ARTICLES

IMPUTED CONFLICTS OF INTEREST IN INTERNATIONAL LAW PRACTICE

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I. INTRODUCTION

Law practice is increasingly carried out through law firms, as distinct from solo or dual practice. It is increasingly done by large and middle-sized law firms, as distinct from small firms. In most American cities of even modest size, for example, there are firms of twenty-five lawyers and more. In other common law countries, the law firm mode of practice in recent years has arrived in full dress; indeed, English solicitor firms are among the largest in the world, and getting larger. This model has been penetrating the European civil law countries, particularly Germany, Belgium, and the Netherlands, some of the Asian countries, and is making appearance in Hispanic America. The multi-member law office is the wave of the present as well as of the future.

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At the same time, law practice increasingly involves organizations as clients, particularly corporations but also unincorporated associations such as business partnerships, joint ventures, trade associations, specialized government units, "NGOs," and other types.

Thus, on both sides of the client-lawyer relationship there has emerged the phenomenon of "bureaucratization." In bureaucratization, functions are performed, not on the basis of proprietary right or inherited authority but through legally-prescribed procedures (including those in contracts such as corporate charters) under the direction of legally-constituted officials such as managing partners. In simpler terms, client-lawyer transactions in many legal engagements today take place between a lawyer who is a member of an organization and a corporate operative who is also a member of an organization, often a very large one.¹

Understanding the implications of these transformations is still a work in progress. Better understanding is becoming more imperative as law practice becomes increasingly global. The rules of ethics and the law governing lawyers in other countries are somewhat different from the counterparts under American law.² In some respects the rules abroad are more permissive than ours, particularly in regard to the concept of conflict of interest as applied to law firms. Paradoxically, perhaps, this difference results from the later development of legal ethics in Europe, which is also a work in progress. The delay in that development has permitted what may be a better measured response. It certainly has resulted in some competitive disadvantage for American-based international law firms.

II. THE TRADITION

Traditionally, the model organization for conduct of the practice of law has been the solo practitioner. Until the beginning of the nineteenth century indeed, virtually the only kind of "law firm" was the combination of a solo practitioner and an apprentice. Only in modern times has the model extended to include the small firm - two or three lawyers, perhaps five including associates and apprentices.

¹ See generally Susan Shapiro, Tangled Loyalties: Conflict of Interest in Legal Practice (2002).
The rules of ethics for the legal profession accordingly have been predicated on the traditional model of practice. Most of the rules of ethics in all legal systems speak in terms of "the lawyer" and are framed in terms of an individual lawyer's conduct. For example, the American rule governing conflict of interest is framed in those terms. As stated in Rule 1.7(a) of the American Bar Association Model Rules of Professional Conduct: "[A] lawyer shall not represent a client if the representation involve[s] a concurrent conflict of interest." Rule 1.7(a) goes on to define types of concurrent conflicts, while Rule 1.7(b) prescribes the procedure of "informed consent" whereby such conflicts can be overcome.

Rule 1.9(a) of the ABA Model Rules, dealing with conflicts in successive representation, also frames the prescription in terms of an individual practitioner: "A lawyer who has formerly represented a client . . . shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client . . . ."

III. THE IMPUTATION CONCEPT

Only in recent decades have the American rules come to acknowledge the existence of law firms and to take account of the additional ethical issues that are thereby entailed. The basic problem is to decide the extent to which the several members of a multi-member law firm should be treated as a single personage for purposes of ethical and legal responsibility. The term for addressing the problem is that of "imputation," i.e., that a restriction on one lawyer in a firm should (or should not) be imputed to other lawyers in the same firm. The problem of imputation arises most obviously among lawyers in law firms in independent practice. However, it is also present among lawyers in the law departments of business corporations, other private organizations, and in public agency law departments such as the corporation counsel for a city or county or the office of an attorney general.

4. Id. at R. 1.7(a).
5. Id.
6. Id. at R. 1.7(b).
7. Id. at R. 1.9(a).
8. Id. at R. 1.10.
As a practical matter, the most important issue is the imputation of conficts of interest among lawyers in a law firm. The basic approach in the American rules has been that if one lawyer in a firm is personally precluded from a prospective multiple representation, then all lawyers in the firm are similarly precluded.9

For example, the American rule is if Lawyer A is engaged in a transaction on behalf of Client X, Lawyer A is precluded from participating in litigation against X, even in an unrelated matter.10 The rule of individual preclusion governs not only litigation, but other transactional matters that would involve material adversity to Client X. The imputation rule is stated in Rule 1.10(a) of the ABA Model Rules as follows: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless ..."11

I shall presently come to the "unless" clauses in Rule 1.10, provisions limiting the scope of the general rule of imputation. The important point about Rule 1.10 is its general scope. That is, the imputed preclusion under Rule 1.10 generally operates even if the matters are entirely unrelated - for example, one matter concerning real estate, the other a franchise agreement - and even if the other lawyer is in a branch office across the country. Under the American rule governing America-based law firms, imputed preclusion operates across the world. Hence, an engagement in a Moscow transaction can be the basis of a disqualification motion in California.12

Another way of interpreting the imputation rule is that it imposes a bureaucratic regimen on law firms by treating separate individuals as legal functionaries.

IV. BUREAUCRATIZED CLIENTS

A functionally related change in law practice arises from changes in clientele. Traditionally, the rules of ethics have been modeled on the conception of the client as an individual, or perhaps a small business partnership. In fact, in the ABA Model Code of Professional Responsibility promulgated in 1970, the possibility that a client could be

9. See id.
10. Id.
11. Id. at R. 1.10(a).
a corporation was not recognized in any of its Disciplinary Rules but only in the comments as Ethical Considerations. A major advance in ethical analysis had to await Rule 1.13 of the Model Rules of Professional Conduct, which addressed the “Organization as Client.”

Even Rule 1.13 had only a cryptic reference to ethical problems arising where the client was a government entity: “The duty defined in this Rule applies to governmental organizations . . . . [However,] when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful [official] act is prevented or rectified, for public business is involved.”

Today, much of law practice, and probably most of “high profile” law practice, involves representation of corporations and other organizations. It is a particularly important fact that in contemporary practice many clients, and many more events of legal representation, involve corporations and other organizations. In all such situations, the client is a legal abstraction, operating through its “duly authorized constituents,” to use the terminology in Rule 1.13. Rule 1.13 in essence is an integration of basic principles of the law of business organizations and the basic principles of professional ethics. Indeed, it is fair to say that Rule 1.13 was the most important contribution of the ethics revision expressed in the Model Rules compared with the Model Code. The formulation in Rule 1.13 clearly recognizes important distinctions between the organization as client and the corporate personnel with whom the lawyer interacts in representing the entity.

However, so far as conflicts of interest are concerned, the Model Rules retained the basic approach to imputation prescribed in the Model Code. Rule 1.10 of the Model Rules has been quoted above. DR 5-

13. MODEL CODE OF PROF’L RESPONSIBILITY (1982). EC 5-18 stated that “[a] lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity.” Id. at EC 5-18. EC 5-24 recognized that an ethical problem could be presented if a corporate official tried to give “direction” to the lawyer’s “professional judgment” on behalf of the organization, but provided no guidance as to how such a problem should be resolved. Id. at EC 5-24.


15. Id. at R. 1.13 cmt. [9].

16. Id. at R. 1.13.

17. Thus, Rule 1.13(b) provides that, in general, the lawyer must be guided by the “best interest of the organization.” Id. at R. 1.13(b). Rule 1.13(c), (d), and (e) prescribe some pathways of response for a lawyer confronted with intransigence by a wrong-doing corporate operative. Id. at R. 1.13(c)-(e).
105(D) of the Model Code provided that: "If a lawyer is required to
decline employment or to withdraw from employment under a
Disciplinary Rule, no . . . other lawyer affiliated with him or his firm,
may accept or continue such employment." 18

The broadly framed imputation rule has its defenders in this country
and is rarely troublesome to lawyers in small firms. Lawyers in small
firms generally practice down the hall from each other, so to speak, and
are "joined at the hip" financially. Professional intimacy with clients,
particularly individual clients, is very real and indeed one of the rewards
of traditional small firm practice. Hence, the imputation concept has a
physical, social, and financial reality that lawyers in small firms
experience and accept.

However, the imputation rule has proved inconvenient and
unsatisfactory to many middle-sized and large American law firms. It is
also inconvenient and unsatisfactory in many applications to law
departments of government. 19 It is proving even more unsatisfactory to
international firms, i.e., those with branches in other countries. Among
other considerations, for American (and Canadian) international firms,
competitive disadvantage is involved because the rules and practice
concerning imputation work differently in most other countries. There
is, however, considerable common ground.

V. COMMON GROUND I: ADVERSITY IN CONCURRENT
REPRESENTATION

In all legal systems it is recognized that an individual lawyer may not
properly represent clients whose interests are in conflict. Thus, Lawyer
A representing Client X in a matter cannot undertake representation of
Client Y in that same matter, absent a reasonable accommodation of their

18. MODEL RULES OF PROF’L CONDUCT DR 5-105(D) (1982).
19. The general principle of imputation in Model Rule 1.13 is both under-inclusive
and over-inclusive as applied to government lawyers. It is under-inclusive because it
does not address the point that a lawyer in government service must not improperly shape
legal advice to favor a private party while in the government. See MODEL RULES OF
PROF’L CONDUCT R. 1.11(a), (c). It is over-inclusive because it does not adequately
facilitate an important aspect of American government, movement of lawyers to and from
government service - the "revolving door." See id. at R. 1.11(b), (d). As stated in
Comment [4] to Rule 1.11, "the rules governing lawyers presently or formerly employed
by a government agency should not be so restrictive as to inhibit transfer of employment
to and from government." Id. at R. 1.11 cmt. [4].
interests and informed consent on both sides. Most obviously, a lawyer representing a client in litigation cannot properly represent an adverse party in that same litigation. In that context the justification goes beyond the issue of loyalty to the client and preservation of client confidences, and it implicates the need of the court to have the full exploration of the issues produced through adversarial representation.

However, the justification for personal preclusion extends to other litigation even if in an unrelated subject matter. Thus, Lawyer A representing Client X in a matter cannot undertake litigation adverse to Client X even if the subject matter in the two is unrelated. It is regarded as unfair to the client that the same lawyer appear as a loyal and confidential counselor in one dispute, but champion of an opponent in another concurrent dispute. Implicit in this application of the principle is recognition of the psychological and moral dimensions of the trusting relationship - loyalty - that the client is entitled to enjoy. More pragmatically, confidences that are only incidental in the one matter, or even irrelevant to it, can be significant in another matter, even confidences concerning facets that are technically irrelevant.

By the same token, most lawyers would find it difficult or impossible to be a loyal advocate for a client in one litigation, but a resolute opponent in another pending case. Certainly that would be so where the client is an individual or a personally-managed partnership or corporation.

VI. COMMON GROUND II: ADVERSITY IN SUCCESSIVE REPRESENTATION

The same principle is extended in all legal systems to preclude adversity toward a former client in litigation concerning the same matter in which the lawyer previously acted for that client. Thus, Lawyer A may not undertake representation against Client X in a matter in which Lawyer A previously provided assistance to Client X. The classic case of impropriety is that of a lawyer attacking the validity of a transaction that he previously handled, for example, contesting a conveyance that the

22. See Hazard & Dondi, supra note 20, at 191.
lawyer himself had drafted. The traditional vernacular is that a lawyer may not “switch sides.”

However, this extension of the principle reaches a point where competing considerations begin to be felt and then possibly supersede the rule of preclusion. It is true that a lawyer must not attack legal structures which the lawyer previously erected. But it is also true that lawyers in independent practice must be able to serve a succession of clients. The possibility and necessity for a succession of clients in a succession of matters is the very essence of independent law practice. A lawyer must be able to have successive engagements even in the same locality where a previous undertaking was consummated - law practice is mainly “local” in this sense. A lawyer must also be able to take on new matters in the same general legal field as in previous engagements - law practice is mainly specialized in this sense. But successive engagements for different clients entail the possibility of a conflict of interest, especially if the engagements are in the same locality or the same field of specialization.

Thus the very concept of independent law practice at some point is inconsistent with the concept of perfect loyalty to a client. Independent law practice requires that a lawyer’s faithfulness to a client be unavoidably transitory, while perfect loyalty would require a lawyer never to be adverse to one who had once been a client.

The inconsistency is captured in the formulation of the rule of preclusion against subsequent adversity. The key concept is that adversity is precluded, not in all subsequent matters, but only in the “same or a substantially related” matter. For example, Lawyer A who drafted a document for Client X would be precluded from representation adverse to Client X not only in a direct attack on the document, but also in an effort to impose an interpretation of the document against Client X in favor of Client Y. Consider, for example, interpretation of a noncompete clause in a partnership severance agreement that was drafted for Client X and is now to be contested by Client Y.

However, some subsequent representations that more or less relate to the original transaction would not be regarded as “substantially related.” What about a suit for unfair competition by one former partner against another, where the lawyer had done trade association work concerning the partnership? Or a suit by a tenant against a landlord concerning occupancy rights in property as to which the lawyer had previously done
title examination work? Most analysts could conclude that the matters in such situations are not “substantially related.”

The concept of “substantially related” is clear enough for practical purposes in most contexts. But it is unavoidably ambiguous and indeterminate in other contexts. Experience suggests that there is no satisfactory way of reducing the concept’s ambiguity. It would be generally impractical and invidious to have special rules for specialized fields of practice. Resort to additional adverbs - “closely,” for example - would not help much, if at all. Hence, we simply have to live with a measure of uncertainty - indeed “substantial” uncertainty.

Once attention moves beyond these simple cases, greater analytic and practical difficulties are encountered. As we shall see, all of the difficulties are magnified where the personal preclusion rule is coupled with the principle of imputation.

VII. TRANSACTIONAL PRACTICE VERSUS LITIGATION PRACTICE

The rules of ethics, and specifically the rule governing conflicts of interest, originally evolved regarding litigation practice. A conflict of interest in litigation practice usually has higher visibility than one in transactional practice, because the process of litigation itself makes the adverse relationship of the parties directly apparent. Furthermore, the courts have always had an interest in prohibiting conflicts of interest by the advocates in litigation, because such a conflict threatens the integrity of the courts’ own functions. Moreover, when a litigation conflict is presented, there is an immediate remedy and, at least in the common law systems, an immediate forum for enforcement of the remedy. That remedy is a motion to compel the offending advocate to withdraw or, as we say today, a motion for disqualification.

The problem of adversity in transactional practice is inherently more complicated and often less visible. In typical simple litigation, the parties are aligned as P v. D. Even in multi-party litigation the alignments as between friend and foe are usually pretty clear. In most litigation the involvement of the interested participants is open and evident. Of course there can be conflicts and other ethical problems concerning parties who are interested but undisclosed, such as the liability insurers who stand behind defendants in modern tort litigation.

But these are more difficult precisely because they have elements of transaction practice embedded in them; for example, the underlying contractual relationship between insurer and insured or, in patent litigation, between patentee and licensee.

In contrast with the typically open and obvious adversity in litigation are the problems of conflicts of interest in transaction practice. In transaction practice, it is often by no means clear whether or not there is adversity among the participants. On one hand, in economic terms every transaction between parties across a table can be “win-win” - an exchange favorable to both or all parties. Thus, both the buyer and seller of a property benefit from a sale at a proper market price under proper covenants, representations, and warranties. In a loan transaction, both borrower and lender stand to benefit if the terms are right, and so also in any transactions among any set of participants.

At the same time, in transaction practice it is often unclear whether participants aligned on the “same side” have an appropriate identity of interest. A familiar situation involves entrepreneurs seeking to create and operate an enterprise, such as a business partnership or a corporation. One participant may be the provider of capital, the other the provider of management; one may be a senior seeking a stable investment, the other a junior seeking to make a fortune; one may be risk-averse, the other adventurous; etc.

The rules governing conflicts of interest permit the participants to assess whether their interests can be coordinated, and hence represented by one lawyer, or are too adverse, and hence require each to have separate counsel. The assessment ordinarily proceeds on the basis of a judgment by the lawyer and counseling from that lawyer accordingly, as to whether there was a conflict of material dimension. Traditionally, the courts usually accepted the lawyer’s judgment that concurrent representation was permissible. In recent years, the courts have confronted claims by disgruntled clients arguing, in hindsight, that they were not adequately informed and counseled. In response, the courts have come to disapprove concurrent representation of buyer and seller or borrower and lender in various contexts.24

Many, if not all of these cases involved the same lawyer providing representation to both or all parties. None of the cases I have found involved one law firm lawyer representing one party and another lawyer

in the same firm representing the other. It would not be unrealistic to consider the "two lawyer" situation to be different, professionally and functionally, from that where one lawyer is involved. However, under the imputation rule as formulated in the ethics rules in this country, such a differentiation is not permitted.

VIII. EXCEPTIONS TO THE IMPUTATION PRINCIPLE

The rule that disqualification of one lawyer in a firm requires disqualification of all others in the firm has been subject to important exceptions almost since the beginning of the modern codification of professional ethics.

One of the first exceptions concerned lawyers moving in and out of government, an exception now stated in Model Rule 1.11 (mentioned above). The problem was directly encountered under the Code of Professional Responsibility in *Armstrong v. McAlpin*, a case involving a lawyer who had left service in the federal government. The government itself, wanting protection against the "revolving door" movement, strongly supported an exception applying the same imputation rules to former government lawyers as would apply to lawyers moving from one private practice setting to another. That position was codified in Rule 1.11 of the Model Rules of Professional Conduct and has subsequently been adopted in most jurisdictions. A recent California case illustrates the consequences of applying the private practice standard to legal employments in the public sector: A lawyer formerly in private practice became corporation counsel for San Francisco, whereupon the entire staff of the city's legal department was subject to a disqualification motion based on a conflicting engagement by the lawyer in his prior private affiliation.

A corollary of this exception concerns whether there should be imputation among lawyers within a government law office. As noted above, this situation was recognized but not resolved in the Comment to Rule 1.13 of the Model Rules. The need for some kind of an exception responds to two-fold circumstances. For one thing, government lawyers simply do not have the same kind of proprietary interest in their

employment relationship as do lawyers in a private law firm. For another, the organization of government legal staffs does not correspond to the unitary partnership or corporate form characteristic of private law firms. In some states, for example, virtually all lawyers employed at the state level are at least nominally under the authority of the state attorney general. Formally, they are all accordingly in the same "firm." Applying the imputation rule in such a setting would preclude government lawyers from representing agencies engaged in litigation against each other, even where state law concerning standing to sue permits such adversity.

A similar problem arises for lawyers in prosecutor and public defender offices. Should the concept of imputation apply across all such offices, including those in small counties with two or three lawyer staffs and in big city departments with dozens or more lawyers? The courts have generally declined to apply the same rule as governs private practice, but have often struggled in developing alternatives.29

Regarding lawyers in private law firm practice, a similar but much narrower set of exceptions has evolved. Some of these exceptions address restrictions in Rule 1.8. That rule includes a number of specific conflicts rules. For example, subsection 1.8(a) concerns business dealings between client and lawyer and subsection 1.8(i) concerns lawyers having a family relationship such as parent and child or marriage.30 The imputation rule in Rule 1.10(a) itself formerly limited imputation of the Rule 1.8 restrictions to that in subsection 1.8(c), which has a prohibition against documenting a gift from client to lawyer.31 By an amendment proposed by the ABA in 2002, the formulation of Rule 1.10 has been changed so it is both broader and narrower than it was previously.

As amended, Rule 1.10 would restrict imputed disqualification when the predicate disqualification arises from "a personal interest of the prohibited lawyer."32 Such a "personal interest" could result from either a representation barred by the general conflicts limitations in Rules 1.7 and 1.9, or from any of the restrictions in Rule 1.8, including those beyond Rule 1.8(c) referred to above.33 When such a personal interest is

30. MODEL RULES OF PROF'L CONDUCT R. 1.8(a), (i) (2003).
31. Id. at R. 1.8(c).
32. Id. at R. 1.10.
33. See id. at R. 1.7-1.9.
involved, it is not imputed to other lawyers in the firm unless it presents "a significant risk of materially limiting the representation . . . by the remaining lawyers in the firm."\textsuperscript{34} The applications of this latter concept are manifold and unavoidably ambiguous. Comment [3] to revised Rule 1.10 states:

Where one lawyer . . . could not effectively represent a given client because of strong political beliefs . . . and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party . . . were owned by a lawyer in the law firm, and others in the firm would be materially limited . . . because of loyalty to that lawyer, the personal disqualification . . . would be imputed to all others in the firm.\textsuperscript{35}

It seems obvious that "significant risk of materially limiting the representation" would be much less likely to exist among lawyers in a large firm than among those in a two or three person firm. Such, for example, would be the differential effect of Lawyer A being a member of the board of directors of a company against which Lawyer B of the same firm is participating in a contract negotiation.

Another set of exceptions deals with situations where a lawyer moves from firm to firm. Rule 1.9(b) provides that the imputation "taint" is removed from a lawyer who leaves a firm, unless while in the firm the lawyer had personally acquired confidential information in the matter in question.\textsuperscript{36} Rule 1.10(b) provides that the firm from which a "tainted" lawyer has left is no longer barred by imputation, unless there are lawyers remaining in the firm who have confidential information in the matter in question.\textsuperscript{37} These exceptions had been recognized in the decisional law under the Code of Professional Responsibility, responding to motions to disqualify, and thereafter were codified in the Model Rules of 1983.

\textsuperscript{34} Id. at R. 1.10(a).
\textsuperscript{35} Id. at R. 1.10 cmt. [3].
\textsuperscript{36} Id. at R. 1.9(b).
\textsuperscript{37} Id. at R. 1.10(b).
Another exception has been more recently formulated to deal with possible conflicts from exchange of information between client and lawyer prior to formation of a client-lawyer relationship. Such an exchange typically will include identification of the contemplated opposite party and description of the matter to be undertaken. Conducting such interviews is a necessary aspect of law practice, particularly in independent firms, precisely because avoidance of improper conflicts of interest has become so salient an aspect of professional ethics. If the exchange results in an engagement, the information is covered by the lawyer's duty of confidentiality and the engagement is covered by the lawyer's duties of loyalty, diligence, etc. But it may be that no engagement results because, for example, the matter is outside the law firm's field of competence, or would overload its capabilities, or is unpromising in terms of fees, or would involve a conflict of interest. What then?

Here again, the first authoritative responses were judicial decisions addressing motions to disqualify. The underlying tension was between the prospective client's right to communicate freely when in search of a lawyer, and the lawyer's right and duty to ascertain whether the prospective matter was professionally acceptable. Problems of this kind of course can arise in solo practice as well as in law firm practice. Hence, lawyers in all forms of practice have learned to be guarded and to proceed incrementally in receiving information about a prospective engagement. The courts have generally been protective when the lawyer has been reasonably cautious in the initial interface with a prospective client. The lawyer who has been suitably guarded may subsequently take on representation of a party adverse to the former prospective client.38

Nevertheless, the interchange between a prospective client and a solo practitioner, followed by an engagement of that lawyer by an opposing party, presents a different problem in practical terms from that where the original interchange was with one lawyer in a firm and the subsequent engagement established through another. It can be a matter of fact, and of law firm procedure, that information in an initial interview be confined to the interviewing lawyer alone. If the lawyer is a solo, the information has been received by the office. If the lawyer is in a firm, the information may not have been received by the office. In law firms of even modest size, it can be a fact and a law firm policy that the

information from a prospective client not be transmitted beyond the firm's conflicts-checking procedures. In large law firms, and ones of national or international scope, it will be routine that transmission be thus limited.

The ABA has now codified a rule addressing this set of problems. Model Rule 1.18 requires the lawyer receiving such information from a prospective client to maintain it essentially on the same basis as confidences from a client.\textsuperscript{39} Hence, that lawyer will be disqualified from subsequent adverse representation unless, as provided in Rule 1.18(d)(1), informed consent had been obtained from the prospective client.\textsuperscript{40} However, Rule 1.18(d)(2) limits the disqualifying effect of the reception if: (1) the lawyer avoided “exposure to more disqualifying information than was reasonably necessary;” (2) that lawyer was screened from a subsequent adverse representation; and (3) notice was sent promptly to the erstwhile prospective client.\textsuperscript{41}

IX. EXEMPTION FROM IMPUTATION BY CONTRACT, IMPLIED OR EXPRESS

The rules against conflicts of interest generally can be obviated by consent on the part of the affected clients. Model Rule 1.7(b) as revised by the ABA in 2002 provides: “Notwithstanding the existence of a concurrent conflict of interest . . . a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; [and] (4) each affected client gives informed consent, confirmed in writing.”\textsuperscript{42}

Model Rule 1.9(a) has an essentially identical provision governing representation adverse to former clients.\textsuperscript{43} Both of these provisions are carried forward from the 1983 version of the Model Rules, with the addition of the provision that the informed consent be confirmed in writing. In turn, they substantially correspond to a counterpart provision in DR 5-105(C) of the 1970 Code of Professional Responsibility.\textsuperscript{44}

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\textsuperscript{39} MODEL RULES OF PROF’L CONDUCT R. 1.18 (2003).
\textsuperscript{40} Id. at R. 1.18(d)(1).
\textsuperscript{41} Id. at R. 1.18(d)(2).
\textsuperscript{42} Id. at R. 1.7(b).
\textsuperscript{43} Id. at R. 1.9(a).
\textsuperscript{44} DR 5-105(C) provided: “[A] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents . . . after full disclosure of the possible effect of such representation on the exercise of his independent
\end{flushright}
These provisions are conventionally referred to as "waiver" although strictly speaking they are matters of contract. In any event, the key problems in their application are: (1) whether there is a conflict of interest in the multiple representations; (2) whether it is objectively reasonable that the lawyer or law firm undertake the multiple representation; (3) whether the client has been adequately informed not only of the conflict but also of the implications regarding the clients' interests; and (4) whether the client thereupon gave consent. Under careful professional practice, and now by rule, the consent must be confirmed in writing.

It is safe to say that administration of the conflicts rules, including seeking and obtaining waivers, is the most frequently encountered ethical problem in contemporary law practice. Although the conflicts rules are central in the Model Rules and were very important in the previous Code of Professional Responsibility, perhaps paradoxically it is unusual that they be addressed in disciplinary proceedings.\textsuperscript{45} Rather, the procedural context most often is either an effort to disqualify counsel\textsuperscript{46} or a civil liability suit for damages.\textsuperscript{47}

In any event, there are virtually infinite permutations of possible conflicts of interest, of whether it is objectively appropriate for a lawyer to undertake multiple representation, of whether the client has been adequately informed of the conflict and its ramifications, and of whether the client gave proper consent. In practice, a lawyer or law firm is always at some risk if it proceeds with multiple representation when there is even a colorable basis for saying there is a conflict of interest. These days, if the underlying litigation or transaction turns out badly, some kind of claim of malpractice often will ensue. In defense representation in criminal cases, the claim will be of inadequate

\textsuperscript{45} For such a case, see State v. Callahan, 652 P.2d 708 (Kan. 1982). It is noteworthy that the lawyer in that case had filed bankruptcy after malpractice in the conflicted representation, thus rendering futile the more appropriate response by an injured client, a civil action for damages. \textit{Id.}

\textsuperscript{46} Disqualification most often is sought by motion in the action the lawyer or law firm has become involved in as advocate for another party in litigation, see, e.g., Westinghouse Elec. Corp. v. Kerr-Mc Gee Corp., 580 F.2d 1311 (7th Cir. 1978), or, more unusual, by injunction against participation in representation of a related transaction, see Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 602 A.2d 1277 (Pa. 1992).

\textsuperscript{47} \textit{See Restatement (Third) of the Law Governing Lawyers} §130 (2000).
representation; in civil litigation and transactions it may be a suit for damages or a demand for forfeiture of fees.

X. CLAIMS OF CONFLICT OF INTEREST HAVE SIMPLY BECOME A RISK OF PRACTICE

The risk of claims of conflict of interest is greater in proportion to the greater amount of different matters of representation a lawyer or law firm undertakes. The risk is greater more or less in proportion as the firm engages on "both sides" of litigation and transaction matters, for example, representation of both claimants and defendants in commercial litigation, or representation of both lender and borrowers in commercial finance. The risk is greater more or less in proportion to the size of the firm, because firm size is more or less correlated to the firm's volume of business. Handling conflicts of interest has become a central ethical and management problem for all large law firms and for most middle-sized firms.

Against claims or potential claims of conflict of interest, a law firm has several layers of protection. The first of course is careful monitoring of new and continuing matters to detect conflicts involved in an initial engagement or conflicts arising as a matter develops over its pendency.\textsuperscript{48} The second is obtaining a waiver when a conflict has arisen. However, consent after a conflict has arisen can be withheld by any of the affected clients and for any reason or no reason; hence, consent in such circumstances is not a reliable recourse from the law firm's viewpoint.

XI. IMPLIED WAIVER

A third line of defense is available against the most typical remedy pursued by an aggrieved client, the motion to disqualify. Disposition of a motion to disqualify is conventionally and properly laid to rest in the trial court's judicial discretion. The motion can be considered as an injunction, and accordingly is subject to the traditional equitable requirement of timeliness and the defense of laches, particularly the effect on the client of the lawyer whose disqualification is sought. Alternatively, the motion can be considered an incident of a court's authority to control its docket and the conduct of advocates appearing

\textsuperscript{48} A conflict, although not present initially, can develop from addition of parties in litigation or of participants in a transaction.
before it. Under either approach, the court has substantial discretion to refuse a remedy in the absence of demonstrable injury or risk to the complaining party.

It is here that the rule of imputation is important. There are many situations where a single lawyer could not handle unrelated matters for two different clients. The difficulty arises, not from the relationship of the matters, but from the personal relationship of the lawyer to each of the clients. As either or both clients might exclaim, “How can you at the same time be my professional friend and also my professional antagonist?” No such personal nexus is necessarily encountered when two lawyers in the same firm are involved.

The absence of demonstrable injury or risk will be clear when the matters at issue are unrelated and when there is no risk of bad interface between client and lawyer. Thus, if Lawyer A in a firm is handling Matter I for Client X, and Lawyer B in the same firm is handling Matter II for Client Y, the claim of conflict of interest will require that some relationship be shown between Matter I and Matter II and, even then, ordinarily will depend entirely on the rule of imputation: Lawyer A personally cannot handle Matter I because Lawyer B personally could not do so.

In dealing with motions to disqualify in such situations, courts in years past could be pretty strict, sometimes indignant to the existence of such conflict. In more recent years they have become more ready to invoke the concepts of implied waiver and laches. If a client had adequate information about the other representation, and for whatever reason refrained from objecting, disqualification may readily be denied. Another relevant factor is whether there has been reasonable reliance by the client on the propriety of representation of the lawyer whose participation is under attack. A common phrase is that “the right of the latter client to its choice of counsel should not easily be disturbed.”

It is not possible to present an accurate picture in quantitative terms of the pattern of decision in disqualification motions in contemporary practice. On the basis of observation and conversation with other observers, however, it seems to me that the courts have become reluctant to disqualify on the basis of conflict of interest through the rule of imputation. The courts are particularly reluctant where the nexus of imputation is required and there is no indication of improper exposure of relevant confidences among the lawyers involved. It would be going too far to say that de facto the rule of imputation has been abolished in
absence of a showing of abuse of client confidences. It might not be going too far to say the rule of imputation has been substantially curtailed in such situations.

XII. GOVERNING CONFLICTS BY CONTRACT

It is in this posture of the developing law that the problem of conflicts of interest among law firm lawyers has become increasingly governed by contract rather than by rule.

The legal basis for governing the problem by contract is the provision in Rule 1.7(b) authorizing client consent to a conflict, under the conditions stated in that rule. Model Rule 1.7(b)(4), as most recently revised by the ABA, provides that a lawyer or law firm may undertake representations involving a conflict of interest if "each affected client gives informed consent, confirmed in writing," provided that the arrangement is objectively reasonable, is not otherwise prohibited by law, and does not involve representation of the clients against each other in litigation.

The typical pattern concerns corporate clients or a corporate client and an official of the corporate client. In the past, "consent" or "waiver" situations would be addressed as they came up, with focus on a specific situation presenting a conflict or potential conflict. Today, law firms are increasingly endeavoring to obtain informed consent to future conflicts, often called "advance waivers."

The propriety of advance waivers has been addressed by the ABA Ethics Committee on two occasions, in 1993 and more recently in 2005. In Formal Opinion 93-372, issued in 1993, the Committee concluded that an advance waiver would be proper only if, among other requirements, there was specific identification of parties whose conflicting interests were involved. This meant that in obtaining in the present a waiver from one client, it was necessary at the same time to identify the other client, even if the second representation was only hypothetical. Thus, a conflict waiver by Client A would have to refer

49. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2003).
50. See id. at R. 1.7(b)(1)-(3). See generally Richard W. Painter, Advance Waiver of Conflicts, 13 GEO. J. LEGAL ETHICS 289 (2000).
53. See id.
to an anticipated conflict with prospective Client B, and vice versa.\textsuperscript{54}
That requirement, if taken as obligatory, sharply limited advance waivers by allowing them no greater scope than waiver of a present conflict. A present conflict waiver addresses a specific situation (for example, representation of Bank A and Borrower B in unrelated transactions), and, under the 1993 Opinion, a future conflict waiver would have to be equally specific (representation of Bank A in the eventuality that the bank would undertake a loan to Borrower B in which the law firm would be involved).\textsuperscript{55}

It seems evident that the authors of the 1993 Opinion intended that very result, in effect radically restricting the use of future waivers.

Many other analysts were of the opinion that future waivers could have a much broader scope. I have thought that open-ended future waivers were ethically improper in some circumstances and, in any event, imprudent. On the other hand, a more limited future waiver has seemed proper to me. This approach is exemplified in the terms of such a prototype waiver:

1. Corporation A, through its general counsel Lawyer X,\textsuperscript{56} hereby consents to Law Firm B undertaking representations adverse to Corporation A, and its affiliates listed in the attached schedule, in present or future transaction or litigation matters, except in:
   \begin{enumerate}
   \item A litigation in which Law Firm B is also representing Corporation A or is otherwise prohibited by governing rules of law or professional ethics;\textsuperscript{57}
   \item A transaction involving a merger or acquisition of Corporation A or any of its affiliates, or to
   \end{enumerate}

\textsuperscript{54} See id.

\textsuperscript{55} Id.

\textsuperscript{56} In my opinion a law firm ordinarily cannot rely on a future waiver unless the client is independently represented in making the agreement. It would be awkward and usually not worth the trouble to negotiate a future waiver with an individual client (for example, in a divorce or an estate planning representation), simply because of the unlikelihood of future representations in which a conflict might occur. Hence, as a practical matter, future waivers are for corporations and other organizations, and usually for those having a stream of legal problems. Organizations having a stream of legal problems typically have an in-house law department or at least a regular outside counsel.

\textsuperscript{57} See MODEL RULES OF PROF'L CONDUCT Rule 1.7(b)(3), an exception providing that "the representation does not involve the assertion of a claim by one client against another client . . . in the same litigation . . . ."
obtain more than [three] percent of the shares of Corporation A or any of its affiliates;

(3) Litigation involving claims of fraud, antitrust conduct, RICO liability, punitive damages, or personal conduct on the part of directors or principal officers of Corporation A or any of its affiliates.

2. Law Firm B agrees that lawyers working on any matter adverse to Corporation A will be screened, as defined in ABA Model Rule 1.0(k).\textsuperscript{58}

Obviously, there could be many variations in such an approach. The point is that the future waiver is not open-ended and that it precludes representations that would be particularly offensive to the consenting client.

The ABA Ethics Committee revisited the matter of future waivers on May 11, 2005, in Formal Opinion 05-436.\textsuperscript{59} As I read the opinion, it comprehensively permits future waivers, subject to the following limits:

(1) Conflicts cannot be waived that are in the exceptions specified in Model Rule 1.7(b).
(2) Consent to a conflict is not consent “to the disclosure or use of the client’s confidential information against the client.”\textsuperscript{60}
(3) Consent may be required from the other client in the matter undertaken in the future.

Formal Opinion 05-436 derives authority from changes made in the recent revisions of Model Rule 1.7. Thus, the change in opinion is justified by change in the terms of the rules governing conflict of interest from what those rules were when the 1993 opinion was issued. It seems to me, however, that the change in approach also reflects a different

\textsuperscript{58} The definition in Model Rule 1.0(k) is: “‘Screened’ denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.” Id. at R. 1.0(k). This definition is elaborated in Comments [8], [9], and [10] to include isolation of support personnel and protection of client confidential information. Id. at R. 1.0 cmts. [8]-[10].

\textsuperscript{59} ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 05-436 (2005).

\textsuperscript{60} Id.
approach in substance - future waivers should be given much more latitude.

In short, the regime under Formal Opinion 05-436 can properly be called "resolution of conflicts by contract" rather than "resolution by rule." The normal operation of the newer regime will involve corporate clients acting through their in-house general counsel.

XIII. CONFLICTS CONTRACTS IN GLOBALIZED LAW PRACTICE

In my opinion, such a regime is entirely proper, not only in domestic American law practice but especially in international practice. First, the scope of conflicts limitations in contemporary practice is often enlarged by contract, the terms being insisted on by the clients. Under the concept of conflicts rules applicable to corporations that is now generally accepted, representation of one corporate affiliate does not necessarily entail an engagement with other affiliates.\(^{61}\) That situation exists particularly where the affiliate has a separate law department. Nevertheless, many large corporations now require an independent firm to agree that the conflicts limitations of Rules 1.7 and 1.9 apply not only to the corporate entity immediately involved in an engagement, but also to all its corporate affiliates. The engagement letters can list dozens or even more than a hundred affiliates. It could be argued that such an agreement offends the principle of a lawyer's professional independence.\(^{62}\) However, law firms do not complain to the disciplinary authority but simply accept the restriction, try to negotiate narrower terms, or decline the proposed representation. A regime of "conflicts by contract" thus continues to be established from the clients' point of view.

Second, the trends in modern law practice make such a contract regime increasingly attractive as a practical matter. Law firm size continues to develop in the direction of larger and larger law firms. By operation of the imputation rule, the more lawyers in a firm the greater the possibility of conflicts among various clients. At the same time, law firm practice has continued to develop in the direction of ad hoc, matter-specific engagements as contrasted with retainers or other on-going client-lawyer relationships.


\(^{62}\) See Model Rules of Prof'l Conduct R. 5.4, 5.6 (2002).
These trends interact with other developments. One is the increasing specialization in law practice and the proliferation of new sub-specialties. Covering emerging sub-specialties is among the incentives for adding new lawyers to a firm. Another influential trend is the expansion of geographical scope of client business operations and corresponding client legal needs. Many more law firms find it necessary to have an office in Washington, D.C. or even New York, now that federal regulation and the world money markets are of practical concern to more and more corporate clients.

All of these trends also operate in international transactions - the globalized political economy. Thirty years ago or so it came to be recognized that a U.S. firm would be helped by having a branch in London or Brussels, and that a firm from the United Kingdom would be similarly advantaged by offices in Washington and other American cities. More recently the same realization has led firms to focus on Shanghai and Mumbay.

A regime of conflicts by contract responds to this reality. Conflicts contracts, like the conflicts rules themselves, protect two basic client interests: Confidentiality of client information and loyalty (and, as appropriate, "zeal") in carrying out the representation. Governing conflicts by contract allows the parties of a client-lawyer engagement to tailor the protection of these interests. The functional rationale is essentially the same as supports the regime of contract in international trade generally. The contract regime in international trade allows parties to put together transactions and relationships that are attractive in part because they transcend the limits of parochial national laws. So also with client-lawyer transactions.

The tailoring consists essentially of limiting the effect of the imputation rule. That is, no one imagines that Lawyer A in Law Firm A will represent Client X Corporation in litigation in New York or London, and that Lawyer A will also at the same time represent some other client against Client X in an arbitration in Zurich. Rather, what the conflicts contract will permit is, for example, that representation by Lawyer A in Law Firm A of Corporation X will not prevent Lawyer B in Law Firm A from representing another company in a licensing negotiation with Corporation X.

63. See Moore, supra note 2, at 543.
XIV. CONCLUSION

Governing the client-lawyer relationship by contract in this way surely does not contravene a universal professional tradition. On the contrary, it neutralizes, in greater or lesser degree, an imputation rule that developed with peculiar rigor in law practice in the United States and some other common law countries: If one lawyer in a firm was precluded, all were precluded. That rule has proved too rigid even in our system.

In contrast, the civil law systems generally have a two-part concept. First, as universally recognized, the same lawyer cannot be acting both for and against a client. Second, the imputation rule operates in more limited scope in litigation matters, precluding a law office from handling both sides of a litigation, but otherwise being a basis for client objection, not a professional preclusion against the lawyers. As Professor Dondi and I have explained:

Thus, Lawyer A in a firm may bring suit against a client of Lawyer B in the same firm if the matter being handled by Lawyer B is unrelated to the subject of the lawsuit. However, one or both clients can object, and some clients will object vehemently. The law firm thereupon must choose which client to serve.64

This approach treats clients as competent participants in the creation of the client-lawyer relationship, which is certainly consistent with the American tradition regarding business clients. It regards the basic operative in law practice to be the individual lawyer, not the law firm. That vision is in many ways very attractive.

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64. HAZARD & DONDI, supra note 20, at 194.