consider about timing of a publication are (1) whether the publication occurred before the attorney agreed to represent a given client (either in the offending matter, or in general); (2) whether the publication was a product of a different employment situation (for instance, produced while a student, or working at a government office); (3) whether the attorney still adheres to the conflicting viewpoint, and if (4) intervening events have rendered the views or facts themselves obsolete.

### ***Relevance of Subject Matter***

A second key factor in determining whether prior publications create a conflict of interest is the closeness of their subject matter to the issues of importance to the client. Today, ethical guidelines prohibit attorneys from representing two clients

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<sup>52</sup> Restatement, *supra* note 4, §125 cmt (e).

<sup>53</sup> Model Rules, *supra* note 1, R 1.8(a).

simultaneously<sup>54</sup> if those representations will be directly adverse<sup>55</sup> or if there is a significant risk that either of those representations will materially hinder the other.<sup>56</sup> The same assessment – degree of opposition, and risk of material hindrance – can be applied to the subject matter of an attorney’s publications.

In general, the closer the situation presented in the publication to a client’s fact pattern or position, the greater the opportunity for legitimate conflict. Situations likely to generate conflicts might include a prior publication expressing an opinion about a specific party (for example, a commentary decrying the practices of a certain corporation), or dealing with the same or very similar facts (e.g., a law review article arguing that a specific class of patent should be ruled invalid). Of course, even if the published subject matter overlaps with the client’s interests, the publication must usually still advocate opposing views for the conflict to emerge.

If the publication is factual in nature (a peer-reviewed scientific journal article, for instance, or the findings of a social science survey) and the facts presented therein are central to the case, there is a risk the attorney may be called as a witness or to provide expert testimony. If this risk is substantial the attorney could be disqualified under Model Rule 3.7, due to the inherent conflict of interest created when an advocate is called to deliver factual testimony. These facts need not oppose the client’s position – indeed, the lawyer would be disqualified if called as a witness for either side.

If the publication presents the attorney’s own opinion, then the degree or strength of opinion and its deviation from societal norms is a relevant factor as well. Some issues

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<sup>54</sup> This was not always so. In 1872, lawyer Matthew Hale Carpenter argued contradictory interpretations of the Fourteenth Amendment’s privileges and immunities clause to the Supreme Court; that court used the decision in one (the Slaughter-House Cases, in which he prevailed) as precedent for their ruling in the next (Bradwell, where his client lost). See *Slaughter-House Cases*, 83 U.S. 36 (1873) and *Bradwell v. Illinois*, 83 U.S. 130 (1873). Arguing both sides of an issue in this manner is also consistent with the thin positional identity ideal espoused by Spaulding. See Spaulding, *supra* note 17.

<sup>55</sup> Model Rules, *supra* note 1, R 1.7(a)1.

<sup>56</sup> *Id.*, R 1.7(a)2.

are culturally divisive and regularly debated, such as desired election outcomes, legislative reform and so on – uniformity on these issues is not expected, and clients are likely to be tolerant of differing views as an upshot of the democratic process. Nonetheless, other issues are so divisive (for instance, stem cell research, abortion or Intelligent Design) that proponents or detractors may be unwilling to be represented by an attorney who has published conflicting beliefs. An attorney obviously need not share or adopt the client’s position on politicized issues,<sup>57</sup> but in rare cases where those matters are themselves at issue, differences may well rise to the level of a material hindrance if the attorney has publicly expressed opposing views.

The relevance to the client’s position of issues raised in the prior publication also plays a role in assessing the severity of potential conflicts. For instance, an attorney may have published a strongly opinionated legal commentary urging reform of a particular procedural detail that is manifest in the client’s case; if this detail is peripheral or incidental this prior publication is unlikely to present a material conflict.

In summary, with respect to ascertaining conflicts of interest, relevant inquiries about the subject matter of prior publications are: (1) whether specific parties or facts at issue are mentioned; (2) the centrality of the issue to the client’s legal matters; (3) whether factual material is presented that may thrust the attorney into the role of witness; and (4) how strongly opinionated it is, and how much tolerance for division there is on that issue.

### ***Freedom of expression and participatory rights***

An attorney’s relationship with a single client rarely constitutes the entirety of his professional existence, let alone his personal life. Professor Anthony Kronman described

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<sup>57</sup> Nor does representing a client suggest an endorsement: “A lawyer’s representation of a client ... does not constitute an endorsement of the client’s political, economic, social or moral views or activities.” Model Rules, *supra* note 1, R 1.2(b).

the lawyer's advocacy for any individual client as "bounded exclusivity," a zealous devotion to the client's cause within carefully prescribed limits.<sup>58</sup> These bounds protect the basic societal rights of free expression that lawyers share with other citizens. And although mandatory recusal from a case due to a speech-related conflict of interest would preserve the lawyer's right to free speech above her right to represent a given client (that is to say, it is the client representation, not the speech, that is prohibited), such recusal would also indirectly discourage dissenting speech by attorneys unwilling to sacrifice future clients. Rule-makers should be mindful of such unwelcome incentives – after all, depending upon the issue, attorneys may be among the most qualified to speak out – and should avoid defining conflicts of interest so broadly that they impinge upon attorney speech.

By limiting actionable conflicts of interest to those that adversely and materially impact the client, the Model Rules properly circumscribe the bounds of the attorney's loyalty to the client and define the ambit of this 'bounded exclusivity.' Staking out the other side of the line, the authors of the Restatement list forms of expression that do not constitute conflicts and in which attorneys may freely engage.<sup>59</sup> As mentioned previously, Model Rule 1.2(b) explicitly reminds readers that attorneys are not required to personally espouse their client's views.<sup>60</sup> As Hejmanowski puts it, "a prohibited conflict of interest does not necessarily develop when a lawyer states opinions that differ from the views that would best serve the client's interests."<sup>61</sup> When assessing a potential conflict of interest, it is therefore important to balance client loyalty against the attorney's right to freedom of expression, the social good stemming from attorney contributions to public opinion, the public's right to information and the attorney's participatory rights.

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<sup>58</sup> Interview with Anthony Kronman, *supra* note 47.

<sup>59</sup> Restatement, *supra* note 4, § 125 illus. 5.

<sup>60</sup> Model Rules, *supra* note 1, R 1.2(b).

<sup>61</sup> Hejmanowski, *supra* note 16 at 894.

The correct balance favors attorney speech slightly over client interests, highlighting the centrality of social participation and free speech.<sup>62</sup> In other words, a client can choose another attorney more easily than the lawyer can find another means to express his views on the matter in question.

Thus, when weighing attorney freedom of expression and participatory rights against the duty of loyalty to the client, the central questions with respect to prior publications are (1) does the publication lie within the bounded exclusivity the client rightly expects, and (2) does the publication express the attorney's view on an issue of great public concern where lawyer speech should be particularly carefully protected?

#### **IV. THE PUBLICATION CONFLICTS TEST**

This section proposes a tri-part test to assist in determining whether prior publications amount to an actionable conflict of interest under the Model Rules for a given representation. The Publication Conflicts test compiles and condenses the factors presented in Section III.

##### ***The Publication Conflicts Test***

- (1) **Timing.** Is the publication recent enough to conflict meaningfully with the client's interests?
  - a. Have intervening events (for example, scientific progress or changes to the law or public policy) rendered the publication less relevant?
  - b. Did the publication occur before the attorney agreed to represent the client?

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<sup>62</sup> See *Johnston v. Koppes*, 850 F.2d 594, 596 (9th Cir. 1988) (stating that abortion is a matter "of great public concern" and holding that a government attorney had a right to voice concern although her position opposed that of her employer, the California Department of Health Services).

- c. Was the publication the product of a previous employment situation where differing views are to be expected (for instance, produced while a student, or working in government)?
  - d. Has the attorney since rejected the conflicting viewpoint?
- (2) **Relevance.** How much overlap is there between the publication and the issues at stake in the representation?
- a. Are specific parties or facts at issue mentioned in the publication?
  - b. Is the issue central to the client's legal matters?
  - c. If the publication presents factual material, might any material presented require the attorney to assume the role of witness?
  - d. If the publication presents the attorney's opinions, is the opinion clearly opposed to the client's position, and is this an issue for which division is expected or often tolerated?
- (3) **Free Expression.** Balancing the rights of the attorney to express views and participate privately in society against the professional obligation of client loyalty.
- a. Was the publication produced in a professional capacity, and does it violate the 'bounded exclusivity' owed to the client?
  - b. Does the publication express concern a matter of great public importance?

Affirmative answers to (1) and negative answers to (2) will tend to decrease the chance that the publication represents an actionable conflict; for (3), a negative answer to part (a) and an affirmative answer to part (b) will tend to further decrease this chance of conflict.

This test is far from definitive – it is easy to envision scenarios in which certain factors override others, and so on. It is intended to provide a framework for attorneys, law firms and clients to evaluate the potential risk of conflict, and moreover as a basic

checklist for attorneys seeking informed consent from clients with respect to prior publications. Because informed consent requires explicit disclosure of risk to satisfy the provisions of the Model Rules,<sup>63</sup> this test should provide useful guidelines for such disclosures.

Before applying the test to the hypothetical presented in this paper, it is informative to apply the principles of the Publication Conflicts test to a similar conflict situation that is directly addressed in the Restatement.

Speaking out in public in a manner inconsistent with a client's views is perhaps the closest analog to publishing conflicting opinions, the only difference being the medium of expression. The Restatement specifically addresses the former situation and states, "a lawyer may publicly take *personal positions on controversial issues* without regard to whether the positions are consistent with those of some or all of the lawyer's clients. Consent of the lawyer's clients is not required"<sup>64</sup> (emphasis added). This reasoning is analogous to part (3)(a) of the Publication Conflicts analysis, in that it distinguishes between the lawyer's personal and professional life, and part 3(b) in its requirement that issues be controversial in nature; the Restatement goes on to say that "[I]awyers usually represent many clients, and professional detachment is one of the qualities a lawyer brings to each client,"<sup>65</sup> again reflecting the 'bounded exclusivity' concept set forth in 3(a). The Restatement authors qualify this by noting that the lawyer cannot publicly assume a policy position adverse to a client "that the lawyer is *currently representing*" if doing so would "*materially and adversely affect* the lawyer's representation of the client,"<sup>66</sup> which invokes both (1) timing – most directly 1(b), since the other three factors are not applicable in this case – and (2) relevance (which breaks

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<sup>63</sup> *E.F. Hutton & Co.*, 305 F. Supp. at 398.

<sup>64</sup> Restatement, *supra* note 4, § 125 cmt (e).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

the ‘material and adverse’ requirement into four component factors). Analysis guided by the Publication Conflicts factors thus yields the accepted Restatement view of this situation, while the test’s ten sub-factors offer enhanced specificity to deal with the specific peculiarities of publication as a medium for expression.

With the applicability of the Publication Factors test demonstrated on this analogous situation, we turn now to apply it to the hypothetical presented in Section II.

## **V. ADAM’S DILEMMA: APPLYING THE PUBLICATION CONFLICTS ANALYSIS**

How should Adam proceed? Adam has expressed strong views against the patenting of human genes in two papers (an opinion piece published shortly before joining the firm, and a law review note published while a law student) and has presented factual information that might bear on the issue in a third (the peer-reviewed article published while in graduate school).

**Timing.** Adam still espouses the viewpoint presented in these three papers.<sup>67</sup> However, each paper represents a product either of previous studies, or Adam’s personal opinion. Adam might also investigate whether intervening changes in law, policy or scientific research have stripped his publications of meaning, which would further decrease the likelihood of conflict. On the whole, the timing of these papers diminishes the chance of meaningful conflict.

**Relevance.** Adam must gauge the relevance of the subject matter of this paper to the PharmaJon representation to the best of his ability (he likely will not know all details of the case before agreeing to represent the company). If any paper specifically mentions

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<sup>67</sup> It is possible that this conflict of (current) views may constitute a traditional positional conflict; this could be dealt with according to the Model Rules. This conflict will not likely affect the representation, however, because the Model Rules and the Restatement give attorneys broad latitude to hold and to some degree express views contrary to a given client’s interests. See Model Rules, *supra* note 1, R 1.2.

PharmaJon, a gene that PharmaJon has patented, or any other party or fact directly applicable to the case, Adam should seek informed consent and the advice of outside counsel to assess whether these facts present a conflict of interest. If the facts presented in the peer-reviewed article prove central to the dispute, Adam might be asked to testify to their validity, and the incompatibility of the advocate and witness roles would disqualify him from representing PharmaJon.<sup>68</sup> (To avoid disqualification, Adam might contact his co-authors: many research papers in basic science are co-authored by students and research supervisors. Adam's former Ph.D. supervisor is an obvious choice to testify to the validity of the facts should this prove necessary, potentially leaving Adam free to represent PharmaJon.) Finally, Adam might also note that, while his positions are indeed opposed to those PharmaJon would have him argue, gene patenting and the ownership of life are contentious issues and some social division is expected.

**Free Expression.** Adam's papers were produced outside his professional capacity as a lawyer, so they exist outside the 'bounded exclusivity' to which PharmaJon or other clients are entitled. While certain personal activities (for instance, buying real estate or entering into business deals) can create conflicts, policy-based speech is a protected societal freedom that attorneys must work to preserve. Adam might also argue that although the law may currently permit the patenting of human gene sequences, this is an oversight of great social importance and his ability to lobby for change while working within the current law should not be curbed.

Adam's three papers are unlikely to present meaningful conflicts or prevent him from representing PharmaJon. He should ensure that the specific facts and parties at issue in the representation are not discussed in the papers, since this would increase the possibility of conflict; but in general, policy-based speech exists outside the 'bounded

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<sup>68</sup> Model Rules, *supra* note 1, R 3.7. *See also*, *Hickman v. Taylor*, 329 U.S. 495, 517 (U.S. 1947) (Jackson, J., concurring) (on the incompatibility of the roles of advocate and witness).

exclusivity' attorneys owe their clients, and barring problematic overlaps in either timing or relevance, Adam need not be concerned. He is free to disclose the papers to PharmaJon in keeping with good business practice, but this is not ethically required.

## **VI. POLICY CONSIDERATIONS: WHY PRIOR PUBLICATIONS SHOULD NOT PRODUCE CONFLICTS**

It has been argued that lawyering is a role for which sincerity is not required.<sup>69</sup> It may not even be desirable, since the idea of the lawyer arguing for positions he does not personally believe in is an established one: "A lawyer is required to be disingenuous. He is required to make statements as well as arguments which he does not believe in ... his freedom from the strict bonds of veracity and of the law are the two chief assets of the profession."<sup>70</sup> The Model Rules seem also to favor this approach.<sup>71</sup>

Nevertheless, clients may reasonably expect their lawyers not to take positions that hinder their ability to effectively advocate the client's case – or to damage their credibility in the representation -- so the Model Rules establish a perimeter that defines the 'bounded exclusivity' attorneys owe their clients. Within these bounds, the attorney is zealously and loyally devoted to the client's cause; outside these bounds, the attorney's duties to other clients and to herself take precedence. The lawyer's own publications, in particular opinionated articles or other forms of policy-based argument, should be protected and kept clearly outside the bounds of her duty to the client.

Clients are not entitled to a lawyer who endorses their views wholesale, but rather to one who in a professional and detached manner can provide a service: to advocate the

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<sup>69</sup> Spaulding, *supra* note 17, at 11.

<sup>70</sup> Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 9 (1951).

<sup>71</sup> Model Rules, *supra* note 1, R 1.2(a), 1.2(b); *see also* Spaulding, *supra* note 17 at 17-18, 20, 47-48, and Anderson, *supra* note 6 at 4.

client's case. (When the client's personal struggle becomes the lawyer's as well, we approach cause lawyering, which is an issue for another review.<sup>72</sup>)

The client's choice of counsel may be motivated by the attorney's prior experience in the very area in which she published. A client who selects a particular attorney for her expertise in a particular field should perhaps expect that she might also have expressed her own views on it. A client may be willing to retain the international expert on tax shelters, for instance, despite the fact that the attorney's own views on tax shelters lean toward their abolition.

Such tolerance of attorney expression is positive: the public good is not served by discouraging policy input from those best qualified to offer it. If clients or law firms were to favor attorneys who kept silent on policy matters – or if the Model Rules were revised to disqualify lawyers who spoke out by classifying this as a conflict of interest – this would create an incentive for experts in a given field to keep quiet.<sup>73</sup>

Similarly, peer-reviewed factual articles should not be employed by opposing counsel to coerce lawyers to appear as witnesses, thereby disqualifying them. On the whole, clients are likely to benefit if experts choose to pursue legal careers after extensive education or time spent in research; as a policy matter, therefore, this path should not be discouraged by complicating the legal careers of those who have carried out and published scientific studies in past.

If prior opinion publications are seen as tipping the attorney's ideological hand, clients may erroneously gravitate toward attorneys who never publicly have expressed their views. However, an absence of opposing articles on the attorney's C.V. is of course

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<sup>72</sup> See generally, Spaulding, *supra* note 17, and Anderson, *supra* note 6.

<sup>73</sup> The Restatement makes this point explicitly in a comment: "Resolution of many public questions is benefited when independent legal minds are brought to bear on them. For example, if tax lawyers advocating positions about tax reform were obliged to advocate only positions that would serve the positions of their present clients, the public would lose the objective contributions to policy making of some persons most able to help." Restatement, *supra* note 4, § 125 cmt (e).

no guarantee that he shares the client's view on any matter. By selecting only unpublished attorneys, the client risks retaining an advocate with the same positional conflict, but who, for whatever reason, was unable or unwilling to publish it. Thus, by selecting against attorneys with prior publications, the client is in effect only selecting against a skill – persuasive writing – that is distinct from attorney viewpoints and, in general, desirable. Clients would fare better by seeking attorneys with thin positional identity (that is, those willing effectively to advocate positions regardless of ideological parity) and a host of well-written articles, as opposed to selecting for attorneys with sparse publication records and unknown ideological bent.

Of course, even if the client is satisfied that the lawyer will advocate its position wholeheartedly, the risk remains that opposing counsel or the court will cite or bring up the lawyer's prior publications, possibly embarrassing the client and the attorney and, in extreme cases, perhaps materially weakening the representation. This threat of humiliation – conceptually similar to the appearance of impropriety standard, mentioned above – is the main potential pitfall that remains after the lawyer and client have decided to proceed with the representation.

Steven Rosenblum, a partner in the corporate department of the law firm Wachtell, Lipton, Rosen and Katz, and author of several articles on mergers and acquisitions and corporate governance, said in an interview that it is not uncommon for opposing counsel to cite a lawyer's previous work, but that "lawyers tend to find this annoying, and I think most judges find it annoying. Unless it's directly on point – same parties, same facts – it's a game of 'gotcha' that really doesn't resonate."<sup>74</sup> Another practitioner stated that in his experience, if a lawyer tried to embarrass opposing counsel by referencing some prior personal viewpoint, the judge would probably "shoot them

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<sup>74</sup> Telephone interview with Steven Rosenblum, Partner, Wachtell, Lipton, Rosen and Katz (Apr 21 2008).

down.”<sup>75</sup> Judge Guido Calabresi, U.S. Court of Appeals for the Second Circuit, said in an interview that if such a situation were to occur, it would not influence his decision because the lawyer’s personal beliefs are not relevant to the client’s position.<sup>76</sup> James Lane Buckley, who served as a judge on the U.S. Court of Appeals for the D.C. Circuit from 1985 through 1996, said he had never heard a case where this situation occurred.<sup>77</sup>

Perhaps the ultimate, worst-case manifestation of prior publication conflict is the situation wherein a judge, in handing down the decision, incorporates a citation to the lawyer’s prior opposing work. In this case, the attorney’s prior publications could rightly be said materially to have impacted the case, inasmuch as they are reflected in the judicial opinion. This very situation occurred in *Liriano v. Hobart*, wherein Judge Calabresi cited prior work by James Henderson, a prominent torts scholar and lawyer in the case, when handing down the decision (which ruled against Henderson’s side).<sup>78</sup> This was done in the context of jest among old friends, however, and the apparent conflict did not influence the outcome.<sup>79</sup>

Socially, the dearth of law review and opinion articles written by practicing lawyers is perhaps a greater hazard than the occasional positional conflict. In general, practicing attorneys ought not fret about their personal positions being used against them, since courts clearly do not recognize ‘attorney estoppel.’

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<sup>75</sup> Interview with a partner in a major intellectual property law firm who requested to remain unnamed (Mar. 4 2008).

<sup>76</sup> Interview with Guido Calabresi, *supra* note 47.

<sup>77</sup> E-mail message from James Lane Buckley, former judge, U.S. Court of Appeals for the D.C. Circuit (Apr. 9 2008) (on file with author).

<sup>78</sup> Judge Calabresi cited an article by attorney Henderson: “But to state the issue that way would be to misunderstand the complex functions of warnings. As two distinguished torts scholars have pointed out, a warning can do more than exhort its audience to be careful. It can also affect what activities the people warned choose to engage in. See James A. Henderson, Jr., and Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L.REV. 265, 285 (1990).” *Liriano v. Hobart*, 170 F.3d 264, 270 (2d Cir. 1999).

<sup>79</sup> Interview with Guido Calabresi, *supra* note 47; telephone interview with James Henderson, *supra* note 47.

### ***Good faith use of an opponent's prior writing***

A lawyer may cite opposing counsel's prior work, if that work is relevant and persuasive.<sup>80</sup> Each side is equally entitled to cite various authorities, and if one of these happens to be written by a lawyer for the other side, this should not per se preclude its use. This situation may well put the affected lawyer in the unenviable position of distinguishing or arguing against his own prior writing, but this is conceptually no different from distinguishing a key case raised by the opposition. It should be noted however that the court should not tolerate lawyers deliberately invoking marginally related work to embarrass or trip up opposing counsel. If this is done with intent to disqualify the affected lawyer, courts should be particularly careful: the strategic use of motions to disqualify is discouraged.<sup>81</sup>

### ***Where writing may create conflicts***

Although it may be ethically permissible, many law firms will not publish articles that undercut prominent positions the firm has assumed for clients – for instance, Wachtell, Lipton, Rosen and Katz, the firm which invented the 'poison pill' response to corporate takeover, would not publish an article questioning the legality of the approach.<sup>82</sup> This reflects the good business practice of keeping customers happy, more than concern over ethical conflicts. However, an attorney who had previously and individually written material opposing that position would not be disqualified from the hiring process.<sup>83</sup>

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<sup>80</sup> Interview with Guido Calabresi, *supra* note 47.

<sup>81</sup> *FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1315 (5th Cir. 1995) (stating that to bring trivial conflicts to the attention of the court "suggests not so much a conscientious professional concern for the profession and the client of the opposing counsel as a tactic designed to delay and harass.").

<sup>82</sup> Telephone interview with Steven Rosenblum, *supra* note 74.

<sup>83</sup> *Id.*

A situation in which prior writings matter a great deal is in the case of expert witnesses, whose testimony is grounded in their expertise. Expert witnesses may be lawyers by trade, but they are retained in this capacity not as advocates but to testify to the validity of certain facts or positions. As such, their publications are of paramount importance, and lawyers retained as expert witnesses can expect to have their prior writings carefully combed for potential conflicts.<sup>84</sup>

Lawyers acting as legal commentators, a role that rose to prominence during the O.J. Simpson trial, may also discover that their prior writings create subtle suggestions of bias, real or not. In the wake of the Simpson trial, scholars set out to forge a code of ethics tailored to legal commentators, although prior writings were not directly addressed.<sup>85</sup>

## **VII. CONCLUSION**

Everyone interviewed for this paper – judges, ethics experts, law professors and practitioners alike – agreed that in general, an attorney’s prior publications do not amount to meaningful conflicts of interest. Attorneys should ensure that the specific facts and parties at issue in the representation are not discussed in the papers; but in general, an attorney’s publications should lie outside the ‘bounded exclusivity’ that attorneys owe their clients. While it may be good business practice to disclose such publications to potential clients, the ethics guidelines do not demand it.

Still, there is no clear instruction on how to deal with prior publications in the Model Rules. Rather, the rules offer very general parameters with which to assess

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<sup>84</sup> Telephone Interview with James Henderson, *supra* note 47; Interview with Anthony Kronman, *supra* note 47.

<sup>85</sup> Erwin Chemerinsky and Laurie Levenson, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: The Ethics of Being a Commentator*, 69 S. CAL. L. REV. 1303 (1996).

potential conflicts, further complicated because, as Professor Gillers notes, “the application of conflict rules is a matter of judgment and degree.”<sup>86</sup> When assessing positional conflicts, it can seem as though the answer is always ‘it depends’ – but with the Publication Conflicts analysis, at least we have some idea what it depends upon.

The Publication Conflicts factors provide a framework for inquiry and can guide analysis of potential publication conflicts by identifying the relevant questions and highlighting areas wherein conflicts are most likely.

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<sup>86</sup> E-mail from Stephen Gillers, *supra* note 47.