

# COMPETITOR AND OTHER “FINITE-PIE” CONFLICTS

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## I. INTRODUCTION

Does a lawyer offend ethical prohibitions against representing adverse parties by representing two different clients, in otherwise unrelated matters, if the two clients are business competitors? Lawyers who focus overmuch on long-range practice development, and thus who have much invested in a negative answer, wish the answer were a flat and emphatic “no.” The lawyer codes and the existing, scattered cases have been reluctant to agree quite so wholeheartedly. Indeed, the cases indicate that there may be disabling conflicts in many such representations. Most standard treatises discuss the issue only in a cursory fashion, or not at all.<sup>1</sup>

This Article attempts to understand the problem in depth, largely embraces the decisions on point, and offers a broader theoretical basis on which competitor and similar conflicts (here called “finite-pie” conflicts) can more carefully be identified. Competitor and other types of “finite-pie” conflicts are but a portion of the larger—and still often murky and unresolved—problem of charting the limits of the concept of “directly adverse” and “impaired representation” conflicts. The present analysis is offered in the hope of advancing that analysis. In a broader view, this effort can be viewed as the first in a multi-step process to better understanding the fundamental nature of client-versus-client conflicts.

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1. See, e.g., Lawyers’ Man. on Prof’l Conduct (ABA/BNA), at 51:115 (Dec. 19, 2001) (merely paraphrasing ABA comment); DENNIS J. HORAN & GEORGE W. SPELLMIRE, JR., ATTORNEY MALPRACTICE: PREVENTION AND DEFENSE 17-1 (1989) (“[T]he fact that an attorney is simultaneously representing two companies that are competitors in the same industry does not itself establish an actionable breach of an attorney’s fiduciary duty.”). Among treatises that ignored the issue entirely is my own MODERN LEGAL ETHICS (1986). The Hazard & Hodes manual starts with an overly broad statement (“In the case of competing business, . . . the lawyer may properly represent both clients in their respective matters without seeking or obtaining the consent of either”), but retrenches two pages later with an extreme bookend example (“If . . . two businesses were not merely competitors in the same industry, but were competing for the same government contract, or the last remaining broadcast license in a particular market and each engaged the same lawyer to help present their bids of applications, Rule 1.7(a)(1) would be applicable.”). Compare 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 11.5, at 11-9 (Supp. 2004), with *id.* at 11-11. The treatise offers no further illumination on competitor conflicts.

## II. THE UNCLEAR POSITION OF THE ABA MODEL RULES ON COMPETITOR CONFLICTS

Those seeking support for a broadly permissive approach to competitor conflicts often point to a portion of a comment in the ABA *Model Rules of Professional Conduct* that attempts to explicate Rule 1.7 on concurrent-representation conflicts.<sup>2</sup> The comment, read in a certain way, would suggest to some readers that merely representing multiple clients who are “competing economic enterprises” involves no conflict. In fact, however, the comment, prior to the so-called Ethics 2000 amendments in 2002, was phrased somewhat more delphically. Explaining the concept of prohibited concurrent representations of clients whose interests were “directly adverse,” the pre-2002 version of comment [3] (as then numbered) to Model Rule 1.7 contrasted competitor representations as follows: “[S]imultaneous 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. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.”<sup>3</sup>

The second sentence is open to the interpretation that mere economic competition is categorically not a “directly adverse” conflict. Yet, the first sentence seems inconsistent. It patently begs the question of what it might be that causes a particular representation of competitors to be “unrelated,” and, for that matter, leaves unclear whether all, or only some, competitors are merely “generally adverse.” Nonetheless, and whatever else it might suggest, the language rather clearly indicates that representing competing clients in “related matters” would indeed raise “directly adverse” types of conflict issues.

The Ethics 2000 amendments rewrote the comment to an extent, but, generally, the attempted clarification did not resolve the competitor-conflict ambiguity, and in fact introduced a second problematic suggestion. The comment, now comment [6] to the same Rule 1.7, states: “On the other hand, simultaneous representation in *unrelated* matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not *ordinarily* constitute a conflict of interest and thus may not require consent of the respective clients.”<sup>4</sup>

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2. The placement of the ABA’s only comment on competitors in the concurrent-representation materials might suggest an assumption either that the problem arises only in that context or, more likely, that it is a general problem. On the treatment of competitor-conflict issues in the context of former-client conflicts, see *infra* text accompanying notes 37-41.

3. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 3 (2000) (emphasis added).

4. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 6 (2007) (emphasis added).

Again, the vague adjective "unrelated" continues to modify "matters,"<sup>5</sup> and the revised comment offers no further explanation of the modifying term. In addition, the new statement about the absence of conflict in representing competing economic enterprises, although otherwise offering some solace to lawyer seeking a flatly negative answer, is qualified by the addition of the notorious weasel word "ordinarily." That qualification obviously suggests that in *non*-ordinary situations a lawyer who represents competitors may indeed confront a conflict requiring consent. But what might cause the ordinary to become non-ordinary is left unexplained. We are left, then, with a rule on competitor conflicts that is framed in a way that appears to recognize the issue, but offers little more than purposefully vague adjectives to suggest how such conflict issues are to be resolved.

As with other such problems, for more definitive answers we must delve more deeply into the philosophy and structure of the general rules of the lawyer codes on conflicts. Even more helpful, in this instance, is a significant body of decisions interpreting and applying the rules that provide particularly helpful guidance.

### III. PRINCIPLES OF CLIENT-CLIENT CONFLICT IDENTIFICATION

We deal here with competitor and similar types of conflicts of interest that arise in the course of a lawyer representing two or more clients, either concurrently (concurrent-representation conflicts) or sequentially (former-client) conflicts. Other kinds of conflict can, of course, arise, such as when a lawyer lets her own interests interfere with those of the client.<sup>6</sup> An example would be a lawyer who personally, and wrongfully, takes a business opportunity away from a client to benefit a business owned by the lawyer.<sup>7</sup> While the lawyer and client could be said to be competitors, the conflict between fiduciary lawyer and beneficiary client is too patent to require much analysis. Instead, this Article focuses on client-versus-client conflicts. As we will see, the conflicts involved when clients are themselves the economic competitors

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5. Rather curiously, the "such as" illustration in the comment is now limited to competitor conflicts in litigation. Should this be read to suggest that representing competitors in *non*-litigation settings is to be treated differently (either more or less permissively)? As will be seen, the decisions support no such limited a reading.

6. On so-called "personal interest" conflicts between lawyers and clients, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125 (2000); *cf. id.* § 126 (conflicts arising from business transactions between lawyer and client); *id.* § 127 (conflicts arising in client gifts to lawyers).

7. *See, e.g.,* David Welch Co. v. Erskine & Tulley, 250 Cal. Rptr. 339, 341-45 (Ct. App. 1988) (affirming finding of breach of fiduciary duty and ordering constructive trust of property thus gained by lawyer).

are in many instances not at all so apparent, and sometimes they will turn out not to exist at all, despite the fact that the clients are competitors.

Starting with the basics, contemporary lawyer codes identify conflicts in the representation of multiple clients (whether concurrently or sequentially) by reference to two general standards—a standard of “adverse” client interests and a complementary standard of “impaired representation.”<sup>8</sup> These can be seen in the baseline definitions of concurrent-representation conflicts in Model Rule 1.7<sup>9</sup> and of former-client conflicts in Model Rule 1.9.<sup>10</sup> (Satisfying either standard suffices to constitute a concurrent-representation conflict under Rule 1.7. In order to identify a former-client conflict under Rule 1.9, of course, more is required. The matter involving the present client must also be the same matter as the matter in which the lawyer represented the original client or the matters must be “substantially related.”) Both standards obviously beg almost as many questions as they purport to answer, yet they usefully provide fundamental directions of inquiry.

We start, then, with the task of attempting to understand what makes clients’ interests “adverse” to each other. That will be considered both generally and in the specific context of competitor conflicts.

#### IV. “ADVERSE” CLIENT INTERESTS—THE KINDS OF CLIENT HOSTILITY THAT CREATE CONFLICT

##### A. *Client Interests*

Under both analyses—that of adversity and that of impaired representation—client interests are key. As the lawyers’ street-language

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8. As will be seen, all competitor-conflict decisions that have been unearthed in preparing this Article turn on the “adverse” concept, rather than the “impaired representation” concept. The discussion in this Article will be similarly focused and limited.

9. Model Rule 1.7(a) defines a concurrent-representation conflict as follows:

A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or  
 (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (2007).

10. Model Rule 1.9(a) defines a former-client conflict as follows:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

MODEL RULES OF PROF’L CONDUCT R. 1.9(a) (2007). On applying the former-client conflict rules in competitor-conflict settings, see *infra* text accompanying notes 37-41.

formulation of the problem of "conflict of [client] interests" puts it, our focus must be upon *client interests*, with appropriate attention to both words in the phrase. One must proceed carefully here, because there are many ways of defining client interests. For example, in certain circumstances a lawyer and client may effectively agree to limit the scope of the lawyer's representation in order to avoid a conflict that might otherwise arise.<sup>11</sup>

Does that mean that many conflicts may be eliminated by the simple device of defining all potentially conflicting aspects of a representation out of the realm of the lawyer's responsibilities? In fact, the answer to the question is significantly complex, but on the whole such arrangements are second-order remedies while conflicts of interest present first-order problems. In other words, in many representations one cannot intelligently fine-tune the representation, in consultation with the client, before resolving problems of conflicts of interest.

How, then, are client interests to be delineated? At one extreme, it would not do for the lawyer to make radical assumptions about the nature and extent of client interests, perhaps based on the lawyer's personal set of values about what is important in a particular type of representation. As one example of such an extreme approach, it will not do for a lawyer always to imagine the worst about the future and human nature and always calculate interests on that gloomy basis. In a Hobbesian world of all warring against all, all interests clash. Adopting such a viewpoint would result in hopelessly over-generalizing conflicts problems. Adopting it only selectively would still be unworkable as well, in the absence of facts in a specific matter suggesting the need for such a gloomy outlook and in the absence of an informed and articulated client directing the lawyer to conduct the client's representation in that way.

Yet another potentially misleading step would be for a lawyer to focus exclusively upon client interests only as defined by the client at

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11. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. c(iii), at 249 (2000) ("Some conflicts can be eliminated by an agreement limiting the scope of the lawyer's representation if the limitation can be given effect without rendering the remaining representation objectively inadequate.") (citation omitted); *See, e.g.*, *Interstate Props. v. Pyramid Co. of Utica*, 547 F. Supp. 178, 181 (S.D.N.Y. 1982) (finding no disqualifying conflict where the challenged law firm "circumscribed its relationship with [Client A] to remove the possibility of conflict by first acting only as special environmental counsel to [Client A] and then, as it became involved in more general commercial affairs of [Client A], by limiting its involvement to developments in which [Client B, the challenging client] had no potential or actual interest as competitor or partner"); *Buehler v. Sbardellati*, 41 Cal. Rptr. 2d 104, 111-12 (Ct. App. 1995) (holding that no conflict was present when clients jointly sought out common lawyer to perform single task of preparing documents for their limited partnership); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2001-3 (2001).

the outset of the representation. Lawyers have often commenced a representation with a client insisting on a certain objective, and perhaps explicitly wishing to ignore others. Yet many such clients, educated during the course of the representation (often in large part through the lawyer's services), decide ultimately to pursue a different and even an inconsistent course. A familiar example involves spouses who visit a lawyer for the purpose of arranging what they presently believe will be an amicable dissolution of their marriage. As the process continues, spouses who initially insisted that their splitting was amicable may develop antagonistic positions.<sup>12</sup> Also familiar are situations where multiple clients approach a lawyer for legal services to arrange a way in which they could do business together. While the proposed joint clients might assert at the outset that they are fully in agreement on all aspects of the arrangement that are important to them, a wise lawyer will be cautious in accepting such assurances uncritically.<sup>13</sup> In those and in many similar settings, it would be hazardous for a lawyer to assume that all interests of relevance to conflicts analysis can be defined by a client's instincts and wishes as the client expresses them at the very outset of the representation.

It is, of course, a hornbook proposition that it is the client, and not the lawyer, that defines the client's interests and instructs the lawyer about them.<sup>14</sup> That, of course, is done as part of a consultative process in which the lawyer will often perform the role of educating the client about relevant legal and perhaps other considerations<sup>15</sup> appropriate to making an informed decision about interests. Interests, then, must be

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12. On the permissibility of joint representation of divorcing spouses, see generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 reporter's note cmt. c, at 344-45 (2000) (collecting authority).

13. See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 130, cmts. b, c, illus. 4 (2000) (providing an overview of multiple client representation conflicts).

14. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2007) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, . . . consult with the client as to the means by which they are to be pursued."); MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2007) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (2000) ("a lawyer must, in matters within the scope of the representation: (1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation"); see also *id.* cmt. c ("[t]he client, not the lawyer, determines the goals to be pursued").

15. On consulting with a client based on considerations in addition to narrowly legal ones, see MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007) ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94(3) (2000) ("In counseling a client, a lawyer may address non-legal aspects of a proposed course of conduct, including moral, reputational, economic, social, political, and business aspects."); *id.* cmt. h.

analyzed in light of the reasonable understandings and expectations of clients as the client expresses them after having an opportunity to consult with the lawyer about legal and other considerations that might bear on the client's decision. Ultimately, the appropriate conflicts inquiry should focus sharply on "interests" of clients that are identified in that way, as opposed, for example, to theoretically conceivable legal claims or positions that, while perhaps possible in some sense, are overly speculative or theoretical. If, after appropriate consultation with the client, the lawyer is reasonably satisfied that a client knowingly wishes to forego assertion of a legally arguable (even a clearly attainable) position, the resulting position should normally be taken as the "interest" of the client. And it is that interest, on the part of each affected client, that is the predicate for assessing any conflict, including competitor and other kinds of "finite-pie" conflicts.

### B. "Adverse" Client Interests

Given such a client-generated delineation of interests, what degree of antagonism—because surely some antagonism is implied—is necessary for the interests of two clients to be sufficiently at odds that they must be considered "adverse" for purposes of the conflict of interest rules? The topic is vast, and only a preliminary sketch will be provided here. To a substantial extent, that question can only be answered definitively in the context of the specific conflict of interest problem presented—here, in the context of competitor conflicts. However, at a preliminary level, certain useful generalizations can be ventured.

The decisions themselves—those of both courts and bar association ethics committees<sup>16</sup>—have sometimes been quite unhelpful in providing a definition of the term "directly adverse," the defining term still found in ABA Model Rule 1.7(b)(1). The relevant comment to the rule is helpful in focusing attention, among other things, on reasonable client sensibilities. First, the client against whom the lawyer appears or otherwise functions will justifiably feel betrayed: "The client as to

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16. For example, the ABA Ethics Committee's occasional treatment of the notion of "adverse" representations in the ABA's Model Rules has been inconsistent and sometimes unhelpful. *Compare, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-434 (2004) (giving limited scope to concept of adversity in concluding that "ordinarily" no conflict precludes a lawyer representing a testator to prepare a testamentary document disinheriting beneficiaries whom the lawyer represents on unrelated matters) *and* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995) (giving a very limited scope to the concept of "adverse" representation in the context of corporate-family conflicts), *with, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-406 (1997) (dealing in a much more nuanced way with possible "adverse interest" conflicts when Lawyer 1 represents Lawyer 2 who in turn represents an adversary of Lawyer 1's client in a factually unrelated matter).

whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively."<sup>17</sup> Second, the client supposedly benefited might also have legitimate reason for concern about the lawyer's effectiveness due to the lawyer's possible instinct to "bend over backwards" to avoid harm to the other client: "In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client."<sup>18</sup>

Some clashes of client-versus-client are obvious conflicts, such as clients involved in litigation against each other, even if the representations involve litigation in different lawsuits, or litigation in one representation and non-litigation representation in the other, or matters that factually are entirely unrelated.<sup>19</sup> In client-versus-client litigation, the difference in their interests is an inevitable aspect of the unilinear, win-lose nature of litigation—one client will lose to the extent

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17. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (2007).

18. *Id.*

19. *See id.*; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128(2) (2000); Lawyers' Man. on Prof'l Conduct (ABA/BNA), at 51:101 (Dec. 19, 2001) ("Suing a current client, or defending against an existing client's lawsuit, is universally condemned."). *But cf., e.g.,* Pioneer-Standard Elecs., Inc. v. Cap Gemini America, Inc., No. 1:01CV2185, 2002 WL 553460, at \*3-4 (N.D. Ohio Mar. 11, 2002) (refusing to disqualify firm representing complaining adversary in unrelated transactional matter). Texas is the lone exception, under a rule that routinely permits litigating against one's own client in a factually related matter. *See, e.g., In re Sw. Bell Yellow Pages, Inc.*, 141 S.W.3d 229, 231 (Tex. App. 2004). Professor Morgan's dissent from the general proposition involved only an argument that litigation involving artificial-entity clients (corporations, etc.) should often be exempt from the general rule. *See* Thomas D. Morgan, *Suing a Current Client*, 9 GEO. J. LEGAL ETHICS 1157 (1996); *cf.* Nathan M. Crystal, *Disqualification of Counsel for Unrelated Matter Conflicts of Interest*, 4 GEO. J. LEGAL ETHICS 273, 298-311 (1990). Courts have not generally accepted such an "artificial-entity" exception, presumably because of an understanding that individuals in corporations and other entity clients who deal with the entity's lawyer would have emotional difficulty in accepting counsel from a lawyer who opposes the organization in litigation, just as would an individual client.

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client.

MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (2007).



that the other gains. The clients are clearly antagonistic in economic terms or, more broadly stated, in terms of their expressed preferences given their contending positions in the litigation in question.

Moreover, the reason for assessing that situation as one of conflict lies in assumptions about client emotions that are considered to be both reasonable and intuitively obvious. The fundamental intuition is that a client should not be expected to be willing to accord her own lawyer the trust and confidence that is a desired hallmark of all representations when the same lawyer is embroiled in litigation against the client on behalf of an opponent or is providing other legal assistance to the client's adversary. Notice that this emotional component of antagonism makes no necessary assumptions about the degree of hostility (or the absence of it) between parties to litigation; it is enough that they are in litigation against each other. No inquiry need be made into the strength, in fact, of either client's feelings.

Transactional representations will sometimes carry many of the same hallmarks of hostility, but hardly always. For example, two clients who were partners in a business might have a falling out over a fundamental question of ownership of the venture, although sometimes the clash of interests may be masked by initially congenial feelings between the participants generated by their mutual anticipation of gain in the transaction. Thus, it is widely accepted that a conflict would exist were the same lawyer to undertake to represent both buyer and seller in the same transaction.<sup>20</sup> At the other extreme, most concurrent representations are clearly non-adverse and present no conflict problem. For example, a well-managed large law firm may have a client list of several thousand clients, without any conflicts existing between any two clients. After appropriate and continued vetting for conflicts, the firm's

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20. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 7 (2007):

Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Note the clear, but implied, limitation that the lawyer may not represent both seller and buyer in the sale of the business. Such a limitation is widely recognized. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt. g(iv), illus. 10 (2000); Lawyers' Man. on Prof'l Conduct (ABA/BNA), at 51:324 (Jan. 29, 2003). Indeed, some jurisdictions treat such representations as non-consentable, at least if they involve retail sales, such as the sale of a residence. See, e.g., Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Wagner, 599 N.W.2d 721, 726-27 (Iowa 1999). The rule of non-consentability is carried farther in New Jersey, where the same lawyer is prohibited from representing both buyer and seller even in complex commercial real-estate transactions—a setting in which the parties are much more likely to be sophisticated. *Baldassarre v. Butler*, 625 A.2d 458, 467 (N.J. 1993).

lawyers can represent all of their clients without concern for collisions on their various courses. How, then, are such tranquil scenes to be differentiated from those in which concurrent-representation conflicts do exist?

It will not do, of course, for a lawyer to be guided entirely by either client's articulated subjective values. For example, thinking specifically about competitor conflicts, some business competitors purport to conduct business following a model that rather strikingly resembles warfare. For such a client, the client's lawyer is not to consort with the enemy, and certainly is not to represent the enemy. While most lawyers would be more amused than alarmed at such a mindset, there are indeed certain areas of practice in which such subjective client sentiments are strongly expressed and even institutionalized.<sup>21</sup> A prominent example is representation of liability insurance companies in defending against claims; many such insurers insist that law firms they retain not represent plaintiffs in asserting claims of the kind against which the company insures, even if the representation does not involve a claim against an insured of the retaining insurer. It is common in labor-law practice to find that law firms specialize in representing only employers or only unions. The same is also true in fields such as employment-discrimination claims and other areas of employment practice.

Such bifurcations are defended on the ground that the client should not be forced to accept the risk that its "own" law firm would establish a legal position in otherwise unrelated litigation that could redound to the substantial financial harm of the client or other members of the client's industry. That, of course, is to carry so-called positional conflict thinking to an extreme.<sup>22</sup> Most lawyers would agree that bifurcation of one's practice along such client-outlook lines is not required by any command of legal ethics, but is instead a voluntary practice restriction undertaken by the lawyer or law firm in order to mollify a valued client who is a source of frequent legal business. Most agree that, for the policy to be enforceable, there must be an explicit agreement on the part of the law firm to restrict its practice in the described way.

Moreover, a lawyer could not sit without comment if a client were

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21. I defer to another occasion consideration of whether such bifurcation of the bar is healthy for lawyers or for their clients. I have grave doubts. Whether, if the problem has become widespread, it is sufficiently deleterious to warrant a rule prohibiting lawyers' participation in it I also doubt. Discussion at the Hofstra conference indicated wide agreement on concern, but less agreement on whether that concern presently warrants prohibition.

22. On positional (or "issue") conflicts generally, see, for example, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 cmt. f (2000). Of course, all lawyers are required to comply with the far more modest requirements of the positional-conflict rules. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 24 (2007).

to express an assumption or demand that the lawyer would not represent a competitor, if the lawyer does so or intends to do so, contrary to the client's wish.<sup>23</sup> Silence on the part of a fiduciary in such an instance would be disloyal. In other words, while there is certainly no default rule of legal ethics that commands such a practice bifurcation, it should also be understood that a lawyer breaches his or her obligations to the client either by violating an explicit agreement with the client to do so or unreasonably failing to inform a client that the client's expressed expectation of such a bifurcation is contrary to the lawyer's intentions. As with other such matters of importance, if lawyer and client remain at loggerheads on the matter, the lawyer must withdraw. A lawyer who ignores a client's expressed wish and proceeds with the representation acts at his or her peril.

The same is true of the range of possible client feelings about business competitors. Thus, looking ahead,<sup>24</sup> it should not be thought to be an inevitable conflict for the same lawyer to do collection work for both of the only two banks in a small community, or to represent both of the community's two shoe stores in separately negotiating the terms of the lease of the store of each retailer with the landlord of each. Nonetheless, it might offend the competitive sensibilities of the president of Bank 1 to know that the same skillful lawyer is also helping competitor Bank 2 keep its collection rate high or its rental costs low—and hence improve its balance sheet and, consequently, the general financial ability of competitor Bank 2 to compete. But, so long as the client's upset is not conveyed to their lawyer prior to the lawyer's undertaking the other representation, more is required before a disabling conflict exists.

## V. COMPETITOR-CONFLICT DECISIONS<sup>25</sup>

We turn, then, specifically to examine how decided cases have

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23. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. c(ii) (2000) ("An otherwise immaterial conflict could be considered material if, for example, a client had made clear that the client considered the possible conflict a serious and substantial matter.").

24. See *infra* text accompanying notes 30-33, 49-50.

25. Not all conflict decisions involving competitors are competitor-conflict decisions within the scope of this Article. For example, *United States Football League v. National Football League*, 605 F. Supp. 1448 (S.D.N.Y. 1985), involved antitrust litigation between formerly competing professional football leagues, and, indeed, its principal substantive issues involved the manner in which the NFL had (successfully) competed with the USFL. Nonetheless, the asserted conflict involved the former representation by the defendant NFL's law firm of the USFL in its early years. The subsequent litigation was obviously "adverse" to the former client (the USFL), and the only significant question of conflict was whether the two representations were substantially related for purposes of the former-client conflict rule.

treated competitor conflicts. Reassuringly, there are a number of relevant decisions. Many avow the general notion that something more than economic competition by itself is required before a conflict will exist.<sup>26</sup> But, several of the decisions hold that a lawyer can act wrongfully against the interests of an existing or former client by representing that client's competitors under certain facts.<sup>27</sup> Indeed, one notable decision upheld the fraud conviction of a partner in a well-known New York City law firm who had secretly assisted a competitor of his firm's own client in obtaining a bus-shelter franchise from the city that the firm's client had formerly held.<sup>28</sup>

In several of the decisions, the objectionable nature of the lawyer's work was made particularly graphic by the fact that the lawyer was assisting the competitor by using confidential information learned from the objecting or injured client.<sup>29</sup> However, note that a predicate finding—which was made or assumed to exist in each of the decisions—is that the representation in question is “adverse” to the objecting or injured client. It is those predicate notions of “adverse” representation in certain competitor representations on which we focus here. Moreover, decisions involving misuse of a client's confidential information could be thought to be distinguishable and unilluminating for general doctrinal purposes, because of the intuitively objectionable misuse.

Representative of a less extreme, and hence more instructive, kind of competitor-conflict decision is *Curtis v. Radio Representatives, Inc.*<sup>30</sup> The law firm had represented the defendant client in obtaining renewal of its broadcast license from the (sole) federal broadcast regulatory agency, the Federal Communications Commission (“FCC”). The law firm was suing the client for unpaid fees. The client defended on the ground that the law firm had violated the concurrent-representation conflict rules in a way that forfeited the law firm's fee. The client's claim of conflict was based on the fact that the law firm had concurrently represented competing radio and television station owners in obtaining or renewing their own broadcast licenses from the FCC, the same sort of work the firm had performed for the defendant client and for which it was suing for fees. The court found no conflict,<sup>31</sup> but it

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26. See *infra* text accompanying notes 30-33.

27. See *infra* text accompanying notes 34-49.

28. *United States v. Bronston*, 658 F.2d 920, 922 (2d Cir. 1981); see generally *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (extensively reviewing the statutory “theft of honest services” basis for lawyer criminal liability).

29. See *infra* text accompanying notes 35-43, 52.

30. 696 F. Supp. 729 (D.D.C. 1988).

31. See *id.* at 736. The court also cited and quoted *HORAN & SPELLMIRE*, *supra* note 1, at 17-1. 696 F. Supp. at 736. Applying a similar test for purposes of finding no conflict in representation

stopped well short of stating that no conflict would exist in any competitor representation. The test announced by the court, in modified form, is sound.<sup>32</sup> The general point is that one does not search for just any difference between two clients, including differences that may matter greatly to the clients.

As a matter of policy, the decision in *Curtis* finding no conflict on the facts before the court is compellingly correct. Among other considerations, a contrary decision would have made it impossible for a law firm to engage in a specialized practice of representing multiple clients before a federal body that regulates a multi-enterprise industry. The rather clear implication of the objecting client's position there was that the law firm's FCC practice should have been limited to the client's legal business only. Unless the client's FCC work was unusually large, that would necessarily preclude law firms from maintaining more than one or two lawyers whose time was substantially devoted to such a practice. The opposite, of course, is both the practice and the reasonable approach (as far as conflicts are concerned) of a large number of American law firms.

The *Curtis* court did suggest, however, that a conflict would exist when the differing interests relate in a more direct and substantial way to the matter on which the law firm is representing the client, such as if the same lawyer were representing competitors in the communications field and the lawyer represented one client against the interests of the others with respect to "objectionable electrical interference [that] existed between two stations."<sup>33</sup> As another example, another federal court held that clients would clearly be adverse to each other if the same law firm attempted to represent one shopping center in negotiating a lease with an anchor tenant whose allegiance was concurrently being sought by a

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of competitors in a bankruptcy setting, see *In re Caldor Inc.*, 193 B.R. 165, 180-82 (Bankr. S.D.N.Y. 1996) (on facts, representation of creditors' committee in debtor's case and creditors' committee in Chapter 11 case of debtor's competitor not representation of adverse interests); *cf.*, *e.g.*, *NordicTrack, Inc. v. Consumer Direct, Inc.*, 158 F.R.D. 415, 421 (D. Minn. 1994) (holding, after entering a confidentiality order prohibiting counsel from disclosing any proprietary information, that lawyer subject to it would not be enjoined from representing a competitor in an apparently unrelated matter).

32. The court's actual test was as follows: "Merely representing multiple clients who have differing interests on matters wholly unrelated to *their differing interests* [sic] does not violate DR 5-105, so long as the lawyer's independent professional judgment is not likely to be called into question." *Curtis*, 696 F. Supp. at 735 (emphasis added). The test is workable if the italicized words are replaced with "the matters on which the common lawyer represents them." See *infra* text accompanying notes 39-41, 50-51.

33. *Curtis*, 696 F. Supp. at 736; *cf.*, *e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. c(i), illus. 1 (2000) (illustrating "adverse" conflict as one in which same lawyer represents two competitors for a single broadcast license in seeking the license before a regulatory agency).

competing shopping center, also a firm client, situated a mile away along a major highway.<sup>34</sup> A similar situation was discussed by the Seventh Circuit in *Analytica, Inc. v. NPD Research, Inc.*<sup>35</sup> The situation involved a law firm who is currently representing Client A, but then agrees to represent Client B in approaching the Federal Trade Commission (“FTC”) to urge that the agency file suit against Client A. The court surely is correct in surmising that all would agree that such a representation involves conflict.<sup>36</sup> It is important to note, however, that the particularly troubling feature of the assumed facts is the disloyalty involved in urging a powerful competition-regulating agency to sue an existing client. If the facts were different, and the law firm was simply urging the FTC to reduce a fine on Client B for an offense unrelated to Client A, no conflict would exist (as reflected in the *Curtis* decision), even though the financial benefit to Client B would, in general terms, leave that client in a better position to compete effectively with Client A.

The scenario discussed in *Analytica* involves facts similar to those in the Pennsylvania decision in *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*,<sup>37</sup> perhaps the most well-known competitor-conflict decision.

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34. *Bieter Co. v. Blomquist*, 132 F.R.D. 220, 221-24 (D. Minn. 1990) (so stating, but refusing to order disqualification on movants’ failure to show that firm in fact represented one of competitors).

35. 708 F.2d 1263 (7th Cir. 1983) (Posner, J.).

36. *Id.* at 1269.

NPD thought Schwartz & Freeman was its counsel and supplied it without reserve with the sort of data—data about profits and sales and marketing plans—that play a key role in a monopolization suit—and lo and behold, within months Schwartz & Freeman had been hired by a competitor of NPD’s to try to get the Federal Trade Commission to sue NPD; and later that competitor, still represented by Schwartz & Freeman, brought its own suit against NPD. We doubt that anyone would argue that Schwartz & Freeman could resist disqualification if it were still representing NPD, even if no confidences were revealed, and we do not think that an interval of a few months ought to make a critical difference.

*Id.*; see also, e.g., *Adco Oil Co. v. Taylor*, No. CJ-88-6176 (7th Dist. Ct., Okla. City, Okla. 1992), in ALAS LOSS PREVENTION J., Jan. 1993, at 10 (reporting jury verdict of \$120 million in former client’s malpractice suit against former law firm that had represented competitor oil company drilling in oil and gas field in opposing plaintiff client’s petition before state administrative agency seeking permit to allow additional drilling in same field).

37. 602 A.2d 1277 (Pa. 1992). (I served as ethics expert for the prevailing client in the Pennsylvania trial court.) *Maritrans* involved a suit for injunctive relief by the company in the position of Client A. By the time of trial, Client A had fired the law firm, so that the issue presented to the court involved a former-client conflict. The court noted that “[w]hether a fiduciary can later represent competitors . . . of its former client is a matter that must be decided from case to case and depends on a number of factors.” *Id.* at 1286. A similar action, with a similar result, was *Hyman Cos. v. Brozost*, 964 F. Supp. 168, 173-75 (E.D. Pa. 1997) (although refusing to enjoin former general counsel of Company A from working as general counsel for Company B, the lawyer was prohibited from representing a new employer in negotiating leases for locations that Company A was currently occupying or was bidding on).

The trial court in *Maritrans* had also found that the law firm had breached an ethical

The court there found an impermissible conflict on the part of a law firm that had served as Client A's long-time labor-law advisers. The firm's work for Client A involved extensively molding the client's labor policies and practices to permit it to compete more effectively. Having succeeded in that work, the firm then secretly began to represent Client B, Client A's principal competitor in the same line of business (coastal tug-and-barge transportation), in similarly molding Client B's labor policies to permit it to compete more effectively, including (most obviously) with Client A. The facts were such that confidential and proprietary information about Client A's operations that the law firm had presumably learned during the course of representing Client A would have been highly useful in molding those policies for Client A's competitor.

The court, agreeing that a former-client conflict existed, upheld the trial court's grant of an injunction against the firm's continued representation of the competitor. What seems to be most objectionable here was that both the original and the later representations were directed to the very ability of the respective clients to compete with each other.<sup>38</sup> In other words, the very point of the conflicted legal services was to enable the competitor to compete more effectively with the firm's former client. On the general question whether a law firm can represent competitors, the *Maritrans* court left no doubt that its approach precluded a flat-earth approach, such as a prohibition against representation of any competitor of a law firm's clients.<sup>39</sup> Key for the court was "the extent to which the [law firm] was involved in its former client's affairs. The greater the involvement, the greater the danger that confidences (where such exist) will be revealed."<sup>40</sup> As a result, the question of conflict, according to the court, is remarkably fact-intensive.<sup>41</sup>

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screen, in the course of which confidential information of Client A relevant to their competition was shared with the firm's lawyer representing Client B. See *Maritrans*, 602 A.2d at 1282.

38. *Maritrans* gave rise to alarms that, in my view, have proved to be overstated. See, e.g., Thomas D. Morgan, *Maritrans v. Pepper, Hamilton & Scheetz*, ALAS LOSS PREVENTION J., Sept. 1993, at 2, 6 (warning that clients would use *Maritrans* to preclude law firms from representing competitors generally). Decisions such as *Hyman Cos.*, 964 F. Supp. at 172-73, and *Reis v. Barley, Snyder, Senft & Cohen LLC.*, 484 F. Supp. 2d 337, 350 (E.D. Pa. 2007), indicate that Pennsylvania courts have applied the *Maritrans* holding sensibly and within appropriately confined limits. For a more moderate view of *Maritrans*, noting some of its appropriate areas of application, see Brian J. Redding, *The "Confidential Information" Conflict—Is It Time for the ABA to Rethink Its Position on Waiver?*, ALAS LOSS PREVENTION J., May 1998, at 2, 6.

39. "We do *not* wish to establish a blanket rule that a law firm may not later represent the economic competitor of a former client . . ." *Maritrans*, 602 A.2d at 1286.

40. *Id.*

41. *Id.* ("Whether a fiduciary can later represent competitors or whether a law firm can later

An Oregon decision in a lawyer discipline case, *In re Banks*,<sup>42</sup> found similarly objectionable, and for the same fundamental reason, a lawyer's undertaking to provide Corporation B advice about how to lure a key employee away from Corporation A, a former client. The lawyer, when formerly representing Corporation A, had crafted a non-compete agreement between Corporation A and the employee, which the lawyer would need to attack or narrowly construe in aiding Corporation B. The court held that the lawyer had violated the former-client conflict rules in subsequently undertaking to represent Corporation A's present competitor.<sup>43</sup>

An equally stark competitor conflict was pleaded in a Pennsylvania diversity decision, *Reis v. Barley, Snyder, Senft & Cohen LLC*,<sup>44</sup> where the claim of wrongdoing was that the law firm, while continuing to represent their corporate client A, had secretly assisted another Client, B, in setting up a corporation that was specifically intended by B (as the lawyer knew) to compete directly with A.<sup>45</sup> A District of Columbia decision, *Avianca, Inc. v. Corriea*,<sup>46</sup> involved similar facts. There the lawyer, while continuing to represent a client engaged in servicing aircraft, helped incorporate and then represented a company owned by

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represent competitors of its former client is a matter that must be decided from case to case and depends on a number of factors.”). The same sentiment had been expressed earlier in an Illinois competitor-conflict decision. *ABC Trans Nat'l Transp., Inc. v. Aeronautics Forwarders, Inc.*, 413 N.E.2d 1299, 1310 (Ill. App. Ct. 1980) (“[T]he facts of each case will determine whether an individual attorney's representation of two companies in the same industry is an actionable breach of duty.”).

42. *In re Banks*, 584 P.2d 284 (Or. 1978).

43. *Banks* inspired a second Oregon decision that also condemned a competitor conflict. *See In re Conduct of Kinsey*, 660 P.2d 660 (Or. 1983).

44. 484 F. Supp. 2d 337 (E.D. Pa. 2007) (denying defendant law firm's motion to dismiss on those facts).

45. *See also, e.g., In re Capps*, 297 S.E.2d 249 (Ga. 1982) (discipline of fulltime in-house counsel of trucking company who represented another trucking company in filing for permission of regulatory agency to engage in direct competition with lawyer's employer); *In re Kinsey*, 660 P.2d 660 (discipline of lawyer who, while still retained as counsel for corporation in air carrier business, accepted corporation's majority shareholder as new client for purpose of setting up competing corporation seeking same corporate opportunity as old corporation was seeking); *cf., e.g., Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1290 (Utah Ct. App. 1996) (law firm that had assisted Client A to bid successfully for same target company that law firm was also representing Client B to buy conceded that facts existed from which fact finder could find breach of duty in malpractice action).

46. 705 F. Supp. 666 (D.D.C. 1989). Also similar is the decision earlier this year in *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 843 N.Y.S.2d 749, 761 (Sup. Ct. 2007) (“While Wilson Elser had the right to represent competitors, . . . it did not have the right to represent competitors in setting up a competing business to which it was contemplated that Ulico's accounts would be transferred.”). Importantly, the *Ulico Casualty* decision held that the aggrieved client could recover all fees paid to the offending law firm, which the court held to be forfeited because of the firm's breach of fiduciary duty. *Id.* at 761-62, 766.



the client company's president that was engaged in direct competition with the client.<sup>47</sup> The court granted summary judgment to the objecting client on its claim that the lawyer had breached his fiduciary duty to it, calling the breach "patent" and "egregious."<sup>48</sup> Similarly stark are decisions involving feckless law firms that, apparently inadvertently, end up providing a patent opinion letter to Client A that suggests ways in which Client A can copy Client B's art without violating a prior patent issued to Client B, which the firm is simultaneously representing in other matters.<sup>49</sup>

What is shared by all of the decisions finding a competitor conflict is not that representing competitors, by itself, involves conflict. To the contrary, many of those decisions recognize explicitly that there is no per se rule precluding representation of competitors in all instances.<sup>50</sup> Instead, all involve lawyers representing competitors and providing legal services in matters that are specifically and materially directed to improving the gross competitive position of a favored client against the position of another client. The courts hold that such representations involve sufficient client-versus-client antagonism that doing so is inconsistent with the minimal demands of client loyalty that underlie much of the law of lawyer conflicts<sup>51</sup> and hence they constitute representations "adverse" to the injured client.

#### A. *Competitor Conflicts and Confidential Client Information*

Some, but not all, of the competitor-conflict decisions involve a second and equally important component—the lawyer is so situated that confidential client information gathered from one competitor client would be relevant and useful in representation of the other competitor client. That, of course, is the holding of decisions such as *Maritrans*,<sup>52</sup> where the court was expressly applying the former-client conflict rule that is avowedly based on avoiding misuse of confidential information of the former client. Doctrinally, the presence of a threat to

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47. Among other conflicting representations, the lawyer had incorporated the company that the president set up to compete with the lawyer's client. The lawyer then arranged for that company to lease aircraft to third parties under documents specifying that the competitor was to provide maintenance on the aircraft. *Corriea*, 705 F. Supp. at 670-71.

48. *Id.* at 680.

49. *See, e.g., Andrew Corp. v. Beverly Mfg. Co.*, 415 F. Supp. 2d 919 (N.D. Ill. 2006) (finding conflict because of concurrent representation of clients with "directly adverse" interests).

50. *See, e.g., In re Banks*, 584 P.2d 284, 295 (Or. 1978) (rejecting as insufficient a portion of disciplinary charges that accused lawyer of representing competitor of former corporate client).

51. On the centrality of the loyalty concept to conflicts law, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. b, at 245-46 (2000).

52. *See supra* note 37; *see also, e.g., In re Banks*, 584 P.2d at 295.

confidentiality can be thought to be separate from, and irrelevant to, a determination whether the later representation is “adverse” to the former client. Evidently and quite understandably, the courts apply a more protective concept of adverseness when such a confidentiality threat is also present.

*B. Competitor Conflicts Arising from Impaired Representation*

A different, and importantly complimentary, basis for finding an impermissible competitor conflict would arise if, instead of objectionably adverse representations, the competitor clients were so situated that a lawyer representing both would not be able to provide adequate representation to both because of their conflicting positions. I have not been able to find an illustrative decision, which is not surprising. The impaired-representation basis for finding conflict is less frequently invoked than the directly-adverse basis. Moreover, most of the imaginable reasons why a competitor representation might be thought to impair a lawyer’s representation of one client or another would also be reasons for finding that the representations are adverse.

*C. Client Consent to Competitor Conflicts*

Given the setting in which competitor conflicts are most likely to arise, most of the clients affected will be sufficiently sophisticated in dealing with lawyers that their adequately informed consent to the conflict will cure it. The few decisions on point agree.<sup>53</sup> That approach seems eminently sound.

*D. “Finite-Pie” Conflicts Beyond Competitor Clients*<sup>54</sup>

Courts have found that a competitor conflict is present when the lawyer attempts to represent two competitors on a material aspect of their competition. Viewed in that way, competitor-conflict decisions bear resemblance to another line of decisions, involving what I refer to

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53. *E.g.*, *Melamed v. ITT Cont’l Baking Co.*, 592 F.2d 290, 293 (6th Cir. 1979). The *Melamed* court held that the plaintiff trustee in bankruptcy, a lawyer, could effectively consent to his law firm’s representation of the bankrupt baking company in an antitrust action for predatory price-fixing damages that was framed by the law firm solely as a claim against one major competitor of the bankrupt company, despite the firm’s failure to join in the same action two other major baking companies who were clients of the firm and potential targets of a similar antitrust claim.

54. One noted authority has referred to such conflicts as “parallel representation” conflicts. RICHARD E. FLAMM, *LAWYER DISQUALIFICATION: CONFLICTS OF INTERESTS AND OTHER BASES* § 3.8 (2003). While there is much to admire in the treatise of my neighbor Mr. Flamm, his phrase is too loose because it might be taken to refer to all concurrent-representation conflicts.

here as "finite-pie" conflicts. For example, is a conflict presented if the same lawyer represents two different plaintiffs in (otherwise) entirely unrelated claims against the same defendant? In most situations, the intuitive answer is no. The two actions are directed against the same defendant, as opposed to a situation of claims against each other.<sup>55</sup>

But, suppose the facts are such that there is a significant risk that the defendant's resources might prove insufficient to satisfy both claimants' claims. Does a conflict now exist? Such a dire strait, obviously, is not the usual situation. As a practical matter, solvency for many defendants with respect to many such multiple claims is simply not an issue. Damage actions against a defendant fully insured for both claims, for example, present only a remote prospect of difficulty in collecting a judgment—for example, because of the remote prospect that the insurer will become insolvent. The same would be true of actions for damages against an apparently solvent defendant, even if uninsured.<sup>56</sup>

*E. "Finite-Pie" Problems in Representing Multiple Claimants Against a Debtor with Limited Assets*

On the other hand, a lawyer's representation of multiple clients in damage actions against the same defendant who is either uninsured or minimally insured and possessed of only modest assets presents the clear risk that the first claimant to obtain execution or otherwise secure its interest might receive full compensation, while clients with claims that are attempted to be collected later would receive little or nothing. In a Pennsylvania case,<sup>57</sup> for example, a lawyer undertook to represent several passengers in an automobile accident who were seriously injured in a collision with a hit-and-run driver whose identity was never established. As a result, the three co-clients were faced with the prospect of recovering only against the driver-owner's uninsured motorist coverage, which was far less than the total of their claims. Without consulting with the co-clients about the obvious conflict, the lawyer attempted to persuade them to agree to informal arbitration before a retired judge. Eventually, the clients discharged the lawyer, hired

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55. Again, I also assume that the representations do not present an issue conflict, such as where establishing a legal position for Client A would create a binding precedent that would materially impair the lawyer's representation of Client B. See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 cmt. f (2000) (discussing situations where a lawyer takes "adverse legal positions on behalf of different clients").

56. *E.g.*, *In re Griffith*, 748 P.2d 86, 100-01 (Or. 1987) (en banc) (dismissing charge that lawyer had conflict of interest in representing two banks with claims against same debtors in absence of allegation that debtors were insolvent or lacked sufficient assets to respond to all claims).

57. *Swenck v. Asbury*, 62 Pa. D. & C.4th 391 (Ct. Com. Pl. 2003).

another, and recovered amounts greater than the original lawyer reasonably thought available. Despite the curative effect of the second lawyer's work, the court denied the original lawyer's claims for fees on a quantum meruit basis because of the concurrent-representation conflict.<sup>58</sup>

Another clear instance would be damage actions against the trustee in bankruptcy of a bankrupt. The bankrupt's assets are, by definition, limited. If one lawyer were to represent multiple claimants against the same limited-assets defendant, the lawyer would likely face the prospect of needing to choose to pursue the claim of one creditor over those of another. Consequently, it is clear that a conflict exists.<sup>59</sup> Another clear example arises outside the bankruptcy context. If both claims of the multiple claimants arise from the same incident and the defendant's insurance coverage is limited in amount for each incident, the prospect that one or more claimants with substantial claims will receive less than a full recovery may be reasonably foreseeable.<sup>60</sup>

A variation on the "finite-pie" theme could arise in a situation in which a lawyer, representing Client A, is proceeding against the interests of a third party who is a debtor of a person, Client B, whom the lawyer is currently representing in an otherwise-unrelated matter. The concern might be expressed that the lawyer's success against the debtor—either in defeating a claim that the debtor has made for economic recovery against A, or in successfully representing Client A in recovering

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58. *Id.* at 406.

59. *See* Kuper v. Quantum Chem. Corp., 145 F.R.D. 80, 82-83 (S.D. Ohio 1992) (refusing to certify class due to lack of adequate representation where counsel for potential class also represented a separate group of claimants with similar claims against the same defending parties); Jackshaw Pontiac, Inc. v. Cleveland Press Publ'g Co., 102 F.R.D. 183, 192-93 (N.D. Ohio 1984) (holding that lawyers could not adequately represent plaintiff class because of concurrent representation of different plaintiffs in an action seeking to tap into the same limited assets of defendants). The court in *In re Griffith* held that Lawyer who represented Bank-1 in litigation to recover assets from Debtors to pay off a loan from Bank-1 was not engaged in an impermissible conflict of interest simply because Lawyer also represented Bank-2, which had made a follow-on loan to Debtors, most of which Debtors had used to pay off the Bank-1 loan. *Griffith*, 748 P.2d at 100-01. (Apparently, Lawyer did not represent Bank-2 in connection with the Bank-2 loan to Debtors.) Lawyer knew, of course, that Debtors were having cash-flow problems. *Id.* The court held that the mere fact that Lawyer was aware of the cash-flow problem was insufficient to prove a conflict in the absence of evidence that the Debtors were insolvent, that Bank-2 had a superior priority position in the assets used to satisfy the claim of Bank-1, that Lawyer had in fact preferred Bank-1 over Bank-2 in collecting assets from the Debtors, or that Lawyer knew that Bank-2 was concerned about the delinquent Debtor account. *Id.* at 101.

60. *See* Brandt v. Bassett (*In re* Se. Banking Corp.), 147 B.R. 267, 270-74 (S.D. Fla. 1992) (on the particular facts before the court, denying a motion to disqualify, but holding open a later opportunity for renewal of motion should concrete facts show conflict). In such situations, the burden should rest on the party objecting to the lawyer's representation to establish with sufficient specificity that such a prospect is more than a speculative possibility.

something of economic value from the debtor—would redound to the disadvantage of Client B's position as creditor of the debtor. In many such instances, of course, there would be no basis for the lawyer to be aware that success in representing Client A would materially impair the ability of the debtor to pay its debt to Client B. Moreover, treating all such instances as concurrent-representation conflicts would vastly increase the conflict-checking responsibilities of lawyers, as well as requiring highly specific and potentially invasive inquiries into the credit-worthiness and debtor-creditor relationships of adversaries of a client or prospective client. On the other hand, if the lawyer *were* aware of the interconnected arrangement, and thus were aware that success for Client A would significantly put at risk the ability of Client B to recover from the same person, in my view the positions of the two clients are adverse and a "finite-pie" conflict is presented.

As with competitor conflicts, the divergence arises only if the lawyer's work with respect to each representation relates to the "finite-pie" matter. It would not suffice if the lawyer represents one claimant with respect to the limited-assets claim and represents the other claimant only in an entirely unrelated matter.<sup>61</sup>

#### F. Multiple-Claimant, "Finite-Pie" Conflicts in Bankruptcy

"Finite-pie" conflicts have arisen with some frequency in federal bankruptcy cases where a lawyer represents two or more creditors who have a claim against the debtor's assets or two or more individuals or entities who might be liable for a debtor's obligations. One type of "finite pie" conflict is governed by a provision of the federal Bankruptcy Code,<sup>62</sup> which prohibits a lawyer who represents a creditor committee from representing an entity having an "adverse interest" in connection with the case. The section, however, states that "[r]epresentation of one

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61. That was the situation in *In re Ainsworth*, 614 P.2d 1127 (Or. 1980), where the court dealt with the situation of a lawyer who represented a client who had a judgment lien against a piece of property and was involved in sometimes heated negotiations with R, the owner of the property, and H, a person who wished to buy the property, but only if the lien were released. *Id.* at 1129-31. The court held that there was no conflict involved in the lawyer's agreement, while the negotiations were still ongoing, to represent H in a matter entirely unrelated to the property dispute and negotiations to resolve it. *Id.* at 1131-32.

62. 11 U.S.C. § 1103(b) (2000).

An attorney . . . employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation 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.

*Id.*

or more creditors of the same class as represented by the committee” does not “per se constitute the representation of an adverse interest.”<sup>63</sup> As do competitor-conflict decisions generally, bankruptcy decisions have held that a lawyer’s representation of clients in bankruptcy who have competing claims to a debtor’s assets or who might be liable for a debtor’s liabilities does not, by itself, offend the “adverse interest” standard.<sup>64</sup> A representation is, however, impermissible where a lawyer’s representation of one creditor’s claim or of a creditor committee as a whole will result in a significant reduction in the debtor’s assets available to satisfy the competing claim of one or more of the lawyer’s other clients.<sup>65</sup>

Of course, theoretically, such a situation could be said to exist in every instance in which a lawyer undertakes to represent multiple claimants of the same class in bankruptcy. But the reality is that all claimants within the same class will receive the same proportionate reduction of their claim; the important issue is the amount to be allocated to the class of creditors as a whole. It is therefore in the interest of each such claimant to reduce legal expenses by retaining the same law firm to represent the class. So long as there is no significant risk that intraclass disputes will arise over the claims of the class members among each other, no conflict exists.

## VI. CONCLUSION

“Finite-pie” conflicts, including those arising from concurrent or sequential representation of economic competitors, present but one variation on the core concepts of lawyer conflicts. As with many other areas of the modern law governing lawyers, the law of conflict that has developed to deal with “finite-pie” and competitor conflicts indicates that courts are carefully assessing considerations that are sometimes congruent and sometimes inconsistent. As with the body of decisions dealing with lawyer conflicts generally, the common-law process is in

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63. *Id.*

64. *See, e.g., In re Tech. For Energy Corp.*, 53 B.R. 32, 33-34 (Bankr. E.D. Tenn. 1985) (holding no § 1103(b) violation where law firm retained by creditors’ committee had represented two shareholders of the debtor because the interests of the shareholders and the creditors’ committee were not in conflict with respect to the firm’s limited services as special counsel).

65. *See, e.g., In re Whitman*, 101 B.R. 37, 39 (Bankr. N.D. Ind. 1989) (holding § 1103(b) violation as a matter of law where law firm simultaneously represents the unsecured creditors committee and a creditor with a secured claim because “every dollar which must be paid on account of that secured claim, . . . will of necessity diminish the assets available for distribution on account of unsecured claims”). This is most likely to occur when the different clients are in different creditor classes or are in subclasses that are or reasonably could be expected to be treated differently within the same class.

the midst of evolving a body of conflict law that is far more concrete and elaborated than was true decades ago.

As one result, methods employed by law firms to deal with conflicts have also been forced to evolve. Systems for detecting and assessing conflicts of interest when taking on new clients or new matters for old clients (and, to an extent, assessing whether conditions in an existing representation have altered the conflict landscape) cannot be based on antiquated notions of conflicts that might have been understandable decades ago. Through improving conflict-checking computer technology and systems and through adequate staffing of risk-management teams in law firms, the means of detecting conflicts continue to improve. In addition, as with many other issues of the law governing lawyers, continued upgrading of each lawyer's awareness of conflicts remains an integral part of the intertwined goals of providing conflict-free representation to all clients, as well as practicing with safety from liability for their lawyers.