An Instrumental Interpretation of Model Rule 1.7(a) in the Corporate Family Situation: Unintended Consequences in Pandora's Box

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An Instrumental Interpretation of Model Rule 1.7(a) in the Corporate Family Situation: Unintended Consequences in Pandora’s Box

Stephen E. Kalish

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I. INTRODUCTION

A. General Discussion

The American Bar Association’s Model Rules of Professional Conduct (“Model Rules”) focus, *inter alia*, on a lawyer’s duty to avoid impermissible conflicts of interest in civil litigation. Rule 1.7 is the general rule. Although there are several reasons for a prohibition on conflicts of interest, the primary one examines how the lawyer works or operates for his client. It focuses on the lawyer’s ability to provide effective, independent representation, including an appropriate regard for confidentiality and loyalty, to his client. It is thereby operational.

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2. Rule 1.7 provides:
   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.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1997).

3. The Model Rules of Professional Conduct reject the nonoperational rubric, “the avoidance of the appearance of impropriety,” as an effective focus of analysis. Although some commentators have suggested this appearance test serves important public relations functions and it warns lawyers to lean over backwards to be ethical, it remains unclear why mere appearances should support important legal ethics violations. First, although the “appearance of impropriety” may have some relevance with respect to public officers, it offers little of substance in the private arena. If citizens distrust their public lawyers, then it is plausible they may lose respect for the governmental and legal system. What the public thinks about lawyers engaged in private law practice does not bear on the issue of public trust. The ABA’s earlier Model Code of Professional Responsibility Canon 9 is entitled: “A Lawyer Should Avoid Even the Appearance of Professional Impropriety.” Its primary focus is on public, not private, lawyers. The ABA deleted this topical rubric from the Model Rules of Professional Conduct. Second, the
This Article focuses on this general conflict of interest rule in the Model Rules in one fairly common situation: legal representation of one or more corporations, all of which are separate juristic entities, when these corporations are commonly owned and affiliated. Those affiliated groups will be referred to as corporate families. This Article raises the following question: When may a lawyer, who represents one juristic entity in a corporate family on one matter, simultaneously represent another client in a lawsuit on an unrelated matter against a different juristic entity within the same corporate family? This Article also speculates how this inquiry applies when the affiliated operating businesses of the family group are not separate juristic entities, but rather operate as divisions of a single juristic corporation. This Article refers to this business arrangement as a corporate conglomerate.

The ABA's Committee on Professional Ethics ("Committee") addressed these issues in Formal Opinion 93-372 and in its important and controversial Formal Opinion 95-390. In Formal Opinion 93-372, the Committee unanimously stated, in passing, that there was a per se breach of legal ethics if a lawyer represents one client against a corporate conglomerate while simultaneously representing that corporate conglomerate in an unrelated matter. In Formal Opinion 95-390, the appearance of the wrong does not necessarily imply that the lawyer has actually committed the wrong. It is unfair to punish a lawyer for doing nothing substantively wrong. Third, it is unclear what the "appearance of impropriety" means. Its precise meaning is ambiguous and changes from differing perspectives. It offers little guidance to active professionals, and although it may encourage them to lean in one direction to avoid a negative appearance, this leaning may itself result in unprofessional conduct. A lawyer who unduly avoids a conflict may not serve a client well. Beauty is in the eyes of the beholder, and so is the nebulous appearance of impropriety.

Of course, not all commentators believe the "appearance of impropriety" is a nebulous rubric. Mr. Lawrence J. Fox worries that clever lawyers will consistently interpret rules, particularly Rule 1.7(a), in a way that opens the door to gamesmanship at the expense of true ethics. His suggestion is for persons to interpret the rule so as to avoid the appearance of impropriety. He writes: "And if this has a chilling effect, reducing the cleverness and glibness of crusading lawyers cutting down the impediments of conflicts, that, too, is a worthwhile result, one that may lift the profession out of its present fixation on conflicts as gamesmanship." Lawrence J. Fox, Litigating Conflicts: Is it Time to Revive the Appearance of Impropriety?, PROF. LAW., Feb. 1998, at 1, 10.

4. This Article uses unrelated matter to refer to legal tasks that do not share information or have information in common.


7. Formal Opinion 93-372 states:

However, when corporate clients with multiple operating divisions hire tens if not hundreds of law firms, the idea that, for example, a corporation in Miami retaining the Florida office of a national law firm to negotiate a lease should preclude that firm's New York office from taking an adverse position in a totally unrelated commercial dispute against another division of the same corporation strikes some as placing unreasonable limitations on the opportunities of both clients and lawyers. [However,] the Model Rules quite correctly treat such a situation as presenting a conflict. . .

Formal Opinion 93-372, supra note 5.
Committee took several years to decide there was no *per se* breach of legal ethics if a lawyer represents one client against a corporate family member while simultaneously representing another family member in an unrelated matter. Several commentators have also addressed these issues.

This Article will reduce the complexity of actual situations and cases by consistently using a simplified hypothetical illustration that builds on what the Committee, in Formal Opinion 95-390, called the "paradigm situation." Parent, Inc. operates its business through a wholly owned subsidiary, Subsidiary A, Inc. The corporate family includes Parent, Inc. and Subsidiary A, Inc. Parent, Inc. retains Lawyer to assist it with a tax matter. Client X retains Lawyer to represent it against the other corporate family member, Subsidiary A, Inc., on a complex tort matter that is unrelated to the tax matter. Client X seeks

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8. In Opinion 684, the New York County Lawyers' Association Committee on Professional Ethics concluded that an attorney may bring an action on behalf of one client against a subsidiary of another client. It decided the issue under the Model Code of Professional Responsibility. Although it used the "appearance of impropriety" rubric, it emphasized the problem as the creation of hostility among human persons. Opinion 684 said:

"While the appearance of impropriety is difficult to define, as a general rule, the closer the relationship between the law firm and the subsidiary and the more material an adverse action to the parent, the greater the chances that the dual representation proposed will appear improper. Where an action would materially affect the parent, Canon 9 considerations are likely to be implicated if the proposed representation would require the lawyer to take action hostile to persons connected with the parent, such as discovery of officers or directors of the parent corporation."


substantial money damages [such that] if the suit is successful, this will affect adversely not only [Subsidiary A, Inc.] but [Parent, Inc.] as well, in the sense that one of its assets is the equity in the subsidiary, and its consolidated financial statements may (unless the subsidiary has applicable insurance coverage) reflect the impact of material adverse judgments against the subsidiary.\textsuperscript{11}

Does Lawyer have an impermissible conflict of interest? Should the answer change if Parent, Inc. runs its business as a single juristic corporate conglomerate, Parent-A, Inc., operating through its Division A? In discussing cases and opinions, this Article will frequently substitute and refer to this simplified, paradigmatic, hypothetical illustration.

This hypothetical situation is surprisingly common in today's complex business world.\textsuperscript{12} Business acquisitions, law firm expansions, complex litigation strategies, and law firm conflict-checking systems all contribute to the problem. For example, Lawyer may represent Parent, Inc. on the tax matter and Client X in a complex tort lawsuit against Independent A, Inc., an unrelated corporation. Parent, Inc. may acquire Independent, Inc., making it Subsidiary A, Inc. Lawyer now represents Client X in a complex tort lawsuit against Subsidiary A, Inc.\textsuperscript{13} Or, Lawyer may represent Parent, Inc. on the tax matter. An unrelated Attorney may represent Client X in a complex tort lawsuit against Subsidiary A, Inc. Lawyer's law firm may laterally hire Attorney, who brings her Client X with him. Because the Model Rules often treat individual members of a law firm as if they were single individuals, the situation becomes tantamount to Lawyer representing Client X in a complex tort lawsuit against Subsidiary A, Inc. while simultaneously representing Parent, Inc. on the tax matter.\textsuperscript{14}

Still another example would be Lawyer representing Parent, Inc. on the tax matter and Client X in a complex tort lawsuit against Independent, Inc. As discovery proceeds on Client X's lawsuit, Lawyer determines Subsidiary A, Inc. must be joined as a defendant. Once this joinder occurs, Lawyer will be

\textsuperscript{11} Id.
\textsuperscript{12} Image Technical Services v. Eastman Kodak Co., 820 F. Supp. 1212 (N.D. Cal. 1993), demonstrates how far reaching this problem is. The law firm Coudert Brothers represented a division of Eastman Kodak, located in Hong Kong, in commercial sales of fibers in China. It also brought a lawsuit on behalf of Image Technical Services concerning sophisticated microphotography equipment against Eastman Kodak in New York. This was believed to be an impermissible conflict of interest.
\textsuperscript{14} See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 cmt. [1] (1997) (discussing the meaning of "firm" for the purposes of imputed disqualification). This Article assumes, for most purposes, that this assumption holds. No law firm-screening or institutionalized ethics wall will defeat this assumption. This Article focuses primarily on the fiction associated with the abstract category "client."
representing Client X in a complex tort lawsuit against Subsidiary A, Inc. while simultaneously representing Parent, Inc. on the unrelated tax matter. Finally, Lawyer may represent Parent, Inc. on the tax matter. Client X requests Lawyer to represent him in a complex tort lawsuit against Subsidiary A, Inc. Lawyer’s law firm checks for conflicts, but it does not discover Parent, Inc. owns Subsidiary A, Inc. until after Lawyer has filed the Client X v. Subsidiary A, Inc. lawsuit.  

B. Simultaneous and Former Client Conflicts

The Model Rules divide conflicts of interest problems associated with multiple clients into two categories: simultaneous conflicts and former client conflicts. Rule 1.7 examines problems associated with conflicts between simultaneous, current clients. Rule 1.9 focuses on conflicts generated between current and former clients, and its primary concern is assuring the integrity of former client information. In the hypothetical illustration, Rule 1.9 would be implicated if Lawyer had been retained by conglomerate Parent–A, Inc. to work on the tax matter, finished it, and subsequently represents Client X in the complex tort matter against Parent–A, Inc. Rule 1.9 provides (1) if the complex tort lawsuit is substantially related (an issue usually resolved by asking if Lawyer had an opportunity to learn relevant information about the complex tort matter while working for Parent–A, 

15. In Harte Biltmore Ltd. v. First Pennsylvania Bank, 655 F. Supp. 419, 420 (S.D. Fla. 1987), for example, the problem was in the computerized index of client names. The client’s name had been misspelled on one of the firm’s list of clients. Id.
16. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1997).
17. Rule 1.9 provides:
Rule 1.9 Conflict of Interest: Former Client
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
unless the former client consents after consultation.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.
MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1997).
Inc.) to the unrelated tax matter or (2) if Lawyer had acquired, while Parent-A, Inc.'s tax lawyer, information relevant to the complex tort matter, then Lawyer would violate Rule 1.9 if he should represent Client X. 18

As this Article will develop, the Rule 1.7 prohibition against a simultaneous conflict is automatic if the facts fall within a prescribed bright-line category: "the representation of that client will be directly adverse to another client." 19 This prohibition is absolute and potentially extensive. Because Rule 1.9's restrictions are less severe, lawyers frequently try to convert a current client into a former client, thereby qualifying for the more permissive Rule 1.9 analysis.

The court in Picker International, Inc. v. Varian Associates20 warned against this maneuver in certain circumstances.21 The law firm Jones Day represented Picker International in a patent lawsuit against Varian. The law firm McDougall, Hersh & Scott ("MH&S") represented Varian on a variety of matters, although not the patent suit. The two law firms proposed a merger that would result in what they believed would be an impermissible conflict of interest. The two firms sought Varian's consent (promising, inter alia, to establish an elaborate screen to assure that all Varian's confidences would remain secret) to the newly merged Jones Day's representation of Picker in the patent suit and its continued, simultaneous representation of Varian on unrelated matters. Varian refused. MH&S, therefore, withdrew from its representation of Varian and the law firm merger took place.22 In upholding Varian's motion to disqualify the merged law firm, the trial court stated the firm could not "drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client."23 To do so would violate its duty of loyalty to Varian and would inevitably lead to undermining the "public perception of lawyers and of the administration of justice."24

This Article assumes Parent, Inc., Parent-A, Inc. (where relevant) and Client X are all Lawyer's current clients. This Article suggests an interpretive approach to Rule 1.7(a) that would obviate, in many circumstances, Lawyer's need to convert a current client into a former client.

19. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1997).
22. Id. In Stratagem Development Corp. v. Heron International N.V., 756 F. Supp. 789, 794 (S.D.N.Y. 1991), the court said:
   Epstein Becker may not undertake to represent two potentially adverse clients and then, when the potential conflict becomes actuality, pick and choose between them. Nor may it seek consent for dual representation and, when such is not forthcoming, jettison the uncooperative client. . . . Under these circumstances, Epstein Becker has no choice but to withdraw from representing either client in this case.
24. Id. at 1367.
II. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.7

A. The Rule’s Structure

Rule 1.7, the general conflicts of interest rule, has two parts: an operational section, Rule 1.7(b), and a bright-line categorical section, Rule 1.7(a). Rule 1.7(b) directly examines the factors that influence how Lawyer, in particular circumstances, works and operates. Its focus is whether Lawyer will be able to provide effective independent representation to his client. If it is likely that Lawyer’s representation may be “materially limited” in particular circumstances, then there is a prima facie violation of Rule 1.7(b) that can only be cured by obtaining the affected client’s consent.

Section 1.7(a) is the bright-line categorical section. It does not focus on the predicted quality of Lawyer’s professional work. It describes a situation, “representation of [one] client directly adverse to another client,” and then concludes if Lawyer’s activities fall within this category, there is a prima facie violation of Rule 1.7(a) that can only be negated by obtaining the consent of both clients. As noted, Lawyer’s clients can consent to a prima facie violation of either section of Rule 1.7. In both cases, however, the Model Rules cautiously establish preconditions to client consent in order to protect the client from making an improper choice. This Article later discusses how the preconditions for Rule 1.7(a) and Rule 1.7(b) are slightly different.

Rule 1.7(a)’s bright-line categorical approach to conflict of interest issues has been the source of many problems. At the least, it has spawned costly and unnecessary motions for the disqualification of opposing counsel. Some commentators have recommended Rule 1.7(a) simply be deleted from the Model

25. See supra note 2.
26. See Rule 1.7(b), supra note 2.
27. Rule 1.7(a), supra note 2.
28. See Rule 1.7(a), supra note 2.
29. In Hanford Accident & Indemnity Co. v. RJR Nabisco, Inc., 721 F. Supp. 534, 541 (S.D.N.Y. 1989), the court conceded that there had been a Canon 5 violation (Rule 1.7(a)’s predecessor), but it was reluctant to disqualify the offending attorney. It said: that only a wooden application of the ABA canons would support disqualification. In this day of frequent firm reorganizations and lateral transfers, such an application would merely invite an increased number of disqualification motions, born of little more than hardball litigation strategy sessions and advanced where there is no threat of actual prejudice. Id. at 541.
30. See MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.7 cmt. [15] (1997) (“Such an objection [to an opposing counsel’s conflict] should be viewed with caution, however, or it can be misused as a technique of harassment.”); see also sources cited supra note 9 (discussing the proliferation of unnecessary motions for disqualification under Rule 1.7(a)).
Rules. Other commentators have suggested any per se connection between a Rule 1.7(a) ethics violation and a motion for disqualification be severed. While sympathetic to those approaches, the aim of this Article is more limited. This Article concedes the continued existence of Rule 1.7(a), but suggests an instrumental interpretation of its important terms that would effectively limit its scope and impact to the principal purpose of the conflict of interest rules—the assurance Lawyer will provide effective, independent client representation with an appropriate regard for confidentiality and loyalty.

As has been noted, Formal Opinion 95-390 held there was no per se violation of Rule 1.7(a) if Lawyer simultaneously represented Parent, Inc. in the tax matter and Client X against Subsidiary A, Inc. in the unrelated complex tort lawsuit. There were vigorous and caustic dissents. Dissenter Lawrence Fox claimed that it would "destroy traditional notions of client loyalty and client concern." Dissenter Richard L. Armster worried that it "opens a Pandora’s Box of unintended consequences which most assuredly will return to vex us in the future." Dissenter Deborah A. Coleman called it "business folly." Even the majority seemed uncertain with its conclusion. This conclusion suggested a presumption that if there were any doubts that Rule 1.7(a) applied to a particular case, these doubts "should be resolved by a presumption that favors the client who will be adversely affected by the prospective representation."

This Article endorses the result of Formal Opinion 95-390 with more enthusiasm. This Article peeks into Pandora’s Box, and explores some surprising implications in it. What some may find as a strained interpretation of Rule 1.7(a) to avoid an unduly wooden approach is perhaps the best argument in favor of simply eliminating Rule 1.7(a) from the Model Rules of Professional Conduct.

B. Model Rules of Professional Conduct, Rule 1.7(b)

Before beginning the discussion of Rule 1.7(a), a brief sketch of how Rule 1.7(b) might operate in the hypothetical illustration is appropriate. Regardless of how commentators interpret Rule 1.7(a), or even if it is eliminated, Rule 1.7(b)
always assures that Lawyer will provide effective, independent legal representation to each of her clients. This operational section provides:

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.39

Rule 1.7(b) directly explores the operational issue of effective representation as it relates to each client separately. Its first operational factor is client loyalty. As to each, Parent, Inc. and Client X, if Lawyer’s representation “may be materially limited,” there is a prima facie violation of the Rule, and Lawyer shall not continue to represent the affected client.40 The key operative words, “may be materially limited,” uses the probabilistic “may.” It thus serves as an early-warning device, alerting Lawyer not to continue representation of a particular client if it is unlikely he will be able to provide that client effective, independent representation in the future. In Formal Opinion 95-390, the Committee’s majority was aware of Rule 1.7(b)’s importance. It said:

What triggers Rule 1.7(b) is a lawyer’s recognition of the possibility that a particular representation may be materially limited by the lawyer’s responsibilities to another client. As the Comment to the Rule makes clear, the reference is to situations “when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests.” Such a material limitation on the lawyer’s ability properly to represent a client could arise, for example, if the lawyer’s concern for remaining in the good graces of client A was likely to impair the independence of judgment or the zeal that the lawyer could bring to bear on behalf of client B.41

A second relevant operational factor included in Rule 1.7(b) is the important principle of client confidentiality. The Model Rules, moreover, emphasize this

39. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1997).
40. Id.
41. Formal Opinion 95-390, supra note 6 (italics added).
important duty. First, there is the independent duty not to disclose information. Rule 1.6 mandates that a lawyer shall not reveal information relating to the representation of a client, unless the client consents after consultation.42 Second, there is the specific articulation of this duty as an aspect of the general duty to avoid impermissible conflicts of interest. In Rule 1.8, entitled "Conflict of Interest: Prohibited Transactions," subsection (b) insists that a "lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation."43

In the hypothetical illustration, pursuant to Rule 1.7(b), Lawyer will have to decide if his representation of Parent, Inc. on the tax matter may be materially limited by his representation of Client X in the complex tort lawsuit against Subsidiary A, Inc. The answer, of course, depends on the facts. Because it is unlikely Lawyer will acquire information relevant to Client X's lawsuit and because it is probable Lawyer will be able to effectively and competently complete the tax matter, there is little likelihood his representation of Parent, Inc. may be materially limited. With respect to Client X, Lawyer will have to engage in a similar but separate analysis pursuant to Rule 1.7(b). Will Lawyer's representation of Parent, Inc. on the tax matter materially limit his representation of Client X against Subsidiary A, Inc.? If, for example, Parent, Inc. is an important client and promises future business, Lawyer may conclude that he might be tempted to soft peddle Client X's lawsuit in order to curry favor with Parent, Inc. After all, from a bottom-line perspective, wholly-owned Subsidiary A, Inc.'s loss is also a loss for Parent, Inc. If these were the facts, Lawyer’s representation of Client X may be materially limited, and his continued representation of Client X would be a prima facie violation of Rule 1.7(b).

42. Rule 1.6 provides:

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1997).

43. The full text of Rule 1.8(b) provides: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(b) (1997).
In the event of a prima facie ethics violation with respect to either Parent, Inc. or Client X, each may consent, under prescribed conditions, to Lawyer's continued representation. As to each client separately, Rule 1.7(b) permits Lawyer to continue if (1) Lawyer "reasonably believes the representation will not be adversely affected,"[44] and (2) if each affected client, either Parent, Inc. or Client X, "consents after consultation."[45] The first condition is an objective one, because it focuses on Lawyer's "reasonable" belief. It asks Lawyer to predict the future, that is, to decide if it is probable that a potential "material limitation" will mature into a situation where her representation will in fact be adversely affected. If this maturation is probable, Model Rule 1.7(b) cautiously prohibits either affected client from consenting to Lawyer's representation. If either client were permitted to consent, the client would likely face a Hobson's choice of waiving the conflict or firing its lawyer in the future. In the hypothetical illustration, Lawyer may know that although Parent, Inc. is not a major client at the moment, Parent, Inc. plans to retain a number of lawyers for an important future project. In this case, Lawyer, after objectively assessing her own resilience to temptation, may understandably be tempted to "pull her punches" on behalf of Client X in order to curry favor with Parent, Inc. In such circumstances, Lawyer may not continue her representation of Client X.

If, on the other hand, Lawyer concludes the potential material limitation will probably not mature so as to adversely affect his future effectiveness, then the affected client can consent to the continued representation. It is less certain that the impermissible conflict will result. This approach allows Parent, Inc. and Client X, separately, to choose their own levels of risk with respect to whether Lawyer will be able to provide effective, independent representation in the future. Client X may wish to retain Lawyer and take the chance that future developments will not undermine effective, independent representation. Client X may wish to choose to deal with these matters if, and when, they occur, and he may be willing to retain a new lawyer if necessary at some future time.

In sum, Rule 1.7(b) is the primary conflicts of interest rule. It is an operational rule that focuses on Lawyer's ability to provide each client, separately, effective, independent representation, with an appropriate regard for the factors of loyalty and confidentiality. It prohibits Lawyer from representing either Parent, Inc. or Client X if Lawyer's representation may (i.e., potentially) be "materially limited" by her

44. Rule 1.7(b)(1), supra note 2.
45. Rule 1.7(b)(2), supra note 2.
46. In defining the prima facie violation, Rule 1.7(b) uses the phrase "may be materially limited." Rule 1.7(b)(1), supra note 2. In permitting representation regardless of a prima facie violation, Rule 1.7(b) uses the phrase "will not be adversely affected." Id. "Will" connotes a stronger probability than "may" that the representation will be adversely affected.
representation of the other client. If there is a prima facie violation of Rule 1.7(b), then Lawyer must cautiously and reasonably determine if the representation of that particular client will (i.e., highly probably) not be adversely affected. If Lawyer reasonably concludes the potential problem is not likely to mature, then, and only then, may each affected client, separately, consent after consultation to Lawyer’s continued representation.

C. Model Rules of Professional Conduct, Rule 1.7(a)

Rule 1.7(a), the bright-line categorical section of the conflict of interest rule, provides “A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.”

1. The Adversarial Veto

Rule 1.7(a) does not focus on Lawyer’s effective, independent representation of Parent, Inc. and Client X, separately. Instead, it describes a situation where “representation of that client will be directly adverse to another client.” If Lawyer’s activities fall within these bright-line categories, then there is a prima facie violation of Rule 1.7(a). If there is such a violation, then Lawyer may not continue her representation without the consent of “each client.” The Official Comment to Rule 1.7 suggests “each” means that both clients must consent to the representation, and this is the commonly held interpretation. The effect of this understanding is that one client has a veto over its adversary’s counsel, without regard to the first client’s interests or injury. In the hypothetical illustration, if Subsidiary A, Inc. were Lawyer’s client, then Subsidiary A, Inc. could withhold consent to Client X’s choice of Lawyer, regardless of Subsidiary A, Inc.’s injury. Or, if Client X’s tort lawsuit were directly adverse to Parent, Inc., or to Parent-A, Inc.,

47. Rule 1.7(a), supra note 2.
48. Id.
49. See Model Rules of Professional Conduct Rule 1.7 cmt. [5] (1997) (“When more than one client is involved, the question of conflict must be resolved as to each client.”).
50. For example, the Restatement provides:
    Lawyer represents Client B in seeking a tax refund. Client A wishes to file suit against Client B in a contract action unrelated to the tax claim. Lawyer may not represent Client A in the suit against Client B as long as Lawyer represents Client B in the tax case, unless both clients give informed consent.
then that client, regardless of its injury, could also withhold consent to Lawyer's representation of Client X.51

2. A Brief History of Rule 1.7(a)

Why the Model Rules include the bright-line categorical Rule 1.7(a) is unclear.52 There is little clue from the "legislative history." The early drafts of the Model Rules clearly reflect a direct emphasis on the operational function of the conflicts of interest rules—the lawyer's ability to effectively and independently serve each client. The 1980 Discussion Draft provided that there is an impermissible conflict of interest if the lawyer has "responsibilities that may adversely affect the representation of a client."53 The 1981 Proposed Final Draft continued this focus, providing that there is an impermissible conflict of interest when the lawyer's ability to represent one client "will be adversely affected by the lawyer's responsibilities to another client"54 or, with certain exceptions, "might [be] adversely affected."55 It was not until 1982 that the Committee, in the Proposed Model Rules, added this bright-line categorical language. The Committee gave no reason for the addition, and the ABA House of Delegates adopted this last version without helpful discussion.

The earlier 1969 Model Code of Professional Responsibility, in its Disciplinary Rules (DR), also directly focused on the lawyer's ability to effectively represent her client. In DR 5-105(A) and (B), the question was whether the lawyer's exercise of independent judgment will be or would likely be adversely affected under the circumstances of a particular case.56 Five years later, the ABA amended this rule to broaden its scope. The amended DR 5-105(A) and (B) defined an impermissible conflict of interest as one in which the lawyer would be likely to be involved in representing differing interests.57 There was no need to define "differing interests."

51. The Comment states that "a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise or conduct of the suit in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise and if both clients consent upon consultation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7, cmt. [8] (1997).
52. This language was not in the early drafts of the Model Rules of Professional Conduct. Professor Morgan has conclusively established the ABA adopted it without any substantive debate. Morgan, supra note 9, at 1180-81.
53. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 (Discussion Draft 1980).
54. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (Proposed Discussion Draft 1981).
55. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (Proposed Model Rules 1981).
57. 99 REPORTS OF THE AMERICAN BAR ASSOCIATION 264 (1974). It is a matter of some debate whether the amendments add anything of substance to the Code. See Lawry, supra note 9, at 1092.

The amended DR 5-105 provides:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional 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
for it had been defined in the 1969 Code as multiple representation in which the lawyer's loyalty to a client would be adversely affected.\textsuperscript{58} This language is consistent with the operational function of ensuring effective, independent client representation.

Canon 6 of the ABA's still earlier 1908 Canons of Professional Ethics further suggests that Rule 1.7(a)'s "directly adverse" language is an unexplained latecomer.\textsuperscript{59} Under the Canons, a lawyer has an impermissible conflict of interest if she "represents conflicting interests." Canon 6 defined "conflicting interests" as those in which the lawyer would, "in behalf of one client, [have a] duty to contend for that which duty to another client requires him to oppose."\textsuperscript{60} In other words, conflicting interests were situations in which it would be logically impossible for the lawyer not to have her representation of at least one of her clients effectively impaired.

The Rule 1.7(a) drafters, perhaps, had \textit{Cinema 5 Ltd. v. Cinerama, Inc.}\textsuperscript{61} in mind. Attorney Fleishmann was a partner in the Buffalo Jaeckle firm and the New York City Webster firm. The Jaeckle firm represented the defendant Cinerama in an antitrust suit with respect to monopolistic licensing practices. Attorney Fleishmann's involvement was minimal. While this suit was pending in Buffalo, the Webster firm "inadvertently and unknowingly [of the Buffalo suit and] with . . . no actual wrongdoing" initiated an anti-takeover suit in New York City against Cinerama on behalf of Cinema 5 Ltd.\textsuperscript{62}

Cinerama moved to disqualify the Webster firm from representing Cinema 5 in the New York City litigation. The trial court granted the motion. The trial court had an operational focus, particularly with respect to the confidentiality issue. It concluded that because Fleishmann was a partner in both firms and there was a sufficient relationship between the two controversies, Cinerama's future confidential communications with the Jaeckle firm would be inhibited.\textsuperscript{63}
The court of appeals affirmed the trial court's order of disqualification. It, however, shifted the emphasis to a more categorical approach. The issue was not whether the Jaeckle firm's representation of Cinerama would be materially limited and confidentiality jeopardized. The court instead asserted that the issue was one of "undivided loyalty." Because Fleishmann was a partner in both firms, and because he therefore owed a duty of undivided loyalty to both Cinerama (in the Buffalo case) and Cinema 5 (against Cinerama in the New York City case), neither he nor his partners could represent "two masters." At the least, the court claimed, there was the "appearance of impropriety," and it affirmed the Webster firm's disqualification.

3. The Purposes (?) of Rule 1.7(a)

One possible purpose of Rule 1.7(a) may be prophylactic. It might be easier to interpret the bright-line categories of Rule 1.7(a) than to make the difficult operational assessments and future predictions required by Rule 1.7(b). Pursuant to Rule 1.7(b), Lawyer must decide if the representation of Client X may be "materially limited" to support a prima facie violation of the Rule. If Lawyer believes there is a prima facie violation, he then must decide whether he "reasonably believe[s] the representation will not be adversely affected" before Client X may consent to the representation. Predictions of this sort are complicated and uncertain, and they are particularly difficult when Lawyer, the person who might be obligated to forego a client, must make the decision. It would be tempting for Lawyer, if he wishes to represent Client X in the complex tort lawsuit against Subsidiary A, Inc., to decide that his representation of Client X would not be "materially limited."

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64. Id.
65. Id. at 1386.
66. Id.
67. Id. at 1387.
68. In SWS Financial Fund A v. Salomon Brothers, Inc., 790 F. Supp. 1392, 1401 (N.D. Ill. 1992), the court stated:
Given the costs imposed by disqualification and the theoretical availability of alternative means of enforcement of the disciplinary code, a court should look to the purposes behind the rule violated in order to determine if disqualification is a desirable sanction. There are basically two purposes behind Rule 1.7. First it serves as a prophylactic to protect confidences that a client may have shared with his or her attorney. In that regard, Rule 1.9 shares the same concern as it prohibits an attorney from representing a client against a former client if the matter is "substantially related" to the matter(s) of the former representation. The second purpose behind Rule 1.7 is to safeguard loyalty as a feature of the lawyer-client relationship. A client should not wake up one morning to discover that his lawyer, whom he had trusted to protect his legal affairs, has sued him—even if the suit is utterly unrelated to any of the work the lawyer had ever done for his client.
69. Rule 1.7(b)(1), supra note 2.
The argument that the categorical Rule 1.7(a) is prophylactic is, however, unpersuasive. First, its categories, although they appear clear and bright, are no easier to interpret than Rule 1.7(b)'s focus on "material limitation." Second, Rule 1.7(a)'s language suggests it was not designed as an early warning prophylactic system. If it were, its language would trigger a response chronologically prior to Rule 1.7(b). The language of the two sections, however, contradicts this suggestion. Rule 1.7(b) uses the verb "may" before "materially limited." This suggests that a mere possibility of material limitation is a prima facie problem. Rule 1.7(a) uses the verb "will" before its categorical situations, suggesting a higher probability that Lawyer's activities and the relevant facts will fall within the bright-line categories of Rule 1.7(a). Because a probability occurs after a possibility, a Rule 1.7(b) violation will frequently come before a Rule 1.7(a) ethics violation. It is therefore unlikely the drafters intended Rule 1.7(a) as an early prophylactic warning with respect to what constitutes an impermissible conflict of interest.

Another possible purpose of the categorical Rule 1.7(a) is that it aptly describes one clearly impermissible situation. The drafters believed a lawyer could not represent one client in a lawsuit against another client on the same matter. First, in these situations, the lawyer could not be loyal to each client; aggressive advocacy for one would, by logical necessity, result in a material limitation on her representation of the other. Second, in a same matter conflict, the judiciary has a strong interest in each client having effective, independent representation. Vigorous advocacy and clear argumentation refine issues and help to present facts. One way to ensure effective advocacy would be to prohibit a lawyer, under any circumstances, from representing opposing adversaries in the same case. The District of Columbia clearly takes this position. The Restatement also takes this view, noting clients may not consent to a single lawyer representing adversarial sides in the same litigation. Another, perhaps less effective, way to protect the

70. Some commentators have suggested that Rule 1.7(a) defines those cases in which there is the "appearance of impropriety," and that lawyers should always avoid these "appearance of impropriety situations." The argument is not that Rule 1.7(a) serves the main purposes of conflicts of interest rules or a prophylactic function, but rather that, in and of itself, the "appearance of impropriety" should be avoided. Lawrence J. Fox, Litigating Conflicts: Is it Time to Revive the Appearance of Impropriety?, PROF. L., Feb. 1998, at 1, 9.

71. District of Columbia, Rule of Professional Conduct 1.7(a) clearly provides that "a lawyer shall not represent a client with respect to a position to be taken in a matter if that position is adverse to a position taken or to be taken in the same matter by another client represented with respect to that position by the same lawyer." D.C. CODE ANN. Rules of Professional Conduct, Rule 1.7 (1996). In such a circumstance, there should be no opportunity for client consent. The Comment articulates the rationale: "Institutional interests in preserving confidence in the adversary process and in the administration of justice preclude permitting a lawyer to represent adverse positions in the same matter." Id.; see Eric L. Hirschhorn, Dealing with Lawyer Conflicts: New D.C. Rules of Professional Conduct Take a More Realistic Approach, LEGAL TIMES, Nov. 18, 1996, at 22 (describing the D.C. Rules as being more congruent with modern business reality).

judiciary's interests in strong advocacy would be to give each client a veto over his adversary's lawyer. This power, certain to be used for strategic ends, will effectively protect the judiciary from ineffective advocacy. This factor perhaps explains why, if Client X retains Lawyer to bring a lawsuit against Parent, Inc., and Lawyer was simultaneously retained by Parent, Inc. to represent it against Client X on the same matter, each client should have a veto over the other's use of Lawyer.

This purpose for codifying Rule 1.7(a) is, also, unpersuasive. It is poor drafting to focus on one situation without an acute awareness of what other cases will be covered by the Rule's language. The last minute adoption of Rule 1.7(a) and the lack of any serious discussion of it presents, however, the possibility that the drafters had in mind only one case when the ABA originally adopted Rule 1.7(a). They did not give the language much thought. This possibility, however, does not explain the near universal acceptance of Rule 1.7(a) after its adoption. Finally, the Official Comment to Rule 1.7(a) suggests the rule is broader. The Comment notes that ordinarily a lawyer cannot represent one client against another client, even if the second matter is unrelated, and in the rare cases in which such multiple representation would be allowed, only if both clients consent.

4. The Disqualification of Opposing Counsel

It should be no surprise that Rule 1.7(a), with its bright-line categorical language and its uncertain purposes, has been the source of countless disqualification motions in which one party withholds consent to an adversary's choice of counsel, and then moves to disqualify the lawyer. It has become an important weapon in a litigator's arsenal. There are legitimate purposes behind a disqualification order. It may be, for example, the only way to assure client confidences will not be misused and that lawyers are appropriately loyal to their clients.

There are, however, a number of problems with these motions. Too often lawyers use the motion to disqualify opposing counsel as a strategic weapon. If an adversary's lawyer can be disqualified, it will clearly be more difficult and expensive for the opponent to continue the lawsuit. This is particularly true when the disqualification order occurs in the midst of litigation. The disqualification order

73. One commentator notes the problem is caused by unduly broad rules that in turn lead to undesirable results. They do not adequately balance the competing interests of clients and the practicing bar. This “failure results in a wooden framework that disserves everyone.” Marc I. Steinberg & Timothy U. Sharpe, Attorney Conflicts of Interest: The Need for a Coherent Framework, 66 NOTRE DAME L. REV. 1, 2 (1990).

74. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.7 cmt. [3] (1997). The Restatement, particularly illustration 3 to section 209(2), notes a lawyer should not represent one client against another, even if the second matter is unrelated to the first. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 209(2) illus. 3 (Proposed Final Draft No.1, 1996).
may also cause delay. This too, can raise opponent's litigation costs. Finally, the disqualification order can result in costly and time-consuming peripheral litigation for all.\textsuperscript{25}

The costs of such satellite litigation can easily outweigh its benefits. The Model Rules' drafters were aware of this, and the Official Comment to Rule 1.7 warns lawyers that it is unprofessional to initiate such motions merely for strategic advantage.\textsuperscript{76} The U.S. Supreme Court has also effectively limited the interlocutory appeals of these motions, signaling its mistrust of the motions misuse.\textsuperscript{77}

As one would expect, with such confusion and high strategic stakes, there has evolved a substantial jurisprudence with respect to these motions. Courts have been of two minds about the proper relationship between an ethics violation and the disqualification motion.\textsuperscript{78} Most courts begin by asking if there has been a violation of the ethics rules. If there has been a violation, courts take one of two approaches to the disqualification motions. Some courts find a \textit{per se} connection between the ethics violation and the disqualification order. Others take a more sensible and moderate approach. It is necessary, they argue, that there must be an ethics violation, but such a violation is not sufficient by itself to support a disqualification order. They apply a practical rule of reason, taking the ethics violation into account in intelligently deciding whether to disqualify opposing counsel. Among other reasons for this practical position, some courts, as well as commentators, have noted that a disqualification order is a disproportionate and misdirected penalty for a Rule

\begin{itemize}
\item \textsuperscript{25} Professor Crystal argues that there are four reasons for disqualification: to prevent a taint in the pending trial; to promote public confidence in lawyers and the legal system; to punish ethical misconduct; and to deter future impropriety. He argues that only the first justifies disqualification; the other three purposes are better served in other procedures. Crystal, \textit{supra} note 9, at 286.
\item \textsuperscript{76} The Comment provides "Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. [15] (1997).
\item \textsuperscript{77} See Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 370 (1981) (holding that there usually could be no interlocutory appeal of the trial judge's ruling with respect to a disqualification motion).
\item \textsuperscript{78} Professor Crystal, in an excellent article, suggests courts have taken two approaches to the problem of disqualification. One line of cases allows disqualification if the lawyer's loyalty is called into question or there is the possibility of the appearance of impropriety. The second line of cases calls for a balancing test of costs and benefits. Crystal, \textit{supra} note 9.
\end{itemize}
1.7(a) breach. Not only is it costly and expensive, but a disqualification order also directly penalizes the client, not the wrongdoing lawyer.

In light of the complexity, it is easy to distrust judicial interpretations of Rule 1.7(a). Judges may too casually address the ethics issue when their principal focus is the disqualification motion. A per se linkage between an ethics violation and a disproportionate and misdirected disqualification order may dispose the judge to avoid finding an ethics violation in the first instance. Other judges, who are comfortable with treating the ethics violation separately from the disqualification motion, may be unduly censurous in finding an ethics violation. In the actual application of their disqualification jurisprudence, they can minimize the importance of their own finding of an ethics violation by denying the disqualification motion. One striking bit of evidence that judges rarely treat Rule 1.7(a) violations as a serious ethics matter is that there is almost no evidence these judges report the “offending lawyer” to the disciplinary authorities after dealing with a disqualification motion.

This Article focuses on the ethics issue without regard to its use in a disqualification motion. There is no emphasis on either the necessary or unjust consequences of a violation of Rule 1.7(a) in the context of a motion to disqualify. To emphasize these consequences would distort the analysis. It has, moreover, been

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79. In *SWS Financial Fund A v. Salomon Brothers, Inc.*, 790 F. Supp. 1392, 1401 (N.D. Ill. 1992), the court said:

> Disqualification, by contrast, is a blunt device. The sanction of disqualification foists substantial costs upon innocent third parties. The innocent client (Hickey in this case) may suffer delay, inconvenience and expense and will be deprived of its choice of counsel. When disqualification is granted, sometimes the new attorney may find it difficult to master fully the subtle legal and factual nuances of a complex case (like this one), actually impairing the adversarial process. Of course, the court may also lose the time and labor invested in educating itself in the proceedings prior to disqualification. It is no secret that motions to disqualify are frequently brought as dilatory tactics intended to “divert[] the litigation from attention to the merits.” (citation omitted).

80. In *Salomon Bros.*, the court found a serious ethics violation, but did nothing to follow up on it: The foregoing discussion should not be misunderstood to mean that this court does not take very seriously a lawyer’s ethical responsibilities to avoid conflicts of interest. Schiff should not have agreed to bring this suit against Salomon Brothers. Rule 1.7 prohibited it from doing so. The court, however, does not believe that the costly sanction of disqualification should be automatic for a breach of even so serious an obligation as that imposed by Rule 1.7. There is no danger in this case that Schiff’s advocacy of Hickey will be less than fully zealous, the trial would not be tainted by Schiff’s continued representation of Hickey, the subject of this litigation is not substantially related to the work Schiff has done for Salomon, and disqualification would simply not be the appropriate remedy. The court’s final concern is whether Schiff would fail adequately to carry out its commodities futures projects for Salomon Brothers. Salomon has not mentioned that this might be a possibility and the court sees no reason to fear that this might be a problem.

*Salomon Bros.*, 790 F. Supp. at 1403.
done elsewhere. This Article takes seriously the idea lawyers will want to comply with the Model Rules. First, lawyers aspire to the highest professional standards. It is therefore necessary for them to know what these standards require. Second, the principal purpose of the conflict of interest rules is to assure effective, independent client representation, with a due regard for confidentiality and loyalty. It is imperative that lawyers should seek to provide this level of service in all contexts. Third, although the jurisprudence surrounding the disqualification motion is the most common venue for an analysis of the issues, there is always the chance that a lawyer may be disciplined for a violation. Fourth, and not least important, conflicts of interest analysis involving juristic entities is a particularly murky and difficult area of law. A limited and focused analysis may bring clarity to these issues.

5. One Implication in Pandora’s Box

Some commentators have recommended that Rule 1.7(a) simply be deleted from the Model Rules. Other commentators have suggested any per se connection between a Rule 1.7(a) ethics violations and a motion for disqualification be severed. Although sympathetic with both those approaches, the aim of this Article

81. See, e.g., Bateman, supra note 9; Crystal, supra note 9; Green, supra note 9; David Hricik, Uncertainty, Confusion, and Despair: Ethics and Large Firm Practice in Texas, 16 REV. LITIG. 705 (1997); Lawry, supra note 9; McMunigal, supra note 32; Moore, supra note 9; Morgan, supra note 9; Penegar, supra note 9; Redding, supra note 9; Rotunda, supra note 9; Michael Sacksteder, Formal Opinion 95-390 of the ABA’s Ethics Committee: Corporate Clients, Conflicts of Interest, and Keeping the Lid on Pandora’s Box, 91 NW. U. L. REV. 741 (1997); Steinberg & Sharpe, supra note 9; Note, Developments in the Law: Conflicts of Interest in the Legal Profession, supra note 9.

82. Professor Crystal notes that a court will have broad discretion in forcing a lawyer to disgorge fees, or to prohibit a client from paying a fee, in cases of impermissible lawyer conduct. He believes the courts can best calibrate the punishment to fit the blameworthiness of the lawyer’s act. Crystal, supra note 9, at 312.

83. If a lawyer violates Rule 1.7(a), he might also lose a fee or be subjected to a malpractice action.

84. E.g., Morgan, supra note 9.

85. See McMunigal, supra note 32.

Texas, for example, has dramatically changed Rule 1.7(a). It uses operational criteria. Texas Disciplinary Rule 1.06(a) through (c) provides:

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which the person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm; or

(2) reasonably appears to be or become adversely limited by the lawyer’s or law firm’s responsibilities to another client. . . .

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full
is more limited. This Article concedes the continued existence of Rule 1.7(a), but suggests an instrumental interpretation of its important categories that will effectively narrow its scope and impact to the principal purpose of the conflict of interest rules. This Article thus enthusiastically endorses the result of Committee’s Formal Opinion 95-390 and follows the logic of its opinion. This Article peeks into Pandora’s Box, and explores some of the surprising implications in it.

An examination of Fox’s dissent to Formal Opinion 95-390 illustrates what these surprising implications might be. His logic is sound; his first premise, however, is not as certain as he believes. Fox begins by stating the purpose of corporate groups is the “maximization of economic success.” He then notes a business may operate through subsidiaries or divisions. There will be a number of reasons for these choices. “They will almost never reflect a client judgment that what happens to the subsidiary, parent or sibling is not a matter that it cares about very much indeed.”

To this point, Fox’s observations are correct. He then states his first premise:

All members of this Committee agree that a lawyer may never take a position directly adverse to a client corporation no matter how minor the matter and no matter how distant geographically, by industry or by personnel, the new proposed representation is from the original one the

disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

The Texas rule thus examines whether the lawyer represents the adversaries on “a substantially related matter,” thereby focusing on the issue of confidentiality, or “adversely limited by the lawyer’s . . . responsibilities to another client,” thus focusing on effective representation.

Unfortunately, not all courts with the opportunity to adopt the proposed rule have done so. In Red Eagle Resources Corp. v. Baker Hughes, Inc., 1992 WL 170614 (S.D. Tex.), the Susman Godfrey firm represented Dresser in two matters. During the pendency of these suits, the Susman Godfrey firm initiated, on behalf of Red Eagle Resources, an antitrust lawsuit against Dresser. The trial court refused to disqualify the Susman Godfrey law firm. It noted that the governing rule was the Texas Disciplinary Rule of Professional Conduct Rule 1.06(b). Rule 1.06(a) was not discussed because the law firm did not represent opposing parties in the same litigation. Rule 1.06(b)(1) was not relevant because the trial court concluded that the two matters were not substantially related. Finally, Rule 1.06(b)(2) was inapplicable because Susman Godfrey’s representation of Dresser would not be materially affected by Susman Godfrey’s representation of Red Eagle in the antitrust lawsuit.

In In re Dresser Industries, Inc., 972 F.2d 540 (5th Cir. 1992), the Fifth Circuit Court of Appeals refused to follow the Texas district court. Instead, it insisted on crafting a national ethics standard, and it borrowed heavily from the Model Rules and the Restatement. It emphasized the “appearance of impropriety,” and it concluded that it was per se impermissible for a lawyer to represent one client against another client, even if the second representation was on an unrelated matter. Id. at 544-45.

See Kline, supra note 9 (explaining the complexities in the American federal system); Gallagher & Hanen, supra note 9 (exploring the federal court’s reluctance to adopt the state’s standard).

86. Formal Opinion 95-390, supra note 6.
87. Id.
lawyer is handling. Not only is that the rule, but that is what the rule should be.\textsuperscript{88}

It now follows, for Fox, that if it is true "a lawyer may never take a position directly adverse to a client corporation no matter how minor the matter and no matter how distant geographically, by industry or by personnel,\textsuperscript{89} it should be equally true a lawyer may never take a position directly adverse to a corporation's subsidiary. The corporation is still hurt economically. Whether the corporation operates its business through subsidiaries or divisions is not a relevant consideration. To hold otherwise, Fox maintains, is to elevate "form over substance."\textsuperscript{90}

Is it possible Fox is correct in that how a corporation operates its business is not a relevant consideration, but that his first premise—that "a lawyer may never take a position directly adverse to a client corporation no matter how minor the matter and no matter how distant geographically, by industry or by personnel, the new proposed representation is from the original one the lawyer is handling,"\textsuperscript{91}—is flawed in that it begs the question of who is the "client" and what is entailed by "directly adverse"? If we combine Fox's insight that whether a business operates through subsidiaries or divisions is irrelevant with the Committee's conclusion that there is no \textit{per se} prohibition on Lawyer representing Client X against Subsidiary A, Inc. in a complex tort matter, while simultaneously representing Parent, Inc. on an unrelated tax matter, then, perhaps, there ought not to be a \textit{per se} prohibition on Lawyer representing Client X in a complex tort lawsuit against Parent-A, Inc. (when the thrust of Client X's lawsuit engages Division A), while simultaneously representing Parent-A, Inc. on an unrelated tax matter. At the least, Lawyer may not violate Rule 1.7(a) in certain situations, including those in which Parent-A, Inc. has prospectively consented to Lawyer's actions with respect to future lawsuits against it or in which Lawyer is not responsible for triggering the bright-line categories of Rule 1.7(a).

As noted above, such conclusions will be surprising to some. Dissenter Fox claimed it would "destroy traditional notions of client loyalty and client concern."\textsuperscript{92} This Article contends that the Committee's Formal Opinion 95-390 will not only fail to destroy traditional notions, but also its analysis is essential to make legal ethics relevant to the complicated world of business and law practice. The Model Rules are premised, in good part, on the assumption that clients and lawyers are single individuals. In such circumstances, the conflicts of interest rules work well.

\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
They do not work well when either client or lawyer is a complicated business enterprise. The wooden application of an abstraction, a client, to a fiction, a corporation, a corporate conglomerate, or a corporate family, can only lead to absurd and inefficient results. The Committee was on the right track when it carefully alluded to the operational significance of Rule 1.7(a). It consistently refused to treat the abstraction, the client, in a one size fits all manner. It noted, for example, a corporation could be a client for purposes of Rule 1.7(a), but not a "full-fledged" client. This instinct to deconstitute the abstract category for different purposes and different situations makes instrumental sense. This Article's analysis purports to extend this instrumental focus, always noting that the issue is whether Subsidiary A, Inc. or Parent-A, Inc. (where relevant) is Lawyer's client for the particular purposes of Rule 1.7(a). This will sometimes be referred to as a Rule 1.7(a) client.

III. AN INSTRUMENTAL INTERPRETATION OF RULE 1.7(A)

This Article discusses a method of analyzing the following questions germane to Rule 1.7(a) in the context of the corporate family and corporate conglomerate complexities. Who is the "client?" When is an action by one client "directly adverse to another client?" May a client prospectively "consent after consultation" to a prima facie violation of Rule 1.7(a)? Opinion 95-390 addressed the first two issues. Because the purposes of Rule 1.7(a) are so ambiguous, this Article suggests that lawyers interpret Rule 1.7(a) to advance the operational purposes of the conflicts of interest rule. The operational focus of Rule 1.7(b) should trump the bright-line categorical approach of Rule 1.7(a) to assure effective, independent client representation, with an appropriate regard for confidentiality and loyalty. This Article endorses, in good part, the salutary analysis of Opinion 95-390. When necessary, this Article supplements the Committee’s conclusions, arguing that the Committee’s rationale implies that the ethics rules should encourage a permissive approach to prospective waivers of conflicts of interest by corporate conglomerates, particularly those represented by in-house counsel. As noted, this Article further suggests that a lawyer may represent one client against another client, even without the second client’s consent. In the hypothetical illustration, Lawyer may be able to represent Client X in the complex tort litigation against Parent-A, Inc. (when the thrust of Client X’s lawsuit engages Division A), while simultaneously representing the corporate conglomerate, Parent-A, Inc. in an unrelated tax matter.

93. *Id.*
94. If Parent, Inc. is represented by in-house counsel, it is likely it will have competent advice with respect to consenting prospectively to future, otherwise, impermissible conflicts of interest.
A. Outline of Instrumental Interpretation

The first step will be to define client for purposes of Rule 1.7(a). This is problematic because it is difficult in that the abstraction, the category "client," is imposed on a fiction, the corporation or corporate family. Real human persons are subsumed in these categories and fictions. What or who is a Rule 1.7(a) client is hardly self-evident. The problem is not, however, intractable once it is remembered that we are constituting one or more juristic entities as "clients" for the limited purposes of interpreting Rule 1.7(a). Thus, Lawyer may be prohibited from representing Client X in a lawsuit against Subsidiary A, Inc., but Lawyer will not necessarily have a professional duty to work for Subsidiary A, Inc.

Once we have determined who the Rule 1.7(a) client is, we can safely claim that (1) the client's lawyer must be loyal to it, and (2) the lawyer must not reveal or misuse information relating to her representation of that client. We might pose the problem in reverse, in an instrumental way. The lawyer's client is that abstraction to whom the lawyer must be loyal and to whom he owes the duty to keep confidences. In a nutshell, a lawyer owes his clients certain duties; an entity to whom a lawyer owes these duties is his Rule 1.7(a) client.

A plausible initial default position in the hypothetical illustration is that only Parent, Inc. is the Lawyer's client. Once this initial position is granted, it should be possible for persons to adjust or to reconstitute who is the Rule 1.7(a) client. First, Parent, Inc. and Lawyer can explicitly or implicitly agree, at the outset of their relationship, to constitute Subsidiary A, Inc., in addition to Parent, Inc., as Lawyer's client for purposes of Rule 1.7(a). The effect of this agreement will be to preclude Lawyer from representing Client X against Subsidiary A, Inc. in the complex tort lawsuit without Subsidiary A, Inc.'s consent.

Second, due to the inherent ambiguities in the situation and due to the extreme importance of keeping quasi-client's confidences, if Lawyer, while working for Parent, Inc., acquires information relevant to the complex tort matter, then Subsidiary A, Inc. will be constituted Lawyer's client for purposes of Rule 1.7(a). Parent, Inc. and Subsidiary A, Inc., however, can, if they do so carefully and explicitly, negate this conclusion. They can agree with Lawyer the acquisition of this information will not constitute Subsidiary A, Inc. a client for purposes of Rule 1.7(a). This explicit understanding would thereby entitle Lawyer to represent Client X against Subsidiary A, Inc. regardless of the fact Lawyer acquired information relevant to the complex tort matter while working for Parent, Inc. on the unrelated tax matter.

Finally, if Subsidiary A, Inc. is Parent, Inc.'s alter ego, then Subsidiary A, Inc. will be constituted a client for purposes of Rule 1.7(a). What does it mean to be an alter ego? This Article suggests for the purposes of Rule 1.7(a), Subsidiary A, Inc. will be Parent, Inc.'s alter ego if the same persons who are in fact responsible for...
representing Subsidiary A, Inc. on the complex tort matter also personally work with Lawyer on Parent, Inc.’s unrelated tax matter. This Article reaches this result by focusing on the meaning of loyalty, and how it relates to effective, independent representation.

The initial default position posits Parent, Inc. as Lawyer’s only client; Lawyer therefore owes it the duty of effective, independent representation. If Parent, Inc. employees who personally work with Lawyer on the tax matter are personally unable to trust him, there is likely to be disharmony in the work group. In these circumstances, it is unlikely Lawyer will be able to effectively and professionally do her tax work. The employees who are most likely not to trust Lawyer are those who believe Lawyer is representing Client X against “them.” Those employees who are most likely to feel this betrayal are those who are personally responsible for managing the Subsidiary A, Inc. defense in Client X’s complex tort lawsuit against it. The claim “my own lawyer” is suing me is a plausible feeling under these circumstances. If this is the case, Subsidiary A, Inc. is Parent, Inc.’s alter ego. As such, it will be constituted a client for purposes of Rule 1.7(a), and Lawyer, without Subsidiary A, Inc.’s consent, will be precluded from representing Client X against it.

B. The Initial Default Position

Corporate law doctrine posits Parent, Inc. as a separate juristic entity. Only the juristic entity, Parent, Inc. has retained Lawyer. This is a rational starting point, or initial default position, for Rule 1.7(a) analysis. The singular noun “client” in Rule 1.7(a) connotes a human or a single fictional entity. Thus, a stylistic argument favors the default position. This default position is consistent with analogous problems in other areas of law that deal with corporate families. One common question, for example, is whether Parent, Inc. will be liable for the torts of Subsidiary A, Inc. In most cases, the answer is no. The law does not pierce the corporate veil without some justifying reason.

There are at least three good reasons for adopting this initial default position in the conflicts of interest area. First, it simplifies the law to have common understandings among different doctrinal areas. Although we must always be wary
of unduly borrowing definitions and approaches from other areas, it is common sense to do it when no harm is caused. Second, because most areas of law posit juristic entities as distinct, there is, at least, the inference Parent, Inc. and Lawyer, at the time of the initial retainer agreement with respect to the tax matter, agreed to this understanding. Third, the Model Rules adopt this assumption of separate juristic entities. Rule 1.13 focuses on the entity client, and it clearly articulates the distinctiveness of the fictional, juristic entity.97

This initial default position, however, does not end the matter. Does Lawyer represent two clients, Subsidiary A, Inc. as well as Parent, Inc.? Some of the Committee’s arguments for separate entity status are question-begging, and they indicate the Committee’s initial default position is only a starting point. The Committee was aware that the Model Rules’ text did not definitively resolve the issue. As the Committee suggests, a resolution of who is Lawyer’s client will not be resolved by “any clearcut per se rule but rather upon the particular circumstances.”98

The Committee’s best (although certainly not conclusive) textual argument supporting the initial default position that Parent, Inc. is Lawyer’s only client is its cross-reference to Rule 1.13’s comment, entitled “The Entity as a Client,” and Rule 1.13’s distinction between an entity and its constituent members, such as its “officers, directors, employees, shareholders and other constituents.”99 The Committee seized on the reference to shareholders and concluded that because shareholders—including parent corporations in a corporate family—were mere constituents, they were not part of the “organization.”100 Neither the entire corporate family nor any member of the family was ipso facto the lawyer’s organizational client.101

The Committee was not confident of this analysis. It conceded that “the thrust of the Rule is to require the lawyer to distinguish between the corporation or other organization, which is his client, and the human representatives of the corporation, with whom the lawyer works and often forms personal relationships.”102 The Official Comment to Rule 1.13 supports this latter distinction by noting that other constituents means the positions equivalent to “officers, directors, employees and shareholders held by persons acting for organizational clients that are not

100. Formal Opinion 95-390, supra note 6.
101. California State Bar Standing Committee on Professional Responsibility and Conduct was more emphatic. It stated: “A parent corporation, even one which owns 100 percent of the stock of a subsidiary, is still, for purposes of rule 3-600, a shareholder and constituent of the corporation.” California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Op. 1989-113 (1989).
102. Formal Opinion 95-390, supra note 6 (emphasis added).
corporations." The primary distinction in Rule 1.13 is between the fictitious entity and its human participants, not between legal entities that might constitute the corporate family. It would have been equally logical to find the organization was the entire corporate family, exclusive of its human agents and shareholders.

In the hypothetical illustration, we begin with Parent, Inc. as Lawyer's only client. This is a plausible initial default position because it is consistent with other areas of law and it can be assumed that Parent, Inc. and Lawyer agreed to it. The Model Rules' text also points in this direction. This Article now examines how Parent, Inc. and Lawyer can change this initial default position by explicit or implicit agreement ab initio; how an appropriate regard for confidentiality can modify it; and how an alter ego analysis with its tie between effective client representation and an appropriate concept of loyalty, can also constitute Subsidiary A, Inc. as Lawyer's client.

C. Agreement Constituting Client

The client-lawyer relationship is not defined in the Model Rules, and for purposes of any ethics analysis, resort must be made to more general law. The relationship is essentially a consensual one. The law maximizes the client's

104. The Committee also analyzed the Official Comment to Rule 1.7, It stated: Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise [or conduct of the suit] and if both clients consent upon consultation.

Formal Opinion 95-390, supra note 6.

The Committee observed this language, especially the emphasized language, tracked and referred to Rule 1.7(a). Thus, it was clear a lawyer might represent, albeit with both clients' consent, an "enterprise with diverse operations." This conclusion implied that such an enterprise could be a client for purposes of Rule 1.7(a). Could the corporate family of Parent, Inc. and Subsidiary A, Inc. be considered such an enterprise, and, consequently, a client? The Committee answered by noting "the use of 'enterprise' in this connection does not refer to [such] a corporate [family]." Id. The Committee stated "the term is used in the Model Rules [of Professional Conduct], in distinction from 'corporation' and 'organization,' to denote profit-making entities, which may include not only corporations but also partnerships, joint ventures and the like." Id.

This is not a strong argument with respect to the issue here. Even if it were true that 'enterprise' denotes a profit-making entity, it does not suggest, as the first part of the Committee's sentence implies, that 'enterprise' does not include a corporate conglomerate or a corporate family as one of many types of profit-making entities. Corporate conglomerate, corporate family, partnership and joint venture could all be enterprises, and each could be a client for Rule 1.7(a) purposes.

105. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 201 (Proposed Final Draft No.1, 1996) states: (A) lawyer's client is ordinarily the person or entity that consents to the formation of the client-lawyer relationship, see s. 26. For example, when a lawyer is retained by Corporation A, Corporation A is
ability to choose its lawyer and it protects the lawyer from having a professional obligation thrust upon him. The law also allows lawyer and client to define the scope of the relationship. They can, within certain limits, agree to a reasonable fee\textsuperscript{106} and to limited objectives.\textsuperscript{107}

This is a broad endorsement of client and lawyer autonomy and freedom to contract. If a client can define so much about the relationship, it follows that in ambiguous situations, the client (with Lawyer’s agreement) should be able to constitute itself for purposes of Rule 1.7(a). This agreement between Parent, Inc. and Lawyer might constitute Subsidiary A, Inc. as Lawyer’s client for the purposes of Rule 1.7(a). Such a broad retainer agreement and Rule 1.7(a) would preclude Lawyer from representing Client X in the complex tort litigation against Subsidiary A, Inc. without Parent, Inc. or Subsidiary A, Inc.’s informed consent. This retainer agreement both restricts Lawyer’s opportunity to represent Client X in the future and it assures Parent, Inc. of appropriate (as Parent, Inc. sees it) professional loyalty.

On the one hand, as a restriction, Parent, Inc. has paid lawyer not to represent certain persons against an affiliated corporation in the future. This is a restriction on the Lawyer’s right to practice, and although Rule 5.6(a) only explicitly prohibits these restrictive arrangements after termination of the lawyer-client relationship,\textsuperscript{108} they are equally troublesome during the relationship. It would be improper for Parent, Inc. to pay Lawyer not to represent Client X in a lawsuit against Independent, Inc. Parent, Inc. would have no interests to protect, and Lawyer and Client X’s important freedom to establish a professional relationship in the future would be restricted. On the other hand, as an assurance of even an idiosyncratic view of professional loyalty, Parent, Inc. has a significant interest in restricting Lawyer’s future opportunities. Parent, Inc.’s interests may be substantial, such as a fear Lawyer will use information to its ultimate, albeit indirect, injury when Lawyer represents Client X in the lawsuit against Subsidiary A, Inc., or it may simply not like the idea of Lawyer representing Client X against what it perceives

\begin{footnotesize}
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  \item[106.] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1997).
  \item[107.] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(c) (1997).
  \item[108.] Rule 5.6(a) provides in pertinent part that “[A] Lawyer shall not participate in offering or making: (a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; . . . .” MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6(a) (1997).
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of as itself. This emphasis on Parent, Inc.'s purchase of professional loyalty suggests that the initial retainer agreement could be a type of "loyalty insurance."  

In balancing Lawyer's and Client X's rights to enter into a professional relationship in the future against Parent, Inc.'s right to purchase loyalty insurance, Parent, Inc.'s right should prevail. First, the agreement is not a restriction on Lawyer's right to practice after termination of the Parent, Inc. - Lawyer retainer agreement. One reason why Rule 5.6(a) limits Lawyer's right to enter into restrictive agreements is that after termination of a professional relationship, Lawyer's ex-client has no substantial interests beyond its concern with confidentiality. Since confidentiality can be protected in other ways, it is sensible not to allow ex-clients to restrict Lawyer's right to future practice opportunities. Second, during a professional relationship, Lawyer must be loyal to her client. Although this Article argues that for purposes of Rule 1.7(a) this notion of loyalty is a narrow and instrumental one, it is of sufficient importance to support Parent, Inc.'s right to take steps to assure that Lawyer does not bring a lawsuit against members of its corporate family.

This loyalty insurance imposes obvious costs on Lawyer and his potential Client X. If Lawyer agrees that Subsidiary A, Inc. will be her client for purposes of Rule 1.7(a), then he will be precluded from representing Client X in the future and Client X may lose its choice of a lawyer. Given this cost, Lawyer is certain to demand a fee premium from Parent, Inc. If this is made explicit, then Parent, Inc.

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109. Professor Schneyer suggested the term loyalty insurance. See Schneyer, supra note 9 (suggesting that concepts such as agreement, consent, and waiver can be understood in insurance terms).

110. In SWS Financial Fund A v. Salomon Brothers, Inc., 790 F. Supp. 1392, 1402-03 (N.D.Ill. 1992), the court said:

Were this court to rule that disqualification was mandated by Schiff's breach of Rule 1.7 in this case, the implications would be overwhelming. Clients of enormous size and wealth, and with a large demand for legal services, should not be encouraged to parcel their business among dozens of the best law firms as a means of purposefully creating the potential for conflicts. With simply a minor "investment" of some token business, such clients would in effect be buying an insurance policy against that law firm's adverse representation. Although lawyers should not be encouraged to sue their own clients (hence the sanctions discussed above), the law should not give large companies the incentive to manufacture the potential for conflicts by awarding disqualification automatically.

The foregoing discussion should not be misunderstood to mean that this court does not take very seriously a lawyer's ethical responsibilities to avoid conflicts of interest. Schiff should not have agreed to bring this suit against Salomon Brothers. Rule 1.7 prohibited it from doing so. The court, however, does not believe that the costly sanction of disqualification should be automatic for a breach of even so serious an obligation as that imposed by Rule 1.7. There is no danger in this case that Schiff's advocacy of Hickey will be less than fully zealous, the trial would not be tainted by Schiff's continued representation of Hickey, the subject of this litigation is not substantially related to the work Schiff has done for Salomon, and disqualification would simply not be the appropriate remedy. The court's final concern is whether Schiff would fail adequately to carry out its commodities futures projects for Salomon Brothers. Salomon has not mentioned that this might be a possibility and the court sees no reason to fear that this might be a problem.
must decide if the insurance is worth the cost. In many cases, Parent, Inc. may decide to forego the insurance, not to include Subsidiary A, Inc. in the definition of client for Rule 1.7(a) purposes, and to retain Lawyer regardless, accepting the initial default position. In other cases, Parent, Inc. may simply choose another attorney to work on the tax matter. As will be discussed later, this insurance concept will be helpful in the discussion of conglomerate Parent–A, Inc.’s ability to consent prospectively to certain conflicts of interest situations.

If an explicit agreement can constitute Subsidiary A, Inc. as a client for purposes of Rule 1.7(a) then two questions must be addressed. Does Lawyer have the obligation to raise the issue; and if so, when?111

Lawyers have an obligation to discover impermissible conflicts of interest, and they must take appropriate steps, such as internal conflict checks, to avoid them.112 Lawyers are certainly in a better position than a lay client to know if there is a likelihood that they might not be able to provide effective, independent representation to the client. Moreover, some small clients may not know that they have the opportunity to constitute affiliates as Rule 1.7(a) clients. Committee Dissenter Richard Amster worried about this, stating:

The majority suggests that the parent corporation might avoid this unhappy situation by arriving at an “understanding” with their lawyers that they “will avoid representations adverse to the client’s corporate affiliates.” In the most elementary terms, what the majority is doing is shifting the lawyer’s burden of protecting the client to the client, who must now protect itself against its own lawyer. If there is one clear message to be drawn from the majority opinion, it is that all corporate in-house counsel and all corporate officers having responsibility for their company’s relationship with their attorneys, should promptly review their retainer agreements and amend them in order to protect their “corporate affiliates” from their own lawyers.113

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111. See Sacksteder, supra note 81, at 768-69 (arguing that although Rule 1.7(a) permits a lawyer to proceed in some cases without his adverse client’s consent, Rule 1.4 provides the lawyer with a duty to communicate: “[B]ecause it is in the client’s best interest for the lawyer to disclose the information concerning the potential for representations against the client’s corporate affiliates—information reasonably necessary to enable the client to make an informed decision about the representation—the lawyer has the duty to communicate to the client.”).

112. The Comment to Rule 1.7 provides: “The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7, cmt. [1] (1997).

To avoid this problem, Lawyer should have a professional obligation to advise Parent, Inc. at the outset of their lawyer-client relationship that its subsidiaries may not be Lawyer's clients for purposes of Rule 1.7(a). Other sections of the Model Rules support this early obligation to discuss the matter with the client. Rule 1.4 requires Lawyer to explain a matter to the extent reasonably necessary to permit Parent, Inc. to make an informed decision regarding the representation. How widely to constitute the abstraction of client for purposes of Rule 1.7(a) is certainly a decision regarding the representation.

114. Although some Committee members may worry that such a position only protects Fortune 500 companies, this is not the case. The lawyer has an obligation to raise these issues with all clients, large and small, who are, or might be, corporate family members. The lawyer's obligation includes telling the client that circumstances could change, and there may be new affiliates. See also Sacksteder, supra note 81 (arguing that a lawyer has a duty to advise clients of such potentially troublesome conflicts).

115. Rule 1.4 states:
   (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
   (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.


In Illinois State Bar Association, Advisory Opinion on Professional Conduct, Opinion 95-15 (1996), the Committee observed Lawyer has an obligation under Rule 1.4 to inform Client X about his relationship with Parent, Inc. It said:

   In order to proceed in that situation, the lawyer must first reasonably conclude that any potential limitation will not adversely affect the representation of the potential client and then seek consent of the affected client after disclosure of the relevant circumstances. In any event, the Committee believes that Rule 1.4(b) requires a lawyer accepting a representation adverse to a subsidiary or other affiliate of an existing corporate client to advise the potential new client of the existing client relationship and explain the consequences of that relationship on the proposed new representation. Where appropriate, the explanation of consequences should include the possibility that the subsidiary will attempt to disqualify the lawyer from the contemplated litigation.

Id.

116. In a concurring opinion, Ms. Deborah Coleman makes reference to the importance of Rule 1.4. She argues, however, that Lawyer had an obligation to discuss the Client X lawsuit at the time Client X wished to retain Lawyer, not originally when Parent, Inc. has retained Lawyer on the tax matter.

A lawyer's unilateral decision to take on a matter adverse to an affiliate of an existing client, made on the basis of imperfect information about how his client will regard that decision, can easily have significant ethical repercussions. Rule 1.4 states that "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." A lawyer's failure to consult his client about a new representation adverse to its affiliate deprives the client of the ability freely to make an "informed decision regarding the representation." Instead, the client is forced to decide between discharging the lawyer, even if such discharge will have a material adverse effect on its interests (a circumstance in which the lawyer would not have been permitted to withdraw), or acquiescing in the lawyer's continuing to represent it, with whatever impairment of communication, cooperation and diligence, and whatever threat to confidentiality, results. It cannot be consistent with a lawyer's ethical duties for a lawyer to force his client to such a decision.

Formal Opinion 95-390, supra note 6.
An explicit agreement between Parent, Inc. and Lawyer constituting Subsidiary A, Inc. as a client for purposes of Rule 1.7(a) is the surest way of amending the initial default position. Because Lawyer has the obligation pursuant to Rule 1.4 to raise this issue of who is the client at the beginning of Parent, Inc. and Lawyer's professional relationship, it is only a small step to require Lawyer to clarify any ambiguous situations. Subsidiary A, Inc. or Parent, Inc. may believe it is Lawyer's Rule 1.7(a) client, and if either manifests this expectation, Lawyer should have the professional duty to dispel these assumptions. Lawyer's failure to dispel these expectations should result in Subsidiary A, Inc. becoming a Rule 1.7(a) client. In this case, there will be an implicit constitutive agreement as to who is the Rule 1.7(a) client. This result is consistent with the general law on the formation of the lawyer-client relationship.\(^\text{117}\)

There will necessarily be an agreement with respect to constituting Subsidiary A, Inc. as a client for purposes of Rule 1.7(a). It may be explicit; it may be implicit; it may simply be an acceptance of the initial default position that Subsidiary A, Inc. will not be constituted a client for these purposes. As has been noted, both Parent, Inc., Subsidiary A, Inc. and Lawyer will rely on their understanding. Parent, Inc. may have paid a premium fee for the broad loyalty coverage, and it would be unfair to it to subsequently allow Lawyer to represent Client X against Subsidiary A, Inc. Lawyer, too, has relied on her agreement as to whether Subsidiary A, Inc. is a Rule 1.7(a) client. Lawyer may have accepted a low fee for Parent, Inc.'s tax matter in exchange for her future right to represent Client X against Subsidiary A, Inc. on unrelated matters.

Because of these expectations, there should be a strong presumption in favor of keeping the original agreement as to who is a Rule 1.7(a) client.\(^\text{118}\) Still, if Parent, Inc. does not include Subsidiary A, Inc. as a Rule 1.7(a) client, there are at least two situations in which Lawyer will nevertheless lose the opportunity to represent Client X against Subsidiary A, Inc. in the future. The first situation is where Lawyer learns relevant information while representing Parent, Inc. on the tax matter. The second case is where Subsidiary A, Inc. is an alter ego of Parent, Inc.

\(^{117}\) How to determine what are legitimate client expectations is difficult. Not infrequently, the sharing of confidences indicates the expectations. The sharing of confidences, however, is of particular importance, and it will also be treated separately. See generally Note, An Expectations Approach to Client Identity, 106 HARV. L. REV. 687 (1993).

\(^{118}\) Professor Rotunda believes the initial default position is a strong one, and he believes persons should be reluctant to change it. Rotunda, supra note 9, at 673-75.
1998 / An Instrumental Interpretation of Model Rule 1.7(a)

D. The Relevance of Client Information

The Model Rules give particular prominence to the principle of confidentiality. Rules 1.6 and 1.8(b) mandate Lawyer not to reveal or misuse information relating to the representation. Moreover, this broad protection of client information, even those of quasi-clients, is consistent with other areas of legal ethics. A person, for example, may interview a lawyer to discuss possible representation. Although the person may not retain the lawyer to represent him, information revealed during the interview will be protected as if the person were a client. The person becomes a client for the purposes of Rule 1.6, 1.8(b), and Rule 1.9(c), prohibiting a lawyer from using information to the disadvantage of a former client. Furthermore, Rule 1.9(a) prohibits a lawyer from representing one client against a former client on the same or a substantially related matter. The courts have consistently defined “substantially related” cases as those in which it is likely the lawyer would have acquired relevant information while working for the former client. At least one jurisdiction, Alaska, has borrowed the former client language and has used it in its simultaneous conflict of interest rule.

Thus, there is a tension between Lawyer’s interest in a firm agreement as to who constitutes his client, and Parent, Inc. and Subsidiary A, Inc.’s interests in confidentiality. One fair way to resolve this problem is to constitute Subsidiary A, Inc. as a client for purposes of Rule 1.7(a) whenever Lawyer has acquired relevant

119. Some commentators even believe that this element of confidentiality is the only situation in which a corporate affiliate is constituted a client. Professor Morgan believes this is too narrow a category. See Morgan, supra note 9, at 1163 (positing that the “substantial relation” test functions only to protect client confidentiality, and not other conflict issues).

120. For an explanation of the complexities of determining client identity in the case of corporate entities, see Hricik, supra note 81, at 722-28.


122. Rule 1.9(a) provides:
   (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1997).

123. In July 1993, Alaska adopted its version of Rule 1.7(a) which states:
   A lawyer shall not represent a client if the representation of that client will be directly adverse to another client in the same or a substantially related matter, 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.

ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1998).
information while working for Parent, Inc., unless Parent, Inc. has explicitly made clear that Parent, Inc. and Subsidiary A, Inc. do not object to Lawyer's use of the information for a future Client X. Although this change in the original agreement may seem unfair to Lawyer, it is consistent with the overriding importance of the principle of confidentiality.

If Lawyer wishes to protect himself with respect to future Client X opportunities, Lawyer must not learn relevant information during his representation of Parent, Inc. This may not be difficult because Parent, Inc. has retained him to work on the unrelated tax matter. Lawyer, furthermore, can assure Subsidiary A, Inc. does not become a client as a result of Lawyer's acquisition of relevant information by making an explicit agreement with Parent, Inc. that the mere acquisition of information will not change the initial default position.\textsuperscript{124}

The ABA Committee concurs on the major point that if Lawyer acquires information while representing Parent, Inc. relevant to the complex tort matter, Subsidiary A, Inc. becomes Lawyer's client for Rule 1.7(a). The ABA Committee said:

A client-lawyer relationship with the affiliate may also arise because the affiliate imparted confidential information to the lawyer with the expectation that the lawyer would use it in representing the affiliate. ... Additionally, even if the affiliate confiding information does not expect that the lawyer will be representing the affiliate, there may well be a reasonable view on the part of the client that the information was imparted in furtherance of the representation, creating an ethically binding obligation that the lawyer will not use the information against the interests of any member of the corporate family.\textsuperscript{125}

E. The Relevance of The Alter Ego Concept

Regardless of the fact that Parent, Inc. may have accepted the original default position, Subsidiary A, Inc. should nevertheless be constituted Lawyer's client for purposes of Rule 1.7(a) if Subsidiary A, Inc. is the alter ego of Parent, Inc. What are

\textsuperscript{124} As will be discussed more fully, the ABA Committee has endorsed, in a guarded way, Parent, Inc.'s ability prospectively to consent to the use of relevant information, even to its disadvantage. Formal Opinion 93-372, \textit{supra} note 5. With respect to the issue of waiving the principle of confidentiality, the Committee was adamant in insisting that no waiver of a conflict of interest necessarily includes a waiver of the confidential treatment of information. \textit{Id.} If a client were to consent to the use of information, it would have to be explicitly and separately done. For a series of opinions promulgating that any waiver of confidentiality had to be clear, see \textit{State Bar of California, Comm. on Professional Responsibility and Conduct, Formal Opinion 1989-113}; Committee on Professional Ethics, \textit{The New York County Lawyers Association, Opinion 684} (1992); Illinois State Bar Association, \textit{Advisory Opinion on Professional Conduct, Op. 95-15} (1996).

\textsuperscript{125} Formal Opinion 95-390, \textit{supra} note 6.
the elements of alter ego? Although the concept is used in other areas of law, such as when to pierce the corporate veil for tort liability, it would be an error to borrow indiscriminately from other doctrinal areas. Each area has its own set of problems, and alter ego analysis should differ for different purposes. In the conflicts of interest area, it is best to relate the meaning of alter ego to a principal purpose of the conflicts of interest rules, providing a client with effective, independent representation. As the Official Comment to Rule 1.7 indicates, this translates, in part, to the idea that Lawyer ought to be loyal to her client. If Lawyer’s loyalty to Parent, Inc. will be jeopardized by Client X’s lawsuit against Subsidiary A, Inc., then it will be appropriate to deem Subsidiary A, Inc. Lawyer’s client for purposes of Rule 1.7(a).

I. The Meaning of Client Loyalty

But what does it mean to impinge on client loyalty? The concept of loyalty is a protean one. It has at least three aspects. At its most general, it relates to a client’s entire interest; this is the concept of general loyalty. At the more particular,
it refers to the client’s interest as it relates to the particular matter for which the lawyer was retained. This more particularized loyalty is professional task loyalty.

Finally, there is an instrumental concept of loyalty. This instrumental concept begins with the idea that the purpose of the conflicts of interest rule is to assure effective, independent representation with respect to a particular task. It recognizes that not infrequently Lawyer will have to work in a cooperative team with Parent, Inc. employees to provide effective service. For the cooperative team to work effectively together, there must be human-to-human trust. Without this trust, there may be a disharmonious relationship and the work may not get done effectively. This instrumental idea focuses on how, and under what conditions, Lawyer’s other commitments will materially impinge on this needed human trust. Lawyer’s representation of Client X in the complex tort lawsuit is only likely to impinge on this human-to-human trust within the group working on Parent, Inc.’s tax matter if those persons who are in fact responsible for representing Subsidiary A, Inc. on the complex tort matter are also personally working with Lawyer on Parent Inc.’s tax matter.

The first aspect of loyalty is the most general. If this were the standard, it would prohibit a lawyer from engaging in any activities that might damage any of her client’s interests.\(^ {129} \) This standard is too broad. It would prohibit law reform, the representation of competitive clients, and even public positions independent of the client’s own view of what is best for it. In a sense, this concept of loyalty incorporates the idea that any damage to Subsidiary A, Inc. resulting in financial loss to Parent, Inc. supports a conclusion of Lawyer’s disloyalty to the broad general interests of Parent, Inc. This Article discusses the weakness of this position more fully in the section examining the meaning of “direct adversity.”\(^ {130} \)

A second meaning of loyalty focuses on the effective, independent representation of a Lawyer on a particular task, such as the tax matter. The general idea is that the lawyer focuses his loyalty on the task for the client, not on the client’s total interests. As has been noted, it is difficult to imagine how Lawyer’s ability to do tax work for Parent, Inc. will be influenced, “without more,” by her obligation to Client X in its lawsuit against Subsidiary A, Inc. Nothing in Client X’s lawsuit will affect the quality of Lawyer’s work on the tax matter. In this situation, most commentators fear that if there is any professional risk, it is to Client X. If Parent, Inc. is an important enough client, Lawyer may soft peddle Client X’s

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129. Rule 6.4 of the Model Rules, by contrast, aggressively encourages lawyers to engage in law reform activity “notwithstanding that the reform may affect the interests of a client of the lawyer.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.4 (1997).
130. \textit{Infra} Part IV.
lawsuit in order to curry favor with Parent, Inc. This issue, of course, has been examined under Rule 1.7(b).

It is the "without more" that suggests instrumental loyalty, the general psychological feeling of human-to-human trust that generates personal harmony necessary for a working group to do a job effectively. Committee Dissenter Coleman worried that the majority's opinion would interfere with the lawyer's ethical duties in that it might impair Lawyer's "communication, cooperation and diligence" with respect to her professional task. In performing the legal work on the tax matter, Lawyer may have to cooperate harmoniously with corporate family personnel. There must, therefore, be a minimal level of human-to-human trust among the team players. If some members of the team believe that one of its members has brought a lawsuit against them, they are unlikely to trust that member. Client X's lawsuit, of course, is not against humans, it is against Subsidiary A, Inc. But, those persons responsible for representing Subsidiary A, Inc. may feel personally attacked. They may believe "My own lawyer is suing me." If these same persons in fact work with Lawyer on the tax matter, then the lawsuit is likely to cause a diminution in trust and workplace harmony that may impact Lawyer's

131. See Note, Developments in the Law: Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1298-99 (1981) (suggesting that "the lawyer, on his own initiative, may represent [Client X] less vigorously").

132. Infra Part IV.B.


134. In SWS Financial Fund A v. Salomon Brothers, Inc., 790 F. Supp. 1392 (N.D. Ill. 1992), the court found a violation of the ethics rules, but it denied disqualification. One reason it denied disqualification was that there was no breach of loyalty, understood in the instrumental sense. No person would "feel" that his lawyer had turned on him, and there would be no disharmony on the unrelated case. The court stated:

The court must also inquire into whether Salomon's expectations of loyalty were so cavalierly trampled that disqualification is warranted as a sanction. In this case, Salomon's General Counsel, Robert Denham (appointed to his position on August 25, 1991) was completely unaware until January 9, 1992 that Schiff had ever provided any legal services to Salomon Brothers. This case is at the polar extreme from the case in which an individual has a personal relationship with a particular attorney who provides for all or substantially all of that client's legal needs. In such a case, were the attorney to "turn on" his client and sue him, disqualification would be appropriate. Materials filed under seal reflect that Salomon Brothers has engaged a number of other outside legal counsel, apart from Schiff, some of whom were retained to do financial futures work.

Id. at 1402.
capacity to do the tax work. In this situation, Subsidiary A, Inc. should be deemed Parent, Inc.'s alter ego and a client for purposes of Rule 1.7(a).

A small difference in the language of the operational section Rule 1.7(b) and the categorical section Rule 1.7(a) supports this emphasis on the necessary harmony among real humans, and how disharmony may result in ineffective counsel. Both sections of Rule 1.7 allow clients to consent to some prima facie ethics violations. In the Rule 1.7(b) situation, the lawyer must first "reasonably believe[] the representation [of the affected client] will not be adversely affected." In Rule 1.7(a), the lawyer must reasonably believe the representation of Client X will not adversely affect the "relationship" with Parent, Inc. Why does Rule 1.7(a) focus on a relationship rather than the representation? The term relationship connotes a human-to-human involvement. One suggestion is that Lawyer's ability to provide Parent, Inc. with effective, independent representation will be influenced, perhaps substantially, by the human-to-human relationship he has with Parent, Inc.'s employees. If, as a result of Lawyer's representation of Client X in the lawsuit against Subsidiary A, Inc., the human employees who are responsible for defending the lawsuit are the same people who make up Lawyer's work team on the tax matter, then there may be sufficient disharmony to impair effective completion of the tax matter task.

In The Vanderveer Group, Inc. v. Petruny, No. CIV.A. 93-3677, 1993 U.S. Dist. LEXIS 11131 (E.D. Pa. July 21, 1993), the law firm represented the plaintiff against Parent, Inc. The firm also represented Independent, Inc. on an unrelated matter. Parent, Inc. acquired 51% of Independent, Inc., making it Subsidiary A, Inc. The law firm continued to represent plaintiff against both Parent, Inc. and Subsidiary A, Inc. on the unrelated matter. Id. at *1, 2. The court concluded that even though the defendant and its subsidiary had the same house counsel, there was no showing of active supervision. Id. at *11, 12. Therefore, the defendant was not per se the client of the law firm for the purpose of direct adversity. Id. at *9, 10. The court stated:

In effect, we would be concluding that acquisition of a subsidiary corporation automatically extends the latter's lawyer-client relationships to the purchasing corporation. Stated another way, such a decision would extend an attorney's duty of loyalty to all other entities then related, or which later become related, to a corporate client.

Id. at 1402.

In Teradyne v. Hewlett-Packard Co., No. C-91-0344MHPENE, 1991 U.S. Dist. LEXIS 8363 (N.D. Cal. June 6, 1991), the F&R Firm represented Teradyne against Hewlett-Packard in a patent infringement case. Id. at *1, 2. It also represented a wholly-owned subsidiary of Hewlett-Packard on an unrelated matter. Different lawyers in F&R worked on the two matters. The court disqualified F&R from representing Teradyne. Id. at *13, 14. Although the fact that F&R represented a subsidiary was not, in and of itself, grounds for finding Hewlett-Packard a client (and the court relied on California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Op. 1989-113 (1989)), the fact that Hewlett-Packard's legal counsel carefully supervised the work did constitute sufficient connection so that Hewlett-Packard was considered a client. Id. at *12.

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138. Committee on Professional Ethics, The New York County Lawyers Association, Opinion 684 (1991) concluded an attorney may bring an action on behalf of one client against a subsidiary of another client. It decided the issue under the Model Code of Professional Responsibility. Although it used the "appearance of impropriety"
The important early case of *Grievance Committee v. Rottner*,\(^\text{139}\) cited in a footnote to the Model Code of Professional Responsibility's Ethical Consideration 5-1, makes this point.\(^\text{140}\) In *Rottner*, Stewart Twibble retained the Lessner law firm to assist him with a default collection action. The law firm did minimal work on his behalf. When Thomas O'Brien sought the law firm's assistance in an assault and battery lawsuit against Twibble, the firm readily agreed. It perceived no conflict of interest. The court held the lawyers in violation of the conflict of interest rules. Its emphasis was on the personal feelings of the firm's current client, Twibble. The court stated:

> When a client engages the services of a lawyer in a given piece of business, he is entitled to feel that, until the business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion. If, as in this case, he is sued and his home attached by his own attorney, who is representing him in another matter, all feeling of loyalty is necessarily destroyed, and the profession is exposed to the charge that it is interested only in money.\(^\text{141}\)

Although the hypothetical illustration assumes a current client conflict, the leading case distinguishing a current from a former client is instructive with respect to this issue of trust between human agents of fictitious entities. The question of whether Subsidiary A, Inc. is an alter ego of Parent, Inc. is analogous to the question of whether a client is a current or a former client. In both cases, courts should look to the operational purposes of Rule 1.7(a).

If the court in *IBM v. Levin*\(^\text{142}\) had focused on the operational significance of Rule 1.7(a), the result in that case would have been different.\(^\text{143}\) In this case, the CBM law firm had represented Levin for several years. In March 1972, CBM, on

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rubric, it emphasized the problem as the creation of hostility among human persons. It said:

> While the appearance of impropriety is difficult to define, as a general rule, the closer the relationship between the law firm and the subsidiary and the more material an adverse action to the parent, the greater the chances that the dual representation proposed will appear improper. Where an action would materially affect the parent, Canon 9 considerations are likely to be implicated if the proposed representation would require the lawyer to take action hostile to persons connected with the parent, such as discovery of officers or directors of the parent corporation.

\(\text{Id.}\) (emphasis added).

\(^\text{139}\) 203 A.2d 82 (Conn. 1964).

\(^\text{140}\) *Rottner*, 203 A.2d. at 84 (holding that it was unethical for a lawyer to represent one client against another person whom he simultaneously represented on an unrelated matter).

\(^\text{141}\) *Id.* (emphasis added).

\(^\text{142}\) 579 F.2d 271 (3d Cir. 1978).

\(^\text{143}\) *Levin*, 579 F.2d 271. Professor Lawry, for other reasons, is equally critical of this case. Lawry, *supra* note 9, at 1109.
behalf of Levin, initiated an antitrust suit against IBM. For several years prior to the
initiation of this lawsuit, a CBM labor law specialist had handled several labor law
matters for IBM under the supervision of IBM’s in-house labor lawyer. Although
no CBM lawyer had a “specific assignment from IBM on hand on the day the
antitrust complaint was filed and even though CBM performed services for IBM on
a fee for service basis,”144 the “pattern of repeated retainers”145 supported the finding
that IBM could legitimately expect CBM to represent it on additional labor law
work. There was, the court concluded, “a continuous relationship.”146 The court then
analyzed the situation as if it were a Rule 1.7(a) simultaneous conflict of interests
problem.147

If the court had focused on CBM’s ability to provide effective, independent
representation to IBM in labor matters, it might well have concluded that there was
no reason to suspect its ability to provide effective, independent counsel to IBM on
unrelated labor matters. First, it was most unlikely that anything CBM might have
learned in its IBM labor law work would be useful in the antitrust lawsuit. There
was no risk to IBM confidentiality.148 Second, there should have been no doubt that
CBM could provide IBM effective, independent professional judgment on any labor
law issues. The only reason to doubt CBM’s ability to provide effective
representation is that, arguably, CBM’s representation of Levin in the lawsuit
against IBM might result in some IBM employees feeling that their lawyer had sued
them.149 And if these same lawyers worked with CBM on labor matters, there would
be such human-to-human distrust and disharmony among the team that CBM could
not do effective, independent work. In the actual case, the IBM in-house lawyers
who worked on antitrust matters were different persons than the in-house lawyers
who assisted with labor matters. They worked in separate departments and did not
even share information with each other.150 There was, therefore, no possibility that
there would be disruptive disharmony in any CBM labor work for IBM.151

Ironically, the court was aware that different in-house lawyers worked on antitrust

144. Levin, 579 F.2d at 281.
145. Id.
146. Id.
147. Id.
148. Id.
149. Id.
150. Id.
151. Professor Crystal notes that the two sets of lawyers did not communicate with each other, and he
therefore concluded that there was no likely disharmony in the trusting relationship.

In the Levin case, different lawyers and different representatives of IBM were involved in the antitrust
case and the labor work. IBM as an entity has undoubtedly faced the situation of having a law firm
represent it in a matter, only later to be opposed by the firm in another matter. In these cases, the risk
of disharmony seems small.

Crystal, supra note 9, at 297.
and labor matters and they rarely talked to each other. Rather than using these facts to conclude IBM was not a current client, the court insisted that it was, and then complained about how IBM ran its in-house office. If the court had used an instrumental interpretation, it would have seized on this important distinction and not have determined IBM as a current client for Rule 1.7(a) purposes.

Thus, for Lawyer to be instrumentally disloyal, some Parent, Inc. personnel must "take the lawsuit personally" and they must in fact work cooperatively with Lawyer on the tax matter. Corporate employees should only take a lawsuit emotionally if they are personally responsible for its management. Moreover, even if some employees feel personally attacked, if they do not in fact work with Lawyer, there is no reason to suspect ineffective disharmony. For example, if Lawyer merely accepts work assignments from Parent, Inc.'s general counsel, then even the general counsel's emotional "I have been sued" will not directly interfere with Lawyer's ability to do effective, independent legal work for Parent, Inc. on the tax matter. The team effort will not be jeopardized. It will take more than general counsel's remote supervision to interfere with the Lawyer's effective representation of Parent, Inc. On the other hand, if Parent Inc.'s general counsel is personally responsible for the complicated tort matter, and if he personally works with Lawyer on Parent, Inc.'s tax matter, there may be such personal disharmony that the two cannot work effectively together on the tax case.

2. Some Ethics Opinions and Cases

The several ethics committees that have addressed this issue recognize this human ingredient. All assert that if Parent, Inc. and Subsidiary A, Inc. are alter egos

152. The court stated: [W]e cannot refrain from expressing our belief that such a situation [where the IBM antitrust lawyers did not know that IBM's labor lawyers were retaining the CBM law firm] could not have existed for over five years if the activities of the IBM legal department had been properly coordinated and controlled.

Levin, 579 F.2d at 282.

In Manoir-Electroalloys Corp. v. Amalloy Corp., 711 F. Supp. 188 (D.N.J. 1989), the court also emphasized the loyalty ingredient in determining if Carmelo Iacono was a present client of the law firm Hannoch. In that case, Hannoch, on behalf of plaintiffs, had named Carmelo Iacono as a third-party defendant. The gravamen of the complaint was fraud. Although the Hannoch firm had not represented Iacono on any matter for a four year period, the Hannoch firm had represented Iacono on all his personal matters for many years. He legitimately expected that the firm would take on his additional work, and if the firm did, there is no doubt that the personal trusting relationship between him and his lawyers would be jeopardized. After all, the gravamen of the complaint was fraud.

153. Professor Morgan sees the issue as whether a "reasonable client [would] perceive a breach of loyalty, loyalty being understood as more than mere financial category." Morgan, supra note 9, at 1163, 1195. Mr. Redding worries this could be too easily manipulated. Redding, supra note 9. He emphasizes the importance of the personal attack. Id.

154. Mr. Redding suggests this emphasis on employee job responsibility can be too easily manipulated. Id.
of each other, then Subsidiary A, Inc. is a client for purposes of Rule 1.7(a). There must be a unity of interest; but the mere fact that Parent, Inc. owns 100% of Subsidiary A, Inc. does not constitute a unity of interests.\textsuperscript{155} What does? All emphasize the human relationships between persons in the two corporations. The ABA Committee noted that the two corporations would be alter egos if there was "a management so intertwined that all members of the corporate family effectively operate as a single entity."\textsuperscript{156} The Illinois Committee noted the same thing. It said the two corporations would be alter egos "where the client corporation and the subsidiary in question have the same management group."\textsuperscript{157} The California Committee said that a major factor was "the extent to which each entity has distinct and independent managements and boards of directors."\textsuperscript{158}

\textsuperscript{155} In \textit{Brooklyn Navy Yard Cogeneration Partners, L.P. v. Superior Court (Parsons Corp.)}, 60 Cal. App. 4th 248, 70 Cal. Rptr. 2d 419 (1997), the court emphasized that the unity of interests test and the alter ego were not the same.

\textsuperscript{156} Formal Opinion 95-390 \textit{supra} note 6. The opinion further states: Finally, the relationship of the corporate client to its affiliate may be such that the lawyer is required to regard the affiliate as his client. This would clearly be true where one corporation is the alter ego of the other. It is not necessary, however, for one corporation to be the alter ego of the other as a matter of law in order for both to be considered clients. A disregard of corporate formalities and/or a complete identity of managements and boards of directors could call for treating the two corporations as one.

\textit{Id.}

\textsuperscript{157} Illinois State Bar Association, Advisory Opinion on Professional Conduct, Opinion 95-15 (1996). The opinion continues:

The Committee notes, as do the ABA and the California Bar, that there may well be particular circumstances that would require the lawyer to consider a subsidiary or other constituent of a corporate client to be a client of the lawyer as well. Such instances could include, for example, situations where the lawyer's work for a corporate parent involves direct contact with its subsidiaries and the receipt of information concerning the subsidiaries protected by Rule 1.6 or situations where the client corporation and the subsidiary in question have the same management group. Another situation that would require the lawyer to treat a corporate affiliate as a client is where one entity could be considered the alter ego of the other. In these kinds of circumstances, the lawyer would be required to seek the corporate client's consent, with appropriate disclosure, before accepting a representation adverse to the affiliate.

\textit{Id.}


The law, however, does recognize in some instances that the corporate form should be disregarded. The doctrine of alter ego, which has been established to avoid injustices in permitting entities or individuals to hide behind the corporate veil, provides helpful principles in determining when affiliated corporations should be treated as the same entity for conflict purposes. When a corporation is the alter ego of another entity or has a sufficient unity of interests, they should be treated as the same entity for conflict purposes. In determining whether there is a sufficient unity of interests to require an attorney to disregard separate corporate entities for conflict purposes, the attorney should evaluate the separateness of the entities involved, whether corporate formalities are observed, the extent to which each entity has distinct and independent managements and board of directors, and whether, for legal purposes, one entity could be considered the alter ego of the other. In this regard, the committee believes that the percentage of ownership of stock, while a factor to consider, is by no means itself determinative.

\textit{Id.} (citation omitted).
The reason why this human-to-human unity of interest is relevant is if there is the same management, then it is likely that the Subsidiary A, Inc. employees who might take Client X's lawsuit personally will be the same people who will work with Lawyer on Parent, Inc.'s unrelated tax matter. This would cause distrust and disharmony, probably leading to Lawyer's ineffective handling of the tax matter.

The leading case, *Pennwalt Corp. v. Plough, Inc.*, 159 captures the importance of this operational focus. In that case, the Philadelphia law firm, Dechert, Price & Rhodes (a multi-city, multi-national firm, hereinafter “DP&R”) represented Pennwalt in a trademark dispute with Plough in the summer of 1977. In June 1978, DP&R agreed to represent Scholl in a lawsuit unrelated to the Pennwalt trademark dispute; this was the Shoe Barn antitrust litigation. In April 1979, Schering-Plough (which owned 100% of Plough) acquired 100% of Scholl. In May 1979, DP&R did not know that Plough and Scholl were sister corporations, and it, on behalf of Pennwalt, filed a lawsuit against Plough (the sister corporation of one of its clients).

Although the court's focus was on Plough's motion to disqualify DP&R from representing Pennwalt (after DP&R had terminated its Scholl representation several months earlier), the court suggested that there was no impermissible conflict of interests in the interim. The court eschewed affixing the label of client to Plough, and instead focused on the "ultimate objective" of the Canons. In other words, Plough would be constituted a DP&R client if such a designation advanced the operational purposes underlying the conflict of interest rules. It concluded that there was no realistic possibility that DP&R would have acquired any Plough information (useful to Pennwalt) as a result of its representation of Scholl. The lawsuits were unrelated and the few Chicago DP&R lawyers who represented Scholl had only communicated with Scholl personnel.

In the future, however, Plough would be constituted a Rule 1.7(a) client. Since Schering-Plough was administratively revamping its legal offices so that Scholl lawyers would, in the future, be more closely aligned with Plough lawyers through the same general counsel’s office, there was a substantial chance that the in-house lawyers who represented Plough might be the same persons who would work with DP&R on the unrelated Scholl matters. In that case, Scholl and Plough would be alter egos of each other, and each would be constituted a Rule 1.7(a) client.

159. 85 F.R.D. 264 (D. Del. 1980).
161. The court did not go so far as to actually state that a lawyer could bring a lawsuit on behalf of one client against another client, because it did not find that Plough was DP&R’s client. In spite of the court’s language, its direct exploration of the relationships suggest that it might have held this. Id. at 269-73.
162. Id.
A court case that cites Formal Opinion 95-390 supports these distinctions. In *Reuben H. Donnelley Corp. v. Sprint Publishing & Advertising, Inc.*, the law firm Jones Day had represented United Telephone in a large legal matter since 1986. Sprint owned United Telephone. In 1993, Sprint acquired Telephone Company. Shortly thereafter, Jones Day represented Reuben in a lawsuit against Telephone Company. Was Jones Day in violation of Rule 1.7(a) because it now represented one client (Donnelley) against the sister corporation (the Telephone Company) of another client (United Telephone) that it represented on an unrelated matter? The court said no. The two companies were not alter egos of each other in that the persons who were responsible for representing Telephone Company in its lawsuit against Donnelley were not the same persons who worked with Jones Day on the United Telephone matter. The court stated:

From the facts presented, it does not appear that the same lawyers in the corporate parent’s office are actively managing the Telephone Company’s defense of this case and the unrelated United Telephone tax matters. The fact of active management is crucial because the core policy concern in conflict of interest law is the protection of client privacy. . . .

When different faces represent the corporations in each litigation, the firm is less likely to feel any divided loyalty that could affect its representation. “The concepts of having a ‘personal attorney’ or a ‘general corporate counsel’ are much less meaningful today, especially among sophisticated users of legal services, than in the past.”

F. Conclusion on the Meaning of Client

What constitutes a client is difficult to determine. The abstraction of client has to be applied to fictitious juristic entities. First, this Article has suggested a plausible initial default position—treat each juristic entity separately. Only Parent, Inc. is Lawyer’s client. Second, in the hypothetical illustration, one must examine if Parent, Inc. and Lawyer have explicitly or implicitly agreed that Subsidiary A, Inc. should be constituted a client for purposes of Rule 1.7(a). If there is no agreement, then Subsidiary A, Inc. should only be constituted a client if it or Parent, Inc. has disclosed information to Lawyer relevant to Client X’s lawsuit and neither

163. In *Apex Oil Co., Inc. Wickland Oil Co.*, No. CIV. S-94-1499-DFLGH 1995 WL 293944 (E.D. Cal 1995), the court held that merely because the lawyer reported to the same general counsel did not necessarily imply that one member of the corporate family was an alter ego of another.
has clearly and explicitly consented to its use by Lawyer. Third, if Subsidiary A, Inc. is the alter ego of Parent, Inc., then it will be a Rule 1.7(a) client. The focus of the inquiry will be on Lawyer’s instrumental loyalty to Parent, Inc. If Subsidiary A, Inc.’s personnel who are responsible for defending against Client X’s lawsuit feel they have been betrayed by “their own” lawyer and these same human employees personally work with Lawyer on Parent, Inc.’s tax matter, there is likely to be distrust and disharmony in the work team. Lawyer’s effectiveness for Parent, Inc. on the tax matter will likely be jeopardized. Only in these circumstances will Subsidiary A, Inc. be Parent, Inc.’s alter ego. This instrumental interpretation severely narrows the reach of Rule 1.7(a).

IV. WHAT IS DIRECT ADVERSITY?

In the above hypothetical illustration, there is no doubt that Parent, Inc. is Lawyer’s client with respect to the tax matter. Is it possible that Client X’s lawsuit against Subsidiary A, Inc. is directly adverse to Parent, Inc.? The California Committee on Professional Ethics took a traditional approach. It argued that there is only “direct” adversity if Lawyer’s client is a party to the litigation. This Article argues that this approach is both too broad and too narrow to resolve the Rule 1.7(a) issue. The ABA Committee’s dissenters thought Client X’s lawsuit would be directly adverse to Parent, Inc. They took a bottom-line, practical approach to the problem. If Subsidiary A, Inc. loses its lawsuit, then its 100% owner, Parent, Inc. would, by necessity, lose money or value also. This loss was as direct, they believed, as if the lawsuit had been against Division A of conglomerate Parent–A, Inc. No one doubted, they asserted, in the latter case there would be direct adversity. Because, from the business person’s perspective, the fact that Parent, Inc. operated

167. See Formal Opinion 95-390 supra note 6 (articulating the issue as whether one of the lawyer’s clients is directly adverse to the other).
168. The Committee stated:
As we have stated in the context of issue conflicts, “Normally the scope of ‘adversity’ which gives rise to a conflict is limited to party identification . . . . [T]he ‘interests’ usually arise within the context of the same legal matter.” (See State Bar Formal Op. No. 1989-108.) Of the numerous and varied consequences which a representation of one client may have on other clients, well-established legal authority interpreting the duty of loyalty limits the scope of ethical inquiry to whether the other affected clients are parties to the case or transaction in which the attorney is acting.
169. Mr. Amster warned that the opinion opened a Pandora’s Box of unintended consequences. He said that he might have trouble “defining a conflict but I know one when I see one.” Formal Opinion 95-390, supra note 6.
170. There are two approaches to this problem. The Task Force on Conflicts of Interest, Conflicts of Interest Issues, 50 BUS. LAW. 1381, 1387-89 (1995).
171. In Stratagem Development Corp. v. Heron International, 756 F. Supp. 789, 792 (S.D.N.Y. 1991), the court found it was clear because the “liabilities of a subsidiary corporation directly affect the bottom-line of the corporate parent.”
through a subsidiary made no important difference, it logically followed that the lawsuit against Subsidiary A, Inc. should be as direct as if it had been against Parent, Inc. This analysis focused only on bottom-line considerations.

Other commentators have focused on the size of Client X's lawsuit to determine its directness. The more material the action is, the more likely it is to be direct. The Restatement adopts this position, at least in an illustration.\footnote{172} In its comment, it states:

In some situations, however, the financial or personal relationship between the lawyer's client and other persons or entities might be such that the lawyer's obligations to the client will extend to those other persons or entities as well. That will be true, for example, when financial loss or benefit to the non-client person or entity will have a direct, adverse impact on the client.\footnote{173}

There is a certain degree of question-begging in this passage. It includes the fact that the loss has a "direct, adverse impact" in its proposition, without defining what is a direct impact. In Illustration 6, it assumes, without analysis, that the materiality of the loss makes a difference. The Illustration states: "[A]ny judgment obtained against Corporation B [i.e., Subsidiary A, Inc.] will have a material adverse impact on the value of Corporation B's assets and thus on the value of the assets of Corporation A [i.e., Parent, Inc.]."\footnote{174} This, the Illustration concludes, disables Lawyer from representing Client X without the consent of Parent, Inc., Subsidiary A, Inc. and Client X.\footnote{175}

This Article considers the materiality of Client X's lawsuit against Subsidiary A, Inc. irrelevant to the issue of what is "direct adversity." Directness is a qualitative term. The size of Client X's lawsuit may have operational significance under Rule 1.7(b) in that the large size of a lawsuit may materially limit Lawyer's representation in a different way than would a smaller lawsuit. If Lawyer, for

\begin{itemize}
\item \footnote{172. \textit{Restatement (Third) of the Law Governing Lawyers} \S 201 illus. 6 (Proposed Final Draft No. 1, 1996).}
\item \footnote{173. \textit{Id.} cmt. d.}
\item \footnote{174. \textit{Id.} illus. 6.}
\item \footnote{175. Committee on Professional Ethics, The New York County Lawyers Association, Opinion 684 (1992) made a similar assumption. It said:
A lawyer's ethical responsibilities with regard to the parent corporation should be a function of the materiality of the adverse action. Where an adverse action would materially affect the parent, the lawyer's ethical duty is the same as it would be were the parent itself the subject of the action. Under such circumstances, the lawyer should only represent the adverse client if it is obvious that the lawyer can adequately represent both clients and if each consents. On the other hand, where an action against a subsidiary would not have a material adverse effect on the parent, the lawyer should be free to represent the adverse party.

\textit{Id.} (citation omitted).}
\end{itemize}
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example, wished to gain favor with Parent, Inc., he might be tempted to soft peddle his advocacy in a large, rather than a small, lawsuit against Subsidiary A, Inc. If this were the case, pursuant to Rule 1.7(b), Lawyer would have to obtain Client X’s informed consent to Lawyer’s continued representation of Client X against Subsidiary A, Inc.

The size of a lawsuit, however, does not change its qualitative nature. Direct adversity should be understood in light of the purposes of the conflicts of interest rules—to provide effective, independent [client] representation, with an appropriate regard for confidentiality and loyalty. What will make an action directly adverse in a Rule 1.7(a) context is its impact on the lawyer’s effectiveness in representing the client on a particular professional task. The Committee suggests a similar position by opining that the concept of directness is not a matter of financial loss, large or small. In determining whether Client X’s lawsuit was directly adverse to Parent, Inc., the Committee relied on two previous opinions: Formal Opinion 92-367 (Lawyer examining a client as an adverse witness) and Formal Opinion 93-377 (Positional Conflicts). In these opinions, the Committee had previously held the former expressed direct adversity, while the latter did not. Why?

In Formal Opinion 93-377, the Committee addressed the question whether “a lawyer can represent a client with respect to a substantive legal issue when the lawyer knows that the client’s position on that issue is directly contrary to the position being urged by the lawyer . . . on behalf of another client in a different, and unrelated, pending matter.” The Committee recognized the precedent that might be created if one case on behalf of one client could easily result in significant


Illinois State Bar Association, Advisory Opinion on Professional Conduct, Opinion 95-15 (1996) stated: The Committee also believes that the choice of the modifier “directly” in Rule 1.7(a) to define adversity should be interpreted to exclude indirect, derivative and other speculative impacts of the lawyer’s activity from an analysis under the Rule. Otherwise, any conceivable impact on a client, however slight or implausible, would have to be taken as impermissible, direct adversity. For these reasons, the Committee agrees with the ABA in its Opinion No. 95-390 that any adverseness in such circumstances is, as a general matter, indirect rather than direct and therefore not prohibited by Rule 1.7(a). Again, unique facts or circumstances might suggest a different result in a particular matter, but the general rule should be that an indirect or speculative impact on an existing client would not render a representation “directly adverse” under Rule 1.7(a).


179. Id.
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financial consequences to the second client. The adversity, however, was indirect, and Rule 1.7(a) was inapplicable.\textsuperscript{180} In Formal Opinion 92-367, the Committee addressed the question of whether a lawyer who has a doctor as a general client may cross-examine the doctor when the doctor testifies as an adverse expert witness in a medical malpractice case.\textsuperscript{181} The Committee explained, in passing, that direct adversity entailed "any advantage gained by the lawyer in representation of the litigation client [that] necessarily entails some concrete disadvantage to the [other] client."\textsuperscript{182} It concluded "there will almost inescapably be a direct adverseness, under Rule 1.7(a)"\textsuperscript{183} in this situation. The Committee explained "that at least absent exceptional circumstances, a lawyer will not adequately examine an opposing expert witness without endeavoring to challenge the witness's qualifications and credibility; impugning a client's word or qualifications is directly adverse to that client."\textsuperscript{184}

In Formal Opinion 95-390, Dissenter Fox, with his focus on the economic bottom-line, noted Client X's lawsuit against Subsidiary A, Inc. threatened Parent, Inc.'s bottom-line more than Lawyer's cross-examination of the doctor witness. Fox stated:

If attacking the credibility of a witness, who is not a party, is said to entail a concrete disadvantage, then suing the subsidiary of a client for damages surely entails an even greater and more concrete disadvantage. In the former case, by definition, the witness has no stake in the litigation and so at worst some feelings get bruised or one's reputation tarnished; but in the latter the lawyer who is suing the subsidiary of a parent client is literally putting her hand in her client's pocketbook. Short of physical injury, it does not get more concrete than that.\textsuperscript{185}

If it is the economic measure of the loss that distinguishes "direct adversity," then Fox is probably correct. Parent, Inc. stands to lose much more than the doctor in Formal Opinion 92-367. What Fox fails to understand is that if the lawyer in Formal Opinion 92-367 attacked the qualifications and credibility of his client doctor, it would be likely that the client doctor would personally resent this attack. He would feel his own lawyer was challenging him. In such a circumstance, distinct

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\textsuperscript{180} D.C. Bar Legal Ethics Committee, Opinion 265 (1996) opined that positional conflicts could raise conflict of interests issues. The question would be whether a particular client would be adversely affected by the lawyer's position. It was not an issue of direct adversity.
\textsuperscript{181} Formal Opinion 92-367, \textit{supra} note 177.
\textsuperscript{182} \textit{Id.}
\textsuperscript{183} \textit{Id.}
\textsuperscript{184} \textit{Id.}
\textsuperscript{185} Formal Opinion 95-390, \textit{supra} note 6.
\end{flushleft}
feelings of human-to-human distrust would create disharmony. It is unlikely client doctor would be able to work effectively with lawyer on the unrelated, general matters that are the subject of lawyer's professional task retain. The Committee's majority suggests this point when it states that what makes adversity direct is "specifically the closeness of the connection between the lawyer's actions and the adverse effect on the client." 186

How can we apply this "closeness of the connection" criteria to the hypothetical illustration? The best way is to focus on the principal purpose of Rule 1.7(a) - to assure Lawyer's effectiveness with respect to Parent, Inc.'s tax matter. Because this was the same way this Article approached the alter ego problem, it is sensible to use the same interpretive approach - the instrumental one. In effect, the criteria for "direct adversity" becomes the same as the standard for alter ego. It is plausible that the persons directly responsible for the complex tort lawsuit will feel personally attacked by Client X's lawyer. They may well feel like the doctor in Formal Opinion 92-367. They will personally distrust Lawyer. If these same persons personally work with Lawyer on Parent, Inc.'s tax matter, there is likely to be disharmony in the work team that may well result in ineffective legal service. This tie between the feeling, the human-to-human distrust and disharmony, and Lawyer's effectiveness provides the quality of "closeness of the connection" that changes an adverse impact on Parent, Inc. into a directly adverse impact. 187

186. Id.
187. The relationship suggested here may be illustrated by one of Dissenter Fox's partial quotes. He states:
   The final ironic infirmity in the majority opinion is its recognition that the lawyer might run afoul of Model Rule 1.7(b)'s material limitation language because the client [Parent-A, Inc.] might resent the lawyer's undertaking any representation that threatened, even indirectly, any adverse effect on the financial well-being... of the corporate client.
   Id.

   This partial quote suggests that the majority believed mere financial loss to Parent, Inc. might be a per se material limitation on Lawyer's representation of Parent, Inc. The majority's full quote, however, suggests it was not concerned with Parent, Inc. but rather with Lawyer's obligations to Client X. As has been noted, if Parent, Inc. stands to lose a great deal, Lawyer may be tempted to relax his advocacy and diligence on behalf of Client X. The full quote reads:
   Thus, Rule 1.7(b) might come into play if the lawyer had reason to believe that, even though there was no understanding as to how the corporate client's affiliates were to be treated, nonetheless the corporate client would resent the lawyer's undertaking any representation that threatened, even indirectly, any adverse effect on either the financial well-being or the programmatic purposes of the corporate client; and if, because of this belief, there was a significant risk that the lawyer's diligence or judgment on behalf of his new client would be adversely affected by his awareness of the corporate client's displeasure.
   Id.
Finally, there are a set of practical problems that caution against holding Client X’s lawsuit against Subsidiary A, Inc., directly adverse to Parent, Inc.\textsuperscript{188} Regardless of what a lawyer does for a client, there will often be a series of indirect consequences to other persons. If a lawyer represents two business competitors, assisting one will injure the other. But, the Official Comment to Rule 1.7 notes competition among competitors does not raise a “directly adverse” problem.\textsuperscript{189} Moreover, with respect to the economic diminution of value of an owners interest in a litigant, it would be very difficult to determine when a small ownership interest becomes so significant that it will be deemed direct adversity.\textsuperscript{190} Indeed, in a large corporation, it will be virtually impossible to tell who owns the corporation, and how significant are their interests.\textsuperscript{191} For these reasons, the mere fact of economic interest should not be the defining element of “direct” adversity.

V. HOW TO DECONSTITUTE A RULE 1.7(A) CLIENT BY CONSENT, WAIVER AND PROSPECTIVE CONSENT

If there has been a prima facie violation of either the operational Rule 1.7(b) or the categorical Rule 1.7(a), under appropriate circumstances the client can consent to the continued representation. The Rule 1.7(b) approach is straightforward. The lawyer must determine if he reasonably believes he can effectively represent each client, and then each affected client must consent to the continued representation.\textsuperscript{192}

Rule 1.7(a) is more complicated. As has been noted, if Lawyer’s actions fall within the bright-line categories of the rule, both clients must consent to Lawyer’s continued representation of either client.\textsuperscript{193} It is not relevant that one client may not be materially affected by the representation of the other. Why this should be the case is unclear. The most plausible explanation is, in a typical situation in which Lawyer is representing adversarial clients in the same lawsuit, each affected client

\textsuperscript{188} California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion 1989-113 states:

If such indirect adverse consequences were prevented by the duty of loyalty, attorneys would be conflicted out of representations where the indirect adverse impact was slight and unpredictable. Moreover, there would be no way to construct any meaningful standard to distinguish among indirect consequences. We can determine no principled basis to distinguish the facts presented here from the situation where an attorney brings suit against a publicly-held corporation in which numerous of his or her clients may own relatively small amounts of stock. The indirect impact on the non-party client shareholders would certainly not give rise to that kind of adversity which would create a conflict of interest.


\textsuperscript{190} Brooklyn Navy Yard Cogeneration Partners, L.P. v. Superior Court (Parsons Corp.), 60 Cal. App. 4th 248, 70 Cal. Rptr. 2d 419 (1997).

\textsuperscript{191} Id.

\textsuperscript{192} Rule 1.7(b), supra note 2.

\textsuperscript{193} Rule 1.7(a), supra note 2.
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would have to consent to representation under Rule 1.7(b). Because the drafters of Rule 1.7(a) might have had this case in mind, they may have simply rushed to the judgment that both clients must always consent to the representation. 194

However, Rule 1.7(a)’s veto provision is unrelated to Lawyer’s effective, independent representation of each client. One escape from the interpretive difficulty between 1.7(a) and 1.7(b) is to encourage carefully drafted engagement letters. This Article suggests that conglomerate Parent–A, Inc. in the hypothetical illustration should be able to deconstitute itself as a Rule 1.7(a) client by waiver or prospective consent.

Earlier this Article argued that Parent, Inc. could constitute Subsidiary A, Inc. as a Rule 1.7(a) client by explicit agreement with Lawyer.195 The initial default position, that Lawyer only represented Parent, Inc., was changed by explicit agreement. Parent, Inc. purchased loyalty insurance. Here, the initial default position should again be that Lawyer represents the single juristic entity, the corporate conglomerate, Parent–A, Inc., but this too can be changed by explicit agreement between Parent–A, Inc. and Lawyer. In other words, Parent–A, Inc. can agree to Lawyer’s representation of Client X against it in a complex tort matter, regardless of the fact that Lawyer may simultaneously represent Parent–A, Inc. on the unrelated tax matter.

Although all commentators agree that Parent–A, Inc. may consent, after full consultation, to some conflicts of interest, there is disagreement with respect to whether it can do this prospectively. Describing Parent–A, Inc.’s consent to a Rule 1.7(a) conflict as the act of deconstituting itself as a Rule 1.7(a) client—analogous to the agreement between Parent, Inc. and Lawyer to constitute Subsidiary A, Inc. as a Rule 1.7(a) client—should make courts and commentators more sympathetic to the validity of prospective waivers. It suggests Parent–A, Inc.’s consent may occur when Parent–A, Inc. first retains Lawyer—in other words, prospectively. This way of describing waiver also suggests Parent–A, Inc. and Lawyer should have broad latitude to deconstitute Parent–A, Inc. for Rule 1.7 purposes. In this process of deconstituting itself, the conglomerate Parent–A, Inc. is granting waivers or exceptions to the loyalty insurance it, ipso facto, acquired with the initial default position.

194. Rule 1.7(a) of the D.C. Rules of Professional Conduct limits impermissible conflicts of interests to “same matter” conflicts. D.C. CODE ANN. Rules of Prof. Conduct, Rule 1.7 (1998). Moreover, the D.C. Rule 1.7(b) permits otherwise impermissible conflicts if “(1) each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation; and (2) the lawyer is able to comply with all other applicable rules with respect to such representation.” Id.

195. Supra Part III.C.
A permissive policy with respect to these waivers may serve the interests of both Parent–A, Inc., Client X, and Lawyer. Without such a prospective consent, Lawyer may be reluctant to work for Parent–A, Inc. on a limited tax matter. Lawyer may fear it will preclude too much future work. Parent–A, Inc. may be equally disadvantaged. It may believe that Lawyer is the best tax lawyer in the country, and it may be willing to reshape the conglomerate default rule to deconstitute itself as a client for purposes of Rule 1.7(a). As the ABA Committee wrote:

Indeed, the seeking of waivers against future conflicts of interest may well represent a total concordance of the present interests of attorney and client. At the moment of the engagement each is perfectly willing to go forward with the representation on a basis that secures to the client her choice of counsel and at the same time protects the lawyer from challenge by the client to future representations whose nature and scope is yet not identified which the lawyer worries that the client might find objectionable at a later, perhaps more emotion-laden, time.¹⁹⁶

There should be the same limitations on the granting of waivers as there were on the purchase of this type of loyalty insurance. First, if Lawyer, while working for Parent–A, Inc., acquires information relevant to Client X’s lawsuit, there should be no permissible consent without the most explicit agreement that such information can be used by Lawyer on behalf of Client X. Second, there should be no permissible consent to Lawyer’s representation of Client X if this representation will jeopardize Lawyer’s professional work on the tax matter for Parent–A, Inc. As with the alter ego analysis, this is most likely to occur if the people responsible for managing Parent–A, Inc.’s complex tort matter against Client X also personally work with Lawyer on the unrelated tax matter.

Normally, the legal literature discusses what this Article has called a deconstituting agreement as the issue of prospective waiver.¹⁹⁷ Although it has been argued that the agreement of Parent–A, Inc. and Lawyer deconstituting Parent–A, Inc. as a Rule 1.7(a) client should be as easily arranged as the agreement of Parent, Inc. and Lawyer constituting Subsidiary A, Inc. as a Rule 1.7(a) client, the law is not so clear.

¹⁹⁶. Formal Opinion 93-372, supra note 5.
As noted above, Model Rule 1.7(a) permits Parent-A, Inc. to consent to a prima facie ethics violation after full consultation. The Committee, in Formal Opinion 93-372, took a guarded view with respect to the enforceability of prospective consents to prima facie violations of Rule 1.7(a). First, it concluded there must be "no adverse effect on the first representation from undertaking the second representation," and this judgment must be made both at the time of the prospective consent and it must be "revisited" at the time of the subsequent representation. Second, it noted "the particular future conflict of interest as to which the waiver is invoked [be] reasonably contemplated at the time the waiver was given." The Committee added the rigorous gloss "it would be unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of potentially conflicting clients would survive scrutiny." Third, it stated any waiver with respect to confidentiality had to be explicit.

The first requirement of no adverse effect on the first representation and the "revisiting of this issue" is consistent with this Article's proposed interpretation. The focus must always be on whether Lawyer can effectively provide Parent-A, Inc. professional and independent tax advice. If Lawyer is disloyal in the instrumental sense emphasized here, then there will be an impermissible conflict, regardless of any prospective consent. The Committee said:

For example, it may be that the [Client X] representation will involve a challenge to the conduct of the CEO of [Parent-A, Inc.], the very individual whose integrity is on the line in the [Client X lawsuit]. [Lawyer] cannot ignore this issue; rather, Rule 1.7 requires [Lawyer] to determine whether this fact alone creates an adverse effect on [Lawyer's representation of the Parent-A, Inc.] which precludes reliance on the prospective waiver as a basis for undertaking the [Client X lawsuit against Parent-A, Inc.].

In this case, what must be determined is whether the CEO, whose personal integrity is on the line and who will feel that Lawyer is challenging him, also works with Lawyer on the tax matter. If these are the facts, it is unlikely that there will be adequate human-to-human trust and harmony to provide Lawyer the work group necessary to assure effective representation on the tax matter.

201. Id.
202. Id.
203. Id.
The second requirement, particularly with the Committee's rigorous gloss, is unreasonable.\textsuperscript{204} Because Lawyer will be working on Parent--A, Inc.'s tax matter, Parent--A, Inc. should be able to consent to Lawyer representing any client in any unrelated matter against it. Lawyer will not know who these future clients will be.\textsuperscript{205} Parent--A, Inc. is not injured by prospectively consenting in that it will be assured of Lawyer's effective work by the "revisit" requirement. This recommended approach, moreover, is consistent with the broad latitude Parent--A, Inc. and Lawyer should have in Parent--A, Inc. deconstituting itself as a Rule 1.7(a) client.

The third requirement accurately captures the importance of confidentiality in this suggested proposal and replicates the problem when the issue was whether Subsidiary A, Inc. would be constituted a Rule 1.7(a) client. There, it was noted, if Lawyer learned information relevant to Client X's lawsuit while representing Parent, Inc., then Subsidiary A, Inc. would be constituted a Rule 1.7(a) client unless there was an explicit refutation of this result.\textsuperscript{206} This requirement of explicit agreement with respect to confidential information assures the important issue of lawyer confidentiality will not be confused with other issues, and that the client clearly knows to what it is agreeing. In the same vein, Parent--A, Inc. should be able to prospectively consent to Lawyer representing some future Client X against it, but any prospective consent with respect to confidential information should be most explicit.

Finally, there should always be the opportunity of finely tailored, conditional prospective consents to meet all interests.\textsuperscript{207} These can go a long way toward assuring Parent--A, Inc. that Lawyer will remain effective and independent with respect to the tax matter and Lawyer will not violate important principles of confidentiality in her representation of Client X. Lawyer may, for example, be a large decentralized law firm. The Omaha branch may be doing Parent--A, Inc.'s tax matter. Parent--A, Inc. and Lawyer may prospectively agree that Lawyer's New

\textsuperscript{204} Professor Crystal distinguishes between a blanket prospective consent and a conditional consent. He clearly disapproves of the former. Crystal, \textit{supra} note 9.
\textsuperscript{205} Redding, \textit{supra} note 9.
\textsuperscript{206} Formal Opinion 95-390, \textit{supra} note 6.
\textsuperscript{207} \textit{Truck Insurance Exchange v. Fireman's Fund Insurance}, 6 Cal. App. 4th 1050, 8 Cal. Rptr. 2d 228 (1992), was a case in which a large law firm argued that it should avoid disqualification because it effectively screened its personnel. The Crosby Firm represented an affiliate of FFIC (Fireman's Fund), the credit union, on two "wrongful termination" cases. Truck, a long-time client of the Crosby firm, asked the Firm to represent it in a large scale lawsuit. The Crosby Firm sought FFIC's consent, and when that was denied, it "fired" FFIC and proceeded to represent Truck against it. FFIC moved to disqualify it, and the court granted the motion. The court was insistent that there not be a different rule for large law firms. It said: "[T]hat the duty of loyalty owed a client of a large law firm is somehow less than that owed to the client of a smaller firm or sole practitioner, we summarily reject the implication." \textit{Id.} at 1060, 8 Cal. Rptr. 2d at 234.
York office, if appropriately screened from its Omaha office, may represent unknown future clients against Parent–A, Inc. on unrelated matters.\textsuperscript{208}

VI. A LAWYER MAY SIMULTANEOUSLY REPRESENT ONE CLIENT AGAINST ANOTHER CLIENT WHOM HE REPRESENTS ON AN UNRELATED MATTER

Might it also be possible, even without Parent–A, Inc.’s consent, for Parent–A, Inc. to be deconstituted as a client for Rule 1.7(a) purposes? Can one take the Committee dissenters’ logic in Formal Opinion \textsuperscript{95-390}, turn it on its head, and discover that a lawyer may represent one client against another simultaneous client on an unrelated matter?

First, the Committee dissenters believed it clear that Lawyer could not represent Client X in the complex tort lawsuit against Parent–A, Inc. whom he simultaneously represented in the unrelated tax matter.\textsuperscript{209} Second, they also believed that whether a business operated through subsidiaries or divisions was essentially irrelevant.\textsuperscript{210} These two premises led the dissenters to their conclusion that Lawyer could not represent Client X in lawsuit against Subsidiary A, Inc., while simultaneously representing Parent, Inc. on an unrelated tax matter.

The dissenters second belief is a strong one. Businesses operate it in a variety of juristic forms, and usually these are irrelevant to actual operating concerns. If we accept the dissenters’ second belief, and combine it with the majority’s conclusion that there was no \textit{per se} breach of ethics if Lawyer represented Client X against Subsidiary A, Inc., while simultaneously representing Parent, Inc. on an unrelated matter, we get the surprising result that Lawyer should not be prohibited \textit{per se} from representing Client X against Parent–A, Inc., even though Lawyer may be simultaneously representing Parent–A, Inc. on an unrelated tax matter. If Client X’s lawsuit engages Division A, then Parent–A, Inc. need not be a Rule 1.7(a) client and Client X’s a lawsuit against Parent–A, Inc. is not necessarily “directly adverse” to it.

This instrumental interpretation of Rule 1.7(a) will always define “client” or “directly adverse” with an eye to its impact on Lawyer’s professional task for Parent–A, Inc. Will Lawyer be able to provide effective, independent representation, with due regard to confidentiality and loyalty, on this professional task. If Lawyer, while working on the tax matter for Parent–A, Inc, acquires no information related

\textsuperscript{208}. In \textit{Fund of Funds, Ltd. v. Arthur Andersen & Co.}, 567 F.2d 225 (2d Cir. 1977), the law firm attempted to set up an ethics wall between its various offices in order to avoid an impermissible conflict of interest. The proposal here suggests it could have entered into an agreement with its first client to permit an ethics wall to avoid the conflict.

\textsuperscript{209}. Formal Opinion \textsuperscript{95-390}, \textit{supra} note 6.

\textsuperscript{210}. Id.
to the complex tort matter, there will be no threat to this important value. And, if the Parent–A, Inc. employees responsible for defending the complex tort lawsuit do not personally work with lawyer on the tax matter, there is no reason to doubt Lawyer's effective, independent representation on the tax matter. If both these conditions are met, then Parent–A, Inc. should be deconstituted as a client for purposes of Rule 1.7(a). Client X's lawsuit, moreover, should not be considered directly adverse to Parent–A, Inc.

This suggestion is surprising. The Committee dissenters could not believe anyone would take this position. It follows, however, from the dissenters' logic, and it grapples with the complex structure of modern businesses. Rule 1.7(a) uses the abstract category “client” and the category “directly adverse” to trigger ethics violations. A wooden application of facts into these categories leads to unfair results. Still, the instrumental mode of interpretation will surprise many. How can a lawsuit that names Parent–A, Inc. as a party defendant not be directly adverse to it? How can a single juristic entity be deconstituted so it is no longer a client for Rule 1.7(a), while it remains a single juristic entity for many other legal purposes?

Because of this surprise element, this instrumental mode of interpretation should be pushed to this ultimate logical position with caution. It should only be applied when a prima facie ethics violation is beyond Lawyer's control. On the one hand, if a client creates the fact situations or if unforeseen facts develop that trigger Rule 1.7(a) categories, it is unfair to Lawyer to subject him to professional discipline. On the other hand, if Lawyer, while representing Parent–A, Inc. on the tax matter, agrees to represent Client X in an unrelated complex tort lawsuit engaging Division A of Parent–A, Inc., then Lawyer has effectively brought the problem on himself. Although this line-drawing may seem illogical, it leaves standing, in many cases, traditional modes of thinking.

*SWS Financial Fund A v. Salomon Brothers,* supports this analysis. The multi-city law firm of Schiff, Hardin represented the Hickey Companies in a conspiracy lawsuit against Salomon Brothers, while it simultaneously represented Salomon Brothers in an unrelated matter. The court stated Schiff, Hardin violated Rule 1.7(a), but in holding the firm should not be disqualified from representing the Hickey Companies against Solomon Brothers, it analyzed the purposes behind Rule 1.7(a) and concluded disqualification was not appropriate.

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211. It is, of course, still Lawyer’s client for other purposes, such as the completion of the tax matter.
215. *Id.* at 1394.
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The court noted there were basically two purposes behind Rule 1.7(a). First, it was designed to protect client confidences.216 In this case, the court concluded there was no evidence that anything Schiff, Hardin might have learned would be even remotely relevant to the Hickey lawsuit. Second, the purpose of Rule 1.7(a) was to assure loyalty.217 The court concluded there was no chance the particular participating personnel would lose their trusting relationship with participating Schiff, Hardin lawyers. The court concluded there was no challenge to the lawyer's loyalty.218 Although the court did not state it, it could easily have concluded that Salomon was not Schiff Hardin's client for Rule 1.7(a) purposes.

VII. CONCLUSION

The underlying problem has been the application of the bright-line categorical Rule 1.7(a) to the abstract category client in the fictional corporate and corporate family situations. The wooden application of the Rule leads to inconvenient and sometimes absurd results. This Article has suggested an instrumental interpretation that emphasizes the operational purposes of the conflicts of interest provisions in the Model Rules. One consequence of this analysis has been to peek into Pandora's box and to suggest it might be permissible for a lawyer to represent one client in a lawsuit against another simultaneous client whom the lawyer represents on an unrelated matter, certainly with the second client's consent, and, in appropriate cases, without its consent. Although this discussion focused on the corporate family problem and relied on ABA Formal Opinion 95-390, it strongly suggests Rule 1.7(a) should simply be deleted from the Model Rules of Professional Conduct.

216. Id. at 1401.
217. Id.
218. Id. at 1403.