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Simultaneous Representation on Adverse Interests: Suing One Client on Behalf of Another - In re Dresser Industries, Inc.

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SIMULTANEOUS REPRESENTATION OF ADVERSE INTERESTS: SUING ONE CLIENT ON BEHALF OF ANOTHER

In re Dresser Industries, Inc.
972 F.2d 540 (5th Cir. 1992)

Edwin S. Gault, Jr.

" 'No man can serve two masters.' "[1]

I. INTRODUCTION

In the case of *In re Dresser Industries, Inc.*,[2] the Fifth Circuit faced its first case involving a conflict of interest based on the simultaneous representation of clients with adverse interests.[3] Addressing the motion to disqualify counsel, the court offered a "rule of thumb": "However a lawyer's motives may be clothed, if the sole reason for suing his own client is the lawyer's self-interest, disqualification should be granted."[4]

This Note analyzes three aspects of the *Dresser* opinion: the substantive law (including the American Bar Association's standards) addressing simultaneous representation, the law governing a disqualification motion, and the appealability of a disqualification order.[5]

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1. Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976) (quoting *Matthew* 6:24).

2. 972 F.2d 540 (5th Cir. 1992).

3. *Id.* at 544.

4. *Id.* at 545.

5. The scope of the American Bar Association standards and federal case law survey is limited to conflicts of interest based on a law firm's concurrent representation of two or more clients whose interests become adverse. However, the analysis of the law governing disqualification motions and the appealability of such motions is not limited to concurrent representation and is applicable to all disqualification motions.

For a discussion of simultaneous representation of two or more clients in the same proceeding or transaction, see Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211 (1982).

For a broader discussion of attorney conflicts of interest, see generally *Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244 (1981); Samuel R. Miller et al., *Conflicts of Interest in Corporate Litigation*, 48 BUS. LAW. 141 (1992); Gary S. Hess, Note, *Disqualification of Attorneys and Their Firms for Conflicts of Interest: A Lack of Consistency in Both Federal and State Courts*, 26 WASHBURN L.J. 493 (1987); Bruce L. Silverstein, Note, *Attorney Disqualification for a Conflict of Interest in Federal Civil Litigation: A Confusing Body of Law in Need of Organization*, 30 VILL. L. REV. 463 (1985); Linda A. Winslow, Comment, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest*, 62 WASH. L. REV. 863 (1987).

II. FACTS OF *Dresser*

The Susman Godfrey law firm represented Dresser Industries, Inc. [hereinafter Dresser] in two pending lawsuits in Texas state court.[6] While these two state court actions were pending, Stephen Susman, a partner in the Susman Godfrey firm, was named chairman of the plaintiffs' steering committee in a consolidated antitrust class action brought against manufacturers of oil well drill bits.[7] Susman Godfrey informed Dresser of Stephen Susman's position in the class action and of the possibility that Dresser would be joined as a defendant.[8] Susman Godfrey offered to assist in the transition to a new counsel if Dresser chose to replace them in the two state court actions.[9] Dresser, however, chose not to remove the firm in either case.[10]

Subsequently, Dresser was joined as a defendant in the drill bits class action.[11] Stephen Susman, as lead counsel for the plaintiffs' committee, signed the amended complaint alleging antitrust violations by Dresser, his firm's own client.[12] Dresser then moved to disqualify Stephen Susman.[13] The motion to disqualify was based on a conflict of interest stemming from Susman Godfrey's representation of Dresser in the two pending state court actions.[14]

The district court denied Dresser's motion to disqualify.[15] The Fifth Circuit Court of Appeals granted Dresser's petition for a writ of mandamus and directed the district court to disqualify Stephen Susman and Susman Godfrey from further representation of the plaintiffs in the class action.[16]

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6. Red Eagle Resources Corp. v. Baker Hughes, Inc., No. CIV.A.H-91-0627, 1992 WL 170614, at *1 (S.D. Tex. Mar. 4, 1992) (order denying counsel disqualification), *mandamus granted sub nom. In re* Dresser Indus., Inc., 972 F.2d 540 (5th Cir. 1992).

The first case, *Cullen Center, Inc. v. W. R. Grace & Co.*, No. 90-01693 (295th Judicial District Court of Harris County, Texas), involved property damage caused by asbestos fireproofing in three office buildings in Houston, Texas. *Red Eagle Resources*, 1992 WL 170614, at *1. Susman Godfrey jointly represented Cullen Center, Inc., Dresser-Cullen Venture, and Dresser Industries, Inc. as plaintiffs. *Id.*

The second case, *CPS International, Inc. v. Dresser Industries, Inc.*, No. 88-46399 (334th Judicial District Court of Harris County, Texas), was originally brought in federal court alleging violations of the Sherman Act and tortious interference with CPS International's contract with a Saudi Arabian businessman. *Id.* The district court granted Dresser's motion for summary judgment based on a lack of subject matter jurisdiction. *Id.* CPS International then filed suit in Texas state court without any allegations of antitrust violations. *Id.* at *2. Susman Godfrey defended Dresser throughout the proceedings and had unlimited access to information related to Dresser's organization, management practices, finances, and accounting procedures. *Dresser Indus.*, 972 F.2d at 541. Furthermore, Susman Godfrey's lawyers discussed antitrust defenses with Dresser's in-house counsel. *Id.* at 542.

7. *Dresser Indus.*, 972 F.2d at 541-42.

8. *Id.* at 542. Before the consolidation of the class, none of the individual lawsuits named Dresser as a defendant. *Red Eagle Resources*, 1992 WL 170614, at *3.

9. *Dresser Indus.*, 972 F.2d at 542.

10. *Id.*

11. *Id.* The consolidated class action was styled Red Eagle Resources Corp. v. Baker Hughes, Inc., No. CIV.A.H-91-0627. *Id.* at 541.

12. *Id.*

13. *Id.* at 542.

14. Red Eagle Resources Corp. v. Baker Hughes, Inc., No. CIV.A.H-91-0627, 1992 WL 170614, at *1 (S.D. Tex. Mar. 4, 1992), *mandamus granted sub nom. In re* Dresser Indus., Inc., 972 F.2d 540 (5th Cir. 1992).

15. *Red Eagle Resources*, 1992 WL 170614, at *5.

16. *Dresser Indus.*, 972 F.2d at 546.

III. SURVEY OF THE LAW

A. Ethical Standards of the American Bar Association

Adopted in 1908, the Canons of Professional Ethics were the first promulgation of a standard of conduct by the American Bar Association.[17] The Preamble to the Canons states that a system of justice cannot be maintained "unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men."[18] Canon 6[19] forbids a lawyer to represent conflicting interests unless all concerned expressly consent.[20] According to this Canon, "a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."[21] Although the language does not specifically address concurrent representation, at least one court held that a lawyer could not sue a present client under the Canons of Professional Ethics.[22]

As a replacement for the Canons, the American Bar Association adopted the Model Code of Professional Responsibility in 1969 as a more specific set of standards governing attorney conduct.[23] The Model Code contains Canons,[24] Ethical Considerations,[25] and Disciplinary Rules[26] as a set of principles to guide and govern attorney conduct.

The Model Code confronts concurrent representation in the Ethical Considerations and Disciplinary Rules of Canon 5 which states: "A Lawyer Should

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17. THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY 11 (University Casebook Series ed., 5th ed. 1991).

18. CANONS OF PROFESSIONAL ETHICS pmbl. (1967).

19. Canon 6 of the Canons of Professional Ethics states:

> It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.
>
> It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.
>
> The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

CANONS OF PROFESSIONAL ETHICS Canon 6 (1967).

20. *Id.*

21. *Id.*

22. *See* Grievance Comm. v. Rottner, 203 A.2d 82 (Conn. 1964) (bringing suit against a present client is a violation of the Preamble to the Canons of Professional Ethics).

23. MORGAN & ROTUNDA, *supra* note 17, at 12.

24. The Canons of the Model Code are "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers." MODEL CODE OF PROFESSIONAL RESPONSIBILITY preliminary statement (1980).

25. The Ethical Considerations of the Model Code are "aspirational in character and represent the objectives toward which every member of the profession should strive." *Id.*

26. The Disciplinary Rules of the Model Code are "mandatory in character. . . . [and] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." *Id.*

Exercise Independent Professional Judgment on Behalf of a Client."[27] Disciplinary Rule 5-105 sets forth the Model Code test regarding concurrent representation.[28] Under Disciplinary Rule 5-105(C), a lawyer can represent "differing interests" only "if it is obvious that he can adequately represent the interest of each [client]," and each client consents after a full disclosure of the possible effects.[29]

In 1983, the American Bar Association adopted the Model Rules of Professional Conduct as its third set of standards governing attorney conduct. Model Rule 1.7 squarely addresses a lawyer suing a present client.[30] Under this Rule, a lawyer cannot represent "directly adverse" interests unless the lawyer "reasonably believes the representation will not adversely affect the relationship" with the present client and "each client consents after consultation."[31] The Comment[32] to Model Rule 1.7 explains that loyalty prohibits a lawyer from representing adverse interests even if the matters are completely unrelated.[33]

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27. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980). The Ethical Considerations addressing concurrent representation are 5-1, 5-14, 5-15, 5-16, and 5-19. Laws. Man. on Prof. Conduct (ABA/BNA) 01:323 (Supp. 1990).

28. Disciplinary Rule 5-105 states:

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

(A) A lawyer shall decline proffered employment if the exercise of his 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 to the extent permitted under DR 5-105(C).

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

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

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

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1980).

29. *Id.* at DR 5-105(C).

30. Model Rule 1.7 states:

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 (1983).

31. *Id.* at Rule 1.7(a).

32. The Comments to each Model Rule "are intended as guides to interpretation, but the text of each Rule is authoritative." *Id.* at scope.

33. *Id.* at Rule 1.7 cmt.

B. Federal Case Law on Simultaneous Representation

Federal courts' disfavor of attorneys concurrently representing parties with adverse interests can be traced back to the early nineteenth century. For example, in *Williams v. Reed*[34] the court, although dismissing the action against the attorney, stated:

> An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. No man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel. When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity.[35]

In more recent years, many federal courts have addressed the conflicts of interest that arise when a law firm simultaneously represents two or more parties with adverse interests.

1. Disqualification Ordered

In *Cinema 5, Ltd. v. Cinerama, Inc.*,[36] a partner in the New York City law firm representing the plaintiff was also a partner in a Buffalo law firm which represented the defendant in other litigation pending in a different district court.[37] Finding a conflict of interest, the district court disqualified the plaintiff's law firm.[38]

On appeal, the plaintiff argued that the decision to disqualify should be governed by the "substantial relationship" test.[39] Noting that the "substantial relationship" test applies only in actions involving former rather than present clients, the court stated:

> Under the Code, the lawyer who would sue his own client, asserting in justification the lack of "substantial relationship" between the litigation and the work he has undertaken to perform for that client, is leaning on a slender reed indeed. Putting it as mildly as we can, we think it would be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge and consent of all concerned.[40]

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34. 29 F. Cas. 1386 (C.C.D. Me. 1824) (No. 17,733) (attorney accused of fraudulently concealing adverse retainer).

35. *Id.* at 1390.

36. 528 F.2d 1384 (2d Cir. 1976).

37. *Id.* at 1385.

38. *Id.*

39. "The 'substantial relationship' test is . . . customarily applied in determining whether a lawyer may accept employment against a former client." *Id.* at 1386. A lawyer cannot accept employment against a former client if the matter is substantially related to the previous representation. *In re* American Airlines, Inc., 972 F.2d 605, 618 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993). *See also* T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983).

40. *Cinema 5*, 528 F.2d at 1386.

Affirming the disqualification of plaintiff's counsel, the court relied on attorney loyalty[41] and Ethical Considerations 5-1[42] and 5-14,[43] noting that it is "prima facie improper" for an attorney to sue a present client.[44]

In *IBM v. Levin*,[45] the Third Circuit faced a classic case of concurrent representation involving completely unrelated matters. In this case, Levin sued IBM alleging violations of the Sherman Act and New Jersey state law.[46] Both before and after Levin filed suit, the law firm representing Levin also represented IBM in labor relations matters which were completely unrelated to Levin's antitrust suit against IBM.[47] Although the law firm performed services for IBM on a fee basis rather than on retainer and had no assignment from IBM when Levin's complaint was filed, the court nevertheless found that IBM was a present client since the law firm had performed services for IBM before and after the filing of Levin's action.[48] Citing Disciplinary Rule 5-105 of the Model Code of Professional Responsibility, the court affirmed the law firm's disqualification.[49]

When a law firm spans nationally or internationally with vast numbers of clients in multiple cities, the probability of accepting employment from parties whose interests are directly adverse obviously increases. *Westinghouse Electric Corp. v. Kerr-McGee Corp.*[50] illustrates this probability. This case involved the Chicago and Washington offices of the Kirkland and Ellis law firm.[51] Kirkland and Ellis defended Westinghouse Electric Corporation [hereinafter Westinghouse] in a consolidated breach of contract action involving uranium supplies.[52] At the same time, the firm represented the American Petroleum Institute in a lobbying effort to defeat proposed legislation.[53]

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41. "The propriety of this conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients." *Id.*

42. Ethical Consideration 5-1 states:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1980).

43. Ethical Consideration 5-14 states:

> Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

Id. at EC 5-14.

44. *Cinema 5*, 528 F.2d at 1387 (citing *In re* Kelly, 244 N.E.2d 456, 462 (N.Y. 1968)).

45. 579 F.2d 271 (3d Cir. 1978).

46. *Id.* at 274.

47. *Id.* at 276-77.

48. *Id.* at 281.

49. *Id.* at 282-83.

50. 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978).

51. *Westinghouse Elec.*, 580 F.2d at 1313-16.

52. *Id.* at 1313.

53. *Id.* The proposed legislation would break up oil companies vertically by separating their entities, and horizontally by prohibiting ownership of alternative energy resources. *Id.*

As an offshoot to the breach of contract action, the firm's Chicago office filed an antitrust action on behalf of Westinghouse against twenty-nine companies alleging an illegal conspiracy in restraint of trade in the uranium industry.[54] On the same day, the firm's Washington office released a report to the American Petroleum Institute which denied that the oil companies had restricted trade in the uranium industry.[55] Thus, on the same day, the firm's Chicago office alleged price-fixing in the Westinghouse action while the firm's Washington office concluded the exact opposite in the report to the American Petroleum Institute.[56]

Although the American Petroleum Institute was not named as a defendant in the Westinghouse suit, three of its members, including Kerr-McGee Corporation, were named in the complaint.[57] All three American Petroleum Institute members named in the complaint completed confidential questionnaires and returned them to the law firm's Washington office.[58] Reversing the district court, the Seventh Circuit Court of Appeals disqualified the law firm from further representation of Westinghouse in the antitrust action unless the three American Petroleum Institute members were dismissed.[59] The court based its decision on an implied attorney-client relationship between the firm's Washington office and the three members of the American Petroleum Institute named in the Westinghouse complaint.[60]

Another situation that may provoke a conflict of interest is the merger of law firms. In *Picker International, Inc. v. Varian Associates, Inc.*,[61] a conflict of interest involving concurrent representation developed when the Jones, Day, Reavis & Pouge [hereinafter Jones Day] law firm merged with the McDougall, Hersh & Scott [hereinafter MHS] firm.[62] Before the merger, Jones Day had a continuing relationship with Picker International, Inc. [hereinafter Picker], and MHS with Varian Associates, Inc. [hereinafter Varian].[63] Jones Day represented Picker in two patent infringement actions against Varian.[64] Although MHS did not represent Varian in either of these actions, it did represent Varian in other pending litigation.[65] MHS sought Varian's consent to the concurrent representation, but Varian refused.[66] Subsequently, MHS notified Varian that it was compelled under the

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54. *Id.* at 1312-13.

55. *Id.* at 1314.

56. *Id.* at 1312.

57. *Id.*

58. *Id.* at 1313.

59. *Id.* at 1321.

60. *Id.* at 1319-20. As an example of an implied attorney-client relation, the court cited Whiting Corp. v. White Machinery Corp., 567 F.2d 713 (7th Cir. 1977), in which a law firm represented the plaintiff and a corporation that owned 20% of the defendant's stock. *See also* Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977).

61. 869 F.2d 578 (Fed. Cir. 1989).

62. *Id.* at 579.

63. *Id.*

64. *Id.* at 579-80. One action was in the Northern District of Ohio and the other in the district court of Utah. *Id.* at 580.

65. *Id.*

66. *Id.*

Model Code of Professional Responsibility to withdraw from all representation.[67] Varian then moved to disqualify Jones Day in both actions, and both district courts granted the motion.[68]

The court of appeals addressed the question within the framework of Disciplinary Rule 5-105 of the Model Code of Professional Responsibility.[69] As to the firm's withdrawal from representing Varian, the court stated: "To allow the merged firm to pick and choose which clients will survive the merger would violate the duty of undivided loyalty that the firms owe each of their clients under Disciplinary Rule 5-105."[70] If the clients with adverse interests refuse to consent to concurrent representation, the court noted that the merged firm must follow

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67. *Id.*
68. *Id.*
69. *Id.* at 581.
70. *Id.* at 583.

Disciplinary Rule 2-110[71] of the Model Code of Professional Responsibility, which addresses the withdrawal of counsel.[72] The court then affirmed both disqualifications.[73]

A testament to the blurred distinction between present and former clients, *EEOC v. Orson H. Gygi Co.*[74] stands as a far-reaching application of the bar on concurrent representation. In this case, two women filed sex discrimination charges against Orson H. Gygi Company [hereinafter Gygi] with the

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71. Disciplinary Rule 2-110 states:

DR 2-110 Withdrawal from Employment.

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory Withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1980).

72. Picker Int'l, Inc. v. Varian Assocs., Inc., 869 F.2d 578, 583 (Fed. Cir. 1989).

73. *Id.* at 584.

74. 749 F.2d 620 (10th Cir. 1984).

EEOC.[75] Thereafter, the attorney for Gygi met with the EEOC in mediation efforts which ultimately ceased.[76]

After the mediation efforts failed, one of the women alleging sex discrimination retained Gygi's attorney to represent her in an annulment matter.[77] Their attorney-client relationship continued until the annulment became final.[78] Several months later, the EEOC filed suit against Gygi alleging sex discrimination in its hiring practices.[79] Although the woman represented by Gygi's attorney was not a named party in the suit, she had initiated the claim and would benefit from the EEOC's prevailing.[80]

The possible conflict of interest remained unknown to the parties and the lawyers for many months.[81] When the EEOC discovered the concurrent representation, it moved to disqualify Gygi's attorney because he simultaneously represented the two parties without obtaining their consent.[82] Although the conciliation efforts with the EEOC had ceased before the woman retained the attorney and the annulment proceedings had ended before the EEOC filed suit, the court, nevertheless, determined that the lawyer had simultaneously represented adverse clients.[83] Citing Canon 5 and Disciplinary Rule 5-105 of the Model Code of Professional Responsibility, the court affirmed the district court's disqualification.[84]

A law firm's representation of a trade or other association can trigger a conflict of interest when the firm sues an association member. Facing this problem in *Glueck v. Jonathan Logan, Inc.*,[85] the Second Circuit added an interesting twist to the usual inquiry. In this case, Glueck alleged that he was discharged by Jonathan Logan, Inc. [hereinafter Logan] in breach of his employment contract.[86] The law firm representing Glueck also represented the Apparel Manufacturers Association, Inc., a trade association with more than one hundred members.[87] One of the Association's members was R & K Originals, a division of Logan, the defendant in Glueck's suit.[88] R & K Originals' President served as the Executive Vice-president of the Association and a member of its negotiating committee.[89] Pursuant to his

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75. *Id.* at 620.

76. *Id.*

77. *Id.*

78. *Id.* During the annulment proceeding, the woman assumed her maiden name. *Id.*

79. *Id.*

80. *Id.* at 622.

81. *Id.* at 620-21.

82. *Id.* at 621.

83. *Id.* The court reasoned that the discrimination charges "remained alive" when the woman retained Gygi's counsel in the annulment matter. *Id.*

84. *Id.* at 622.

85. 653 F.2d 746 (2d Cir. 1981).

86. *Id.* at 748.

87. *Id.*

88. *Id.*

89. *Id.*

duties with the trade Association, R & K Originals' President met with members of Glueck's law firm in regard to labor matters.[90]

Thus, the issue facing the Second Circuit was whether Logan was a present client of Glueck's law firm by virtue of R & K Originals' membership in the trade Association.[91] The court distinguished the situation when a law firm represents adverse parties who are both clients in the "traditional sense" from the present situation when the adverse party is only a "vicarious" client by virtue of membership in a trade association.[92] The court then concluded that the "substantial relationship" test[93] is proper when deciding disqualification motions in actions brought by an association's law firm against an association member.[94] Since the law firm's duties for the trade association and Glueck's action both involved labor matters, the "substantial relationship" test was satisfied, thus requiring the firm's disqualification.[95]

2. Disqualification Motion Denied

Upon a finding of concurrent representation of adverse parties, some federal courts have nevertheless refused to disqualify the law firm. In *Unified Sewerage Agency v. Jelco, Inc.*,[96] the Ninth Circuit faced a dispute between a prime contractor and two subcontractors for a sewer plant project.[97] The prime contractor, Jelco, Inc. [hereinafter Jelco], sought to retain a law firm in regard to a controversy with the electrical subcontractor.[98] The law firm, however, represented the concrete subcontractor in a dispute with Jelco also arising from the sewer plant project.[99] The law firm advised Jelco of the possible conflict of interest as the dispute with the concrete subcontractor might ripen into a lawsuit, but Jelco, nevertheless, retained the law firm.[100] After the settlement negotiations between Jelco and the concrete subcontractor collapsed, the law firm asked Jelco to re-evaluate the conflict of interest.[101] Jelco decided to keep the law firm as counsel in the dispute with

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90. *Id.*

91. *Id.* The court noted that in the Second Circuit disqualification is "granted only when a violation of the Canons of the Code of Professional Responsibility poses a significant risk of trial taint." *Id.* (citing Armstrong v. McAlpin, 625 F.2d 433, 444-46 (2d Cir. 1980) (en banc), *vacated on other grounds and remanded*, 449 U.S. 1106 (1981); Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979)). However, "[t]hat risk is encountered when an attorney represents one client in a suit against another client, in violation of Canon 5." *Id.* (citing Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976)).

92. *Id.* at 749. As an analogy, the court noted that a law firm representing the American Bar Association would not have to decline to represent a client who was injured by an automobile driven by a member of that Association. *Id.*

93. *See supra* note 39.

94. Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 749-50 (2d Cir. 1981).

95. *Id.* at 750.

96. 646 F.2d 1339 (9th Cir. 1981).

97. *Id.* at 1342.

98. *Id.* at 1343.

99. *Id.* at 1342-43.

100. *Id.* at 1343.

101. *Id.*

the electrical subcontractor regardless of the firm's representation of the concrete subcontractor.[102]

Both actions eventually ripened into lawsuits.[103] Thus, the law firm was defending Jelco in the action brought by the electrical subcontractor and also suing Jelco on behalf of the concrete subcontractor.[104] After the liability issues were determined adversely to Jelco in the electrical subcontractor case, Jelco discharged the law firm.[105] Jelco then moved to disqualify the firm in the action with the concrete subcontractor.[106]

The court found that Jelco had consented to the dual representation as required by Disciplinary Rule 5-105.[107] Refusing to disqualify the law firm, the court stated: "We think the Code strikes a balance on the side of an individual's right to choose his own counsel and against a per se rule forbidding multiple representation."[108]

Also addressing the issue of client consent, *Gould, Inc. v. Mitsui Mining & Smelting Co.*[109] involved an action by Gould, Inc. [hereinafter Gould] against, among others, Pechiney.[110] Pechiney moved to disqualify Gould's counsel alleging two independent conflicts of interest.[111] First, the law firm of Jones Day, who represented Gould against Pechiney, also represented Pechiney in patent matters.[112] Rejecting Pechiney's argument that it only consented to Jones Day's position as local counsel for Gould, the court refused to disqualify Jones Day:

> Although the term "local counsel" at one time may have meant less responsibility on the part of attorneys so designated, it is clear to the court, and should be to every lawyer who litigates in this country, that in the last ten years developments in the law have invalidated this prior meaning. The trend is, properly, away from the view that some counsel have only limited responsibility and represent a client in court in a limited capacity, or that the local counsel is somewhat less the attorney for the client than is lead counsel.[113]

Pechiney, however, also alleged a separate conflict of interest stemming from Jones Day's longstanding representation of IG Technologies [hereinafter IGT], a

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102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 1345-46.
108. *Id.* at 1350.
109. 738 F. Supp. 1121 (N.D. Ohio 1990).
110. *Id.* at 1122.
111. *Id.* at 1122-24.
112. *Id.* at 1122. The law firm of MHS had represented Pechiney in patent matters. *Id.* When MHS merged with Jones Day, a conflict arose as Jones Day was local counsel for Gould in the action against Pechiney. *Id.* at 1122-23. Pechiney, however, consented to Jones Day's adverse representation. *Id.* at 1123. Thereafter, Gould moved to replace the lead counsel with Jones Day, and upon no objections, the court granted the motion. *Id.*
113. *Id.* at 1125. *But cf.* Bodily v. Intermountain Health Care Corp., 649 F. Supp. 468 (D. Utah 1986) (apparently relying on local counsel's limited duties).

subsidiary of Pechiney, in unrelated matters.[114] Preliminarily, the court found that Jones Day's concurrent representation of Gould and a subsidiary of Pechiney was a conflict of interest under Disciplinary Rule 5-105.[115] As no consent was forthcoming,[116] the court found Jones Day in violation of the prohibition against simultaneously representing parties with directly adverse interests.[117]

Although finding a violation of Disciplinary Rule 5-105, the court refused to take a "mechanical approach"[118] and denied the motion to disqualify.[119] However, the court ordered Jones Day to discontinue its representation of either Gould or IGT.[120]

In obvious disregard of an attorney's duty of loyalty to a client, *Tipton v. Canadian Imperial Bank of Commerce*[121] stands for the proposition that a law firm can avoid future disqualification by withdrawing from representation of the less desired client.[122] In this case, Tipton was discharged as bank manager and thereafter brought suit.[123] When Tipton filed suit against the bank, she was represented by an attorney in the bank's retained law firm in an ongoing but unrelated property dispute.[124] The law firm discovered the conflict and withdrew its representation of Tipton in the property dispute.[125]

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114. Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121, 1124 (N.D. Ohio 1990). Pechiney acquired IGT four years after Gould filed suit and two years after it consented to Jones Day's representation of Gould. *Id.* at 1123. Jones Day represented IGT before and after the acquisition. *Id.*

115. *Id.* at 1125.

116. The court refused to imply Pechiney's earlier consent to a conflict that arose two years later. *Id.* at 1126.

117. *Id.*

118. The court noted:

> The explosion of merger activity by corporations during the past fifteen years, and the corresponding increase in the possibility that attorney conflicts of interest may arise unexpectedly, make it appropriate for a court to adopt a perspective about the disqualification of counsel in ongoing litigation that conforms to the problem. This means taking a less mechanical approach to the problem, balancing the various interests. The result is that the courts are less likely to order disqualification and more likely to use other, more tailored measures to protect the interests of the public and the parties.

Id.

119. *Id.* The court reasoned that Pechiney had not been prejudiced, and that disqualification would delay the litigation. *Id.* at 1126-27. Furthermore, the court recognized that Pechiney created the conflict by acquiring IGT. *Id.* at 1127.

120. *Id.* The court acknowledged other cases which prohibit "dropping one client for another" to avoid conflicts. *Id. See* Picker Int'l, Inc. v. Varian Assocs., Inc., 869 F.2d 578 (Fed. Cir. 1989); *see also supra* notes 61-73 and accompanying text. However, the court distinguished this case because Pechiney, not Jones Day, created the conflict of interest. Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121, 1127 (N.D. Ohio 1990).

121. 872 F.2d 1491 (11th Cir. 1989).

122. *Id.* at 1498. *But see Picker Int'l*, 869 F.2d at 583 ("To allow the merged firm to pick and choose which clients will survive the merger would violate the duty of undivided loyalty that firms owe each of their clients under [Disciplinary Rule] 5-105."); Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1345 n.4 (9th Cir. 1981) ("challenged attorney could always convert a present client into a 'former client' by choosing when to cease to represent the disfavored client"); Hartford Accident & Indem. Co. v. RJR Nabisco, Inc., 721 F. Supp. 534, 540 (S.D.N.Y. 1989) ("Clearly, no court should condone such conduct; it smacks of disloyalty where loyalty is owed . . . .").

123. *Tipton*, 872 F.2d at 1492. Tipton alleged sex discrimination, retaliatory discharge, breach of contract, interference with a contractual relationship, and fraudulent conduct. *Id.*

124. *Id.* at 1498.

125. *Id.*

When Tipton moved to disqualify the bank's law firm for simultaneously representing parties with directly adverse interests, the attorney previously involved in the property dispute submitted an affidavit stating that she had never discussed the case with any lawyer in the firm except as identified in the affidavit.[126] With almost no discussion and apparently relying on the affidavit, the court affirmed the district court's denial of disqualification.[127]

In *Hartford Accident & Indemnity Co. v. RJR Nabisco, Inc.*,[128] the court allowed a law firm to cure a conflict of interest by firing a member of the firm.[129] In this action, an attorney in the Boston office of the law firm LeBoeuf, Lamb, Leiby & MacRae represented R. J. Reynolds Tobacco Company [hereinafter Reynolds Tobacco] in ongoing products liability litigation.[130] Roughly eighteen months after the firm's Boston office began representing Reynolds Tobacco, the firm's New York office filed suit on behalf of long-time client, The Hartford, against RJR Nabisco, Inc. [hereinafter RJR Nabisco], the parent corporation of Reynolds Tobacco.[131] Subsequently, the firm terminated the partner involved with Reynolds Tobacco.[132] RJR Nabisco moved to disqualify the firm based on the firm's simultaneous representation of The Hartford and Reynolds Tobacco.[133]

Preliminarily, the court determined that the firm's attorney-client relationship with Reynolds Tobacco extended to RJR Nabisco.[134] Noting the difference between suing a continuing and a former client,[135] the court stated that the firm's relationship with RJR Nabisco should not be considered continuing, although it was continuing when Hartford filed suit.[136] Refusing to employ a mechanical

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126. *Id.* at 1499. The remainder of the firm's attorneys attested that they had received no confidential information from the representation in the property dispute. *Id.*

127. *Id.*

128. 721 F. Supp. 534 (S.D.N.Y. 1989).

129. *Id.* at 540.

130. *Id.* at 536. The attorney represented Reynolds Tobacco prior to joining the firm. *Id.*

131. *Id.* at 536-37. The suit challenged the leveraged buy-out of RJR Nabisco. *Id.* at 537. The court noted that no attorney involved in the Hartford case ever participated in any matter related to Reynolds Tobacco. *Id.* at 536.

132. *Id.* at 537. Although the attorney objected to the Hartford representation, the stated reason for termination was the downgrading of the Boston office. *Id.*

133. *Id.* at 535.

134. *Id.* at 540.

135. "'[W]here the relationship is a continuing one, adverse representation is prima facie improper . . . .'" *Id.* at 539 (quoting Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1387 (2d Cir. 1976)) (alteration in original). However, "where the alleged conflict relates to a former client, disqualification is warranted only where there is a substantial relationship between the subject matters of the representation." *Id.*

136. *Id.* at 539-40. RJR Nabisco argued that the "substantial relationship" test was improper because any firm could convert a present client into a former client by withdrawing from representation. *Id.* at 540. The court distinguished this case because it did not involve "a client abandoned by its counsel" or any "practical threats" to RJR Nabisco. *Id.* at 541. *But cf.* Miller, *supra* note 5, at 187 & n.270 (noting that many courts determine status—whether a present or a former client—by the filing of the complaint rather than the disqualification motion).

application of the Model Code of Professional Responsibility,[137] the court denied the motion to disqualify the firm, distinguishing the case as one not involving "a client abandoned by its counsel."[138]

Some view the prohibition against representing adverse interests as an incentive for corporations to "taint shop"—i.e., parcel business among many law firms as a means of preventing the firm from representing clients with interests adverse to the corporation.[139]

The taint shopping scenario apparently influenced the court's decision in *SWS Financial Fund A v. Salomon Bros.*[140] In this case, the plaintiffs, seven limited partnerships and corporations, sued Salomon Bros. alleging securities and antitrust violations.[141] The law firm of Schiff, Hardin, and Waite [hereinafter Schiff Hardin] represented the plaintiffs.[142] Salomon Bros., however, had previously retained the Schiff Hardin firm in regard to commodities trading.[143]

When the plaintiffs filed suit, Schiff Hardin had not performed any work for Salomon Bros. for five months, but they remained in contact.[144] The court nevertheless concluded that Salomon Bros. was a present client of the firm.[145] The court stated that "Salomon [Bros.] was entitled to 'assume' that Schiff [Hardin] would continue to be its lawyer on a continuing basis."[146] Furthermore, "Schiff [Hardin] had the . . . responsibility for clearing up any doubt as to whether the client-lawyer relationship persisted."[147]

Although finding a violation of Model Rule 1.7, the court refused to disqualify Schiff Hardin.[148] Acknowledging that the "decision may be viewed by some as a departure from the norm,"[149] the court opted for the pragmatic approach, expounding on the risks of taint shopping:

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137. In the court's words:

> Under such circumstances, it seems to this Court that only a wooden application of the [American Bar Association] 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.

Hartford Accident & Indem. Co. v. RJR Nabisco, Inc., 721 F. Supp. 534, 541 (S.D.N.Y. 1989).

138. *Id.* at 542. The court stated:

> So long as there is no showing of a substantial similarity between the matters being litigated and those handled in the past for the former client, so long as there is no showing of even the potential for actual prejudice against the former client, and so long as the former client retains access to its prior counsel—precisely the situation here—then there is no reason to disqualify any counsel.

Id. at 541.

139. *See* Anne M. Rossheim, *Simultaneous Representation: Cracks Begin to Appear in Per Se Disqualification Rule*, 11 No. 13 OF COUNSEL 5 (1992).

140. 790 F. Supp. 1392 (N.D. Ill. 1992).

141. *Id.* at 1393.

142. *Id.* at 1394.

143. *Id.*

144. *Id.* at 1395.

145. *Id.* at 1398.

146. *Id.*

147. *Id.*

148. *Id.* at 1403.

149. *Id.*

> 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 firm's adverse representation.[150]

C. The Law Governing Motions to Disqualify[151]

In deciding (or reviewing) motions to disqualify counsel, federal courts have given varied treatment to the rules of decision, the law governing the motion.

United States v. Walsh,[152] a criminal case, involved differing standards in the Model Rules of Professional Conduct and the Model Rules as amended by the New Jersey Supreme Court.[153] In this RICO[154] prosecution, the government moved to disqualify defense counsel based on a conflict of interest.[155] The government contended that the district court's local rules[156] incorporated the New Jersey Supreme Court's amendments.[157] The court held that the local rules incorporate only the Model Rules of Professional Conduct without amendment by the New Jersey Supreme Court.[158] The court further noted that the " 'supervision of the professional conduct of attorneys practicing in a federal court is a matter of federal law.' "[159]

Some district courts, however, specifically adopt the code of conduct of the state bar or state supreme court as their ethical standards without reference to the American Bar Association standards. In *Unified Sewerage Agency v. Jelco, Inc.*,[160] the district court adopted in its local rules the code of ethics of the Oregon State

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150. *Id.* at 1402.

151. The application of this section is not limited to disqualification motions based on simultaneous representation; it extends to all federal disqualification motions based on a conflict of interest.

152. 699 F. Supp. 469 (D.N.J. 1988).

153. *Id.* at 471-72.

154. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (1988).

155. *Walsh*, 699 F. Supp. at 470-71. The alleged conflict stemmed from a member of the defense counsel's law firm who previously worked for the Department of Justice supervising activities closely related to the case against the defendant. *Id.* at 470.

156. Local Rule 6 provides: " 'The Rules of Professional Conduct and the Code of Judicial Conduct of the *American Bar Association* shall govern the conduct of the Judges and the members of the bar admitted to practice in this Court.' " *Id.* at 471 (quoting D.N.J. Gen. R. 6) (emphasis added).

157. *Id.* The defendant contended that the district court was not bound by any one rule, but rather that the decision was a matter of federal law. *Id.*

The difference in the American Bar Association and New Jersey rules was important in two ways. First, the New Jersey rule contained an "appearance of impropriety" standard in addition to the American Bar Association's "personal and substantial participation" standard. *Id.* at 471-72. Second, the American Bar Association rules permitted screening former government attorneys to avoid disqualification of the entire firm, but the New Jersey rules imputed disqualification throughout the firm. *Id.* at 472.

158. *Id.* at 471. The decision rested on the federal statute governing local rulemaking authority, 28 U.S.C. § 2071 (1988), and the clear language of the local rules. *Id.* at 472-74.

159. *Id.* at 473 (quoting United States v. Miller, 624 F.2d 1198, 1200 (3d Cir. 1980)). *Cf.* IBM v. Levin, 579 F.2d 271, 279 n.2 (3d Cir. 1978) ("It seems clear that the conduct of practitioners before the federal courts must be governed by the rules of those courts rather than those of the state courts.").

160. 646 F.2d 1339 (9th Cir. 1981).

Bar.[161] The Ninth Circuit apparently rejected the argument that state law controlled: "'[W]e do not think that the rule of *Erie Railroad Co. v. Tompkins* compels the federal courts to permit, in proceedings before those courts, whatever action by an attorney-at-law may be sanctioned by the courts of the state.'"[162] Noting the similarities in Canons 4, 5, and 9 of the Oregon Code and the Model Code of Professional Responsibility, the circuit court employed American Bar Association opinions and authority from several jurisdictions adopting the Model Code.[163]

In contrast to the *Jelco* Court's position on state ethics law, *Image Technical Services, Inc. v. Eastman Kodak Co.*[164] held that California law must be applied to a disqualification motion.[165] In this case, the district court, in its local rules, adopted as its code of ethics the Rules of Professional Conduct of the State Bar of California.[166] Rejecting both of the plaintiff's arguments as to the inapplicability of the California Rules,[167] the court disqualified the law firm.[168]

The far-reaching possibilities of *Eastman Kodak* injecting state ethics law into federal courts are somewhat undercut by *Atasi Corp. v. Seagate Technology*,[169] an earlier case also arising in the Northern District of California.[170] Although the district court's local rules adopted the California Rules of Professional Conduct, the Federal Circuit nevertheless reviewed the disqualification under Ninth Circuit law.[171] This was important because the California Rules, unlike the Model Code of Professional Responsibility, did not provide for imputed disqualification of the law firm.[172] Affirming the disqualification, the court stated that the American Bar

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161. *Id.* at 1342 n.1.

162. *Id.* (quoting Cord v. Smith, 338 F.2d 516, 524 (9th Cir. 1964)) (alteration in original) (citation omitted). *But see* Image Technical Servs., Inc. v. Eastman Kodak Co., 820 F. Supp. 1212, 1216 n.7 (N.D. Cal. 1993) (noting that the *Jelco* Court expressly declined to decide which law applied).

163. *Jelco*, 646 F.2d at 1342 n.1. *Cf.* Bodily v. Intermountain Health Care Corp., 649 F. Supp. 468, 472 (D. Utah 1986) (district court's local rule adopting Utah Code of Professional Responsiblity "incorporates both the state and national codes of professional responsibility and makes both binding upon counsel before this court").

164. 820 F. Supp. 1212 (N.D. Cal. 1993).

165. *Id.* at 1215. *Accord* Graham v. Wyeth Lab. Div. of Am. Home Prods. Corp., 906 F.2d 1419, 1423 (10th Cir. 1990) (Kansas case law controls); Uhlrig v. Harder, No. 93-1009-PFK, 1993 WL 246006, at *1 (D. Kan. 1993) (order denying disqualification motion) (Kansas case law controls). *But see* County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1413-14 (E.D.N.Y. 1989) ("A federal court is not bound to enforce New York's view of what constitutes ethical professional conduct."), *aff'd*, 907 F.2d 1295 (2d Cir. 1990); Figueroa-Olmo v. Westinghouse Elec. Corp., 616 F. Supp. 1445, 1450 (D.P.R. 1985) ("Although reference to how the supreme court, of a district where the federal court sits, applies its code of professional conduct is helpful, the resolution of problems of this nature . . . is a matter of federal law . . . .") (citation omitted); Black v. Missouri, 492 F. Supp. 848, 874-75 (D. Mo. 1980) (federal court's ethical determination contrary to state bar ethics opinion).

166. *Eastman Kodak*, 820 F. Supp. at 1215.

167. The first argument rested on the inapplicability of the California Rules because the law firm in question only participated in briefs to the United States Supreme Court. *Id.* The second argument, based on *Jelco*, sought a federal standard for disqualification motions. *Id.* at 1216.

168. *Id.* at 1218.

169. 847 F.2d 826 (Fed. Cir. 1988).

170. *Id.* at 828.

171. *Id.* at 829. *Accord* Picker Int'l, Inc. v. Varian Assocs., Inc., 869 F.2d 578, 580-81 (Fed. Cir. 1989) (disqualification reviewed under the law of the regional circuit where an appeal from the district court would normally lie).

172. *Atasi*, 847 F.2d at 830.

Association Model Code of Professional Responsibility "as applied in court decisions" was "binding on the lawyers practicing before the Northern District" of California.[173]

Other court decisions have approached a federal common law of ethics relying on the court's inherent or supervisory powers to control the litigation proceedings.[174] Although involving an attorney suspension rather than disqualification, *In re Snyder*[175] provided the Supreme Court with an opportunity to address federal courts' inherent powers. The *Snyder* Court rejected the Eighth Circuit's statement that the conduct expected of an attorney was defined by the standards adopted by the state licensing authority.[176] Hinting at a federal common law standard, the Court stated: "The state code of professional responsibility does not by its own terms apply to sanctions in the federal courts. Federal courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of federal law."[177]

D. Appealability of a Motion to Disqualify Counsel[178]

Section 1291 of Title 28 of the United States Code allows appeals only from "final decisions" of a district court.[179] This section precludes an appeal until there has been "a decision by the [d]istrict [c]ourt that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' "[180] This prohibition "emphasizes the deference that appellate courts owe to the trial judge," which would be undermined by permitting piecemeal appeals.[181] Furthermore, the

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173. *Id.* For its decision, the court relied on the district court's local rule which adopted the California Rules and " 'decisions of any court applicable' to 'standards of professional conduct.' " *Id.* (quoting Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435, 440 (9th Cir.), *cert. denied*, 464 U.S. 851 (1983)). *Cf.* Bodily v. Intermountain Health Care Corp., 649 F. Supp. 468, 473 (D. Utah 1986) (district court's local rule adopting Utah Code of Professional Responsibility "incorporates both state and national codes").

174. *See, e.g.*, United States v. Miller, 624 F.2d 1198, 1201 (3d Cir. 1980) ("The district court's power to disqualify an attorney derives from its inherent authority to supervise the professional conduct of attorneys appearing before it."); Handelman v. Weiss, 368 F. Supp. 258, 263 (S.D.N.Y. 1973) ("The power of this court to disqualify lawyers is based on the court's general supervisory powers, and questionable behavior will not be permitted merely because it is not directly covered by the Canons.") (footnote omitted); *cf.* Chambers v. Nasco, 501 U.S. 32, 41 (1991) (The district court's imposition of sanctions outside the realm of Rule 11 was permissible because the court's "inherent power extends to a full range of litigation abuses.").

175. 472 U.S. 634 (1985).

176. *Id.* at 645 n.6.

177. *Id.* (citing Hertz v. United States, 18 F.2d 52, 54-55 (8th Cir. 1927)).

178. The application of this section is not limited to disqualification motions based on simultaneous representation; it extends to all federal disqualification motions based on a conflict of interest.

179. 28 U.S.C. § 1291 provides:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1291 (1988).

180. Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).

181. Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).

finality requirement of § 1291 promotes efficient judicial administration by "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."[182]

The Supreme Court, however, has recognized a limited exception to the finality requirement of § 1291 in what has become known as the "collateral order" doctrine.[183] In *Cohen v. Beneficial Industrial Loan Corp.*, the Court found that the district court's decision[184] fell "in that small class [of decisions] which finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[185] Thus, the Court held the decision appealable as a "final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."[186]

Following the *Cohen* decision, many courts of appeals found that orders granting or denying motions to disqualify counsel were within the "collateral order" exception to § 1291.[187] The Supreme Court, however, has effectively halted this practice.[188]

Although the grant or denial of a motion to disqualify counsel is not appealable under § 1291, the party losing the motion may seek a writ of mandamus[189] from the court of appeals.[190] The Supreme Court has characterized the writ of mandamus as a "drastic" remedy that should be issued "only in extraordinary situations."[191] A party seeking a writ of mandamus must show no other adequate

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182. Cobbledick v. United States, 309 U.S. 323, 325 (1940).

183. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

184. The district court's decision denied the defendant's motion to direct the plaintiff and the intervenor to post a security bond as required by a New Jersey statute. *Id.* at 545.

185. *Id.* at 546.

186. *Id.* at 546-47. More recently, the Court stated that in order to fall within the "collateral order" doctrine, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (footnote omitted).

187. For a discussion of the checkered history of the treatment of disqualification motions within the collateral order doctrine, see United States v. Greger, 657 F.2d 1109, 1110-12 (9th Cir. 1981), *cert. denied*, 461 U.S. 913 (1983); Community Broadcasting, Inc. v. FCC, 546 F.2d 1022, 1025-26 (D.C. Cir. 1976).

188. *See* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) (order disqualifying counsel in a civil case is not a collateral order subject to immediate appeal); Flanagan v. United States, 465 U.S. 259 (1984) (order disqualifying counsel in a criminal prosecution is not a collateral order subject to immediate appeal); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) (order denying disqualification motion in a civil case is not a collateral order subject to immediate appeal).

189. The All Writs Act, 28 U.S.C. § 1651, states:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 1651 (1988).

190. *See Risjord*, 449 U.S. at 378 n.13 (noting mandamus availability "in the exceptional circumstances for which it was designed").

191. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980) (citations omitted).

means of obtaining the desired relief.[192] Furthermore, the right to the writ must be "'clear and indisputable.'"[193] Concerning the availability of the extraordinary writ, the Supreme Court stated: "What never? Well, *hardly* ever!"[194]

The use of mandamus to review disqualification motions has received varied treatment in the courts of appeals. Some courts have granted the writ,[195] generally relying on the satisfaction of the two-pronged test: no other adequate means of obtaining relief, and a clear and indisputable right to the writ.[196] While the second prong (clear and indisputable right) is substantive, addressing the merits of the district court's decision, the first prong (no other adequate means of obtaining relief) is procedural and requires the court of appeals to find that appellate review after final judgment is not adequate.[197]

Other courts of appeals have refused to issue a writ of mandamus in regard to disqualification motions.[198] Of these decisions, a predominant reason for denying the writ is the opportunity for review on appeal after final judgment.[199] However, mandamus might be available if the party can "'demonstrate that something about the order, or its circumstances, would make an end-of-case appeal ineffectual or leave legitimate interests unduly at risk.'"[200]

The Seventh Circuit in *In re Sandahl*[201] distilled the confusing mandamus analysis into a different inquiry: whether the disqualification order is patently erroneous.[202] Recognizing the difficulty in resolving whether there is no other adequate means of relief (irreparable harm),[203] the court noted the importance of the second

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192. *Id.* at 35 (citing Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976); Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943)).

193. *Id.* (quoting Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953) (quoting United States *ex rel* Bernardin v. Duell, 172 U.S. 576, 582 (1899))).

194. *Id.* at 36.

195. *See, e.g.*, *In re* Sandahl, 980 F.2d 1118 (7th Cir. 1992); *In re* American Airlines, Inc., 972 F.2d 605 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993); *In re* American Cable Publications, Inc., 768 F.2d 1194 (10th Cir. 1985).

196. *See, e.g.*, *American Airlines*, 972 F.2d at 608-09; *American Cable Publications*, 768 F.2d at 1195.

197. *See American Airlines*, 972 F.2d at 608-09. *But cf.* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 438 (1985) (noting that absent a requirement of prejudice, a disqualification order can be effectively reviewed on appeal after final judgment); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 376 (1981) (noting that an order denying disqualification can be effectively reviewed on appeal after final judgment).

198. *See, e.g.*, *In re* Mechem, 880 F.2d 872 (6th Cir. 1989); *In re* Bushkin Assocs., Inc., 864 F.2d 241 (1st Cir. 1989); Merle Norman Cosmetics, Inc. v. United States Dist. Court, 856 F.2d 98 (9th Cir. 1988); *In re* Ford Motor Co., 751 F.2d 274 (8th Cir. 1984).

199. *See, e.g.*, *Mechem*, 880 F.2d at 874; *Bushkin*, 864 F.2d at 243; *Ford Motor*, 751 F.2d at 275-76. *But cf. Merle Norman Cosmetics*, 856 F.2d at 101-02 (finding no other adequate means of relief, but denying writ because order was not clearly erroneous).

200. *Bushkin*, 864 F.2d at 243 (quoting *In re* Recticel Foam Corp., 859 F.2d 1000, 1005-06 (1st Cir. 1988)). *Cf.* Community Broadcasting, Inc. v. FCC, 546 F.2d 1022, 1028 (D.C. Cir. 1976) ("In the exceptional case, where irreparable harm would indeed result, the movant may petition this court for a writ of mandamus . . . .").

201. 980 F.2d 1118 (7th Cir. 1992).

202. *Id.* at 1121.

203. The difficulty turns on whether the party losing the disqualification motion, on appeal after final judgment, would have to show that a different outcome would have resulted with a different set of lawyers. *Id.* at 1119. The Supreme Court stated in *Koller* that prejudice has never been required to reverse a final judgment due to an erroneous disqualification motion, but specifically left the question open. Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 438 (1985).

prong of the mandamus test—clear and indisputable right to the writ.[204] However, the court stated that some courts of appeals have allowed mandamus to become "functionally identical to direct appeal" because disqualification orders raise legal issues which receive little deference from appellate courts.[205] Therefore, in order "[t]o avoid the collapse of mandamus into appeal," the court held that a party seeking mandamus must show that the disqualification order was "patently erroneous."[206]

Another possible avenue of appeal is to seek certification of the disqualification order pursuant to 28 U.S.C. § 1292(b).[207] As the Supreme Court has acknowledged this route,[208] and some courts of appeals have employed it,[209] the certification process is a viable avenue of immediate appeal for a party losing a disqualification motion.

IV. *In re Dresser Industries, Inc.*

When Dresser was joined as a defendant in the drill bits class action, it moved to disqualify Stephen Susman and Susman Godfrey as plaintiffs' counsel.[210] Dresser's motion rested on the fact that Stephen Susman, chairman of the plaintiffs' steering committee in the class action, was a partner in the Susman Godfrey law firm which currently represented Dresser in two pending state court actions.[211] In the class action, Dresser was charged by its own lawyers, Susman Godfrey, with fraudulently concealing a conspiracy to fix prices of drill bits.[212]

Addressing the motion to disqualify, the district court determined that the Texas Disciplinary Rules of Professional Conduct "wholly" governed the

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204. *Sandahl*, 980 F.2d at 1121.

205. *Id.*

206. *Id.*

207. 28 U.S.C. § 1292(b) states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiciton of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, [t]hat application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (1988).

208. *See* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 435 (1985); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 378 n.13 (1981).

209. *See, e.g.*, Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988); Atasi Corp. v. Seagate Technology, 847 F.2d 826 (Fed. Cir. 1988); Waters v. Kemp, 845 F.2d 260 (11th Cir. 1988); *cf.* Kennecott Corp. v. United States Dist. Court, 873 F.2d 1292 (9th Cir. 1989) (denying mandamus on the ground that the question should be certified under § 1292(b) to the Federal Circuit). *But see* Shurance v. Planning Control Int'l, Inc., 839 F.2d 1347 (9th Cir. 1988) (order denying counsel disqualification does not meet the requirements of § 1292(b)); United States v. White, 743 F.2d 488 (7th Cir. 1984) (certification under § 1292(b) is not applicable to criminal proceedings).

210. *In re* Dresser Indus., Inc., 972 F.2d 540, 542 (5th Cir. 1992).

211. Red Eagle Resources Corp. v. Baker Hughes, Inc., No. CIV.A.H-91-0627, 1992 WL 170614, at *2 (S.D. Tex. Mar. 4, 1992) (order denying counsel disqualification), *mandamus granted sub nom. Dresser Indus.*, 972 F.2d at 540.

212. *Dresser Indus.*, 972 F.2d at 541.

decision.[213] This reasoning was based on the district court's local rules, which adopted the Code of Professional Responsibility of the State Bar of Texas as the district's rules of conduct.[214] The district court found that Texas Rule 1.06(b)[215] allows concurrent representation of adverse interests except when the representations involve a substantially related matter or one representation reasonably appears to become adversely limited by responsibilities to other clients.[216] The court then concluded that Susman Godfrey had not violated Texas Rule 1.06(b)(1) because the two pending state court actions were not substantially related, legally or factually, to the class action.[217] Further, the court found no violation of Texas Rule 1.06(b)(2), as the representation of the class action plaintiffs did not reasonably appear to become adversely limited by the representation of Dresser in the state court actions.[218]

Because the district court's denial of the motion to disqualify Stephen Susman was not an appealable collateral order under § 1291,[219] Dresser petitioned the United States Court of Appeals for the Fifth Circuit for a writ of mandamus.[220] Preliminarily, the court of appeals held that the district court "clearly erred" in determining that its local rules of professional conduct, the Texas Rules, solely governed the motion to disqualify Stephen Susman.[221] The Fifth Circuit reasoned that "[m]otions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law."[222] The court further stated that a motion to disqualify counsel is "governed by the ethical rules announced by the national profession in the light of the public interest and the litigants' rights."[223] However, the court noted that while the rules announced by the

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213. *Red Eagle Resources*, 1992 WL 170614, at *3.

214. *Id.* "Had this Court intended other guidelines—the [American Bar Association] Model Code of Professional Responsibility, for example—to be considered in deciding motions to disqualify, it could have so stated in the Local Rules, as the United States District Court for the Western District of Texas has done." *Id.*

215. Rule 1.06(b) of the Texas Disciplinary Rules of Professional Conduct states:

> 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 that 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 or to a third person or by the lawyer's or law firm's own interests.

TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.06(b) (1994).

216. *Red Eagle Resources*, 1992 WL 170614, at *3.

217. *Id.* at *4.

218. *Id.* at *5.

219. *See* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981).

220. *In re* Dresser Indus., Inc., 972 F.2d 540, 541 (5th Cir. 1992). The court of appeals noted that mandamus is appropriate " 'when the trial court has exceeded its jurisdiction or has declined to exercise it, or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court.' " *Id.* at 543 (quoting *In re* Chesson, 897 F.2d 156, 159 (5th Cir. 1990)).

221. *Id.*

222. *Id.* A district court can adopt "rules for the conduct of [its] business." 28 U.S.C. § 2071(a) (1988). The court of appeals pointed out that the district court's local rules only identify conduct subject to sanctions and cannot alone govern the parties' rights to choose their own counsel. *Dresser Indus.*, 972 F.2d at 543.

223. *Dresser Indus.*, 972 F.2d at 543 (citing Woods v. Covington County Bank, 537 F.2d 804, 810 (5th Cir. 1976)).

national profession are useful in deciding motions to disqualify, they do not control the decision.[224]

Faced with its first case involving concurrent representation, the Fifth Circuit considered the matter under the *Woods v. Covington County Bank*[225] framework.[226] Citing Model Rule 1.7[227] and Ethical Considerations 5-2[228] and 5-19,[229] the court concluded that the American Bar Association standards "unquestionably" forbid an attorney from bringing an action against a current client without the consent of all involved parties.[230] However, the court pointed out that under the *Woods* framework, exceptional circumstances might exist which would permit an attorney to continue the concurrent representation.[231] Since no exceptional circumstances existed in this case, Stephen Susman and Susman Godfrey were disqualified from representing the plaintiffs in the class action.[232]

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224. *Id.* at 544.

225. 537 F.2d 804 (5th Cir. 1976). The *Woods* Court held that standards announced by the legal profession carry great weight in determining motions to disqualify counsel, but social interests such as the parties' right to the counsel of their choice should also be considered. *Id.* at 810.

226. *Dresser Indus.*, 972 F.2d at 544.

227. *See supra* note 30.

228. Ethical Consideration 5-2 of the Model Code of Professional Responsibility states:

> A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-2 (1980).

229. Ethical Consideration 5-19 of the Model Code of Professional Responsibility states:

> A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-19 (1980).

230. *Dresser Indus.*, 972 F.2d at 544-45. The court also noted that the same position is taken by the ABA/BNA Lawyer's Manual on Professional Conduct and the draft of the Restatement of the Law Governing Lawyers. *Id.* at 544-45 n.9. The ABA/BNA Lawyer's Manual states:

> A lawyer may not represent one client whose interests are adverse to those of another current client of the lawyer's, even if the two representations are unrelated, unless the clients consent and the lawyer believes he or she is able to represent each client without adversely affecting the other. Courts and ethics panels generally take a broad view of this restriction, and a specific adverse effect probably will not have to be shown. All that need be present is that one lawyer or firm is representing two clients, even in unrelated matters, with potentially conflicting interests.

Laws. Man. on Prof. Conduct (ABA/BNA) 51:101 (Supp. 1990).

The Restatement states:

> A lawyer's representation of Client A may require the lawyer to file a lawsuit against Client B whom the lawyer represents in an unrelated matter. It might seem that no conflict of interest is presented in such a case if Client B is represented in Client A's suit by a lawyer unaffiliated with the lawyer for Client A . . . . However, the lawyer has a duty of loyalty to the client being sued, and the client on whose behalf suit is filed might fear that the lawyer would pursue that client's case less effectively out of deference to the other client . . . . Because what is at stake in such cases is the lawyer's loyalty, the rule should be applied so as to minimize the impact on the choice of counsel by the affected clients.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 209 cmt. d (Tentative Draft No. 4, 1991).

231. *Dresser Indus.*, 972 F.2d at 545. For example, the court noted that an attorney might be permitted to continue concurrent representation if he could show "some social interest to be served by his representation that would outweigh the public perception of his impropriety." *Id.*

232. *Id.* at 546.

V. ANALYSIS

A. The Substantive Law of Simultaneous Representation

In most situations, it seems clear that clients can consent to adverse representation.[233] Absent consent, problems arise in defining "directly adverse"[234] interests.

The Comment to Model Rule 1.7 notes that "simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients."[235] While questions may arise as to whether some types of representations are generally or directly adverse, there can be no doubt that bringing a suit against a present client on behalf of another client constitutes representation of interests that are directly adverse.[236] As the *Dresser* Court recognized, "[u]nquestionably, the national standards of attorney conduct forbid a lawyer from bringing a suit against a current client without the consent of both clients."[237]

Some federal courts, however, have refused to disqualify law firms when they file suit against present clients.[238] Although the American Bar Association's ethical standards are not binding on courts,[239] no court should allow a law firm to sue a present client. Notwithstanding the potential for misuse of client confidences, a lawyer's duty of loyalty to the client forbids adverse representation.[240] In the often-quoted words of the Connecticut Supreme Court, "[w]hen a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that 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."[241]

The *Dresser* Court noted that "exceptional circumstances" may exist which would allow a lawyer to simultaneously represent adverse interests.[242] For example, a lawyer might avoid disqualification if he can show "some social interest to be served by his representation that would outweigh the public perception of his impropriety."[243]

As the federal case law survey illustrates, most courts disqualify lawyers who sue present clients. What facts call for an exception to the prohibition is uncertain.

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233. *See, e.g.*, Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981); Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121 (N.D. Ohio 1990). *But see* Guthrie Aircraft, Inc. v. Genesee Co., 597 F. Supp. 1097, 1098 (W.D.N.Y. 1984) (noting that a municipality cannot consent to adverse representation because the public interest is involved).

234. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).

235. *Id.* at cmt.

236. *In re* Dresser Indus., Inc., 972 F.2d 540, 545 (5th Cir. 1992).

237. *Id.*

238. *See, e.g.*, Tipton v. Canadian Imperial Bank of Commerce, 872 F.2d 1491 (11th Cir. 1989); SWS Fin. Fund A v. Salomon Bros., 790 F. Supp. 1392 (E.D. Ill. 1992); Hartford Accident & Indem. Co. v. RJR Nabisco, Inc., 721 F. Supp. 534 (S.D.N.Y. 1989).

239. *Dresser Indus.*, 972 F.2d at 542.

240. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1983).

241. Grievance Comm. v. Rottner, 203 A.2d 82, 84 (Conn. 1964).

242. *Dresser Indus.*, 972 F.2d at 545.

243. *Id.*

When faced with a disqualification motion, courts should analyze the problem in light of the predominant purpose behind the rule: ensuring that the attorney's duty of loyalty to the client remains paramount.[244] Clearly, when a lawyer sues a present client, loyalty is trampled upon, leaving the client with a less than favorable perception of the legal profession.

B. The Law Governing Motions to Disqualify

In *Dresser*, the district court's local rules adopted the Texas Disciplinary Rules of Professional Conduct as the district's ethical standards.[245] When a district court adopts the state bar's code of ethics as its rules of conduct, many problems can arise if the state code of ethics differs from the American Bar Association standards. To illustrate these possible problems, consider the following hypothetical.

The *XYZ* law firm, located in Portland, Oregon, represents Pepsico in litigation pending in Oregon state court. The firm is later retained by client A to sue Pizza Hut, a subsidiary of Pepsico,[246] in California state court. Pizza Hut then removes the case to the United States District Court for the Northern District of California. The district court's local rules adopt the California Rules of Professional Conduct as the district's code of ethics. Under the California Rules, there is no conflict of interest when a law firm sues the subsidiary of a client.[247] However, there is no similar provision in the Model Rules of Professional Conduct or the Model Code of Professional Responsibility.

The conflict in this hypothetical is obvious. If the district court follows the California rules,[248] the result will likely be different than a district court in another state.[249] Furthermore, if the district court applies the California rules and finds no conflict, how should the Ninth Circuit treat the decision on appeal? If affirmed, how will this affect other district courts in the Ninth Circuit which adopt American Bar Association standards as their code of ethics?

As the many federal district courts adopt their own code of ethics, the possibility of different ethical standards in different regions of the country becomes worthy of concern. In effect, a law firm with a possible conflict of interest could forum shop for a district court with more liberal conflict rules and file suit there, rather than file with a district court whose local rules adopt the American Bar Association standards. The solution lies in placing the various ethical codes in the

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244. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. (1983).

245. *Dresser Indus.*, 972 F.2d at 541.

246. *See* Gesing v. Pizza Hut of Am., No. CIV.A.85-0128, 1986 WL 4468 (E.D. Pa. Apr. 14, 1986) (mem.).

247. *See* Image Technical Servs., Inc. v. Eastman Kodak Co., 820 F. Supp. 1212, 1214 n.1 (N.D. Cal. 1993) ("Parent and subsidiary corporations are separate entities, therefore, representation of a wholly owned subsidiary, let alone a separately incorporated subsidiary, does not create a conflict of interest.") (citing State Bar of California Standing Comm. on Professional Responsiblity and Conduct, Formal Op. 1989-113).

248. *See id.* at 1215 (order disqualifying counsel) ("[T]his court must apply California Rules of Professional Responsibility, including California case law . . . .").

249. *See* Stratagem Dev. Corp. v. Heron Int'l N.V., 756 F. Supp. 789, 792 (S.D.N.Y. 1991) ("The duty [of loyalty] applies with equal force where the client is a subsidiary of the entity to be sued."); Gould, Inc. v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121 (N.D. Ohio 1990) (law firm's representation of subsidiary, while suing parent, created conflict of interest and required withdrawal from one representation).

perspective for which they were designed: a framework for the ethical practice of law and not as rules of decision in disqualification motions.[250] Thus, a disqualification motion should be governed by a federal common law of ethics with the ethical codes serving as guides. As the Fifth Circuit stated: "Federal courts may adopt state or [American Bar Association] rules as their ethical standards, but whether and how these rules are to be applied are questions of federal law."[251]

Looking back to the hypothetical, how should the district court decide a motion to disqualify the *XYZ* law firm? Rather than look to California state law,[252] the court should rely on other federal decisions regarding a similar conflict of interest problem.[253] Arguably, this route will produce a more uniform body of federal ethics law and reduce the different ethical standards in the district courts.[254]

C. Appealability of a Motion to Disqualify Counsel

Because the Supreme Court has held that orders granting or denying disqualification motions are not appealable as collateral orders,[255] the losing party can obtain immediate review only through the certification process of § 1292(b)[256] or a writ of mandamus. To obtain a writ of mandamus, the party must satisfy a two-pronged test: (1) there must be no other adequate means of obtaining relief, and (2) the party must demonstrate a clear and indisputable right to the writ.[257]

The problem with employing mandamus to review a district court's disqualification order lies in the first prong of the test (no other adequate means of relief). If the disqualification order can be effectively reviewed on appeal after final judgment, then there are other adequate means of relief.

The conflicting views on whether a disqualification order can be effectively reviewed on appeal after final judgment boil down to a single, unanswered question: Must a party losing a disqualification motion show prejudice—i.e., a different outcome with a different set of lawyers? Showing prejudice on appeal would be

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250. *See* MODEL RULES OF PROFESSIONAL CONDUCT scope (1983); John F. Sutton, Jr., *How Vulnerable Is the Code of Professional Responsibility?*, 57 N.C. L. REV. 497, 515 (1979) (reporter for American Bar Association committee which wrote the Code states that Code was not intended to govern disqualification motions); *cf.* J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1359 (2d Cir. 1975) (Gurfein, J., concurring) ("[A] court need not treat the Canons of Professional Responsibility as it would a statute that we have no right to amend.").

251. *In re* American Airlines, Inc., 972 F.2d 605, 610 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1262 (1993); *cf. In re* Snyder, 472 U.S. 634, 645 n.6 (1985) ("[T]he [ethical] standards imposed are a matter of federal law.").

252. *See* County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1413-14 (E.D.N.Y. 1989) ("A federal court is not bound to enforce New York's view of what constitutes ethical professional conduct.").

253. *See* Atasi Corp. v. Seagate Technology, 847 F.2d 826, 830 (Fed. Cir. 1988) (California rules did not provide for imputed disqualification of law firm, but court relied on Model Code "as applied in court decisions" to disqualify firm).

254. Of course, this means that California state courts will have different ethical standards than the United States District Court for the Northern District of California.

255. *See* Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985); Flanagan v. United States, 465 U.S. 259 (1984); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981).

256. *See supra* note 207 and accompanying text.

257. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35-36 (1980).

almost impossible.[258] The Supreme Court, however, stated that it had never required prejudice to reverse a final judgment following an erroneous disqualification, but had left the question open.[259] If a showing of prejudice is not required, then the final judgment could be reversed even though the erroneous disqualification order did not affect the outcome of the trial.[260]

Putting aside the prejudice question which remains unanswered with no satisfactory solution, the standard of review which should be applied to a district court's ruling on a disqualification motion on appeal via a petition for mandamus varies from circuit to circuit. In *Dresser*, the Fifth Circuit reviewed the district court's decision de novo because "district courts enjoy no particular advantage over appellate courts in formulating ethical rules to govern motions to disqualify."[261]

Rather than reviewing disqualification orders de novo in a mandamus petition, the better approach is that taken by the Seventh Circuit—the order must be "patently erroneous."[262] Unlike de novo review, the "patently erroneous" standard sets a higher threshold of error, thus comporting with the Supreme Court's mandamus formulation: "Although a simple showing of error may suffice to obtain a reversal on direct appeal, to issue a writ of mandamus under such circumstances 'would undermine the settled limitations upon the power of an appellate court to review interlocutory orders.' "[263] Furthermore, as the Seventh Circuit noted, reviewing a disqualification decision de novo through a petition for mandamus "provide[s] a route of appellate review functionally identical to the direct appeal of disqualification orders."[264]

VI. CONCLUSION

In *Dresser*, the Fifth Circuit faced its first case involving simultaneous representation of adverse interests.[265] Unlike some other circuits, the Fifth Circuit unequivocally stated that absent "exceptional circumstances," a lawyer or law firm

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258. As the Seventh Circuit stated:

> Impossible at least if the party obtained a competent substitute for the disqualified lawyer—and if not he has only himself to blame, save in the extraordinary situation in which only one lawyer is competent to represent the party, a situation generally confined to the rare case of disqualification on the eve of trial coupled with a refusal to grant a continuance.

In re Sandahl, 980 F.2d 1118, 1119 (7th Cir. 1992). *See also Koller*, 472 U.S. at 443 (Stevens, J., dissenting) ("I believe it would be virtually impossible to demonstrate that an outcome has been affected by the change of counsel as opposed to the other myriad variables present in civil litigation.").

259. *Koller*, 472 U.S. at 438.

260. *Sandahl*, 980 F.2d at 1119. *But see Koller*, 472 U.S. at 443 (Stevens, J., dissenting) ("[A]fter a trial with substitute counsel has been held, I would be most reluctant to subscribe to a rule requiring reversal without a showing of some impact on the outcome.").

261. *In re* Dresser Indus., 972 F.2d 540, 543 (citing Woods v. Covington County Bank, 537 F.2d 804, 810 (5th Cir. 1976)).

262. *See Sandahl*, 980 F.2d at 1121.

263. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1981) (quoting Will v. United States, 389 U.S. 90, 98 n.6 (1967)).

264. *Sandahl*, 980 F.2d at 1121.

265. *Dresser Indus.*, 972 F.2d at 542.

who sues a present client without consent should be disqualified.[266] Additionally, the court approached a federal common law of ethics by applying "standards developed under federal law," rather than the district court's local rules, to the disqualification motion.[267]

The federal substantive law of simultaneous representation of adverse interests, the law governing disqualification motions, and the appealability of disqualification orders via mandamus are far from uniform in the federal courts. The Fifth Circuit in *Dresser* has, for now, firmly spoken.

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266. *Id.* at 545.
267. *Id.* at 543.