Conflicts of Interest Among Existing Clients: The Civil Litigator's Obligations and Options

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CONFLICTS OF INTEREST AMONG EXISTING CLIENTS: THE CIVIL LITIGATOR'S OBLIGATIONS AND OPTIONS

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I. INTRODUCTION ................................................. 879
II. ANALYSIS OF CRITICAL LANGUAGE IN THE APPLICABLE RULES UNDER EACH OF THE PROFESSIONAL CODES .............. 882
   A. The Model Code of Professional Responsibility ...... 884
      1. The “Adverse Effect” Requirement ............... 884
      2. The “Obvious” Requirement ..................... 885
      3. The “Consent” Requirement ..................... 886
   B. The Model Rules of Professional Conduct .......... 888
      1. The “Adverse Effect” Requirement ............... 889
      2. The “Reasonable Belief” Requirement .......... 890
      3. The “Consent” Requirement ..................... 891
III. APPLICATION OF THE RULES RESTRICTING ADVERSE PARTY REPRESENTATION: RELATIONSHIP BETWEEN MATTERS IS DETERMINATIVE .................................................. 892
   A. Single Litigation Matter Related to Representation of Existing Client .......... 892
   B. Separate Litigation Matter Related to Representation of Existing Client .......... 895
   C. Separate Litigation Matter Unrelated to Representation of Existing Client .......... 897
IV. CONCLUSION .................................................... 898

I. INTRODUCTION

Scarcely may the legal profession claim to be the originator of ethical rules proscribing one’s service to persons with conflicting interests,

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for such rules long predate legal memory.\textsuperscript{1} In fact, one of the most ancient of these precepts dates back to biblical times: “No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other.”\textsuperscript{2}

Lawyers properly may claim, however, to be among the first to incorporate these rules into their profession, being able to trace them back at least to thirteenth-century England.\textsuperscript{3} The legal profession since has significantly refined and expanded upon these once general and often vague axioms intended to breed trust and loyalty. But who more than lawyers should be charged with striving to perfect standards which promote trust and loyalty? The very foundation on which a lawyer builds his practice wholly depends upon his clients’ trust in him and his loyalty to his clients.\textsuperscript{4} Ethical rules restricting representation of clients with adverse interests, therefore, protect not only clients, although this is certainly their primary purpose,\textsuperscript{5} but also the legal profession itself.

Since adoption of the original American Bar Association Code of Professional Ethics in 1908, this country has possessed a codified rule

\begin{itemize}
\item \textit{1. See Statute of Westminster I, 1275, 3 Edw, 1, ch. 39 (fixing legal memory at 1 Rich, 1 (Sept, 3, 1189)).}
\item \textit{Matthew 6:24. At least one author cites this oft-quoted verse as the indisputable “original ethical prescription for human relationships from which [legal] disciplinary rules are drawn.” R. Alexander-Smith, Conflicts of Interest: Multiple Representations 1 (1983).}
\item \textit{See Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1292 n.43 (1981) [hereinafter Developments] (“The prohibition against the simultaneous representation of conflicting interests can be found in one of the earliest of professional codes, the London Ordinance of 1280: ‘No counter is to undertake a suit (plai) to be partner in such suit or to take pay (lower) from both parties in any action but well and lawfully he shall exercise his profession.’” (quoting H. Cohen, A History of the English Bar and Attornatus to 1450, at 233 (1929)).}
\item \textit{4. This is a long recognized truth about which it has been written:}
\begin{quote}
The greatest trust between man and man is the trust of giving counsel. For in other confidences men commit the parts of life; their lands, their goods, their child, their credit, some particular affair; but to such as they make their counsellors they commit the whole: by how much more they are obliged to all faith and integrity. 12 Essays of Counsel: The Works of Francis Bacon 147 (J. Spedding, R. Ellis & D. Heath eds. 1872).}
\end{quote}
\item \textit{But see Morgan, The Evolving Concept of Professional Responsibility, 90 Harv. L. Rev. 702 (1977). Morgan suggests that certain provisions of the American Bar Association Model Code of Professional Responsibility which purport to restrict representation by lawyers who are presented with a conflict actually serve the interests of the bar more than those of the clients. The theory is that the rules potentially increase the number of lawyers involved in the matter and, at the same time, decrease the level of lawyer responsibility for identifying those cases in which actual conflicts are apt to develop. Id. at 727-28.}
\end{itemize}
against representing clients with adverse interests. The rule has been consistently developed and broadened in scope with almost every revision of the professional codes. Today, the rule is no longer "a" rule; it is several rules. They are found in both the Model Code of Professional Responsibility (Model Code) and the recently adopted Model Rules of Professional Conduct (Model Rules).

It is important to discuss the restrictions on representing clients with adverse interests under both the Model Code and the Model Rules. Although the two exhibit many similarities, they also contain notable differences. Furthermore, a number of jurisdictions still adhere to the Model Code. Even those states that have adopted the Model Rules cannot simply disregard the Model Code. Disciplinary proceedings in which ethical standards were breached while the Model Code was in force will continue for some time, since the disciplinary rule that will apply is that which was in effect at the time of the misconduct.

Accordingly, this Article will discuss both the Model Code and the Model Rules. It will center on the conflicts that arise in the civil litiga-

6. The original model rule read as follows:

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure to the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

**Canons of Professional Ethics Canon 6 (1908).**

7. **Model Code of Professional Responsibility (1980).**

8. **Model Rules of Professional Conduct (1983).**

9. The Model Rules were adopted as modified in South Carolina on January 9, 1990, by order of the South Carolina Supreme Court, and became effective on September 1, 1990. See S.C. App. Ct. R. 407. The provisions analyzed in this Article are identical under both the Model Rules and the South Carolina version of the rules. Therefore, the modifications found in the South Carolina version are not pertinent to this Article and will not be addressed.

tion context when a lawyer's existing clients have adverse interests. This Article will proceed on the premise that clients normally should be free to receive, and attorneys free to provide, representation of choice, but shall focus upon the general restrictions on this freedom under the professional codes when a conflict exists. This Article also will analyze the critical language in each code's rule, concentrating on when representation of existing clients with adverse interests is permissible. Specifically, it will address the way in which the rules are applied with ranging degrees of strictness depending upon the extent to which the adverse clients' matters are related.

II. Analysis of Critical Language in the Applicable Rules Under Each of the Professional Codes

Under the Model Code, representation of existing clients with adverse interests is governed by DR 5-105. A similar provision gov-

11. From an analytical perspective, three types of conflicts of interest exist: (1) conflicts between a lawyer and his client; (2) conflicts between existing clients; and (3) conflicts between an existing and a former client. Haynsworth, Twenty-Five Common Conflict of Interest Situations, in Legal Malpractice and Ethics: Do You Know the Rules? (S.C. Bar Continuing Legal Education Seminar, Dec. 2, 1988). It has been suggested that only the first conflict is properly called a "conflict of interest" and the remaining two are more accurately described as "conflicts of obligation." K. Kipnis, Legal Ethics 40-55 (1986). The distinction is a simple one, but one worth noting since only the first situation presents a conflict with the lawyer's own interest, while the others present conflicts with the lawyer's obligations to his clients.

This Article will address only those rules relating to conflicts between existing clients in a civil litigation context. It does not address conflicts between existing and former clients or between an existing client and the lawyer himself. It also does not address conflicts arising in criminal litigation or in the nonlitigation context. For a thorough discussion of these and other conflict issues beyond the scope of this Article, see C. Wolf- ram, Modern Legal Ethics (1986).

12. Cf. In re Vanderbilt Assocs., 111 Bankr. 347, 351 (Bankr. D. Utah), rev'd on other grounds, 117 Bankr. 678 (Bankr. D. Utah 1990) ("An analysis of conflicts of interest must begin with the premise that debtors should be free to select counsel of their choice.").

13. This Article analyzes representation of clients with adverse interests in matters that are related as follows: (1) representation of adverse clients in a single litigation matter, see infra notes 73-83 and accompanying text; (2) representation of adverse clients in litigation matters that are separate but related, see infra notes 84-94 and accompanying text; and (3) representation of adverse clients in separate litigation matters that are unrelated, see infra notes 95-101 and accompanying text.

14. Model Code of Professional Responsibility DR 5-105 (1980). This rule reads as follows:

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his pro-
erning this type of representation is found in Rule 1.7 of the Model Rules of Professional Conduct. Neither DR 5-105 nor Rule 1.7 imposes a blanket prohibition against representing existing clients with conflicting interests. Instead, they set forth a general rule forbidding such representation, but allow the attorney to accept or continue the

fessional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).  

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).  

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.  

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate of, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

Id.

15. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983). This rule reads as follows:

Rule 1.7 Conflict of Interest: General Rule
(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after consultation.
(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
(1) the lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id.

16. Exactly who qualifies as an existing client has been the source of some confusion. Resolving that confusion to unanimous satisfaction is beyond the scope of this Article and, quite probably, the ability of the authors. It generally seems accepted, however, that a client would be considered an existing client if either the firm has an open file for him or he is a retainer client. In the latter case, it is immaterial whether the firm has an active matter for him at the time the new matter is offered. In neither case may the firm fire one client in favor of a more attractive one in an effort to come within the more liberal rules governing conflicts with former clients. Haynsworth, supra note 11, at 9-10.
employment under defined circumstances.

In a fairly common conflict situation, an attorney is offered employment in a matter whose acceptance either could or would have some bearing on his representation of an existing client. Also fairly common, prospective clients might seek joint representation in a single matter, but the matter is one which could result in the clients’ ultimately developing conflicting interests, despite the spirit of cooperation present at the inception of the attorney’s employment. These situations pose a dilemma for the attorney, who must decide whether he may accept the proffered employment, and whether he will be able to remain in the case as it develops. He must consider the requirements of the professional code applicable in his jurisdiction when he makes these decisions.

A. The Model Code of Professional Responsibility

If the jurisdiction in which the attorney is practicing follows the Model Code, he should focus primarily on DR 5-105(A) and (B). These provisions require him to decline or discontinue the employment if acceptance or continuance could or would adversely affect his independent professional judgment on behalf of a client. The requirements of subsections (A) and (B), however, are subject to the exception set forth in subsection (C), which permits the lawyer to undertake or continue simultaneous representation if the following two conditions are met: first, it is obvious that the lawyer can represent adequately the interest of each client; and second, each client consents after full disclosure of the possible effect of such representation on the exercise of the lawyer’s independent professional judgment.

1. The “Adverse Effect” Requirement

The requirement that the simultaneous representation adversely affect the attorney’s professional judgment before DR 5-105 is triggered is really no requirement at all. Courts presume an adverse effect on an attorney’s independent professional judgment when he takes an adversarial position toward another client. DR 5-105 is triggered the moment an attorney undertakes such representation and no specific

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18. Id. DR 5-105(C).
adverse effect needs to be demonstrated.20

2. The "Obvious" Requirement

Conversely, the requirement that it be obvious the attorney can adequately represent the interests of each client is real indeed. Nonetheless, considerable confusion exists regarding this requirement.21 The difficulty has resulted from the word "obvious," especially in light of the presumption that an attorney's professional judgment is marred once he undertakes representation adverse to another client. As one court noted, "Once it is shown that the exercise of the lawyer's independent professional judgment would be or would likely be adversely affected . . . , how could it ever be 'obvious' that he could adequately represent the interest of each party?"22

Mindful that such an interpretation would defeat the test set forth in DR 5-105, however, most courts have rejected the proposition that once an adverse effect is established, it is never "obvious" an attorney can adequately represent the interests of each client.24 In doing so, courts have kept the "obvious" requirement alive, although they rarely define the circumstances which have led them to the conclusion that a questioned representation is obviously adequate.25 Instead,


21. It has been said "that what is and is not obvious within the meaning of DR 5-105(C) is not obvious." Fordham, There are Substantial Limitations on Representation of Clients in Litigation which are not Obvious in the Code of Professional Responsibility, 33 Bus. Law. 1193, 1198 (1978). It also is not obvious from whose perspective the adequacy of representation should be measured: that of the reasonable lawyer or that of the attorney whose representation is being questioned. Developments, supra note 3, at 1304. Some guidance may be found in the Annotated Code of Professional Responsibility, which states, "Without belaboring the point, we think 'obvious' must refer to an objective standard under which the ability of the attorney adequately to represent each client is free from substantial doubt." AMERICAN BAR ASSOCIATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 243 (1979).


23. This interpretation would abolish the first prong of the test (requiring adequate representation be obvious), as well as the second prong (requiring consent to the representation). If the attorney could not represent adequately the interests of both parties, the existence or absence of consent would be irrelevant. See Unified Sewerage, 646 F.2d at 1348-50.

24. E.g., id. at 1347 (expressly rejecting the analysis and conclusion of the Porter court).

25. But see id. at 1350. The court in Unified Sewerage stated:

In determining whether it is obvious that an attorney can represent adverse parties, the court should look at factors such as: the nature of the litiga-
courts typically discuss the "obvious" requirement with any measure of detail only in cases involving actual conflicts that are essentially indisputable.26

Undoubtedly, these cases show that the "obvious" requirement is one which cannot be ignored. Even when the attorney has obtained consent to his undertaking of the representation, if there exists an impermissible conflict, courts will disqualify the attorney on the ground that it is not obvious he can adequately represent the interest of each client.27

3. The "Consent" Requirement

Just as it must be obvious an attorney can adequately represent the interest of each client, even if he has obtained consent to the representation, so too must there be consent, even if it is obvious the representation would be adequate.28 Determining the existence or absence of effective consent, however, is not always a simple task. A number of factors must be considered, including whether consent was obtained at all,29 and, if so, whether it was informed.30

Whether or not consent was obtained at all frequently is a subject of dispute.31 This may pose a problem for the attorney who fails to get consent in writing because the burden of proving consent is always

27. See, e.g., In re Bentley, 141 Ariz. 593, 688 P.2d 601 (1984). The Arizona Supreme Court held that despite the consent of both the judgment debtor and creditor, the attorney who had represented the creditor in obtaining the judgment against the debtor could not represent the debtor in matters that would enable the debtor to pay the creditor under an agreed plan. The court concluded that, considering the debtor's past payment record, it was obvious that a dispute could arise about the agreement. Id. at 596, 688 P.2d at 604.
28. See generally Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981) (discussing the importance of satisfying both prongs of the test set forth in DR 5-105).
31. See, e.g., In re Hansen, 586 P.2d 413 (Utah 1978).
upon the attorney, even though as a general rule, the movant in a motion for disqualification has the burden of proof. Failure either to obtain consent or to meet the burden of proving it invariably will result in disqualification.

Even in cases in which an attorney can prove he obtained consent, however, the consent is ineffective unless it is "informed consent." Informed consent can be given by a client only after he has received "full and effective disclosure of all material, relevant facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to [make] an informed [decision]." If the lawyer is able to demonstrate to the court that he has engaged in full and effective disclosure and has obtained the clients' knowing and intelligent consent, he will find that in almost all cases

33. See, e.g., Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976); Killian v. Iowa Dist. Court, 452 N.W.2d 426 (Iowa 1990).
35. See, e.g., cases cited supra notes 33-34.

To satisfy the requirement of full disclosure by a lawyer before undertaking to represent two conflicting interests, it is not sufficient that both parties be informed of the fact that the lawyer is undertaking to represent both of them, but he must explain to them the nature of the conflict of interest in such detail so that they can understand the reasons why it may be desirable for each to have independent counsel, with undivided loyalty to the interests of each of them.

Id.

38. As one commentator has noted, the "cases pragmatically recognize the differences in legal sophistication and knowledge among various clients." Developments, supra note 3, at 1313. Typically, courts scrutinize consent given by lay clients, but are willing to assume an understanding of potential or real conflicts by knowledgeable corporate officers and employees who grant consent on behalf of their businesses. See id. at 1312-13. This point is illustrated by Allegaert v. Perot, 434 F. Supp. 790 (S.D.N.Y.), aff'd, 565 F.2d 246 (2d Cir. 1977), in which the court found that the lawyer's clients, who were Wall Street brokerage firms, could not succeed in claims that the attorney failed to make potential conflicts clear in light of "the sophistication of all persons involved . . . ." Id. at 799 n.13. For additional cases arriving at similar conclusions, see Developments, supra note 3, at 1312 n.143. Surely it is unwise to rely on a client's supposed sophistication in legal or business matters to satisfy the informed consent requirement, however, since potential conflicts often are difficult to recognize and it is ultimately up to the courts to determine whether the client, on behalf of a corporation or not, appreciated the meaning of his consent. See id. at 1313.
the consent will be upheld.\textsuperscript{39} Courts that refuse to uphold consent under these circumstances typically do so, at least partially, out of concern for the perceived integrity of the legal profession and the judicial process.\textsuperscript{40} They note that civil litigants do not have an absolute right to retain particular counsel,\textsuperscript{41} and that "maintenance of the integrity of the legal profession and its high standing in the community are important additional factors to be considered . . .."\textsuperscript{42} While few attorneys would argue against the proposition that these are indeed important additional factors, courts must be careful not to allow them to become overriding factors. To do so would result in a per se rule against multiple representation, which, as noted, would defeat the purpose of DR 5-105.\textsuperscript{43} As the court commented in Unified Sewerage Agency v. Jelco, Inc.,\textsuperscript{44} "[a court's] responsibility is to preserve a balance, delicate though it may be, between an individual's right to his own freely chosen counsel and the avoidance of representation where undivided loyalty is impossible."\textsuperscript{45}

\textbf{B. The Model Rules of Professional Conduct}

If the jurisdiction in which the lawyer is practicing does not follow the Model Code but has adopted the Model Rules, then the attorney should focus primarily on Rule 1.7. This rule does not differ materially from DR 5-105 except in locution, which at least arguably eliminates some of the ambiguity of the Model Code. Rule 1.7 requires a lawyer to decline or discontinue representation of a client if the representation will be either: (1) directly adverse to another client; or (2) materially limited by the lawyer's responsibilities to another client.\textsuperscript{46} But as with

\textsuperscript{39} See, e.g., Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981) (law firm could represent both parties adequately); Bankers Trust v. Bruce, 283 S.C. 408, 323 S.E.2d 623 (Ct. App. 1984) (court found full and effective disclosure of relevant facts and circumstances).

\textsuperscript{40} See, e.g., Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 267 (D. Del. 1979) (court's obligation to resolve ethics problems is owed not only to the parties before it and their law firms, but also to the profession and the public).

\textsuperscript{41} E.g., Kramer v. Scientific Control Corp., 534 F.2d 1085, 1093 (3d Cir. 1976); cf. Schwarzer, \textit{Dealing With Incompetent Counsel—The Trial Judge's Role}, 93 HARV. L. REV. 633, 665 n.143 (1980) (no case has been found supporting a Fourteenth Amendment right to appointed counsel in civil cases).

\textsuperscript{42} International Business Machs. Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978).

\textsuperscript{43} See supra notes 23-24 and accompanying text.

\textsuperscript{44} 646 F.2d 1339 (9th Cir. 1981).

\textsuperscript{45} Id. at 1350. The court also noted, "We think the Code strikes a balance on the side of an individual's right to choose his own counsel and against a \textit{per se} rule forbidding multiple representation." \textit{Id.}

\textsuperscript{46} \textit{Model Rules of Professional Conduct} Rule 1.7(a)-(b) (1983).
the general prohibition in the Model Code, Rule 1.7 is tempered significantly by an exception which permits the representation if the lawyer reasonably believes there will be no adverse effect to representation of the client, and the lawyer obtains client consent after consultation.47

1. The "Adverse Effect" Requirement

Rule 1.7 is divided into subsections (a) and (b), which essentially address simultaneous representation from two opposing perspectives.48 Subsection (a) approaches the representation from the perspective of the existing client.49 It requires an attorney not to accept or continue representation that "will be directly adverse to another client"50 unless the attorney reasonably believes the representation will not have an adverse effect on the relationship with that client and each client consents after consultation.51

Subsection (b) focuses on the representation from a prospective client’s point of view.52 It disallows the representation if the attorney’s efforts on the prospective client’s behalf "may be materially limited by the lawyer’s responsibilities to another client"53 unless the attorney reasonably believes the representation will not be adversely affected and the prospective client consents after consultation.54

But regardless of whether the existing client, the prospective client, or both assert the adverse effect, it is unlikely a court would require that adverse effect actually be proved by one challenging the representation before Rule 1.7 is triggered.55 As with DR 5-105, courts generally can be expected to presume an adverse effect under Rule 1.7 once the attorney undertakes representation that requires opposition

47. Id.
48. C. WOLFRAM, supra note 11, at 350.
49. Id.
50. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1983). One change from the Model Code is the requirement in Rule 1.7(a) that the representation be directly adverse to another client. Exactly what is meant by the word "directly," however, is not completely clear. The comment to Rule 1.7 suggests the rule is intended generally to prohibit all degrees of direct advocacy against the client, but not to proscribe representation which requires only that the lawyer take a position which is generally adverse to the client, such as representing an economic competitor. See id. Rule 1.7 comment.
51. Id.
52. C. WOLFRAM, supra note 11, at 350.
53. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983).
54. Id.
55. Although no case directly on point has been found, judicial decisions interpreting the "adverse effect" requirement under DR 5-105 demonstrate the soundness of this contention. For citation and discussion of these cases, see supra notes 19-20 and accompanying text.
to another client.  

2. The "Reasonable Belief" Requirement

As noted previously, considerable confusion exists concerning whether the "obvious" requirement of the Model Code is to be judged by an objective or a subjective standard. The Model Rules' requirement that the lawyer "reasonably believe" the representation will not be adversely affected is an intended clarification of the Model Code. The improvement is slight, however, in that the language of the rule still leaves the standard debatable.  

The Model Rules define the terms "reasonable belief" and "reasonably believes" to mean "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." The fact that the lawyer must believe the matter in question suggests the standard is subjective, but the requirement that his belief be reasonable suggests the standard is objective. Despite the lack of clarity in this purported clarification, the prevailing view of the courts is that the standard is an objective one.  

Thus, the courts have measured the propriety of simultaneous representation of adverse interests by considering whether a reasonable attorney under the same circumstances would have undertaken the representation and once undertaken, whether he would have contin-

56. See supra note 55.  
57. See supra note 21 and accompanying text.  
59. See Developments, supra note 3, at 1304 n.96.  
61. See, e.g., Clay v. Doherty, 608 F. Supp. 295, 302 n.5 (N.D. Ill. 1985). The court in Clay explained, "Under the Code the 'it is obvious' language established an independent third condition, over and above the requirements of full disclosure and consent. Model Rule 1.7 deliberately changed that locution but retained the objective standard by stating the matter in terms of the lawyer's 'reasonable belief.'" Id. (emphasis added) (citations omitted).  
62. The Mississippi Supreme Court articulated the test under Rule 1.7 in Hartford Accident & Indem. Co. v. Foster, 528 So. 2d 255 (Miss. 1988). The court stated: Where the interests of the two parties are in some manner antagonistic to one another, before any lawyer is authorized to assume dual representation (or continue if the adversity appears after he has been retained), he must first satisfy himself that there is no objective reason why he cannot, despite such dergency of interest, faithfully represent them both. If this cannot be met, the lawyer should not accept employment in the first place (or terminate it, if begun). Secondly, even if the lawyer reasonably (and from an objective point of view) believes he can faithfully represent dual parties with adverse interests, he still must fully explain all implications of the advantages as well as the risks
ued it as the case developed. Furthermore, this objective first prong of the test to determine whether the representation is permissible must be satisfied whether or not the attorney has satisfied the second prong by obtaining client consent.

3. The "Consent" Requirement

From the preceding statement, it is clear that meeting one prong of the two-prong test will not satisfy the requirements for representing parties with adverse interests. Thus, under Rule 1.7, just as consent cannot cure representation of adverse interests in cases in which the lawyer does not reasonably believe he can adequately represent each client, neither can the lawyer's reasonable belief that he can provide adequate representation cure his failure to obtain client consent.

Although the consent requirement under Rule 1.7 has been criticized for its failure to resolve the question of what is required under the Model Code's demand that consent be given only after "full disclosure," Rule 1.7 is at least as clear as the Model Code and, with benefit of the comment, probably more so. First, the rule plainly imposes upon the lawyer the duty to consult with the clients before they consent. If the representation is of multiple clients in a single matter, the consultation must "include explanation of the implications of the common representation and the advantages and risks involved." It is true the rule does not define the scope of the consultation under other circumstances, but the potential abuse to result from this failure to define the contents is tempered significantly by the comment to Rule 1.7, which provides that "[a] client may consent to representation notwithstanding a conflict . . . , [but] when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot ask for such agreement or provide representation on the basis of the client's consent." This provision implicitly requires the attorney adequately to inform the client of his representation to both parties, and assure himself that they both have given knowing and informed consent.

Id. at 268.
63. See id.
64. See id.
65. See id.
66. See id.
69. Id. Rule 1.7(b)(2).
70. Id. Rule 1.7 comment.
whatever the circumstances before the obtained consent can be deemed effective.\(^1\)

Accordingly, the critical language in both DR 5-105 and Rule 1.7 requires the attorney to consider carefully the possibility that his acceptance or continuance of multiple employment may divide his loyalty or impair his judgment.\(^2\) In weighing the reasons for and against accepting or continuing representation when it involves litigation, the lawyer must assess his obligations and options in light of the particular factual situation. Specifically, he must consider whether the representation involves a single matter that is related to his representation of an existing client, a separate matter that is related to his representation of an existing client, or a separate matter that is unrelated to his representation of an existing client.

### III. Application of the Rules Restricting Adverse Party Representation: Relationship Between Matters is Determinative

#### A. Single Litigation Matter Related to Representation of Existing Client

If an attorney is offered employment in a single litigation matter, a conflict with an existing client typically will arise, if at all, under one of two circumstances. First, an existing or prospective client will ask the attorney either to bring or defend a lawsuit against a party whom the attorney already represents or is committed to represent in the particular matter. In this case, the attorney should decline the representation.\(^3\) An attorney cannot represent both a plaintiff and a defendant

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71. See In re Vanderbilt Assocs., 111 Bankr. 347, 352 (Bankr. D. Utah), rev’d on other grounds, 117 Bankr. 678 (Bankr. D. Utah 1990) ("The Rules . . . provide however that the client may be able to relinquish its right to a conflict-free representation if the client is fully informed.") (emphasis added).

72. This proposition and analysis of the rules are supported by the Ethical Considerations under the Model Code and the comments under the Model Rules. See Model Rules of Professional Conduct Rule 1.7 comment (1983); Model Code of Professional Responsibility EC 5-15 (1980). It should be noted that neither the Ethical Considerations nor the comments are mandatory. Instead, the Ethical Considerations are aspirational and represent the objectives toward which lawyers should strive. Model Code of Professional Responsibility Preliminary statement (1980). Similarly, the comments serve not as additional obligations, but as tools to guide lawyers toward appropriate practice under the Rules. Model Rules of Professional Conduct scope (1983).

73. See Model Rules of Professional Conduct Rule 1.7 comment (1983) ("paragraph (a) prohibits representation of opposing parties in litigation"); Model Code of Professional Responsibility EC 5-15 (1980) ("[a] lawyer should never represent in litigation multiple parties with differing interests"). Under both professional codes, the lawyer’s disqualification also would extend to members of his firm. Model Rules of Professional Conduct Rule 1.10(a) (1983); Model Code of Professional Responsibility
in a single suit.74 This prohibition is so sound it requires little discussion. It would be impossible for an attorney to undertake this kind of representation and still fulfill his obligation to act in the matter solely for the benefit of and with undivided loyalty to his client.75

Second, the prospective or existing clients may seek joint representation in litigation matters.76 Unlike cases in which the representation is of parties on opposing sides of the case, lawyers can jointly represent the coparties. As a general rule, "[m]ost coparty-conflict problems can be cured by client consent."77 However, these conflicts are not always easy to recognize at the outset. Regardless of this difficulty, a lawyer who intends to undertake coparty representation has a duty of loyalty and competence to investigate each party's potential cross-claims or cross-defenses.78 If it appears one party could assert a

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DR 5-105(D) (1980).

74. E.g., Jedwabny v. Philadelphia Transp. Co., 390 Pa. 231, 235, 135 A.2d 252, 254 (1957), cert. denied, 355 U.S. 966 (1958); see also In re Morgan, 288 S.C. 401, 343 S.E.2d 29 (1986) (attorney hired by client in financial difficulty to find buyer for client's home could not bring eviction action against client on behalf of buyer whom attorney also agreed to represent in the transaction). But see Brown & Williamson Tobacco Corp. v. Daniel Int'l Corp., 563 F.2d 671, 673-74 (5th Cir. 1977) (court allowed sister corporations who were nominally adverse to have same counsel in what was basically a collusive lawsuit); Klemm v. Superior Court, 75 Cal. App. 3d 893, 142 Cal. Rptr. 509 (1977) (court permitted representation of nominally opposing parties who sought same judgment and whose interests were not antagonistic).

75. This is a fair statement of the standard imposed by each of the professional codes. See Model Rules of Professional Conduct Rule 1.7 comment (1983); Model Code of Professional Responsibility EC 5-1 (1980).

76. Perhaps the most notable account of conflicts resulting from this type of representation can be traced to the 1916 Senate confirmation hearings on Louis D. Brandeis's nomination to the United States Supreme Court. Conservative opposition to President Wilson's nominee charged that Brandeis had acted improperly while in practice when, among other things, he put together a business deal between parties who had competing interests, represented a family business and continued to do so even after a falling out within the family required reorganization, and mediated a dispute and adjusted interests among owners and creditors of a floundering business in order to keep it afloat. Brandeis responded to these charges by saying that he did not consider himself the lawyer for one of these parties to the detriment of the other, but as the "lawyer for the situation." Of course, the Senate ultimately confirmed Justice Brandeis, but at least one commentator suggests this is due less to collapse of the charges than to concessions by other reputable attorneys that they often had engaged in the exact conduct. G. Hazard, Jr., Ethics in the Practice of Law 58-68 (1978). Such a defense would be unlikely to succeed today, whether before the Senate, a court, or a disciplinary panel.

77. C. Wolfram, supra note 11, at 354.

78. Id. at 353; cf. In re Vanderbilt Assocs., 111 Bankr. 347, 353 (Bankr. D. Utah), rev'd on other grounds, 117 Bankr. 678 (Bankr. D. Utah 1990) ("Counsel representing debtors in possession have a duty to search for potential conflicts affecting loyalty and confidentiality, to disclose the same, and to seriously analyze whether consent to a conflict can be given by the client.").
claim or defense against the other, the lawyer may not proceed unless
the conflict can be consented to and he obtains each client’s consent
after fully disclosing the nature of their potentially conflicting interests
and the risks accompanying joint representation.\textsuperscript{79}

The requirement that the conflict be consented to is extremely im-
portant and must not be overlooked. Indeed, both the Model Code and
the Model Rules proceed upon the premise that serious conflicts of in-
terest cannot always be cured by consent.\textsuperscript{80} Under the Model Code,
this point is illustrated by the fact that mere client consent is insuffi-
cient. Not only must the consent follow full disclosure, but it must be
obvious that the attorney can represent adequately the interest of each
client.\textsuperscript{81} The Model Rules similarly permit the representation after
consent only if both the consent is given after consultation and the
attorney reasonably believes his representation will not be affected by
the conflict.\textsuperscript{82}

But even full compliance with the tests set forth in the Model
Code and the Model Rules will not ensure that consent will be upheld.
Some courts have demonstrated a willingness to disqualify or discipline
attorneys despite compliance with the rules whenever they have deter-
mined the conflict is simply too severe to be cured.\textsuperscript{83} Thus, the prudent
attorney will make positive efforts to discover potential cross-claims or
cross-defenses among coparties. If any exist, he will decline the joint
representation if the parties are not able to consent to the conflict. If
they are able to consent, he will fully comply with the test set forth in
the applicable professional code, being especially certain to adhere to
the essentially parallel requirement that he be able to properly re-
represent the interest of each client, which avoids the later determina-

\textsuperscript{79} C. Wolfram, supra note 11, at 353-54. Dean Harry Haynsworth writes that in
situations in which the lawyer is not precluded from proceeding with joint representa-
tion, the lawyer must make an objective determination that he or she can adequately
represent each of the joint clients, obtain the informed consent of each of the clients
after full disclosure of all of the potential conflicts that might arise, explain that the
attorney-client privilege does not apply to joint clients, and explain that in the event a
disqualifying conflict arises during the course of the litigation, the lawyer must withdraw
completely from the case and each of the joint clients will have to obtain new counsel.
Haynsworth, supra note 11, at 10.

\textsuperscript{80} C. Wolfram, supra note 11, at 340.

\textsuperscript{81} Model Code of Professional Responsibility DR 5-105(C) (1980); see also
supra notes 21-27 and accompanying text (discussing the “obvious” requirement).

\textsuperscript{82} Model Rules of Professional Conduct Rule 1.7 (1983) see also supra notes
57-64 and accompanying text (discussing the “reasonable belief” requirement).

\textsuperscript{83} See, e.g., Greene v. Greene, 47 N.Y.2d 447, 451-52, 391 N.E.2d 1355, 1358, 418
N.Y.S.2d 379, 382 (1979); see also C. Wolfram, supra note 11, at 342 & notes 62-64
(recognizing the stated proposition and citing authority in support); Annotation, What
Constitutes Representation of Conflicting Interests Subjecting Attorney to Disciplinary
tion that the conflict was too severe to be cured by consent.

B. Separate Litigation Matter Related to Representation of Existing Client

In contrast to the situation in which an attorney represents a client in a particular case and is asked to undertake representation in direct opposition to that client in the same case, no blanket prohibition exists against accepting employment adverse to an existing client in a litigation matter that is separate from, even though related to, the matter in which the existing client is being represented. But the absence of an express prohibition does not mean that representation under these facts generally is permissible. To the contrary, courts have demonstrated an almost uniform practice of disqualifying or disciplining attorneys who engage in this type of representation.\(^84\)

Still, courts have stopped short of declaring that such representation is per se intolerable.\(^85\) Instead, they typically have disciplined or disqualified attorneys in these cases because of the lawyer's inability to represent adequately the interest of each client, his failure to obtain the required client consent, or judicial concern that the attorney could misuse information gained in confidence.\(^86\)

For example, the Arizona Supreme Court stated in *In re Bentley*\(^87\) that although it is not always improper to represent opposing parties simultaneously, an attorney may do so only if he can represent each client adequately.\(^88\) The Bentley court determined that the representation in that case was improper because the attorney for the creditor, who had obtained for his client a judgment against the debtor, undertook representation of the debtor in related\(^89\) financial matters which

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84. See, e.g., cases cited and discussed infra notes 87-94 and accompanying text.
85. Developments, supra note 3, at 1307. But see In re Garber, 95 N.J. 597, 472 A.2d 586 (1984). The court in Garber, stating a rule shared by few other jurisdictions, declared: "It is patently unethical for a lawyer in a legal proceeding to represent an individual whose interests are adverse to another party whom the lawyer represents in other matters, even if the two representations are not related." Id. at 607, 472 A.2d at 572. Because the court reached this strict conclusion on unrelated matters, it necessarily follows that it would have reached the same conclusion if it had been presented with facts showing the representations to be related.
86. See, e.g., cases cited and discussed infra notes 87-94 and accompanying text.
88. Id. at 596, 688 P.2d at 604.
89. Although the court characterized the attorney's representation of the debtor as one dealing with matters "unrelated" to his representation of the creditor, that characterization probably is inaccurate. The attorney himself acknowledged the relationship of the representations in a letter to the creditor, in which he wrote, "as [the debtor's] attorney, I will become privy to certain information relative to his assets . . . to satisfy the
would have enabled the debtor to pay off the judgment, and subsequently sued the debtor when he failed to satisfy the debt.³⁰ The court censured the attorney, holding it was not obvious the attorney could adequately represent the interest of each client as required by the Model Code.³¹

Other courts also have demonstrated an unwillingness to tolerate representation of opposing parties in litigation of related matters when the representation is not in strict compliance with prescribed ethical precepts. An illustrative case is Killian v. Iowa District Court.³² In Killian the Iowa Supreme Court disqualified an attorney from representation of one beneficiary in a suit against trustees because he already represented in a similar suit another beneficiary whose already-reached settlement agreement could have been jeopardized as a result of the multiple representation.³³ The court did not hold the representation to be absolutely proscribed, but was persuaded to disqualify the attorney in that case because he did not obtain the required client consent and, at least arguably, possessed information which could have been used to the first client’s disadvantage.³⁴

Thus, an attorney presented with making the decision of whether to undertake or continue representation of opposing parties in litigation matters that are separate but related may proceed generally under the premise that his representation is not in itself violative of the applicable provisions in either the Model Code or the Model Rules. He should proceed cautiously, however, and be aware that courts typically look upon such representation with disfavor. It is imperative, therefore, that he carefully consider the factual situation, taking pains to ensure that it is obvious he can adequately represent the interests of each cli-

outstanding judgment.” Id. at 594, 688 P.2d at 602.

90. Id. at 594-97, 688 P.2d at 602-05.

91. Id. at 597, 688 P.2d at 605. Two additional facts about Bentley should be noted. First, it seems the court also based its decision in part on Canon 9 of the Model Code, since it concluded its decision with reference to not only the actual conflict that arose, but also the appearance of impropriety that resulted from the representation. Id. Second, the court pointed out that consent was given by both clients in this case. That fact was not determinative, however, since “[e]ven with full disclosure, not all conflicts can be waived by consent of the parties.” Id. at 596, 688 P.2d at 604. In support of this second point, the court quoted from the comment to Model Rule 1.7, which states that “ ‘[w]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.’ ” Id. at 596-97, 688 P.2d at 604-05 (quoting Model Rules of Professional Conduct Rule 1.7 comment (1980)).

92. 452 N.W.2d 426 (Iowa 1990).

93. Id. at 427-30.

94. Id. at 429-30.
ent, that he has obtained the informed consent of each, and that he possesses no confidential information that could be used against the existing client.

C. Separate Litigation Matter Unrelated to Representation of Existing Client

Because courts almost unanimously have declined to impose a per se rule against representing parties with opposing interests in litigation matters that are separate but related, it is logical that they also typically have refused to impose such a rule when the litigation matters are separate and unrelated. Courts generally have adhered to this practice even though some ethics committees have attempted to establish a per se rule against accepting proffered or continued employment in this situation.

The fact that the matter in which the attorney is asked to oppose an existing client is unrelated to his representation of that client does not mean, however, that the requirements that the attorney be able to adequately represent the interests of each client and that he obtain the consent of each need not be satisfied. Although the Model Code does not expressly require compliance with DR 5-105(C) in such cases, courts interpreting the provision have demonstrated a willingness to

95. See Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1349 (9th Cir. 1981) (court analyzing the questioned representation under DR 5-105 and noting that while it did not encourage opposing an existing client, even in an unrelated matter, it was "not prepared to enunciate a per se rule that a client must forego in all circumstances his choice of a particular attorney merely because there is the foreseeability of a future conflict with one of the attorney's existing clients"). But see In re Garber, 95 N.J. 597, 472 A.2d 566 (1984).

96. For instance, the American Bar Association Standing Committee on Ethics and Professional Responsibility has issued an informal opinion stating that a lawyer may not accept employment adverse to an existing client, even in an unrelated matter. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1495 (1982). For similar opinions from state ethics committees, see Mass. Ethics Comm., Op. 80-10 (1980); N.J. Advisory Comm. on Professional Ethics, Op. 507 (1982). It is important to note that the Code's disciplinary rules, which ethics committees are charged with interpreting, were drafted for use in disciplinary proceedings and were not intended to be used as rules governing disqualification motions. Consequently, disciplinary bodies are not bound by judicial interpretation or application of rules from cases that have dealt with disqualification. In other words, an attorney may be disciplined for unethical conduct even if a court determines the conduct does not warrant disqualification. This situation rarely occurs, however, because courts typically rely on the rules as guidelines in cases in which disqualification of an attorney is at issue. See, e.g., Kevlirik v. Goldstein, 724 F.2d 844, 846-47 (1st Cir. 1984); Unified Sewerage, 646 F.2d at 1342 n.1; Central Milk Prod. Coop. v. Sentry Food Stores, Inc., 573 F.2d 988, 993 (8th Cir. 1978).

97. See Model Code of Professional Responsibility DR 5-105(C) (1980).
permit the adverse representation in an unrelated matter only when it is obvious the attorney can represent adequately the interest of each and he has obtained the required client consent. 98

As for the Model Rules, the comment to Rule 1.7 does address specifically representation adverse to an existing client in matters unrelated to those in which the attorney represents that client. The comment states that "[a]s a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent . . . . Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated."99 Since a lawyer may not even ask for consent unless he reasonably believes he can provide adequate representation,100 it is clear from the comment that Rule 1.7 contemplates permissible representation of adverse interests in unrelated matters only when the lawyer both holds this reasonable belief and has obtained client consent to the representation.

IV. Conclusion

Because of the extraordinarily high fiduciary duty a lawyer owes to his clients, he should take every reasonable precaution to protect his clients' interests. The professional codes demand no less. But the codes wisely stop short of imposing an absolute prohibition against representing parties with adverse interests in most cases.101 In fact, the codes expressly provide that such representation is permissible under defined circumstances.102 Furthermore, courts interpreting the applicable rules within each code almost unanimously have refused to impose a per se rule proscribing representation of parties with adverse interests.103 Accordingly, a lawyer presented with a situation in which representation of clients with adverse interests is an issue should not immediately assume he must decline or withdraw. To do so, in many cases, would undermine the important principle of representation of choice.104

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98. See, e.g., Unified Sewerage, 646 F.2d at 1345-47.
100. See id.
101. See supra note 85 and accompanying text. But see supra notes 73-74 and accompanying text.
102. See Model Rules of Professional Conduct Rule 1.7(a)(1)-(2) (1983); Model Code of Professional Responsibility DR 5-105(C) (1980) (specifically providing exception to general rule against representation of clients with adverse interests) (same).
103. See, e.g., supra notes 85 and 95 and accompanying text.
104. See supra note 12 and accompanying text.
Instead, as has been demonstrated throughout this Article, the lawyer should consider closely the critical language of the applicable rule in light of the circumstances surrounding the representation, especially the extent to which the adverse clients' matters are related. This often will lead the attorney to the conclusion that the representation of both clients is impermissible. If that is the case, he should decline or withdraw immediately. But when he is led to the opposite conclusion after an objective and thorough analysis of the rules, cases, and principles detailed in this work and others,\textsuperscript{105} he may accept or continue the representation, confident that the applicable precepts are being followed as intended.

\textsuperscript{105} The prudent attorney always will analyze personally the applicable rules and controlling cases in his jurisdiction, but should build upon his analysis with reference to secondary authorities. For two excellent reference works, see \textit{Developments, supra} note 3 and C. \textsc{Wolfram}, \textit{supra} note 11.