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ARTICLES AND RESPONSES

CONFLICTS OF INTEREST IN LITIGATION: THE JUDICIAL ROLE

Bruce A. Green*

INTRODUCTION

Courts regulate lawyers by making and enforcing much of the law governing lawyers' professional conduct. As lawmakers, courts promulgate rules of conduct, or disciplinary rules, such as those contained in the Model Rules of Professional Conduct and the Model Code of Professional Responsibility, and adopt additional legal standards relating to lawyers' conduct in ad hoc or common-law fashion in the course of adjudication. As law-enforcers, courts establish disciplinary mechanisms to which allegations of lawyer misconduct may be referred. Courts also sanction lawyers for wrongdoing that arises in the course of litigation.

In litigation, disputes over lawyers' professional conduct most frequently involve conflicts of interest, a subject addressed extensively by disciplinary rules. Although various purposes have been ascribed to them, the "conflict rules" are best understood as rules of "risk avoidance." They address situations in which there is a risk that a

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3. Another judicial role, which grows out of the first two, is as law-interpreter. Courts interpret disciplinary rules and other law governing lawyers in the course of reviewing disciplinary decisions or resolving issues of professional conduct that arise in litigation. The courts' role as interpreters of conflict-of-interest law is addressed only tangentially in this Article.
5. See Model Rules, supra note 1, Rules 1.7 - 1.12; Model Code, supra note 2, DR 5-101 - DR 5-107.
6. By "conflict rules," this Article means disciplinary provisions addressing conflicts of interest. See supra note 5 and accompanying text.
lawyer will not adequately carry out obligations to a present or former client because of competing obligations to another present or former client or because of the lawyer's own competing interests. Before accepting or continuing the representation in such situations, the lawyer must obtain the informed consent of the clients whose interests are put at risk; where the risk is unreasonably high, the lawyer must refrain from accepting or continuing the representation.

Like other rules of professional conduct, the conflict rules are designed to be enforced primarily by disciplinary agencies, to the extent they are not self-enforced. As David Wilkins has shown, however, disciplinary bodies do not comprehensively police litigators' conduct. Particularly in litigation involving corporate clients, violations of the conflict rules are unlikely to be called to the disciplinary authorities' attention and, consequently, unlikely to be punished.

In overseeing litigation, courts have the opportunity to compensate for the inadequacy of the disciplinary process. They frequently seek to do so by disqualifying a lawyer as punishment for violating an applicable conflict rule. Unlike the personal sanctions imposed in disciplinary proceedings, disqualification punishes lawyers indirectly. Nonetheless, disqualification of counsel may serve effectively as an alternative enforcement mechanism—in David Wilkins's words, it serves as an "institutional control" as distinguished from a "disciplinary control."

In some cases, independently of any interest in complementing the disciplinary process, courts would disqualify the lawyer in order to protect a present or former client from the risks posed by the lawyer's conflict of interest. Thus, disqualification may serve a remedial function. In other cases, however, disqualification seems unnecessary or inappropriate as a remedy, because the risks posed by the lawyer's conflict of interest are slight or because those risks seem to be acceptable ones in light of the countervailing harms that disqualification would cause both to the court and to the litigant who would be deprived of the chosen lawyer's services. In such cases, disqualification serves primarily, if not exclusively, as a sanction. Given that the burden of disqualification falls largely on the client, not the lawyer, the question arises whether it is an appropriate sanction in light of the alternatives available to courts seeking to oversee litigators' conduct.

This Article argues that disqualification is not an appropriate sanction and should therefore be reserved for cases in which it is needed.

8. See Model Rules, supra note 1, Preamble.
10. Wilkins, supra note 9, at 827-28.
11. Id. at 805-09.
as a remedy. When a litigant's lawyer violates the standard of con-
duct established by an applicable conflict rule, the court should sanc-
tion the lawyer personally, but should remove the lawyer from the
case only if found necessary to avert harm to a former or present cli-
ent. The decision concerning disqualification should not be predi-
cated on the conflict rules that apply to a lawyer's conduct in
accepting a new representation and, where violated, serve as the basis
of possible disciplinary sanctions. Instead, courts should develop a
conflict-of-interest jurisprudence that is less restrictive and less cate-
gorical than the conflict rules. Further, the ad hoc judicial resolution
of disqualification motions should serve as a model for addressing
conflicts of interest in other procedural contexts, including in rulings
on requests for declaratory relief.

By way of background, part I first identifies some points of conten-
tion regarding the appropriate judicial role in making and enforcing
the law governing lawyers' conflicts of interest. It then underscores
some contributions that David Wilkins's article makes to the discus-
sion of these issues of institutional choice. Finally, part I describes a
judicial decision that will then be used to illustrate points made in the
remainder of the Article.

Part II addresses the courts' role in enforcing the standards of con-
duct governing lawyers' conflicts of interest. It considers whether
courts should disqualify lawyers as a sanction for violating the conflict
rules. It explores two arguments against doing so—first, that discipli-
nary proceedings are more appropriate than judicial proceedings as a
forum for sanctioning litigators who violate the conflict rules, and, sec-
ond, that disqualification is an inappropriate sanction, because its bur-
dens fall principally on a presumptively innocent client and on the
court, not on the lawyer. The Article suggests that the second argu-
ment is persuasive, particularly because courts, if they chose to do so,
could impose personal sanctions as an effective alternative. It there-
fore concludes that disqualification should be employed as a remedy
only.

Part III, addressing the courts' role as lawmakers, considers what
law should determine whether disqualification is a necessary remedy
for a litigator's conflict of interest. It argues that disqualification
should not be a per se remedy for a violation of a conflict rule and
that, on the contrary, the court's determination should not be based
on the conflict rules at all. The conflict rules, which are designed to
apply to a lawyer's decision at the outset of the representation, would
be overly restrictive if applied by courts in the disqualification setting
after the representation is under way. Rather than applying an alter-
native set of rules, courts should apply an open-textured standard that

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12. In referring to a disqualification as a "remedy," this Article means a device to
prevent future harm, as distinguished from a punishment.
permits an ad hoc weighing of the likely harms to be caused by the conflict of interest and the countervailing harms that disqualification would engender. Courts should also employ this standard when ruling on the appropriateness of representation outside the disqualification setting.

I. BACKGROUND

A. Questions of Institutional Role

Two questions of institutional role underlie discussions of conflicts of interest in litigation. The first is what role courts should play in enforcing the standards governing litigators' conduct with respect to conflicts of interest. The second is what role courts should play in establishing those standards. As discussed below, both questions have defied uniform judicial resolution.

1. The Judiciary's Role in Enforcing Conflict Standards

The appropriate judicial role in enforcing conflict-of-interest standards turns on the extent to which courts should disqualify lawyers as a sanction for violating the standards, rather than exclusively as a remedy for harms that would be imposed on the trial process or on clients if the lawyer were to continue in the representation. Courts substantially disagree about this.13

Some courts have explicitly refused to serve a disciplinary function. For example, the Second Circuit issued a series of influential opinions more than fifteen years ago, at the time when district court rulings on disqualification motions were still immediately appealable.14 Reacting against what it perceived to be the increasing misuse of disqualification motions for tactical reasons, the court ruled that disqualification was proper only when a litigator's conflict of interest

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14. In a succession of decisions in the 1980s, the Supreme Court held that decisions on disqualification motions are not immediately appealable. See, e.g., Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 430 (1985) (holding that a disqualification order in a civil case was not immediately appealable); Flanagan v. United States, 465 U.S. 259, 260 (1984) (holding that a disqualification order in a criminal case was not immediately appealable); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 370 (1981) (vacating judgment of Court of Appeals because orders denying motions to disqualify counsel are not immediately appealable). Underlying these decisions is a concept of disqualification as a remedy for harms that may or may not later occur, rather than as a sanction. If disqualification were thought to serve primarily to sanction the lawyer for violating a conflict rule, one should expect the Court to afford disqualified lawyers an immediate opportunity to appeal.
would "taint" the trial, and that otherwise, these conflicts were better relegated to disciplinary authorities.  

The Fifth Circuit's 1992 decision in *In re American Airlines, Inc.* took precisely the opposite approach. It held that litigators who violated the applicable conflict-of-interest standards should be disqualified even if the conduct of the trial would not be affected adversely if the lawyer were to remain in the case. It reasoned that unless courts address the impermissible conflict, it may go entirely unpunished and that, in any event, enforcing the conflict law is the courts' business. The court also expressed skepticism as to whether there often were tactical motivations behind disqualification motions.

The draft Restatement of the Law Governing Lawyers takes no clear stand on this question. A 1989 draft noted that "several different sanctions and remedies" have been created to address lawyers' 

15. See, e.g., *Armstrong v. McAlpin*, 625 F.2d 433, 445-46 (2d Cir. 1980) (en banc) (finding that bar association disciplinary machinery is better equipped to handle ethical conflicts that arise during litigation); *Board of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979) (finding that because disqualification would immediately disrupt the litigation, questions about the lawyer's conduct would be better handled by other means); see also *W.T. Grant Co. v. Haines*, 531 F.2d 671, 677 (2d Cir. 1976) ("The business of the court is to dispose of litigation and not to act as a general overseer of the ethics . . . unless the questioned behavior taints the trial of the cause before it.").

16. 972 F.2d 605 (5th Cir. 1992), cert. denied, 507 U.S. 912 (1993). The case came to the court by way of petition for a writ of mandamus. *Id.* at 608.

17. *Id.* at 610-11.

18. *Id.* at 611.

Insofar as disqualification serves a disciplinary function, courts may impose this sanction pursuant to their inherent authority to regulate lawyers. See, e.g., *Pantori, Inc. v. Stephenson*, 384 So. 2d 1357, 1358-59 (Fla. Dist. Ct. App. 1980) (finding that Florida Constitution empowers supreme court to regulate attorney conduct). For discussions of the courts' supervisory authority over the practice of law, see generally Charles W. Wolfram, *Modern Legal Ethics* 22-33 (1986) (discussing courts' inherent powers to regulate lawyers' conduct); Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. Ark. Little Rock L.J. 1 (1989-90) (arguing that courts have an inherent, but non-exclusive, power to regulate lawyers in the absence of statutes specifying otherwise); Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 Minn. L. Rev. 783, 784 (1976) (discussing the role courts play in tandem with the legislative branch in regulating attorney conduct). Questions concerning the scope of judicial authority to regulate lawyers arise intermittently. Most recently, the question has been posed by the regulation recently promulgated by the Department of Justice to govern federal prosecutors' communications with represented persons. As Rory Little discusses in his article for this Symposium, the regulation purports to supersede rules of conduct adopted by federal courts to regulate lawyers' communications with represented parties. The Department defends the regulation based in part on its claim that federal courts lack authority to regulate prosecutors' out-of-court conduct. *See* Rory Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 Fordham L. Rev. 355 (1996); Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 Geo. Wash. L. Rev. (forthcoming 1996) (manuscript on file with the Fordham Law Review) [hereinafter Green, *Whose Rules of Professional Conduct?*].

19. *In re American Airlines, Inc.*, 972 F.2d at 611.
conflicts of interest.\textsuperscript{20} and characterized disqualification of counsel as a "sanction"—indeed, as "the most common sanction for conflicts of interest in litigation"\textsuperscript{21} as well as "often the most effective sanction."\textsuperscript{22} Yet, the rationales provided for disqualifying counsel seemed entirely remedial: Disqualification, according to the 1989 draft, "assures both that the case is well presented in court, that confidential information of present or former clients is not misused, and, where appropriate, that a client's interest in a lawyer's loyalty is not violated."\textsuperscript{23} The implication would seem to be that disqualification of counsel is justified principally to avert harms to clients or to the judicial process, rather than to punish or to deter violations of the conflict rules.\textsuperscript{24} The March 1996 Proposed Final Draft continues to refer to "sanctions and remedies for conflicts of interest,"\textsuperscript{25} perhaps with the intent to distinguish "sanctions" from "remedies,"\textsuperscript{26} but otherwise omits most of the earlier discussion.\textsuperscript{27} The American Law Institute Director's Foreword to the more recent draft acknowledges that a disqualification motion may be construed either as an appeal to the court's authority to regulate lawyers' conduct—i.e., as a sanction—or, "in another equally coherent interpretation," as an appeal to the court's equitable authority "to provide immediate specific relief against threat of irreparable or continuing wrong"—i.e., as a remedy.\textsuperscript{28} It does not take a position, however, as to whether courts should invoke both sources of authority or only the latter.\textsuperscript{29}

\textsuperscript{21} Id.
\textsuperscript{22} Id. at 119.
\textsuperscript{23} Id. at 118-19.
\textsuperscript{24} That this draft of the Restatement envisioned disqualification as a remedy, not a sanction, is also suggested by its endorsement of a "standing" requirement. See infra note 53.
\textsuperscript{26} See id. ("In addition to the sanction of professional discipline, disqualifying a lawyer from further participation in a pending matter is a common remedy for conflicts of interest in litigation.").
\textsuperscript{27} Oddly enough, in the Director's Foreword to the Proposed Final Draft, Professor Hazard observes that "[p]erhaps the most important issue pervading the text is that of remedies and the related question of the precise contours of conduct that occasions some remedy other than those provided through the disciplinary process." Id. at xxii.
\textsuperscript{28} Id. at xxiii.
\textsuperscript{29} Professor Hazard's Foreword to the draft Restatement recognizes that the conflict rules should not always determine the outcome of disqualification decisions. It provides the illustration of the lawyer who, only after undertaking the representation, discovers that another lawyer in the firm formerly represented the client's adversary. Even if the applicable disciplinary rule would have forbidden the lawyer from knowingly undertaking the representation and would require the lawyer to withdraw from the representation once the conflict is discovered, Professor Hazard suggests that "screening" the lawyer involved in the prior representation may be a sufficient remedy. Id. at xxv. Presumably, screening would be sufficient because insofar as the
2. The Judiciary's Role in Establishing Conflict Standards

The proper judicial role in developing conflict-of-interest law turns on the extent to which courts should rely on ABA rules or other rules as opposed to making ad hoc decisional law or “common law” to set the standard of conduct with respect to litigators’ conflicts of interest. Courts have promulgated rules of professional conduct drafted by the ABA, beginning with the 1970 Model Code of Professional Responsibility and, in most jurisdictions, followed by the 1983 Model Rules of Professional Conduct. Both sets of rules contain conflict-of-interest provisions designed to apply to all lawyers, including litigators. The ABA’s apparent expectation was that, once having promulgated these rules, courts and disciplinary authorities would employ them as the exclusive standard of conduct governing lawyers in judicial proceedings, as well as in non-judicial settings.

At present, however, courts rely on the conflict rules to varying degrees. In addressing disqualification motions in civil cases, many courts refer to the conflict rules in determining whether a lawyer improperly undertook or continued to represent a party in the face of an actual or potential conflict of interest. But other courts, such as the Fifth Circuit, have rejected the idea that conflict rules set the exclusive standard for litigators, opting instead to derive the applicable standard of conduct by contemplating the legal profession’s norms “in light of the public interest and the litigants’ rights.”

Conflict rules would have forbidden the firm from accepting the representation with screening, the rules are overinclusive. The Foreword also notes, however, that “if the standards [of professional conduct contained in the lawyers codes] are an adequate predicate for the sanction of professional discipline, they could not often be ‘overinclusive’ when applied in other remedial contexts” such as in the disqualification context. Id. at xxiii.

This Article shares Professor Hazard’s view that the standards for imposing disciplinary sanctions should not necessarily be employed in ruling on disqualification motions. However, it rejects Professor Hazard’s view that the conflict rules are rarely “overinclusive.” The Article argues, in contrast, that the conflict rules are “overinclusive” by design. See infra part II.B. As a consequence, it argues, there will often be cases in which a litigator should be sanctioned, but not disqualified, for representing a party in violation of the conflict rules.

30. On the question of whether federal courts should rely on the Model Rules or draft their own, more detailed rules of professional conduct, see Green, Whose Rules of Professional Conduct, supra note 18.


32. In re American Airlines, Inc., 972 F.2d 605, 611 (5th Cir. 1992), cert. denied, 507 U.S. 912 (1993) (citations omitted); see In re Dresser Industries, 972 F.2d 540, 543-44 (5th Cir. 1992) (“When presented with a motion to disqualify counsel in a more generic civil case [not governed by statutory or constitutional provision], however, we consider the motion governed by the ethical rules announced by the national profession in the light of the public interest and the litigants’ rights.”).
Moreover, in certain classes of cases, conflict rules are largely ignored by most courts. For example, judicial decisions dealing with disqualification motions in criminal cases typically make no mention of the conflict rules.\(^{33}\) Courts have instead developed standards of conduct for criminal defense lawyers on a case-by-case basis against the background of the Sixth Amendment right to counsel.\(^{34}\) Similarly, in dealing with the conflicts of interest of class counsel, courts appear to be developing an independent body of decisional law against the background of Federal Rule of Civil Procedure 23.\(^{35}\)

### B. The Significance of David Wilkins's Who Should Regulate Lawyers?

David Wilkins's article, *Who Should Regulate Lawyers?*,\(^{36}\) advances the discussion of the courts' lawmaking and enforcement roles with respect to litigators' conflicts of interest. First, it demonstrates that, at least until now, certain conflicts of interest have been regulated more effectively by courts than by disciplinary agencies. Second, it teaches that insights such as this one may not justify a broad generalization about the appropriate judicial role in regulating litigators' conflicts of interest.

#### 1. The Efficacy of Judicial Enforcement

In the course of developing a framework for enforcing professional norms generally, Wilkins's article specifically addressed the enforcement of conflict standards. Among other things, he observed that disciplinary controls will not effectively deter corporate law firms' conflicts of interest, because corporate clients do not report their lawyers' misconduct to disciplinary agencies.\(^{37}\) On the other hand, he asserted, judicial controls have been effective, as demonstrated when a wave of disqualification motions by corporate parties in the mid-1970s prompted corporate law firms to institute procedures to reduce the likelihood that conflicts would occur.\(^{38}\) In its *American Airlines* decision, the Fifth Circuit relied on Wilkins's observation to justify employing disqualification widely as a sanction and not simply as a remedy for the limited number of cases in which a lawyer's conflict of interest might "taint" the judicial proceedings.\(^{39}\)

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\(^{34}\) Cf. *In re Dresser*, 972 F.2d at 543-44 & n.5 (suggesting that general standards be used to evaluate a motion to disqualify).

\(^{35}\) See *infra* note 202.

\(^{36}\) Wilkins, *supra* note 9.

\(^{37}\) *Id.* at 827-28.

\(^{38}\) *Id.* at 828.

Wilkins's insights about the superiority of disqualification over discipline from the perspective of enforcing conflict rules challenges conventional academic wisdom about the courts' appropriate law-enforcement role. The seminal academic work on this issue is James Lindgren’s 1982 article, which criticized the use of disqualification as a sanction for violations of the conflict rules and endorsed the Second Circuit’s approach, which requires a demonstration that the trial will be “tainted” by the impermissible conflict. More recent academic writings, such as those of Steven H. Goldberg and Nathan Crystal, have embraced this view. Wilkins's article invites a closer examination of their position that courts seeking to enforce the conflict rules have effective alternatives to disqualification.
2. Why Context Counts

Wilkins's article also demonstrates, however, that the utility of judicial controls, or any other controls, on lawyer conduct depends on a variety of factors, including both the type of conduct to be regulated and the nature of the client whom the lawyer represents. Thus, as Wilkins underscored in a subsequent article, context counts in the area of professional regulation.45

This is important to bear in mind because the conflict of interest standards are designed to forbid lawyers from representing clients in a vast array of contexts where there is a significant risk that either the lawyer's obligation to other clients or the lawyer's own interests will adversely affect the representation. For example, the ABA rules address conflicts arising out of a lawyer's representation of one client in a matter adverse to another client46 or to a former client,47 conflicts arising out of a lawyer's representation of joint-clients whose interests may diverge,48 conflicts arising out of a lawyer's financial or property interests that are implicated by the representation,49 and conflicts arising out of a lawyer's family relationship with an adversary's lawyer.50 Further, in each of these contexts, the conflict rules address the crucial question of whether the lawyer's conflict of interest will be imputed to other members of the lawyer's firm or law office.51

Wilkins's insight suggests that generalizations about the courts' role in developing or enforcing conflict-of-interest standards may be relevant to some categories of conflicts but not to others. While many distinctions might be made, the most obvious one for purposes of judicial enforcement is between conflicts of interest that are likely to be the subject of disqualification motions and those that arise in litigation but typically escape judicial notice.

46. See Model Rules, supra note 1, Rule 1.7(a).
47. See id. Rule 1.9.
48. See id. Rules 1.7(b)(2), 1.8(g).
49. See id. Rule 1.7(b), 1.8(j); Model Code, supra note 2, DR 5-101(A).
50. See Model Rules, supra note 1, Rule 1.8(i).
51. See id. Rule 1.10.
Most often, disqualification motions implicate conflicts between the lawyer's duty to the client represented in the litigation and the lawyer's duty to another client or former client who seeks the lawyer's disqualification. For example, the defendant may seek to disqualify the plaintiff's lawyer because that lawyer or someone else in the lawyer's firm previously represented the defendant and would be tempted to misuse confidences acquired in the former representation to the plaintiff's benefit and the former client's detriment. In this category of cases, a party has knowledge of a possible conflict of interest, an incentive to call the conflict of interest to the court's attention (created by the prospect of disqualifying the adversary's lawyer), and, although not invariably required by law, "standing" to challenge the representation. Consequently, the academic literature on disqualification for conflicts of interest in litigation has focused on those particular classes of conflicts of interest that implicate the interests of adversaries.

Other categories of conflict of interest may well be more prevalent in litigation, yet evade judicial review. One example is the conflict between the lawyer's own business interests and the interests of the lawyer's client. The client is less likely to be aware of the facts underlying this type of conflict. If the client knows of the conflict and is troubled by it, the client will have no incentive to bring the conflict to the court's attention rather than simply discharge the lawyer. At least in the civil context, no other party is likely to have the requisite knowledge and incentive either.

52. See generally Goldberg, supra note 41 (explaining the evolution of successive conflict disqualification and rejecting Model Rules addressing successive conflicts).

53. Compare In re Yarn Processing Patent Validity Litig., 530 F.2d 83, 90 (5th Cir. 1976) (stating that only a client has standing to raise a conflict) and In re Appeal of Infotechnology, Inc., 582 A.2d 215, 221 (Del. 1990) (stating that non-client has standing only if "he or she can demonstrate that the opposing counsel's conflict somehow prejudiced his or her rights") with Fiandaca v. Cunningham, 827 F.2d 825, 828 (1st Cir. 1987) (allowing non-client to raise conflict).

An early version of the draft Restatement proposed a standing requirement. See 1989 Draft Restatement, supra note 20, at 83-84 ("The costs associated with disqualification require that standing to seek disqualification ordinarily be limited to present or former clients who would be adversely affected by the continued representation.").

54. See, e.g., Crystal, supra note 42, at 274 (addressing the "conflict [that] occurs when a lawyer represents one client while that lawyer or another member of her firm is simultaneously representing that client's adversary, not directly against the first client, but in an unrelated matter"); Goldberg, supra note 41 (addressing conflicts arising out of litigation against a former client).


56. Following an unfavorable resolution of the litigation, however, a client who believes its lawyer had a conflict of interest may raise this in connection with a civil lawsuit against the lawyer. See, e.g., Damron v. Herzog, 67 F.3d 211, 213 (9th Cir. 1995) (holding that a former client may bring a cause of action when an attorney breaches her duty "not to represent an interest adverse to [the] former client on a matter substantially related to the matter of [the] engagement").
Another example, in civil litigation, is the conflict between the interests of jointly represented parties. The prevailing rules forbid a lawyer from representing joint-clients, even with their consent, unless the lawyer's belief that he can represent both clients adequately is objectively reasonable. Yet, in cases where the lawyer cannot adequately represent co-parties to litigation, the clients themselves would ordinarily have no reason to complain to the court, even assuming they recognized the problem. The adversary, presumptively the beneficiary of the lawyer's inability to represent the joint-clients adequately, would have no incentive to ask the court to intervene. Although courts occasionally acknowledge that lawyers have a duty to report other lawyers' misconduct and that this alone would justify raising conflict of interest questions with the court, courts tend to view with suspicion disqualification motions from parties who themselves have nothing at stake. The exception, of course, is in criminal cases, where a prosecutor's motion to disqualify a lawyer representing multiple defendants can be justified in various ways, including by the prosecutor's interest in protecting against the later reversal of a criminal conviction and by the prosecutor's special "responsibility [as] a minister of justice" to promote the fairness of the trial.

Finally, an additional implication of Wilkins's teaching about the significance of context is that to resolve satisfactorily questions of institutional choice with respect to conflicts of interest in litigation, one must turn to a subject that Wilkins's article set aside. Wilkins's article did not address the question of who should establish enforceable professional norms. To facilitate his discussion of enforcement issues, Wilkins "bracket[ed] disputes over the content of professional norms" as well as disputes over who should determine their content and how they should do so. For purposes of his analysis, Wilkins assumed that all enforcement officials will be interpreting a single set of rules, either the ABA Model Rules of Professional Conduct or the ABA Model Code of Professional Responsibility, so that lawyers will

57. See Model Rules, supra note 1, Rule 1.7(b)(1); Model Code, supra note 2, DR 5-105(C).
58. For an interesting and much discussed counter-example, see Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987).
59. See, e.g., Brown & Williamson Tobacco Corp. v. Daniel Int'l Corp., 563 F.2d 671, 673 (5th Cir. 1977) (noting that non-client's attorneys are "authorized to report any ethical violations committed in the case").
60. See, e.g., United States v. Rahman, 837 F. Supp. 64, 65 (S.D.N.Y. 1993) (involving government's motion to bar defense counsel from representing more than one defendant).
61. Model Rules, supra note 1, Rule 3.8 cmt.
63. Wilkins, supra note 9, at 809.
be subject to sanction for violating the standards set forth in one of those sets of rules. As will be shown, however, questions of institutional choice with respect to conflict-of-interest standards in litigation cannot fully be answered without considering the content of those standards.

C. A Paradigmatic Case: IBM v. Levin

As a focal point, this Article employs a decision, IBM v. Levin, which is a favorite in the secondary literature and which Wilkins cites in his discussion of conflicts of interest in litigation. He uses the case to illustrate that it is difficult for a large corporation to keep track of what different law firms representing it are doing on its behalf, much less what work those law firms may be doing contrary to the corporation's interests on behalf of other clients. Andrew Kaufman's casebook includes the decision as a principal case and uses it profitably to raise various interesting questions. Professor Crystal uses Levin extensively both to develop a framework for addressing what he terms "unrelated matter conflicts" and to illustrate how his framework should apply. It is used here for the limited purpose of providing a set of facts with which to illustrate a series of arguments. It is with some measure of irony that the decision is used, given the admonition, already noted, that one must beware of generalizations drawn from particular conflict scenarios. Nevertheless, one must start somewhere. Dozens of other cases would undoubtedly serve just as well.

Consider, then, the following oversimplified version of the facts of Levin. In March 1972, Levin Computer Corp., a computer leasing firm, retained the law firm of Carpenter, Bennett & Morrissey to file an antitrust action against IBM. Levin Computer Corp.'s relationship with the firm dated back to 1966. It turned out, however, that IBM also had a relationship with the firm, which had represented IBM in labor matters unrelated to the antitrust action. After undertaking representation of Levin Computer Corp., the Carpenter, Bennett firm took on a series of new labor matters for IBM after purportedly apprising a member of the IBM legal staff of the firm's role in the antitrust action. Over the course of almost five years, the firm continued
to represent IBM in labor matters while also representing Levin Computer Corp. against IBM. In early 1977, a different member of IBM's legal staff realized that Carpenter, Bennett was simultaneously representing IBM and its adversary, prompting IBM both to terminate the law firm's representation in labor matters and, in June of that year, to file a motion in the antitrust action to disqualify the firm. The district court granted the motion and, in June 1978, the court of appeals affirmed.

The court in Levin disqualified Carpenter, Bennett to enforce a conflict-of-interest principle that, until recently, seemed fairly uncontroversial. It is that a lawyer may not represent a party in a lawsuit against an existing client unless the existing client will not be prejudiced and both clients consent. This principle, although clearly embodied in Model Rule 1.7(a), was not so clearly captured by the counterpart provision of the predecessor Code of Professional Responsibility. Part of the court's task in Levin was therefore to deal with this interpretive question. Another part of its task was to determine whether IBM had in fact consented to the firm's representation of its adversary. For purposes of the discussion that follows, however, one should accept that the rule appropriately applies to a lawyer deciding whether to undertake a new representation and that Carpenter, Bennett violated the rule by failing to obtain IBM's informed consent.

The remaining question before the court in Levin was whether, in 1977, five years into the representation of Levin Computer Corp., it should disqualify Carpenter, Bennett from continuing the representation. This question implicates the court's role in promulgating conflict standards as well as in enforcing conflict standards. This can be seen by considering how the court should approach disqualification in two situations: The first is where the only possible reason to disqualify the law firm would be to sanction it for violating the applicable conflict rule; the second is where the only possible reason to disqualify the law firm would be to remedy past or future harm to IBM.

II. Judicial Enforcement: Disqualification as a Sanction

Suppose that in 1977, when the court in Levin examined the question of whether to disqualify Carpenter, Bennett, it found that the

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69. See infra note 136.
70. Model Rule 1.7(a) provides:
   A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
   (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
   (2) each client consents after consultation.
Model Rules, supra note 1, Rule 1.7(a); see also infra note 136.
72. Id. at 281.
firm's representation of both IBM and IBM's adversary, Levin Computer Corp., had not harmed IBM during the previous five years and that no harm was likely to befall IBM in the future if the firm continued to prosecute the antitrust action. Thus, disqualification would serve no remedial function.

In that event, the court would be left with the question of whether to employ disqualification for some nonremedial purpose, given that Carpenter, Bennett had violated the applicable standard of conduct by undertaking to represent both IBM and Levin Computer Corp. The most obvious purpose would be regulatory: to punish the law firm for violating the applicable conflict rule and thereby to deter other lawyers from doing the same under similar circumstances.

Two arguments might be raised against employing disqualification as a judicial sanction for a litigator's impermissible representation of conflicting interests. The first, examined below in part II.A., is that courts are the wrong forum for resolving issues of professional discipline. The second, examined in part II.B., is that disqualification is the wrong sanction. Finding the second argument persuasive, this Part argues that courts should satisfy their enforcement responsibilities by sanctioning lawyers personally for violating the conflict rules, while reserving disqualification for cases in which it is a necessary remedy.

A. The Appropriateness of the Judicial Forum

One reason not to disqualify the law firm as a regulatory measure would be because disciplinary bodies, not courts, are the appropriate fora for punishing professional misconduct. This view is summed up in the Second Circuit's admonition that "the business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice here unless the questioned behavior taints the trial of the cause before it." 73 Certainly, if one believed that disciplinary bodies were already dealing effectively with litigators' impermissible conflicts of interest, disqualification would seem to be excessive at worst and unnecessary at best. There are three possible responses to this view.

1. The Need to Preserve Judicial Integrity

One response to the notion that disciplining bodies deal effectively with conflicts of interest in litigation is that disqualification remains necessary, not as a sanction, but to protect the "integrity" of the proceeding. 74 The argument is that it undermines the court's integrity to

73. W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976) (citing Lefrak v. Arabian American Oil Co., 527 F.2d 1136, 1141 (2d Cir. 1975)).
74. See Levin, 579 F.2d at 283 ("[D]isqualification in circumstances such as these where specific injury to the moving party has not been shown is primarily justified as a vindication of the integrity of the bar."); cf. Wheat v. United States, 486 U.S. 153, 160
allow a lawyer with a conflict of interest to remain in the representa-
tion, and thus to continue to violate the applicable rules of profes-
sional conduct. The force of this argument derives, however, from a
questionable assumption about what it means when a court denies a
disqualification motion. If one assumes that a lawyer acts unethically
by remaining in the representation after a disqualification motion is
denied—i.e., that the lawyer has an ethical obligation to withdraw
notwithstanding the court's decision—then this argument about judi-
cial integrity has considerable sway. But that need not be what deny-
ing a disqualification motion means. While the court's decision would
not necessarily mean that the lawyer acted properly in initially under-
taking the representation, it can mean that the lawyer acts properly in
remaining in the representation after the disqualification motion is de-
nied.\footnote{Denial of a disqualification motion can also mean that the court is agnostic as
to whether the lawyer's participation in the ongoing representation is appropriate.
Thus, the continued participation could later be sanctioned by a disciplinary body.}
Indeed, the court's decision should have this meaning unless,
perhaps, the court declines to address the merits of the motion. It
would be unfair implicitly to invite the lawyer to remain in the repre-
sentation by denying a disqualification motion, but also to sanction
the lawyer for accepting the invitation.

Thus, if the court in \textit{Levin} had denied IBM's motion and thereby
authorized Carpenter, Bennett to remain as counsel in the antitrust
action, a disciplinary body could fairly punish the firm for undertaking
the representation and remaining in the representation for the first
five years, but not for failing to withdraw from the representation af-
fter the disqualification motion was denied. This might mean, of
\textit{[1988] ("Federal courts have an independent interest in ensuring that criminal trials
are conducted within the ethical standards of the profession . . . ").}
course, that the court was applying a different conflict-of-interest stan-
dard to determine whether the firm may continue in the representa-
tion than it would apply in a disciplinary proceeding to the question of
whether the firm properly entered into the representation. There is
no reason why it should not do so. As will be discussed in part III, the
standards of conduct governing litigators' conflicts of interest are judi-
cially constructed and may be constructed differently for different pro-
cedural contexts.

The argument about judicial integrity becomes considerably weaker
when one accepts that, by denying a disqualification motion, a court
implicitly declares that based on the facts then known to it, the lawyer
would not be acting unethically by continuing in the representation,
even if the lawyer impermissibly undertook the representation in the
first place. One might argue that, to preserve its integrity, the court
must nevertheless disqualify the lawyer as a sanction for the past mis-
conduct. But doing so would be vastly inconsistent with how courts
generally treat past instances of misconduct,\textsuperscript{76} including lawyer misconduct.\textsuperscript{77} Given that undertaking an impermissible conflict of interest is misconduct directed primarily at a client, not the court, and given the considerable costs of disqualification—a matter to which this Article will return in a moment\textsuperscript{78}—it would be hard to justify disqualifying counsel in the name of "judicial integrity."

2. The Efficiency of Judicial Enforcement

An alternative response to the Second Circuit's view that courts should generally be enforcing disciplinary rules is that, when it comes to litigators' conflicts of interest, judicial enforcement is more cost-effective than enforcement by disciplinary agencies, so that if one institution should defer to another, disciplinary agencies should defer to courts. There are several possible reasons for preferring judicial enforcement. First, a court begins with some familiarity with the parties and the factual context in which the alleged conflict arose, and therefore will be a more efficient factfinder than the judge in a disciplinary proceeding who has no initial knowledge of relevant facts. Second, a disqualification motion shifts the entire cost of prosecution from a public prosecutor to a private party. Further, the lawyer for the private party seeking disqualification can proceed more efficiently than a public prosecutor because, like the trial judge, that lawyer starts out conversant with the relevant facts. Third, decisions of a disciplinary body are typically subject to review through the judicial process. Beginning a disciplinary proceeding in the trial court cuts out a potential stage of review. Finally, a judicial sanction generally will be more timely than a disciplinary sanction, because disciplinary bodies typically wait until the conclusion of a litigation before initiating proceedings based on a litigator's alleged misconduct.

Some courts, however, would find this efficiency argument unpersuasive. Among the reasons they might give are that agencies that address disciplinary matters on a regular basis can deal with lawyers' alleged conflicts more efficiently and more fairly because of their superior expertise.\textsuperscript{79} Another might be that prosecutions by disinter-

\textsuperscript{76} An analogy may be drawn to the exclusionary rule of the Fourth Amendment. At one time, the exclusion of illegally obtained evidence was justified by "the imperative of judicial integrity," Elkins v. United States, 364 U.S. 206, 222 (1960), but the Supreme Court has since rejected that rationale. See United States v. Leon, 468 U.S. 897, 922 (1984). Thus, a court may condemn the manner in which the state, through its officers, obtains evidence, and may afford a civil remedy against the state or its officers for the misconduct, while allowing the evidence to be used in a criminal proceeding.

\textsuperscript{77} See, e.g., Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975) (finding counsel's conduct insensitive, but not necessitating counsel's disqualification).

\textsuperscript{78} See infra part II.B.

\textsuperscript{79} Cf. In re Cook, 49 F.3d 263, 265 (7th Cir. 1995) (arguing that misconduct in federal court proceedings should be prosecuted by state disciplinary authorities).
ested disciplinary authorities are preferred over prosecutions by lawyers for private parties, to ensure the fairness of proceedings. Additionally, many judges undoubtedly believe that they have too much other work or more important work than overseeing the ethics of one portion of the bar. Their time is more precious than that of a disciplinary agency. Ancillary litigation concerning conflicts of interest distracts courts from their principal mission of resolving disputes between litigants.

3. Lack of Notice

The third response to the Second Circuit's approach is the one provided by David Wilkins and endorsed by the Fifth Circuit, namely, that disciplinary agencies, even given sufficient resources, cannot adequately enforce conflict rules because the conflicts that are alleged in judicial proceedings would not be called to the attention of disciplinary bodies. Wilkins's explanation is that complaints are made typically to disciplinary bodies by individuals, not by corporations. The corporate parties whose interests are implicated by disqualification motions do not generally report lawyer misconduct to disciplinary agencies, but prefer other methods of controlling lawyers. An alternative explanation draws on Wilkins's insight that disciplinary bodies are most often presented "agency problems," [which] involve cases in which lawyer misconduct primarily injures clients," whereas courts are most often brought complaints about "externality problems," . . . [which] involve cases in which lawyers and clients together impose[d] unjustified harms on third parties or on the legal framework." Wilkins categorizes "representing conflicting interests" as an agency problem, rather than an externality problem, but the appropriateness of this characterization is doubtful. Conflicts between the interests of one current client and another current or former client are, in the very least, hybrids. From the perspective of the real "victim" of the conflict—the current or former client who is not represented in the litigation—the lawyer's conflict of interest presents an "externality

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Two related but seemingly inconsistent arguments might be that disciplinary hearing panels are preferable to judges either because: (1) insofar as they are comprised of fellow lawyers, a disciplined lawyer is more likely to take their criticisms seriously; and (2) insofar as they include nonlawyers, their judgments are less likely to seem unduly protective of lawyers accused of misconduct.


81. Presently, even when violations of conflict rules are called to their attention, disciplinary bodies, because of limited resources, will often decline to commence proceedings as a matter of discretion in cases in which no actual harm occurs.

82. Wilkins, supra note 9, at 824-30.

83. Id. at 819-20.

84. Id. at 826-28.
problem” involving the risk of unjustified harm to that third party, who can therefore be expected to look to the court for redress. Wilkins’s dichotomy between agency and externality problems obscures the point that, however one characterizes the problem, parties perceiving themselves to be wronged by a lawyer will seek the most effective and/or least costly redress available. In cases involving pending litigation, that will typically mean turning to the court to redress wrongdoing by a lawyer other than one retained to represent that client in the litigation.85 Disciplinary agencies will be a last resort because the explicit purpose of discipline is to vindicate the public interest in promoting proper professional conduct, not to remedy harms caused by a lawyer’s improprieties.86

Accepting the premise that corporate clients—for whatever reason—do not report their lawyers’ conflicts of interest to disciplinary agencies, one might nevertheless question the conclusion that courts must take on the disciplinary function. If corporate clients have preferred in the past to seek the disqualification of lawyers who owed them a duty to refrain from representing their adversaries, rather than to report the alleged conflicts to disciplinary bodies, one must consider why that has been. To the extent that disciplinary bodies have been ignored because they lack resources to deal with any but the most egregious conflicts of interest, the answer might be to expand their resources, rather than shifting part of their function to the courts. To the extent that corporations have preferred a combination of other devices for controlling errant lawyers as Wilkins suggests—for example, corporations may deny the lawyers future business—one might consider the importance of disqualification in the mix. To the extent that a corporation, the most sophisticated of clients, sees no need to report its lawyer’s alleged conflict unless the corporation will somehow benefit from doing so, one must consider whether the wrongdoing is serious enough to merit judicial attention, even assuming that there is no other effective means of enforcement.

85. The situation is different in criminal cases in which a defendant is appointed counsel. Unable to discharge the trial lawyer and retain another, the defendant who is displeased with the lawyer’s performance can be expected to bring the complaint to the trial court, rather than to a disciplinary authority. Following a conviction, the defendant similarly can be expected to raise the problem with an appellate court. Although the underlying problems can be described as “agency” problems, rather than “externality” problems, the defendant will look to the court because it is the most effective forum to redress his complaints—the trial court by substituting a new lawyer prior to trial, or the appellate court by overturning a conviction.

86. See, e.g., ABA Standards for Imposing Lawyer Sanctions, Standard 1.1 (1992), reprinted in ABA/BNA Law. Manual on Prof. Conduct 01:801, 01:807 (1992) [hereinafter ABA Standards] (“The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.”).
B. The Appropriateness of the Sanction

1. Why the Punishment Does Not Fit the Wrong

The more compelling argument against the court's use of disqualification as a sanction is the lack of fit between the punishment and the wrongdoing. The wrongdoer is the lawyer who failed to comply with the applicable rules of professional conduct. It is the lawyer's duty to comply with the conflict rules, not the client's duty. But the burden of disqualification falls primarily on the client who is denied the chosen lawyer in the midst of the representation and secondarily on the court and the public. As an early draft of the Restatement observed:

The costs imposed on a client by disqualification of the client's lawyer can be substantial. At a minimum, the client must incur the costs of finding a new lawyer and educating that lawyer about the facts and issues. The costs of delay in the proceeding are borne by the client in part, but also by the tribunal and society.8

Thus, by disqualifying counsel, courts are punishing clients to regulate their lawyers.

The burden on the disqualified lawyer, in contrast, is far less direct than any of the sanctions traditionally imposed for professional misconduct, such as a public or private censure, suspension or disbarment in the disciplinary context,88 or monetary sanctions in the judicial context.89 The lawyer may suffer some reputational damage insofar as the disqualification is publicized, but less than would be incurred if the sanction were specifically directed at the lawyer. The lawyer will also suffer some financial loss, although an indirect and immeasurable one, since lost fees will be partially offset by the time saved once the representation is concluded. While it is true that disqualification does serve as a rebuke to a lawyer and that the prospect of disqualification discourages a litigator from undertaking an impermissible representation, the regulatory benefits to be achieved by enforcing the conflict rules via disqualification rulings seem to be far outweighed by the costs to the innocent client and to the judicial process.

This assumes, of course, that the client is innocent. If the client knew that the lawyer's representation was impermissible and assumed the risk that the lawyer would be disqualified as a consequence, the sanction would seem less troublesome. It might then be appropriate to punish the client as well as the lawyer. There is no justification,

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87. 1989 Draft Restatement, supra note 20, at 83; see Bergeron v. Mackler, 623 A.2d 489, 493 (Conn. 1993) (holding that a court ruling on a disqualification motion “must be . . . mindful of the fact that a client whose attorney is disqualified may suffer the loss of time and money in finding new counsel and ‘may lose the benefit of its longtime counsel’s specialized knowledge of its operations.’” (citation omitted)).

88. See, e.g., ABA Standards, supra note 86, Standards 2.1 - 2.8 (listing various sanctions).

however, for presuming that a client knowingly accepts the risk of the lawyer's disqualification. Further, in most cases there will be no specific facts to warrant the contrary conclusion that the client was as guilty as the lawyer. Indeed, this is the flipside of Wilkins's point about Levin. As noted earlier, Wilkins observes that it was difficult for IBM, the victim of the Carpenter, Bennett's conflict, to know "that it was being represented and sued by the same firm." \(^9\) It would have been no less difficult for Levin to know, without being told by Carpenter, Bennett, that its law firm was simultaneously representing its adversary in unrelated matters.

To be sure, the conflict rules require lawyers to obtain informed consent before undertaking to represent possibly conflicting interests, and, in the usual case, it would be fair to assume that a lawyer has complied with the applicable conflict rules. But once a lawyer has demonstrably failed to comply with one aspect of the conflict rules—for example, by representing two parties whose interests irreconcilably conflict or, as in Levin, by failing to obtain informed consent from one client before representing its adversary—one can no longer assume that the lawyer has complied with other aspects of the rules.

Nor is it appropriate to put the burden of disqualification on clients to create an incentive for them to avoid the possibility that their lawyers will violate the conflict rules. It seems axiomatic that lawyers, not clients, are the appropriate ones to avoid these violations. Clients not only are far less likely than their lawyers to know the facts giving rise to an impermissible conflict, but they are also less likely to know and understand the rules governing litigators' conflicts of interest. \(^9\) That is why lawyers have the burden of obtaining informed consent from their clients and, in some cases, are not allowed to undertake the representation even with client consent.

Further, one cannot easily adduce facts to overcome the assumption that the client was unaware of the lawyer's impropriety and the consequent risk of disqualification. To do so, one would ordinarily have to inquire into conversations between the lawyer and the client. Such an inquiry is ordinarily impermissible, however, because of the attorney-client privilege.

2. Why Personal Sanctions Are Preferable

Rather than disqualifying counsel, the more appropriate sanction for a violation of the conflict rules would be one directed at the lawyer personally. It may be that individual judges presently have inherent

\(^9\) Wilkins, supra note 9, at 827 n.112.

\(^9\) This is true even in cases of corporate clients. The corporate officer hiring outside counsel to represent the corporation is often a nonlawyer. Even when that officer is in-house counsel, he or she may not be trained as a litigator, and, consequently, may be less likely than outside counsel to recognize that circumstances give rise to a conflict of interest.
authority to impose such a sanction. If not, just as courts have authority to establish formal disciplinary mechanisms, they almost certainly have authority to establish internal processes by which individual judges may discipline lawyers who appear before them for violating the conflict rules in the course of litigation, rather than referring those lawyers to a disciplinary body.

The court's sanction would serve a regulatory function—explicitly, directly, and exclusively. Thus, the court would select a sanction designed to deter the lawyer, and similarly situated lawyers, from undertaking such improper representations in the future. Unlike a disqualification order, the sanction would not serve to remedy the conflict of interest. Thus, it would not be measured to compensate the client or former client who is wronged by the conflict, as would an award of damages in civil litigation. Attempts to match monetary sanctions with the extent of harm that an aggrieved client suffered would almost certainly engender lengthy fact-findings on this collateral issue. The point of integrating the disciplinary hearing with the disqualification hearing would be to make the disciplinary process efficient, not to embroil the court in ancillary fact-findings.

Similarly, it would be a mistake to deprive the lawyer of a fee for the continued representation of the client in litigation, thereby possi-
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bly undermining the lawyer's zeal for that client's cause. Instead, the court should seek to do "rough justice," as sentencing judges do in criminal cases—at least where their discretion is not severely restricted by sentencing guidelines—and as disciplinary bodies now do. In cases involving close questions, a public finding of impropriety might be enough to discourage future violations, given lawyers' ordinary concern for their professional reputation. In cases of clear and willful violations, however, a substantial monetary sanction—i.e. one well in excess of the expected fee for undertaking the representation—would more likely be appropriate in order to remove the economic incentive for violating the conflict rules. In extremely rare cases—perhaps involving lawyers who repeatedly and blatantly violate the conflict rules—the appropriate sanction might be suspension or disbarment, effective after the conclusion of the case, unless disqualification is necessary as a remedy.

The personal sanction would serve as a more direct penalty, and potentially a more effective deterrent, than disqualification. It would also avoid the attendant costs to the innocent client and the

94. Professor Crystal has endorsed this approach. See Crystal, supra note 42, at 287-88, 311-12.
95. Cf. Gaiardo v. Ethyl Corp., 835 F.2d 479, 482 (3d Cir. 1987) (holding that Rule 11 sanctions may include warnings, oral reprimands, or written admonitions).
97. See Richard A. Epstein, The Legal Regulation of Lawyers' Conflicts of Interest, 60 Fordham L. Rev. 579, 591-92 (1992) (arguing that imposing "heavy sanctions" on law firms that violate bright-line conflict rules would "structure incentives so as to minimize the number of violations that take place in order to avoid the difficulties of running a clean-up operation, at enormous inconvenience and expense to everyone, after the conflicts have occurred").
98. One of the ironies, if not perversities, of the prevailing disqualification doctrine is that while it places little weight on the client's innocence, it accounts for the "innocence" of the law firm that is subject to a conflict of interest. For example, in cases in which a conflict of interest arises unexpectedly in the course of the representation—such as where a law firm's corporate client acquires a company against which the firm is litigating—courts are more apt to allow a law firm to represent a party in litigation against another client who is represented in unrelated matters, notwithstanding the standing of another firm forbidding such representation. See, e.g., Whiting Corp. v. White Mach. Corp., 567 F.2d 713, 716 (7th Cir. 1977) (noting that the plaintiff's firm "is innocent of any wrongdoing" where its long-time corporate client acquired an interest in the defendant corporation); Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 272 (D. Del. 1980) (finding no ethical violation when a law firm represented the corporate plaintiff against the corporate defendant which became a subsidiary of the corporate parent of another law firm client ten months after the litigation commenced). These decisions reflect in part the courts' assumption that one purpose, if not the sole purpose, of disqualification is to sanction lawyers who violate the conflict rules. Where the conflict of interest is inadvertent, disqualification would serve no legitimate regulatory function. These decisions reflect further the courts' recognition that although the continued representation might violate the conflict rules, there is no significant likelihood that interests protected by the rules would thereby be disserved, because the rules themselves are overly protective. Thus, in these cases, disqualification would serve no remedial purpose, either. This Article argues that even if the
judiciary. At the same time, the personal sanction would promote the integrity of the judicial proceeding by demonstrating, as graphically as a disqualification order, that the court will not condone violations of its rules of professional conduct.

While it remains to fill in the outlines of the process by which courts would sanction lawyers personally for violating conflict rules in connection with judicial proceedings, it seems clear that such a process could be devised as an efficient alternative to employing disqualification as a judicial sanction. The lawyer charged with an impermissible conflict of interest would have to receive notice and a fair opportunity to defend the challenged conduct, as would a lawyer accused of abusing the judicial process in violation of Federal Rule of Civil Procedure 11. Upon finding that the lawyer violated the applicable conflict rules, regardless of whether the court disqualified the lawyer, the court would impose an appropriate sanction. Its ruling, like that of a disciplinary committee or a district court imposing Rule 11 sanctions, would be reviewable. Because the process would be employed in tandem with the court’s hearing on a disqualification motion, it would be far more efficient than separate disciplinary proceedings. Given the choice between punishing lawyers by depriving their clients of their continued services or punishing lawyers personally, the latter is the preferable course if, as posited, it can be done reasonably efficiently. In that event, disqualification should be employed exclusively for remedial purposes, not for enforcement purposes.

No doubt, courts would hesitate to devise a process for disciplining lawyers directly for a variety of reasons. One concern may be that the norms governing conflicts of interest are, in many situations, too un-

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99. For a well-publicized example of a court’s imposition of direct sanctions on a law firm as an alternative to disqualification, see In re Leslie Fay Cos., 175 B.R. 525, 539 (Bankr. S.D.N.Y. 1994) (imposing a monetary sanction of approximately $800,000 and precluding a firm from taking on new matters arising out of a case, when the firm improperly represented debtors and interests adverse to debtors without disclosure to court).


101. Because the lawyer’s interest in defending himself would be consistent with the lawyer’s interest in defending the client’s right to retain the lawyer, there would be no conflict in simultaneously defending against a disciplinary sanction and representing the client in opposition to the disqualification motion.

102. Particularly in federal court, this would promote the effective development of the law governing conflicts of interest. Presently, the law of some circuits, such as the Second Circuit, has not developed since the 1980s because of the unavailability of interlocutory appellate review of decisions regarding disqualification, see supra note 14, and the limited availability of review by way of mandamus. District courts in the Second Circuit continue to apply a “taint” test that was announced in decisions more than fifteen years ago but never refined or reconsidered in light of developments in professional regulation. See supra text accompanying note 15.
certain to fairly impose personal sanctions.\textsuperscript{103} A moment's reflection should make clear, however, that in such situations, disqualifying the lawyer as a sanction, rather than a remedy, for violating uncertain norms would be even more unfair. Moreover, as courts impose sanctions, the norms will become increasingly certain. Another concern may be that direct sanctions are disproportionately harsh, given the "technical" nature of the conflict rules. Yet, it would hardly be appropriate to place the primary hardship on innocent clients by denying them counsel of choice in order to temper the hardship to the lawyer who committed the wrong.

More weighty objections, however, might be raised from opposite perspectives. From the perspective of a court seeking to preserve judicial resources, it might be argued that courts should avoid ancillary litigation over the propriety of lawyer conduct that has no bearing on the conduct of the case. From the perspective of a court concerned about maximizing its role in enforcing conflict rules, it might be argued—recalling Wilkins's insight\textsuperscript{104}—that reducing the availability of disqualification will discourage parties from calling violations of the conflict rules to the court's attention. Neither argument should carry the day, however.

\textit{a. Concern for the Preservation of Judicial Resources}

From the Second Circuit's perspective, one might argue that sanctioning lawyers personally will require courts to expend resources beyond those necessary to rule on whether disqualification is an appropriate remedy. For example, a court might find, without resolving whether the lawyer violated the conflict rules, that there would be no harm to remedy even if such a violation had occurred. In that event, additional fact-finding and deliberation would be necessary to determine whether the lawyer violated the rules and, if so, what sanction to impose—questions of no direct relevance to the parties in the litigation. Why should a court take up these questions, rather than referring them to the disciplinary authorities? After all, the greatest obstacle to the effectiveness of disciplinary agencies—that litigators' conflicts are not called to their attention—will have been removed once the court refers the case. There are, however, at least three good answers to this objection.

The first answer is that once a court is presented with a conflict issue, it becomes more efficient for the court to determine the propriety of the lawyer's conduct than for a disciplinary body to take up this question separately. This question is entirely bound up with one that the court must already decide—namely, whether to disqualify the law-

\textsuperscript{103} Cf. Wilkins, \textit{supra} note 9, at 821 ("[E]nforcement officials will generally only impose sanctions when a lawyer has clearly violated a relatively unambiguous professional norm.").

\textsuperscript{104} See \textit{supra} note 10 and accompanying text.
yer, not as a sanction, but as a remedy for engaging in an impermissible representation. In most cases, there will already be a complete, or nearly complete, development of the relevant facts and the lawyer charged with violating the conflict rules will have a fair opportunity to wage a defense.

The second answer is that imposing sanctions enables courts, with only a modest expenditure of resources, to clarify the meaning of the applicable conflict rules and, where appropriate, to modify them. As many have noted, the rules of professional conduct—conflict rules among them—are highly general. In some contexts, they need to be interpreted; in others, they do not work well. By addressing the question of whether the lawyer properly undertook the representation, the court will have the opportunity to clarify the meaning and reach of conflict rules and, in procedural contexts where the rules are inadequate, to announce alternative rules.105

The third answer is that the personal sanction corrects two significant problems with the practice in the Second Circuit of denying disqualification in cases in which no remedy is necessary for the lawyer's violation of a conflict rule. One problem is that lawyers might misconstrue a decision denying disqualification as an endorsement of the lawyer's decision to undertake the representation. Particularly in the federal system where different courts approach disqualification, and lawyer ethics generally, in vastly inconsistent ways, a lawyer cannot be faulted for thinking that decisions denying disqualification motions set the standard of conduct governing litigators' conduct from the very outset of the representation, and not simply going forward from the point mid-representation when the court issues its ruling.107 Coupling a personal sanction with the denial of a disqualification motion would make it clear that these two standards are different.


107. It is a common misconception that disqualification decisions set the standard of conduct for litigators. The Reporters Notes to the conflict-of-interest provisions of the draft Restatement cite disqualification decisions extensively. On occasion, bar association ethics opinions providing advice to lawyers about whether their prospective conduct would entail an impermissible conflict of interest also cite disqualification decisions, generally without regard to whether the decisions purported to set the standard of conduct at the outset of the representation or whether they merely reflected a determination that disqualification was an unnecessary remedy. See, e.g., N.Y. St. B.A. Comm. on Prof. Ethics, Op. 628 (1993) (relying on federal and state decisions in concluding that an attorney may represent a client in a tort claim against a restaurant that the attorney formerly represented in an unrelated matter).
The other problem with the practice of denying motions for disqualification for impermissible but harmless conflicts is that sophisticated lawyers, aware that disciplinary agencies do not effectively enforce the conflict rules, may conform their conduct to the standard reflected in the judicial decisions even though they know that the more restrictive conflict rules are meant to set the standard governing their conduct. For example, in a case like Levin, a lawyer proposing to represent one client against another might calculate that the risk of disqualification is exceedingly low in a jurisdiction employing disqualification exclusively as a remedy and that the risk of disciplinary proceedings is equally low. The lawyer might decide to accept these risks and undertake the representation knowing that it is flatly forbidden by the conflict rules. The prospect of a substantial personal sanction imposed by the court in the litigation raises the stakes considerably. Even if courts imposed modest sanctions the first time litigators violated the conflict rules, they could be expected to impose increasingly severe sanctions on subsequent occasions, thus greatly reducing the incentive for violating the rules in contexts where disqualification is unlikely.

b. Concern for Maximizing the Courts' Enforcement Role

From the Fifth Circuit's perspective, one might argue that imposing personal sanctions ancillary to ruling on disqualification motions will be an ineffective mode of regulation, because the limited availability of disqualification will greatly discourage parties from filing disqualification motions in many cases in which an adversary's lawyer clearly violated the conflict rules. The concern is almost certainly overstated, however. A court might take either of two approaches to the imposition of personal sanctions for violating conflicts rules. Under either approach, many motions would still be filed because disqualification would remain available to remedy the harms against which the conflict rules protect. While some percentage of conflicts violations will not be brought to the courts' attention when once they would have been, the percentage will depend on which of two approaches are adopted and, in either case, will probably be small.

A court seeking a narrow enforcement role would provide that parties seeking to disqualify their adversary's lawyer must make a colorable claim that disqualification is necessary to remedy harms resulting from the violation of a conflict rule. The court would make a personal sanction available whether or not it was ultimately determined that disqualification was an inappropriate remedy. Under this ap-

108. It would be inappropriate to regard disqualification as one aspect of the sanction, and therefore to take account of the fact of disqualification as justification for mitigating the severity of the personal sanction. Doing so would create an incentive for lawyers defending against both a disqualification motion and a motion for personal sanctions to argue less vigorously against disqualification as a remedy in order to promote their own disciplinary interests.
proach, disqualification motions would not be filed in cases in which there was a conflict violation but no conceivable harm. But this will describe few of the cases in which disqualification motions were previously granted. In most cases in which a lawyer engages in an impermissible conflict of interest, a nonfrivolous claim can be made that some harm will result.

Disqualification motions might also be filed less frequently in cases in which some harm can be alleged but it seems unlikely that there is sufficient harm to justify disqualifying counsel as a remedy. As a practical matter, however, this will also describe few cases, both because the relevant standard will be so ad hoc and discretionary, as will be discussed later, and because the relevant facts will be subject to dispute. Further, as the proliferation of Rule 11 motions—"at least prior to recent amendments to the rule—suggests, parties may be more than willing to file colorable, but nonmeritorious disqualification motions because of the prospect that personal sanctions will be imposed against opposing counsel. Finally, to the extent that somewhat fewer challenges are brought on the basis of conflicts of interest, it is unclear why courts should care. Courts already address only a limited number of conflicts that arise in litigation; as noted earlier, many evade review. It is unclear why courts have a special interest in encouraging ancillary litigation over whether lawyers should be sanctioned for violations of conflict rules that are essentially harmless.

A court, like the Fifth Circuit, seeking the broadest enforcement role, would allow parties to obtain monetary sanctions against lawyers who violate the conflict rules even when there is no colorable basis for a disqualification motion. If this approach were taken, there might be virtually no shortfall in motions. At present, the ordinary motives for filing a disqualification motion for conflict violations that clearly require no remedy would seem to be either to exact revenge or to gain a tactical advantage. While the prospect of monetary sanctions might seem less appealing than disqualification from either perspective, it probably offers enough of an incentive.


110. The judicial responsibility for imposing personal sanctions on lawyers who violate conflict rules in connection with an ongoing litigation is entirely consistent with practice under Federal Rule of Civil Procedure 11. If satellite litigation is justified under Rule 11, it is more clearly justified with respect to conflicts of interest because the sanction question will be interrelated with the disqualification question that must be resolved, rather than entirely ancillary as it often is under Rule 11.

111. See supra text accompanying note 15.

112. See Lindgren, supra note 40, at 440-41.
Assume that the court in Levin had no interest in sanctioning Carpenter, Bennett for representing Levin Computer Corp. against IBM in violation of the applicable conflict rule. This might be because, contrary to Wilkins's teaching, the disciplinary mechanism works ideally and comprehensively and any additional judicial sanction would therefore be unnecessary either to punish the law firm or to deter other law firms from violating the applicable conflict rule. Alternatively, this might be because disqualification is an inappropriate sanction for a lawyer's violation of a conflict rule, as argued in part II.B. In either event, a court must decide what legal framework to employ in ruling on the disqualification motion. The answer depends in part on how the court conceives the applicable conflict rule. This part argues that because the conflict rules are prophylactic rules, a violation does not necessarily cause harm that must be remedied by removing the lawyer from the representation. Consequently, the conflict rules should not serve as the appropriate standard for deciding disqualification motions. Nor is it likely that other, less restrictive rules would provide an adequate substitute. Courts should eschew rules in favor of case-by-case application of an open-textured standard which should be narrowly tailored to the harms that conflicts of interest cause, while, at the same time, giving weight to the countervailing harms caused by depriving a litigant of chosen counsel after the representation is under way.

A. Disqualification as a Per Se Remedy

This section considers and rejects two arguments for affording disqualification as a remedy in every case in which a party's lawyer undertook the representation in violation of the conflict rules. The first argument is that undertaking an impermissible conflict of interest violates a client's right and that disqualification must invariably be afforded as an equitable remedy. The second argument is that impermissible conflicts invariably threaten harm that must be averted by disqualification.

1. Conflict Rules as Enforceable Rights

The conflict rules, promulgated by courts based on the ABA models, are rooted in common law principles that are more than a century old. A client or former client moving for disqualification might

114. See, e.g., Baker v. Humphrey, 101 U.S. 494, 502 (1879) (holding that a lawyer engaged in constructive fraud by switching sides in a matter); Manning v. Hayden, 16 F. Cas. 645, 653 (D. Or. 1879) (stating that an attorney who purchased land for himself from his client put his duty to the client in conflict with his interest as the purchaser to the detriment of his client and must account to the client as a trustee).
therefore argue that the lawyer's conflict of interest violates a common law right that either exists independently of the conflict rule violated by the lawyer or is codified by the applicable rule. In either case, the right is violated without regard to whether, as a consequence of the conflict of interest, the quality of representation suffers, the lawyers breach a confidence, or some other legal interests protected by the conflict rule are impaired. Further, disqualification should be available as a form of injunctive relief, rather than relegating the aggrieved client to a separate lawsuit for monetary damages. For example, if IBM has a "right" not to be opposed by Carpenter, Bennett, then the court should disqualify the law firm as the most effective means of enforcing the right. Wholly apart from whether it is an appropriate sanction, disqualification is per se a remedy for an impermissible conflict, at least when the disqualification is sought by someone who can claim to be under the protection of the applicable conflict rule.

Insofar as this argument rests on the conflict rules themselves rather than on the underlying common law principles, it fails for two reasons. First, the weight of judicial authority favors the view that disciplinary provisions such as the conflict rules do not provide an independent basis for civil liability, although they may be relevant in defining the

115. Stated somewhat differently, disqualification should be afforded to enforce the lawyer's fiduciary duty to refrain from conflicts of interest—a duty that either co-exists with, or is embodied in, the conflict rules.


119. See, e.g., Fishman v. Brooks, 487 N.E.2d 1377, 1381 (Mass. 1986) ("A violation of a... disciplinary rule is not itself [a] breach of duty to a client."); Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400, 407 (Tenn. 1991) (stating that violating codes of conduct is not conclusively a breach of duty); Hizey v. Carpenter, 830 P.2d 646, 654 (Wash. 1992) (en banc) (holding that jury may not be informed of ethical rules in determining legal malpractice). But see Avianca, Inc. v. Corriea, 705 F. Supp. 666, 679 (D.D.C. 1989) (stating that although it does not expressly provide a basis for a civil action, the Model Code nonetheless "may be considered to define the minimum level of professional conduct required of an attorney, such that a violation of one of the DRs is conclusive evidence of a breach of the attorney's common law
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scope of a lawyer's obligations in a malpractice action.120 Thus, a client whose lawyer had a conflict of interest may bring an action for malpractice or breach of a fiduciary duty,121 but not for violating a conflict rule per se.

Second, and more importantly, the conflict rules are judicially promulgated and may therefore be superseded by other court-established standards of conduct or by preemptive judicial rulings.122 As noted earlier, a court may determine that an otherwise applicable conflict rule is unduly restrictive and therefore does not set an appropriate legal standard with respect to the question of whether the lawyer may properly remain in the representation.123 This judicial determination means that a lawyer has no obligation to withdraw from the representation and, hence, there is no ongoing obligation to be enforced by means of disqualification.

If the argument for disqualification as a per se remedy rests on a preexisting common law right, it is more difficult to dismiss. One possible answer is that even if the movant has a legally enforceable common-law right, it does not necessarily follow that disqualification is an

120. See e.g., Miami Int'l Realty Co. v. Paynter, 841 F.2d 348, 353 (10th Cir. 1988) (holding that although the Model Code is admissible in malpractice suit to show standard for attorneys, it has no force and effect of law); Fishman, 487 N.E.2d at 1381 (finding a violation of a disciplinary rule may be evidence of attorney negligence); Lazy Seven Coal Sales, 813 S.W.2d at 405 (noting that the Model Code provides guidance in ascertaining a lawyer's obligations and constitutes evidence of standards of conduct). See generally Michael P. Ambrosio & Denis F. McLaughlin, The Use of Expert Witnesses in Establishing Liability in Legal Malpractice Cases, 61 Temp. L. Rev. 1351, 1360-62 (1988) (noting that the Model Rules do not provide an independent cause of action, but can be used to show malpractice).

121. Cf. Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543 (2d Cir. 1994) (involving a law firm's breach of fiduciary duty by assisting client in business transaction about which it had previously counseled another client).

122. Cf. County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1414 (E.D.N.Y. 1989) (noting that the Supremacy Clause supersedes state rules regarding attorney conduct); Sullivan v. Alaska Bar Ass'n, 551 P.2d 531, 534 (Alaska 1976) (stating that court has inherent authority to depart from rules governing admission to practice law). Professor Penegar's history of judicial disqualification decisions suggests that, at least initially, a disqualification order was not viewed as a personal remedy for the violation of a party's right. Rather, a disqualification order was issued pursuant to a court's supervisory authority over the practice of law and over judicial proceedings in order to enforce judicially established standards of conduct. See Penegar, supra note 43, at 837-55.

123. See supra notes 87-97 and accompanying text.
appropriate equitable remedy, given the represented litigant’s countervailing right to the lawyer’s services. For example, presumably Levin Computer Corp. had an enforceable contractual right to Carpenter, Bennett’s services. Although Carpenter, Bennett might argue that its contractual obligation is implicitly qualified by its right to withdraw from the representation to avoid a conflict of interest, the firm might well be liable for breach of contract where, as in Levin, the conflict was not of the client’s making and was known to the firm, but not the client, at the outset of the representation. It is by no means clear that, to enforce Carpenter, Bennett’s fiduciary obligations to IBM, a court should compel the firm to breach its contractual duty to Levin, rather than requiring IBM to seek monetary damages.

Concededly, however, this is not an entirely satisfactory answer for two reasons. First, to the extent that the ongoing conflict should be remedied at all, the most effective remedy will be disqualification. Few clients can afford malpractice lawsuits even where there is a prospect of a significant recovery; fewer still would commence a suit where, by hypothesis, the lawyer’s wrongdoing was probably harmless. This concern may be offset by the recognition that disqualification will give rise to a cause of action on behalf of the client who would lose the lawyer’s services that is no more realistically enforceable.

Second, insofar as the lawyer has a duty—even if unenforceable by disqualification—to withdraw from the representation, the lawyer incurs an additional conflict of interest by remaining in the representation. The lawyer faces the possibility of a civil action premised in part on the lawyer’s acts after the disqualification motion was denied. The lawyer’s pecuniary and professional interest in minimizing liability based on the ongoing representation conflicts with the client’s interest in prevailing in the lawsuit. The saving grace may be that because the likelihood of a civil action against the lawyer is so remote, a reasonable lawyer should feel little compulsion to subordinate the litigant’s interests to his own.

124. See, e.g., Smith v. Staso Milling Co., 18 F.2d 736, 737 (2d Cir. 1927) (stating that a court considering whether to grant injunctive relief should balance “the comparative hardships of the continued wrong and the injunction”). See generally David S. Schoenbrod, The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy, 72 Minn. L. Rev. 627, 655 (1988) (arguing that “a suit for an injunction without balancing the equities would present a rare instance of the judicial process without a safety valve”).

125. Cf. Model Rules, supra note 1, Rule 1.16(a)(1) (stating that a lawyer must seek to withdraw from the representation if “the representation will result in violation of the rules of professional conduct”).

126. Cf. Lindgren, supra note 40, at 432-33 (stating that a new conflict of interest between a lawyer and her client emerges when opposing counsel raises the prospect of a conflict of interest, because counsel’s incentive to clear her name may conflict with her incentive to promote her client’s interests).

127. Moreover, the remote possibility that the client in the litigation will bring a malpractice action if the lawyer represents it poorly may counterbalance the incentive
A better answer to the argument that disqualification should be a per se remedy for violations of the common law right is that ethics rules and judicial rulings supersede the common law rights insofar as they authorize lawyers to engage in particular conduct. Therefore, an otherwise applicable common law principle making a particular conflict of interest impermissible should be limited by a judicial determination in the disqualification setting to the effect that the lawyer may properly continue the representation. The lawyer who complies with the judicially established standard need not worry about the related common law obligations. Recognizing that a judicial order denying a disqualification motion has the effect of superseding the otherwise applicable common law obligation as well as the otherwise applicable conflict rule would also avoid the conflict of interest posed by the prospect of a later civil action against the lawyer.

As a matter of sound regulation, this seems to be an appropriate way to understand the interplay between the ethics rules and judicial standards on one hand, and the common law principles on the other. Presently, litigators look to the conflict rules and disqualification decisions, and not to the sparse common-law case law, to determine their obligations vis-à-vis conflicts of interest. In the interest of effective regulation, courts should be authorized to modify outmoded common law doctrine regarding lawyers' conflicts of interest. If a court concludes that disqualifying a lawyer in the course of litigation would serve no meaningful purpose and would cause various countervailing harms to the represented litigant, the only way to give effect to this judgment would be to hold that, although the lawyer may have had an enforceable obligation not to undertake the representation in the first place, he has no enforceable obligation to withdraw from the representation.

The question remains, however, whether courts have authority to make ethics law that trumps the common law in this manner. This authority may be rooted in the courts' inherent power to regulate the bar, their power to develop the common law, or a combination of the two. This Article assumes that courts do have power to promulgate rules or issue ad hoc rulings that restrict or refine lawyers' common law obligations, while acknowledging that the question may be worthy of further consideration.

to render inadequate representation to avoid the equally remote possibility of a civil lawsuit by the other client.

128. As a legal matter, a judicial determination that a lawyer may continue the representation would almost self-evidently foreclose a malpractice claim founded on negligence. It is less clear that as a legal matter compliance with judicial standards would foreclose a claim founded on contract or agency principles. See generally Roy Ryden Anderson & Walter W. Steele, Jr., Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle, 47 SMU L. Rev. 235 (1994) (arguing that courts should establish a consistent set of rules when classifying legal malpractice).

129. For commentary addressing this source of judicial authority, see supra note 18.
2. Impermissible Representation as Harmful Per Se

One might also conceive of the conflict rules as defining conduct that is harmful *per se*, rather than as defining conduct that poses an unacceptable risk of harm.\(^{130}\) If IBM is necessarily harmed by its law firm’s representation of an adversary, wholly apart from how that representation appears to affect IBM, then a court could not allow the representation to continue without appearing to countenance ongoing harm to a client in a matter within its jurisdiction.

This Article takes as a further premise, however, that the conflict of interest rules are prophylactic rules and that in this respect, as Ted Schneyer has observed, they are unlike most disciplinary rules.\(^{131}\) They do not proscribe conduct that is necessarily harmful in itself, but protect against the occurrence of various harms.\(^{132}\) Some are tangible, such as breaching client confidentiality or rendering substandard representation, and others are intangible, such as engendering a feeling of betrayal on the part of the client. Conflict rules avert these harms by forbidding the representation under circumstances giving rise to an unreasonably high risk that such harms will occur.\(^ {133}\) In doing so, the conflict rules impose costs not only on lawyers who are deprived of

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\(^{130}\) Cf. Earl Scheib, Inc. v. Superior Court, 61 Cal. Rptr. 386, 390 (1967) (holding that injury to former client is presumed when an attorney represents conflicting interests).


\(^{132}\) See McMunigal, *supra* note 7, at 834 (positing that conflict of interest doctrine is based on the assumption that something is needed to protect the judicial process from the threat of impairment).

\(^{133}\) See, e.g., Restatement of the Law Governing Lawyers § 209 (Proposed Final Draft No. 1, 1996) (requiring consent before permitting an attorney to represent two or more clients in civil litigation when there is a “substantial risk” that the attorney’s representation of one of the clients would be materially adversely affected by the attorney’s duties to the other client[s]); McMunigal, *supra* note 7, at 839 (explaining the “risk avoidance approach” to conflict of interest rules).

In some cases, a risk of harm will be acceptable, not because the risk is slight, but because the countervailing benefits of undertaking the representation are substantial. For example, lawyers generally may not acquire a proprietary interest in a client’s cause of action, in part because of the conflict between the lawyer’s interests and those of the client that thereby arises. An exception is made, however, for attorneys representing civil litigants on a contingent fee basis because of the social utility of this practice. See, e.g., Model Rules, *supra* note 1, Rules 1.5, 1.8(i) (1993) (setting forth contingent fee regulations). See generally Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 Geo. J. Legal Ethics 813 (1989) (arguing that contingent fee contracts that calculate the fee as a percentage of the recovery present sufficiently serious possibilities of abuse of the attorney-client relationship to warrant elimination by regulation); Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 Colum. L. Rev. 595 (1993) (discussing issues raised by the ban on contingent fees in criminal cases and suggesting a partial step back from the prohibition). Similarly, as Professor McMunigal has pointed out, lawyers for civil rights defendants have been permitted to condition settlement offers on waivers of attorneys’ fees by the plaintiffs’ lawyers, even though the offers give rise to substantial conflicts between the interests of the plaintiffs and their lawyers. See McMunigal, *supra* note 7, at 865-68.
business but also on clients who are denied their choice of counsel in contexts where no harm would in fact occur or where clients would willingly accept the risk that harm will occur. Nonetheless, such rules may be justified by various considerations, among them the difficulty of predicting whether the lawyer’s work will in fact be impaired as the representation progresses.

Thus, returning to the Levin case, there is nothing harmful per se in representing one client against another. Rather, in enjoining a lawyer from doing so without client consent, the conflict rule aims to prevent harms that are likely to occur in this category of cases. For example, there is a risk that the lawyer may represent one client less zealously out of loyalty to the other or may misuse one client’s confidences to benefit the other. Even more likely, the representation of one client against another may lead a client to feel betrayed. This, most believers, would be bad in itself and would potentially undermine the attorney-client relationship to the detriment of the quality of representation.

In this category of cases, the lawyer’s obligation to obtain client consent before undertaking the representation, even when the lawyer is personally convinced that both clients can be adequately represented, serves at least two functions. First, by consenting to the representation, the client assumes the risk that the lawyer erred in predicting that the lawyer’s representation of the new client will not disadvantage the existing client. Additionally, the act of seeking client consent provides some assurance to the existing client that the lawyer

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134. Many examples may be found in criminal cases involving conflicts of interest. In order to secure a new trial based on trial counsel’s conflict, a convicted defendant must show that the lawyer had an actual conflict that impaired the quality of the representation. See Cuyler v. Sullivan, 446 U.S. 335, 348-49 (1980). Defendants are rarely able to meet this standard, even in cases where the lawyer violated the applicable rules of professional conduct.

135. Among the possibilities is that in seeking to avoid one set of harms, lawyers will engage in overly cautious conduct that itself undermines a client’s interests.

136. The Model Rules of Professional Conduct strongly endorse the principle applied in Levin. The rules provide that in the ordinary case, even with client consent, “a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated.” Model Rules, supra note 1, Rule 1.7 cmt. While recognizing that there may be an exception where the lawyer “represent[s] an enterprise with diverse operations,” a lawyer seeking employment as an advocate against such an enterprise would require the consent of both clients before doing so. Id. This principle is also embodied in the draft Restatement. See infra note 189 and accompanying text; see also Ethics Conference Speakers Take Controversial Positions, 12 ABA/BNA Lawyers’ Manual on Prof. Conduct 73, 86-87 (Mar. 20, 1996) (opposing Professor Thomas Morgan’s suggestion for liberalizing the rule against suing current clients). But see Steven C. Krane, Re-evaluating Expectations in the Attorney-Client Relationship, 1994 The Prof. Law. 7, 15 (suggesting that Rules should allow representation adverse to client interest unless there would be “some palpable detrimental impact” on the lawyer’s professional judgment).

137. Professor Crystal refers to this problem as “the risk of disharmony.” Crystal, supra note 42, at 293-94.
takes the obligations to that client seriously and enables the client to
determine whether, subjectively, it will nonetheless perceive the rep-
resentation of its adversary as an act of disloyalty. By consenting, if it
chooses to do so, the client confirms that it will not feel betrayed. But the consequence of requiring informed consent before represent-
ing one client in an action against another is that some litigants will be
denied counsel of choice in cases in which the harms against which the
rule protects would not materialize. This would be true in some cases
in which the existing client withholds consent exclusively for tactical
reasons, without any genuine concern about the effect of the conflict
on the representation. It would also be true in some cases in which
one client or the other lacks capacity to consent to the conflict.

If, as posited here, the conflict-of-interest rules are judicially-con-
structed prophylactic rules, the dispositive question for the court
should be whether disqualifying the lawyer in the particular case is
justified in order to remedy a past harm or avert a future one. Thus,
in Levin, unless disqualification would redress or avert some harm to
IBM, disqualification would be an inappropriate remedy. It would
serve no legitimate purpose while creating a variety of other harms.
These harms include delaying the litigation, depriving Levin Com-

138. The conflict rules require client consent even where one might objectively con-
clude that it is obvious that the conflict of interest poses no practical risk. The low
threshold might be justified on the ground that regardless of the lawyer's conclusion,
this is information that a client ordinarily should be provided in order to make an
informed decision regarding the representation that is entrusted to the client, namely,
the decision of whom to retain as counsel. Cf. Model Rules, supra note 1, Rule 1.4(b)
(“A lawyer shall explain a matter to the extent reasonably necessary to permit the
client to make informed decisions regarding the representation.”). The low threshold
is problematic, however, in situations in which the client is incapable of giving in-
formed consent, for example, where the client is incapacitated or, under traditional
doctrine, where the client is a government agency.

139. In some cases, the advantage may be to deprive the adversary of one good
lawyer among many, of a lawyer in whom the adversary reposes particular confidence
because of past dealings, or of a lawyer who can proceed with particular efficiency
because of prior familiarity with the adversary's business. In other cases, the advan-
tage may be considerably greater. Consider a case in which a lawyer already repre-
senting the plaintiff in pending litigation against several defendants identifies another
possible defendant who turns out to be a client in an unrelated matter. If consent is
withheld, the plaintiff may decide to forego adding the additional defendant rather
than retaining a new lawyer.

140. On the general question of decision-making in representation of incapacitated
clients, see Peter Margulies, The Lawyer as Caregiver: Child Client's Competence in
Context, 64 Fordham L. Rev. 1473, 1474 n.4 (1996); Peter Margulies, Access, Connec-
tion, and Voice: A Contextual Approach to Representing Senior Citizens of Questiona-
ble Capacity, 62 Fordham L. Rev. 1073 (1994); Jan Ellen Rein, Clients With
Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and
Beyond the Competency Construct, 62 Fordham L. Rev. 1101 (1994).

(“Where the relationship is a continuing one, adverse representation is prima facie
improper, ... and the attorney must be prepared to show, at the very least, that there
will be no actual or apparent conflict in loyalties or diminution in the vigor of his
representation.”).
puter Corp. of its chosen counsel, and forcing Levin Computer Corp. to incur the expense of retaining a new lawyer who is unfamiliar with the litigation.

If IBM had been harmed by Carpenter, Bennett's representation of its adversary in a manner that the conflict rule is designed to avoid and disqualification would have remedied, or if Carpenter Bennett's continued representation of Levin Computer Corp. could have been expected to cause such a harm as the litigation proceeded, disqualification might have been appropriate. However, even if disqualification might in fact have redressed or avoided some harm to IBM, disqualification would not have been justified unless the harm to be redressed or avoided was greater than the harm caused by disqualification itself.

If one assumes, as discussed above, that the second client is no more guilty than the first, then there is no reason in fairness why the burden of the lawyer's misconduct should invariably fall on the second.\textsuperscript{142} In a case like \textit{Levin}, one client will be burdened—IBM if the motion is denied; Levin Computer Corp. if the motion is granted.\textsuperscript{143} If the second client could no more be expected to prevent the lawyer's misconduct than the first, the appropriate question should be who will be harmed less—IBM if the firm continues to represent its adversary, or Levin Computer Corp. if the firm is disqualified. The relevant harms are not necessarily reciprocal, as the \textit{Levin} case illustrates.\textsuperscript{144}

In \textit{Levin}, as viewed from the perspective of the court in 1977, it seems highly unlikely that disqualification would have served to redress any past harm. The ordinary harm to be redressed by disqualification is the misuse of client confidences. If it were reasonably likely that Carpenter, Bennett received information in the course of representing IBM in labor matters and used that information to benefit Levin Computer Corp. in the antitrust action, disqualifying the law firm and depriving successor counsel of work product containing IBM's confidential information might have afforded some measure of

\begin{footnotesize}
\footnotesize 142. \textit{Cf.} Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121, 1127 (N.D. Ohio 1990) (holding that where merger of law firms resulted in firm's representation of one client against another, the appropriate remedy was not disqualification, but for the firm to choose which client to withdraw from representing); Crystal, \textit{supra} note 42, at 297 ("As between two innocent clients, it seems more appropriate to consider the respective interests of those clients rather than reflexively favoring the interests of one client over the other.").

143. While it is true that the sins of the lawyer are often visited on their clients in the form of procedural penalties for their lawyers' lapses, the conditions that ordinarily justify such penalties—e.g., sanctions for failing to comply with timing requirements—are not present in the disqualification context. Ordinarily, the penalty protects an innocent third party at the expense of the lawyer's client. Here, both are clients. The question is which client to burden.

144. \textit{See} Crystal, \textit{supra} note 42, at 297 ("On the facts of the \textit{Levin} case, for example, it seems that Levin rather than IBM had the superior interest in continued representation.").
\end{footnotesize}
Given the unrelated natures of the labor matters and the antitrust action, however, there was no reason to believe that confidences had been or would be misused.

Nor was there an indication of any other tangible harm to IBM that could be redressed by disqualification. For example, in the unlikely event that the firm had represented IBM inadequately in the labor matters and the inadequacies could somehow be attributed to the firm’s representation of Levin Computer Corp., disqualification would not provide any meaningful remedy. A malpractice action, on the other hand, would more appropriately enable IBM to remedy this problem. Even to the extent that IBM previously felt “betrayed” by the firm’s representation of an adversary, disqualification would not cure the corporation’s past “hurt feelings.”

Similarly, from the court’s perspective in 1977, it seems unlikely that disqualification would have been necessary to avert any future harm to IBM. By the time of the court’s ruling, IBM had discharged Carpenter, Bennett as its counsel in labor matters. Thus, IBM was only a former client and the firm’s only remaining duty to IBM was to preserve its confidences. As the prevailing conflict rules reflect, the firm could ordinarily be expected to represent Levin Computer Corp. adequately while preserving IBM’s confidences because of the lack of any relationship between the representation of IBM in labor matters and the representation of IBM’s adversary in an antitrust action.

Thus, as a consequence of changed circumstances—IBM’s discharge of Carpenter, Bennett—the conflict rules themselves would not re-

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145. Generally, courts allow disqualified lawyers to provide their work product to their successors, at least absent a showing that identifiable items contained, or were impermissibly based on, another client’s confidential information. See, e.g., First Wis. Mortgage Trust v. First Wis. Corp., 584 F.2d 201, 211 (7th Cir. 1978) (directing former counsel to turn over work product because there would be no improper advantage); IBM v. Levin, 579 F.2d 271, 275, 283 (holding that ordering the turning over of work product to substitute counsel did not abuse the court’s discretion under the circumstances).

146. See, e.g., Model Rules, supra note 1, Rule 1.9(a) (permitting law firm to undertake new representation adverse to a former client where the new representation is unrelated to the former representation).

147. As the foregoing discussion reflects, this Article adopts Professor Crystal’s approach, see Crystal, supra note 42, which is in some ways more restrictive and in other ways more permissive than the Second Circuit’s “taint” analysis, and which was endorsed by Professor Lingren in his article on disqualification for conflicts of interest. See Lindgren, supra note 40. It is more permissive in the sense that it would countenance some risk of “taint”—i.e., adverse consequences in the pending litigation—where the risks are acceptable in light of the greater harm that might be caused by disqualification. See Crystal, supra note 42, at 310 (“Courts should focus precisely on a balance of the prospective benefits and costs.”). It is more restrictive in the sense that it examines harms occurring outside the litigation—e.g., to clients represented on unrelated transactional matters. See id. at 310, 313 (focusing on the risk either of trial taint in the adversity matter or disharmony in the nonadversity matter from continued misrepresentation).
quiere disqualification if applied from the point when the motion was decided.\textsuperscript{148}

B. Developing an Independent Standard of Conduct to Judge the
Propriety of Continued Representation

Suppose that in Levin, IBM had not discharged Carpenter, Bennett. In that event, not only would the representation have been improper from the outset, but the ongoing representation would also have been improper under the conflict rules, which make no allowances for conflicts which first arise or are first discovered mid-representation. The underlying premise of the conflict rules is that, where the representation is forbidden by such a rule, undertaking the representation poses a risk of harming one or more clients and, at least absent client consent, this risk is unacceptable. One might take the view that in deciding whether disqualification is a necessary remedy, courts should defer to the judgments underlying the conflict rules so that if a conflict rule would forbid the ongoing representation, a court should do so as well. Rejecting this view, this section argues, first, that the framework for deciding disqualification motions should be independent of the conflict rules and, second, that the framework should involve application of an ad hoc standard, rather than an alternative set of rules.

1. The Inadequacy of the Conflict Rules

To determine whether disqualification is a necessary remedy, a court might employ the conflict rules, just as a law firm would do if it were determining the propriety of the ongoing representation for itself. Thus, in Levin, the court would look to the conflict rules to de-

\textsuperscript{148} As Professor Crystal explains, a law firm should often be able to avoid disqualification by withdrawing from the representation of one of two clients who are adversaries. It does not follow, however, that a law firm acts properly by doing so unilaterally. See Crystal, supra note 42, at 294-95, 310. For example, a law firm may not knowingly undertake a new representation with the intention of withdrawing from an ongoing representation with which the new one will conflict. See Restatement of the Law Governing Lawyers § 213 cmt. c. (Proposed Final Draft No. 1. 1996). By the same token, if the law firm withdraws from representing the client that has the stronger claim to the lawyer's continued services, the withdrawal should compound the impropriety in initially undertaking the representation of conflicting interests. Indeed, it might be argued that, absent client consent to its withdrawal, a law firm should never unilaterally withdraw from representing one client in order to represent another. By doing so, the law firm deprives the client of an opportunity for a disinterested, judicial determination as to which client has the stronger claim to the lawyer's services.

On the other hand, the possibility of withdrawal with client consent, as a way of avoiding disqualification, provides the possibility of a private resolution. The law firm may offer one client or the other an inducement for client consent—e.g., the return of fees already expended on the representation. Attempting to negotiate for client consent, however, might simply compound the lawyer's conflict of interest. Further, withdrawing from the representation would not prevent the possibility of sanctions for having improperly undertaken conflicting representations in the first place.
cide whether Carpenter, Bennett's representation of Levin Computer Corp. would irreconcilably conflict with its representation of IBM and, if so, whether Carpenter, Bennett must refrain from representing both clients to avoid the attendant harms that are likely to result.\textsuperscript{149} The applicable rule would be the one already discussed, namely, that without client consent, a lawyer may not represent a party in a lawsuit against an existing client even if the lawyer is convinced that doing so will not prejudice the existing client's representation. Therefore, if the court were to apply the conflict rules, it would be constrained to disqualify the firm, even if it were convinced, on this set of facts, either that there was no reasonable possibility that the representation of IBM would be adversely affected or that any harm to IBM's representation would be vastly outweighed by the harm to Levin Computer Corp. from the loss of its original counsel.

As a general rule, courts should accept the judgments underlying the conflict rules. To the extent that courts believe these rules do not appropriately resolve the general class of cases, courts should change or refine them.\textsuperscript{150} Even so, it does not follow that a court should apply the conflict rules to the disqualification decision. It would be entirely consistent with the judgments underlying the conflict rules for courts deciding disqualification motions to engage in an independent determination of whether, on the facts before it, the harms likely to occur if the representation continues outweigh the harms likely to occur if the law firm is disqualified. That is because the conflict rules are based on two premises that are inapplicable in the disqualification setting and that cause them to be unduly restrictive as applied in this setting.

First, the conflict rules are based on the expectation that they will ordinarily be applied before the lawyer accepts the representation. Based on the paradigm of a lawyer and client addressing the conflict issue at the very outset of the proposed representation, the rules strike a balance between the interest in counsel of choice and the interest in avoiding harms that may be caused by a conflict of interest. At this point, the cost of depriving the client of the particular preferred lawyer is generally low. This generalization will not always be appropriate, because the particular lawyer may have unusual expertise, because the client has a long-term relationship with that lawyer, or

\textsuperscript{149} Some courts employ explicitly the Model Rules as the standards governing disqualification decisions. See, e.g., Host Marriott Corp. v. Fast Food Operators, Inc., 891 F. Supp. 1002, 1007 (D.N.J. 1995) (applying New Jersey Rules of Professional Conduct, Rule 1.9(a)(1) in determining whether an attorney should be disqualified). See generally Richardson, supra note 106, at 152-56 (discussing local courts' adoption of the Model Rules to govern attorney conduct and how they conflict with existing local rules).

\textsuperscript{150} For example, if courts believe that screening is a generally acceptable solution to the problem of vicarious disqualification for certain types of conflicts, courts should promulgate rules that permit screening.
because the particular lawyer is most affordable. Nonetheless, in the interest of clear line-drawing, the conflict rules apply in these situations as well.

In contrast, disqualification motions almost invariably are filed after the representation has commenced, and sometimes, as in Levin, long after. Although the conflict rules apply when a conflict is addressed mid-representation, as well as at the outset, they do not adequately account for the interests of both the client and the court that are generally implicated at this stage. Clients have a much greater stake in retaining lawyers who have already performed work on the particular matter than in retaining a particular lawyer before work has commenced. Thus, the balance struck by the conflict rules, predicated on the generalization that there will be no preexisting attorney-client relationship with respect to the matter in litigation, is likely to be inappropriate.

Second, the conflict rules are premised on the expectation that they will be applied by lawyers to their own conduct, not by judges to the conduct of others. It seems appropriate that the rules, as interpreted, should be both as categorical as possible and extremely protective, since they will be applied by individuals whose financial self-interest or other self-interests are likely to weigh in favor of accepting the representation. Self-interest can distort the lawyer’s assessment in a variety of ways. It can influence the lawyer to discount the likelihood of events that would give rise to a conflict or to minimize the likelihood that the lawyer’s representation will thereby be affected. Or, self-interest may affect how the lawyer advises the client about the wisdom of giving consent to, or “waiving,” the conflict. As the Supreme Court noted in its leading decision on lawyer disqualification, “the willing-

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151. See Bruce A. Green, Through a Glass, Darkly: How the Court Sees Motions to Disqualify Criminal Defense Lawyers, 89 Colum. L. Rev. 1201, 1255-56 (1989) [hereinafter Green, Through a Glass, Darkly].

152. The conflict provisions of the Model Code and Model Rules are explicitly intended to apply both pre- and mid-representation. See Model Code, supra note 2, DR 5-105(B) (“A lawyer shall not continue multiple employment . . . .”); Model Rules, supra note 1, Rule 1.7 cmt. 2 (“If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation.”).

153. See supra note 87 and accompanying text.

154. Professor Lindgren deserves credit for making this point in response to the argument that the conflict-of-interest standards applied in disciplinary and disqualification proceedings are prophylactic standards “requir[ing a] similar determination of costs and benefits.” Lindgren, supra note 40, at 430-31 (quoting Note, Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1470-71 (1981)). Professor Lindgren concurred in the conception of the conflict rules as prophylactic rules that strike a balance between the costs and benefits of undertaking the particular representation in the face of a conflict of interest. He argued, however, that these rules are unduly restrictive in the disqualification setting, because they do not account for unrecoverable work done by the lawyer by the time a disqualification motion is filed. Thus, when the court rules on a disqualification motion, the balance may tip in favor of preserving an attorney-client relationship that should not have been established at the outset. Id. at 431-32.
ness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.\textsuperscript{155} On the other hand, when the decision is made by a disinterested judge, there is less need for a categorical and highly protective rule as a counterweight to distortions in the decision making process.

Thus, it would not derogate the judgments underlying the conflict rules for courts to apply a less restrictive and more flexible standard in the disqualification context than in the disciplinary context. Nor would doing so derogate the rules themselves. There is nothing anomalous about rendering decisions about lawyer conduct based on a standard different from the disciplinary rules,\textsuperscript{156} and the professional codes specifically contemplate this possibility.\textsuperscript{157} Indeed, courts do so whenever they rule on a criminal defendant’s post-conviction claim that his lawyer’s representation was compromised by a conflict of interest.\textsuperscript{158} Uncoupling the disciplinary rules, which lawyers apply to


\textsuperscript{156} Courts often enforce lawyers’ fee-sharing agreements that violated the rules of professional conduct. For example, in New York, DR 2-107 permits a division of fees between lawyers only if “the division is made in proportion to the services performed and responsibility assumed by each” or each lawyer assumes joint responsibility for the representation, but the judicial standard governing enforceability of fee sharing agreements is different from, and more permissive than, the disciplinary standard. As long as both lawyers in the joint representation have some responsibility for the representation or both lawyers have done some work, the agreement will ordinarily be enforced without consideration of whether the allocation between the lawyers accurately reflects the relative amount of work performed. The agreement will be deemed void as against public policy only if it is a pure referral fee agreement in which, in exchange for the referral, one attorney agrees to split fees with another lawyer who renders no services whatsoever to the client. See, \textit{e.g.}, Oberman v. Reilly, 66 A.D.2d 686, 687 (N.Y. App. Div. 1978) (holding that an agreement dividing legal fees was valid provided the attorneys seeking shares contributed services); Wojcik v. Miller Bakeries Corp., 142 N.E.2d 409, 412 (N.Y. 1957) (stating that a dispute between attorneys is not grounds to void a contract if both attorneys have performed services for their clients); cf. N.Y. St. B.A. Committee on Prof. Ethics, Opinion 414 (1975) (noting that a lawyer has an ethical duty to revise the original fee-sharing agreement if it turns out to be disproportionate to work performed). One possible reason is that courts do not want to be drawn into disagreements about precisely how much work the co-counsel performed. A second is the policy generally favoring the sanctity of contract, particularly between equally sophisticated parties, such as attorneys. A third is that the lawyer seeking to void the agreement, having voluntarily entered into it, lacks “clean hands.” See, \textit{e.g.}, Carter v. Katz, Shandell, Katz & Erasmous, 465 N.Y.S.2d 991, 997 (Sup. Ct. 1983) (“Whatever minor transgressions one might perceive, this court cannot condone this defendant’s use of the Code’s provisions as a shield to avoid its legal, ethical and moral obligations.”).

\textsuperscript{157} See, \textit{e.g.}, Model Rules, \textit{supra} note 1, Preamble (stating that rules are not intended to have extra-disciplinary consequences).

their own conduct, from the law applied by courts to disqualification
decisions will benefit the development of both sets of standards.159

Applying a more narrowly tailored standard to the question of
whether disqualification is necessary as a remedy, a court in a case like
Levin almost certainly should allow Carpenter, Bennett to continue
the representation. While it was possible that the firm’s labor lawyers
would serve IBM less vigorously because the firm’s litigators repre-
sented IBM’s adversary in the antitrust action,160 this does not seem
particularly likely in practice. The firm could reasonably have con-
cluded that it would represent IBM in precisely the same way and
therefore agreed to represent Levin Computer Corp. if IBM had been
willing to consent at the very start. Apparently, nothing occurred in
the intervening five years when the law firm represented both IBM
and Levin Computer Corp. to suggest that the law firm had performed
inadequately.

The greater likelihood is that the attorney-client relationship with
IBM would have been harmed by the firm’s continued representation
of its adversary because IBM would perceive that representation as an
act of disloyalty.161 Weighing against this, however, is the fact that
IBM is a large corporation, not an individual, and that the IBM offi-
cials with whom the law firm was dealing in connection with the labor
matters were apparently not concerned with the antitrust action.162

Even assuming the possibility that IBM’s relationship with Carpen-
ter, Bennett might be irreparably harmed, one must consider the ex-
tent to which disqualifying the firm would avert that harm. Insofar as
the attorney-client relationship has been strained by the firm’s ongo-
ing involvement in the antitrust action, there is a question whether
disqualification would improve it. Finally, one must consider the ex-
tent to which disqualification would cause harms to others far greater
than any harm it would avert. At most, disqualifying the firm would
avoid the expenses that IBM would incur if, unable to have its law
firm continue representing its adversary, it were otherwise compelled
to obtain new counsel to represent it in an ongoing labor matter. That
might entail some delay and some additional expense because the new
firm would have to repeat work for which Carpenter, Bennett had
already been compensated. It is hard to imagine, however, that this

159. Courts are likely to interpret the rules of conduct more appropriately if they
allow a lawyer to continue the representation despite an impermissible conflict of
interest in cases in which disqualification is not necessary as a remedy. If the discipli-
nary and disqualification standards were precisely the same, courts interpreting the
professional rules in the disqualification context would be influenced to adopt inter-
pretations that were too permissive, as viewed ex ante, in order to avoid unnecessarily
depriving a litigant of chosen counsel. See infra note 163 and accompanying text.
161. See id.
162. This is precisely why it took IBM five years to discover that its own law firm
was representing its adversary in litigation.
would be anything approaching the cost to Levin Computer Corp. of having to obtain new counsel to represent it in an antitrust action that had been ongoing for five years.

2. The Inadequacy of Alternative Rules

As discussed above, courts employing disqualification exclusively as a remedy should not rely on the conflict rules, which were designed to be "overbroad" because they apply before a representation is undertaken and are self-enforced. The question then, is how courts should develop the law applicable to this mid-representation judicial decision—by announcing and applying an alternative set of determinate rules or by applying a single, open-textured standard on an ad hoc, case-by-case basis.\(^\text{163}\)

One possibility would be for courts to develop categorical—albeit, less restrictive—rules, as an alternative to those developed by the ABA. For example, to resolve cases such as Levin, a court might adopt a rule permitting a lawyer to continue representing one client in litigation against another client who is represented in connection with an unrelated business transaction. Such a rule would reflect two irrebuttable presumptions. The first is that the litigation will not pose a significant risk that the transactional client’s confidences will be misused. The second is that even if representing the litigating client will irreconcilably destroy the lawyer’s relationship with the transactional client, the transactional client is the one who would be harmed less by the loss of counsel.

Another rule might be developed for the familiar situation in which a lawyer who had previously represented two clients jointly—e.g., two business partners or two related corporate entities—subsequently agrees to represent one in litigation against the other. Many authorities take the view that participating in the litigation in such a case is improper, not so much because of the risk of misusing the former client’s confidences (because presumably there were no confidences between the co-clients), but because the former client would rightly feel betrayed by a lawyer who represented its adversary in connection with litigation involving the very subject matter of the former representation.\(^\text{164}\) In such a situation, a court might rule that undertaking the representation is indeed improper and sanction the lawyer accord-

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\(^{164}\) See, e.g., Brennan’s, Inc. v. Brennan’s Restaurants, Inc., 590 F.2d 168, 172 (5th Cir. 1979) (“A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the client in the same matter.”). But see Christensen v. United States Dist. Court, 844 F.2d 694, 699 (9th Cir. 1988) (al-
ingly. The court may conclude, however, that a lawyer may continue representation because the burden on the litigating party from the loss of counsel will invariably be more serious than the former client's discomfort at having to face its former lawyer in litigation.

There are at least three benefits to employing categorical rules rather than an open-textured standard. The first is that rules make the law more certain. Lawyers and their clients will be able to predict with greater accuracy whether a disqualification motion will be granted in a particular case. This is not an especially significant benefit, however, because lawyers deciding whether to represent a client at the outset would not be entitled to rely on the standard of conduct applicable in the disqualification context. They would ordinarily be required to apply the conflict rules. Thus, a body of law that was uncertain or subject to change would not undermine any legitimate reliance interest. Moreover, as suggested earlier, the greater the uncertainty, the greater the incentive for the aggrieved client to move for disqualification—which some might view positively.\(^{165}\)

A second benefit is that rules will cut down on the courts' fact-finding and deliberation process. In the disqualification context, however, the extent of the economy created by rules may not be very great. Much of the court's work would be taken up with the question of whether the lawyer undertook an impermissible representation and, if so, whether a particular rule governing the court's disqualification decision applies. The additional work required by an ad hoc standard, rather than a categorical rule, would be merely incremental. For example, in the Levin case, the court could not avoid a fact-finding concerning whether Carpenter, Bennett represented IBM in labor matters, whether the labor matters were related to the antitrust litigation, and whether IBM had given informed consent to the firm's representation of Levin Computer Corp. Not much additional work would be required to determine whether IBM had been harmed or would likely be harmed in the future by the firm's participation in the antitrust action.

A third benefit of categorical rules is that courts could look to other institutions, as they have done over the past quarter-century, for help in developing the applicable rules of conduct. With respect to the rules applicable to disqualification decisions, the ABA might not be an appropriate body to aid the courts as the ABA has designed its rules to govern decision-making by lawyers, not judges. The ALI, however, might be an appropriate institution to assume this task, if it were to endorse the concept of disqualification decisions as remedial only. In that event, the ALI might propose provisions specifically directed at the court's disqualification decision, as distinguished from

\(^{165}\) See supra text accompanying note 56.
provisions—like those of the ABA Model Rules—directed at the lawyer’s decision. The existing draft Restatement provisions dealing with conflicts of interest would not suffice, however, because of the apparent assumption that they are meant to apply both to lawyers in making their own decisions about whether to take on representation and to a court’s disqualification decision. Of course, one might question the need for the ALI’s help in setting the standard applicable to the court’s disqualification decision. After all, as the Fifth Circuit stated regarding enforcing conflict rules in American Airlines, “it is our business—our responsibility,” and the same might equally be said about making ethics law. Certainly, at this point, the draft Restatement would serve a more useful function if it were to explore and provide guidance on the fundamental question of the appropriate relationship between rules of conduct and disqualification.

Regardless of the possible benefits of categorical rules, they are not the appropriate solution. To return to one of Wilkins’s points, that is because questions of professional regulation are highly contextual. Rules would undermine the principal benefit of a judicial decision, namely, the opportunity to make a judgment that is closely tailored to the relevant facts and procedural circumstances.

One important contextual factor is timing. As the representation progresses, a court will be increasingly well situated to assess the likelihood that the harms the conflict rules protect against will occur. Additionally, as both the client’s investment in the lawyer and the judicial investment of resources increases, it becomes reasonable to accept an increasingly greater risk that harm will occur as well as to accept the actual imposition of some harms, particularly intangible ones, to the moving party. On the other hand, if a disqualification motion fol-

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166. Section 201, which expresses the basic prohibition of conflicts of interest, is framed as a rule of conduct. See Restatement of the Law Governing Lawyers § 201 (Proposed Final Draft No. 1, 1996) (“Unless all affected clients and other necessary persons consent . . . a lawyer may not represent a client if the representation would involve a conflict of interest.”). Subsequent provisions, which elaborate on the basic prohibition, are similarly worded.


168. See generally Green, Whose Rules of Professional Conduct, supra note 18 (proposing that federal courts employ a rule-making process to develop and promulgate rules of professional conduct to govern litigators in federal-court proceedings).

169. Criminal case law interpreting the defendant’s Sixth Amendment right to counsel reflects this insight. Courts are far more likely to remedy conflicts prior to trial than after trial. Prior to trial, courts have broad discretion to disqualify criminal defense lawyers with potential conflicts of interest. This reflects both the difficulty of predicting whether the quality of representation will in fact be impaired as the representation progresses as a consequence of a lawyer’s conflict, and recognition that the cost of disqualifying a lawyer at an early stage of the proceeding is modest, particularly compared with the cost of later overturning a conviction to remedy a conflict of interest. See Wheat v. United States, 486 U.S. 153, 162-63 (1988). Post-conviction, a defendant is entitled to a new trial based on the lawyer’s conflict of interest only if the defendant can show that the lawyer had an actual conflict that adversely affected the representation. See Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). This standard in part
ows hard on the heels of the lawyer's retention, it may be appropriate to apply the conflict rules, even if the interests they protect do not seem particularly weighty.\textsuperscript{170}

An equally important set of factors are the nature of the client, the nature of the various present or past representations, and the relationship between the lawyer and client.\textsuperscript{171} The court's analysis should be more nuanced than the analysis called for by the conflict rules. The conflict rules do not account for the possibility that in a given case the particular lawyer may be especially valuable, that the client may be especially sophisticated, or that for other reasons it is appropriate for the client to assume a greater than ordinary risk that the conflict will impair the quality of the lawyer's representation. Courts can and should account for these possibilities. On the other hand, courts need to account particularly for the interests of the moving party that particularly warrant disqualification. For example, if the transactional client in \textit{Levin} was not IBM, but an individual or small enterprise, the need for disqualification would be more compelling. Disqualification would also be more appropriate if it were extremely prejudicial to substitute a new lawyer in the ongoing transactional matter, either because the lawyer had developed substantial knowledge over the long course of the representation or because there would be great harm if the transaction were delayed.

A third factor, highlighted in cases where one lawyer's conflict of interest is imputed to other lawyers in a firm, is the possibility of reducing the risks inherent in the conflict by "screening" the lawyer faced with the conflict or by other procedural means. State rules of professional conduct take differing approaches to the question of whether, by instituting procedural safeguards at the outset of the representation, a law firm can avoid vicarious disqualification. For example, when one member of a law firm formerly represented the prospective client's adversary in a matter related to the subject of the prospective litigation, several states allow the law firm to undertake the representation provided it screens the lawyer at the outset of the

\textsuperscript{170} See, \textit{e.g.}, \textit{Burkes v. Hales}, 478 N.W.2d 37 (Wis. Ct. App. 1991) (involving a motion for disqualification, filed immediately after the lawyer was appointed, based on the lawyer's former representation of partners of predecessor firm that represented him).

\textsuperscript{171} See \textit{Crystal}, \textit{supra} note 42, at 293-96 (noting that the extent to which representing one client against another may undermine the lawyer's zealously in representing the client in litigation or may cause disharmony in the lawyer's relationship with the non-litigation client will vary depending on such factors as the importance of the respective clients to the law firm, whether the clients are individuals or corporations, and the presence of in-house counsel for corporate clients to offer independent advice).
representation and complies with other procedural requirements.\textsuperscript{172} These procedures are designed to ensure that the lawyer does not disclose the former client's confidences or otherwise assist members of the firm involved in the new representation.\textsuperscript{173}

There are various reasons why courts might adopt rules of conduct that do not contemplate screening. They may make a judgment that screening is inappropriate in most cases and that, as a matter of clear line-drawing, it should be forbidden categorically. Or, they may conclude that the determination of whether screening is appropriate in a particular case is highly contextual and therefore particularly subject to the biases created by lawyer self-interest. Or, they may conclude that given the modest weight assigned to a prospective client's interest in counsel of choice, a categorical rule is adequately justified by the countervailing interest in protecting the former client from a perception of betrayal.\textsuperscript{174} Yet, consistent with these underlying judgments, a court might conclude that screening is an appropriate alternative to disqualification in individual cases. Thus, in a case in which a firm violated the applicable conflict rules, either because the firm was categorically forbidden from undertaking the representation\textsuperscript{175} or because the firm failed to comply with the relevant procedural requirements,\textsuperscript{176} a court would determine whether confidences had been dis-


\textsuperscript{174} Cf. Cardinale v. Golinello, 372 N.E.2d 26, 30 (N.Y. 1977) (“Irrespective of any actual detriment, the first client is entitled to freedom from apprehension and to certainty that his interests will not be prejudiced in consequence of representation of the opposing litigant by the client’s former attorney.”).

\textsuperscript{175} See, e.g., In re Del-Val Fin. Corp. Sec. Litig., 158 F.R.D. 270, 274 (S.D.N.Y. 1994) (permitting screening devices when the attorney was only peripherally involved in the representation).

\textsuperscript{176} One recent example where disqualification may have been unnecessary as a remedy for a conceded violation of the screening requirement is Cobb Publishing, Inc. v. Hearst Corp., 891 F. Supp. 388 (E.D. Mich. 1995). In Cobb, the rule of imputed disqualification, although allowing screening of a lawyer who switches firms if the screen is put in place at the outset of the representation, was violated because the firm waited 11 days to set up the screen and 16 days to notify the court. Id. at 395. Assuming that the “tainted” lawyer had not discussed the case with others in the firm or allowed them access to confidential material during the intervening period, disqualification might be unnecessary.

Another example is Decora Inc. v. DW Wallcovering, Inc., 899 F. Supp. 132 (S.D.N.Y. 1995). In that case, the lawyer who switched firms had worked on the other
closed by the conflicted lawyer and, if not, whether procedures could be put in place to prevent future disclosures. Relevant considerations would include the amount of relevant confidential information possessed by the disqualified lawyer, the size of the law office, and the extent of financial or other incentives to breach confidentiality. Where screening could be expected to prevent all harms other than intangible ones, such as the perception of disloyalty, it might be appropriate to let the representation continue subject to procedural safeguards, while sanctioning the law firm or its individual lawyers directly.

A fourth set of relevant factors are policy concerns applicable to the particular legal or procedural setting. For example, in criminal cases, a court might take into account the public interest in avoiding unjust convictions and the defendant's countervailing constitutionally protected, albeit qualified, interest in counsel of choice. Particular policy considerations not ordinarily taken into account by the conflict rules might be equally relevant in the class action context and in other procedurally complex settings.

Thus, categorical rules that might be appropriate to govern a lawyer's decision whether to undertake the representation of a client would not be appropriate to govern a court's decision whether to disqualify a lawyer from continuing the representation. An example is the rule underlying Levin—that out of loyalty to the client, a lawyer may not advocate against a client whom the lawyer represents in an unrelated matter. Although some commentators have questioned this rule, most authorities endorse it. It seems entirely reasonable to apply this rule categorically to the lawyer's decision at the outset of the representation, yet unreasonable to apply it in Levin to the court's decision five years after the representation has commenced. Similarly,
one might accept the prevailing view that “screening” is generally not an acceptable way of avoiding imputation of a lawyer’s conflict of interest to the entire law firm. Nonetheless, courts deciding disqualification motions should find that screening is an appropriate alternative to disqualification in individual cases.

Given the factually intensive nature of the court’s determination, it seems unlikely that categorical rules would fit the bill. One can do little better than an open-textured standard. Courts must consider in each case on an ad hoc basis: (1) whether the lawyer will face an irreconcilable conflict in continuing the representation; (2) if so, whether disqualification would correct or avert harm to the party seeking disqualification; and (3) if so, whether the need to remedy such harm is great enough to justify the burdens on the opposing party and the court that would result from disqualification. The conflict rules, or alternative rules of conduct announced by the court, may answer the first of the three questions, but not the last two. Published decisions may give guidance about the relative importance of various factors in determining whether disqualification is an appropriate remedy. Moreover, as time goes on, published decisions may identify classes of cases in which disqualification is typically inappropriate even though the lawyer undertook an impermissible representation. But in the end, much would still be left to judges’ informed discretion.

The result is that two different legal standards would be employed to address lawyers’ conflicts of interest. The first, contained in the conflict rules, would be employed by lawyers. It would set the standard of conduct for lawyers in situations in which there was no judicial intervention. Lawyers violating this standard would be subject to personal discipline. The second, reflected in judicial opinions, would govern courts’ decisions in ruling on disqualification motions—as distinguished from motions for the imposition of personal sanctions. The decisional law would be less restrictive than the conflict rules and more responsive to factual nuances.

One might argue that the law governing lawyers is already unduly fragmented, and that separating the standard of conduct from the dis-

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182. See Lindgren, supra note 40, at 458 (suggesting that a “necessarily vague standard” should govern disqualification decisions).

183. This approach to disqualification might also be appropriate in settings, such as bankruptcy proceedings, where the lawyer’s conduct is governed by statute, rather than or in addition to disciplinary rules relating to conflicts of interest. Cf. Rome v. Braunstein, 19 F.3d 54, 57-59 & n.3 (1st Cir. 1994) (stating that although the prophylactic ethical rules governing attorney conduct under the Bankruptcy Code impose “particularly rigorous conflict-of-interest restraints upon the employment of professional persons in a bankruptcy case,” in special circumstances, the bankruptcy court could determine, in its discretion, “that any potential impairment of its institutional integrity, or risk of divided loyalty by counsel, was substantially outweighed by the benefits to be derived from counsel’s continued representation of multiple entities or the impracticability of disentangling multiple interests ‘without unreasonable delay and expense.’”).
qualification standard will simply compound the problem. The reality, however, is that in many jurisdictions, these standards are already inconsistent with each other precisely because courts understand on some level that the conflict rules do not invariably make sense in the disqualification context. Thus, courts in the Second Circuit look to whether the lawyer's impermissible conflict will "taint" the proceeding; some courts apply a "standing" doctrine or employ principles of laches or estoppel to weed out cases in which disqualification would unfairly burden the client while serving no remedial purpose; some courts deny disqualification where the conflict arose inadvertently; and still others employ procedural devices, such as screens, as an alternative to disqualifying a law firm for an impermissible conflict. Few if any courts now disqualify lawyers in all cases in which undertaking the representation violated a conflict rule. Focusing explicitly on whether disqualification is a necessary remedy will enable courts to rationalize disqualification doctrine.

Further, the development of separate conduct and disqualification standards will enable courts to develop law that is better suited to each of these separate contexts. The danger of the draft Restatement's approach—that a conflict standard should serve both as the basis of personal discipline and as the basis of disqualification—is that the standard will not be well suited to both contexts. Sometimes the standard will be overly restrictive as applied to disqualification decisions. For example, the categorical principle applied in Levin is expressed in a Restatement provision that without client consent, "a lawyer in civil litigation may not... represent one client in asserting or defending a claim against another client currently represented by the lawyer, even if the matters are not related." One might argue

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184. See supra note 15 and accompanying text.


187. See supra note 42.

188. See supra note 29 and accompanying text; infra note 201 and accompanying text.

that this is appropriate as a standard of conduct but unduly categorical as a standard governing disqualification decisions.

Other times, the standard will be overly permissive as applied to lawyer conduct. For example, the Restatement's rule of imputed disqualification would let a law firm undertake representation adverse to a former client of a lawyer in the firm as long as "there is no reasonably apparent risk that confidential information of the former client will be [mis]used," because (1) confidences possessed by that lawyer are "unlikely to be significant in the subsequent matter," (2) "adequate" screening measures are in effect, and (3) "timely and adequate notice of the screening has been provided to all affected clients." The Reporter's Note reflects that the proposed screening provision, like most of the draft Restatement's other conflict of interest provisions, is premised principally on judicial rulings on disqualification motions. The rule makes sense as a standard to guide judicial decision-making in the disqualification setting. It affords courts flexibility to deny disqualification where it is satisfied that a lawyer's conflict of interest will be harmless or that the small risk of harm is acceptable. It might, however, reasonably be argued, consistent with both the Model Code and the Model Rules, that this rule is not sufficiently protective when applied by lawyers to their own conduct. Self-interested lawyers cannot be trusted to assess fairly the likely significance or insignificance of confidential client information possessed by the personally-prohibited lawyer, the adequacy of screening procedures, and, ultimately, whether client confidences are reasonably likely to be misused. Further, even if the profession were willing to believe that lawyers could fairly implement this standard on their own, former clients might not be so sanguine and, consequently, would perceive the adverse representation as an act of betrayal.

C. Beyond Disqualification

Suppose that before agreeing to represent Levin Computer Corp., Carpenter, Bennett unsuccessfully sought IBM's informed consent to the representation. The firm might then seek judicial authorization to undertake the representation which would otherwise be impermissible under the conflict rules. The firm might argue that the rule against suing one current client on behalf of another, even where the two matters are unrelated, is appropriate in most cases, but not this one. Among other reasons, the new representation would be adverse to a current client that is a large corporate entity, IBM. The IBM officers and employees concerned with the litigation would be different from

190. Id. § 204(2).
191. One procedural barrier is that the "tainted" lawyer may not share the confidential information he possesses with those in the firm who would undertake the representation and who are therefore in the best position to assess the significance of the confidential information.
those concerned with the labor matters on which the firm represents it. Thus, the perception of disloyalty and the risk of harm to the attorney-client relationship with IBM would be far less than in an ordinary case. Further, the cost to the prospective client of forbidding the representation would be greater than in an ordinary case because of Carpenter, Bennett's six-year relationship with Levin.

In cases such as Levin, or in other unique categories of cases, should a court entertain a motion for a declaratory judgment that a firm may properly represent a client, notwithstanding conflict rules to the contrary? If so, what standard should the court use to decide the motion?

In cases like Levin, courts probably should not entertain such motions, even though the movant can make a plausible, and perhaps convincing, claim that the conflict rule is unnecessarily restrictive on the particular facts of the case. Levin fits within a category of cases which are clearly contemplated by the general rule and as to which the general rule presumably leads to the appropriate outcome on the vast majority of occasions. That the rule may be unduly restrictive in a small number of cases is an acceptable cost of a prophylactic rule of professional conduct that is designed to be self-enforcing. The alternative would be to invite judicial review whenever a law firm or its client has a plausible argument that the conflict rules are an imperfect fit. The benefits to the occasional client whose argument would prevail would not justify the considerable institutional burden on courts of having to make decisions that would otherwise be made by lawyers. Moreover, routine judicial involvement might appear to be an unwarranted intrusion into the conduct of attorney-client relations.

The justifications for an independent judicial determination are not nearly as compelling at the outset of representation as they are in the context of disqualification motions. Once a disqualification motion is made, the court has no choice but to determine whether disqualification is a necessary remedy. Deciding this on the basis of a judicial standard is only marginally more work than deciding it on the basis of a conflict rule. That extra labor is warranted mid-representation when disqualification motions are addressed, because the conflict rules do not adequately account for the client's interest in retaining the continued services of the lawyer who has begun representation in litigation. Thus, the rules would often lead to the wrong result if applied in disqualification cases.

When an unforeseen conflict arises at a midpoint in the representation, however, it is appropriate for courts to make themselves available to determine the propriety of a lawyer's representation at the behest of the party that would otherwise lose its lawyer's services. In the course of litigation, unforeseen conflicts occasionally arise that implicate the interests of other former or present clients. In criminal cases, this typically occurs because of the prosecution's decision to call
the defense lawyer's client as a witness.192 In civil cases, this typically occurs because of the movement of lawyers between firms, and, in recent years, has also occurred with increasing frequency because of law firm mergers193 and the mergers of corporate clients.194 Conflicts arising out of a lawyer's own interest may also occur unexpectedly mid-representation when the litigation proceeds along unexpectedly unforeseeable lines.195

In this category of cases, the benefit of judicial review would seem to justify the attendant judicial burden. The conflict rules are unduly restrictive mid-representation. The same considerations that justify applying a less restrictive standard to disqualification decisions should justify reviewing the propriety of the representation under the ad hoc judicial standard when asked to do so by a party that would otherwise lose its lawyer in the middle of litigation by operation of the conflict rules. Further, insofar as the conflict was unforeseeable, a judicial

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192. See, e.g., United States v. Iorizzo, 786 F.2d 52, 57 (2d Cir. 1986) (finding ineffective assistance of counsel because of conflict of interest arising when attorney's former client was the government's key witness against the current client); United States v. Jeffers, 520 F.2d 1256, 1264-65 (7th Cir. 1975) (discussing the possibility of a conflict of interest arising when an attorney's former client is called as an adverse witness), cert. denied, 423 U.S. 1066 (1975); see also Gary T. Lowenthal, Successive Representation by Criminal Lawyers, 93 Yale L.J. 1, 1-22 (1983) (providing data from an empirical study on the frequency with which criminal defense attorneys must face former clients as adverse witnesses and discussing several ethical considerations in such cases).


194. See, e.g., In re Wingspread Corp., 152 B.R. 861, 864 (Bankr. S.D.N.Y. 1993) (pointing out that, through no fault of a law firm, previously unrelated representations can raise a possible conflict of interest because of a merger between two companies); Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 273 (D.Del. 1980) (suggesting, in dicta, that law firms inform both clients in writing as soon as the firm learns of a potential conflict of interest caused by a change in the internal operations of the clients).

195. For instance, a lawyer who represents the plaintiff in a legal malpractice action may be the subject of the defendant's third-party action for contribution. See, e.g., Costin v. Wick, 95 CA 006133, 1996 Ohio App. LEXIS 233, at *7 (Jan. 24, 1996) (involving plaintiffs malpractice attorney who was forced to withdraw after being joined as a third party defendant). This possibility raises a conflict between the plaintiff's interest in prevailing in the malpractice action and the lawyer's interest in avoiding liability. The conflict exists even if plaintiff's counsel is convinced that a threatened action against it would be utterly meritless. See, e.g., Schenck v. Hill, Lent & Troescher, 130 A.D.2d 734, 734 (N.Y. App. Div. 1987) (affirming the decision to disqualify plaintiff's counsel who was impleaded as a third-party defendant). Moreover, this may be a conflict to which consent ordinarily would be unavailable under the conflict rules. In criminal cases, the defense lawyer's personal interests may unexpectedly be implicated if the lawyer is accused of participating in the defendant's alleged crime or subjected to unrelated accusations that might lead the lawyer to advocate less vigorously to curry favor with the prosecution. See, e.g., Mannhalt v. Reed, 847 F.2d 576, 581 (9th Cir. 1988) (holding that a conflict exists when an attorney is accused of crimes related to those of his client, because of the great potential for diminished effectiveness in representation).
declaration that the representation may be undertaken should foreclose discipline based on an otherwise applicable conflict rule.

A recent federal case illustrates the utility of an ad hoc judicial determination concerning the propriety of ongoing representation in light of an unanticipated conflict. The conflict arose when the plaintiff’s law firm agreed to employ a lawyer who, more than a year earlier, served as an associate of the defendant’s law firm and performed approximately 800 hours of work for the defendant. Before the lawyer commenced the new employment, the plaintiff’s law firm offered to institute screening procedures designed to allow it to remain in the representation. The jurisdiction’s conflict rules would not have permitted screening as an alternative to disqualifying the entire law firm. Nonetheless, over the defendant’s opposition, the court authorized the law firm to continue the representation subject to the proposed screening and additional procedural protections.196 As the court apparently recognized, undertaking this determination was justified given the considerable cost to the client of losing its lawyer in the course of ongoing litigation.197

Even at the outset of the representation, courts should be willing to issue declaratory judgments in some categories of cases to protect clients from the hardship of overly restrictive rules. An example might be where the client lacks capacity to consent to a representation that ordinarily could not be undertaken without client consent. In this category of cases, the conflict rules are overly restrictive because they are based on a paradigm of a client who is capable of consenting to the conflict. In cases in which a client with capacity would almost invariably consent, forbidding the representation of someone who is incapable of consenting may do more harm than good.

An illustration, suggested by Professor Geoffrey Hazard’s testimony as an expert in a recent case, is where a parent and minor child injured in an automobile accident sue the same defendant.198

197. The same rationale should apply when a conflict of interest that should have been apparent at the outset is identified only after the representation has commenced and withdrawal would be costly to the client. See Restatement of the Law Governing Lawyers xxv (Proposed Final Draft No. 1, 1996). Suppose, for example, that five years after the representation commenced, the conflict in Levin was identified by Carpenter, Bennett, rather than IBM, and instead of concealing the problem, the firm unsuccessfully requested IBM’s consent at that late date. If the firm, rather than awaiting a disqualification motion, itself sought a declaratory judgment permitting the ongoing representation, it would have been appropriate for the district court to consider the motion and to do so under the same standard as it would have reviewed IBM’s disqualification motion. The willingness to consider such requests, even when the conflict of interest was far from inadvertent, would not encourage lawyers to ignore the conflict rules as long as the court also directly sanctioned the lawyers. The lawyers’ disclosure might mitigate the sanction, but not excuse the wrongdoing.
Although the lawyer might not doubt the ability to represent both family members adequately, an ordinary application of the conflict rules would probably condition the representation on the clients' willingness to give informed consent because of the possibility that the lawyer in settlement negotiations might minimize the settlement for one client in order to maximize the settlement for the other.\textsuperscript{199} The conventional wisdom, however, is that child clients cannot give effective consent.\textsuperscript{200} This would certainly be true if the child were non-verbal or quite young. Thus, lawyers must either undertake the representation contrary to the language, if not the intent, of the conflict rules, or decline the representation and force the family to incur the otherwise unnecessary expense of retaining two different lawyers. In this scenario, the preferable course might be to allow the lawyer to seek a judicial determination about the propriety of the representation.\textsuperscript{201}

Finally, there may be particular legal settings in which courts should be receptive to determining, under a common law standard, whether to permit a representation that would otherwise be improper under the conflict rules. In class actions, for example, undertaking this determination is only an incremental burden, as courts are nevertheless

\textsuperscript{199} For an argument that conflict rules should apply differently in cases involving family members, see Russell G. Pearce, \textit{Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses}, 62 Fordham L. Rev. 1253 (1994).


\textsuperscript{201} At the recent Conference on Ethical Issues in the Legal Representation of Children, participants addressed this problem without agreeing on a satisfactory resolution. A group of participants who focused on conflicts of interest in the legal representation of children proposed that judicial authorization be allowed to substitute for consent of the child client. The Conference ultimately recommended, however, that further study be given to this question. See \textit{Recommendations of the Conference on Ethical Issues in the Legal Representation of Children}, 64 Fordham L. Rev. 1301, 1319-20 (1996); \textit{Report of the Working Group on Conflicts of Interest}, 64 Fordham L. Rev. 1379, 1385-86 (1996).

At present, there would be little incentive for the lawyer to seek judicial approval before accepting the representation where the conflict rules ordinarily require consent but the client is incapable of providing it. In this context, there is little danger of disqualification or a personal sanction for what might be considered a violation of the applicable rules. In cases in which courts have reason to know that there may be an impermissible representation—for example, where a lawyer enters an appearance on behalf of co-clients, one of whom is a child—the court itself may initiate an inquiry and, if it finds a violation, impose a sanction. Thus, the willingness of courts to become "proactive" in civil cases, as they presently are to some degree in criminal cases, see, e.g., Fed. R. Crim. P. 44(c) (requiring judicial inquiry where criminal defendants are jointly represented), may encourage lawyers to seek judicial guidance at the outset of a proposed representation where it is appropriate to do so. In contexts, however, where a possible conflict would not be reasonably apparent to the court, less scrupulous lawyers would have little incentive to seek judicial review until such time as disciplinary agencies became stricter in enforcing the relevant conflict provisions.
obliged to determine the adequacy of class counsel. Moreover, the conflict rules do not appear to be drafted with class action procedures in mind and may be at odds with the policies underlying the class action rules. Finally, class action procedure affords safeguards, such as judicial review of the fairness of a settlement that may reduce the risk of harm from class counsel's conflict of interest. Thus, it may be appropriate for courts, in response to the exigencies of class

202. In class action litigation, the question of whether an attorney is barred by a conflict of interest from engaging in a particular representation may arise in various contexts, including at the certification stage, when the court determines the adequacy of class counsel. See Fed. R. Civ. P. 23(a)(4); see, e.g., Tedesco v. Mishkin, 689 F. Supp. 1327 (S.D.N.Y. 1988) (holding that in a class action certification motion, attorney representing plaintiff class had to withdraw from representing individual co-trustee because of conflict); Jackshaw Pontiac, Inc., v. Cleveland Press Publishing Co., 102 F.R.D. 183 (N.D. Ohio 1984) (holding that attorneys could not adequately represent plaintiff class because of simultaneous representation of different plaintiff in action against same defendant). The issue may also arise in the context of proceedings concerning the fairness of a settlement. See, e.g., Parker v. Anderson, 667 F.2d 1204, 1213-14 (5th Cir. 1982) (holding that a settlement providing for attorney's fees payable out of a settlement fund does not create a conflict of interest); Georgine v. Amchem Products, Inc., 157 F.R.D. 246 (E.D. Pa. 1994) (holding that settlement and attorney's fees were fair and reasonable, and that concurrent representation of clients with similar claims to class was not a conflict), vacated and remanded, 83 F.3d 610 (3d Cir. 1996); Holden v. Burlington N., Inc., 665 F. Supp. 1398, 1426-28 (D. Minn. 1987) (allowing attorneys to concurrently negotiate settlement and attorneys' fees).


Recent articles addressing the settlement of asbestos-related personal injury claims in Georgine, demonstrate the considerable need for study of class counsel's conflicts of interest. See Susan P. Koniak, Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc., 80 Cornell L. Rev. 1045 (1995); Menkel-Meadow, supra note 198. Professor Koniak's article suggests that in the course of determining the fairness of a proposed class action settlement—which necessarily requires consideration of the adequacy of counsel's representation—a district court may be tempted to approve of representation that would be improper under a seemingly straightforward application of conflict rules. Koniak, supra at 1078-86. Professor Menkel-Meadow's article suggests that one reason for doing so is the imperfect fit between the class action setting and conflict rules that contemplate the representation of individual clients and the possibility of client consent in situations raising a theoretical, but not realistic, possibility that the lawyer's representation will be impaired because of other interests the lawyer may be tempted to serve. Menkel-Meadow, supra note 198, at 1189-98.

204. See Fed. R. Civ. P. 23(e).

205. See, e.g., In re Corn Derivatives, 748 F.2d at 165 (Adams, J., concurring) (noting that strict procedural requirements, and particularly fairness hearings, serve as safeguards for the rights of class action members); Mary Kay Kane, Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer, 66 Tex. L. Rev. 385, 397 (1987) ("Rule 23(e) protects class members from some potential attorney conflicts of interest in settlements by mandating judicial approval and notice of any proposed settlement.").
representation, to address conflicts of interest under a judicial standard that is more permissive than the conflict rules.206

CONCLUSION

With limited exceptions,207 courts have ultimate authority to make and enforce the law governing litigators’ conflicts of interest. They exercise their lawmaking authority in large measure by adopting conflict rules as part of a larger array of rules of professional conduct. They exercise their enforcement authority in part by disqualifying lawyers who represent litigants in violation of the conflict rules.

The two judicial roles give rise to warring impulses. As lawmakers, courts adopt highly restrictive rules for lawyers to apply when deciding whether to take on a new client or a new matter in litigation. Based on the recognition that lawyers are generally replaceable, if not fungible, and that new clients have a minimal interest in choosing any particular lawyer, courts are particularly solicitous of the interests of past, present, and future clients who might be harmed by a lawyer’s conflict of interest. As one expression of this, the conflict rules generally privilege the interest in preserving the former or existing client’s confidence in its lawyer’s loyalty over the new client’s interest in choice of counsel.

As law-enforcers in the disqualification setting, however, courts must consider interests of the newly represented litigant that would have been far less compelling, if present at all, prior to the representation. Particularly, these include the interest in retaining the services of a lawyer with whom the litigant has now formed an attorney-client relationship and who may have already performed considerable work on the case. The litigant’s interest will often outweigh another client’s countervailing interests, particularly if they are exclusively intangible ones.

The common assumption that the rules governing lawyers’ conduct prior to accepting the representation must be the same as those applied to the court’s decision whether to disqualify the litigator places

206. Cf. Bash v. Firstmark Standard Life Ins. Co., 861 F.2d 159, 161 (7th Cir. 1988) (denying a motion to disqualify former class counsel from representing unnamed class members in an appellate challenge to the settlement). In Bash, the court stated:

When all is said and done, Williams has represented two sides of the same case—the defense of the settlement before the district judge, and the attack on the settlement in this court. But conflicts of interest are built into the device of the class action, where a single lawyer may be representing a class consisting of thousands of persons not all of whom will have identical interests and views. Recognizing that strict application of rules on attorney conduct that were designed with simpler litigation in mind might make the class-action device unworkable in many cases, the courts insist that a serious conflict be shown before they will take remedial or disciplinary action.

Id.

207. One exception is in bankruptcy cases, where conflicts of interest are governed in part by statute. See supra note 183.
courts in a quandary. Under a restrictive standard that appropriately applies to the lawyer's conduct at the outset, courts will be compelled to disqualify lawyers when it is unnecessary to do so to avert harm to the movant and where doing so will seriously harm the client who is denied the lawyer's services. Under a permissive standard that is well tailored to the disqualification decision, however, lawyers will be permitted to undertake representations when there is an unreasonably high risk that a client's interests will suffer as a consequence.

Courts might disqualify lawyers whenever they violate the conflict rules based on any of several rationales, including that: (1) disqualification should be employed to safeguard the integrity of judicial proceedings whenever a lawyer violates a conflict rule; (2) disqualification should be employed to sanction lawyers for violating conflict rules; (3) disqualification should serve as an equitable remedy for violations of either the conflict rules themselves or the common law rights underlying them; or (4) in employing disqualification to prevent the harms against which the conflict rules protect, courts should defer to the judgments underlying the conflict rules as to whether disqualification of counsel is necessary to avert such harm. This Article analyzes and rejects these rationales. In doing so, it explores various interconnected considerations relevant to how courts deal with litigators' conflicts. These include the legal significance and the content of the conflict rules, the importance of a judicial role in enforcing conflict rules, the appropriateness of employing disqualification as opposed to direct personal sanctions to punish violations of conflict rules, the use of disqualification as a remedy, and the utility of ad hoc judicial standards in place of conflict rules.

This Article advances a conception of the judicial role that would require deciding disqualification motions based on a legal standard apart from the conflict rules. First, courts should enforce the conflict rules by imposing personal sanctions on lawyers, rather than disqualifying them as a form of sanction. Disqualification should be employed exclusively as a remedy.

Second, as lawmakers, courts should develop a flexible, fact-intensive legal standard for deciding whether to disqualify a lawyer to remedy a conflict of interest. This standard, to be employed by courts on an ad hoc basis, should be less restrictive than the conflict rules and more closely tailored to the relevant harms that might be caused by the conflict of interest, on the one hand, and disqualification, on the other. This standard should also be applied in other contexts in which it is appropriate for a court, at the request of a party, to substitute its judgment for that underlying the conflict rules. When a court authorizes the representation to commence or continue based on this judicial standard, its decisions should have the legal effect of superseding more restrictive legal standards contained in the conflict rules or in
common law that might otherwise apply to the lawyer's ongoing representation.