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Nancy B. Rapoport

University of Nevada, Las Vegas – William S. Boyd School of Law

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TURNING AND TURNING IN THE WIDENING GYRE:* THE PROBLEM OF POTENTIAL CONFLICTS OF INTEREST IN BANKRUPTCY

Nancy B. Rapoport**

Traditional conflicts of interest analysis rests on a basic

* Turning and turning in the widening gyre
  The falcon cannot hear the falconer;
  Things fall apart; the centre cannot hold;
  Mere anarchy is loosed upon the world,
  The blood-dimmed tide is loosed, and everywhere
  The ceremony of innocence is drowned;
  The best lack all conviction, while the worst
  Are full of passionate intensity . . .


** Assistant Professor, The Ohio State University College of Law. B.A., Rice University, 1982; J.D., Stanford Law School, 1985. I would like to thank the College of Law for its generous summer research support and the College of Law's faculty for participating in a colloquium on an earlier version of this Article. I would particularly like to thank the following people for their help in the research, brain-storming, and editing phases: William Anderson, John D. Ayer, T. Arnold Barnes, Michael Beekhuizen, Gail Boling, Daniel J. Bussel, Sanford Caust-Ellenbogen, Albert L. Clovis, Rheta Eaton, Karl Fickenscher, David Frederick, Arthur F. Greenbaum, Denise Hanson, Jordan Herman, Robert Kagan, Michael Kindred, George Kuney, Allison Lisbonne, Ronald J. Mann, Kathy Northern, Rhonda R. Rivera, Jenn Sommer, John Steinberg, Arlus J. Stephens, and Douglas J. Whaley. Any mistakes or cognitive leaps are, of course, my own.

1. By "traditional," I mean that model of conflicts of interest analysis that takes as its foundation the adversarial view of the legal process—e.g., plaintiff vs. defendant, buyer vs. seller—rather than a less structured or role-based view of how people resolve issues. For a fascinating critique of the role of professional ethics in the adversarial system, see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).

The adversarial model of professional ethics is not universally favored. Several critics have charged that the American Bar Association's Model Code of Professional Responsibility was ineffective because it concentrated on the role of lawyer as litigator; the Model Rules of Professional Conduct were supposed to have remedied that wrongheaded focus by adding rules to guide the lawyer in her role as counselor. See, e.g., John D. Ayer, How to Think About Bank-
assumption: the parties embroiled in a particular dispute or negotiation have roles that are adversarial and immutable. Plaintiffs and defendants will always oppose one another; a buyer and a seller will always have distinct, opposite interests separate from their mutually desired end result. No one expects a buyer to wish suddenly for an uncompensated increase in price, and no one expects the plaintiff to waive a meritorious cause of action without a good settlement agreement.

In the arena of bankruptcy, however, a party’s position is not set in stone. Although the roles of the various parties in interest in a bankruptcy case—the debtor, the trustee, the creditors’ committee, the secured creditor, the unsecured creditor, a potential buyer, etc.—may not change over the course of a case, a particular party’s allegiances may shift from faction to faction, depending on the specific issue involved. A party in interest may not be bothered at all by this position-shifting,
as the changes in allegiance are all part of a larger effort to protect the party’s own interests. But a lawyer considering whether to represent a client has a problem to confront: whether she may take on the representation at all.

Can a lawyer know, at the onset of a case, which interests will diverge, which ones will converge, and which ones may potentially diverge later? Although a lawyer can, with relative safety, hazard a guess that she should not represent both the debtor and a creditor,

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7. Even the single creditor, in choosing a law firm, must consider whether the law firm has, in prior or contemporaneous representations, represented another one of the “sides” in the bankruptcy. See discussion infra Part I.


9. Groucho Marx said it best:

I was a little frightened when I read the imposing list of lawyers on your letterhead. There are at least forty . . .

How do you all get along at the office? Do you trust each other? Or does each one have a separate safe for his money? Isn’t there some danger that you and one of your many partners could both be in a courtroom representing opposing clients, and not be aware of it until you faced each other before the judge?


10. See discussion infra Part III.
not all relationships among other parties in interest in the bankruptcy case can be categorized so readily. Can an attorney represent an unsecured creditor and a creditors’ committee simultaneously? Can she represent an unsecured creditor while representing a purchaser of one of the debtor’s assets? What about representing an unsecured creditor and a proposed purchaser of all of the debtor’s assets, or a secured creditor and an unsecured creditor? The frequent shifts of position that occur in bankruptcy cases call into question any ethics rules that are based on a presumption that parties do not keep changing sides, issue by issue. Politics, after all, is not the only field that makes strange bedfellows.

In this Article, I will argue that potential conflicts of interest in bankruptcy are different from conflicts of interest that arise in other areas of representation and that, therefore, they should be treated differently from those other areas. In Part I, I illustrate the unique difficulties that a lawyer encounters whenever she undertakes simultaneous representation of more than one party in interest in a bankruptcy case. I demonstrate that, in other areas of law, a conflict is either actual or potential, but that conflict stays the same for the duration of the representation. In bankruptcy cases, however, a third type of conflict is possible. These dormant, temporary, actual conflicts (what I term “DTACs”) are issue-specific and deserve special treatment. In Part II, I review the Bankruptcy Code’s treatment of potential conflicts arising in several different situations, including representation of single parties and of several parties simultaneously. In Part III, I examine the role that professional ethics rules play in analyzing these conflicts. I conclude that neither the Bankruptcy Code nor the existing framework of

11. Professor John D. Ayer has explored the problem of shifting alliances and the fundamental problems of multiple representation of certain key players in bankruptcy. See Ayer, supra note 1, at 387-92.

12. By defining the ethical problems posed by this shifting of positions as being unique to the bankruptcy/workout context, I reject Professor Kevin McFungal’s theory that ethics problems should be analyzed on a more general, and less contextual, basis. Kevin McFungal, Rethinking Attorney Conflict of Interest Doctrine, 5 GEO. J. LEGAL ETHICS 823 (1992). I do agree with Professor McFungal that several conflicts issues cut across all areas of law, especially if one takes his view that all conflicts essentially impair a lawyer’s ability to represent her client. Id. at 829-33. I believe, however, that the effect of the impairment resulting from conflicts of interest requires special rules in the bankruptcy/workout context.

ethics provisions (which are designed to apply to traditional two-party conflicts of interest) offers an adequate response to DTACs and other problems of the multi-party bankruptcy context. In Part IV, I discuss my search for guidance from other areas of law where lawyers may be serving two masters that have dormant and temporary conflicts of interest. Finally, in Part V, I argue that the traditional ratchet-theory approach to conflicts principles\textsuperscript{14} can no longer be sanctioned in the bankruptcy arena, and I suggest a two-step inquiry as the guideline for determining whether to accept (or maintain) representation in potential conflict and DTAC situations. This two-step approach requires the lawyer and the client to discuss, first, how likely the potential conflict is to develop into a full-blown actual conflict during the course of the representation, and, second, how significant a harm the client would experience if the lawyer had to withdraw during the "actual" phase of the conflict. This two-step test forces the lawyer and the client to examine explicitly the degree of risk and the severity of harm and, unlike the current approach, does not assume that the lawyer must withdraw for the remainder of the entire representation; rather, the duration of the withdrawal depends on the nature of the potential conflict.

I. SWITCHING SIDES AT LIGHTNING SPEED: HOW SIMULTANEOUS REPRESENTATION OF MULTIPLE PARTIES IN A BANKRUPTCY CASE OVERWELMS CURRENT CONFLICT OF INTEREST PRINCIPLES

Imagine that you are the chief executive officer of Megatools, a creditor embroiled in the chapter 11 case of Widget Co. The case is already two years old. Someone finally has proposed a plan of reorganization that looks reasonable to you, and you walk into the courtroom and wait for the confirmation hearing to begin. You hope that the court confirms the plan today. Several lawyers from Tinkers, Evers, and Chance,\textsuperscript{15} the law firm that you routinely use for all of your legal needs, greet you as you enter. You sit down near the lawyer who has acted as your contact throughout the case. When the bankruptcy judge asks all of the lawyers to make their appearances, you hear the following:

Your lawyer: Pat Brown, of Tinkers, Evers, and Chance, appearing

\textsuperscript{14} By "ratchet theory," I mean the approach which maintains that conflicts, once activated, stay active for the duration of the representation and never disappear.

on behalf of Megatools, the largest unsecured creditor.

Another Tinkers lawyer: Chris Smith, of Tinkers, Evers, and Chance, appearing on behalf of the Debtor in Possession, Widget Co.

Still another Tinkers lawyer: J.J. Jones, of Tinkers, Evers, and Chance, appearing on behalf of Immense Lending Institution, a secured creditor.

Other lawyers make their appearances, and after going through the standard procedure for making a record on the plan’s confirmability, the court asks if any party objects to confirmation of the plan. You may already have been mildly surprised to see several lawyers from “your” firm appear on behalf of other interests. But you are shocked when you hear lawyers Smith and Jones, of “your” law firm, object to the very plan that you support. You leave at the end of the hearing wondering how it was possible for the law firm representing you to argue so vehemently against the plan. When you corner your lawyer and ask her that question, she begins by explaining that bankruptcy law is “special.”

The Tinkers, Evers, and Chance hypothetical is not so far-fetched. When it comes to the ways in which simultaneous representation of several seemingly nonadverse parties can pit former allies against each other, the combinations are mind-boggling. Take another example. The debtor, Widget Co., is a medium-sized business specializing in the manufacture and sale of widgets. Immense Lending Institution (“ILI”) finances most of Widget Co.’s operations; to secure ILI’s loans, Widget Co. has granted ILI a security interest in its inventory, accounts receivable, equipment, and general intangibles. Landlord has leased Widget Co.’s manufacturing and retail facility to Widget Co. on a long-term, slightly below-market lease. Various trade creditors sell raw materials to Widget Co. Widget Co.’s employees make slightly above-market salaries.

Now assume that some sort of crisis has caused Widget Co. to file for protection under chapter 11 of the Bankruptcy Code. At the beginning of the case, ILI appears to be a secured creditor, and its security

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16. Before the court can confirm the reorganization plan, the court must find that it complies with the provisions of 11 U.S.C. § 1129 (1988).

17. You may have remembered that, at the beginning of the case, a partner at Tinkers, Evers, and Chance asked you to sign a waiver consenting to the firm’s multiple representation of interests in the case (or sent you a letter indicating that a waiver was not necessary), but you never expected this type of perfidy.
interest has tied up several (if not all) of Widget Co.'s assets. Landlord wishes to terminate the lease and relet the premises at the market rate. The trade creditors are unsecured and may have been stiffed on recent bills. The employees are worried about keeping their lucrative jobs.

Setting aside the possibility of representing the debtor, what if a law firm is approached by ILI, Landlord, some of the trade creditors, and some of the key employees about representing their interests in the Widget Co. bankruptcy? May the law firm take on more than one representation? Should it?

Part of the answer is easy. If obvious, directly adverse conflicts of interest exist among the parties, such as a fracas in which the debtor and a creditor are squabbling over an asset of the estate, the law firm cannot represent both of those conflicting interests at once. The rest of the answer is more difficult for two reasons: first, not all conflicts are identifiable at the beginning of the case, and, second, even some obvious potential conflicts may last only a short time. Throughout Widget Co.'s bankruptcy, several points may arise during which the various creditors will form temporary alliances. For example, ILI might enter into a post-petition financing agreement with Widget Co. that is secured by the remaining unencumbered assets of the estate. Such an action might not make the unsecured creditors very happy, as they had expected to be paid from those same unencumbered assets. ILI might later join forces with the Unsecured Creditors' Committee to oppose Widget Co.'s attempt to cut a favorable post-petition deal with Landlord or with Widget Co.'s overpaid CEO, or ILI might strike out on its own to support (or oppose) a plan of reorganization, depending on the plan's treatment of its claim(s). The more parties in interest, the more pos-

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18. The Bankruptcy Code has particular rules governing who may represent the debtor. See 11 U.S.C. § 327 (1988); see infra text accompanying notes 38-47.

19. On the other hand, if post-petition financing will enable the reorganization to succeed, then perhaps the unsecured creditors will not mind that much.

20. Lest the reader think that I have a vivid imagination when it comes to discussing the strange (and promiscuous) bedfellows in bankruptcy cases, see, e.g., Blackburn-Bliss Trust v. Allied Bank (In re Hudson Shipbuilders), No. 83-07199-SC (Bankr. S.D. Miss. July 22, 1985) (debtor, second lienholder, and creditors' committee joined forces to dispute the reasonableness of the first lienholder's claim for attorneys' fees). Although this situation is far from unique (the second lienholder and the creditors' committee always want to reduce the first lienholder's "take"), seeing the owner of the asset climb into bed (not literally, of course) with a security interest holder and with the representative of those creditors without security interests makes for a nice contrast with the inevitable later situation in which all three parties claim that the other
sible conflicts can arise; whether a conflict actually arises will depend on the strategies and actions of the various parties during the case.\textsuperscript{21}

We are not limited in our discussion to conflicts among parties in interest. Various internal conflicts within large groups of lawyers also can erupt. For example, given both the size of the “mega-bankruptcy cases” that were recently filed at an alarming rate\textsuperscript{22} and the growth of law firms in the last decade,\textsuperscript{23} two lawyers in the same firm may “conflict each other out” based on their past representations of clients.\textsuperscript{24} In all of these situations, courts have weighed various compet-

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two are being unreasonable about some other issue. For another example of strange bedfellows, see Stephanie Strom, Law Firm’s Roles Questioned in Macy Case, N.Y. TIMES, Apr. 7, 1994, at Cl (noting that several law firms have been accused of representing conflicting interests in the Macy bankruptcy).

21. Conflicts of interest do not occur solely in bankruptcy cases. Obviously, every practice area has its conflicts. In a recent survey of California lawyers, 52% reported problems in representing interests adverse to a current or former client, and 77% reported problems in representing multiple clients. Thirty-five percent of the responding attorneys reported choosing to “purposely or strategically conflict[] [themselves] out of a matter.” Fax Poll, CAL. LAW., July 1993, at 96.

The problem of frequently shifting alliances, however, seems to be most acute in the bankruptcy and pre-bankruptcy (“workout”) contexts. In order to avoid unnecessary confusion in this Article, I will only discuss conflicts in the more formal framework of bankruptcy, instead of in the significantly less structured and less regulated realm of pre-bankruptcy workouts. Even though opportunities for alliance-shifting exist in workouts, by and large the shorter-term and more limited nature of workouts means that there are fewer opportunities for such shifts than there are in full-blown bankruptcy cases. Nonetheless, my discussion of DTAcs and similar types of conflicts would apply as parties grow closer to the filing of an actual bankruptcy case. Also, to the extent that other fields of law have alliance-shifting problems, this Article would be helpful in those fields as well.


24. Moreover, even within a particular role, a player in a bankruptcy case can have conflicting interests. The most obvious example that of the attorney for the chapter 11 debtor in possession, who has a vested interest in a successful reorganization because, if the case is con-
ing policies—a client’s right to choose his own counsel versus, for example, a client’s right to counsel’s undiluted loyalty—under

verted to a case under chapter 7, that attorney’s administrative expenses are subordinated to the chapter 7 administrative expenses. 11 U.S.C. § 726(b) (1988); see also 11 U.S.C. §§ 503(b)(4), 507(a)(1) (1988).

25. Under either the Model Code or the Model Rules, certain basic standards govern whether a conflict exists. A lawyer must not represent a client if the representation jeopardizes confidences transmitted by a different client, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1989) [hereinafter MODEL RULES]; see MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980) [hereinafter MODEL CODE]; if the representation inhibits the lawyer’s representation of another client, see MODEL CODE, supra, Canon 5; MODEL RULES, supra, Rule 1.7; or if the lawyer has a personal stake in the outcome; see MODEL CODE, supra, Canon 5; MODEL RULES, supra, Rule 1.7. In addition, the Model Code imposes the requirement that a lawyer must not accept representation that would, in some way, seem unethical. MODEL CODE, supra, Canon 9. Some conflicts issues can be resolved by the client’s or clients’ informed consent. I discuss these issues further infra, Part III. I leave a related issue—to what extent the debtor in possession is a fiduciary and how that fiduciary status affects the debtor in possession’s waiver of conflicts—for another time.

26. Two clients with aligned interests may choose the same lawyer even if their interests are not always in sync:

This arrangement [simultaneous representation after disclosure and waiver of conflicts] has of course the obvious benefit of reducing the total bill, given that the second client does not have to educate the lawyer from scratch about the details of the case. There are more subtle benefits that are generated as well. First, the use of the same lawyer by separate clients increases the likelihood that the co-defendants (or co-plaintiffs) will forge a common strategic alliance against the other side . . . . Second, the use of a smaller number of lawyers reduces the likelihood of a breach in confidentiality. The fewer the persons who have to be entrusted with confidential information, the less likely a damaging leak.

When the dust has settled, all sides can gain. The lawyer receives more work; the first client has a greater influence on the views of the second; the second client has lower costs in training the lawyer; and the increased likelihood of a common approach redounds to the benefit of all.

Epstein, supra note 8, at 589-90 (1992). Professor Epstein likens this arrangement as a lend-lease of sorts to the second client. In exchange for reduced costs of representation, the second client may expressly agree that, if a conflict arises, the lawyer will withdraw from the second client’s representation. Id. at 590. In some situations, however, the lawyer may not need to withdraw from the second client’s representation even after the conflict has arisen. Agreements that carve out the scope of the representation before the conflict, along with or in place of communications that eliminate any fear of breached confidences (either by limiting what the attorney is told by the two clients or by the clients telling each other everything anyway), might solve any conflict problems. Id.  

27. Other commentators have noted the importance of these competing factors. See, e.g.,
two general schemes: a motion for disqualification of counsel or an application for approval of fees. 28 Unfortunately, by the time a court

Christopher M. Ashby, Comment, Bankruptcy Code Section 327(a) and Potential Conflicts of Interest—Always Or Never Disqualifying?, 29 Hous. L. Rev. 433, 453-56 (1992).

28. The issue of conflicts questions also arises in attorney disciplinary proceedings. See, e.g., People v. Odom, 829 P.2d 855 (Colo. 1992); People v. Awenius, 653 P.2d 740 (Colo. 1982); In re Donohoe, 580 P.2d 1093 (Wash. 1978). Applications to employ counsel or other professionals for the trustee or the creditors' committee could also trigger these inquiries. See 11 U.S.C. §§ 327, 1103 (1988).

Because these opinions usually arise in the context of a court passing judgment on the propriety of representation or of fee awards—see, e.g., In re AOV Indus., Inc., 797 F.2d 1004 (D.C. Cir. 1986) (challenge to fee award based on simultaneous representation of debtor and major creditor); In re Lee Way Holding Co., 100 B.R. 950 (Bankr. S.D. Ohio 1989) (granting motion to disqualify counsel and ordering the return of fees because of a conflict of interest)—the opinions often involve at least one party who is an "official" entity (one for whom the court must approve counsel). See 11 U.S.C. §§ 327, 1103 (1988) (discussing appointments of professionals). The issue of conflicts of interest is not easy to decide, and courts are all over the board in determining whether representation is permissible. The common denominator is full disclosure, which can save some questionable representations and which, if absent, is sometimes enough to bar representation. See, e.g., In re Martin, 817 F.2d 175, 182 (1st Cir. 1987) ("There must be at a minimum full and timely disclosure of the details of any given arrangement"); AOV, 797 F.2d at 1011-14 (emphasizing need for disclosure); Lee Way, 100 B.R. at 959-62 (same); In re Michigan Gen. Corp., 77 B.R. 97, 100 (Bankr. N.D. Tex. 1987) (setting forth a textbook case for how not to embark on a representation: "[The law firm], by purportedly representing the several bankruptcy estates when in fact it was representing creditors, equity holders, and was not disinterested, placed itself by artifice and lack of disclosure in the central position of the bankruptcy process and thereby gained an access to unjust and unfair advantage over other parties in interest"); In re O'Connor, 52 B.R. 892, 900 (Bankr. W.D. Okla. 1985) ("From the very outset, counsel has revealed the exact nature of its relationship with the O'Connors and Magic Circle") (emphasis in original); In re Guy Apple Masonry Contractor, Inc., 45 B.R. 160, 164 (Bankr. D. Ariz. 1984) (indicating, in dicta, that even late disclosure may be sufficient to salvage a representation); Hassett v. McColley (In re O.P.M. Leasing Serv., Inc.), 16 B.R. 932 (Bankr. S.D.N.Y. 1982) (permitting representation of intertwined estates by a single trustee, even though there was some potential for conflicts of interest among estates, because there was full disclosure of potential conflicts).

But the disclosure to the court is minimal when only "non-official" entities (e.g., creditors), who need not seek court approval for the representation, are involved. See Bankruptcy Rule 2019 (codified at 11 U.S.C. app. § 2019 (Supp. IV 1992)) (requiring minimal disclosure standards in multiple representation situations but not requiring court approval of either the Rule 2019 statement or of the representation(s)). The crux of my Article involves the multiple representation of these non-official entities. Disclosure to non-official entities involves the attorney explaining the scope and risks of representation to her clients—without court supervision to provide a double-check of the adequacy of the disclosure.
hears a disqualification motion or an objection to a fee application, the case may be well underway. 29

In order to put the problem in perspective, we must first distinguish among several different types of conflicts of interest. An actual conflict of interest is one in which a lawyer would be put in the position of representing two parties whose interests are clearly adverse (or representing a new client whose interests are directly adverse to a former client’s interests). 30 A potential conflict of interest is one in which interests of the two current clients (or the new and former clients) are not yet adverse, but a chance exists that the interests will become adverse at some point during the representation. 31 One could view a potential conflict of interest as a ratchet: once the conflict moves from potential to actual, the conflict is “joined” and remains so for the duration of the representation. If one adopts the ratchet theory, then the greater the chance that the potential conflict will become actual, the more the potential conflict should be treated like an actual conflict.

29. Depending on the circumstances, courts have found that substantial delays in objecting to representation often indicate that the late-raised objection is merely a litigation tactic. See, e.g., In re Nephi Rubber Prod. Corp., 120 B.R. 477, 483 (Bankr. N.D. Ind. 1990) (implying that the timing of the disqualification motion looked suspiciously like a strategy move, having been filed more than a year after the first meeting of creditors); Jay Lawrence Westbrook, Fees and Inherent Conflicts of Interest, 1 AM. BANKR. INST. L. REV. 287, 289 (1993) [hereinafter Westbrook, Fees] see generally Miller, supra note 23, at 152-53 (discussing client consent or waiver in adverse representation).

30. “Conflict of interest is most commonly defined as a situation in which the lawyer has a duty to contend for one client that which his duty to another client requires him to oppose.” Patterson, supra note 8, at 570. Professor Patterson categorizes conflicts into three types—per se, actual, and potential—based on the client’s options after a conflict has been isolated. Id. at 572-74. If the conflict is per se, the client cannot waive the conflict and continue with the representation. If the conflict is actual, the client may, in some situations, be able to waive the conflict. Id. at 572. If the conflict is only potential, then the client can choose whether or not to waive it and continue the representation. Id. at 573. Although Professor Patterson and I use the same terminology, he does not speak to the question of DTACs, discussed below.

31. See In re Johnson, 707 P.2d 573, 578-79 (Or. 1983) (per curiam) (defining actual and potential conflicts). But see In re TMA Assoc’s., Ltd., 129 B.R. 643, 649 (Bankr. D. Colo. 1991) (refusing to distinguish between actual and potential conflicts). The Johnson case splits potential conflicts into those that are “likely” and those that are “unlikely.” The “unlikely” conflict “is found in those circumstances in which the lawyer’s independent judgment is ‘unlikely’ to be adversely affected [by representing multiple clients].” 707 P.2d at 579. In such a scenario, the Johnson court posited that the lawyer would even need to disclose the unlikely conflict to her clients or have to obtain their consent. Id.
when the lawyer initially considers whether to take on the representation.

The ratchet theory may describe some potential conflicts, but it does not describe all of them. I believe that, in bankruptcy cases, a third type of conflict of interest is possible: the dormant, temporary, actual conflict (DTAC).\textsuperscript{32} DTACs are more like toggle-switches\textsuperscript{33} than like ratchets. DTACs are dormant because the potential for conflict lies in wait unless and until the right combination of strategy decisions (by several parties) comes into play. They are temporary because they are issue-specific: once the underlying issue (e.g., a cash collateral stipulation, voting on a proposed plan of reorganization) has been resolved, the conflict is resolved as well. They are actual because, as long as the particular triggering issue is active, two or more parties are at odds with each other.

To get an idea of how a DTAC could develop, take two unsecured creditors in Widget Co.'s case. One is a trade creditor supplying Widget Co. with the bulk of its widget needs. The other creditor is a tort victim. In general, both parties, as unsecured creditors, have aligned interests. The unsecured creditors support Widget Co.'s efforts to increase the size of the estate through preference actions, lien avoidance,

\textsuperscript{32} Other areas exist in which potentially temporary conflicts of interest can arise: for example, in certain disputes between a union employee and the employer, the aggrieved employee's personal interests might conflict with the union's position on the issue raised by the employee's grievance. Adrienne L. Saldana, Note, \textit{Conflicting Interests in Union Representation: Should Exclusivity Be Abolished}, 6 GEO. J. LEGAL ETHICS 133 (1992). Due to a bizarre quirk in labor law known as the exclusivity rule, the union lawyer is charged with the responsibility of representing the interests of both the employee and the union. Although the reasoning behind the exclusivity rule is laudable (the \textit{raison d'etre} of unions is that employees need to present a united front, and having individual lawyers for employees might weaken that front), the rule still poses a problem for the union lawyer, who might find herself caught between two opposing positions. See Vaca v. Sipes, 386 U.S. 171, 185-86 (1966) (regarding union employee's suit against union for wrongful discharge). The Note author recommends that the exclusivity requirement be relaxed when a conflict between the two interests occurs. Saldana, \textit{supra}, at 157-61. I have a sneaking suspicion, though, that an employee with grievances, who is thwarted by union lawyers serving union interests will be unlikely to call the conflict of interest temporary. Once the employee learns that the union lawyer is not going to pursue his grievance, the employee may not want to "get back in the game" and play ball with the union on other issues. In other words, this type of conflict is probably not a DTAC.

\textsuperscript{33} For those of you with limited mechanical aptitude, visualize a light switch, which can either be "on" or "off" at any given time, but which can move freely back and forth between the two settings.
and the like, because a larger estate will increase the amount (though not the proportion) of their distributions from the bankruptcy estate. They will also receive payment from the same (unencumbered) pool of assets. The two creditors, however, may differ in what they would like to see in a plan of reorganization. Suppose a plan of reorganization proposed to pay unsecured creditors a small amount of cash up front and to issue shares of stock for the balance of their claims. The trade creditor might be perfectly delighted with the plan, thinking that a reorganized Widget Co. is a Widget Co. that will continue to buy more widget supplies for years to come. The tort victim may also be happy with the plan. (Some money is better than no money.) On the other hand, the tort victim, for reasons of his own, may have no interest in seeing Widget Co. continue in business. The larger goal—that of increasing the size of the pot for unsecured creditors—places both the trade creditor and the tort victim in sync. But their personal preferences create a potential conflict of interest that may become a DTAC at the time of plan confirmation. Both creditors have unsecured claims but very different personal stakes in the outcome of the reorganization. After the confirmation hearing is over, though, whether or not the plan is confirmed, the DTAC presumably disappears.

Obviously, actual conflicts that are apparent at the onset of a case will, and should, bar dual representation by a single lawyer. But in terms of analyzing DTACs, as well as any other potential conflicts with risks that are difficult to determine at the onset of the case (or that are ascertainable at the onset but are low-risk), something more than the traditional conflicts analysis is required.

Theoretically, the simplest solution would be to make certain that every party in interest is represented by separate counsel. But that solution may be easier said than done, and, in fact, it may not be a good idea anyway. Hiring a lawyer to protect her rights may be expensive

34. By “low-risk,” I mean that the likelihood that the conflict will ever occur is small.

35. As Professor Kenneth Kipnis has pointed out, a strict interpretation of a rule in which a lawyer may not represent any potentially conflicting interest could well result in a client getting no legal representation at all. Kenneth Kipnis, Conflict of Interest and Conflict of Obligation, in ETHICS AND THE LEGAL PROFESSION 283, 285-86 (Michael Davis & Fredrick A. Elliston eds., 1986); see, e.g., Civic Center Square, Inc. v. Ford (In re Roxford Foods, Inc.), 12 F.3d 875, 877 (9th Cir. 1993) (“Apparently the Trustee had difficulty obtaining counsel to represent him due . . . [in part] to the fact that because of the complexity of the case many Fresno law firms were already representing the numerous parties in the proceedings.”). Because a lawyer is also an “officer of the court” and because her duty of loyalty to the client may sometimes run afoul
for the creditor with a small claim against the estate, and the more lawyers representing interests in bankruptcy, the more likely it is that transaction costs (and collection costs) will increase exponentially.\textsuperscript{36} Moreover, depending on the size of the bankruptcy case and its venue, matching each party in interest with a local lawyer well-versed in the ins and outs of bankruptcy law and practice may be impossible (or, at the least, impracticable).\textsuperscript{37} Therefore, single-client representation may mean that a client will have to hire a lawyer unfamiliar with bankruptcy law or forego representation entirely.

II. THE TRADITIONAL APPROACH TO CONFLICTS OF INTEREST IN BANKRUPTCY CASES

A lawyer does not exist in a vacuum, suddenly materializing to represent only one client in one matter and then abruptly vanishing once the matter has ended, never to reappear. Lawyers have histories. We have represented clients in the past, and those clients may need our

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of her duty to the tribunal, then representing anyone at all, in some circumstances, could risk the progression of a potential conflict to an actual one. But even if we do not take the avoidance of all potential conflicts to this extreme, Professor Kipnis poses a more pragmatic objection to a rule that always requires separate counsel for every party. Some situations might be resolved quite well informally but, instead, they escalate into a full-blown war when each person drags her own attorney into the fray. Kipnis, supra, at 286-87.

36. One of the goals of bankruptcy is to reduce total collection costs by adjudicating all of the claims against the debtor in a single proceeding. See THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 5 (1986); cf. S. REP. NO. 989, 95th Cong., 2d Sess. 49 (1978), reprinted in 1978 U.S.C.C.A.N. 5835 (discussing goals of modernization and efficiency in bankruptcy reforms); H.R. REP. NO. 595, 95th Cong., 2d Sess. 340 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97 (noting the efficient "orderly" design of bankruptcy). This goal may well be thwarted if each and every entity must pay a lawyer to protect his rights.

37. See Ashby, supra note 27, at 435 ("[A] limited number of law firms exist with the expertise and resources to effectively handle such complex bankruptcies"); Westbrook, Fees, supra note 29, at 288; see also Civic Center Square, Inc. v. Ford (\textit{In re Roxford Foods}, Inc.), 12 F.3d 875, 877 (9th Cir. 1993) (all of the major law firms in the area were already representing parties in interest, so the trustee found it difficult to obtain counsel). In City of Lafayette, Colorado v. Oklahoma P.A.C. First Ltd. Part. (\textit{In re Oklahoma P.A.C. First Ltd. Part.}), 122 B.R. 387, 392 (Bankr. D. Ariz. 1990), the court inadvertently makes this point by noting that a successful disqualification motion meant that new, out-of-state counsel was going to have to step in for one creditor. As the court noted, "counsel for the secured creditors conceded that out-of-state law firms were already involved, so it might not be that difficult to have a second law firm step in." \textit{Id.} I am currently investigating how often this issue arises in the Columbus, Ohio, bankruptcy bar. The results of that study will appear in a later article.
help in the future. One client may need our help at the same time that we are representing another client. Because lawyers do not exist in a vacuum, we sometimes face difficult conflict of interest problems.

Such conflict of interest problems are tricky enough to resolve when just two parties are battling over a negotiation or a court case. The questions are, in such a case, at least relatively simple when compared to the more complex multi-party conflicts: May I represent party A against party B? What if I have represented party B (or others in party B’s position) before? Even in large class-action cases, these questions start out simply enough: May I represent this group against that entity? In the giant free-for-all of a bankruptcy case, however, the questions are far more complex. This section discusses the problems of multiple representation that flow from the peculiar nature of bankruptcies.

Several well-respected scholars have examined the Bankruptcy Code’s standards for representation of “official” entities—debtors, creditors’ committees, and other parties looking to be paid from estate funds—and have developed helpful rules of thumb. Before I examine the less-charted waters of multiple creditor representation within a single bankruptcy case, I will first review the rules regarding representation of the official entities. These cases are, by and large, the easy ones. Most courts are comfortable deciding whether to permit representation in these recurring situations.

38. But see infra notes 191-214 and accompanying text.


A. Single-Representation Issues

Congress, in enacting what is now the current Bankruptcy Code, sought to eliminate the perceived hazard, under the former Bankruptcy Act, of having a small, close-knit bar of bankruptcy specialists. 40 Fearing inbreeding, Congress sought both to make the Bankruptcy Code more understandable and to eliminate the need for specialized practitioners, who could divine their way through a labyrinthine set of rules and guidelines. Unfortunately (or fortunately for those lawyers who are, in fact, bankruptcy practitioners), Congress did not realize its dream. Every specialty develops its own bar over time, and the bankruptcy bar is no exception. The utter fear with which non-bankruptcy practitioners view bankruptcy has created, once again, a bar of specialists who greet each other by first names and know each other's quirks and leanings quite intimately. 41

1. Rules for Representing the Debtor or Trustee

Debtors file for protection under the Bankruptcy Code for any of several reasons—for example, to get out from under a crushing debt burden, to stay foreclosures and other proceedings that threaten their assets, and to jettison burdensome contracts. In exchange for the Bankruptcy Code's various debtor protection provisions, debtors must give up a certain amount of autonomy and control. The bankruptcy court oversees much of a debtor's post-petition activities. Among the activities that the bankruptcy court monitors is the debtor's post-petition employment of professionals (accountants, attorneys, and the like).

Section 327 (the "Employment Rule") governs the choice of counsel


41. See Lynn M. LoPucki & William G. Whitford, Bargaining Over Equity's Share in the Bankruptcy Reorganization of Large, Publicly Held Companies, 139 U. Pa. L. Rev. 125, 154-57 (1990) (suggesting that reorganization specialists have evolved over time into entities with a significant effect on the outcome of reorganizations, even beyond affecting just necessary business decisions of the debtor in possession); cf. LoPucki, Demographics, supra note 40, at 318 (observing that most bankruptcy lawyers do not limit their practice to bankruptcy law).
for the estate (i.e., counsel for the trustee or the debtor in possession). Counsel for the estate must not “hold or represent an interest adverse to the estate [and must be a] disinterested person.”42 If the debtor has had, pre-petition, an ongoing relationship with counsel, the nature of the ongoing relationship will determine whether that counsel may continue to represent the estate post-petition. For example, if the debtor owed large, long-overdue payments to its counsel pre-petition, a bankruptcy court might well consider counsel not to be “disinterested” for purposes of section 327(a).43 Moreover, if the debtor paid off a generous chunk of that long-overdue bill shortly before filing its petition, counsel might be susceptible to a preference attack that, if successful, would require a return of the payment to the estate.44 The possibility of such a preference attack would mean that counsel held “an interest adverse to the estate,” precluding representation.45

42. 11 U.S.C. § 327(a) (1988); see also Westbrook, Fees, supra note 29, at 300-03. Unfortunately, the Bankruptcy Code itself confuses the issue by creating a vicious circle that defines a “disinterested person” as one who “does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders.” Id. § 101(14)(E) (Supp. IV 1992). The Code thereby merges the tests of section 327(a) into one long redundancy. See H & K Developers v. Waterfall Village of Atlanta, Ltd. (In re Waterfall Village of Atlanta, Ltd.), 103 B.R. 340, 343-44 (Bankr. N.D. Ga. 1989) (noting the infinite loop between section 327(a)'s requirements that the professional person hired by the estate must be “disinterested” and must not “hold or represent an interest adverse to the estate” and section 101’s definition of “disinterestedness”; the court calls for a more flexible approach to approving counsel for debtors in possession). For examples of what the Code means by “disinterested,” see, e.g., In re Eagle-Picher Indus., Inc., 999 F.2d 969, 971 (6th Cir. 1993); In re Swansea Consol. Resources, Inc., 155 B.R. 28, 36 (Bankr. D.R.I. 1993); In re TMA Assocs., Ltd., 129 B.R. 643, 646-49 (Bankr. D. Colo. 1991); In re Patterson, 53 B.R. 366, 370-74 (Bankr. D. Neb. 1985).


44. 11 U.S.C. § 547 (1988); see Westbrook, Fees, supra note 29, at 300.

Obviously, maintaining an ongoing relationship as counsel for the debtor post-petition has a major advantage: the debtor does not have to bring new counsel up to speed on its operations and dealings with others. At the same time, a lawyer who holds an adverse interest or is not disinterested may not be able fully to separate her own interests from those of the estate. Section 327(a) rules out the possibility that the lawyer would have to struggle by herself with such a conflict.46 Before a lawyer may act as the estate's legal representative, she must apply for court approval of the representation pursuant to Bankruptcy Rule 2014. Failure to receive court approval can be quite expensive: courts can deny or reduce compensation to counsel who have omitted this important first step.47

2. Rules for Representing Non-Debtor Parties in Interest

Although the Code is primarily concerned with overseeing the debtor's choice of professionals, it also contains some provisions touching on the representation of other parties in interest in a bankruptcy case.

a. Creditors' Committees

In a chapter 11 case, the United States trustee appoints "a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders."48 The Bankruptcy Court may also order the appointment of additional creditors' or equity security holders' committees on request of a party in interest.49 The appointed committee then may employ professionals of its own,

46. Even if the lawyer is barred from acting as general counsel to the estate under section 327(a), the estate could still retain the lawyer as special counsel under section 327(e) if the retention is "in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate" on the matter for which the lawyer is to be retained as special counsel. 11 U.S.C. § 327(e) (1988); see also United States Trustee v. Price Waterhouse, 19 F.3d 138 (3d Cir. 1994) (prohibiting an accounting firm, which was one of the debtor's creditors, from representing the debtors).


subject to court approval.\textsuperscript{50} The Code provides that the committee’s attorneys or accountants “may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case.”\textsuperscript{51} Section 1103 specifically states that “[r]epresentation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.”\textsuperscript{52} In part II.B.8. of this Article, we shall see how this simple statement plays out.

b. Creditors

The Code controls the appointment of professionals for the estate and for the official committees in part because estate funds can be used to pay the fees of these professionals.\textsuperscript{53} Creditors’ professionals generally are not paid from estate funds.\textsuperscript{54} Nonetheless, bankruptcy courts are interested in at least some of the circumstances surrounding other creditor representation. An attorney representing more than one creditor or equity security holder in a case under chapter 9 or chapter 11 (and every indenture trustee) must file a statement listing each creditor’s or equity security holder’s name and address and describing the claim or interest and the nature of the employment of the attorney. Attorneys who do not comply with this rule may, among other things, find themselves barred from being heard in the case.\textsuperscript{55}

B. Simultaneous Representation Issues

1. Representing the Debtor and a Creditor Simultaneously

Representing the debtor is not the same thing as representing the debtor in possession or the trustee.\textsuperscript{56} Debtors in possession and trust-

\begin{footnotesize}
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\item \textsuperscript{50} 11 U.S.C. §§ 1103(a), 328(a) (1988).
\item \textsuperscript{51} 11 U.S.C. § 1103(b) (1988).
\item \textsuperscript{52} \textit{Id.; see In re Oliver's Stores, Inc.}, 79 B.R. 588, 593-97 (Bankr. D.N.J. 1987) (determining, in accordance with section 1103, that dual representation of creditors’ committee and individual creditors would be, under the circumstances, a conflict of interest).
\item \textsuperscript{53} \textit{See} 11 U.S.C. §§ 328(a), (c), 331, 503(b) (1988).
\item \textsuperscript{54} \textit{But see} 11 U.S.C. §§ 503(b)(3)-(4) (1988).
\item \textsuperscript{55} \textit{See Bankruptcy Rule 2019(b) (codified at} 11 U.S.C. app. § 2019(b) (Supp. IV 1992)).
\item \textsuperscript{56} People, however, do confuse things by calling a debtor in possession a “debtor” for short. They do so all the time.
\end{itemize}
\end{footnotesize}
ees are fiduciaries of the estate;\(^{57}\) in essence, the trustee or the debtor
in possession represents the unsecured creditors. The debtor, on the
other hand, represents no one but the debtor. The issue of when the
counsel for the debtor may represent a creditor in the same bankruptcy
case is by far the easiest to resolve. Think of the relationship between
the debtor and one of its creditors as being a tug-of-war for assets. A
lawyer cannot usually represent the debtor and one of its creditors in
the same bankruptcy case, even if the debtor is completely solvent and
every creditor will be paid 100 cents on the dollar: courts often feel
uneasy about a lawyer representing both the person who owes the mon-
ey and the person who wants to collect it.\(^{58}\) Nor can a lawyer, in
most cases, represent the debtor if she has previously represented a
creditor: she might have prior knowledge gleaned from her represent-
tion of the creditor that the debtor could use against that very credi-
tor.\(^{59}\)

2. Representing the Debtor and the Trustee or Debtor in Possession

Keeping in mind that the "debtor" is separate from the "estate"\(^{60}\)
and that the estate is managed either by a trustee or by the debtor in
possession,\(^{61}\) a lawyer could well be faced with the dilemma of whether she could represent the debtor and either the trustee or the debtor in
possession simultaneously.\(^{62}\) When a trustee administers the estate (e.g., in all chapter 7 cases and some chapter 11 cases), courts routinely

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\(^{57}\) Kelbon et al., supra note 39, at 363, 397-98.

\(^{58}\) Cross, supra note 39, at 243 n.32 (describing cases prohibiting such representation). But see In re Hoffman, 53 B.R. 564 (Bankr. W.D. Ark. 1985) (permitting such representation).

\(^{59}\) Professor Cross observes, correctly, that prior representation of a creditor is not always a bar to representing a debtor that owes that particular creditor some money. He posits, for example, that chapter 7 debtors turn over the estate assets to a trustee for administration and do not particularly care how much any individual creditor gets from the estate; therefore, any actual conflict of interest would arise only by dint of the specifics of the prior representation of the creditor. Cross, supra note 39, at 243-44.


\(^{61}\) 11 U.S.C. § 704 (1988) (regarding trustee who represents the estate in chapter 7 cases); id. § 1107 (dealing with debtor in possession generally representing the estate in chapter 11 cases).

\(^{62}\) In chapter 11 cases, the question usually is whether an attorney who represented the debtor pre-petition may represent the debtor in possession post-petition. In the other chapters, the question usually is whether the attorney who represented the debtor pre-petition either may continue to represent the debtor post-petition or may represent the trustee post-petition as well.
reject simultaneous representation of the trustee and the debtor, as their interests are often adverse. In a chapter 7 case, the trustee wants to maximize the estate to increase the assets that he may pay to creditors, while the debtor wants to maximize the value of assets that he may keep for himself.\textsuperscript{63} In reorganization cases (in which a trustee is only appointed under very unusual circumstances),\textsuperscript{64} the debtor in possession's goal is, again, to maximize the estate and, thus, the distribution to creditors, but the debtor's goal may be to reorganize with as few encumbrances on future business as possible.\textsuperscript{65} Even prior representation of a debtor can disqualify that counsel from representing the trustee as general counsel, presumably because of a perceived loyalty split.\textsuperscript{66} The trustee, however, is often able to hire present or former debtor's counsel as special counsel—for example, to continue highly specialized litigation or to continue to give advice on other specialized nonbankruptcy issues.\textsuperscript{67} Efficiency considerations permit the debtor's counsel to continue to give nonbankruptcy advice; normally, that advice does not raise conflict of interest concerns.

3. Representing the Trustee or the Debtor in Possession and a Creditor Simultaneously

Not all cases use trustees. In the vast majority of chapter 11 cases, the debtor in possession runs the show.\textsuperscript{68} Because the debtor in possession is not just the debtor wearing a new 'post-filing hat,'\textsuperscript{69} however,

\textsuperscript{63} See Cross, supra note 39, at 256; Westbrook, Fees, supra note 29, at 290.
\textsuperscript{65} Cross, supra note 39, at 256.
\textsuperscript{66} Peter E. Meltzer, Whom Do You Trust? Everything You Never Wanted to Know About Ethics, Conflicts and Privileges in the Bankruptcy Process, 97 CUM. L.J. 149, 154-58 (1992). The sticking-point is whether the proposed attorney for the debtor in possession is "disinterested." If she holds a claim against the estate for pre-petition services, courts may not consider her to be disinterested. Id. at 155. In fact, courts are split on whether a pre-petition claim for fees disqualifies an attorney from representing the estate. Id. at 155-58 (citing and discussing cases on both sides of the issue).
\textsuperscript{67} 11 U.S.C. § 327(e) (1988). Special counsel does not have to be "disinterested," cf. id. § 327(a) (general counsel must be "disinterested"), but special counsel must "not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed." Id. § 327(e). For a case that illustrates the use of special counsel, see In re O'Connor, 52 B.R. 892 (Bankr. W.D. Okla. 1985).
\textsuperscript{69} The debtor in possession has special fiduciary duties. See Kelbon et al., supra note 39.
matters involving conflicts of interest with the debtor in possession (or the trustee) are a little trickier than most. Whether counsel may be retained for the debtor in possession depends on whether she (1) is disinterested and (2) holds or represents an interest adverse to the estate. Although section 327(a) speaks of representing (present tense) adverse interests, several courts have barred counsel from representing the debtor in possession where she had previously represented a creditor, on the theory that her duty of loyalty to a former client would interfere with her duty to all of the creditors of the estate. Section 327(c), however, provides that representation is not precluded "solely because of such person's [the potential counsel's] employment by or representation of a creditor [unless, after objection, the court finds an actual conflict]." Many courts are uncomfortable with the concept of simultaneous representation of the debtor in possession or trustee and a creditor. In the end, courts will look to ethics rules to determine whether the simultaneous representation is permissible. Representing a debtor in possession while representing a current (or prior) creditor may cause the same loyalty conflict if that creditor's interest diverges from those of the other creditors. In such a situation, section 327(a)'s Employment Rule would prohibit that simultaneous representation notwithstanding section 327(c)'s savings clause.

4. Representing the Trustee or the Debtor in Possession While Representing an Entity Owing Money to the Estate

A situation in which the interests of an obligor of the estate do not conflict with those of the estate itself (which, naturally, wants to collect the debt) is difficult to imagine. Therefore, this type of simultaneous

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71. Cross, supra note 39, at 265 n.135; Meltzer, supra note 66, at 162-64.
73. Kelbon et al., supra note 39, at 362 n.76 (citing cases prohibiting simultaneous representation of a debtor in possession and one of its creditors); see also In re AOV Indus., Inc., 797 F.2d 1004 (D.C. Cir. 1986) (holding that section 327(c) prohibits simultaneous representation of trustee and creditor); In re Lee Way Holding Co., 100 B.R. 950, 953 (Bankr. S.D. Ohio 1989) (citing legislative history prohibiting simultaneous representation of trustee and creditor); Kohn & Shuster, supra note 39, at 149.
74. Of course, a lawyer may not be able to determine easily, at the onset of the case, if and when that one creditor's interest will conflict with those of other creditors. See infra part II.B.9.
representation is generally prohibited. Presumably, the propriety of representing the trustee or the debtor in possession after having represented an obligor of the estate in a separate matter would hinge on the knowledge that counsel for the obligor had acquired during the prior representation. As for representing the estate’s obligor and the debtor simultaneously, even if one takes to heart the notion that the debtor is, theoretically, neutral about what happens to the estate once it passes from his hands, much depends on whether the obligor will contest the debt to the estate.

5. Representing the Trustee or the Debtor in Possession While Representing an Insider of the Debtor

If the proposed counsel for the trustee or the debtor in possession were herself an insider, sections 327(a) and 101(14) (defining “disinterested person”) would bar such representation. What, though, of the attorney who is not an insider herself, but who represents one? Section 327(a) provides that the attorney must “not hold or represent an interest adverse to the estate,” but whether the insider’s interests are adverse to the estate will depend on the circumstances. In many cases, however, an actual conflict of interest exists. For example, an insider who is an extremely inefficient manager may stubbornly want to retain control of the company, even in light of a proposal for the substitution of a more efficient manager. It is the rare insider who wants to cede control

75. 11 U.S.C. § 327(a) (1988); Cross, supra note 39, at 243.
77. If the debt is contested, ethical rules would prohibit simultaneous representation, at least during the litigation of that issue. See MODEL CODE, supra note 24, DR 5-105; MODEL RULES, supra note 24, Rule 1.7. Representing the debtor after having represented the obligor in a separate matter would, of course, depend on the usual concerns about loyalty and the sanctity of client communications.
78. Bankruptcy Code section 101(31) defines “insider” in terms of the debtor’s status as an individual, a corporation, a partnership, a municipality, a business affiliate, or a managing agent of the debtor. 11 U.S.C. § 101(31) (Supp. IV 1992). All of the definitions involve the ability of the insider to exercise some form of control over the debtor.
79. See Rome v. Braunstein, 19 F.3d 54, 60-61 (1st Cir. 1994) (simultaneous representation of debtor and third-party purchaser of assets was improper); Westbrook, Fees, supra note 29, at 290-91. But see Meltzer, supra note 64, at 160-62 (citing cases holding that a lawyer’s insider status was not a per se bar to representation of the estate).
81. See Meltzer, supra note 64, at 164-66.
of the company to others better suited to run it. The insider’s interests often diverge from the debtor in possession’s or trustee’s interests. Courts will determine whether representation is appropriate on a case by case basis.

6. Representing Related Estates Simultaneously

The scenario in which related entities all file for bankruptcy at the same time is not uncommon. In those cases in which the entities shared counsel before the bankruptcies, often the entities would prefer, on efficiency grounds, to retain the same counsel, post-filing, for the various estates. In order to approve joint representation, the bankruptcy court must first find that the estates’ interests do not actually conflict. Courts often permit such representation if the magnitude or likelihood of actual conflict is small and the efficiency of joint representation is great.

82. Kelbon et al., supra note 37, at 363-66 (discussing cases in favor and against such simultaneous representation); see also Levit v. Ingersoll Rand Fin. Corp., 874 F.2d 1186 (7th Cir. 1989) (the Deprizio case).

83. Kelbon et al., supra note 37, at 366; Westbrook, Fees, supra note 29, at 290-93 (discussing cases dealing with such representation issues). For a recent example of how high tempers can run when even potential conflicts of interests with insiders are alleged, see Frances A. McMorriss & Teri Agins, Weil Gotshal Criticized for Work on Leslie Fay Bankruptcy Case, WALL ST. J., August 26, 1994, at B8.

84. The recovery of debts owing from one entity to another, or of fraudulent conveyances, would create a conflict that would bar simultaneous representation. See 11 U.S.C. § 327(a) (1988); In re Vanderbilt Assoc., Ltd., 117 B.R. 678 (D. Utah 1990) (potential conflicts were not sufficient to bar law firm from representing two different limited partnerships sharing the same general partner); Cross, supra note 37, at 258-59, 266-67. But see Hassett v. McColley (In re O.P.M. Leasing Servs., Inc.), 16 B.R. 932 (Bankr. S.D.N.Y. 1982) (permitting representation of intertwined estates on the grounds that the estates’ primary goals did not conflict and any potential conflict regarding the obligations owing among the estates could be dealt with if and when actual conflict arose).

85. See Cross, supra note 37, at 266-67; Meitzer, supra note 64, at 166-68. In Hassett v. McColley (In re O.P.M. Leasing Servs., Inc.), 16 B.R. 932 (Bankr. S.D.N.Y. 1982), the court, observing that simultaneous representation has its good points and its bad points, took a wait-and-see approach to a potential conflict. See 16 B.R. at 939-40. The most interesting part of the Hassett opinion is that, although the court did not classify the potential conflict as such, it was a DTAC: once the two estates recovered some funds and then dickered over which estate was entitled to the funds, the conflict was over.

In other types of representation of general debtors, the rules are slightly more clear-cut. For example, “[p]rior or current representation of a general partner of a limited partnership will
7. Representing the Debtor in Possession or the Trustee After Having Represented the Debtor

Reading the Employment Rule of section 327(a) strictly would seem to preclude the debtor's attorney from representing the debtor in possession. Section 327(a) mandates that only "disinterested person[s]" may represent the trustee, and section 101(14) defines a "disinterested person" as being a person who does not have "an interest materially adverse to the interest of the estate . . . by reason of any direct or indirect relationship to, connection with, or interest in, the debtor." Section 327(a) appears to mean, then, that anyone who had worked with the debtor pre-petition will not be able to represent the debtor in possession. Such a blanket prohibition would make no sense; the debtor's attorney is the one who is most familiar with the debtor's legal needs and business. Hiring a brand-new attorney who has to get up to speed quickly in each and every bankruptcy case would stall most cases with potentially dire consequences. In chapter 11 cases, delay is often fatal to a reorganization. Debtors in possession may be spared this slow death by the savings clause of section 1107(b), which states that "[n]otwithstanding section 327(a) . . . , a person is not disqualified for employment under section 327 . . . by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case." In other words, if no other link exists between the lawyer and the debtor except the fact that the lawyer represented the debtor pre-petition, the bare fact that the lawyer

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almost always disqualify counsel from representing the debtor-in-possession limited partnership" because the interests of the two entities almost always conflict. Kelbon et al., supra note 37, at 367. But see id. at 368 (noting the exceptions to this general rule).


87. 11 U.S.C. § 101(14)(E) (Supp. IV 1992). One commentator has queried whether the apparent two-part test ((1) being a disinterested person who (2) does not hold or represent a materially adverse interest) collapses into a simple test of whether the attorney is "disinterested," as the concept of "disinterestedness" may subsume the requirement that the attorney not hold or represent a materially adverse interest. Ashby, supra note 26, at 438-40; see also supra note 42 and accompanying text.

88. As Christopher Ashby's Comment recognizes, the crucial question is whether a potential conflict of interest will become an actual conflict during the course of the representation. See Ashby, supra note 26, at 440-41.

is familiar with the debtor’s legal needs will not bar post-petition representation.\footnote{90} On the other hand, if the debtor owes the lawyer a large\footnote{91} amount of pre-petition legal fees, thereby preventing the lawyer from being “disinterested,” section 1107(b) will not save the appointment as counsel for the debtor in possession.\footnote{92}

8. Representing the Creditors’ Committee and an Individual Creditor Simultaneously

Section 1103(b) prohibits counsel for the creditors’ committee (and other official committees, such as an equity security holders’ committee) from representing any other entity with an adverse interest, but it specifically provides that “[r]epresentation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.”\footnote{93} Accordingly, counsel for the creditors’ committee (which represents the unsecured creditors) could represent an individual unsecured creditor simultaneously, as long as that particular creditor’s interests were not adverse to those of the committee. Likewise, counsel for an equity security holders’ committee could represent an individual, nonadverse equity security holder.\footnote{94} Of course, a prior representation of an entity with interests adverse to the committee (such as the debtor or a secured creditor with an avoidable lien) would disqualify counsel from representing the creditors’ committee under general ethics principles.\footnote{95}

\footnote{90}{See Childress v. Middleton Arms, Ltd. (In re Middleton Arms Ltd.), 934 F.2d 723 (6th Cir. 1991) (holding that section 1107(b) does not circumvent the “disinterestedness” requirement of section 327(a)).}

\footnote{91}{Courts are split as to whether the disqualifying amount must be large in terms of actual dollar amount or just proportionally large in relation to the other debts. See generally Brothers, \textit{supra} note 43 (discussing majority and minority rules on when law firms representing the debtor or pre-petition may continue to represent the debtor in possession post-petition).}

\footnote{92}{Cross, \textit{supra} note 39, at 261-62.}

\footnote{93}{11 U.S.C. § 1103(b) (1988). The lawyer for the committee presumably would not bill both the committee and the individual member for work done for the committee, but nothing precludes the lawyer from also billing the individual member for work done representing the particular individual member’s interests.}

\footnote{94}{See \textit{In re Oliver’s Stores, Inc.}, 79 B.R. 588 (Bankr. D.N.J. 1987) (applying section 1103 and determining that dual representation of creditors’ committee and individual creditors would be improper under the circumstances); Meltzer, \textit{supra} note 66, at 181-92.}

\footnote{95}{See \textit{MODEL CODE, supra} note 59; \textit{MODEL RULES, supra} note 24, Rule 1.7; Cross, \textit{supra} note 39, at 267-69.}
9. Rule 2019 and the Simultaneous Representation of Creditors or Equity Security Holders

Rule 2019 is the Bankruptcy Code’s mechanism for keeping tabs on multiple representation of creditors and equity security holders. The rule requires that entities representing more than one creditor or equity security holder must file a verified statement setting forth specific information relating to the identity of the represented parties, the nature of the claim, and the circumstances surrounding the employment (and any claims) of the representing entity. Rule 2019 appears to be honored more in the breach than in the observance, and courts seem to vary in terms of the nature of the compliance that they require. Courts occasionally do use the rule as a way of policing conflicts of interest. The Code, after all, has no other real way of monitoring whether multiple representation of creditors is appropriate (i.e., ethical) because creditors do not need to seek court approval to hire counsel to represent them in bankruptcy cases. Therefore, Rule 2019 is the only current, specific means of keeping creditors’ attorneys in line in

96. Although Rule 2019 speaks only to representation of creditors and equity security holders in chapter 9 and chapter 11 cases, at least one opinion has noted that “Rule 2019 is commonly invoked without discussion in Chapter 7 liquidations” as well. Office & Professional Employees Int'l Union v. FDIC, 962 F.2d 63, 68 n.9 (D.C. Cir. 1992).


100. See, e.g., City of Lafayette, 122 B.R. at 392 (Rule 2019 is designed to help ferret out conflicts of interest).

101. A bankruptcy court could use section 105(a), 11 U.S.C. § 105(a) (Supp. IV 1992), the catch-all section permitting the court to do whatever it needs to in order to effectuate the purposes of the Code, as a means of monitoring conflicts of interest, but not all courts would use section 105 that way. If some courts did use section 105 to police ethical problems, and others did not, section 105 would not be a very efficient enforcement mechanism.
terms of conflicts. In general, though, the traditional ethics principles regarding simultaneous representation of entities with potentially adverse interests hold true here as well.\textsuperscript{102}

III. THE TRADITIONAL ETHICS APPROACHES TO MULTI-CLIENT CONFLICTS OF INTEREST

The Bankruptcy Code, of course, is not the only source of ethics law that courts consult when trying to resolve a conflict, especially since its ethics rules are limited primarily to the representation of official entities, leaving countless other representation issues unaddressed. Courts must address conflicts of interest frequently, and in so doing, each court is guided primarily by its own particular set of ethics rules, typically—but not always—those adopted by its "home" state.\textsuperscript{103} Currently, thirty-seven states have adopted some version of the more recent Model Rules of Professional Conduct; of the remaining states, most have retained some version of the earlier Model Code of Professional Responsibility or some hybrid of the two systems.\textsuperscript{104} We must turn, then, to the Model Code and the Model Rules to discover why the current rules on conflict of interest fall short of addressing the problem of potential conflicts in bankruptcy. In addition, the American Law Institute's Restatement (Third) of the Law Governing Lawyers deserves mention for its suggested treatment of these problems.

\textsuperscript{102} See Kohn & Shuster, supra note 39, at 149-51.


\textsuperscript{104} See AMERICAN BAR ASSOCIATION & BUREAU OF NATIONAL AFFAIRS, LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 01:3-01:4 (1994).
A. The American Bar Association's Model Code of Professional Responsibility

The American Bar Association originally adopted the Model Code in 1969, and the Model Code became effective on January 1, 1970. After several amendments, the American Bar Association replaced the Model Code in 1983 with the Model Rules. A majority of states follow the Model Rules, but the Model Code continues to be operative in several jurisdictions.

The Model Code has three components: Canons, Ethical Considerations ("ECs"), and Disciplinary Rules ("DRs"). The nine Canons define the professional standards of conduct expected of an attorney. Expressed as maxims, the Canons form the framework for the development of the Ethical Considerations (the suggested guidelines for an ethical lawyer's appropriate professional behavior) and the Disciplinary Rules (the rules prescribing a minimum acceptable standard of conduct) that follow each Canon. A lawyer can only be disciplined for violating the aptly named Disciplinary Rules. The drafters designed the Canons and Ethical Considerations to be hortatory pronouncements rather than enforceable rules. Courts, however, may (and often do) use the Canons and Ethical Considerations as guidance when interpreting the Disciplinary Rules. Taken together, the Model Code's principles are supposed to guide lawyers in maintaining high professional standards. For the reasons discussed below, however, these principles do not provide sufficient guidance in the bankruptcy context.

105. AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY ix (1979) [hereinafter ANNOTATED CODE].

106. Id. at xii.

107. But not all. Some states, such as New York and California, have their own rules. See N.Y. COMP. CODES R. & REGS. 22 §§ 603.2, 691.2, 806.2, 1022.17 (1986); CAL. R. PROF. CONDUCT (1974).

108. See Kohn & Shuster, supra note 39, at 127.


110. Id.

111. Id. at 4. In fact, one of the reasons for drafting the Model Rules in their current format was that some courts had elevated the Canons and Ethical Considerations to be equivalent in force to the Disciplinary Rules. AMERICAN BAR ASSOCIATION, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 3 (1987) [hereinafter LEGISLATIVE HISTORY OF MODEL RULES].

112. Even though the principles imbued in the Model Code and the Model Rules do not
Three aspects of the Model Code affect the analysis of conflicts of interest generally: in shorthand terms, they are "client confidentiality," "disinterestedness," and "appearance of impropriety." Of these three aspects, only two—disinterestedness and the avoidance of the appearance of impropriety—present thorny issues in the context of potential conflicts in bankruptcy cases. A strict application of the confidentiality principle in bankruptcy representation, by itself, does not pose a problem. Maintaining confidentiality while representing two or more parties in interest in bankruptcy is not particularly difficult, just as maintaining confidentiality is not particularly difficult while handling several divorce cases or multiple mergers and acquisitions. Good provide enough guidance in the bankruptcy context, that does not prevent courts from using those principles to decide conflict issues in bankruptcy cases. See, e.g., National Westminster Bank USA v. Yaeger (In re RPC Corp.), 114 B.R. 116 (M.D.N.C. 1990) (using Canon 9 and section 327(a) of the Bankruptcy Code to rule on an application for employment); In re Kuykendahl Place Assocs., Ltd., 112 B.R. 847 (Bankr. S.D. Tex. 1989) (using the Model Code and the Model Rules to disqualify attorney from representing the debtor in possession); In re Glenn Elec. Sales Corp., 99 B.R. 596, 598 (D.N.J. 1988) (using Model Rules in reviewing a disqualification motion; citing In re Star Broadcasting, Inc., 81 B.R. 835 (Bankr. D.N.J. 1988), the court avers that "these rules govern the conduct of members of the bar in federal court"); In re Kendavis Indus. Int'l, Inc., 91 B.R. 742 (Bankr. N.D. Tex. 1988) (using a strict reading of Bankruptcy Code and Model Code principles to decide fee application case); In re Star Broadcasting, Inc., 81 B.R. 835 (Bankr. D.N.J. 1988) (using the Model Rules to disqualify law firm from representing two debtors in possession); In re Flanigan's Enters., Inc., 70 B.R. 248 (Bankr. S.D. Fla. 1987) (using the Model Code to rule on disqualification motion); In re McKinney Ranch Assocs., 62 B.R. 249 (Bankr. C.D. Cal. 1986) (discussing Model Code and Model Rules in ruling on fee application); Shapiro, Quandaries, supra note 37, at 25.

113. There are two meanings of "disinterestedness" that bankruptcy lawyers might intend: the general "disinterestedness" requirements of the ethics rules of their jurisdiction and the more particular "disinterestedness" rules of section 327 of the Bankruptcy Code, 11 U.S.C. § 327 (1988). The former meaning connotes a single-minded representation of a client that is not affected by outside interests; the latter is a special term of art relating to representation of certain entities in bankruptcy. I will discuss both meanings in this Article. See infra text accompanying notes 118-31, 142-47 (discussing the general meaning of "disinterestedness"); supra text accompanying notes 42-47, 86-92 (discussing section 327).

114. For a nice, brief discussion of the application of these three principles in the context of representing creditors' committees and debtors, see Meltzer, supra note 66.

115. Canon 4 provides that "[a] [l]awyer [s]hould [p]reserve the [c]onfidences and [s]ecrets of a [c]lient." MODEL CODE, supra note 25, at 21. Ethical Consideration [EC] 4-1 discusses the ethical precepts embedded in Canon 4:

Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences
lawyers can keep secrets rather nicely (and bad lawyers will soon have no secrets to keep),\textsuperscript{116} so the confidentiality requirement has no particular bankruptcy-related issues. I will, therefore, concentrate my discussion on the Model Code principles of disinterestedness and the avoidance of the appearance of impropriety. Of these two principles, disinterestedness is of more importance.\textsuperscript{117} Read strictly, the disinter-

and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

\textit{Model Code, supra} note 24, at EC 4-1 (footnotes omitted); \textit{see also id.} at EC 4-5 (lawyers should not misuse client information); \textit{id.} at EC 4-6 (the obligation to protect client information survives the termination of the attorney-client relationship). The Model Code defines "confidenc-es" as "information protected by the attorney-client privilege under applicable law, and it defines the broader term "secrets" as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client." \textit{Id.} at Disciplinary Rule [DR] 4-101(A). The lawyer's duty not to divulge confidences or secrets is virtually perpetual. That duty does not terminate upon the end of the attorney-client relationship, and a lawyer may reveal confidences and secrets only in the most limited of circumstances: when the client consents after full disclosure, when the Disciplinary Rules permit the revelation, or when the law requires the revelation. \textit{Id.} at DR 4-101(C). See \textit{generally The Firm} (Paramount Pictures 1993) (the character Mitch McDeere, played by Tom Cruise, demonstrates a very perceptive understanding of the extent to which client confidences must be protected). The confidentiality rule is broader than the attorney-client privilege and applies whether the lawyer is representing the client in litigation or non-litigation matters.

\textsuperscript{116} I assume, of course, a market in which information about bad lawyers is readily accessible. On a more serious note, it is important to recognize that, in some situations, lawyers cannot keep the confidences of one client and still remain loyal to another client who needs to know or could make use of the confidential information. In such a situation, both the Model Code and the Model Rules would bar the multiple representation of both clients. \textit{See Model Code, supra} note 25, at DR 5-105; \textit{Model Rules, supra} note 24, at Rules 1.7, 1.9; \textit{infra} part III.C.

Professor Kevin McMunigal's recent article on conflicts emphasizes that the central question on conflicts of interest is whether there is "some particular incentive which threatens the effective and ethical functioning of a lawyer"—in other words, the concept of disinterestedness. McMunigal, \textit{supra} note 12, at 831.

\textsuperscript{117} Few courts have held that the appearance of impropriety, by itself, is enough to find an
estedness rules might override the client’s own informed choice of a particular lawyer.

1. Disinterestedness and Simultaneous Representation

Canon 5 provides that “[a] lawyer [s]hould [e]xercise [i]ndependent [p]rofessional [j]udgment on [b]ehalf of a [c]lient.” EC 5-1 emphasizes how far this loyalty extends:

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.

A test of such loyalty has two distinct aspects: conflicting loyalties stemming from multiple client representation (both in litigation and non-litigation situations), and conflicting loyalties stemming from a


118. See, e.g., Model Code, supra note 25, at EC 5-14 (A lawyer should not accept or continue employment if that employment would adversely affect her loyalty to another client); id. at EC 5-15 (“A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests.”); id. at EC 5-16 (in those situations in which a lawyer contemplates simultaneous representation of two clients, the client must have the chance to consider whether she should secure separate counsel); id. at EC 5-17 (“Whether a lawyer can fairly and adequately protect the interests of multiple clients . . . depends upon an analysis of each case.”); id. at EC 5-18 (discussing the loyalty owed by corporate counsel to the client); id. at EC 5-19 (a lawyer representing several clients must explain the situation to each client and defer to each client’s wishes); id. at DR 5-106 (a lawyer simultaneously representing multiple clients may not participate in a settlement among the clients unless the clients all consent after full disclosure); cf. Model Rules, supra note 25, at Rule 2-2, discussed infra at part III.B. Although everyone knows that not all lawyers are litigators, see, e.g., Lonnie Koontes, Client Confidentiality and the Crooked Client: Why Silence Is Not Golden, 6 Geo. J. LEGAL ETHICS 283, 285-88 (1992), the Model Code and Model Rules often seem to pay only lip service to this knowledge. Cf. Russell G. Pearce, Rediscovering the Republican Origins of
lawyer's own interests. In both of these loyalty conflicts, the lawyer's exercise of her own professional judgment determines whether the representation is proper. A lawyer may accept only those representations in which she may argue her client's position (or negotiate her client's desires) independently of her own needs or the needs of her other clients. If, during the course of her representation of one client, that separation of competing needs becomes impossible, she must withdraw from one or both representations. This principle causes the

the Legal Ethics Codes, 6 GEO. J. LEGAL ETHICS 241, 276 (1992) [hereinafter Pearce].

DR 5-105 is explicit about the lawyer's duties in multiple representation situations:

(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, supra note 25, at DR 5-105 (footnotes omitted).

119. See, e.g., MODEL CODE, supra note 25, at EC 5-2 (a lawyer should not accept employment if her own interests would affect her ability to represent the client); id. at DR 5-101 (codifying EC 5-2).

120. ANNOTATED CODE, supra note 105, at 226. Professor Kenneth Kipnis has coined the useful term "conflict of obligation" to describe the situation in which a lawyer represents two parties whose interests clash; he reserves the term "conflict of interest" for a clash between a lawyer's duty to her client and her pursuit of her own interests. Kipnis, supra note 35.

121. MODEL CODE, supra note 25, at DR 5-105(B), DR 5-101, DR 5-102; see, e.g., id. at EC 5-4, EC 5-5, EC 5-6, EC 5-7, EC 5-8, EC 5-10, EC 5-11, EC 5-15. The typical current "solution" for dealing with potential conflicts of interest is that of obtaining waivers from clients. The waivers indicate that the clients have consented to simultaneous representation. Typically, these waivers also notify the clients that—should a potential conflict ripen into an actual one—the lawyer must withdraw from at least one client's representation. But obtaining these
most difficulties in bankruptcy representation. How can an attorney represent several clients when those clients' interests may potentially (although possibly only temporarily) differ?^{122}

The Model Code rejects the idea that a lawyer may represent two clients whose interests are in potential (not just actual) conflict.^{123} If the two clients have "differing interests" that do not appear to be ripe for conflict, then the lawyer may represent both clients if they both consent to the representation after disclosure.^{124} If, however, one of the clients is uncomfortable with the prospect of simultaneous representation, then the attorney cannot represent the nonconsenting client, even if the attorney herself sees no conflict in the representation.^{125} The

waivers may not suffice in the bankruptcy context, especially if no mechanism exists for the lawyer to withdraw only for the duration of the conflict.

122. Subsumed within the disinterestedness concept is the maxim that "[a] [l]awyer [s]hould [r]epresent a [c]lient [z]ealously [w]ithin the [b]ounds of the [l]aw." Id. at 32 (Canon 7); see also id. at EC 7-1, DR 7-101. In the Ethical Considerations under Canon 7, we again see the separation of the litigation model of lawyering from the non-litigation model. EC 7-3 posits that "the two roles [of advocate and adviser] are essentially different."

In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law. Id. at EC 7-3 (footnotes omitted). As facile as this distinction might be, the Model Code only flirts with it. Compare id. at EC 7-4 (permissible behavior for the lawyer-as-advocate) with id. at EC 7-5 (permissible behavior for the lawyer-as-counselor). The Preamble to the Model Rules of Professional Conduct recognizes the lawyer's many roles: as the client's representative, as an advocate, as a negotiator, as a mediator, as an officer of the court, and as an objective evaluator of legal situations. AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 7-8 (1992) [hereinafter ANNOTATED RULES]. The Model Code does not create entirely separate rules for advocates and counselors (and thankfully so, because a lawyer's role hardly ever divides into distinct components). Nonetheless, neither the litigation model nor the non-litigation model addresses how to deal with low-risk or short-term conflicts.

123. MODEL CODE, supra note 25, at EC 5-19.
124. MODEL CODE, supra note 25, at EC 5-16.
125. Id. at EC 5-19. Unlike the Model Rules, the Model Code does not deal directly with the representation of current clients against former clients. ANNOTATED RULES, supra note 120, at 162. At various times, these current/former situations were dealt with by reference to the "impropriety" rules of Canon 9, EC 4-6 (lawyers must keep confidences even after representation has terminated), or Canon 5 (lawyer should "exercise independent professional judgment"). Id.
Model Code places a great deal of emphasis on a lawyer's loyalty to her clients. What the Model Code does not do is explain how lawyers should handle temporary actual or unlikely potential conflicts that are only a "blip" in otherwise harmonious representations.

The maxims governing client confidentiality and disinterestedness/zealousness will often overlap. A lawyer who "knows too much" about a current or former client will be hard-pressed to avoid using that information (perhaps subconsciously?) when representing another client. Because all lawyers—in fact, all professionals—build their skills through their experiences, some of the knowledge about one client's business will inure to the benefit of other clients who are also in the same business. For example, an entertainment lawyer saves valuable time by not having to reinvent clauses involving residuals or royalties every time she drafts an agreement. Furthermore, a lawyer who has represented several different types of clients in a particular practice area (e.g., a lawyer who has done both debtor- and creditor-side work or one who has represented several different types of creditors) has a deeper understanding of the nature of an issue and is therefore more valuable to the client. A lawyer must avoid not the knowledge of the client's business but the misuse of that knowledge for another client's advantage. As long as no misuse occurs, then, simultaneous

126. Or the Model Rules and the Restatements. See infra parts III.B and III.C.
127. Often, the American Bar Association's Committee on Ethics and Professional Responsibility will acknowledge this overlap in Formal or Informal Ethics Opinions. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Ops. 1233 (1972), in 2 INFORMAL ETHICS OPINIONS 478 (1975) (in advising a legal service organization representing Native Americans as to whether the organization could also represent the tribe itself, the Committee raised both the client confidences and disinterestedness maxims in rendering its advice); id. at 1235, in 2 INFORMAL ETHICS OPINIONS 484 (1975) (advising the Coast Guard that each of its military lawyers should choose strictly prosecution or strictly defense work, instead of alternating 'sides,' as alternating sides gave rise to potential problems of divided loyalty and possible revealed confidences).
128. Good lawyers, of course, will take great pains to avoid using their clients' confidences inappropriately.
129. Obviously, a lawyer who has done several loan transactions and who has represented different borrowers and different banks has been exposed to several different perspectives and will be able to draw on those perspectives in future transactions. See generally Dziemkowski, Positional Conflicts, supra note 8 (discussing the ethical issues raised when lawyers represent clients who may be on different sides of related matters).
130. For example, a lawyer who routinely represents a particular bank may know that the bank is sloppy about perfecting its security interests. That knowledge would be extremely help-
representation, carefully managed, might well be both feasible and beneficial to the clients.\textsuperscript{131}

2. Avoidance of the Appearance of Impropriety

In addition to the Model Code's specific guidelines on conflicts questions, Canon 9 establishes a catchall ethics principle that calls for a lawyer to "[a]void [e]ven the [a]ppearance of [p]rofessional [i]mpropriety." Canon 9's primary justification seems to be that the avoidance of the appearance of impropriety "promote[s] public confidence in our system and in the legal profession."\textsuperscript{132} The baseline standards set forth in DR 9-101 are straightforward and quite limited in their scope. DR 9-101 enumerates those situations that connote impropriety:

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.
(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.
(C) A lawyer shall not state or imply that he is able to influ-

\textsuperscript{131} Lawyers can represent all of their clients zealously. To maintain that a bankruptcy judge would be confused by seeing one lawyer speak on behalf of several different clients is pure fiction. Confusion would only arise in two situations: (1) in the limited circumstances under which jury trials are held, jurors might be confused (possibly solved by appropriate jury instructions, although not everyone agrees that proper jury instructions alone can solve such confusion, see, e.g., Newton N. Minow & Fred H. Cate, \textit{Who Is An Impartial Juror in an Age of Mass Media?}, 40 AM. U. L. REV. 631, 648-49 n.109 (1991); Peter D. Blanck et al., Note, \textit{The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials}, 38 STAN. L. REV. 89, 97-98 n.32 (1985); cf. Richardson v. Marsh, 481 U.S. 200, 211 (1987) (assuming that jurors routinely follow their jury instructions)); and (2) in the situation where the clients themselves feel as if they were getting less than zealous representation (solved by a frank discussion at the onset of representation, possibly accompanied by some sort of waiver or disclosure letter).

\textsuperscript{132} MODEL CODE, supra note 25, at EC 9-1; see also id. at EC 9-2, EC 9-6. Others have argued that the "appearance of impropriety" standard is no longer appropriate in today's large law firms. \textit{See} Copeland, supra note \textit{brevio} 258, 261 (suggesting that the use of ethical walls should supplant the "appearance of impropriety" standard).
ence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

According to the Reporter for the Committee drafting the Model Code, the Committee intended Canon 9 as a guideline for complying with the other eight Canons, rather than serving as an entirely distinct precept.\textsuperscript{133} The Committee itself intended the three situations enumerated in DR 9-101 to be the only instances where a lawyer was \textit{required} to act in order to avoid the appearance of impropriety.\textsuperscript{134} Although some courts have decided cases on the grounds of "appearance of impropriety" alone,\textsuperscript{135} several courts have recognized that the appearance of impropriety, by itself, is not a sufficient reason to deprive a person of the counsel of her choice.\textsuperscript{136} Given its vague standards, Canon 9 is not as useful in guiding lawyers on multiple representation issues as are the guidelines concerning confidentiality and disinterestedness—and even those guidelines do not address the problems specific to bankruptcy conflicts.

The Model Code, as did the Canons before it, addressed the standards by which ethical attorneys ought to practice. But its confusing manner of presenting these standards—a mishmash of enforceable rules and unenforceable aspirations—led to the development of the Model Rules, which abandoned the "tripartite format" of Canons, Ethical Considerations, and Disciplinary Rules in favor of a more direct system in which each enforceable Rule was followed by Comments that related specifically to that rule alone.\textsuperscript{137} As we shall see, though, the problems that inhere in a system of rules focusing primarily on the adversarial model remained.\textsuperscript{138}

\textsuperscript{133} ANNOTATED CODE, supra note 105. at 398-99 (referring to interview with John F. Sutton).

\textsuperscript{134} Id. at 399.


\textsuperscript{136} ANNOTATED CODE, supra note 105. at 400-16.

\textsuperscript{137} LEGISLATIVE HISTORY OF MODEL RULES, supra note 111, at 3 (explaining that, because the Model Code's Ethical Considerations were not associated with specific Disciplinary Rules, it was difficult to tie together all of the precepts governing a given situation).

\textsuperscript{138} Most commentators believe that the Model Code and the Model Rules are based on an adversarial view of the lawyering process. See, e.g., Patricia M. Butt, Note, The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys, 6 GEO. J.
B. The American Bar Association’s Model Rules of Professional Conduct

The American Bar Association adopted the Model Rules in 1983 and amended them in 1987, 1989, 1990, and 1991. The Model Rules set forth both mandatory and permissive guidelines for a lawyer’s professional conduct. The Comments to the Rules “do not add obligations to the Rules but provide guidance” for complying with them. The themes of client confidentiality and disinterestedness are paramount; the theme of the avoidance of the appearance of impropriety appears only as a minor subtext. As in my discussion of the Model Code, I will focus on the loyalty and avoidance of the appearance of impropriety themes because the confidentiality principle does not pose a particular problem with conflicts of interest in bankruptcy.

LEGAL ETHICS 319 (1992); cf. Pearce, supra note 118. That is not to say that the Model Code and the Model Rules do not address the problems facing lawyers in non-litigation situations. They do—albeit only sporadically. See supra notes 73, 77.

139. ANNOTATED RULES, supra note 122, at ii.
140. Id. at 8.
141. In addressing the client confidentiality problem, the American Bar Association sought a more encompassing standard than that previously provided by the Model Code:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b) [to prevent certain types of crimes and to defend the lawyer herself in a controversy with the client].

MODEL RULES, supra note 25, at Rule 1.6; see ANNOTATED RULES, supra note 122, at 88-89 (comparing the scope of the Model Code, which protects information relating to the lawyer after the attorney-client relationship begins, to the scope of the Model Rules, which protects “all information about a client ‘relating to the representation’”); MODEL RULES, supra note 25, at Rule 1.6 cmt. The Comment to Model Rule 1.6 makes clear that the American Bar Association considers the effect of maintaining client confidences to be of supreme importance. In fact, so important is client confidentiality to the lawyer-client relationship that, as with the Model Code, “[t]he duty of confidentiality continues after the client-lawyer relationship has terminated.” MODEL RULES, supra note 25, at Rule 1.6 cmt.; cf. MODEL CODE, supra note 25, at DR 4-101. Unlike DR 4-101 of the Model Code, though, Model Rule 1.6 protects information that the lawyer acquires even before representation begins, and Rule 1.6 does not require the client to specify which information he considers to be confidential. ANNOTATED RULES, supra note 122, at 88-89. Rule 1.6 drops the distinction between “confidences” and “secrets,” id. at 102, instead prohibiting the lawyer from revealing “information relating to representation of a client.” Id. This continuing duty, of course, creates significant complications when a lawyer seeks to repre-
Whether we are examining the Model Code or the Model Rules, we still have the same problem: these ethics systems do not cope well with DTACs and other low-risk potential conflicts.

1. Disinterestedness and Simultaneous Representation

The Model Rules established Rule 1.7 to govern conflicts of interest. Rule 1.7 simultaneously addresses multi-client conflicts and conflicts stemming from a tension between a lawyer’s own interests and the client’s interests: it requires a lawyer to decline simultaneous representation if the representation of both clients would directly conflict or materially affect the lawyer’s ability to represent each of the clients, unless (1) the lawyer reasonably believes that the two representations will not adversely affect each other and (2) the clients consent to the simultaneous representation. The Comment to Model Rule 1.7 justifies this two-part test on the grounds that the unifying principle is the lawyer’s loyalty to the client.142 In fact, the rule ensures that the lawyer keep in mind her duty of loyalty because the rule requires her to go beyond obtaining her client’s consent to the representation. She must determine, independent of the client’s consent, that “the representation reasonably appears not to be adversely affected by the lawyer’s other interests.”143 In this way, Rule 1.7 provides a double-check against an

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142. The Comment provides:

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client’s consent . . . . On the other hand, 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 . . . .

MODEL RULES, supra note 25, at Rule 1.7 cmt.

143. ANNOTATED RULES, supra note 122, at 109; see ANNOTATED RULES, supra note 122, at 136-37. Model Rule 1.6 covers the revelation of confidential information. Model Rule 1.8 covers the use of such information without necessarily revealing it. Id. at 138-39; see also MODEL RULES, supra note 25, at Rule 1.8(b): “A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation . . . .” Compare MODEL RULES, supra note 25, at Rule 1.8(b) with MODEL CODE, supra note 25, at DR 4-101(B)(2)-(3) (Model Code assumes that the lawyer’s use of information about a client will always disadvantage the client, but Model Rule 1.8(b) does not make the same assumption).
improvident waiver of conflict by the client.

As in EC 7-3 of the Model Code, Model Rule 1.7 draws a distinction between multi-client representation in the litigation and non-litigation contexts. Both the Model Code and the Model Rules focus heavily on the litigation model in determining when representation is appropriate. Because the Model Rules assume that lawyers can generally spot actual and potential conflicts at the beginning of a case, rules based on that model make no exception for potential conflicts that are low-risk at the onset or for potential risks that are only temporary. This is where the Rules fall short: lawyers could use Rule 1.7 to justify multiple representation in bankruptcy cases if the potential for conflict is small. A lawyer cannot know, however, at the time that she decides to represent a client, that a potential conflict will never become actual, given that the occurrence of the conflict will depend on what decisions other participants make during the course of the case.

2. The “Former Client” Complication

In a jurisdiction using the Model Rules, the regulations governing multi-client conflicts prohibit a lawyer from representing clients with directly adverse interests. As the positions of the multiple clients clash less directly, the ethical regulations governing representation be-

144. ANNOTATED RULES, supra note 122, at 109-27; see MODEL RULES, supra note 25, at Rule 1.7 cmt.

145. Even though Model Rule 1.7 focuses on litigation, the drafters did not intend for it to apply only in a litigation context.

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer’s relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

MODEL RULES, supra note 25, at Rule 1.7 cmt.

146. Not to mention the Model Code and the Restatements. See supra discussion in Part III(B) and infra discussion in Part III(D).

147. If a representation is forbidden under the Model Rules, then Model Rule 1.16 provides that the lawyer must withdraw. The Model Code also requires withdrawal upon discovery of an actual conflict. See MODEL CODE, supra note 25, at DR 5-105.

148. ANNOTATED RULES, supra note 122, at 111-12; MODEL RULES, supra note 25, at Rule 1.7; see also id. at Rule 1.9 (lawyer cannot represent a current client against former client in the same matter, absent the former client’s consent). The same prohibition would apply under the Model Code. MODEL CODE, supra note 25, at DR 5-105.
come more difficult to apply. The more a matter is "related" to prior representation, and the more adverse the clients' positions are, the less acceptable joint representation becomes.\textsuperscript{149} If the clients' positions are only adverse in a general sense (e.g., two business competitors) and the matters are unrelated, the lawyer may represent both interests as long as the clients consent after disclosure and the lawyer reasonably believes that the representation will not be adversely affected.\textsuperscript{150} Model Rule 1.9 prohibits an attorney from representing a present client against a former client in the same or a substantially similar matter in which the interests of the two clients are materially adverse, unless the former client provides informed consent. As does Model Rule 1.7, Model Rule 1.9 emphasizes both the client confidentiality\textsuperscript{151} and disinterestedness\textsuperscript{152} principles. To have both Greenpeace and whalers on

\textsuperscript{149}. ANNOTATED RULES, supra note 122, at 112-13.

\textsuperscript{150}. Id. at 113; LEGISLATIVE HISTORY OF MODEL RULES, supra note 111, at 56; cf. MODEL CODE, supra note 25, at DR 5-105(C) (simultaneous representation is permitted if the lawyer can represent each client's interest and if each client consents to the representation); id. at EC 5-15 (indicating that it is more likely for simultaneous representation of litigation clients to run afoul of DR 5-105(C) than would simultaneous representation of non-litigation clients); ABA Formal Opinion 90-358 (Sept. 13, 1990), in AMERICAN BAR ASSOCIATION, RECENT ETHICS OPINIONS (lawyer who is given confidential information by a would-be client may only represent another client in the same or a related matter if either (1) the information imparted by the would-be client is not critical to the representation of the other client and the lawyer takes steps to keep the imparted information confidential or (2) the imparted information is critical to the other client's representation but the would-be client consents to the representation of the other client). In situations in which the new representation is unrelated to the firm's representation of its former client, even obtaining waivers from the former client may not be necessary.

\textsuperscript{151}. See MODEL RULES, supra note 25, at Rule 1.9 cmt.

\textsuperscript{152}. See id. That Comment, however, sneaks in a reference to the appearance of impropriety standard as well:

The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a twofold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

\textit{Id.} As the American Bar Association pointed out, there is no counterpart to this Model Rule in the Model Code. Prior to the Model Rules, the Model Code handled such conflict
the same client roster would require some prestidigitation.\textsuperscript{153}

3. Imputed Disqualification

Even though Model Rule 1.9 only alludes to disinterestedness as a ground for refusing representation in the multiple-client context, Model Rule 1.10 clarifies how far such loyalty to the client must stretch. A lawyer representing one client while she worked at one firm might later switch firms, and her representation of the client at her old firm can preclude other lawyers at her new firm from representing competing interests.\textsuperscript{154} The Comment to Model Rule 1.10 notes that “[a] group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.” The Comment also notes that, at least for inside counsel, a question may exist as to the identity of the true client (e.g., a corporation, subsidiary, or affiliate). Model Rule 1.10 is similar to DR 5-105(D).\textsuperscript{155} In the bankruptcy con-

questions under the rubrics of Canon 9 (Appearance of Impropriety), Canon 4 (Client Confidences), or Canon 5 (Exercise of Independent Professional Judgment). \textit{ANNOTATED RULES, supra} note 122, at 162.

153. Obviously, the lawyer cannot represent Greenpeace and whalers in a lawsuit where the two clients are suing each other. Still, I suppose that the lawyer could represent the clients in different matters, given appropriate waivers and meticulous observation of any ethical walls. I would like to be a fly on the wall during the “informed consent” meeting, though.

154. The Rule provides that:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

\textit{MODEL RULES, supra} note 25, at Rule 1.10.

155. \textit{See ANNOTATED RULES, supra} note 122, at 175. Other Model Rules also touch upon the
text, then, if a lawyer in a law firm represents a bank (often a secured creditor), that representation might preclude another client of that firm (say, another creditor) from obtaining that firm's representation in the same bankruptcy case.

The Model Code and Model Rules assume that conflicts generally behave like ratchets—that those conflicts that are unlikely to occur or that are DTACs are no different in kind from actual, direct, permanent conflicts identifiable at the onset of representation. The presence of any conflict causes the lawyer to then ask herself whether the conflict is one that the client may waive or whether she must withdraw from (or refuse to begin) representation. Such inquiry is, of course, appropriate and necessary; however, when the conflict is extremely low-risk or brief, the client may regard withdrawal (or the refusal to represent) as a severe penalty. Thus, her waiver, even if it is technically voluntary, is given only very reluctantly—it is just the lesser of two evils. Imagine, for example, the situation in which a client—say, a creditor in the bankruptcy case—has waited through two or three years of a reorganization. Some party in interest finally proposes a confirmable plan. The end is in sight. If that client’s lawyer now discovers a temporary conflict relating to the proposed plan and has to withdraw from the representation, unless the client waives the conflict, how likely

need to maintain the sanctity of client confidences. See, e.g., Model Rules, supra note 24, at Rule 1.17 & cmt.; id. at Rule 2.2 & cmt.

156. See, e.g., Model Rules, supra note 25, at Rule 1.7 & cmt. 2 ("If such a conflict [actual or potential] arises after representation has been undertaken, the lawyer should withdraw from the representation"); Model Code, supra note 25, at EC 5-15 ("If a lawyer accepted such employment [by multiple clients in a litigation situation] and the [client’s] interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially"). EC 5-15 goes on to note that, in non-litigation matters, it is possible to represent clients with "potentially differing interests" but that "if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients."

157. Model Rule 1.7 differs from DR 5-105 in that Rule 1.7 clarifies the initial inquiry that the lawyer must make before she may represent the client, and it specifies, in the context of simultaneous representation, what disclosures the lawyer must make to the client before the client may decide whether to consent to the simultaneous representation. Annotated Rules, supra note 122, at 108-09.

158. One commentator has argued that a client may agree to waive even a serious and permanent conflict, depending on how her lawyer explains the conflict to her. See D. Kent Meyers, Ethical Considerations in the Representation of Multiple Creditors Against a Single Debtor, 51 Am. Bankr. L.J. 19, 24 (1977).
is the client, exhausted from years of delay, to refuse to waive the conflict? More likely, unless the conflict is extremely serious, the client will prefer to avoid withdrawal at all costs. Indeed, the client may well resent the fact that her lawyer “discovered” a conflict in medias res, whether or not that particular conflict was foreseeable.\textsuperscript{159}

C. The Restatement (Third) of the Law Governing Lawyers

The Restatement (Third) of the Law Governing Lawyers,\textsuperscript{160} promulgated by the American Law Institute, provides another approach to the treatment of conflicts of interest.\textsuperscript{161} As did the older Model Code and Model Rules, the Tentative Drafts of the Restatement (Third) of the Law Governing Lawyers\textsuperscript{162} discuss the lawyer’s duties of confidentiality,\textsuperscript{163} disinterestedness, and zealousness, but this Restatement, which

\textsuperscript{159} If we were to reject the ratchet theory of conflicts and adopt the two-part inquiry that I suggest \textit{infra} in Part V, the client would not experience the same level of resentment if the lawyer were to withdraw during the “actual” part of the conflict.

\textsuperscript{160} Hereinafter Restatement. The American Law Institute (ALI) is charged with the responsibility of describing (and sometimes revising) legal doctrine through its promulgation of the Restatements. \textit{See} MORRIS L. COHEN ET AL., FINDING THE LAW 395-404 (9th ed. 1989). Members of the ALI include well-respected legal theorists, jurists, and practitioners. \textit{Id.} at 395.

\textsuperscript{161} As such, the Restatements are a counterpart to the Model Rules and the Model Code. For a good discussion of the development of these Restatements, see \textit{Symposium: The Evolving Restatement of the Law Governing Lawyers}, 46 OKLA. L. REV. 1 (1993).

\textsuperscript{162} Cited with reference to the particular Tentative Draft version number.

\textsuperscript{163} The Restatement defines “confidential client information” very carefully:

Confidential client information consists of information about a client or a client’s matter contained in oral communications, documents, or other forms of communications, other than information that is generally known, if the lawyer or the lawyer’s agent learns or comes into possession of the information:

1) During the course of representing a client or consulting with a prospective client, regardless of the relationship of the information to the matter involved in the representation or consultation; or

2) At a time before a representation begins or after it ends, the information concerns a specific client (other than a prospective client whom the lawyer never represents as a client), and the information is entrusted to the lawyer under circumstances reasonably indicating that the lawyer is to employ and safeguard the information in behalf of the client whom the information concerns.

\textit{Restatement (Third) of the Law Governing Lawyers} § 112 (Tent. Draft No. 3, 1990). Comment c to section 112 clearly indicates that section 112 is much more closely related to the Model Rules’ expansive concept of protected client information than it is to the Model Code’s
is still in draft form, is less litigation-focused.\textsuperscript{164}

1. Zealousness,\textsuperscript{165} Loyalty, and Disinterestedness

According to section 28, a lawyer owes four duties to her client:

[A] lawyer must:
(1) In matters covered by the representation, act in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after disclosure and consultation;
(2) Act in the matter with reasonable competence and diligence;
(3) Safeguard the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ adversely to the client powers arising from the client-lawyer relationship; and
(4) Fulfil [sic] any valid contractual obligation to the client.\textsuperscript{166}

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more restrictive concept. \textit{Id.} § 112 cmt. c. The Restatement protects confidential client information from disclosure by prohibiting the lawyer from revealing such information if (1) "there is a reasonable likelihood that [disclosure would] adversely affect a material interest of the client" or (2) the client has told the lawyer not to use the information. \textit{Id.} § 111(1). As with the Model Code and the Model Rules, section 111's mandate to protect confidential information from disclosure does not present significant difficulties in the bankruptcy context. One commentator has observed that the Model Code, the Model Rules, and the Restatement form a continuum as to what constitutes protected confidential information, with the Model Code protecting the least, and the Restatement protecting the most, information. See Fred C. Zacharias, \textit{Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?}, 6 GEO. J. LEGAL ETHICS 903, 907 (1993).

\textsuperscript{164} For example, the Restatement observes that:

Confidentiality is of concern to lawyers in every area of law practice and in virtually every representation. Confidentiality is naturally of great significance in litigation practice. Confidentiality rules, however, reach far beyond litigation. For example, many of the rules concerning conflicts of interest (see Chapter Eight) apply to representations outside litigation and are founded on concepts of confidentiality that are not limited by the evidentiary doctrines.


\textsuperscript{165} Comment d to section 28 explains that zealousness does \textit{not} include nastiness. See \textbf{RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS} § 28 cmt. d (Tent. Draft No. 5, 1992).

\textsuperscript{166} \textit{Id.} § 28; \textit{cf. MODEL CODE}, supra note 25, at Canon 6 (in addition to the duties of preserving confidentiality and maintaining disinterestedness, lawyers must act competently on behalf
Of these four duties, the ones listed in section 28(3) are of the most concern in the bankruptcy context.\textsuperscript{167}

Section 28(3) requires the lawyer to "avoid impermissible conflicting interests." Section 201 states that "[a] conflict of interest exists if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, to a former client, or to a third person."\textsuperscript{168} Section 201 names the only prohibited conflicts.\textsuperscript{169} Just those conflicts of interest that entail "a substantial risk that the material and adverse effect will occur" fall within section 201.\textsuperscript{170} In the end, the Restatement, like the Model Code and the Model Rules, leaves to the client much of the decision as to whether the conflict of interest is, in fact, impermissible,\textsuperscript{171} given the costs of

\footnotesize

of their clients); MODEL RULES, supra note 25, at Rule 1.1 (same).

\textsuperscript{167} Note that the Restatement does not focus on an appearance-of-impropriety standard. In fact, section 201 explicitly rejects such a standard:

\begin{quote}
The [conflict of interest] standard is different from the appearance-of-impropriety standard sometimes used by courts to define the scope of impermissible conflicts . . . . [T]he appearance of impropriety concept suggests a standard so inherently subjective that it could be used to justify prohibiting, without careful examination, any relationship that a reviewing tribunal wished to condemn.
\end{quote}

\textsuperscript{168} RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 201 cmt. c(iv) (Tent. Draft No. 4, 1991). The Restatement goes on to observe that the Model Rules, too, rejected the notion that the appearance of impropriety should be a factor in determining whether a conflict was impermissible. See id. § 201 Reporter's Note cmt. c(iv).

\textsuperscript{169} Id. § 201.

\textsuperscript{169} Comment a to section 201 observes that "the definition [of conflict of interest] is intended to exhaust the legal prohibition. Except as specifically noted hereafter, any situation not within the definition should not be considered to be a prohibited conflict of interest." Id. § 201 cmt. a. The authors of the Restatement explained their rationale for prohibiting conflicts of interests that materially and adversely affect a client: they wanted to preserve the lawyer's loyalty to the client, to enhance the lawyer's competence and effectiveness, to preserve the client's confidential information, and to make sure that all sides of a disputed matter were heard completely. See id. § 201 cmt. d. At the same time, the drafters recognized that too broad a prohibition of simultaneous representation could "impose significant costs on lawyers and clients alike." Id.

\textsuperscript{170} According to comment c(iii), "substantial means that, in the circumstances, the risk is significant and plausible, even if not probable. The standard requires a greater showing than that the effects may occur or that there is a mere possibility that they may occur; almost nothing would be excluded by a standard that low." Id. § 201 cmt. c(iii); see also id. § 201 cmt. c(iii), illus. 3; Miller, supra note 23, at 177-80.\textsuperscript{171}

\textsuperscript{171} Section 202 permits a client to waive a conflict of interest; see also RESTATEMENT
disqualification based on a conflict.\textsuperscript{172}

2. Simultaneous Representation of Clients in Bankruptcy Cases

If the Restatement were to be applied specifically to bankruptcy cases, two sections would govern the simultaneous representation of more than one client: section 209 covers simultaneous representation in civil litigation, and section 211 covers simultaneous representation in non-litigated matters.\textsuperscript{173} The two sections are similar.\textsuperscript{174} In non-liti-

\begin{quote}
(THIRD) OF THE LAW GOVERNING LAWYERS § 202 cmt. b (Tent. Draft No. 4, 1991). Comment e to section 202 permits partial or conditional consent. Id. § 202 cmt. e. In addition, the lawyer might be able to avoid the conflict by limiting the scope of the representation. See id. § 201 cmt. c(iii); Miller, supra note 23, at 178-79.

On the other hand, not every situation in which there is a conflict can be solved by waiver. Comment g to section 202 points out that three types of conflicts are non-waivable:

(i) conflicts between adversaries in the same litigation; (ii) conflicts in which one or more of the clients is legally incapable of giving consent; and (iii) other circumstances rendering it unlikely that the lawyer will be able to provide adequate representation to one or more of the clients.


172. The Restatement explains:

The costs imposed on a client by disqualification of the client's lawyer can be substantial. At a minimum, the client must incur the costs of finding a new lawyer and educating that lawyer about the facts and issues. The costs of delay in the proceeding are borne by the client in part, but also by the tribunal and society. Disqualification is often the most effective sanction for a conflict of interest and will likely continue to be vigorously applied where necessary to protect the integrity of a proceeding or an important interest of the moving party. In applying it, however, tribunals must avoid creating a tactic by which one party may impose unwarranted delay, costs, and other burdens on another.

Id. § 201 cmt. c(ii).

173. Although bankruptcy cases are "litigated," in that they fall under a bankruptcy court's jurisdiction and involve orders, motions, and the like, much of the day-to-day client counseling involves business strategies and other "non-litigation" activities. Debtors in possession negotiate financing arrangements. See 11 U.S.C. § 364 (1988 & Supp. IV 1992). Secured creditors decide whether to obtain court permission to foreclose on their collateral. See id. §§ 361, 362. Outsiders contemplate buying estate assets. See id. §§ 363, 1129. Parties dealing with financially troubled entities engage in pre-bankruptcy preventive planning at the same time that the troubled entities consider whether to seek bankruptcy protection.

174. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 211 cmt. b (Tent. Draft No. 4, 1991) (noting that both sections concentrate on demonstrating loyalty and maintaining confidentiality while "[p]roviding economical legal services"). But section 211 does not involve
gated matters (e.g., negotiations either in the shadow of bankruptcy or during the bankruptcy itself), section 211 prohibits simultaneous representation “if there is a substantial risk that the lawyer’s representation of one or more of the clients would be materially and adversely affected by the lawyer’s duties to one or more of the other clients.”

Section 211 does, however, contemplate a business lawyer’s active role in advising her clients, in a way reminiscent of Model Rule 2.2. The

the complicating factor of practice before a tribunal. Id. § 211.

175. Id. Comment a explains that “[t]his Section examines personal and business planning among multiple clients, for example, and assisting clients to accommodate their differences short of litigation.” Id. § 211 cmt. a. Comment b notes that “[a]s in litigated cases, multiple representation not involving litigation requires a lawyer to remain loyal to clients and protect their confidential information. Providing economical legal services is also a relevant concern. The orderly administration of tribunals is, however, not a relevant factor for the issues in this Section.” Id. § 211 cmt. b (citations omitted).

Comment b recognizes that there are two types of non-litigation issues that might arise under section 211:

First, the multiple clients may have common interests with respect to some issues, although even in such situations there may be a potential for later conflict. Second, the multiple clients may have different interests that need to be resolved if they are to accomplish a common objective. Often, both situations will be present in a single representation.

Id.

176. For a discussion of Model Rule 2.2, see infra notes 266-82 and accompanying text. Like Model Rule 2.2, section 211 observes that the lawyer representing several clients has a special role:

Rarely are the interests and objectives of multiple clients wholly identical. Commonly, the clients agree on many issues but have others remaining to be resolved. As to the differences, the lawyer must ascertain at the outset what kind of assistance the clients require. Arbitration or mediation of some of the issues, for example, might better serve the clients’ interests than would joint representation. In other cases, a lawyer representing both clients might be able to help reconcile their differences.

Id. § 211 cmt. d (citations omitted). Comment d goes on to note:

Some counseling situations involving multiple clients could develop into adversarial, even litigated, matters later. Even if the possibility of litigation is substantial at the outset of the representation, and even though consent would not permit the lawyer to represent all parties if litigation should result, a lawyer could accept multiple representation in an effort to reconcile the differences of the clients short of litigation. The lawyer should inform the clients, however, that the effort to overcome differences might ultimately fail and require the lawyer’s partial or complete withdrawal from the matter.

Id. (citations omitted).
problems with Rule 2.2 itself, though, also plague any Restatement-based use of the lawyer as intermediary.\footnote{177}

In civil litigation, section 209 adds a second requirement. Not only does section 209 prohibit a lawyer from representing more than one client (absent client consent)\footnote{178} "if there is a substantial risk that the lawyer's representation of one of the clients would materially and adversely affect the lawyer's representation of another client in the matter," but that section also prohibits any representation that would pit the lawyer against another of her current clients, whether or not the representation in the two matters is related.\footnote{179} In the abstract, section 209 might well preclude the representation of multiple clients in a bankruptcy case. As the Restatement authors explain,

When multiple claimants assert claims against a defendant who lacks sufficient assets to meet all of the damage claims, a conflict of interest is also presented. Indeed, whether or not the defendant has assets sufficient to pay all claims, a proposed settlement may create conflicts because the plaintiffs may differ in their willingness to accept the settlement. Before any settlement is accepted on behalf of multiple clients, their lawyer must inform each of them about all of the terms of the settlement, including the amounts that each of the other claimants will receive if the settlement is accepted. The difficulty that may be encountered in negotiating a settlement in such circumstances is inherent in multiple representation.\footnote{180}

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\footnote{177} See infra notes 266-82 and accompanying text.

\footnote{178} Section 209 recognizes that clients might have good reason to consent to simultaneous representation:

[O]n the other hand, clients may have countervailing concerns about reducing the costs of litigation and achieving the benefits of a coordinated position in their cases. Particularly in view of potential positive benefits, clients should not invariably be required to have separate counsel but normally should be allowed to consent under § 202.


\footnote{179} \textit{Id.} § 209.

\footnote{180} \textit{Id.} § 209 cmt. d(i). Comment d emphasizes that "[m]ultiple representation is also precluded when the clients are nominally on the same side of a lawsuit but in fact have such different interests that the lawyer's representation of one will have a material and adverse effect on the other." \textit{Id.} § 209 cmt. d.
The primary reason behind such a strict interpretation of the conflicts rules in the Restatement is the loyalty principle, although the Restatement recognizes that the client’s desire for the lawyer’s loyalty is directly linked to the client’s choice of counsel.\textsuperscript{181} The client wants to choose the lawyer to whose loyalty she will lay claim.

Obviously, the trick in determining how section 209 would apply in a bankruptcy case is in ascertaining how substantial is the risk of “material and adverse effect” in the simultaneous representation and whether or not a direct clash of current clients would result.\textsuperscript{182} The “material and adverse” determination, in turn, depends on how well the lawyer could predict the permutations of potential conflicts that may arise at any time in the case.\textsuperscript{183} Just as the conflicts rules of the Model Code

\textsuperscript{181} The Restatement provides:

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. Because the matters are unrelated, no confidential information is likely to be used improperly, and no tribunal need fear that the same lawyer will appear to take both sides in a single proceeding. 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. Thus, a lawyer may not sue a current client on behalf of another client, even in an unrelated matter, unless consent is obtained under the conditions and limitations of § 202. 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. Restraint is particularly appropriate when the conflict is created by a merger or other event that occurs after representation has begun.

\textit{Id.} § 209 cmt. e (emphasis added).

\textsuperscript{182} The Reporter’s Note to section 209 observes that “[t]he strictness of the prohibition [against representing clashing clients] may be tempered when the client being sued is one for whom the lawyer is performing services other than handling litigation.” \textit{Id.} § 209 Reporter’s Note cmt. e.

\textsuperscript{183} The more experienced bankruptcy lawyer will often be able to describe to her clients exactly what types of conflicts might arise during the case. For example, secured creditors are likely to fight with some party in interest, at some time during a bankruptcy, about the valuation of their collateral. See 11 U.S.C. § 506(a) (1988 & Supp. IV 1992). Unsecured creditors will be watching every post-petition deal that the debtor makes to monitor whether the debtor is giving away too much in the way of unencumbered assets to which they might otherwise look for repayment of their claims. These unsecured creditors are likely to engage in a battle with someone regarding at least one post-petition transaction. The problem is not necessarily what
and the Model Rules require lawyers to act as psychics in dealing with temporary conflicts, so, too, does section 209—all three sets of standards have the same flaw. Unless we are prepared to ban multiple representation in order to have an overinclusive protection against the harm of late-developing conflicts of interest, we must find other ways to reconcile the client's right to counsel with the lawyer's desire to avoid situations in which she must argue both sides of an issue simultaneously.

3. Imputed Disqualification

Where the Restatement truly differs from the Model Code and the Model Rules is in the area of imputed conflicts. The latest version of the Restatement approves of screening\(^{184}\) (sometimes referred to as "ethical walls" or "Chinese walls").\(^{185}\) Assume that a law firm represents several clients in many different practice areas (for example, real estate, banking, securities, etc.) and that two clients of the firm find themselves to be creditors in the same bankruptcy. May the clients consent to simultaneous representation by the firm as a whole on the condition that different lawyers in the firm handle their matters and do not discuss the representation or share information? Although the Model Code and the Model Rules do not address fully the idea of screening as a means of avoiding conflicts of interest,\(^{186}\) section 203 provides that

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\(^{184}\) The ALI's decision to approve screening was widely criticized at the 1993 annual meeting of the Professional Responsibility Section of the Association of American Law Schools. See Susan R. Martyn, Conflict about Conflicts: The Controversy Concerning Law Firm Screens, 46 Okla. L. Rev. 53 (1993). Some authors argue that the Model Rules themselves incorporated screening as a solution to the imputed disqualification problem, although not all states have agreed with an interpretation of Model Rule 1.11 that would permit the use of ethical walls.


\(^{185}\) The term "Chinese wall" is obviously a misnomer: the "wall" separating sides of a firm representing conflicting clients is paper-thin, not rock-solid and permanent. At best, the appropriate cultural stereotype would have been "Shoji screens," referring to interior home design in Japan. So much for the theory that lawyers are sociologically au courant.

\(^{186}\) See MODEL RULES, supra note 25, at Rules 1.9, 1.10 (covering disqualification and imputed disqualification); Charles W. Wolfram, Parts and Wholes: The Integrity of the Model Rules, 6 GEO. J. LEGAL ETHICS 861, 877 (1993) [hereinafter Wolfram, Parts and Wholes] (noting that the Model Rules originally only discussed screening of former government lawyers who entered private practice); Miller, supra note 23, at 158-64; cf. MODEL CODE, supra note 25, at DR 9-101, EC 9-3 (no mention of screening): Miller, supra note 23, at 162.
a conflict preventing one lawyer from taking on a representation bars the entire firm from taking on that representation unless all of the affected clients consent or the imputed conflict is removed pursuant to section 204.\textsuperscript{187} The Restatement acknowledges that imputation can often cause more harm than good.\textsuperscript{188}

Because imputation is often not the best solution, at least from the client’s perspective, the Restatement has approved the use of screening devices in some circumstances.\textsuperscript{189} Section 204 gives some guidance as to what measures would constitute effective screening.\textsuperscript{190} As I will discuss in Part IV, screening at the onset of the case might provide a partial solution to the problem of temporary conflicts, but it does not provide a complete solution.

All in all, the Restatement seems to address some of the conflicts issues more satisfactorily than do the Model Code and the Model Rules. Less bound to a model that emphasizes litigation and more cog-

\textsuperscript{187} RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 203 (Tent. Draft No. 4, 1991). Section 204 provides that section 203’s restrictions do not apply when (1) the previously involved lawyer’s affiliation with the previously uninvolved lawyer has ended and the previously involved lawyer did not communicate any confidential information to the previously uninvolved lawyer; (2) the previous involvement concerned representation of a former client and the confidential information relating to the former client would be unlikely to be used against that client; (3) the previously involved lawyer is a former government lawyer, and the firm has adopted adequate screening methods and notice provisions. Id. § 204.

\textsuperscript{188} Id. § 204 cmt. b.

\textsuperscript{189} Miller, supra note 23, at 165-66.

\textsuperscript{190} To satisfy section 204:

Screening must assure that confidential client information, if any, that the personally-prohibited lawyer possesses will not pass from that lawyer to any other lawyer in the firm. The screened lawyer should be prohibited from talking to any other person in the firm about the matter as to which the lawyer is prohibited, sharing documents about the matter, and the like. Further, the screened lawyer should receive no direct financial benefit, based upon the outcome of the matter, such as a financial bonus or a larger share of firm income. In any litigated matter, ordinarily a tribunal should require that affidavits, signed by the primarily-prohibited lawyer and by a lawyer principally responsible for maintaining and supervising the screening measures and describing the screening procedures in detail, be made a part of the record in the matter. A tribunal may require a bond to assure compliance and require that other appropriate steps be taken. Violation of the procedures should be remediable on motion of any affected client.

nizant of some of the current practices of lawyers in addressing ethics issues, the Restatement may come closer than do the Model Code and the Model Rules in setting priorities for all of a lawyer's conflicting responsibilities. All of these ethical frameworks, though, are far from perfect, and none of them are "the law," although legislatures or courts can adopt them (and most have adopted one set of ethical pronouncements or another).\footnote{See supra note 112 and accompanying text.}

IV. THE TREATMENT OF POTENTIAL CONFLICTS IN OTHER PRACTICE AREAS

Parts II and III discussed the web of rules governing whether lawyers can take on simultaneous representation in bankruptcy cases. The overlapping rules—the Bankruptcy Code, the various ethics codes, and the proposed new rules contained in the Restatement—make for a great deal of confusion as to conflicts that may crop up briefly and then disappear. In bankruptcies, the nature, extent, and duration of a conflict may be unpredictable, so the guidelines for dealing with a conflict should be as clear as possible. How do we develop these guidelines, and what should they be? Although bankruptcy cases involve more issue-dependent side-switching than do other subject areas in law, other areas are similar enough to provide some guidance as to how a resolution of multiple representation problems might be accomplished. In this Part, I will discuss how such conflicts of interest are handled in the areas of class actions, corporate law, and family law. I have chosen this order of presentation to reflect a continuum of analogy: the law of class actions, although seemingly the most closely related area to bankruptcy (an "us against the debtor" scenario), is actually the least helpful,\footnote{Corporate law is a close second in the contest of which area of law is the least helpful as an analogy. See infra notes 215-27 and accompanying text.} and the area of family law, although not "commercial" in nature, is actually the most helpful.

A. Class Actions

In many ways, the dynamics of litigation in a class action case mirror the dynamics of litigation in a bankruptcy case: a multiplicity of parties is involved in the case; each "side"\footnote{Plaintiffs or defendants.} shares some of the
same concerns but maintains distinct individual interests within a "side"; the coordinated efforts of the litigants provide economies of scale; and resolution of the case provides a final hearing as to the parties involved.\textsuperscript{194} In the abstract, a bankruptcy case is nothing but a specialized class action case with all of the plaintiff-claimants attempting to get at least a fair share from the defendant-debtor.\textsuperscript{195} Why, then, should we treat conflicts of interest in bankruptcy any differently from the way that we treat conflicts of interest in "normal" class actions?\textsuperscript{196}

The answer hinges primarily on the types of conflicts of interest that routinely arise in the two types of cases. Two traditional forms of conflicts may arise in "normal" class actions. First, a conflict may develop between the class of plaintiffs and the class attorney, who may wish to settle the case in order to maximize her return.\textsuperscript{197} The pres-
sures of not overlawyering the case may cause the attorney to settle for a smaller but more certain sum for the plaintiffs than the plaintiffs might have received if the case had gone to trial. Second, not all of the class plaintiffs may agree on an appropriate settlement, in terms of the amount of damages or other remedy. Especially in situations in which the plaintiffs seek an institutional remedy, such as in a sex or race discrimination case, the plaintiffs may disagree as to which remedy is the most appropriate. That disagreement, once it occurs, should necessitate separate counsel for each group of plaintiffs that wants the court to choose a different remedy from the one proposed by the majority of plaintiffs. At the onset of the class action, both of

on whose behalf the action was initiated").

198. "Overlawyering" in this context means spending more lawyer time on the case than the fees will justify.

199. See Kane, supra note 197, at 398.

200. Professor Rhode's term. See Deborah L. Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183 (1982); Kane, supra note 197, at 396.

201. Other differences exist between the two types of cases. For one thing, creditors do not have as much of an opportunity to "opt out" of the bankruptcy case as do potential plaintiffs in a class action. See Fed. R. Civ. P. 23. Once a creditor is scheduled or appears in the case, that case will be a final adjudication of the creditor's rights against the debtor. See 11 U.S.C. §§ 727, 1141, 1228, 1328 (1988 & Supp. IV 1992). Moreover, in a typical class action (as opposed to a typical bankruptcy case), the "pie" is more likely to be enough to go around. But see id. § 301 (no requirement in Bankruptcy Code that a debtor voluntarily filing for protection under the Bankruptcy Code must be insolvent). Therefore, one of the most common reasons for conflicts in bankruptcy cases—that of wanting to grab as much of the pie as possible for oneself before the pie is completely consumed—may not present itself in class actions.

202. Class action plaintiffs must meet four criteria before the court will certify the class: numerosity, commonality, typicality, and representativeness. See Fed. R. Civ. P. 23(a); General Tel. Co. of the S.W. v. Falcon, 457 U.S. 147, 150 n.2 (1982) (citing Rule 23(a)); Weiss v. York Hosp., 745 F.2d 786, 807 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985); Franks v. The O'Connor Corp., No. 92-0947, 1993 U.S. Dist. LEXIS 3415, at *5 (E.D. Pa. Mar. 17, 1993); In re Broadhollow Funding Corp., 66 B.R. 1005 (Bankr. E.D.N.Y. 1986). The representativeness factor requires all of the members of the class to be similar. If the class members' preferences for particular remedies diverge, the court should certify subclasses, and each subclass should have separate counsel. See Premier Elec. Constr. Co. v. National Elec. Constrs. Ass'n., 814 F.2d 358, 366 (7th Cir. 1987) ("Different members of the class may suffer different kinds of damages, but this is a reason to establish subclasses (or to appeal the approval of a one-sided settlement) rather than to increase the number of separate suits."); Floyd v. City of Philadelphia, Nos. 446, 2157, 1978 Phila. Cty. Rptr. LEXIS 44, at *20 (Aug. 18, 1978) ("Class action conduct of trials of the issues of damages appears possible, therefore, by way of creation of subclasses for certain groups of claimants, but requiring other claimants to be ex-
these types of conflicts are potential conflicts. Should one of these types of conflicts arise, however, the actual conflict is unlikely to be temporary. If the lawyer settles prematurely or the plaintiffs disagree on whether an injunction or a fine is the appropriate solution, that rift will probably not heal for the duration of the lawsuit. In bankruptcy cases, however, the temporary nature of many rifts forces a different dynamic on the conflicts analysis.

Still, enough similarities exist between a “normal” class action and a bankruptcy case to merit examination of the ways in which courts supervising class actions handle conflicts. Many of the conflicts that courts catch when hearing class action cases come about during the court’s review of settlement agreements, when the issue of attorneys’ fees comes to the fore. In a recent essay, Dean Mary Kay Kane discussed some of the methods that courts have used to ferret out conflicts of interests in class actions. These methods include increasing the scrutiny of attorneys’ fee petitions;\textsuperscript{203} separating the negotiation of the settlement from the negotiation of the fees;\textsuperscript{204} appointing a guardian to oversee the settlement process;\textsuperscript{205} spending more time evaluating the adequacy of the class representatives during the certification process;\textsuperscript{206} and increasing the number of subclasses, with separate lawyers representing each subclass.\textsuperscript{207} Dean Kane found none of these solutions particularly helpful: most of them led to no more than “adequate” settlements that did not optimize the benefits flowing to the class plaintiffs,\textsuperscript{208} and the subclass solution only ignored the reason for mounting a class action in the first place.\textsuperscript{209} Dean Kane suggested that a better solution would involve increased judicial scrutiny of potential conflicts of interest—not just when reviewing proposed settlement agreements but throughout the entire process.\textsuperscript{210} That scrutiny would take the form of an informal approach in which lawyers disclose all

\begin{itemize}
  \item Kane. \textit{supra} note 197, at 399.
  \item \textit{id.}
  \item \textit{id.} at 399-400.
  \item \textit{id.} at 400-01.
  \item \textit{id.} at 401.
  \item \textit{id.} at 400.
  \item \textit{id.} at 401-02. “Assuming that the special dilemmas for class counsel can be resolved by relying on a greater number of more independent class representatives is simply sticking one’s head in the sand.” \textit{id.} at 402.
  \item \textit{id.} at 403.
\end{itemize}
potential conflicts,\(^{211}\) not to obtain a ruling from the court as to whether they could represent the class, but in a sort of cooperative venture with the court, in which the court takes an active role in resolving the conflicts.\(^{212}\)

Some of Dean Kane's suggestions could apply in the bankruptcy context. Certainly, a bankruptcy judge could take an active role in monitoring conflicts of interest. Whether the bankruptcy judge should take an active role in resolving the conflicts is another matter.\(^{213}\) Although the judge can determine, at the commencement of the case, the actual and likely potential conflicts, the DTACs and the remote potential conflicts may never come to fruition—they depend on the strategic choices that the parties make during the case. Active judicial resolution of the conflicts arising from the business decisions that the parties make during the case will eventually become just another factor that the parties will consider when making their issue-by-issue decisions.\(^{214}\) They will take the judge's known predilections into account when deciding whether one of their business decisions might cause the judge to rule that an impermissible conflict had occurred. If the parties can accommodate this extra cost of making decisions, then this solution holds possibilities. But the solution still does not address the more basic problem: what does the client with a DTAC do for counsel during the time when the DTAC is activated?\(^{215}\)

\(^{211}\) *Id.* at 405. When the lawyer does disclose all potential conflicts, would that list of potentially adverse parties include non-lawyer staff people, working with the lawyer, who have some personal connection with the case? What if, for example, in class actions involving antitrust allegations with the airlines, a lawyer's secretary had purchased airline tickets during the relevant period? That secretary might be a possible plaintiff. Could the lawyer represent a defendant airline under those circumstances?

\(^{212}\) *Id.* Dean Kane's suggestion is a reaction to, and a rejection of, Professor Deborah Rhode's proposal that courts should force counsel to make detailed disclosures, both about what information counsel disseminates to the class and about counsel's own connections to the class. *Id.* at 404 (discussing Rhode, *supra* note 200, at 1197-1202, 1249-51). Dean Kane feared that Professor Rhode's proposal would be time-consuming, expensive, and—in the end—too formal to garner anything but "pro forma compliance." *Id.*


\(^{214}\) Like the Heisenberg uncertainty principle, DAVID HALDIDAY & ROBERT RESNICK, PHYSICS 1125 (1978); J. RICHARDS ET AL., MODERN COLLEGE PHYSICS 848 (1962), the judges will find themselves affecting directly that which they thought they were only monitoring.

\(^{215}\) *See infra* part V.
B. Counsel for Business Associations

The lawyer for a corporation, whether she is "inside" or "outside" counsel,\(^{216}\) owes her loyalty to the corporation itself—that inchoate entity whose owners (the shareholders) may be too numerous to count and whose physical representatives (the officers and directors) may have interests quite distinct from those of the client corporation.\(^{217}\) Although the lawyer takes her marching orders from the officers and directors, she is not their legal representative.\(^{218}\) As long as the offi-

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\(^{216}\) "Inside" counsel refers to lawyers who are actual employees of the company. Law firm lawyers, who represent a company from the "outside," are often called "outside" counsel. "Inside" counsel used to be called "in-house" counsel until law firm counsel, not always quick on the uptake, finally figured out their corresponding sobriquet.


Not all theorists agree that the entity theory is appropriate for all business associations. See Wendy Kilbride, Note, Identifying the Client in the Corporate Setting and the Attorney-Client Privilege, 6 GEO. J. LEGAL ETHICS 1129, 1135-37 (1993) (discussing reasons for modifying the entity theory when dealing with close corporations); Note. An Expectations Approach to Client Identity, 106 HARV. L. REV. 687, 689 (1993) [hereinafter Expectations]. In Expectations, the Note author argues that limited partnerships and close corporations should not be subject to the entity theory because the people who make the decisions for entities such as limited partnerships or close corporations are more closely identified with the business association than are their counterparts in publicly held corporations. Id. The Note suggests the elimination of the bright-line "entity as client" rule in favor of a case-by-case approach: the more "personal contact" the lawyer has with the decision maker for the entity, the less likely it is that the decision maker will understand that the lawyer is not representing him in his individual capacity. Id. at 691. As interesting as Expectations is, the currently accepted approach is better. The attorney for the business entity can simply explain the entity theory to the decision maker.

\(^{218}\) MODEL CODE, supra note 25, at EC 5-18 (corporate lawyer owes her allegiance to the corporation and may only represent individual interests in addition to representing the corporation if those individual interests do not conflict with those of the corporation); MODEL RULES,
cers and directors act in the best interests of the corporation, no conflict of interest exists. When the lawyer advises her corporate client, the traditional view is that if the board of directors is taking its fiduciary responsibilities seriously, the lawyer may safely take her instructions from the board. 219 But when the officers', directors', or shareholders' interests diverge from the corporation's interests (such as in a takeover situation 220 or in cases of fraud by the management), 221 the corporate lawyer is going to find herself pulled in many directions at once. 222 If she finds herself in the position of being asked to advise both the corporation and those who, although they control the corporation, are not behaving as fiduciaries, her choice is clear: she must remind the controlling parties that she represents only the corporation. 223 She cannot advise persons having an interest adverse to her corporation client. Instead, her best course, in a conflict situation, is to insist that the adverse parties retain separate counsel—a necessary but unpleasant task, as she is unlikely to relish telling the person who signs her salary check that she is not that person's lawyer. 224 If the corporation's lawyer believes that the board is not behaving as a responsible fiduciary should behave, she must try to persuade the board to act in the corporation's best interests. If she cannot, she may withdraw from her representation of the corporation. 225

A corporate lawyer's position is, in some ways, very different from the position of a bankruptcy lawyer representing two or more clients with potential conflicts. If the corporate lawyer represents only the

supra note 24, at Rule 1.13 (corporate lawyer represents the corporation and must act in the corporation's best interests); id. at Rule 1.7 (describing the parameters under which a lawyer may represent more than one client simultaneously); McCall, supra note 217, at 627-40.

219. See, e.g., Jonas, supra note 216, at 621-22; McCall, supra note 216, at 625.

220. See, e.g., Jonas, supra note 216, at 617; McCall, supra note 216, at 623.

221. See, e.g., George D. Reycraft, Conflicts of Interest and Effective Representation: The Dilemma of Corporate Counsel, 39 Hastings L.J. 605, 611 (1988).


223. See MODEL CODE, supra note 25, at EC 5-18; MODEL RULES, supra note 25, at Rule 1.13; see also Jonas, supra note 216, at 620-22.

224. See Jonas, supra note 216, at 621.

225. MODEL RULES, supra note 25, at Rule 1.13; McCall, supra note 216, at 637 (discussing Rule 1.13).
corporation and has not agreed to represent individual interests simultaneously, then she has just one client (even though direct communication with that one client is literally impossible), not several. That client may speak with several voices—officers, directors, or shareholders—but the lawyer’s loyalty is clear. Only when the corporation’s lawyer represents the corporation as well as an individual is the analogy to bankruptcy counsel somewhat apt. But the analogy is not completely appropriate: if the individual’s interests become adverse to the corporation’s interests, they are likely to stay adverse. The director who does not want to be replaced in a takeover that is, in fact, good for the corporation (or the officer who is embezzling funds) will probably not have a chance to “return” to the corporation after the immediate conflict is resolved. Corporate law does not provide us with a solution to the problems of low-risk potential conflicts or temporary actual ones.

C. Family Law

Even in the relatively non-commercial arena of family law, the law of conflicts of interest cannot accommodate temporary conflicts. For example, a recent commentator noted that issues involving care for the elderly often involved conflicts of interest between the aged relative and

226. Instead, the lawyer generally communicates with the board of directors. See Jonas, supra note 216, at 619; McCall, supra note 216, at 626.
227. To the extent that the director truly does only have a DTAC during a takeover (or that the officer is wrongly accused of embezzlement), the analogy to the bankruptcy situation is appropriate. I have not, however, uncovered any creative solutions to the DTAC problem in the corporate law context.
228. As with corporate counsel, the prevailing view in partnership law is that counsel for the partnership owes her loyalty to the partnership and not to the individual partners. See, e.g., Miller, supra note 23, at 183-84. But see, e.g., Roberts v. Heim, 123 F.R.D. 614, 625 (N.D. Cal. 1988) (attorney for partnership automatically represents the partners as well, at least for partnership business); Wortham & Van Liew v. Superior Court, 233 Cal. Rptr. 725, 727 (1987); McCain v. Phoenix Resources, 230 Cal. Rptr. 25, 28 (1986). The American Bar Association has adopted the entity representation philosophy for partnerships. See Miller, supra note 22, at 184; see also In re Hickory Mills Apts., 133 B.R. 898, 901 (Bankr. S.D. Ohio 1991) (holding that the Bankruptcy Code adopted the “entity” theory). Certainly, most courts have found that the simultaneous representation of both the partnership and the general partner poses an impermissible conflict of interest. See, e.g., In re TMA Assoc., 129 B.R. 643, 647 (Bankr. D. Colo. 1991) (citing several cases in accord); Hickory Mills, 133 B.R. at 901. But see cases cited supra, note 84.
the other family members. Some or all of the family members might want to arrange for long-term institutional care of a parent with Alzheimer's disease. The parent might prefer not to be institutionalized. As Patricia Batt points out, the Model Code and Model Rules would prohibit a lawyer from representing the parent and the other family members simultaneously, absent consent by all parties. Yet this situation is not the typical adversarial model—the family members all want what is best for the family as a whole (whatever that might be).

If ethical rules force each family member to seek an individual attorney, none of them can hire the "family" attorney because the family attorney's prior representation of some or all of the family members would conflict with the current representation. The sheer expense involved in hiring separate lawyers for each person in the family would certainly cause tension and might possibly create a conflict of its own between those family members with means to hire lawyers and those without means. A hypertechnical interpretation of conflicts here could cause more harm than good. After all, the resolution of the institutionalization issue might be the only conflict that this family unit faces. The "intermediation" model of Model Rule 2.2 is unsatisfactory because any family member who withdraws consent to the intermediation forces the lawyer to withdraw from representing all of the family members.

One commentator has suggested that the lawyer considering simultaneous representation should treat the family unit as corporate lawyers treat corporations: take the marching orders from the "corporation" and not from the individuals who comprise the corporation. If irreconcilable conflicts make the analogy inapt, then the lawyer should not represent the family. The idea is intriguing but not completely satisfying. The question of who speaks for the family is a more difficult


230. Id. at 325-31. The Note does not address which provisions of the Model Code would prohibit the simultaneous representation, but DR 5-105 would apply.

231. Of course, the parent in question might just be looking out for his or her own interests, which would be more of a typical adversarial situation.

232. Id. at 330-31.

233. For a discussion of Model Rule 2.2, see infra, part V.A.4.


235. Id. at 339-42.

236. Id.
one than the question of who speaks for the corporation. At least with business associations, there are legally designated humans who are responsible for communicating the decisions of the entity. Setting aside the issue of whether the traditional patriarchal hierarchy describes the modern family, no one in a family unit is automatically accorded "head decision-maker" status and, more than likely, different family members are each given responsibility in different areas. Family law is like bankruptcy law in that family members are likely to form issue-specific alliances, and those alliances will consist of different constituencies, depending on the issue. Unlike bankruptcy cases, however, families usually hire lawyers for specific, discrete issues and not for long-term representation with shifting issues over the course of an entire case. The alliances shift issue by issue, but each issue does not necessarily require legal representation. Because representation in family law issues is typically limited and not long-term, the harm stemming from an abrupt withdrawal of counsel is probably not as serious as that withdrawal might be in the bankruptcy context. Moreover, the identity of the "client" keeps shifting in family law, making the question of simultaneous representation particularly complex and not very helpful for our purposes.

In adoption law, simultaneous representation of both sides (birth mother and adoptive parents) also poses difficult ethical problems. In independent adoptions (as opposed to adoptions administered by public agencies), the adoptive parents usually use a lawyer to facilitate the adoption. The birth mother usually does not hire a lawyer. When the adoptive parents' lawyer explains the adoption forms to the birth mother, the lawyer runs the risk of advising both sides of the transaction. Even if the lawyer makes it clear to the birth mother that the lawyer represents only the adoptive parents, the birth mother may still be able to argue that she was unduly influenced (or even actually repre-

237. Ask any parent. Children may fight like cats and dogs with each other but are only too happy to gang up on the parents when they can gain some strategic advantage by doing so. And what parent has not been the victim of a scheme in which the child has participated in some forbidden activity by claiming that "Mom [or Dad] said I could"? Every now and then, life imitates law.


239. Id. at 169-70.
sented) by the adoptive parents' lawyer.\footnote{Id. at 171, 182-86.} The adoption, then, is a potential conflict situation: if the birth mother later changes her mind about the adoption, she may fight to rescind the adoption agreement.\footnote{Id. at 171.} The lawyer cannot represent both sides in such a fight, no matter which code of ethics applies.\footnote{See MODEL CODE, supra note 25, at DR 5-105; MODEL RULES, supra note 25, at Rule 1.7.} The lawyer might try to act as an intermediary,\footnote{See MODEL RULES, supra note 25, at Rule 2.2.} but Model Rule 2.2 is fraught with its own problems.\footnote{See infra part V.A.A.} Even before a fight over the child develops (assuming that a fight ever does), the American Bar Association and several state bar associations have indicated that the lawyer should not try to advise both sides.\footnote{Amlung, supra note 237, at 176-77.} Some courts have permitted lawyers to represent both sides after full disclosure,\footnote{Id. at 179-80.} while others are adamantly opposed to simultaneous representation.\footnote{Id. at 181-82.} Both approaches involve transaction costs for the birth mother.\footnote{Prohibiting simultaneous representation would require both sides to hire lawyers, which would increase the overall expenses for the birth mother, whose legal expenses are usually covered by the adopting parents. Permitting simultaneous representation with institutionalized safeguards would still increase transaction costs because it would increase the amount of time that the lawyer spends counseling her clients—even those savvy ones who do not need as much "ritualized" advice.} These alternatives provide no guidance in the bankruptcy context because, once the birth mother decides to fight for the return of her child, the potential conflict is both actual and permanent. The independent adoption situation does not involve temporary side-switching. None of these analogies—class actions, corporate law, or family law—has provided us with an answer for problems relating to low-risk potential conflicts or DTACs.

V. OF EFFICIENCY, LOYALTY, AND REALITY: SOLVING THE PROBLEM OF TEMPORARY CONFLICTS

Balancing two goals—giving the client the lawyer of his choice and avoiding a situation in which the lawyer is forced to argue both sides at once—is a difficult task in the bankruptcy context. The current ethics
rules fulfill the second goal but often defeat the first. In order for the reader to gain an appreciation for the solution that I will propose, I will first discuss possibilities that I ultimately rejected.

A. Trial and Error: Proposals That Failed to Meet Both Goals

1. Clarifying the Use of Client Consent and Waivers Under Current Ethics Rules

Using the hypothesis that less-dramatic tinkering with the current system is often better than wholesale change, the least controversial revision would be to embue bankruptcy law with more explicit guidelines as to what lawyers might tell their clients before asking them to consent to simultaneous representation. After all, if the lawyer does not find any direct conflicts adversely affecting representation and the client makes an informed decision that he still wishes to retain the lawyer's services after disclosure of the possible risks, what more is necessary? The problem is that the ethics rules do not yet provide for temporary withdrawal during a conflict, and, therefore, those rules do not address DTAC situations. Moreover, knowing that a potential conflict might become actual is not the same thing as knowing which two parties are likely to clash; therefore, the scope of the waiver letter might not be explicit enough to pass muster. We need

249. Either through case law or legislation.
250. See MODEL CODE, supra note 25, at DR 2-110; MODEL RULES, supra note 25, at Rule 1.16. Carving out the scope of the representation is the closest thing to temporary withdrawal, but what happens if the carved-out scope prophesied by the waiver letter does not represent accurately the DTAC that arises two years into the representation? Does the carved-out scope that is only directly on point solve the problem?
251. There is also the question of whether courts would permit debtors in possession or trustees to waive conflicts based on simultaneous representation. See In re Kuykendahl Place Assocs., Ltd., 112 B.R. 847, 851 (Bankr. S.D. Tex. 1989) (refusing to permit debtor to waive conflict); In re Patterson, 53 B.R. 366, 374 (Bankr. D. Neb. 1985) (noting that the debtor in possession cannot waive a conflict of interest). But see In re McKinney Ranch Assocs., 62 B.R. 249, 257 (Bankr. C.D. Cal. 1986) (permitting the general partners of debtor in possession to waive a potential conflict of interest).
252. There are some other "minor tinkering" possibilities that I also rejected as not being drastically different from the current ways in which lawyers view this particular conflicts problem. One of these trendy solutions would have involved the use of a statistical method called Bayesian decision-making. Bayesian decision-making, in essence, might provide some sort of "educated guess" at the beginning of the bankruptcy case that weights the probability of conflicts becoming actual and permanent or temporary and issue-specific. Although I will not go into the
something different from what the current ethics rules provide.

2. Expanding the Role of the Creditors' Committee and the Bankruptcy Court

Still, working within the system is easier than changing it entirely, and the next least-drastic possibility involved using the Bankruptcy Code itself for a solution. Could there be some sort of way in which creditors might be protected by sources other than their own lawyers? An obvious candidate would be the chapter 11 creditors' committee. The theory behind establishing creditors' committees is that some unsecured creditors will have claims too small to justify hiring lawyers to represent them in the case; therefore, committee members are supposed to behave as fiduciaries of these unsecured creditors (as well as the larger unsecured creditors). Clients who want to have some representation in bankruptcy cases might be able to use the creditors' committee

mathematics of Bayesian decision-making here, the idea behind it is that, by assigning probabilities to each of various outcomes, one can predict the likelihood that a given outcome (here, how "permanent" a conflict might become) would occur. See generally SAMUEL A. SCHMITT, MEASURING UNCERTAINTY: AN ELEMENTARY INTRODUCTION TO BAYESIAN STATISTICS (1969).

But, because Bayesian decision-making is really just a sophisticated form of an educated guess, this solution is nothing more than a superficial reassurance to the lawyers who would have to assign their own "guessed" probabilities to the various potential conflicts; in other words, Bayesian decision-making is probably more descriptive of what lawyers actually do in this situation than it is prescriptive.

Another possibility, now receiving increasing attention in the literature, is the use of mediation to solve disputes. See, e.g., Lisa A. Lomax, Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Programs, 68 Am. Bankr. L.J. 55 (1994). If we want clients to choose their own lawyers without fear that a DTAC will force a reluctant waiver or the withdrawal of counsel, then one possibility is to refer the DTACs to some sort of mediation, perhaps with a panel of available lawyers able to represent the "conflicted-out" clients in that mediation. (The possibility of using arbitration to ease the problem of conflicts in bankruptcy cases is not as attractive as mediation, because arbitration, as a more formal procedure than mediation, differs little from "traditional" litigation in its use of attorneys.) When the DTAC ends, the clients pick up where they left off, with their original choice of counsel familiar with the ins and outs of the overall bankruptcy case. The advantage of mediation is clear: the clients would be able to keep their chosen lawyers for most of the case. But there are disadvantages as well. The client faced with a conflict that arises in the middle of the case will still have to use a different lawyer for the mediation. Depending on the complexity of the issue, that client may need to use a lawyer who is also familiar with the client's particular business. Moreover, mediation may not be appropriate under the circumstances. Not all issues in bankruptcy can be settled; sometimes one party must simply lose so that the case as a whole can continue.
instead of retaining their own lawyers. As with any other committee, however, sometimes an individual member's interests may clash with the collective interests of the entire group of unsecured creditors. If a clash arises, then the committee cannot act as the representative for all of the creditors with respect to that issue, and we are back to the situation in which the creditors need separate representation for as long as the clash exists (the DTAC).

Creditors' committees are not the proper solution to the conflicts problem for other reasons. First, such committees are usually appointed only in chapter 11 cases, primarily because they are too expensive to use in cases filed under the other chapters.\(^{253}\) Adding such an expense in other chapters would tend to hurt small creditors rather than help them.\(^{254}\) Second, committee members are not usually bankruptcy lawyers, and even the committee's lawyer cannot be expected to pay individual attention to the bankruptcy needs of each unsecured creditor. Nor should she: the committee's lawyer is supposed to represent the common interests of the constituent creditors vis-à-vis the estate and is not supposed to represent any particular creditor's special interests.\(^{255}\) If the creditor needs the committee to perform somehow as a forum for legal advice and does not want the committee to have just a general watchdog role, that creditor is going to be sorely disappointed. Finally, even if the Code mandated committee representation for all parties in interest, that solution would not resolve the dilemma of a lawyer who wants to represent a party in interest in the case and an "outsider" (e.g., a potential purchaser of the debtor's assets). In short, creditors' committees cannot provide the complete solution.

Nor could the bankruptcy courts alone—given the current ethical guidelines—be able to determine, at the commencement of the case, which potential conflicts are "acceptable" risks. It has been suggest-

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254. Among other things, the creditors' committee might incur administrative expenses that would need to be reimbursed by the estate. 11 U.S.C. §§ 507(a)(1), 503(a), (b)(3)(D) (1988). As administrative expenses mount, less money is left available in the pot for general unsecured creditors (who, if they have small claims, are the ones least likely to hire their own counsel).

255. Unless she really does represent that individual creditor as well. Note that the committee's counsel is compensated as an administrative expense for activities that benefit the estate, not for activities that benefit only individual creditors. See 11 U.S.C. §§ 507(a)(1), 503(b)(1) (1988).
ed\textsuperscript{256} that it was the intention of the drafters that, at least with respect to the employment of the counsel for the debtor in possession, the bankruptcy court should determine the likelihood that a potential conflict of interest will evolve into a disabling actual conflict of interest. If the potential conflict of interest is such that the court doubts whether counsel will objectively represent the interests of the bankruptcy estate, the court should disqualify counsel. By requiring that a specific, identifiable potential or actual conflict exist, courts will respect the important right to counsel of choice while protecting the integrity of the bankruptcy process.\textsuperscript{257}

Unfortunately, the drafters blurred the line between “maintaining the integrity of and public confidence in the bankruptcy process”—an important goal—and “avoiding the appearance of impropriety,” which at best is a concept that courts use to break ties after other ugly ethical gaffes appear in a case.\textsuperscript{258} More importantly, the drafters failed to distinguish between ratchet-type potential conflicts that stay actual for the duration of the representation (the easy cases) and low-risk, short-term potential conflicts (the hard cases). And even if courts were able to rule on potential conflicts of interest without separating the easy cases from the more difficult ones, the Comment’s proposal only works in cases where the court must rule on the employment of counsel in the first place. The bankruptcy court does not review the employment of creditors’ individual counsel or counsel for outside entities, such as third-party purchasers from the estate, unless some party in interest raises an objection to that employment. If the Code required a court to rule on the employment of everyone’s counsel, the administration of bankruptcy cases would grind to a halt. The Bankruptcy Code as currently written, therefore, cannot help us resolve the problem.

3. Ethical Walls

If the goal in obtaining bankruptcy representation is to minimize lawyering costs while maximizing the efficacy of the client’s legal representation, one way of keeping down costs is the use of shared resources. Large law firms attract clients because, even though the

\textsuperscript{256} See Ashby, supra note 27.
\textsuperscript{257} Id. at 457 (footnotes omitted).
\textsuperscript{258} Id. at 457-58.
lawyers' fees are usually quite high, each lawyer within the firm does not have to bear all of the costs associated with legal practice. The lawyers bear a proportionate share of support expenses, such as secretaries, computers, and library materials, and the lawyers benefit from their colleagues' expertise.\textsuperscript{259} Is there a way, in bankruptcy cases, for several clients of a large firm to benefit from these reduced costs without running afoul of ethical constraints?

Currently, the answer to that question is generally "no." Because lawyers should not misuse client confidences, courts are reluctant to permit several lawyers in the same firm to represent many different clients in the same case if the clients have potentially conflicting interests. Courts fear that lawyers might breach confidences (in idle elevator chatter, for example). Whether or not that fear is justified, courts, as well as the drafters of the various ethical rules, have resisted the broad use of devices, such as ethical walls, that might facilitate simultaneous representation.\textsuperscript{260}

Ethical walls developed as a method of segregating lawyers leaving government practice and entering private practice from the rest of the private firm. The segregation ostensibly prevented the law firm lawyers from having to turn down clients who had previously dealt with the government attorney. Later, ethical walls evolved as a way of segregating even private-sector lawyers, who were entering a new firm, from the new firm's other lawyers. To the extent that the incoming lawyer possessed actual confidential information about a client, many courts have refused to use ethical walls to shield that lawyer's information from another, adverse client of the firm.\textsuperscript{261} Other courts have been more lenient.\textsuperscript{262} But there is a difference between establishing screening devices to facilitate lawyer movement among firms and establishing screening devices merely to facilitate additional client representation.\textsuperscript{263} The former is just another means of preserving the sanctity of

\textsuperscript{259} In a large law firm, the lawyer can simply walk across the hall to ask a tax expert a question; she would not need to make an appointment with a tax expert at another firm. Given lawyers' perpetual fear of losing clients to other firms, a lawyer might feel less vulnerable using her "own people" rather than using another firm's expert.

\textsuperscript{260} See supra notes 184-90 and accompanying text.

\textsuperscript{261} See Miller, supra note 23, at 158-61.

\textsuperscript{262} Id. at 160-61.

\textsuperscript{263} Not all courts accept ethical walls as a legitimate method of preventing or shielding conflicts. See generally Miller, supra note 23, at 158-61 (discussing cases approving or disapproving screening). A recent Note argues that screening for purposes of permitting simultaneous
confidences; the latter may conflict with the lawyer’s duty of loyalty to her clients by gerrymandering artificial lines of demarcation that may not make sense from the firm’s long-term institutional perspective. If the law firm does not take those lines of demarcation seriously, then the screening devices are useless.

But those devices do not have to be useless. Is screening to facilitate simultaneous representation, absent any lawyer movement between firms, really a breach of the duty of loyalty? On the one hand, if a firm represents Client A and Client B in the same case, and the two clients are not directly adverse at the onset of the case, no absolute loyalty implications are involved in the simultaneous representation. On the other hand, if Client A and Client B are directly adverse at the case’s commencement, the law firm’s duty of loyalty is directly implicated. Could the lawyers circumvent the duty of loyalty by using ethical walls? Certainly, lawyers in different firms could each represent one of the two clients. Can the lawyers create “mini-firms” with ethical walls?264

The threshold question is whether the clients themselves should be allowed to determine whether the “mini-firm” idea is appropriate for them. Should the decision rest on client-by-client consent, or should the ethical rules decide the matter once and for all? The answer depends on whether our initial assumption—that clients want to maximize lawyer efficacy while minimizing costs—is valid. If that assumption is valid, then the clients are in the best position to decide whether the decreased costs associated with shared lawyer resources outweigh the risks to confidentiality and loyalty. An across-the-board rule would be overinclusive. Lawyers can design the screens to reduce any danger of breached confidences,265 and the clients can make the final decision

representation (as opposed to representation involving a current client who is adverse to a former client) is—among other things—unworkable. See Lee E. Hejmanowski, Note, An Ethical Treatment of Attorneys’ Personal Conflicts of Interest, 66 S. Cal. L. Rev. 881, 921-22 (1993).

264. Professor Epstein has suggested that large law firms may divide into subunits in order to address conflict of interest problems. See Epstein, supra note 8, at 586-87. Although I disagree with Professor Epstein’s theory that, eventually, conflicts of interest will force firms to choose whether to represent only plaintiffs or only defendants, id. at 584-85, his discussion of the mental calculus a lawyer must make in deciding which client to represent is right on point. If a possibility exists that choosing to represent a client with a small stake in a big case will foreclose the representation of a client with a larger stake in the same case, the lawyer has to be rather careful which telephone calls from the two clients she answers first. Id. at 588.

265. See supra notes 184-90 and accompanying text.
on how much the factor of lawyer loyalty is worth to them.

The advantages of screening, though, can only go so far. Not every lawyer works in a large law firm. Smaller-sized firms may find impractical the type of screening protections that Restatement (Third) of the Law Governing Lawyers section 204 and various courts have proposed. But screening might be a partial solution to avoid problems with low-risk potential conflicts.266

4. Model Rule 2.2

Model Rule 2.2 establishes a separate rule for lawyers who "represent[] two or more parties with potentially conflicting interests."267 The rule permits the lawyer representing more than one client to act as intermediary among clients, after obtaining the informed consent of all the clients, if the lawyer "reasonably believes" that acting as intermediary is in the clients' best interests and will not adversely affect those interests.268 Should the matter become one in which intermediation among clients is no longer feasible, or if one of the clients requests that the lawyer no longer act as an intermediary, the lawyer must withdraw from the representation of all of the clients "in the matter that was the subject of the intermediation."269 The advantages of Rule 2.2

266. Should those potential conflicts become actual, screening will not necessarily eliminate the perception that something is fishy. For example, onlookers could be puzzled if, during a confirmation hearing of Widget Co.'s proposed plan, lawyer A of Tinkers, Evers, and Chance appears on behalf of Immense Lending Institution to oppose the plan and lawyer B of Tinkers, Evers, and Chance appears on behalf of the creditors' committee to support the plan. Those bemused onlookers will wonder whether Tinkers, Evers, and Chance has some sort of law firm monopoly on clients. But as long as Tinkers, Evers, and Chance screened lawyer B from lawyer B at the time that they both represented clients dealing with Widget Co., and as long as ILI and the creditors' committee made informed decisions approving of the simultaneous representation and of the screening devices, the two most important parties affected (ILI and the committee) should not be perturbed by the battle of the two lawyers in court. And, of course, if Tinkers, Evers, and Chance filed its Rule 2019 statement properly, the court will also know the score and will not be surprised by the two lawyers' skirmish.

267. ANNOTATED RULES, supra note 122, at Rule 2.2 cmt.

268. MODEL RULES, supra note 25, at Rule 2.2(a). In a recent article, Professor John Dzienkowski astutely observes that the Rule's use of the word "intermediary" is overinclusive because it would embrace even those representations in which some sort of group goal is not an object. John S. Dzienkowski, Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession, 1992 U. ILL. L. REV. 741, 771-74 [hereinafter Dzienkowski, Intermediaries].

269. MODEL RULES, supra note 25, at Rule 2.2(c).
are obvious: if the lawyer can help her clients work out a problem of some sort, the clients save time and expense, and they all retain their counsel of choice in the matter. If the clients cannot resolve the problem, they start the next phase—lawyer-to-lawyer combat—with fresh counsel, so none of them retains the “counsel of choice” advantage to the detriment of the other clients.

Model Rule 2.2, though, has its disadvantages as well. Foremost among these disadvantages is the question of exactly when the rule applies. Model Rule 1.7 governs conflicts of interest among present clients, and Model Rule 2.2, by its own terms, contemplates at least a clashing of client interests. Moreover, Rule 2.2 does not explain precisely what the lawyer should do in her function as intermediary. Is she supposed to behave as a formal mediator or as an informal facilitator? Furthermore, the rule has addressed neither who the “client” is for the purposes of the intermediation nor what the lawyer’s confidentiality obligations are to that “client.”

Professor John Dzienkowski valiantly attempts to fill in the gaps left by the drafters of Rule 2.2. He defines “intermediation” as “the consummation of a transaction or resolution of a dispute between or among multiple [clients] with potentially conflicting interests.” In an intermediation, which can occur in a litigation or non-litigation context, “the lawyer seeks to adjust the clients’ rights and responsibilities in a private manner outside of a traditional forum.” Professor Dzienkowski also focuses on exactly whom the lawyer-as-intermediary represents: although the lawyer still represents each client who is a party to the intermediation, she must consider not only each client’s own best interests but also the best interests of the clients, who as a group, have submitted themselves to intermediation. Even though Professor Dzienkowski acknowledges that his view of the lawyer’s “client(s)” in an intermediation is not a perfect solution, inasmuch as

270. See Wolfram, Parts and Wholes, supra note 186, at 881-85.
271. See Dzienkowski, Intermediaries, supra note 268, at 745-46, 767-68.
272. Is the “client” the group of clients undergoing the intermediation, or are there several “clients”? See id. at 745-46, 769.
273. See id. at 746, 769-71.
274. Dzienkowski, Intermediaries, supra note 268.
275. Id. at 775, 777.
276. Id. at 777.
277. Id. at 778-86.
the lawyer will have to develop a way to reconcile each client’s individual interests with the group’s interests, his definition of “client” probably comes closest to capturing what the drafters of Rule 2.2 intended. He believes that the lawyer should take an active role as an intermediary by “identify[ing] the interests of the clients at the beginning of the representation . . . [and] ensuring that the clients have considered fully both the alternatives and the consequences of the agreement.”

In order to serve all of the lawyer’s intermediation clients as zealously as possible under the circumstances, some of the Model Rules’ strict duties of representation must change: to accommodate Rule 2.2, “the traditional duty of diligent and zealous representation [must be modified] . . . [n]aturally, the traditional duty of loyalty also must be modified to recognize that the lawyer is representing multiple conflicting interests.” Rule 2.2’s duty of impartiality is what makes the intermediation work without bending the lawyer’s other duties so far that they break. The rule prohibits favoritism and promotes a loyalty to the group as a whole.

Even if we take Professor Dzienkowski’s exposition of Rule 2.2 as the proper way to understand that rule, the rule itself acts as a solution only when the clients agree ahead of time to undergo intermediation. But the pre-planned intermediation is not likely in bankruptcy. More likely, several clients of the same lawyer will find themselves suddenly embroiled in a conflict that must be decided quickly. For example, one client might be a secured creditor and another one might be a third party interested in buying some of the debtor’s assets (including the secured creditor’s collateral). The third party and the secured creditor could disagree about the proper valuation of the collateral. If time is of the essence in the sale, the two clients might not want to sit down with the lawyer and begin a protracted negotiation on valuation. In those instances where the clients have the time to attempt

278. Id. at 792.
279. Id. at 802.
280. Id. at 802-03.
281. Which it is.
282. Often, valuation conflicts come down to a “Sez who?” “Sez me!” type of dickering. In the long run, the “value” of collateral is not an absolute; value is tied to the purpose for which the valuation is made, as well as to the proposed disposition or use of the property. See 11 U.S.C. § 506(a) (1988).
an intermediation, Rule 2.2 might save the day if the intermediation is successful. If the intermediation fails, though, the clients lose the lawyer for the duration of the bankruptcy case—a very harsh result.

B. A Solution That Meets Both Goals: Sliding Scales of Conflicts

For various reasons, none of the above proposals is completely satisfactory. The ethics rules’ use of waivers does not handle toggle-switch conflicts problems. A bankruptcy court does not have the time to monitor every creditor’s representation. Creditors’ committees are too expensive to use in this capacity, and making use of the committee to protect creditors’ special interests (as opposed to the common interests of the creditors) would not be possible. Of all of the proposed solutions, ethical walls and the use of Rule 2.2 show the most promise, but those tools are just part of a piecemeal approach. Clients and their lawyers need an overall, principled way of making representation decisions.

1. Theory: The Two-Part Test

Two factors should govern the decision of whether simultaneous representation is appropriate. The first is the likelihood that the potential conflict will become an actual conflict. The second is the magnitude of the harm that the client (or clients) would suffer if the lawyer had to withdraw for the duration of the potential-turned-actual conflict. Neither factor alone is sufficient—both must be considered together.

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283. See MODEL RULES, supra note 25, at Rule 2.2(c). We might be able to interpret Rule 2.2 in such a way that the clients only lose their lawyer for the duration of the temporary conflict and not for the rest of the case. Such an interpretation would make Rule 2.2 a more attractive possibility.

284. Nor would that use of the committee be compensable as an administrative expense because it would not benefit the estate. See 11 U.S.C. §§ 507(a)(1), 503(b)(1) (1988).

285. I envision two types of harm: one is the harm that results when a potential conflict becomes and then stays actual, necessitating permanent withdrawal from representation. The other is the harm that results when a lawyer withdraws temporarily from representation. At that point, the magnitude of the harm could range from mild (the increase in costs stemming from duplicative lawyer effort and the client’s increased time in explaining the situation to the substitute lawyer) to the severe (the lawyer’s withdrawal is temporary but occurs during a crucial stage of that representation and no other lawyer can get “up to speed” quickly enough).

286. If we were to consider just the first factor (the likelihood of potential conflict) alone, we would just be rephrasing the way that the current ethical codes work. The current codes—
Because the lawyer and the client have different areas of expertise, any balancing of factors must take those differences into account. Furthermore, because the client, and not the lawyer, suffers the most when the lawyer must withdraw mid-representation, the client should make the final decision on whether representation is acceptable. For this reason, I have placed upon the client the onus of determining whether he is willing to risk the possibility of some mid-game substitutions of counsel for a given issue in the case. At the same time, it is the lawyer's job to determine how much her experience as a bankruptcy lawyer is necessary should a clash between clients arise. Moreover, she must explain both factors—the likelihood that a potential conflict will become temporarily (or permanently) active and the ramifications of withdrawal (will the withdrawal be on a "per issue" basis or a "total" basis?)—to the client.\footnote{Doing that job effectively will mean that the lawyer has to be creative: she must think of as many possible potential conflicts as possible and then remind the client of the necessity\footnote{Of course, if the lawyer and the client go over the range of potential conflicts and then decide to use some mechanism, such as an ethical wall or a pre-agreed use of Model Rule 2.2, to opt out of the need for withdrawal, that decision will short-circuit the need for the two-part test—that is, assuming that courts permit the chosen opt-out procedure.} of temporary or permanent withdrawal if any of the conflicts occur.\footnote{Lawyers frequently carve out the scope of their representation. When I speak of temporary withdrawal, all that I am saying is that the scope of the lawyer's representation will not include representation of any of the clients concerning the issue in temporary conflict.} Using this two-part test clarifies the decision of the client(s). If the possibility that the potential conflict will become actual is remote and the harm of temporary withdrawal is minimal, then the client is likely to consent to simultaneous representation without hesitation. If the possibility of potential conflict becoming actual is remote but the harm of temporary withdrawal is great, the client must consider whether the harm outweighs the risk—especially because not every potential conflict...
will be a DTAC. Some potential conflicts develop into actual and permanent conflicts, necessitating withdrawal for the remainder of the case. If, on the other hand, the harm of withdrawal is negligible, then even if the likelihood of a potential conflict becoming actual is high, the client should still be willing to consent to simultaneous representation (at least if the potential conflict will, at worst, become a DTAC). That way, unless and until a conflict becomes actual, the client still can use her own lawyer, whom she prefers to another second-choice lawyer. Obviously, if both the likelihood that an actual conflict will develop and the magnitude of harm from a temporary withdrawal are high, the client should think twice before consenting to simultaneous representation, and the lawyer should think three or four times before even broaching the possibility of representation with the client.

If we were to represent the interrelationship of these two factors graphically, the picture would look like this:

### Likelihood of Potential Conflict Becoming Actual

<table>
<thead>
<tr>
<th>Low</th>
<th>High</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Low</strong></td>
<td><strong>High</strong></td>
</tr>
<tr>
<td>Very low risk: need to withdraw is unlikely</td>
<td>More difficult case: lawyer must use her experience to judge, based on the particular facts of the case and the likely strategies of her client(s), whether the forthcoming actual conflict is likely to be permanent or temporary</td>
</tr>
<tr>
<td><strong>Magnitude of Harm of Withdrawal</strong></td>
<td></td>
</tr>
<tr>
<td>More difficult case: client(s) must judge how important this particular lawyer’s services are to the representation in the bankruptcy case</td>
<td>Easy case: barring extremely unusual circumstances, lawyer should refuse representation in this matter</td>
</tr>
</tbody>
</table>
An experienced lawyer will be able to give her clients a description of the range of situations in which potential conflicts could become actual, even if she cannot measure with accuracy the relative likelihood of each scenario. Similarly, an experienced lawyer will be able to discuss intelligently with her client the magnitude of harm that will result from withdrawal and the likelihood that the withdrawal will be only temporary. This theory is not designed to assign actual numbers to the relative probability of risk but to elucidate the proper thought processes of both lawyers and clients.\textsuperscript{290}

This new test is not problem-free. For one thing, it does not provide a definitive answer to the question of whether a lawyer should take on a given representation. Lawyers and clients alike will still have to make judgment calls, and they may still guess incorrectly.\textsuperscript{291} The two-part test uses a sliding scale in not just one dimension, but two, and decisions made in the “middle” of the spectrum will be more difficult to justify than those made at either end of the spectrum. Moreover, the inexperienced lawyer will not be able to conjure up all possible conflict scenarios when discussing with her client whether representation is appropriate. The lack of experience will mean that the client’s deci-

\textsuperscript{290} The question, of course, becomes one of how to promulgate my two-part test. Should it be enacted as part of the Model Code, the Model Rules, or the Restatements? Should it become a part of the Bankruptcy Code? Should it simply be used by bankruptcy judges in deciding particular cases?

The less authoritative the promulgation of my test, the less useful it becomes. To leave to an individual bankruptcy judge the decision whether to apply the test is not a bad solution, but it is imperfect. Different judges will disagree about which rule—the jurisdiction’s general ethics rule or my test—to apply. Amending the Bankruptcy Code to include rules for simultaneous representation of all parties in interest would produce a more uniform result than would leaving the decision to individual judges; moreover, amending the Bankruptcy Code would recognize the endemic side-switching in bankruptcy cases. On the other hand, some side-switching occurs in pre-bankruptcy workouts and in other areas of law. The focus really should be on the back-and-forth nature of the allegiance-shifting; if that type of behavior occurs in other fields, such as family law, then limiting the two-part test to the Bankruptcy Code is not a complete solution, either. If I am correct in hypothesizing that bankruptcy cases present unique conflict issues and that only in limited cases do other fields present the same type of side-switching, then including my test in a particular jurisdiction’s general ethics rules would not result in unlimited special-interest lobbying for individualized ethics rules for every single specialty. For a discussion of problems inherent in communicating risk, see Peter H. Schuck, \textit{Rethinking Informed Consent}, 103 \textit{Yale L.J.} 899, 948-51 (1994).

\textsuperscript{291} See discussion \textit{infra}, part V.B.2.b.
sion will not be as well-informed as it would have been had the client obtained a more seasoned lawyer’s advice. But lack of experience always penalizes the new lawyer. My approach does not make the problem worse—just more explicit.

Although this proposal is similar to the way in which current ethics rules operate, there are important differences. First, the proposal assumes that, although the range of potential conflicts is predictable, the particular conflicts that will arise in a given case depend on the decisions made by the parties in the case and therefore are inherently unpredictable. Unlike the Model Code, the Model Rules, and the Restatement, the proposal admits that lawyers will not know which potential conflicts will activate during the case. It does not base its analysis on identifying particular conflicts with certainty. Second, the proposal does not leave to the lawyer the initial judgment of whether the representation is appropriate. The client makes that judgment call (after appropriate explanation of the alternatives). Finally, the two-part test explicitly recognizes that different conflicts have different durations.

On the other hand, the two-part test retains the important parts of the current ethics rules. The concepts of zealousness and loyalty remain. Unless there is an out-and-out conflict between the two-part

292. I’ll bet that the less-experienced lawyer’s hourly rate is lower than that of her more-experienced counterpart. Deciding to skimp on lawyers’ fees may be, in part, a decision to forgo paying for the most experienced available counsel.

293. Contrast this with current waiver letters carving out the scope of a representation; the lawyers usually articulate, with some specificity, exactly what the representation will not cover. I’ve always been in awe of the predictive powers of lawyers with very well-defined “scope” waivers.

Detractors of my theory may argue that lawyers will merely devise a checklist of possible potential conflicts and their effects, much the way that a surgeon develops an “informed consent” form. Even a checklist, though, gives the power to the client to weigh the relative importance of having that particular lawyer represent her versus the importance of having uninterrupted representation.

294. Although the Model Code and the Model Rules leave to the lawyer the initial determination of whether simultaneous representation is in the client’s best interest, see MODEL CODE, supra note 25, at DR 5-105; MODEL RULES, supra note 25, at Rule 1.7, that approach does not give the client the right to exercise his own cost-benefit analysis as to whether representation by the chosen lawyer makes sense in the particular context. To the extent that the two-step test changes the inquiry from lawyer-focused to client-focused, then, any jurisdiction that adopts this test will have to adjust its ethics rules accordingly.

295. Moreover, nothing in this proposal changes the rules of confidentiality. Lawyers will still have to take appropriate steps to safeguard each client’s confidences.
test and a jurisdiction's current ethical rules, lawyers will, of course, use those ethical rules to guide their judgments in applying the two-part test. What is new is that the lawyer and the clients address more explicitly which potential withdrawals from representation are tolerable and which ones are not. The primary contribution of this theory is that it separates the question of whether the initially chosen lawyer should represent this client who selected her as counsel (typically asked at the beginning of the case) from the different question of whether that chosen lawyer should represent the client during the temporary conflict. The two-part test focuses on the overall benefit to the client from a particular lawyer's representation by acknowledging that temporary conflicts may preclude representation during a portion of a legal matter but may not necessarily preclude the resumption of that representation after the conflict is over.

2. Sample Applications

a. When the Lawyer's Advice is Correct

Some examples will illustrate how the two-part test would work. Starting with the easiest examples first, assume that an unsecured creditor and a fully secured creditor both want to hire the same lawyer in a chapter 11 case. The case looks as if it will turn out to be long and complex. The lawyer concludes that a risk exists that, down the line, when a plan of reorganization is proposed, one creditor will support the plan and the other one will vigorously oppose it. Until someone proposes a plan, however, no one can determine just how likely such a conflict would be. We could probably classify the potential conflict as being somewhere in between low-risk and high-risk. The magnitude of harm resulting from the lawyer's withdrawal, from one or both representations, during the plan confirmation hearing, though, is probably minimal. Good bankruptcy lawyers may well be able to argue in support of, or in opposition to, a plan without necessarily needing to know the intimate details of the client's (or debtor's) business, as long as they understand the broad outlines of the client's needs and how the

296. At times, the two-part test will conflict with a jurisdiction's ethical rules. See supra notes 118-30, 142-54, 165-83 and accompanying text. In such a situation, the ethical rules should be amended to indicate that, in bankruptcy cases (and possibly pre-bankruptcy workout representations as well), the two-part test will govern.

297. This conflict might come to a head earlier if the clients are powerful players in the bankruptcy with an ability to affect the plan negotiations.
plan’s operations will affect those needs. What is necessary is not client expertise but bankruptcy expertise. Taking on both representations at the onset of the case would not cause problems as long as the clients understand that a temporary withdrawal might occur if the clients oppose each other’s position during a confirmation hearing.

Now assume that two unsecured creditors wished to share the same lawyer, and one of the two clients had accepted a payment within ninety days of the filing of the bankruptcy petition and was therefore potentially the subject of a preference attack.298 The unsecured creditor who is not subject to preference attack would like nothing more than to see the other one cough up the money, which would increase the size of the distribution to all unsecured creditors. The potential for a conflict is reasonably likely if the alleged preferential payment is large.299 If the target of the preference attack has a business that is relatively easy to understand, then the magnitude of the harm from the lawyer’s withdrawal upon the filing of a preference complaint is small. A good lawyer can see whether the preference defenses, such as payment in the ordinary course of business, would apply.300 Again, this situation would be one that calls for bankruptcy expertise and not client expertise. If the target creditor’s business is extremely complex, though, the lawyer’s client expertise might save the day. The lawyer who understands her client’s business would be able to dovetail the client’s complex needs with the appropriate bankruptcy law quickly and easily, and the lawyer’s withdrawal would be extremely costly301—to the point that the withdrawal might increase the chances that the creditor would lose the lawsuit. The target creditor should make the decision, based on the potential risk of the preference action and the type of defense that might be mounted, as to whether simultaneous representation by the lawyer is appropriate.302

298. See 11 U.S.C. § 547(b) (1988). The general idea in a preference attack is that, in the immediate period before the bankruptcy petition was filed, the debtor improved a creditor’s position vis-à-vis the debtor’s other creditors (e.g., by paying an unsecured creditor’s debt in full); post-petition, the estate seeks to reclaim the preference in order to achieve a more equitable distribution to creditors.

299. If the alleged preferential payment is very small, the estate may well not wish to spend attorneys’ fees litigating the matter, and therefore the potential for conflict would be quite small. Of course, if the alleged preferential payment is extremely small, then the trustee may decide it is not worth the lawyers’ fees to pursue the recovery at all.


301. The more complex a situation is, the more lawyer-hours it takes to understand it.

302. Of course, in counseling the target client, the lawyer has to be careful not to go too far
Looking back at the hypothetical posed in the Introduction, we can see how the two-part approach would clarify the parties’ decisions at the onset of representation. Widget Co.’s creditors include Immense Lending Institution ("ILI"), a secured creditor; Landlord, who holds the lease to Widget Co.’s manufacturing and retail facility; a group of trade creditors; and some very well-paid employees. ILI, Landlord, the largest trade creditor (Megatools), and Widget Co.’s chief executive officer have all approached the law firm of Tinkers, Evers, and Chance regarding potential representation in Widget Co.’s impending bankruptcy. Can Tinkers, Evers, and Chance take on all of these representations?\(^{303}\)

Tinkers, Evers, and Chance will explain to ILI that its biggest potential problem will concern the value of its collateral. If ILI’s position slips from secured to unsecured,\(^ {304}\) there is a risk that the creditors’ committee (or Megatools itself, if it has money to burn), will search for weaknesses in the valuation or perfection of ILI’s secured position. Tinkers, Evers, and Chance cannot represent both sides in such a fight (at least without screening beforehand, and maybe not even then), but the valuation/perfection fight may not last for the duration of the representation. Both ILI and Megatools will have to evaluate the potential for actual conflict, but the magnitude of the harm is likely to be relatively low. The withdrawal from one or both sides is likely to be temporary, and unless the valuation issue involves some quirky forms of collateral, any good business litigator can handle the fight.\(^ {305}\)

If either Megatools or Landlord wants to cut an advantageous deal with the debtor post-petition, other creditors will have to be on guard that those deals do not deplete the estate. Again, such a fight is likely to be short-term. These deals may, however, require significant client expertise in terms of negotiating the nuts-and-bolts of the post-petition

\(^{303}\) Assume that some other law firm intends to represent Widget Co. and that Tinkers, Evers, and Chance has never represented Widget Co.


\(^{305}\) Of course, if the valuation question comes up in several different situations during the course of the case, then a scenario might develop in which the Tinkers lawyers might have to bow out of the representation more than once. Such a possibility could increase the "magnitude of harm" factor.
transactions. The more client expertise is required, the more harm will result from a temporary withdrawal.

As for representing the CEO and a creditor, no particular conflicts may come up until a plan of reorganization is proposed. That plan might save the CEO's position, or it might call for her replacement. This potential conflict may not ever arise, or it may arise months or years into the case. Assuming that Tinkers, Evers, and Chance institutes, at the onset of representation, appropriate devices to protect the confidences of its clients, the CEO and the creditor must each weigh (1) the potential for actual conflict and (2) the magnitude of harm from withdrawal during the conflict. Tinkers, Evers, and Chance's representation of the CEO probably will not be too labor-intensive during most of the case: it is possible that the law firm will simply file proofs of claim for unpaid wages,306 but it should not have to do much more until the time comes to negotiate (or vote on) a plan of reorganization. At that time, though, the interests of the CEO and the creditor may diverge sharply. Because Tinkers, Evers, and Chance may have learned something of the CEO's abilities during the case, the firm may, absent some screening device adopted at the onset of the representation, have to withdraw from representing both sides, and that withdrawal may have to be permanent if the issue of the CEO's work competency is ever raised. For this reason, the CEO might decide that it is better to hire separate counsel at the onset of the bankruptcy.

b. When Things Go Wrong

Because there are no hard and fast answers to many of the choices that clients face when considering simultaneous representation, sometimes those clients who consented to simultaneous representation will realize, with the sharp focus of 20-20 hindsight, that they should not have consented: either the conflict will arise more frequently than the lawyer and client had supposed,307 or the effect of withdrawal will

306. Tinkers, Evers, and Chance may have to file two proofs of claim for the CEO: one for any priority wage claim and another one for general unsecured wages. See 11 U.S.C. §§ 507, 503 (1988).
307. I am assuming throughout that the lawyer who proposes simultaneous representation does so in good faith. For those greedy lawyers who propose simultaneous representation when they know that the representation is not appropriate, their state bar disciplinary committee awaits. The real problem that the disciplinary committee will have is in determining what to do with a lawyer who did not know, yet should have known, that the representation was inappropriate.
turn out to be more severe than the client had expected.\textsuperscript{308} Once this hindsight confirms that simultaneous representation is truly inappropriate, then the lawyer must withdraw from one or both representations.\textsuperscript{309} Although this last-minute withdrawal is no different from what happens now when lawyers and clients discover a conflict late in the game, the two-part test still provides the advantage of permitting simultaneous representation in cases in which the lawyers and clients correctly estimated the chance that a potential conflict might later become actual and the magnitude of the harm stemming from a temporary withdrawal. In other words, although the test is overinclusive in that some inappropriate simultaneous representations will occur, that overinclusiveness is not as harmful as the current system's underinclusiveness.

c. \textit{Summary}

As long as the lawyer can analyze competently the range of possible conflicts and possible withdrawal outcomes—and can explain those factors to the clients—the two-part test should give the clients a meaningful way to evaluate whether simultaneous representation makes sense for them. At the same time, the two-part test protects the lawyer from having to explain, years into the representation, just why she is withdrawing at a particular juncture. The test benefits the clients and the lawyer without being paternalistic.

VI. CONCLUSION

Even in the smallest-sized bankruptcy, the stakes can be high for many of the players. Clients want the reassurance of skilled lawyers whom they can trust and, if possible, whom they already know. If those lawyers are already representing one of the "official" players, such as the debtor or the creditors' committee, then the Bankruptcy Code has

\begin{quote}
But the state bar decides those types of questions all the time. With any luck, the public will find out about the results of these types of disciplinary proceedings, and then the lawyer who knowingly flaunts the ethics rules will see her reputation (and perhaps her client base) suffer. \textsuperscript{308} There may also be some behind-the-scenes maneuvering that the client may never fully realize. Because the lawyer's advice to the client may cause the client to choose a particular strategy, the advice itself may create (or avoid) a situation in which the DTAC turns into an actual conflict.\textsuperscript{309} Presumably, the lawyer will have explained this final risk to the client before obtaining her client's consent to the simultaneous representation.
\end{quote}
some guidelines for simultaneous representation of other clients, although those guidelines are usually quite fact-dependent. If the Bankruptcy Code does not govern the particular simultaneous representation situation, then the particular jurisdiction’s code of ethics is supposed to provide the appropriate guidance. Here, too, the guidance falls short. The lawyer is supposed to represent each client without divided loyalty and with appropriate zeal, but many of the situations in a bankruptcy case that bring into focus the question of divided loyalties and limits on zeal are those that the lawyer cannot predict at the onset of the case. The current ethics codes tend to assume the one thing that is not true in bankruptcy law: that all conflicts, once activated, remain permanent for the duration of the case. Other areas of law share some of the same characteristics as bankruptcy law, with family law coming the closest, but none of those other areas have solved the problem of conflicts arising from constantly shifting alliances among clients.

Bankruptcy law needs a new approach that lawyers and clients can use to decide whether representation of more than one client is proper. That decision perforce must be made before the potential conflicts ever have a chance to become temporary, actual conflicts. A two-part test that first examines the likelihood that the potential conflicts would become temporary, actual ones and then examines the magnitude of harm that would befall a client whose lawyer has to withdraw during the “actual” phase of the temporary conflict is a test that clarifies the very real choices that clients and lawyers must make.