CHAPTER VI
LOYALTY, INDEPENDENT JUDGMENT AND CONFLICT OF INTEREST

I. INTRODUCTION

The concept of loyalty to the client pervades every set of rules governing lawyer behavior and is an essential element of the attorney/client relationship. To promote such loyalty, the Canons of Ethics focused on avoiding "conflicts of interest." That term was difficult to define, however, and the Code focused on the attorney's duty to exercise independent professional judgment on behalf of the client. The rules under the Code suggest that by avoiding situations in which the attorney's independent professional judgment is likely to be impaired, the obligation of loyalty to the client can be achieved. The Model Rules have returned to the concept of conflict of interest, but most of the essence of the rules has not changed. See generally Rule 1.7, Comment ¶1.

Issues of conflict of interest and exercise of independent professional judgment arise in many contexts at all levels of practice. Conflicts can arise in the advising and counseling stage as well as in litigation; and in choosing clients, lawyers and law firms must keep a watchful eye towards current or future conflicts. Challenges to an attorney's acceptance or continuation of employment can arise in various forums as well. In addition to the potentiality of disciplinary proceedings, issues involving conflicts of interest and independent professional judgment arise in attorney disqualification motions, malpractice cases and in appeal of criminal convictions alleging ineffective assistance of counsel.

Should the setting in which the question arises affect the substantive standards used to address whether a conflict exists and whether it is permissible? Should the Code or Model Rules be used as the relevant “law” in disqualification or malpractice cases involving conflicts? Why or why not? Keep these questions in mind as you read the following materials.

What kind of interests can impair an attorney's independent professional judgment? What are the sources of conflict, both potential and real? These materials will consider the various conflicts that may affect a lawyer's independent judgment and the attempts that have been made to balance the various interests at stake. Read M.R. 1.7, 1.8 and 1.10.

II. LAWYER'S OWN INTEREST

The Model Rules address issues of the lawyer’s own interests in Rule 1.7(a)(2) and 1.8. The Missouri Supreme Court has recognized the "inherent danger of becoming personally involved with the affairs of clients, self dealing with clients, and of 'taking a piece of the action.'" *In re Lowther,* 611 S.W.2d 1, 2 (Mo. banc 1981). The Court there stated: "The attorney, with his superior knowledge and education, can pursue this course only at his peril. It is an area wrought with pitfalls and traps and the Court is without choice other than to hold the attorney to the highest of standards under such circumstances." *Id.*

A. Personal and Financial Interests

1. Model Rule 1.7(a)(2) prohibits representation where the lawyer's interest may materially limit the lawyer's representation of a client. The Restatement of the Law Governing Lawyers similarly prohibits undertaking or continuing representation if "there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests. RESTATEMENT, § 125 (2000). Interests that have been found to fall within the rule include investing a client's money in property owned by the attorney or the attorney's relative and loans or other arrangements between clients and the lawyer or members of the lawyer's family. See CC 121-124.

Fee arrangements with clients can also lead to problems under this Rule. Special care is necessary where a lawyer takes an interest in a client's property as part of the fee. *See, e.g., In re Snyder,* 35 S.W.3d 380-384-85 (Mo. banc 2001) (lawyer suspended in part for improperly handling liens he took on client's property as part of his fee arrangement).

2. When does a lawyer's personal views give rise to conflicts under this section? When does a lawyer's representation of a client limit what the lawyer can say or do outside of the contours of the attorney-client relationship? See RESTATEMENT, § 125, Comment e. Although a lawyer's representation of a client is not an endorsement of the client or its views, M.R. 1.2(b), there may be a point at which a lawyer's own views and the needs or demands of the client come into real conflict. At what point is consent required? At what point, if any, must or may the attorney withdraw? See M.R. 1.16(a)(1) and (b)(4).

3. What about sexual interest in a client? Can unwanted sexual advances create a conflict of interest? The Missouri Supreme Court said yes in *In re Howard*, 912 S.W.2d 61 (Mo. banc 1995), where the court stated:

> The Rules are clear: "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client." Comment, Rule. 1.7. Howard's unwanted sexual advances undermined the client's faith in his service and interfered with his independent professional judgment. Both the complainants testified that rejecting Howard's advances adversely affected his representation. In sum, Howard attempted to force clients to prostitute themselves to secure legal services, and thus violated Rules 1.7(b) and 2.1.

See also ABA/BNA LAWYER'S MANUAL, 51:408-410; ABA Formal Op. 92-364 (1992). The 2002 Model Rules added M.R. 1.8(j), which prohibits such relations unless a consensual sexual relationship existed before the attorney-client relationship commenced. See also ANNOTATED MODEL RULES, 129.

4. What about the lawyer who is seeking employment with a firm representing adverse to a current client? Do negotiations with that firm create a conflict of interest? The ABA Commission on Ethics and Professional Responsibility concluded that such negotiation could implicate Rule 1.7(b) [now (a)(2)] where there is sufficient likelihood that a conflict will eventuate and could materially interfere with the lawyer's independent professional judgment. Thus,

> a lawyer who has an active and material role in representing a client in litigation must consult with and obtain the consent of that client, ordinarily before he participates in a substantive discussion of his experience, clients, or business potential or the terms of an association with an opposing firm.

ABA Formal Op. 94-400. See also RESTATEMENT, § 127, Comment d.

5. The Model Rules are more specific than the Code with regard to certain potential conflicts. For example, M.R. 1.8(c) prevents a lawyer from soliciting a substantial gift from a client or preparing an instrument giving the lawyer or a person closely related to the lawyer a substantial gift unless the client is related to the donee. See also RESTATEMENT, § 208.

B. Business Transactions With Clients

Model Rule 1.8(a) prevents an attorney from entering into a business transaction with a client or acquiring a pecuniary interest adverse to a client unless the transaction is fair and reasonable, the terms are understandably disclosed in writing to the client, the client is given a reasonable opportunity to seek advice from independent counsel, and the client consents in writing. The Restatement prohibits such business or financial transactions except a standard commercial transaction in which the lawyer does not render legal services, unless (1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement, (2) the terms and circumstances of the transaction are fair and reasonable to the client, and (3) the client consents after being encouraged to seek, and given a reasonable opportunity to obtain, independent legal advice. RESTATEMENT, § 128.

In Missouri, D.R. 5-104(A), the predecessor to Rule 1.8(a), was utilized to discipline an attorney for making a sale of unwanted property to a client, *In re Mills*, 539 S.W.2d 447 (Mo. banc 1976) and for borrowing money from an incompetent client and selling property of the client to the attorney's wife. *In re Miller*, 568 S.W.2d 246 (Mo. banc 1978). In both instances, it was no defense that the transactions were consummated at fair market value and there was neither profit to the attorney nor loss to the client. Further, the court has indicated that dealings between lawyer and client are presumptively invalid, and the attorney bears the burden of demonstrating that the transaction was fair and full disclosure made. *Miller*, 568 S.W.2d at 205-208. This provision (1.8[a]) also applies where a lawyer takes a legal or equitable interest in the client's property as part of a fee. As noted, such transactions are "subject to the heightened scrutiny and notice requirements of Rule 4-1.8(a)." *In re Snyder*, 35 S.W.3d 380, 383 (2000).

Rule 1.8(a) does not apply unless there is an actual attorney-client relationship between the lawyer and the client at the time the business transaction is entered into. Thus, where an attorney borrowed a substantial sum from a former client, and gave no indication he was giving legal advice to the former client regarding the current transaction, a finding of violation of Rule 1.8(a) was not proper. *In re Disney*, 922 S.W.2d 12, 14-15 (Mo. banc 1996). Discipline is appropriate where the lawyer fails to disclose his interest in a transaction with clients, since "scrupulous fidelity to the cause of the client" is required and "precludes the attorney from any personal advantage from the abuse of that reposed confidence." *In re Weier,* 994 S.W.2d 554, 558 (Mo. banc 1999).

M.R. 1.8(d) prohibits an attorney from acquiring publication rights in a client's case prior to the conclusion of the matter. Note that there is no consent provision relative to this prohibition. See also ABA Standards, The Defense Function, Standard 4-3.4. Why? What are the risks of such transactions? Are they sufficient to override the client's desire for such representation? And why would a client agree to such conflicted representation in any event? Might a criminal defendant have a constitutional right to counsel of choice that overrides this provision? See *Maxwell v. Superior Court*, 639 P.2d 248 (Cal. 1982). See generally ANNOTATED RULES, at 144.

C. A Piece of the Action

Pursuant to M.R. 1.8(i), a lawyer may not acquire a proprietary interest in a client's cause of action. Exceptions to this rule allow an attorney to acquire a lien to collect a fee and to charge a contingent fee. Note that this rule applies only to litigation, and not to business transactions or other non-litigation matters.

M.R. 1.8(e) addresses financial assistance to clients. The Rule prohibits an attorney from advancing or guaranteeing financial assistance to a client unless the items involve costs of litigation. Such costs and expenses may be advanced with repayment contingent on the outcome of the case, and, if the client is indigent, the attorney may pay costs and litigation expenses for the client. Expenses beyond these, however, are still prohibited.

Should an attorney be allowed to advance living expenses to an impoverished client who is unable to work due to an accident? Why or why not? What if the client's lack of funds would cause the client to accept a settlement the attorney considers grossly inadequate, and such advancement of funds would therefore prevent an injustice? What justifications for the rule outweigh these seemingly compelling considerations? For a discussion of the policies behind these rules, see Michael R. Koval, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 Geo. J. Leg. Eth. 1117 (1994); see also ANNOTATED RULES, at 145-146.

III. OTHER CLIENTS

The Missouri Supreme Court has characterized the "basic law of conflict of interest" as follows:

> An attorney has a duty of loyalty to his client. A conflict of interest is "any substantial risk that a lawyer's representation of a client would be materially and adversely affected because of the lawyer's countervailing interests or duties." Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* sec. 10.7 (3d ed. Supp.2004). Consequently, attorneys have a duty to avoid representation of clients when that representation may be affected due to the attorney's relationship to other parties. This is because, "when a lawyer is laboring under this kind of conflict of interest, the conflict in effect forecloses alternatives that would otherwise be available to the client." *Id.* at sec. 11.8 (quoting Model Rules of Prof'l Conduct Rule 1.7(a)(2) cmt. 8 (2002)).

State ex rel. Union Planters Bank, N.A. v. Kendrick, 142 S.W.3d 729, 736 (Mo. banc 2004).

A. Current Clients

M.R. 1.7(a) addresses simultaneous representation of multiple clients. As a general rule, such representation is permitted where the clients give informed consent confirmed in writing (which includes full disclosure of risks and benefits) and where the attorney reasonably believes the interests of both clients can be adequately served by joint representation.

Issues relating to conflicts among current clients can arise in a variety of contexts. The Restatement has developed separate sections dealing with the different types of issues. See, RESTATEMENT, § 128-131.

1. Litigation Conflicts

Initially, current client conflicts can arise in litigation. These conflicts can occur in representing opposing parties or co-parties.

a) Representing Opposing Parties

Representation of parties in opposition to each other implicates loyalty concerns as well as potential misuse of confidential information. Thus, representing opposing parties in the same litigation is clearly prohibited, even when different lawyers from the same firm work on the opposite sides. See M.R. 1.7(b)(3), 1.10(a). The same rule applies when one attorney in a firm represents a defendant in a civil case arising out of an assault and another attorney in the firm works as a part-time prosecutor in the office prosecuting the defendant for criminal assault arising out of the same incident. The Missouri Supreme Court held that the entire prosecutor's office had to be disqualified on these facts. *State v. Ross*, 829 S.W.2d 948 (Mo. banc 1992).

But what about representing a client in one case, and opposing that client in a wholly unrelated matter? Would that violate Rule 1.7 or require disqualification? Are the standards for discipline and disqualification the same? Should they be?

Consider the following:

In re DRESSER INDUSTRIES, INC.
972 F.2d 540 (5th Cir. 1992)

E. GRADY JOLLY, Circuit Judge:

> In this petition for a writ of mandamus, we determine whether a law firm may sue its own client, which it concurrently represents in other matters. In a word, no; and most certainly not here, where the motivation appears only to be the law firm's self-interest.[1] We therefore grant the writ, directing the district judge to disqualify counsel.

1 "Drill Bits was going to be a case that was going to be active, big, protracted, the first price fixing case that's come along in Houston in a long time. I had made somewhat of a reputation in that area, and I guess it's kind of painful not to be able to play in the game anymore, . . ." Deposition of Stephen D. Susman.

The material facts are undisputed. This petition arises from a consolidated class action antitrust suit brought against manufacturers of oil well drill bits. Red Eagle Resources et al. v. Baker Hughes ("Drill Bits ").

Dresser Industries, Inc., ("Dresser") is now a defendant in Drill Bits, charged--by its own lawyers--with conspiring to fix the prices of drill bits and with fraudulently concealing its conduct. Stephen D. Susman, with his firm, Susman Godfrey, is lead counsel for the plaintiff's committee. As lead counsel, Susman signed the amended complaint that levied these charges against Dresser, his firm's own client.

Susman Godfrey concurrently represents Dresser in two pending lawsuits. CPS International, Inc. v. Dresser Industries, Inc., No. H-85-653 (S.D.Tex.) ("CPS "), is the third suit brought by CPS International, a company that claims Dresser forced it out of the compressor market in Saudi Arabia. CPS International initially sued Dresser for antitrust violations and tortious interference with a contract. The antitrust claim has been dismissed, but the tort claim is scheduled for trial. Susman Godfrey has represented Dresser throughout these actions, which commenced in 1985. During its defense of Dresser, Susman Godfrey lawyers have had relatively unfettered access to data concerning Dresser's management, organization, finances, and accounting practices. Susman Godfrey's lawyers have engaged in privileged communications with Dresser's in-house counsel and officers in choosing antitrust defenses and other litigation strategies. Susman Godfrey has also, since 1990, represented Dresser in Cullen Center, Inc., et al. v. W.R. Gray Co., et al., a case involving asbestos in a Dresser building, which is now set for trial in Texas state court.

On October 24 and November 24, 1991, Susman Godfrey lawyers wrote Dresser informing it that Stephen Susman chaired the plaintiffs' committee in Drill Bits, that Dresser might be made a Drill Bits defendant, and that, if Dresser replaced Susman Godfrey, the firm would assist in the transition to new counsel. Dresser chose not to dismiss Susman Godfrey in CPS and Cullen Center.

Dresser was joined as a defendant in Drill Bits on December 2, 1991. Dresser moved to disqualify Susman as plaintiffs' counsel on December 13. Both Dresser and Susman Godfrey submitted affidavits and depositions to the district court, which, after a hearing, issued a detailed opinion denying the motion.

[The District Court, in ruling on the motion, looked to the Texas Disciplinary Rules.]

The district court described the Drill Bits complaint as a civil antitrust case, thus somewhat softening Dresser's description of it as an action for fraud or criminal conduct. The court held, "as a matter of law, that there exists no relationship, legal or factual, between the Cullen Center case and the Drill Bits litigation," and that no similarity between Drill Bits and the CPS suits was material. The court concluded that "Godfrey's representation of the plaintiffs in the Drill Bits litigation does not reasonably appear to be or become adversely limited by Susman Godfrey's responsibilities to Dresser in the CPS and Cullen Center cases," and accordingly denied the motion to disqualify. . . .

[The court determined that mandamus was appropriate to review the denial of a motion to disqualify counsel where the “petitioner can show its right to the writ is clear and undisputable.” It then focused on what rules it should apply in determining whether disqualification was required. It concluded that it must “consider the motion governed by the ethical rules announced by the national profession in the light of the

public interest and the litigants' rights." It then continued:]

Our most far-reaching application of the national standards of attorney conduct to an attorney's obligation to avoid conflicts of interest is *Woods v. Covington County Bank* . . . . We held in *Woods* that standards such as the ABA canons are useful guides but are not controlling in adjudicating such motions. The considerations we relied upon in *Woods* were whether a conflict has (1) the appearance of impropriety in general, or (2) a possibility that a specific impropriety will occur, and (3) the likelihood of public suspicion from the impropriety outweighs any social interests which will be served by the lawyer's continued participation in the case. . . .

In *Woods* [and subsequent cases], we applied national norms of attorney conduct to a conflict arising after the attorney's prior representation had been concluded. Now, however, we are confronted with our first case arising out of concurrent representation, in which the attorney sues a client whom he represents on another pending matter. We thus consider the problem of concurrent representation under our framework in *Woods* as tailored to apply to the facts arising from concurrent representation.

We turn, then, to the current national standards of legal ethics to first consider whether this dual representation amounts to impropriety. Neither the ABA Model Rules of Professional Conduct [1.7] nor the Code of Professional Responsibility allows an attorney to bring a suit against a client without its consent.[2] This position is also taken by the American Law Institute in its drafts of the Restatement of the Law Governing Lawyers.[3]

Unquestionably, the national standards of attorney conduct forbid a lawyer from bringing a suit against a current client without the consent of both clients. Susman's conduct violates all of these standards--unless excused or justified under exceptional circumstances not present here.

Exceptional circumstances may sometimes mean that what is ordinarily a clear impropriety will not, always and inevitably, determine a conflicts case. Within the framework we announced in *Woods*, Susman, for example, might have been able to continue his dual representation if he could have shown some social interest to be served by his representation that would outweigh the public perception of his impropriety.[4] Susman, however, can present no such reason. There is no suggestion

---

2 The agreement between the Code and Rules on this point is made obvious in the practice guide of the ABA/BNA Lawyer's Manual On Professional Conduct, which discusses the obligations of a lawyer under both the ABA rules and code. The practice guide describes a bar to a nonconsensual representation adverse to the client: A lawyer may not represent one client whose interests are adverse to those of another current client of the lawyer's even if the two representations are unrelated, unless the clients consent and the lawyer believes he or she is able to represent each client without adversely affecting the other. Courts and ethics panels generally take a broad view of this restriction, and a specific adverse effect probably will not have to be shown. All that need be present is that one lawyer is or firm is representing two clients, even in unrelated matters, with potentially conflicting interests. ABA/BNA Lawyer's Manual, 51:101 (1990 Supp.).

3 See RESTATEMENT, §127, Comment e (1996) for the current version.]

4 [The Texas rule would allow some concurrent adverse representation, for example where] necessary either to prevent a large company, such as Dresser, from monopolizing the lawyers of an area or to assure that certain classes of unpopular clients receive representation. Although we do not now reach the matter, our consideration of social benefit to offset the appearance of impropriety might allow such a representation if the balance clearly and unequivocally favored allowing such representation to further the ends of justice. We believe, moreover, that the Texas

that other lawyers could not ably perform his offices for the plaintiffs, nor is there any basis for a suggestion of any societal or professional interest to be served. This fact suggests a rule of thumb for use in future motions for disqualification based on concurrent representation: However a lawyer's motives may be clothed, if the sole reason for suing his own client is the lawyer's self-interest, disqualification should be granted.[5]

V

We find, therefore, that Dresser's right to the grant of its motion to disqualify counsel is clear and indisputable. We further find that the district court clearly and indisputably abused its discretion in failing to grant the motion. We have thus granted the petition and have issued the writ of mandamus, directing the [District Court] to enter an order disqualifying Stephen D. Susman and Susman Godfrey from continuing as counsel to the plaintiffs in Red Eagle Resources et al. v. Baker Hughes.

****

1. Is this result fair to the attorneys? Should they be forced to turn down important and lucrative cases simply because someone else hired them first? Might not a strict approach cause firms to shy away from representing small clients with relatively small matters in complex areas for fear that doing so might affect future representation of an existing client or the ability to attract large clients in the future?

2. Remember that, for purposes of disqualification (and discipline under Rule 1.7), courts treat an entire law firm as one unit. Model Rule 1.10(a) provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . . ." This prohibition may prohibit representation where a lawyer in one office of a "mega-firm" on one coast represents a client, and another attorney in the same firm, a continent away on the other coast (who the first attorney has never even heard of or met), sues that client for something totally unrelated. Should this make a difference to applicability of the rule? Or is this merely a price a firm pays for the benefits of large-scale, multi-office practice? What about representation of a corporation and representation by the same firm adverse to an affiliated corporation, such as a subsidiary? Are the concerns the same? See ABA Formal Op, 95-390. What if the conflict is caused by merger of companies? Of law firms? Should the resolution be the same?

3. Can a law firm resolve this problem by obtaining in advance consent to future

---

rules are drawn to allow concurrent representation as the exception and not the rule. Even if the Texas rules had applied, no special circumstances being present here, Texas rule 1.06's prohibition of representation of potentially adverse interests would have barred the representation.

5 This result accords with the approach of other circuits, which have similarly found concurrent representation to be grossly disfavored. See, e.g., International Business Machines Corp. v. Levin, 579 F.2d 271 (3d Cir.1978) (antitrust plaintiff firm disqualified from suing company for which it was on retainer); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir.1976) (antitrust plaintiff counsel's representation while firm was counsel in an unrelated antitrust case was prima facie improper); EEOC v. Orson H. Gygi Co., Inc., 749 F.2d 620 (10th Cir.1984) (attorney disqualified from defending employer in sex discrimination suit by employee represented in state annulment proceeding).

adverse representation? Should this be permitted? See Comment ¶22 to Rule 1.7. See also Restatement, § 202, Comment d, which permits waiver of future conflicts with informed consent in most circumstances.

4. Why can't the firm just withdraw from client #1 and turn the situation into a "former client, subsequent representation" case? Where former clients are involved, no disqualification is required unless the matters are substantially related. (See *infra*). In *Dresser*, the client refused to discharge the attorney. Could the firm withdraw in any event? See M.R. 1.16. Would this resolve the problem? Most courts say no. They are unwilling to "allow a law firm to drop a client 'like a hot potato' in order to shift resolution of the conflict question from Rule 1.7 to Rule 1.9." ABA/BNA LAWYERS MANUAL, ' 51:213. The result is to the contrary where the original client agrees to the firm's withdrawal. In such a situation, the concerns of "unceremoniously dumping" the client are not involved. *In re Sandahl*, 980 F.2d 1118, 1121 (7th Cir. 1992).

b) Representing Co-Parties

Representation of co-plaintiffs or co-defendants is not prohibited, but requires consent and a high degree of caution. Initially, if undertaking joint representation, it is necessary to insure that, although nominally aligned on the same side, the parties are not really adverse. If the representation is truly adverse, the prohibition against dual representation applies. See RESTATEMENT, § 128, Comment d. See also Wolfram, MODERN LEGAL ETHICS (West 1986) at ¶ 7.3.3.

If the parties appear to have similar interests, representation may be undertaken where the clients consent and the lawyer believes he or she can provide competent and adequate representation to all clients. Rule 1.7(a) and (b); see RESTATEMENT § 128, especially Comment d. Care must be taken to watch for signs of actual conflict, and further consents or withdrawal may be required if such conflicts arise. Lawyers must also make clear to jointly represented clients the scope of confidentiality as between co-clients and the limits that joint representation entails. See Comment, ¶29-31.

Why would multiple parties desire the same attorney? What risks does having one attorney for several clients in the same case pose? In what circumstances are the risks likely to outweigh the benefits? What precautions must/should be taken to avoid problems when representing multiple parties? Or should attorneys avoid such representation altogether? Note that joint representation is frequently discouraged and many attorneys have strict policies against it.

Are there special problems or issues in some areas of practice? For example, what about representation of multiple co-defendants in a criminal case? While joint representation is permissible where the interests of the co-defendants are the same, *Holloway v. Arkansas*, 435 U.S. 475 (1978), once these interests begin to diverge, a problem arises under Rule 1.7. See ABA Informal Opinion 1418 (1978). In order to fully protect a defendant's Sixth Amendment right to counsel, an attorney should notify the court immediately when a real conflict becomes apparent. Compare *Holloway* with *Cuyler v. Sullivan*, 466 U.S. 920 (1980). See ABA Standards, The Defense Function, Standard 4-3.5(b). Continuing such employment without clear consent after full disclosure may lead to discipline as well as a finding of ineffective assistance of counsel. As a result, most Public Defender offices will not engage in joint representation of multiple co-defendants. *See generally* RESTATEMENT, § 129.

Difficult issues also arise in matrimonial cases. In Missouri, an attorney is not permitted to represent both husband and wife in a dissolution proceeding even where it is uncontested and both parties consent. See Missouri Formal Op. 109 (1974). This view is consistent with the standards of the Americans Academy of Matrimonial Lawyers. See Standard 2-20, 9 J. AMER. ACAD. OF MATRIM. LAWYERS (1992). Many states permit such representation where there is informed consent. Which approach is better. Missouri does permit one lawyer to represent one of the parties and draft the joint petition, while the other party remains unrepresented. Is this a better solution than joint representation? See generally Saylors, *Conflict of Interest in Family Law*, 28 FAM. L.Q. 451, 454-55 (1994); see also ANNOTATED RULES, 147-48.

What about representation of an insured and the insurer against a third-party claimant? Again, the interests of the parties may appear identical, but the possibility of conflicts are legion. See generally ANNOTATED RULES, at 158-59. There is some question whether this is properly viewed as a multiple client issue or a third party payor situation. Compare *In re Allstate Ins. Co.*, 722 S.W.2d 947 (Mo. banc 1987) with *Arana v. Koerner*, 735 S.W.2d 729 (Mo. App. 1987). If the latter, Rule 1.8(f), which requires client consent, protection of client information, and exercise of independent professional judgment, is implicated. Particularly difficult issues arise where the lawyer is representing under a reservation of rights. For more detailed analysis of the complex issues in this area, see ABA/BNA LAWYERS MANUAL ¶ 51:308.

Special rules apply as well to settlement of multiple claims. Where aggregate settlements are involved, each client must give written consent after consultation, which must include disclosure of the existence and nature of all claims involved and the participation of each person in the settlement. M.R. 1.8(g). Failure to obtain proper consent may be grounds to void a settlement. See *Hayes v. Eagle-Pilcher Indust., Inc*., 513 F.2d 892 (10th Cir. 1975).

An area that has caused some confusion and difficulty is issue, or positional, conflict. Under what circumstances should an attorney be prohibited from advancing arguments for one client that potentially may be harmful to another client? Can an attorney take inconsistent positions in different courts, for different clients, at the same time? In the same court? If the rules are too strict in this regard, won't this substantially limit the lawyer's ability to practice, perhaps restricting lawyers to only one side of any given area of law? Won't this also limit client access to competent lawyers, especially in specialized areas?

Comment 24 to Rule 1.7 addresses positional conflict, allowing it unless "there is a significant risk that the lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client . . . ." The Comment sets out relevant factors to consider, including where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issues to the immediate and long-run interests of the clients involved, and the clients' reasonable expectations in retaining the lawyer. The ABA Formal Opinion on this issue and the Comment to the Restatement focus on "whether the lawyer in either case would be caused to "soft-pedal' or alter arguments on behalf on one client so as not to undercut the position of the other client." Reporter's Notes, Comment f to § 128. See also Formal Op. 93-377.

2. Non-litigation Conflicts

Representation of multiple clients arises also in nonlitigation settings. For example, can an attorney properly represent more than one party in putting together a business transaction. Can a lawyer represent both buyer and seller in a real estate deal? Can an attorney represent the entrepreneurs who are working to set up a new company? Formerly, Rule 2.2 addressed these issues, but they are now dealt with in Rule 1.7. Rule 1.7 permits such representation where the lawyer reasonably believes he or she can impartially and competently handle the matter and the clients give informed consent. See Comment 24, see also RESTATEMENT, § 211. See generally G. Hazard, *Ethics in the Practice of Law*, 61-68 (1978), discussing the "lawyer for the situation." What interests are served by such representation? What interests would be served by prohibiting it? Does Rule 1.7 adequately address these issues?

A significant issue that arises with joint representation is its effect on confidentiality. “Sharing of information among . . . co-clients with respect to the matter involved in the representation is normal and typically expected.” RESTATEMENT § 60, Comment l (P.F.D. 1). A lawyer representing more than one client may have a fiduciary duty to share any information relating to the representation obtained from one client with other jointly represented clients (as part of the lawyer’s duties of diligence and communication, 1.3 and 1.4). This may well include information adverse to a co-client. *See generally* RESTATEMENT § 60, Comment l. While information obtained may not be confidential among co-clients, it is confidential as to third parties (those outside the attorney-client relationship). *See generally* Comment ¶30. Of course, at some point, the existence of information that one co-client does not want to share may well be a signal to the attorney that he or she is no longer able to reasonably believe that all clients can be adequately represented and may be a strong indicator that withdrawal is advisable or necessary. RESTATEMENT §60 , Comment l. It has been suggested, however, that the parties can agree in advance to limit the sharing of information, see COMMENT ¶31, but caution is advised.

B. Former Clients

Although the Code did not directly address the problem of successive representation, the Model Rules adopted a version of the substantial relationship test used by the courts to disqualify attorneys. Under the Model Rules, a lawyer who has previously represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter where that person's interests are materially adverse to the former client unless the client gives informed consent. M.R. 1.9. In interpreting the Rule, paragraph 2 of the Commentary indicates that the scope of a matter depends on the facts involved, and that the "underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides. . . . “ See also RESTATEMENT, § 132. The primary rationale behind this rule is protection of client confidences and, to a lesser extent, preservation of loyalty and avoidance of an appearance of impropriety.

Most of the law in this area has developed in the context of disqualification cases. During the time of the Code of Professional Responsibility, courts looked to Canons 4 (confidentiality), 5 (conflicts/independent judgment) and 9 (appearance of impropriety) for guidance, but no provision expressly addressed this issue. The courts developed their own approaches, culminating in the “substantial relationship” test, which

was ultimately adopted by the Model Rules. The term “substantially related” appears in Rule 1.9, but is not defined, although it is explained in Comment 3. Court opinions help with the definition.

As noted, most of these issues arise in the disqualification context. The following is one of the few cases in which attorneys were actually disciplined for violation of Rule 1.9. Under what circumstances can and should an attorney be disciplined for undertaking subsequent representation adverse to a former client? Are the standards for disqualification different? Should they be? Read Model Rule 1.9, 1.10(b) and related Commentary.

In re John J. CAREY, Respondent.
In re Joseph P. DANIS, Respondent.
89 S.W.3d 477 (Mo. banc 2002)

WILLIAM RAY PRICE, JR., Judge.

It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield," to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries been compendiously described as "moral character." *Schware v. Bd. Of Bar Exam'rs*, 353 U.S. 232 (1956) (Frankfurter, J., concurring).

The Chief Disciplinary Counsel (CDC) filed a three count information against attorneys John J. Carey and Joseph P. Danis based upon their alleged professional misconduct in prosecuting product liability class action suits against a former client, the Chrysler Corporation, and in making misrepresentations in discovery in the subsequent lawsuit for breach of fiduciary duty brought by Chrysler against them. We find that both John Carey and Joseph Danis engaged in professional misconduct by representing another person in a substantially related matter adverse to the interest of a former client in violation of Rule 4-1.9(a), Rule 4-8.4(a), and by making false discovery responses in violation of Rule 4-3.3(a)(1), Rule 4-8.4(c)], Rule 4-8.4(d), Rule 4- 3.4(a) and Rule 4-3.4(d). John J. Carey and Joseph P. Danis are indefinitely suspended from the practice of law, with leave to apply for reinstatement not sooner than one year from the date of this opinion.

I. Factual Background . . . .

A. Representation of Chrysler by John Carey and Joseph Danis

John Carey joined Thompson & Mitchell in 1987, after being admitted to practice law in Missouri. While at Thompson & Mitchell, Carey worked under Charles Newman as part of a "team" of partners and associates that defended Chrysler against product liability and consumer class action cases brought against it nationwide. From January 1992 through December 1995, Carey billed 1,314.6 hours to Chrysler. As part of the Chrysler team, Carey was privy to all aspects of the Chrysler representation and directly participated in nearly all aspects of the Chrysler litigation. In addition, Carey assessed Chrysler's potential liability in pending litigation and helped draft a "blueprint" for Chrysler to follow in defending class action product defect suits pending concurrently with a National Highway Traffic Safety Administration ("NHTSA") investigation.

Joseph Danis was licensed to practice law in Missouri in 1993 and began work as an associate for Thompson & Mitchell that year. Carey acted as Danis' mentor while Danis was a summer associate and again when Danis was a new associate. Danis joined Carey as a member of Charles Newman's Chrysler team. As a new associate, Danis' involvement with the Chrysler class action litigation was less extensive than Carey's. However, as a member of the team, Danis was privy to all aspects of the Chrysler representation. Danis billed 513.5 hours to Chrysler from January 1992 through December 1995.

Newman would circulate information on the widest possible basis to every member of the Thompson & Mitchell team involved in representation of Chrysler. Carey was the primary associate on four different Chrysler class action cases. Charles Newman testified:

> John [Carey] was totally immersed in that case [*Osley*], along with me, and played the same role that I played in many respects. And that obviously involved ... determining the legal issues that the case presented. It also involved analyzing the jurisdiction ....
> . . .
> He was also involved with me and others in massing the facts relevant to the claims that were asserted, and that involved contacting and principally working with the personnel in the office of the general counsel at Chrysler Corporation.

Newman further testified that in the other three cases, Carey had "a similar role with a few additional aspects."

Danis was not involved in *Osley,* but did participate in the other three cases. Danis was involved in the lower level associate functions, but worked extensively with both Newman and Carey. Danis worked principally on drafting discovery responses and obtaining information from Chrysler to respond to discovery requests.

The component parts involved in the class action lawsuits Carey and Danis defended while with Thompson & Mitchell were Renault heater coils and Chrysler minivan door latches. Charles Newman and other Chrysler attorneys, William McLellan and Lewis Goldfarb, each stressed, however, that the actual defective component was not materially important in this type of class action lawsuit. Goldfarb testified:

> The products at issue in class actions are almost irrelevant to how we go about defending class actions. There's almost an identity of process in terms of how we defend class actions, regardless of the nature of the component involved.
> . . .
> Product-related class action[s], particularly those that follow on the heels of a government investigation, are virtually identical in the way the company handles them. The nature of the component involved is almost irrelevant to these cases because they never go to trial. We're always dealing with the government, that investigation relates to the ongoing class action case. And the class action strategy is almost independent in some respects of the nature of the component involved.

These three Chrysler attorneys also testified that respondents Carey and Danis were privy to a wealth of information that would be useful to them in

prosecuting a product-related class action against Chrysler. Newman testified that Carey and Danis learned Chrysler's strategy in defending minivan product liability class action suits:

> Respondents [were] present during meetings with in-house Chrysler counsel when there was a discussion of the strengths and weaknesses of various Chrysler employees ... [and] with non-lawyer Chrysler employees; for example, expert witnesses.
> . . .
> We would talk with the client about other pending litigation alleging a similar product or defect .... So we would talk to the attorneys at Chrysler about their defense of those cases, what factual defenses were being developed and implemented, what expert witnesses, if any, they were working with there. The legal strategies in those cases, the legal defenses in those cases. Determine their applicability, determine their usefulness, determine whether they could be implemented in the class action . . . .

Newman also said that Carey and Danis knew that Chrysler was very hesitant to interplead or sue a critical supplier because of the way its supply lines were managed.

> [I]f somebody was thinking of suing Chrysler and knew ... that Chrysler had a predisposition against bringing in third parties, you would know in contemplating a suit against Chrysler that it would be relatively efficient in that Chrysler wouldn't bring in everybody else in the world that might be involved or had a bearing with that particular component or product and that you could tailor your claims accordingly to focus just on Chrysler and not have to worry about suppliers and the like.

Newman testified that, although the component parts differed, there were many similarities in available defenses, such as statute of limitations, improper certification of the class, improper class representatives, and improper assertion of claims. Finally, Newman indicated that many expert witnesses overlap: economists, automotive repair experts and human factor engineers. Newman testified that "[t]he Respondents ... learn[ed] which experts Chrysler chose to use and not use." He stressed that Carey and Danis helped formulate Chrysler's defense strategy in class action product liability cases involving Chrysler minivans.

William McClelland confirmed that Carey and Danis were "made aware about the types of information Chrysler kept, the sources of information within Chrysler relevant to the defense of a product liability class action lawsuit involving the minivan." McClelland testified that respondents' specific knowledge of the minivan would be extraordinarily helpful.

> [T]he minivan was incredibly important to Chrysler. It still is today. I'm not sure the public fully understands its importance to our profitability. They know Chrysler makes solid minivans, but not I think the importance that we attach to it internally.
>
> We were just coming out with a brand-new minivan at the time. We had put over a billion dollars investment into that minivan and were very concerned from a marketing and public relations perspective.

> One of the strategies of the plaintiffs' bar would be to muddy our name. We noticed during that time Ford was coming out with ads touting its safety record.

Carey's and Danis' first-hand knowledge of the minivan's importance would allow them to "know what hot buttons to push."

Lewis Goldfarb also discussed respondents' work for Chrysler. Goldfarb testified that Carey and Danis had access to "detailed, internal information and analysis done by the in-house legal department, as well as [Chrysler] engineers and other personnel, regarding the status of a confidential government investigation ...." He emphasized that Carey and Danis had a "road map as to how we [Chrysler] look at and analyze alleged defects concerning our products."

The "road map" Goldfarb spoke of referred to a "matrix" or "blueprint" that the Chrysler team--including John Carey and Joseph Danis--developed to formulate Chrysler's defense to class action product liability cases involving Chrysler minivans. The team prepared a matrix of all considerations that Chrysler should consider in deciding whether or not to settle the minivan latch cases. This matrix listed relevant criteria and matched those criteria with a factual scenario. For each scenario, the team gave thoughts about the applicability of the criteria and its impact on the company. The matrix also included a form of a decision tree. The decision tree visually described the different scenarios and their implication on important areas of the company like marketing, public and consumer relations, dealer relations, and the recall itself.

This information was very important to Chrysler. Charles Newman summed up Chrysler's position on the matrix in saying:

> [T]his is highly confidential information and it was shared with us by our client in confidence. We had a discussion, extensive discussions with the client that resulted in the creation of this document, this matrix or template. And to have a plaintiff's lawyer know, for instance, of the very considerations themselves what Chrysler's thought process deemed important and deemed material and how I in representing them analyzed each of those aspects would be very sensitive, confidential information that neither the company nor I would want to share with anyone.

B. Carey & Danis, L.L.C.--The Chrysler ABS Class Action

In January 1995, Carey and Danis left Thompson & Mitchell and formed their own firm, Carey & Danis, L.L.C.Carey & Danis shared office space with the firm of David Danis--Joseph Danis' father--Danis, Cooper, Cavanagh & Hartweger, L.L.C. The two firms shared staff, a bookkeeper, a fax machine, and unlocked (but separate) filing cabinets.

In August 1995, a Thompson & Mitchell secretary referred her brother-in-law, Dennis Beam, to Carey & Danis after he experienced problems with the anti-lock brake system on his Chrysler minivan. Carey discussed the potential case with Beam. Carey, obviously aware that he and Danis had represented Chrysler, researched Rule 1.9 of the Model Rules of Professional Conduct for an hour or two to determine if a conflict existed. Carey testified that he "made the determination that since Joey [Danis] and I had no knowledge or information at all concerning anti-lock brakes ... that those were not substantially related under my review of the case law and reading those rules." Carey determined there was not a conflict. However, Carey & Danis did not file suit because Thompson

& Mitchell had been referring business to them and they did not want to embarrass their former firm by filing suit against a former client.

Carey & Danis arranged for the Danis, Cooper firm to represent Beam and a class of plaintiffs against Chrysler. Danis, Cooper was to get help on the case from another St. Louis law firm, Blumenfeld, Kaplan & Sandweiss. Carey and Danis met with attorneys from Danis, Cooper and the Blumenfeld firm to discuss the *Beam* class action suit over lunch at a restaurant. According to Evan Buxner, who was working for Blumenfeld at the time, the "purpose of the meeting was to discuss generally if Blumenfeld, Kaplan & Sandweiss participated in the litigation what our role was and what we might expect representing a plaintiff in a proposed class in a plaintiffs' class action case." Carey & Danis was the only firm with any significant class action litigation experience among the three firms. The firms discussed a number of topics relating to the class action against Chrysler: attorney time and cost, the fact that NHTSA was conducting an investigation into the brake system, that a proposed class action could ride the government coattails and let the government agency do most of the work, the effect of a recall on a potential class action, the necessity (or lack thereof) of hiring experts, and that they could expect a barrage of motions from Chrysler.

Shortly after their involvement began, Blumenfeld was informed that Carey & Danis' involvement in *Beam* was being investigated for conflict of interest. Blumenfeld then withdrew from the *Beam* litigation. Carey explained:

> Once they withdrew David [Danis] and Richard [Cooper] approached Joey [Danis] and I and asked us if we would be interested in getting involved in the case, we knew that there was no conflict of interest, and they needed help because ... there was a motion to transfer that was pending in St. Louis City. They needed help. There wasn't time to try and go out and find another co- counsel.

Carey & Danis entered their appearance on behalf of the *Beam* plaintiffs. However, neither Carey nor Danis sought or received Chrysler's consent to act as plaintiffs' counsel against Chrysler.

In December 1995, Joseph and David Danis met in New York with Stanley Grossman, an attorney who had a similar ABS class action suit against Chrysler in New Jersey. At the meeting they discussed joining--and later did join--the two class actions as well as a third group of plaintiffs from Mississippi represented by John Deakle. Following the meeting, Joseph Danis wrote Grossman to confirm the discussion regarding the ABS cases. Danis also inquired as to allocation of attorneys' fees if the cases were consolidated, saying there was "plenty of money for all .... Consequently, we will all be better served working together against Chrysler ...." This correspondence has been termed "the Grossman letter."

While Danis and his father were in New York meeting with Grossman, Carey received a letter from Charles Newman accusing Carey & Danis of having a conflict of interest in the *Beam* case. Carey was "very upset" upon reading Newman's letter and immediately called Newman to tell him that he believed "in the strongest terms that [Carey & Danis] did not have a conflict of interest," but that he did not want to cause any trouble with Newman, Thompson & Mitchell, or Chrysler. Carey inquired if they could put an end to "all this ugliness and nastiness" if he and Danis withdrew from the *Beam* case. Newman did not make any promises, but thought that might appease Chrysler.

Thereafter, the *Beam* case was voluntarily dismissed and then joined with Grossman's case in New Jersey. Carey & Danis withdrew from *Beam,* but the Danis, Cooper firm and John Deakle were among the attorneys listed for the plaintiffs. Carey & Danis associated with a group of class action attorneys--David Danis and John Deakle, among others, that often worked together on cases and shared information. A number of these attorneys were involved in Chrysler ABS litigation. Members of this group would forward correspondence regarding the ABS litigation to each other and many of these communications would find their way to Carey & Danis.

C. *Chrysler v. Carey & Danis*--False and Misleading Statements

Respondents Carey and Danis notified their malpractice insurer of a potential lawsuit by Chrysler and gave the insurer copies of documents that could be relevant--including the Grossman letter. The insurer later met with Lou Basso, the attorney Carey and Danis had chosen to represent them. The insurer gave the documents respondents had compiled to Mr. Basso. Basso made copies and then returned the documents to the insurer. Carey and Danis had also given the original Grossman letter to Basso, along with some other documents, when Basso was originally retained.

On March 26, 1996, Chrysler sued Carey & Danis for breach of fiduciary duty and respondents were served with process. Chrysler alleged that Carey & Danis, though not attorneys of record, assisted a group of lawyers in prosecuting ABS class action claims against Chrysler. Chrysler served interrogatories and requests for production upon both Carey and Danis, individually. [The Court discussed requests for production of documents related to this litigation and the attorneys failure to produce documents pursuant to those requests. The Court found that both attorneys made misrepresentations regarding the existence and production of those documents. Based on this failure to produce and misrepresentation, the judge in the civil case brought by Chrysler struck the attorneys' response and entered a default judgment against them.]

II. Discussion

A. Count I: Conflict of Interest

Count I alleges professional misconduct by violating Rule 4-1.9(a), which governs conflict of interest with former clients. Rule 4-1.9(a) states:

A lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation ....

It is not disputed that respondents Carey and Danis formerly represented the Chrysler Corporation, nor is it disputed that respondents' representation of the plaintiffs against Chrysler in *Beam* was materially adverse to Chrysler. The only issue presented is whether the *Beam* case was "substantially related" to Carey's and Danis' previous defense work for Chrysler.

"Gallons of ink" have been consumed by those trying to articulate or explain the test for deciding whether a substantial relationship exists between two representations. ABA/BNA Lawyer's Manual on Professional Conduct, 51:215. See also *Chrispens v. Coastal Ref. & Mktg., Inc*. The "substantially

related" test was first announced in *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.* In announcing the rule, the court was primarily concerned with preserving client confidences and avoiding conflicts of interest The court said:

> It would defeat an important purpose of the rule of secrecy--to encourage clients fully and freely to make known to their attorneys all facts pertinent to their cause. Considerations of public policy, no less than the client's private interest, require rigid enforcement of the rule against disclosure. No client should ever be concerned with the possible use against him in future litigation of what he may have revealed to his attorney. Matters disclosed by clients under the protective seal of the attorney-client relationship and intended in their defense should not be used as weapons of offense. The rule prevents a lawyer from placing himself in an anomalous position. Were he permitted to represent a client whose cause is related and adverse to that of his former client he would be called upon to decide what is confidential and what is not, and, perhaps, unintentionally to make use of confidential information received from the former client while espousing his cause. Lawyers should not put themselves in the position "where, even unconsciously, they might take, in the interests of a new client, an advantage derived or traceable to, confidences reposed under the cloak of a prior, privileged relationship." In cases of this sort the Court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation. If so, then the relationship between the two matters is sufficiently close to bring the later representation within the prohibition . . . .

Other courts have also commented on the rule's purpose:

> It is a prophylactic rule to prevent even the potential that a former client's confidences and secrets may be used against him. Without such a rule, clients may be reluctant to confide completely in their attorneys. Second, the rule is important for the maintenance of public confidence in the integrity of the bar. Finally, and importantly, a client has a right to expect the loyalty of his attorney in the matter for which he is retained.

Important policies behind the rule include the promotion of "fundamental fairness ... by prohibiting an attorney from using an informational advantage gained in the course of a former representation, the desire to promote client disclosure of all pertinent information ..., and the desire to promote confidence in the integrity of the judicial system."

There are three primary tests for substantial relationship used throughout the country. *See Chrispens,* The first approach compares the facts of the former and current representations. The second approach, which has not been widely adopted, insists that the issues involved in the two representations be identical or essentially the same. The third approach, developed by the Seventh Circuit Court of Appeals, blends the fact and issue comparisons into a three-step test. The Seventh Circuit test states:

> [D]isqualification questions require three levels of inquiry. Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation. Second, it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters. Finally, it must

> be determined whether that information is relevant to the issues raised in the litigation pending against the former client.

The test "does not require the former client to show that actual confidences were disclosed. That inquiry would be improper as requiring the very disclosure that [MRPC 1.9(a)] is intended to protect."

Missouri addressed substantial relationship in *State v. Smith*, 32 S.W.3d 532 (Mo. banc 2000). Our approach is consistent with that set out in *Westinghouse* and *Chrispens,* combining an analysis of both the facts and issues in determining substantial relationship. In *Smith* we said that the court "employs a focused approach, where the court examines the relevant facts of the case in order to determine whether the various matters are substantially related." "[W]hether there is a 'substantial relationship' involves a full consideration of the facts and circumstances in each case." "The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." Rule 4-1.9 cmt. The key to the analysis is whether there was a central issue common to both representations. *Smith*.

The fact that a lawyer has previously represented a client does not automatically preclude the lawyer from opposing that client in a later representation. The court must determine whether confidential information acquired in the course of representing the former client is relevant to the issues raised in the current litigation. “The 'appearance' of impropriety must be more than a fanciful possibility. It must have a rational basis." The court's conclusion must be based on a close and careful analysis of the record. Without such an analysis, the test serves "as a substitute for analysis rather than a guide to it. It is easier to find 'doubt' than to resolve difficult questions of law and ethics."

Chrispens offers a short, non-exclusive list of six factors that courts following the Seventh Circuit approach have considered in determining whether a substantial relationship exists. The factors include:

> (1) the case involved the same client and the matters or transactions in question are relatively interconnected or reveal the client's pattern of conduct; (2) the lawyer had interviewed a witness who was key in both cases; (3) the lawyer's knowledge of a former client's negotiation strategies was relevant; (4) the commonality of witnesses, legal theories, business practices of the client, and location of the client were significant; (5) a common subject matter, issues and causes of action existed; and (6) information existed on the former client's ability to satisfy debts and its possible defense and negotiation strategies.

In some cases, one factor, if significant enough, can establish that the subsequent case is substantially related. Careful review of the facts at hand in relation to these six factors provides a specific framework for resolution of this case.

First, when compared to the prior representation, the ABS cases involve the same client, Chrysler. Because the cases all involve the Chrysler minivan in the same "type" of case, Chrysler's pattern of conduct is applicable despite the different specific component parts involved. It is undisputed that Carey and Danis defended the Chrysler Corporation on product liability class action lawsuits involving Chrysler minivan components and then later prosecuted a product liability class action lawsuit involving another minivan component

against Chrysler. The subject matter of the lawsuits was components of Chrysler's minivan. Carey and Danis also knew how important the minivan was to Chrysler and had access to "detailed, internal information and analysis done by the in-house legal department ...." In fact, both Carey and Danis helped formulate the "blueprint" Chrysler used when defending a product liability class action suit involving the minivan.

Second, respondents interviewed or deposed a number of expert witnesses while working for Chrysler that could have been called to testify in the *Beam* lawsuit. Carey and Danis were present during meetings with in-house Chrysler counsel when there was a discussion of the strengths and weaknesses of various Chrysler employees and expert witnesses. Carey and Danis had personal contact with a number of expert witnesses that could be used in both cases and had learned which experts Chrysler chose to use and not use. Specifically, Charles Newman stated that "... I contacted some of the same experts for possible use in the defense of the ABS case that we had contacted in the defense of the *Osley* case." Two witnesses, Mr. Pat Gross, an auto mechanic, and Dr. Mather, an economist, were mentioned by name and the general nature of their testimony common to these cases was briefly discussed.

Third, Carey's and Danis' knowledge of Chrysler's negotiation strategies were particularly relevant. Respondents helped formulate the decision matrix used by Chrysler when defending suits precisely like *Beam.* The matrix listed criteria Chrysler deemed relevant and matched those criteria with a factual scenario. For each scenario, the team gave thoughts about the applicability of the criteria and the impact on the company.

Fourth and Fifth, the commonality of witnesses, legal theories, and business practices of the client were significant, and there was a common subject matter as well as common issues and causes of action. This case involved the Chrysler minivan. Although the particular minivan parts at issue may have been different, in this case, testimony indicated that the actual components at issue in this type of product liability class action suit are almost irrelevant to how Chrysler defended the case. Lewis Goldfarb testified:

> Product-related class action[s], particularly those that follow on the heels of a government investigation, are virtually identical in the way the company handles them. The nature of the component involved is almost irrelevant to these cases because they never go to trial. We're always dealing with the government, that investigation relates to the ongoing class action case. And the class action strategy is almost independent in some respects of the nature of the component involved.

Finally, information existed on Chrysler's possible defense and negotiation strategies. As previously discussed, Carey and Danis knew of and actually helped formulate Chrysler's defense and negotiation strategies.

Respondents' justification for prosecuting a consumer class action lawsuit involving Chrysler minivans, within one year after having represented Chrysler, was that the component parts were different. Carey and Danis defended Chrysler on Chrysler minivan door latch cases while *Beam* involved Chrysler minivan anti-lock brake systems.

Certainly, a client does not own a lawyer for all time. In appropriate circumstances our rules allow lawyers to take positions adverse to former clients and even to bring suit against them. *See* Rule 4-1.9. The similarity of each case

and its facts and issues is the determinative factor. Rule 4-1.9, however, simply does not allow respondents to cut such a sharp corner here. This is why the rule is not limited to "the same" matter but also extends to "a substantially related" matter.

Upon a close examination of the facts and issues surrounding the respondents' representation of Chrysler, the fact that Carey and Danis defended Chrysler in product liability class action claims involving Chrysler's minivan overshadows the fact that different automotive parts were at issue. Respondents' work at Thompson & Mitchell allowed them access to information and strategy considerations that could not be turned fairly against their former client after changing employment. Although these lawsuits concerned different parts, the issues in the lawsuits and Chrysler's defense strategies were shown to be unavoidably linked. The expertise that Carey and Danis developed at Chrysler's expense and the confidences shared with them by Chrysler cannot be used by respondents to harm their former client.

"No client should ever be concerned with the possible use against him in future litigation of what he may have revealed to his attorney. Matters disclosed by clients under the protective seal of the attorney-client relationship and intended in their defense should not be used as weapons of offense." The public must have confidence in the integrity of the Bar and every "client has a right to expect the loyalty of his attorney in the matter for which he is retained." "Every lawyer owes a solemn duty ... to strive to avoid not only professional impropriety but also the appearance of impropriety."

> It is this Court's duty to not only dispense justice, but equally important, to maintain the integrity of the judicial system. The public's trust and confidence in the system is essential to the ability of the system to function efficiently and justly. As this Court has previously noted "even an appearance of impropriety may, under the appropriate circumstances, require prompt remedial action ...."

By representing Dennis Beam in a products liability class action lawsuit against Chrysler, respondents Carey and Danis represented another person in a substantially related matter that was materially adverse to their former client in violation of Rule 4-1.9.

B. Count II: Client Confidentiality

Count II alleges that Carey and Danis violated Rule 4-8.4 by using confidential information obtained while representing Chrysler to later prosecute the ABS class action claim against Chrysler. The Disciplinary Hearing Panel found that respondents did not violate Rule 4-8.4. We agree.

The Chief Disciplinary Counsel's contention is based in large part on the fact that respondents took over 800 pages of documents from Thompson & Mitchell when they left. The CDC argues that many of these documents were confidential and that Carey and Danis violated their duty of loyalty by using some of these documents as templates for the pleadings filed in the *Beam* case. The only specific document identified was a Chrysler petition used by Carey and Danis as a form for the *Beam* petition. The Chrysler petition had been filed and was thus a public record. It was not confidential.

W. David Wells, the head of litigation at Thompson & Mitchell when respondents left that firm, testified that he had reviewed the documents Carey

and Danis had taken and did not find them to be confidential. Wells testified that most of the documents were either a matter of public record or were generic memos that could apply to a variety of clients. Wells further testified that he believed that it was not uncommon for lawyers to take copies of such documents when they leave one law firm for another.

Count II alleges specifically that respondents used confidential documents against Chrysler, and this must be proved specifically. Given the testimony of those involved, the preponderance of the evidence supports a finding that respondents did not take confidential documents from Thompson & Mitchell and use them against Chrysler. We hold that respondents Carey and Danis did not violate Rule 4-8.4.

. . . .

III. Discipline

> The purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession. Those twin purposes may be achieved both directly, by removing a person from the practice of law, and indirectly, by imposing a sanction which serves to deter other members of the Bar from engaging in similar conduct.

. . . .

Assessing discipline in cases such as this is always difficult. Here, two talented young lawyers, full of promise, lost their way among the economic temptations of modern practice and then again lost their way while struggling to defend themselves. In doing so, they violated two of the most fundamental principles of our profession, loyalty to the client and honesty to the bench. Significant discipline must follow to maintain the public's trust and confidence in our ability to police ourselves. A "slap on the wrist" will not suffice.

While disbarment would ordinarily be expected in a case such as this, the mitigating factors warrant some degree of leniency and offer hope that respondents can return to the responsible practice of law having learned a very hard lesson.

John J. Carey and Joseph P. Danis are indefinitely suspended from the practice of law, with leave to apply for reinstatement not sooner than one year from the date of this opinion.

As noted, disqualification, rather than discipline, is the common means by which courts usually address issues relating to representation of former clients. As you may have noted, the following case is cited extensively in *Carey and Danis.* This case presents one of the best explanations of the issues involved in deciding whether to disqualify an attorney who has previously represented adverse to a current client.

CHRISPENS v. COASTAL REFINING & MARKETING, INC.
257 Kan. 745, 897 P.2d 104 (1995)

DAVIS, Justice

This appeal involves a motion to disqualify counsel under Model Rules of Professional Conduct (MRPC) 1.9(a) (1994 Kan.Ct.R.Annot. 320) . . . .

Christopher Christian was a member of the firm of Turner and Boisseau, Chartered, from 1991 to 1993. During this time, he, along with Eldon Boisseau, represented Coastal Refining and Marketing, Inc., in several cases involving pipeline leakage or spills. In September 1993, Christian left Turner and Boisseau and began working for the firm of Michaud, Hutton, Fisher & Andersen (Michaud firm). In November 1993, the Michaud firm, with Christian signing the petition on behalf of plaintiffs Eldon Chrispens, et al, (Chrispens), filed an action against Coastal Refining and Marketing, Inc., (Coastal) alleging that its clients were injured by substances that leaked from a pipeline owned by Coastal.

Before any discovery, Coastal filed a motion to disqualify Christian pursuant to MRPC 1.9(a), and to disqualify the Michaud firm pursuant to MRPC 1.10(b). After an evidentiary hearing with testimony from Eldon Boisseau and Debra Broussard, Coastal's in-house counsel, the trial court determined that the Coastal cases upon which Christian worked when a member of the firm of Turner and Boisseau were not substantially related to the case in which Christian, as a member of the Michaud firm, now brought suit against Coastal. The court held that in the absence of a substantial relationship between the cases, MRPC 1.9(a) did not prevent Christian from suing his former client, Coastal. Based on its decision of no personal conflict, the question of imputed disqualification of the Michaud firm was resolved against Coastal. . . .

Our discussion centers upon [MRPC 1.9] . . . . The applicable provisions of MRPC 1.9(a) provide:

> A lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." (1994 Kan.Ct.R.Annot. 320.) (Emphasis added.)

The trial court determined that there was not a substantial relationship between the previous cases Christian worked on while at Turner and Boisseau and the new case filed by Christian against his former client while working at the Michaud firm. This conclusion resulted in the court's denial of the motion for disqualification based upon a conflict of interest. Our first inquiry, and to a large extent, the resolution of this appeal, involves a determination of what is meant by the phrase "substantially related matter" expressed in MRPC 1.9(a) . . . .

SUBSTANTIALLY RELATED MATTER

One noted authority has commented that gallons of ink have been consumed by those who have tried to determine or explain the test for deciding whether a substantial relationship exists between representations. ABA/BNA Lawyers' Manual on Professional Conduct, 51:215. There is widespread agreement that conflict questions involving former clients should be resolved through application of the substantial relationship test. However, there is no standard definition of what the test should compare in determining whether there is a close connection between the conflicting representations. ABA/BNA Lawyer's Manual on Professional Conduct, 51:225. The Model Rules do not provide a definition, nor do the comments to the rules attempt to define the phrase "substantially related." There is no Kansas case law addressing the meaning and application of the phrase "substantially related matters" as used in MRPC 1.9(a) . . . .

The ABA/BNA Lawyer's Manual on Professional Conduct, 51:225 notes:

> Perhaps the most widely followed formulation of the substantial relationship test is that it compares the 'matter' or 'subject matter' of the former representation to that of the current representation. 'Matter' is the word used in Model Rule 1.9(a), and this word, or the term 'subject matter,' is a popular means of applying the substantial relationship test.

Three separate approaches regarding the substantial relationship test have been used throughout the country. The first approach indicates that the comparison of the former and current representations should center on the facts of each case. The second approach, advanced by the Second Circuit, insists that the inquiry should focus on legal issues and requires the issues involved in the former representation to be "identical" to or "essentially the same" as those presented in the current representation. The relationship under the second approach must be "patently clear." This approach has not been a view widely adopted. See Nelson, *Conflicts in Representation: Subsequent Representations in a World of Mega Law Firms*, 6 GEO.J. LEGAL ETHICS 1023, 1031 (1993). The third approach is set forth in the case of *Westinghouse Elec. Corp. v. Gulf Oil Corp*. The Seventh Circuit blends fact and issue comparisons into a three-step substantial relationship test:

> [D]isqualification questions require three levels of inquiry. Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation. Second, it must be determined whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters. Finally, it must be determined whether that information is relevant to the issues raised in the litigation pending against the former client.

The substantial relationship test developed so that a determination of a conflict of interest could be made without requiring the former client to reveal what confidential information passed from client to lawyer. The following quote from *T.C. & Theatre Corp. v. Warner Bros. Pictures,* which did not invent the substantial relationship test but is perhaps the case responsible for popularizing it, highlights the objective of the test: " 'In cases of this sort the Court must ask whether it can reasonably be said that in the course of the former representation the attorney might have acquired information related to the subject of his subsequent representation. If so, then the relationship between the two matters is sufficiently close to bring the latter representation within the prohibition of Canon 6,' the former- client conflicts rule in the ABA Canons of Professional Ethics. Whether using the Model Code or the Model Rules as their guide, courts follow the same path today." ABA/BNA Lawyer's Manual on Professional Conduct, 51:226-27.

Several federal cases interpreting Kansas law have dealt with the phrase "substantially related" as used in MRPC 1.9(a). In *Graham v. Wyeth Laboratories,* the Tenth Circuit noted that the term "has acquired the status of a term of art in the general law of attorney conflicts of interest," and defined the term to mean that the "factual contexts of the two representations are similar or related." This same definition was employed in Geisler by *Geisler v. Wyeth Laboratories.*

In *Graham v. Wyeth Laboratories,* the Tenth Circuit found that cases were substantially related when the actual context of the two representations

were similar or related. In *Koch v. Koch Industries*, the United States District Court defined the term "substantially related" to mean that the cases "involve the same client and the matters or transactions in question are relevantly interconnected or reveal the client's pattern of conduct." . . . In *Trone*, the court states: "[T]he underlying concern is the possibility, or appearance of the possibility, that the attorney may have received confidential information during the prior representation that would be relevant to the subsequent matter in which disqualification is sought. The test [under MRPC 1.9(a)] does not require the former client to show that actual confidences were disclosed. That inquiry would be improper as requiring the very disclosure the [MRPC 1.9(a)] is intended to protect."

Each case under both MRPC 1.9(a) . . . must be decided on its unique facts and an application of the rule to those facts. This perhaps is another way of saying that the determination of conflict under MRPC 1.9(a) . . . must be made on a case-by-case basis with the decision to be based on the unique facts and application of the rule to facts of that case. Factors which courts have considered in making a determination under MRPC 1.9(a) . . . include: (1) The case involved the same client and the matters or transactions in question are relevantly interconnected or reveal the client's pattern of conduct; (2) the lawyer had interviewed a witness who was key in both cases; (3) the lawyer's knowledge of a former client's negotiation strategies was relevant; (4) the commonality of witnesses, legal theories, business practices of the client, and location of the client were significant; (5) a common subject matter, issues and causes of action existed; and (6) information existed on the former client's ability to satisfy debts and its possible defense and negotiation strategies. This is by no means an exhaustive list but merely reflects that the determination is oftentimes an evaluative determination by the trial court based upon the unique facts of the case. In some cases, one factor, if significant enough, may establish that the subsequent case is substantially similar. For example, if the former representation involved defending the client on a criminal charge and the attorney is thereafter elected as a prosecutor and then seeks to prosecute the same client upon a charge connected with the prior defense, the former representation alone makes the disqualification an easy question.

On the other hand, in cases less clear, the trial court must balance the previous client's right of confidentiality, the right of having a reasonable choice of legal counsel, and the right of lawyers to form new associations and take on new clients when leaving a previous association. Given the mobile society we live in and the very real need to preserve professional integrity as well as the real needs of those citizens who rely upon attorneys for assistance, the balancing of the competing interests becomes very difficult at times. Both the wording of the rules involved and the somewhat elusive test of "substantially related" provide the court with an opportunity to make a circumspect decision concerning conflict of interest. We reject the narrow Second Circuit view, which requires that a substantial relationship must be patently clear and disqualification is required only when the issues involved are identical or essentially the same. We adopt a rule which requires the trial court to make a determination after considering the facts surrounding the two representations. . . .

BURDEN OF PROOF

. . . MRPC 1.9 deals with the disqualification of an individual attorney. There is no requirement under this rule as there is under MRPC 1.10(b) to establish that the attorney gained material and confidential information during the course of his or her previous employment. As stated in *Koch v. Koch*

Industries, disqualification under MRPC 1.9(a) is dependent upon the party moving for disqualification to establish that (1) the attorney whose disqualification is sought formerly represented them in a matter, (2) the matter is substantially related to a matter in which the attorney now seeks to represent a new client, and (3) the new client's interest is substantially adverse to the interest of the party seeking disqualification. We hold that the burden of proof under MRPC 1.9(a) is upon the party alleging conflict and moving for disqualification.

PRESUMPTIONS

The question under MRPC 1.9(a) regarding presumptions is: Once a matter has been found to be substantially related under MRPC 1.9(a) and all other requirements of the rule have been satisfied, does this result in automatic disqualification of the subject attorney? . . .

The answer to the question posed in the last paragraph is twofold. First, if the disqualification motion is advanced solely under MRPC 1.9(a), an irrebuttable presumption arises that in cases "substantially related," the former client revealed confidential information requiring the attorney's disqualification. . . .

A. Proceeding Under MRPC 1.9(a)

Once it has been established that an attorney has formerly represented a client in a matter and seeks to represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client, an irrebuttable presumption arises that the attorney acquired confidential information in the former representation and is disqualified from representing the latter client. MRPC 1.9(a), by its express terms, provides that an attorney who has represented a client in a matter "shall not" represent an adverse party in the same or a substantially related matter. This is consistent with the substantial relationship test as used in the majority of jurisdictions. In *Koch*, the federal district court stated:

> If a substantial relationship is found, an irrebuttable presumption arises that the former client revealed facts requiring the attorney's disqualification. The court need not inquire into whether the confidential information was actually revealed or whether the attorney would be likely to use the information to the disadvantage of the former client. . . . To conduct such an inquiry would frustrate the former client's interest in the confidential information.

We believe the reasoning of *Koch* is sound. The reason for this irrebuttable presumption, as noted in *Koch*, is rooted in the idea of attorney loyalty:

> [MRPC 1.9(a)] is a prophylactic rule to prevent even the potential that a former client's confidences and secrets may be used against him. Without such a rule, clients may be reluctant to confide completely in their attorneys. Second, the rule is important for the maintenance of public confidence in the integrity of the bar. [Citation omitted.] Finally, and importantly, a client has a right to expect the loyalty of his attorney in the matter for which he is retained.

> Where a lawyer has been directly involved in a specific transaction, subsequent representation of clients with materially adverse interests in a matter substantially related to the specific transaction is prohibited. The burden upon a motion for disqualification under this rule is upon the moving party asserting the conflict. See MRPC 1.9, Comment (1994 Kan.Ct.R.Annot. 320- 21). . . .
>
> [The court engaged in a lengthy analysis of the facts involving Christian's prior representation of Chrispens and the current case]
>
> . CONCLUSION
>
> Coastal's burden under MRPC 1.9(a) was to show that (1) Christian formerly represented it in a matter, (2) that the matter is substantially related to the matter in which Christian now seeks to represent a new client, and (3) that the new client's interests are substantially adverse to the interests of Coastal.
>
> The essential facts are not in dispute. As we have stated above, the trial court's conclusion that the matters were not substantially related is a question of law subject to de novo review. Contrary to the trial court's conclusion, we conclude as a matter of law that the matter between the two representations were substantially related. We base this conclusion on the facts that all cases involved the same client; that the matters or transactions in question are relevantly interconnected and reveal Coastal's pattern of conduct; that Christian had interviewed and acquired valuable knowledge of the weaknesses and strengths of key witnesses who will be key witnesses in the Chrispens case; that Christian obtained confidential financial information in representing Coastal concerning the settlement of a punitive damage claim in the Jerke/Ebenkamp cases, which information is material and relevant in the Chrispens case; that Christian gained material, confidential information of Coastal's negotiations strategies which may become valuable in the Chrispens case; that all cases involve the common subject of pipeline leaks or spills from Coastal's Wichita refinery; and that the previous representation by Christian of Coastal terminated less than three months from the time Christian initiated the Chrispens action against Coastal.
>
> Reversed and remanded with directions to grant the motion for disqualification.

1. *Chrispens* identifies various approaches to determining whether a substantial relationship exists. Which approach (issue or fact-based) seems more appropriate? It appears that the majority is leaning toward a fact-based approach, which may be more sound since, as the court noted in *Carlson v. Langdon*, 751 P.2d 344, 349 (Wyo. 1988), issues frequently do not develop until long after litigation has been instituted. An approach that considers the factual context of the matters to determine if they have common facts is more consistent with the underlying concern that the attorney may have been in a position to receive confidential information which could possibly be used to the detriment of the former client in the later proceeding. *Id*. Some courts look to both a comparison of the issues and a review of the facts in order to determine whether a substantial relationship exists. *See, e.g., Home Ins. Co. v. Marsh,* 790 S.W.2d 749, 754 (Tex. Ct. App. 1990). As the authors of the ABA/BNA Manual have noted, "[i]n practice, the distinctions between formulations of the substantial relationship test become blurred." 51:226.

2. Should the test for "substantial relationship" be a strict one, or should it be fairly liberal? Which approach does the *Chrispens* court take? As noted, some courts require that the relationship be "patently clear,' while other courts appear to require merely that there be an opportunity for "greater insight" into the affairs of the client. The courts using a strict approach are usually concerned primarily, if not exclusively, with protecting confidential information. Those courts using broader tests are frequently also concerned about appearance of impropriety. How would it *look* to the public to allow the attorney to sue his or her former client in this situation? Is this an appropriate consideration? Canon 9 of the Code of Professional Responsibility provided that a lawyer should avoid the appearance of impropriety. The Model Rules contain no such provision.

Is appearance of impropriety an appropriate basis for disqualification where there is little or no real risk to confidential information? Courts are split on this issue. *Compare Harker v. Commissioner of Internal Revenue*, 82 F.3d 806. 808-809 (8th Cir. 1996)(not appropriate); *President Lincoln Hotel Venture v. Bank One*, 271 Ill. App. 3d 1048, 649 N.E.2d 432, 441 (1994)(appearance of impropriety too slender a reed" on which to base disqualification even under the Code) with *First American Carriers, Inc. V. Kroger*, 302 Ark. 86, 787 S.W.2d 696 (1990) (test still appropriate); *Heringer v. Haskell*, 536 N.W.2d 362, 366-67 (N.D. 1995)(appearance of impropriety standard "has not been wholly abandoned in spirit."). At least one court has equated the appearance of impropriety considerations that appeared in the old Code with loyalty considerations recognized by the Commentary to the Model Rules. See *In re American Airlines, Inc. AMR*, 972 F.2d 605, 607-20 (5th Cir. 1992).

3. As noted, where a court finds a substantial relationship, it will presume that the attorney has access to confidential information that would be helpful in the current litigation. Most courts hold this presumption to be irrebuttable and require disqualification. See. e.q. *Herbes v. Graham*, 180 Ill. App. 3d 692, 536 N.E.2d 164, 168 (1989); *Home Insurance*, 790 S.W.2d at 754. If no substantial relationship is found, the party seeking disqualification may still be permitted to demonstrate that there is a substantial risk that confidential information may be used improperly. See RESTATEMENT, § 213. If such a risk exists, disqualification is appropriate. Does the availability of disqualification even in the absence of a finding of substantial relationship indicate that the test ought to be a narrow one? After all, the test only addresses when *automatic* disqualification is required. If no such relationship exists, the party seeking disqualification still can prove that specific information is at risk. But doesn't the need to do so put the information even more at risk?

4. Where an attorney has been disqualified, most courts will permit that attorney to turn over work product to new counsel unless actual confidential information is included or other improper advantage is likely. *See, e.g., First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 584 F.2d 201 (7th Cir. 1978) and *Canadian Gulf Lines, Inc. v. Triton International Carriers, Ltd.*, 434 F. Supp. 691 (D. Conn. 1976); *see also EZ Painter Corp. v. Padco, Inc.,* 746 F.2d 1459, 1463 (Fed. Cir. 1984) (work product created after new lawyers who possessed information came to firm not turned over; previous work product could be given to new counsel.)

5. What about consultations with prospective clients? If a lawyer declines representation and is thereafter consulted by a person with interests materially adverse to the prospective client in a substantially related matter, should the lawyer be

disqualified? Not necessarily, according to the Restatement. The Restatement would require disqualification only if the lawyer "has received from the prospective client confidential information that could be significantly harmful to the prospective client." Restatement § 15. The Restatement recognizes that the policy considerations are different with prospective and actual clients. What are these differences? Do you agree that prospective clients should be treated differently? This is dealt with in the new Model Rules in Rule 1.18. Read that Rule now. Are you satisfied with its resolution of the relevant issues?

C. Imputed Disqualification

Difficult questions arise with regard to imputed disqualification. As a general matter, where attorneys are associated in a firm none of them may represent a client if any one of them, practicing alone, would be prohibited from doing so by the conflict rules. M.R. 1.10(a). Where lawyers do not move between firms, this rule is not usually difficult to apply except with regard to determining whether the affiliation requirement has been met. See M.R. 1.0(c), see also RESTATEMENT, § 203. That requirement has been held by the ABA in Formal Opinion 90-357 (1990) to apply to lawyers who are "of counsel" to a firm. Thus, for purposes of imputed disqualification, if two or more firms share an "of counsel" attorney they are effectively considered to be a single firm in determining whether disqualification is required. Similarly, where a firm is "of counsel" to another firm, this would "entail the complete reciprocal attribution of disqualifications of all lawyers in each firm." *Id.* Where lawyers change firms, the conflicts are more difficult to resolve.

The question of "imputed knowledge, and therefore "imputed" disqualification, exists at both ends of the representation. The issue arises because of the presumption of shared confidences. It has long been accepted that attorneys in the same firm can, and often do, share information. See M.R. 1.6, Comment 5. One of the advantages of practicing in a firm setting is the ability to bounce ideas off others in the firm, and to obtain expertise in a variety of areas within the firm. This requires consultation among attorneys in the firm. In addition, in many firms, there is unrestricted access to client files, and in some firms, regular meetings are held at which progress on cases is discussed. Thus, in many cases, it is reasonable to presume that, where an attorney in a firm represents a client, the attorney's partners and associates have access to, and in fact have, protected information about that client.

The issue also arises where an attorney works on a client's case within a firm, but may have very little to do with the case. This comes up most often involving young associates in large firms. It is not uncommon that the attorney will be given few, if any facts, and will be asked to research a discrete issue. The attorney may have no access to the client file and little opportunity to discuss the case with others. Is it reasonable to presume that this attorney has confidential information of the client that would be at risk if the attorney were on the other side?

These questions are at the core of the courts' attempts to resolve the issue of imputed disqualification. Under what circumstances should the courts presume that an attorney who did not actually represent a client has protected information? Under what circumstances should the courts allow an attorney who actually worked on a case to deny that he or she has such information? While these matters are difficult enough, they are further complicated by the fact that it may not be the lawyer him or herself, but

rather the lawyer's new firm, that is undertaking the subsequent representation. How, if at all, should this alter the analysis?

Where disqualification is sought against a lawyer whose firm previously represented a client who the lawyer now represents adversely to, the courts have generally used two levels of presumptions to determine whether disqualification is required. The first presumption is that the attorney who represented the client in fact had confidential information that (if the matters are substantially related, and the subsequent representation is materially adverse) could be used against the client. This presumption is routinely viewed as irrebuttable. But where the attorney whose disqualification is sought did not actually work on the matter, most court will apply a rebuttable presumption on the issue of whether that attorney has protected information. If the attorney can rebut that presumption, by showing, for example, that he or she had no access to files and spoke to no one about the case, disqualification will not be ordered unless the other side comes back with information to show the contrary. In that case, the courts, not wanting a "swearing contest," will generally allow the presumption to carry the day and will disqualify the attorney.

Where, however, the attorney actually worked on the matter, most courts will not allow the presumption of access to confidential information to be rebutted. In such situations, disqualification will be mandated. Some courts, however, are concerned about the limited access problem. In order to facilitate mobility among lawyers and choice of counsel by clients, these courts will allow rebuttal where the attorney was only "peripherally involved" in the previous matter. This issue was addressed in another portion of the *Chrispens* decision as follows:

> This idea [of limited representation] is best reflected in the case of *Silver Chrysler Plymouth Inc. v. Chrysler Mot. Corp.,* 518 F.2d 751, 756-57 (2d Cir.1975), wherein the court stated: "But there is a reason to differentiate for disqualification purposes between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery.... Under the latter circumstances the attorney's role cannot be considered 'representation.' "
>
> In order for the automatic disqualification to take place under MRPC 1.9(a), there must be a showing that the attorney whose disqualification is sought actually represented the former client, not just that his or her law firm did so. This allows attorneys on the periphery of issues to avoid being cast as having represented a client when, in fact, they merely belonged to the firm. This also corresponds to the Comment to MRPC 1.9, which states: "The lawyer's involvement in the matter can also be a question of degree."

Although the court in *Silver Chrysler* refused to draw a controlling distinction between partners and associates in addressing this question, it seems clear that this doctrine is designed to protect those with limited access to information, and they are most likely to be younger associates. For the most part, it is only where the scope and degree of representation by their nature rebut the presumption of shared confidences that the *Silver Chrysler* peripheral involvement approach has been accepted.

While the use of these presumptions to resolve issues of disqualifications has been generally accepted for some time, the advent of the Model Rules has begun to cause a change in focus. Under the Model Rules, a lawyer should not represent a

person in the same or a substantially related matter in which that lawyer's prior firm previously represented a client whose interests are materially adverse and about whom the lawyer has acquired protected information. M.R. 1.9(b). The disciplinary rule allows for discipline only where the lawyer in fact possesses such information, although proof of such fact may be aided by "inferences, deductions or working presumptions." Comment ¶ 6.

Courts in a number of jurisdictions that have adopted the Model Rules have begun to use the language of the rules, rather than the presumptions, to resolve disqualification issues. Thus, in *Parker v. Volkswagenwerk Aktiengesellschaft*, 781 P.2d 1099 (Kan. 1989), the court focussed not on whether it should presume access to information, but rather on whether there had been a showing that the attorney "had knowledge of material and confidential information." See also *Graham v. Wyeth Labs*, 906 F.2d 1419 (10th Cir. 1990) (applying Kansas law). Missouri appears to have followed this approach in *In re Marriage of Carter*, 862 S.W.2d 461 (Mo. App. 1993). Does this provide sufficient protection to the former client's information? Does it adequately address appearances? Is use of the Model Rules appropriate in this context? Why or why not?

The problem is further complicated by the issue of screening. If it is not the attorney, but the attorney's new firm, that is currently representing adverse to the attorney's former client, can the attorney be screened from the current representation so that the firm can continue in the representation? The majority view, at least in the state courts, does not allow screening to prevent disqualification if the substantial relationship test has been met. *See, e.g., Parker*, 781 P.2d at 1106-07 (Model Rules "reject. . . any thought that the 'taint' of the incoming lawyer can be cured by screening. . . "); *JK & Susie L. Wadley Research v. Morris*, 776 S.W.2d 271, 284 (Ten. Ct. App. 1989); *Weglarz v. Bruck*, 128 Ill. App. 3d 1, 470 N.E.2d 21, 24 (1984) (screening only permitted where attorney had no confidential information). These courts believe that the continued risk of disclosure, coupled with the appearance of impropriety, outweigh interests in mobility and the right to counsel of choice.

Despite the rejection of screening by the Model Rules, a growing minority of courts has begun to recognize screening as a legitimate means of curing conflicts of this type based on the new realities of law practice which require a balancing of interests. *Manning v. Waring, Cox, James, Sklar & Allen,* 849 F.2d 222, 225 (6th Cir. 1988); see *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983); *EZ Painter, supra*. This issue caused heated discussion during debate on the Restatement. The current version of the Restatement would permit representation in the "former client" context "when there is no reasonably apparent risk that confidential information of the former client will be used with material adverse effect on the former client." Such risk will not be found where any confidential information "is unlikely to be significant in the subsequent matter" and the lawyer having such information "is subject to screening measures adequate to eliminate involvement by that lawyer in the representation." The Restatement also requires "timely and adequate notice of the screening" to all affected clients. RESTATEMENT, § 124(2). Is this an adequate resolution of the issue? Is it likely to be effective?

Where screening is permitted, it generally requires that the screened attorney be denied access to files, not discuss the matter with others in the firm, and not share in

profits or fees derived from the representation. See Restatement, Comment to § 204; ABA/BNA LAWYER'S MANUAL, ¶51:2004-2005, 2010-2013.

Note that, in the prospective client context, the Restatement would permit screening even where the screened attorney actually had access to information that could be significantly harmful to the prospective client. RESTATEMENT § 15. Does this satisfactorily resolve the issues where prospective clients are concerned? See also M.R. 1.18.

D. Non-lawyer Personnel

Conflict of interest problems can arise with regard to non-lawyer personnel within a law firm. In Informal Opinion 88-1526 (1988), the ABA addressed whether a law firm must be disqualified where a paralegal, who worked on a case with a prior firm, joined the firm representing the opposing party. The Committee noted that, under M.R. 5.3, the firm has an obligation to protect information that the paralegal may possess. This information can be adequately protected by using screening procedures that ensure the employee does not discuss the case with lawyers in the firm and does not work on the matter in any way. Disqualification of the firm, however, is not required.

This Opinion reflects the prevailing view in the courts, *see, e.g. Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994), although there are courts that see no reason for making a distinction between lawyers and non-lawyers in this situation. See *Esquire Care Inc. v. Maguire, 532 So. 2d 740* (Fla. App. 1988) and cases discussed therein. See Comment ¶4, Rule 1.10. In Kansas, the Supreme Court, citing Kansas Bar Association Ethics Opinion 90-05, stated:

> A law firm that employs a nonlawyer who formerly was employed by another firm may continue representing clients whose interests conflict with the interests of clients of the former employer if (1) the former employing firm and their affected clients consent after consultation, or (2) the employee can meet the burden of proof that he or she did not acquire 'material and confidential information during the course of his former employment.' A screening wall imposed unilaterally is inappropriate to meet this burden under our case law."

Zimmerman v. Mahaska Bottling Co., 270 Kan. 810, 19 P.3d 784, 791-2 (2001). Thus, where the secretary had obtained confidential information before switching firms, disqualification was required despite the attempt at screening.

Where lawyers and non-lawyer personnel are treated differently for these purposes, how should law students be treated?

E. Government Lawyers

Read Rule 1.11 and Comments.

Why are the rules for government lawyers different than for private lawyers? See A.B.A. Formal Opinion 342 (1975); see also *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980), *vacated on jurisd. grounds*, 449 U.S. 1106 (1981). What competing interests are at stake where Rule 1.11 is involved? Are these interests balanced appropriately? Who has a right to complain when a former government lawyer gets

involved in a private matter? Do the rules adequately address their legitimate complaints? See generally RESTATEMENT § 133.

What constitutes a "matter"? Can drafting legislation or regulations ever constitute a "matter"? Should it? What about participating "personally and substantially"? What level of participation implicates the interests the rule was designed to protect? *See Kelly v. Brown*, 9 Vet. App. 37 (1996); *Securities Investor Protection Corp. v. Vigman*, 587 F. Supp. 1358, 1366-67 (C.D. Calif. 1984); *see generally* Opinion 342.

Does Rule 1.9 apply when an attorney who formerly represented the government represents adverse to the same governmental entity in a substantially related matter? See *Violet v. Brown*, 9 Vet. App. 530 (1996). Should it? See ABA Formal Op. 97-409, holding 1.9(a) and (b) inapplicable to former government lawyers. See also ANNOTATED MODEL RULES, 184. Is this a correct result?

Does the government, as a "client," have the same entitlement to confidentiality that non-government clients have? Is there any justification for a distinction here? Consider the following:

> The government has few secrets of the kind Canon 4 is meant to protect. A basic premise of the Freedom of Information and Government in the Sunshine Acts is that, with the exception of classified information, the only types of information that the government should properly seek to protect are matters of tactics, investigatory documents, and similar materials.

National Bonded Warehouse Ass'n, Inc. v. United States, 718 F. Supp. 967, 970 n.2 (C.I.T. 1989), *quoting Developments in the Law - Conflict of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1431 (1981). Do you agree?

Is the government consent provision too easy? Who is it that must provide the consent? Does that person have a sufficient stake in the outcome when the government is not a party to the subsequent litigation? And does that person have a potential conflict - between protecting the agency's legitimate interests and setting a precedent that will preserve that individual's own marketability in the future? While the government frequently consents, there are situations where it refuses to do so. See, e.g., *Vigman*. Is there any better solution to this problem?

F. Lawyer as Witness

Read Rule 3.7 and Comments. Why is it inappropriate or professionally irresponsible for an attorney to act as both witness and advocate in the same case? Read the following, interpreting the predecessor provision under the Code.

NUNN v. STATE
778 S.W.2d 707 (Mo. App. 1989)

STEPHAN, Judge.

> Michael Nunn appeals the judgment of the trial court denying his Rule 27.26 motion. . . . In his first point, movant asserts that he was denied effective assistance of counsel in that his counsel testified at the trial and, when counsel's

conduct was made an issue, counsel failed to move for a mistrial or to withdraw as counsel.

Prior to movant's trial on charges of arson, assault, and burglary, defense counsel decided to interview three of the state's witnesses over the telephone. Defense counsel tape-recorded portions of these conversations without the other person's knowledge.

About six months prior to defendant's trial, one of these witnesses, Ms. Yvette Blake, was subpoenaed to appear for a deposition at defense counsel's office. The state, however, received no notice of the subpoena or scheduled deposition nor was a copy of the subpoena filed with the court. Ms. Blake appeared at defense counsel's office; however, no deposition was taken.

At trial, Ms. Blake testified for the state. When defense counsel cross-examined her, he attempted to attack her credibility and establish her bias by showing that her testimony, if favorable to the state, would result in the state's more lenient disposition of certain criminal charges pending against her. She denied this. She further denied that she remembered talking to defense counsel on the telephone about the case, although she acknowledged she had appeared at his office.

Defense counsel attempted to refresh her recollection of the telephone conversation by mentioning the subpoena she had received from his office. After the prosecutor's objections, defense counsel abandoned his efforts to impeach her credibility. Instead, during defense counsel's presentation of his case-in-chief, he called himself as the first witness in order to counter the testimony of Ms. Blake. Prior to testifying, he made no motion to withdraw as defense counsel. His brother, also an attorney, conducted the direct examination and defense counsel testified to his knowledge of the inconsistent statements by the state's witness, Ms. Blake.

The prosecutor vigorously interrogated defense counsel suggesting that defense counsel had served the subpoena on Yvette Blake for improper reasons. The prosecutor inquired whether defense counsel knew of the requirement not only that notice be given to all parties in an action when a deposition is to be taken, but also that attorneys avoid even the appearance of impropriety. The prosecutor further asked whether, in defense counsel's opinion, it was "legally, morally or ethically wrong" to call a state's witness and tape record their telephone conversation without disclosing they are being taped. After defense counsel finished testifying, he resumed his place at counsel's table and continued his presentation of defendant's case.

The last witness defense counsel called to testify was Timothy Murphy, an attorney and former law clerk in defense counsel's firm. He admitted being responsible for the handling of the subpoena. The sole purpose of his testimony was to absolve defense counsel of any wrongdoing with the subpoena episode.

During the state's closing argument, the prosecutor attacked defense counsel's credibility. He mentioned both the taping of telephone conversations and also the subpoena incident. He concluded his argument with the following: [Defense counsel] thinks it's an honorable thing to call witnesses up and not tell them they are being taped. Is it an honorable thing also to deliver a subpoenaed witness for deposition to a State's witness, have them come in to a law firm when there is no deposition taken, where there is no notice to the Prosecutor? If

we are going to talk about Yvette Blake's credibility, look at the people who are calling her a liar, and [defense counsel is] the primary one.

At the hearing on the motion, defense counsel testified he knew that if he took the stand his credibility, like that of any other witness, would be put in issue. Nevertheless, since he was the only person to hear the inconsistent statements from the state's witnesses, he believed his testimony was vital in the case. He discussed his course of action with movant and other members of his office.

After the evidentiary hearing, the motion court issued its findings of fact and conclusions of law and denied movant's allegation that his attorney was ineffective for failing to withdraw after testifying in movant's behalf. The court observed that defense counsel "wanted to testify on behalf of Movant at the trial in order to show that a State's witness had lied on the witness stand" and that "[t]he only way to show the witness' inconsistent statement was for [defense counsel] to testify." The court stated there was no reason for defense counsel to withdraw from the case prior to or during the trial since he could not have known that the state's witness would testify differently as to the facts she had related to defense counsel before trial. The court concluded that defense counsel's decision to call himself as a witness was one of "trial strategy" and did not reflect "errant judgment."

We disagree. Rule 4 of the Supreme Court of Missouri Rules, (since repealed) DR 5-101(B) provides that a lawyer shall not accept employment if he knows or it is obvious that he ought to be called as a witness, except if the testimony will relate solely to an uncontested matter, a matter of formality, the nature and value of legal services, or would work a substantial hardship on the client. DR 5-102(A) requires a lawyer and his firm to withdraw from the conduct of the trial if he learns or it is obvious that he ought to be called as a witness on behalf of his client except as allowed by the exceptions in DR 5-101(B).

Our Missouri Supreme Court analyzed the rationale behind DR 5-102 and 5-101 in State *v. Johnson*, 702 S.W.2d 65, 69 (Mo. banc 1985):

> The reasons underlying this rule are set forth in Ethical Consideration 5-9 of Missouri's Code of Professional Responsibility. First, a lawyer who serves as both trial counsel and witness is open to impeachment on the basis of an apparent interest in the outcome of the trial and is thus rendered less effective as a witness. Second, a lawyer who assumes both of those roles in a single case makes it more difficult for opposing counsel to conduct effective cross-examination and creates an awkward scenario in which one advocate must challenge the credibility of his legal adversary. Third, the lawyer who assumes the role of a witness must argue his own credibility, which may serve to weaken his credibility and effectiveness as an advocate. Finally, the two roles are said to be simply inconsistent. These reasons, though, have greatest purpose when the witness and advocate are one and the same.

Here, since each of these concerns surfaced during trial, we conclude that an actual conflict of interest existed between defense counsel and movant. At trial, the state first identified defense counsel's obvious interest in the outcome of the case by noting that he was not an appointed counsel but, rather, had been retained by defendant. Second, through its intimation of impropriety in counsel's tape-recording telephone conversations without the other side's knowledge and issuing a subpoena for an improper purpose, the state made

defense counsel's credibility an issue for the jury. Third, defense counsel called a witness for the sole purpose of rehabilitating defense counsel's own credibility. Finally, defense counsel's appearance in the inconsistent roles of advocate and witness may have undermined the jury's ability to decide the facts and its perception of movant.

Although the courts of Missouri have not addressed the particular situation in which a defense counsel testifies on behalf of his client and then continues with the case, a comparable scenario developed in State *v. Hayes*, 473 S.W.2d 688 (Mo.1971). In *Hayes*, the prosecuting attorney appeared as a witness for the state and then continued in the case as the prosecutor. Our Missouri Supreme Court echoed *Tomlin v. State*, 81 Nev. 620, 407 P.2d 1020, 1022 (1965), stating as follows: [T]he right of a prosecuting attorney to testify in a criminal case 'is strictly limited to those instances where his testimony is made necessary by the peculiar and unusual circumstances of the case. Even then, his functions as a prosecuting attorney and as a witness should be disassociated. If he is aware, prior to trial, that he will be a necessary witness, or if he discovers this fact in the course of the trial, he should withdraw....' The court held that "the prosecuting attorney occupied conflicting positions as a witness for the State and as a prosecutor ... and the natural tendency in such a case is for defendant to question the fairness of a trial when the prosecutor becomes a witness for the state."

In the instant case, when defense counsel decided that he should testify in his client's behalf, he was under a duty to withdraw from the case. He should not have been surprised that the state inquired about the subpoena and the taping of the telephone calls. Defense counsel's disregard for EC 5-9 and DR 5-102(A) thus put him in a situation where his continued representation jeopardized movant's position during the criminal trial. For example, counsel's act in calling the last defense witness, his former law clerk, was solely to refute the allegations of counsel's involvement with the subpoena. The only testimony elicited from the witness was directed at disassociating defense counsel from the entire subpoena episode.

Counsel was caught between the obligation to do his best for movant and the need to justify his own conduct as legal and ethical. An accused is entitled to representation which is uncluttered by counsel's efforts to vindicate his own conduct. A conflict of interest resulting in ineffective assistance of counsel may arise from an interest adverse to the accused or an interest simply personal to the attorney.

The only issue which should have been before the jury was defendant's conduct, not that of his attorney. Counsel's actions which injected his credibility as an issue during movant's trial undoubtedly adversely affected his client's interests. Counsel's prior conduct was completely irrelevant to movant's case and could only detract from his defense. That the jury unintentionally imputed the alleged improprieties of defense counsel to his client is a very real possibility. Counsel could have avoided this possibility by adhering to the ethical prohibitions.

We do not dispute counsel's right to call himself as a witness; clearly, an attorney may be a competent witness. Trial strategy, however, only applies to the decision to call a witness; it does not extend to the decision to remain as counsel. Such a situation produces a conflict of interest, and to sweep it under the rug of trial strategy is a mischaracterization. Furthermore, we find no

"peculiar and unusual circumstances" as referred to in *Hayes* which would justify the need to remain as counsel.

Can a defendant consent to his or her lawyer serving as both advocate and witness? While ordinarily Rule 3.7 prohibits a lawyer doing so even where the attorney consents, the Missouri Court of Appeals noted that, where a defendant desires to retain counsel despite the possible conflict of roles, the court "must balance the defendant's constitutional right against the need to preserve the highest ethical standards of professional responsibility." *State ex rel. Fleer v. Conley,* 809 S.W.2d 405, 409 (Mo. App. 1991). In *Fleer*, the court found that the lawyer might not in fact have to testify. In addition, it believed that the trial judge had not adequately considered the degree of hardship disqualification would cause to the defendant who had no further funds to retain counsel and who was ready for trial and did not want a further long delay. It reversed the trial court's disqualification of counsel pending a more complete balancing of the interests involved.

Outside the context of criminal defense, the courts generally will not permit the lawyer to play dual roles except in exceptional circumstances. Courts generally construe the exceptions to Rule 3.7 rather narrowly. Note also that the rule applies only to appearance and testimony at trial; appearance at pretrial proceedings, and involvement outside of the courtroom, are not addressed by this rule. See generally ANNOTATED RULES, at 387-88.

If a lawyer cannot represent a client because that lawyer will be required to testify, should the lawyer's firm be disqualified as well? Under the Code, the answer was generally "yes," but the Model Rules are more liberal in this regard. Rule 3.7(b) permits associated lawyers to continue to represent as long as they are not precluded by other conflict of interest rules (e.g., 1.7, 1.9). In what circumstances would such a conflict arise? When would no such conflict exist?