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DEVELOPING THE JUDICIAL ROLE IN CONTROLLING LITIGATION CONFLICTS: RESPONSE TO GREEN

*Susan R. Martyn**

THE same day I finished reading Professor Bruce Green's article, I came across a quote from Emerson in his essay entitled "Illusions." Emerson's words aptly sum up my conscious response to Professor Green's ideas.

> From day to day the capital facts of human life are hidden from our eyes. Suddenly the mist rolls up, and reveals them, and we think how much good time is gone, that might have been saved had any hint of these things been shown.[1]

Professor Green has rolled up the mist surrounding disqualification litigation and has revealed some of the illusion and gap in our current doctrine. I am specifically intrigued with his idea that personal sanctions might redress conflicts in litigation, especially where courts have been reluctant to disqualify lawyers and disciplinary agencies have rarely responded. As Professor Green puts it:

> 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 interests. 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.[2]

This emphasis propels Professor Green's argument in the right direction. As a result, he correctly focuses on what happens to the client or clients in disqualification cases, rather than on what happens to the lawyers or their law firms. This also explains why Professor Green agrees with Professor Ted Schneyer, who sees conflict rules, unlike most other disciplinary rules, as primarily prophylactic prescriptions.[3]

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* Professor of Law, University of Toledo College of Law. My thanks to Lawrence Ponoroff, Bruce Green, and David Harris for offering help in thinking through the ideas in this Article.

1. Ralph W. Emerson, *Illusions*, *in* The Oxford Authors: Ralph Waldo Emerson 397, 403 (Richard Poirier ed., 1990).

2. Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 Fordham L. Rev. 71, 91 (1996) (footnote omitted).

3. *Id.* at 104 (citing Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. Tex. L. Rev. 639, 644 (1994)).

Professor Green also helps solve a partially unraveled enigma in Professor Wilkins's classification of conflicts issues. He notes that Wilkins labels conflicts matters as "agency problems," that is, situations in which lawyer conduct injures clients.[4] Green points out that, from the perspective of the opposing client or former client in litigation, a lawyer's conflict also can be labeled as an "externality problem," that is, one that involves lawyers and clients together imposing harm on third parties or on courts.[5]

Wilkins points out that disciplinary agencies typically respond best to agency problems, but poorly to externality problems.[6] If conflicts violations primarily raise agency issues, then disciplinary agencies should respond effectively. Increasingly, where clients are aware of conflicts, such as personal conflicts of a lawyer that affect her ability independently to represent the client, disciplinary agencies are stepping up their response.[7] In litigation, however, conflicts have been addressed primarily through disqualification motions to courts, not by disciplinary bodies. This may be because conflicts in litigation raise externality issues. As Professor Green points out, this is precisely the characterization some courts articulate.[8]

If Wilkins is correct that conflicts problems raise primarily agency issues, then it does not necessarily follow that Professor Green is correct when he suggests a new remedy—sanctions—to address agency issues that clients may not refer to disciplinary authorities. Instead, the answer may lie in providing greater incentives for clients to complain to disciplinary authorities. If, on the other hand, Professor Green is correct that externality problems are also created by conflicts matters in litigation, then perhaps he is also correct to suggest an additional judicial remedy apart from the disciplinary process.

My conscious praise for Professor Green's ideas, however, was soon undermined by my subconscious response to his article. The morning after I finished reading his essay, I awoke from a vivid dream, in which I played the role of a student in a law school class. The professor had just completed a lecture entitled: "How to Handle Client Conflicts of Interest in Litigation." I questioned the instructor: "But if we follow

4. *Id.* at 88 (citing David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 800, 824-30 (1992)).

5. *Id.*

6. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L. Rev. 800, 822-30 (1992).

7. *See, e.g.*, *In re* Wade, 814 P.2d 753 (Ariz. 1991) (finding suspension appropriate where attorney did not tell client of potential conflict of interest in purchase of client's property by corporation owned by attorney); *In re* Schaeffer, 824 S.W.2d 1 (Mo. 1992) (holding disbarment warranted by attorney's willful misappropriation of client funds); *In re* Conway, 301 N.W.2d 253 (Wis. 1981) (holding that litigation representation against a former client in the same matter warrants public reprimand and payment of costs of disciplinary proceeding).

8. Green, *supra* note 2, at 88-89.

your recommendations we would violate current well accepted conflicts or confidentiality rules."

The professor responded: "That is correct."

I continued: "And my client could sue me for legal malpractice."

Once again, the response was: "Correct."

Frustrated, I asked: "But you say we should treat clients like this despite these risks?"

Again, the answer: "Correct."

"Why?" I asked incredulously.

"Because you won't get caught."

Here lies the core of my subconscious fear. I worry that Professor Green's call for two separate legal standards, the violation of which would result in two separate remedies, disqualification and sanctions, will confuse most lawyers. At the same time, I fear that a few others, those I might label the "Holmesian Bad Lawyers," will rationally seize upon Professor Green's proposal as a means to avoid getting caught.

Let me explain. Consider how a rational self-maximizing law firm might react to the notion that two legal standards now govern conflicts of interest in litigation. First, they would note that Professor Green proposes no changes to existing conflicts rules designed to protect lawyer loyalty and client confidentiality. These rules are designed as a counterweight to lawyer self-interest; consequently, Professor Green expects that they should continue to be applied by the lawyer before he undertakes the representation.[9] This means that existing conflicts systems in law firms, to the extent they accurately reflect existing conflicts rules, should stay in place.

Second, the law firm would note that Professor Green advocates a change in conflicts doctrine when the conflict issue occurs later, before a court. Here, he finds the over protection of client interests built into the conflicts rules inappropriate. Because more than one client will be affected by the outcome, a new rule that uses remedies less cataclysmic than disqualification should seek to protect the interests of current clients. The rational law firm therefore realizes that disqualification becomes less likely should it forget its initial conflicts check or the disclosure to clients potentially affected by conflicts.

Essentially, Professor Green argues that a court should respond to a disqualification motion in a bifurcated manner. First, the court would consider "whether disqualifying the lawyer . . . is justified in order to remedy a past harm or avert a future one."[10] If a court grants the motion, it should be able to articulate some tangible harm to the current or former client making the motion. In addition, that harm must outweigh any harm to the adversary caused by the disqualification itself. Tangible harms to the moving client include misuse of client con-

9. *Id.* at 104-07.
10. *Id.* at 106.

fidences and inadequate representation. Tangible harms to the non-moving client include delay of litigation and the expense of retaining a new lawyer.[11] The disqualification motion should be granted only when the misuse of client confidences or actual inadequate representation occurs or will occur, and only when they would harm the moving client more than the delay and cost would hurt the non-moving client.[12]

Absent this excess of tangible harm to the client moving for disqualification, the court should deny the motion. It then should integrate a disciplinary hearing into the disqualification matter. The second issue the court considers should be whether the lawyer violated the conflict rules when she took on the representation.[13] If an attorney violates these rules, then a personal economic sanction becomes appropriate, even though the lawyer is allowed to continue the representation that violated the same rules. Green argues that personal sanctions are more direct penalties, more effective deterrents, and more cost-effective than disqualification motions.[14] Courts would impose "modest" sanctions the first time litigators violate conflicts rules and increase the amount for repeat offenders.[15]

Monetary or personal sanctions are designed to fill several gaps in current conflicts doctrine. In jurisdictions such as the Second Circuit, which tend to deny disqualification motions in cases where the rules are violated but no remedy is deemed necessary, personal sanctions offer an alternative means to redress rules violations that fall short of disqualification. In jurisdictions such as the Fifth Circuit, which tend to grant disqualification motions more readily, some disqualification motions will be replaced by motions for personal sanction. Sanctions might also become available for rules violations not currently redressable by disqualification.[16]

Professor Green argues that sanctions should follow both substantive violations of conflicts rules as well as what he describes as "procedural requirements," such as law firm screens.[17] The latter are best illustrated by court rules that allow law firms to wall off a lawyer tainted by a conflict from all participation in the case. The minority of jurisdictions allow screening provisions, intended as a means of avoiding disqualification by preventing actual harm, such as the use of confidential information, to the client.

11. *Id.* at 106-07.

12. Professor Nathan Crystal earlier reached a similar conclusion. *See* Nathan M. Crystal, *Disqualification of Counsel for Unrelated Matter Conflicts of Interest*, 4 Geo. J. Legal Ethics 273 (1990).

13. Green, *supra* note 2, at 109-10.

14. *Id.* at 93-94.

15. *Id.* at 97.

16. *Id.* at 95-97.

17. *Id.* at 117-19.

Professor Green rightly points out that these courts insufficiently protect clients against their own lawyer's conduct.[18] He therefore seems to reject the view that screens can serve as an adequate alternative remedy for conflicts violations. I agree with this analysis.[19] He analogizes the purpose of screens to the substantive rules intended to prevent conflicts. "Self-interested lawyers" he argues, "cannot be trusted to assess fairly the likely significance or insignificance of confidential client information . . . [or] the adequacy of screening procedures."[20] Absent client consent, therefore, violation of the substantive rules occurs even with a screen, and sanctions should follow, even when disqualification does not.

Professor Green uses the cases *IBM v. Levin Computer Corp.*[21] and, to a lesser extent, *In re Leslie Fay Cos.*[22] to illustrate his proposal. The Third Circuit in *Levin* disqualified Levin Computer's law firm because it violated the non-controversial rule that a lawyer cannot represent a client in a lawsuit against another existing client unless the latter will not be prejudiced, and both parties consent.[23] Professor Green does not quibble with this rule. He asks instead what should have occurred when, five years into the representation of Levin Computer, IBM moved to disqualify.[24] Green argues that if the court had found that the law firm's representation of both IBM and Levin Computer had not harmed IBM more than losing counsel after five years would hurt Levin, then the court should have denied the motion to disqualify. Why? Because "disqualification would serve no remedial function."[25]

Wait. Why did it take five years for either of these clients to discover the conflict? Obviously, the law firm neither raised it nor sought consent from both clients, as the rules require. Yet Green argues that "there is nothing harmful *per se* in representing one client against another [client]."[26] At the same time, he also recognizes that the obligation to obtain client consent is critically important because it allows the *client* to assess the extent to which the adverse representation will represent an act of disloyalty. It also allows the client to monitor the lawyer, or the screen, more closely should consent be granted.

It was precisely this opportunity that Levin Computer and IBM were deprived of by their law firm. Either the firm failed to complete

18. *See id.* at 119.
19. *See* Susan R. Martyn, *Visions of the Eternal Law Firm: The Future of Law Firm Screens*, 45 S.C. L. Rev. 937 (1994).
20. Green, *supra* note 2, at 122.
21. 579 F.2d 271 (3d Cir. 1978).
22. 175 B.R. 525 (Bankr. S.D.N.Y. 1994).
23. *Levin*, 579 F.2d at 274-75.
24. Green, *supra* note 2, at 84-85.
25. *Id.* at 85.
26. *Id.* at 105.

an adequate conflicts check or failed to inform the clients of the potential problem as the rules required. Yet Green contends that, applying his new bifurcated standard, "a court in a case like *Levin* almost certainly should allow [the law firm] to continue the representation."[27] This follows because, even if IBM could prove harm, which seems unlikely, this harm would fall far short of the cost to Levin Computer of having to obtain new counsel to replace five years of work.[28]

Professor Green is on to something here, but in searching for its meaning he may have opened the wrong door. By focusing on adequate client protections against lawyer resolution of conflicts, he correctly estimates the need for additional client remedies. Serving this need does not necessarily mean disparaging the disqualification remedy, however.

Consider once again how a rational lawyer might respond to this change in the law. First, she knows that the chance of disqualification will be no greater and probably will decline following the implementation of Green's bifurcated doctrine. Second, she knows that the violation of some conflicts rules, which currently result in disqualification, could result in personal sanctions instead. This rational lawyer also knows that the amount of personal sanctions will be a function of how often she or her law firm have been caught in the past. Beyond that, Professor Green gives her little guidance about what standard governs the amount of the sanction.

The lawyer or law firm therefore may see an opportunity: a chance to create new legal standards governing sanctions for conflicts. This law, he will argue, should nuance the conflicts rules so that only real client harm and bad lawyer motive is redressed. He will analogize, as Professor Green has taught him, both to Rule 11[29] and disciplinary sanctions,[30] where these factors reign supreme. In situations when clients are unable to prove harm or bad motive, the attorney would receive nominal sanctions, while clients who can show either would get more significant sanctions. How much more? That, he will argue, also should be determined by the harm caused by the firm's violation.

27. *Id.* at 113.

28. Professor Green agrees with Professor Crystal's conclusion regarding this case. Green, *supra* note 2, at 108 n.147; *see* Crystal, *supra* note 12, at 313 (stating disqualification in *Levin* was unwarranted since the risk of taint was low and the costs were high).

29. Federal Rule of Civil Procedure 11(c)(2) provides that sanctions "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2).

30. The Preface to the ABA Standards for Imposing Lawyer Sanctions indicates that the drafters consider three factors important: "the ethical duty and to whom it is owed," "the lawyer's mental state," and "the amount of injury caused by the lawyer's misconduct." ABA Standards for Imposing Lawyer Sanctions Preface B (1992).

This means that my dream-based fears may have come true. Lawyers in Professor Green's world will worry far less about disqualification and will have a window of legal opportunity to argue their way out of severe economic sanctions. The rational lawyer willing to calculate risk will have greater incentives to undertake proposed employment that violates conflicts rules. The same lawyer also may purposely avoid learning whether the rules are violated by ignoring conflicts checks in the law firm. Lawyers and law firms in general may take on new matters and more often ignore conflicts rules. Ultimately, as long as the client will generate large fees that will eventually outweigh the chance and amount of later economic sanctions, taking a case without a conflicts search may be more cost effective.

Currently, law firms that assess future fees where potential conflicts surface must weigh two main risks: the risk of being caught multiplied by the risk of disqualification. These rules provide a less than adequate remedy to the non-moving client and a semi-adequate remedy to the moving client. Green's alternative makes lawyers weigh a proposed client fee against the risk of being caught times two factors: a greatly reduced risk of disqualification plus an unknown but perhaps manageable risk of sanctions. This proposed change confuses conflicts law, dilutes its deterrence potential, and fails to provide an adequate remedy to both the moving and non-moving clients. Professor Green's insistence on tangible harm weakens his call for a new remedy, because it fails to take seriously both the opportunity lost by the client or clients to evaluate the potential conflict and the ability to monitor the potential conflict if consent is given.

A better answer is provided by *Leslie Fay*, a recent bankruptcy case.[31] Professor Green cites this case as an example of the kind of personal sanctions he envisions as an alternative to disqualification.[32] He fails, however, to give full meaning to both the reasoning and the result of an excellent decision. The reasoning of Judge Brozman in *Leslie Fay* helps to clarify Professor Green's problem with current disqualification law and also provides a more precise answer to his search for an alternative remedy. The result comes in the form of the old-fashioned remedy of fee forfeiture authorized in statutory form by the Bankruptcy Code.[33]

In *Leslie Fay*, the law firm of Weil, Gotshal & Manges ("Weil") faced a conflict similar to that ignored by the law firm of Carpenter, Bennett in *Levin*. Weil initially represented an internal audit committee designed to identify management participation in fraudulent entries in Leslie Fay's general ledger. Before these investigations were complete, Weil expanded its role to representing management in filing for bankruptcy reorganization. Applicable bankruptcy rules, like the

31. *In re* Leslie Fay Cos., 175 B.R. 525 (Bankr. S.D.N.Y. 1994).
32. Green, *supra* note 2, at 94 n.99.
33. *Leslie Fay*, 175 B.R. at 539 (citing 11 U.S.C. § 328 (1994)).

general conflicts rules applied in *Levin*, required the firm to disclose its relationships to any party in interest other than the debtor.[34] At the time of its approval as counsel to the debtor, Weil failed to disclose several of its relevant professional relationships, including: simultaneous representation of two members of the Audit Committee; Leslie Fay's independent auditor at the time of the fraud; and Leslie Fay's seventh largest creditor. When these facts later came to light, the court appointed an examiner to review the lack of disclosure and its impact on the veracity of the Audit Committee report. During the course of the investigation, a Weil partner admitted that his firm would not have sued Leslie Fay's independent auditor "even if the facts warranted it."[35]

The examiner found Weil's lack of disclosure to the court inexcusable.[36] The law firm therefore was not "disinterested" as required by the Bankruptcy Code.[37] In other words, there existed a "fair perception that because of multiple representations and client relationships, Weil Gotshal would be unable to act solely in the debtor's best interests."[38] Despite these conflicts, the examiner found that the debtor suffered no actual injury, because Weil had represented it in exemplary fashion. He therefore recommended disallowance of the law firm's fees rather than disqualification.

Judge Brozman generally accepted this recommendation, but enlarged both its remedy and its rationale. She began by identifying the source of the disclosure and disinterestedness requirement in the Bankruptcy Code as "concern with the proper attention to fiduciary obligation[s]."[39] She then concluded that the firm was not "disinterested" because some of its interests were "materially adverse" to those of the bankrupt estate.[40] After reviewing the relevant case law, she defined actual conflicts as those which affect the representation, and potential conflicts as those which create a reasonable perception of meaningful incentive to act contrary to the best interests of the estate. She pointed out that both types of conflicts trigger the need for disclosure. These are to be distinguished from "hypothetical or theoretical" conflicts, which raise the possibility of clashing interests but are unlikely to occur.[41]

34. Fed. R. Bankr. P. 2014 requires disclosure in professional employment to the bankruptcy court of "the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee." Fed. R. Bankr. P. 2014(a).

35. *Leslie Fay*, 175 B.R. at 535.

36. *Id.*

37. 11 U.S.C. § 327 (1994).

38. *Leslie Fay*, 175 B.R. at 531.

39. *Id.* at 532.

40. *Id.* at 531-32 (citing 11 U.S.C. § 101(14) (1994)).

41. *Id.* at 532.

These categories parallel those that Professor Green would have us impose on current conflicts rules. Actual conflicts, he argues, generate actual harm; all other conflicts call for sanction. He does not clearly distinguish, however, between potential conflicts, where the motive or opportunity to breach fiduciary duty exists, and hypothetical conflicts where little or no motive or opportunity are apparent. I agree with Judge Brozman that true hypothetical conflicts do not trigger disclosure obligations.[42] Potential conflicts, on the other hand, call for both disclosure and client consent. Professor Green agrees with this conclusion but fails to follow it through to its logical consequence. When there is neither disclosure by the law firm nor consent by the party to a potential conflict, a breach of fiduciary duty occurs; the person in the position to evaluate the impact of the potential conflict has been deprived of the opportunity or the right to control the subsequent representation.

Weil's conduct in *Leslie Fay* precisely illustrates this point. The law firm unilaterally breached its fiduciary duty by exclusively reserving the role of investigating potential targets of the Audit Committee, while simultaneously representing some of those interests in the same and other matters. This deprived the debtors and the court of an "unbiased investigation of the facts,"[43] requiring a subsequent, lengthy investigation by a new committee and counsel.[44] If Weil had disclosed the conflict when required to do so, the court would have appointed an independent examiner to complete the Audit Committee investigation, allowing Weil to remain as counsel to the debtor.[45]

Despite these breaches of fiduciary duty, Judge Brozman responded to the examiner's finding of no actual harm to the debtor, in addition to the "financial burdens to Leslie Fay of remaining in chapter 11" by finding that both outweighed the need to redress the undisclosed conflicts by complete disqualification.[46] She therefore permitted Weil to complete existing matters necessary for the reorganization. She disqualified the firm, however, from handling new matters and instructed it to refrain from charging any fees for providing background to new

42. Courts and commentators have referred to hypothetical conflicts as "the appearance of impropriety," borrowing the language of Canon 9 of the ABA Model Code of Professional Responsibility. Most agree that the standard should not be used in conflicts cases. *See, e.g.*, Crystal, *supra* note 12, at 286-90 (arguing that disqualification is only appropriate if there is a substantial risk of trial tainting because disqualification imposes costs on both the client and the court system); Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 Tex. L. Rev. 211, 227-28 (1982) (arguing that the appearance of impropriety standard impinges on legitimate client interests and is inconsistent with current practice).

43. *Leslie Fay*, 175 B.R. at 535.

44. *Id.* at 533-36.

45. *Id.* at 537-38.

46. *Id.* at 538.

counsel.[47] She further imposed an economic sanction on Weil, in the form of "disgorgement of the costs, direct and indirect, of both of the examiner's investigations and of the failure to disclose."[48] Weil retained its fees for the Audit Committee investigation because an investigation would have been necessary for Leslie Fay's reorganization.

Leslie Fay teaches that potential conflicts, even when they do not ripen into actual conflicts, nevertheless can cause actual harm. Though the court-appointed examiner eventually found that the Audit Committee's work was untainted by Weil's potential conflicts, the very real, and admitted, motive and opportunity to favor interests other than those of the debtor remained a viable possibility. The only way to discern whether these conflicts caused harm to Leslie Fay[49] was to duplicate the earlier investigation with independent counsel. This investigation cost a great deal of time and money, which the court found to constitute actual harm to the client.[50]

Professor Green too easily dismisses potential conflicts, such as those in *Leslie Fay* and *Levin*, as "intangible" harms, redressable by sanctions but not by disqualification.[51] *Leslie Fay* demonstrates that potential conflicts warrant both disqualification as well as sanctions. It also illustrates that intangible harm becomes tangible during the process of ascertaining whether any harm has been caused by the conflict. Finally, even if no tangible harm has occurred, *Leslie Fay* correctly placed the costs of that discovery on the lawyer or law firm who prevented the investigation, and who had control of the conflict in the first place.

In a more recent case, *In re Bonneville Pacific Corp.*,[52] a trustee, appointed after the first lawyer for the debtor was disqualified and denied compensation, recovered an additional $141 million for the debtor, part of which came from professionals and insiders formerly represented by the disqualified lawyer. When the lawyer sought his fees, the court reiterated its denial of all compensation, writing a extensive opinion that detailed the lawyer's fiduciary lapses. The court adopted a bright line rule: "professionals who violate their fundamental ethical obligations to the estates do not provide 'valuable services' to those same estates."[53]

Leslie Fay and *Bonneville Pacific* therefore return us to the original purpose of conflicts rules, and simultaneously provide another more

47. *Id.* at 539.
48. *Id.* These costs included at least $800,000 incurred by the examiner and his staff as well as "those incurred by the Committees in dealing with Weil's relationships and its disqualification or retention." *Id.*
49. An example of harm would be failing to identify one or more potentially liable parties.
50. *Leslie Fay*, 175 B.R. at 539.
51. Green, *supra* note 2, at 97.
52. 196 B.R. 868 (Bankr. D. Utah 1996).
53. *Id.* at 887-88.

flexible remedy—a goal that Professor Green applauds. The courts do not, however, create a bifurcated substantive conflicts standard to achieve this result. Instead, both judges recognize that the real concern behind conflicts rules is a client assessment of whether an actual or potential conflict will harm the interests of the client, whether tangible or intangible. This is why all conflicts rules require client notification of the conflict and why most allow for client consent to the conflict.

Empowered by these insights, we now can address the current gap in conflicts doctrine that Professor Green so conveniently calls to our attention. I suggest two changes to his proposal that I believe will better protect clients, deter lawyer misconduct, and clearly add an additional, readily available remedy.

First, I would hesitate to bifurcate the conflicts standard that courts apply. As *Leslie Fay* illustrates, conflicts rules derive from long standing fiduciary principles embodied in the law of agency. Further, distinguishing between actual and potential conflicts in terms of substantive outcome ignores the discovery cost of later investigation. Finally, lawyers and law firms are just beginning to come to grips with the meaning of these rules in a wide variety of cases. They are finally organizing their law firm conflicts checks to take these rules into account.[54] Inserting a new legal standard into the mix risks confusion at the very least. Unfortunately, a new standard also offers opportunity for obfuscation of important lawyer obligations. A unitary standard is essential because disclosure allows clients to retain control over lawyer conduct. Professor Green is correct in suggesting an additional remedy, as long as uniform conflicts rules continue to operate.

Second, I suggest reframing Professor Green's suggested standard for sanctions. Focusing on fee-forfeiture cases rather than Rule 11 or disciplinary sanctions more adequately addresses the issues faced by all parties.[55] When disqualification is called for by the conflicts rules, as in *Leslie Fay* and *Bonneville Pacific*, sanctions would automatically follow in the form of fee-forfeiture. The amount would be calculated by determining the sum necessary to restore both the moving and the non-moving client to the status quo.[56]

54. *See, e.g.*, Susan R. Martyn, *Implementing a Conflicts Control System*, 40 Prac. Law., Apr. 1994, at 15 (stating that lawyers and law firms need to establish, maintain, and continually update conflicts information systems).

55. After I completed this Response I belatedly discovered that Professor Crystal had previously made this analysis. *See* Crystal, *supra* note 12, at 311-12.

56. Federal Rule of Civil Procedure 11(c)(2) does allow a sanction to include "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Fed. R. Civ. P. 11(c)(2). To this extent, I agree with Professor Green's analogy to Rule 11 sanctions. I prefer, however, the rich texture of the fee-forfeiture cases over the rather vague sufficiency of deterrence standard under Rule 11.

There are several possible ways to tally this amount. In cases in which disclosure has not occurred or been adequate, at least one client has been deprived of an independent opportunity to assess the risk.[57] By definition, the law firm has breached a fiduciary duty to that client. It therefore seems fair that the firm or lawyer should bear the burden of minimizing the amount of the fee refund attributable to the breach. This can be accomplished by an expensive subsequent examination of the situation as occurred in *Leslie Fay*. It also could be approximated in a more efficient manner, by procedurally placing the costs of explanation on the law firm or lawyer that generated the need for the investigation. The court in *Bonneville Pacific* took this route by allowing the disqualified lawyer subsequent opportunity to prove that he "had indeed fulfilled his fiduciary responsibility to act in the best interest of this estate."[58] This can be accomplished by presuming disgorgement of the entire fee the firm has charged the clients. Absent proof of real benefit to a client from the firm's past services, the law firm forfeits all of the fee.

The financial incentive of proving this benefit should rest with the law firm for two reasons. First, agency law traditionally has provided for fee disgorgement as a remedy for breach of fiduciary duty.[59] Second, the law firm is the best risk avoider, because it has the best access to the facts that generate the need for disclosure in the first place.[60] It also has the best access to facts about the cost of subsequent investigation to prove the value of services that benefited the client.

Of course, in many cases like *Levin*, where the firm provided services over a long period of time, the firm may be able to show real benefit to one or more clients. Once IBM fired the law firm, for example, it was entitled to fee disgorgement. Similarly, once the court disqualified the firm, Levin Computer also became eligible for a full refund. If the law firm raised the issue, the court then could consider the benefit of its past services to either or both former clients. The lawyer's ability to prove benefit, however, should have been limited to the amount necessary to bring a new law firm to the same place in representing the client. If this amount is unclear, a court could escrow a large enough sum to pay the new firm until its preparation and services reach the same point in the pending proceedings. In a situation like *Leslie Fay*, where the services may be severable and time is of the essence, the court can deny the firm future fees and require disgorgement of past amounts attributable to the unreviewed and unresolved conflict. In a case like *Bonneville Pacific*, the court can wait, compare the results of new counsel without a conflict, and uphold its prior order.

57. *In re* Leslie Fay Cos., 175 B.R. 525, 534 (Bankr. S.D.N.Y. 1994).
58. *In re* Bonneville Pac. Corp., 196 B.R. 868, 870 (Bankr. D. Utah 1996).
59. Restatement (First) of Agency §§ 399(k), 456, 469 (1933).
60. *See* Guido Calabresi, The Costs of Accidents 26-28 (1970).

Casting an additional remedy in fee-forfeiture terms renews fiduciary incentives for lawyers and cautions them to heed conflicts rules. Even if we accept Professor Green's proposal for a bifurcated legal standard, the firm will know that undetected conflicts risk complete fee disgorgement. The opportunity to argue lack of bad motive or knowledge evaporates. The law returns to its primary goal of client protection. It also redresses harm to the non-moving client by granting the right to seek refund of past fees paid. The refund then can be used to employ new counsel. Extending this remedy both to the non-moving and moving client provides a needed remedy and eliminates the fear some courts share with Professor Green: that granting disqualification motions causes more harm than it avoids.

I am happy to report that this idea is a very old one. Learned Hand reminds us that it had become commonplace by the beginning of the seventeenth century for attorneys to refrain from representing conflicting interests. The usual consequence of violating this rule was debarment "from receiving any fee from either, no matter how successful his labors."[61] Justice Douglas, in commenting that "the incidence of a particular conflict of interest can seldom be measured with any degree of certainty," also placed the burden of establishing the value of the fee on the lawyer who breached the fiduciary duty.[62] Even when no damage is identified, a lawyer who labors under a conflict of interest should be denied compensation. Douglas believed that a lower standard would fail to support the legal duty of fiduciaries "at a level higher than that trodden by the crowd."[63]

Similarly, the Second Restatement of Agency provides for fee forfeiture in cases of "willful and deliberate breach of contract."[64] The comments explain that a serious violation of a duty of loyalty constitutes a willful and deliberate breach of contract.[65] Specifically, the rule applies to an agent who "acts . . . for the benefit of another in antagonism to or in competition with the principal . . . even though the agent believes that his conduct is for the benefit of the principal."[66] For example, a real estate broker who exhibits disloyalty by concealing material information from a seller forfeits the right to all compensation, even if no tangible harm has been demonstrated.[67]

These ideas are now more specifically applied to lawyers by section 49 of the Third Restatement of the Law Governing Lawyers:

Partial or Complete Forfeiture of Lawyer's Compensation

61. Silbiger v. Prudence Bonds Corp., 180 F.2d 917, 920 (2d Cir. 1950).
62. Woods v. City Nat'l Bank & Trust Co., 312 U.S. 262, 268 (1941).
63. *Id.* at 269 (citing Justice Cardozo in Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928)).
64. Restatement (Second) of Agency § 469 (1958).
65. *Id.* at cmt. b.
66. *Id.* at cmt. a.
67. Moore & Co. v. T-A-L-L Inc., 792 P.2d 794, 799 (Colo. 1990).

> A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. In determining whether and to what extent forfeiture is appropriate, relevant considerations include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.[68]

Comments to this section mirror those found in the Second Restatement of Agency section 469. For example, a violation of a client duty is deemed clear "if a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful."[69] The Reporter's notes provide citations to cases where this rule has been applied to conflicts violations. The norm is complete fee forfeiture from the point a law firm has failed to disclose its representation of the opposing party in other matters. For example, a lawyer who agreed to represent a current client's wife in a divorce was prevented from recovering any fee charged the husband after the lawyer took on the wife's case.[70] Similarly, in a recent California case, the court ordered complete fee forfeiture for failure to obtain the client's consent to a conflict.[71] On the other hand, it excluded from forfeiture fees paid during the period when no conflict existed.[72] Another court has excluded from fee forfeiture amounts for services rendered before the lawyer knew or should have known he would be a witness in the client's case.[73]

Fee forfeiture differs from the damage remedy of malpractice actions. In *Hendry v. Pelland*,[74] for example, a lawyer represented five family members who owned property in negotiating a complex sales transaction.[75] When the deal unraveled, the clients later settled an unjust enrichment suit brought by a land developer for 1.5 million based on the lawyer's advice.[76] Three of the clients then sued the lawyer and his law firm for professional negligence and breach of fiduciary duty. The law firm counterclaimed for its fee. The clients were unable to prove that the lawyer's incompetence or conflict of interest

68. Restatement (Third) of The Law Governing Lawyers § 49 (Tentative Draft 1996).

69. *Id.* at cmt. d.

70. Jeffry v. Pounds, 136 Cal. Rptr. 373 (Ct. App. 1977); *see also In re* Eastern Sugar Antitrust Litig., 697 F.2d 524 (3d Cir. 1982) (holding that law firm should have disclosed its merger discussions with opposing counsel to the district court); Rice v. Perl, 320 N.W.2d 407 (Minn. 1982) (denying compensation to law firm that represented opposing party's insurance adjuster).

71. Giannini, Chin & Valinoti v. Superior Court, 42 Cal. Rptr. 2d 394, 404-05 (Ct. App. 1995).

72. *Id.* at 407.

73. Hill v. Douglass, 271 So. 2d 1, 1 (Fla. 1972).

74. 73 F.3d 397 (D.C. Cir. 1996).

75. *Id.* at 399.

76. *Id.*

in representing all five family members caused compensatory damages.[77] Despite this lack of actual harm, however, the court found that the lawyer's failure to disclose possible conflicting interests between the parties justified a finding of breach of the fiduciary duty of loyalty.[78] Citing cases relied on by section 49 of the Third Restatement of the Law Governing Lawyers, the court held that clients need not prove proximate causation and injury if they seek only fee forfeiture.[79]

This differing treatment of malpractice (tort) and breach of fiduciary duty (agency) claims made sense to the court because each remedy serves a different purpose. Compensatory damage in tort actions "compensates clients for a harm they have suffered."[80] Fee forfeiture, on the other hand, serves the purpose of deterring attorney misconduct, "a goal worth furthering regardless of whether a particular client has been harmed."[81] It also reflects "the decreased value of the representation itself," and "fulfills a long-standing and fundamental principle of equity—that fiduciaries should not profit from their disloyalty."[82]

The *Hendry* court next addressed, as the *Leslie Fay* and *Bonneville Pacific* courts did, the extent of the fee forfeiture.[83] It left resolution of that issue to a new trial, but held that the client's proof of the lawyer's breach of fiduciary duty would provide a defense to the lawyer's counterclaim for fees.[84] Presumably, this leaves the lawyer free to bear the burden of establishing the value of the service rendered despite the breach.

Similar outcomes have occurred in cases involving confidentiality conflicts generated by former client representation. In one recent case, the New Jersey Supreme Court refused to disqualify a law firm even though it had clearly violated Model Rule of Professional Conduct 1.9.[85] Noting that the disqualification motion reached them on the eve of trial and worried that a new lawyer might not be able to master the complex technical details of the case, the court refused to harm the current client by disqualifying his law firm.[86] The court conditioned future representation, however, on the forfeiture of all future fees. This was justified because of the failure of the law firm "to have

77. *Id.* at 401-02.

78. *Id.* at 402.

79. *Id.* (citing Frank v. Bloom, 634 F.2d 1245, 1257-58 (10th Cir. 1980); Gilchrist v. Perl, 387 N.W.2d 412, 415 (Minn. 1986)).

80. *Id.*

81. *Id.* at 402.

82. *Id.*

83. *Id.* at 402-03.

84. *Id.* at 403.

85. *See* Dewey v. R.J. Reynolds Tobacco Co., 536 A.2d 243, 250 (N.J. 1988).

86. *Id.* at 252.

addressed the obvious ethical implications of their association that has created the awkward situation now confronting us."[87]

Other courts have shown similar nuance in applying fee forfeiture to conflicts cases. In another recent case, the Oregon Supreme Court approved a reduction of attorney's fees in a probate matter.[88] The court documented no violation of a disciplinary rule and disapproved of "direct sanction[s]" imposed by trial courts even when disciplinary rules are violated by lawyers.[89] Citing the Second Restatement of Trusts section 243, which lists factors to be considered in assessing the extent of fee forfeiture by a trustee who breaches a duty of loyalty, the court upheld a reduction in the lawyer's fee that depleted the corpus of the estate.[90]

The Minnesota Supreme Court has traveled the farthest in addressing the subtle, "dual nature of the fee forfeiture remedy."[91] On the one hand, disgorging fees serves a remedial, reparative, purpose by aiming "to make amends to the client" and putting right the fiduciary relationship tainted by the conflict.[92] On the other hand, fee forfeiture also serves a quasi-punitive purpose insofar as it deters breaches of fiduciary duty. In this sense, the remedy is similar to nominal damages for breach of an "absolute right."[93] Because total fee forfeiture "teaches a lesson,"[94] insuring against a lawyer's personal forfeiture has been held contrary to public policy. At the same time, policy exclusions for fraudulent acts and punitive damages do not apply to fee forfeiture for which the law firm is vicariously liable.[95] Given this midpoint between reparation and admonition, the court determined the amount of the fee forfeiture by referring to the factors set out in the state's punitive damage statute.[96]

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87. *Id.*
88. Kidney Ass'n v. Ferguson, 843 P.2d 442, 449 (Or. 1992) (en banc).
89. *Id.*
90. *Id.* The lawyer in *Ferguson* probably violated DR 5-101(A) by not disclosing the extent of his personal interest in the fee charged the estate. The court correctly rejected a DR 5-105 analysis, because the interest of the personal representative and the beneficiary, who sought full fee disgorgement, coincided. *Id.*
91. Gilchrist v. Perl, 387 N.W.2d 412, 416 (Minn. 1986).
92. *Id.*
93. *Id.* (citing Perl v. St. Paul Fire & Marine Ins. Co., 345 N.W.2d 209, 212 (Minn. 1984)).
94. *Id.* at 417.
95. *Id.* at 415.
96. *Id.* at 417 (relying on Minn. Stat. § 549.20(3) (1984)). Minnesota Statute § 549.20 reads in relevant part:

> Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of

These cases make sense. They appropriately address the lawyer's failure to disclose a conflict and prevent harm to clients. Although these same goals might be sought under the rubric of sanctions, with analogies to disciplinary or Rule 11 standards, I agree with courts that prefer the proportionality and appropriateness of fee forfeiture. Explicitly applying the forfeiture remedy to conflicts violations may be especially important in state trial courts, where judges may be less accustomed to sanctions or disciplinary matters. Like the bankruptcy courts in *Leslie Fay* and *Bonneville Pacific*, the state trial courts will often have statutory or common law authority over attorneys fees. Probate matters, such as the one in *Kidney Association*, and class actions, such as the underlying action in *Gilchrist*, require judicial supervision of fees. Fee issues can also arise in the context of a malpractice suit by a disgruntled client, as in *Hendry*, or in a separate suit for payment or refund of fees, as in *Jeffry*. The judges in these cases felt quite at ease recognizing fee forfeiture for breach of fiduciary duty as an additional remedy in a conflicts case.[97]

Cases such as *Dewey*, *Leslie Fay*, and *Bonneville Pacific* illustrate that the judiciary easily can renew this historically recognized remedy in disqualification cases as well. Serious harm from conflicts violations can be redressed through disciplinary mechanisms, disqualification motions, and malpractice suits. At the same time, the litigants' major problem, the cost of counsel, also can be addressed by courts themselves. I thank Professor Green for bringing this insight to our attention. He has clarified my belief that it is time to dust off the fee forfeiture remedy. He also has furthered Professor Wilkins's call for multiple remedies when they reinforce lawyer compliance and trust.

> the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Minn. Stat. Ann. § 549.20 (West 1988).

97. *See, e.g.*, Huffer v. Cicero, 667 N.E.2d 1031 65 (Ohio Ct. App. 1995) (holding criminal defense lawyer who failed to convey plea agreement to his client liable for legal malpractice and ordered him to disgorge entire $16,000 attorney's fee).