"DIRECTLY ADVERSE" MEANS *DIRECTLY* ADVERSE: HOW COURTS HAVE MISREAD RULE 1.7(A)(1) AND WHY IT MATTERS

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ABSTRACT

The Model Rules do not define "directly adverse." These words limit a lawyer's freedom to accept clients and a client's ability to hire counsel of choice—this prohibition derives from the lawyer's duty of loyalty. When, then, is a matter directly adverse to a nonparty client simply because the outcome could harm its interests? The answer to that question, the subject of this Article, is where the boundaries of Rule 1.7(a)(1) have been blurred, leaving the courts and the bar without adequate guidance. By confusing Rule 1.9(a)'s protection of a former client's "interests" with Rule 1.7(a)(1)'s prohibition of direct adversity to a current client, courts have rewritten and expanded Rule 1.7(a)(1). This Article examines the current rules, discusses how they have been erroneously applied, and offers guidelines for a proper interpretation of directly adverse.

TABLE OF CONTENTS

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INTRODUCTION

"Directly adverse," two consequential words in Rule 1.7(a)(1) of the American Bar Association's (ABA) Model Rules of Professional Conduct and in the rules of forty-six American states, limits a lawyer's freedom to accept clients and a client's ability to hire counsel of choice.[1] A lawyer cannot represent *A*, directly adverse to *B*, if *B* is a current client. The prohibition derives from the lawyer's duty of loyalty.[2] Rule 1.10(a) imputes a lawyer's Rule 1.7(a)(1) conflict to other lawyers in the lawyer's firm. So the reach of a directly adverse conflict is broad.[3]

In a wrong turn, courts have greatly expanded the directly adverse test for current client conflicts, leading to mistaken findings of a conflict and disqualifications. They have, in effect, construed the words "directly adverse" to incorporate the "materially adverse" test for former client conflicts in Rule 1.9(a).[4] Yet the two rules describe different conflicts, protect different interests, and operate from different premises.

Rule 1.7(a)(1) protects a client's interest in not seeing the client's current lawyer in a certain position—i.e., the position of direct adversity. The position is itself the conflict with no need to further assess the effect on any other client interest. A lawyer is directly adverse to client *A* when, for example, the lawyer represents client *B* in a negotiation or litigation against client *A*, even if a different firm represents client *A* in the negotiation or litigation,[5] or when success in the work for which client *C* hired the lawyer is incompatible with the work for which client *D* hired the lawyer (or the lawyer's firm).[6] For example, a law firm that is representing a client in negotiating to buy a company cannot concurrently aid another client in competing to buy the same company.[7]

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1. MODEL RULES OF PRO. CONDUCT r. 1.7(a)(1) (AM. BAR ASS'N 2020) (providing that absent informed client consent, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . the representation of one client will be directly adverse to another client"). The American Bar Association compiles state adoptions for each of the Model Rules. The "directly adverse" language of Rule 1.7(a)(1) has been adopted in forty-six states. *See generally* CPR POL'Y IMPLEMENTATION COMM., AM. BAR. ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 1.7 (2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_7.pdf. This compilation is current through December 11, 2018. My research confirms its present accuracy. See *infra* notes 43–52 and accompanying text for summary of the rules in other U.S. jurisdictions.

2. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 6. Rule 1.7(b) will allow informed client consent to most current conflicts. The antecedent question posed in this Article is whether there is a conflict at all.

3. *See id.* at r. 1.10(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 Rule[] 1.7. . . .").

4. *See infra* text accompanying notes 9–14, 187–94.

5. *See* MODEL RULES OF PRO. CONDUCT r. 1.7 cmts. 6–7.

6. *See infra* text accompanying notes 152–69.

7. *See infra* text accompanying notes 152–59.

Rule 1.9(a) protects different interests. It protects a former client's interests in a lawyer's duties of confidentiality and loyalty.[8] It does so by forbidding representation of a later client whose "interests are materially adverse" to the former client's interests in the matter if there is a substantial relationship between the current and former matters.[9] That inquiry requires comparing the former and current matters.[10] For example, a law firm that represented a client on a tax matter would be disqualified from later representing a new client against the former client in an antitrust matter. The firm would be able to use financial information it presumably learned in the tax matter adversely to its former client in the antitrust matter.[11]

A firm may be disqualified under Rule 1.9(a) even when the former client is not a party to the matter and there is no direct adversity because Rule 1.9(a) forbids material adversity to the former client's "interests" in a "substantially related matter."[12] Conversely, a lawyer may be directly adverse to a former client in a matter that is not substantially related to the former representation. "Certainly, a client does not own a lawyer for all time. In appropriate circumstances our rules allow lawyers to take positions adverse to former clients and even to bring suit against them."[13]

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8. *See* MODEL RULES OF PRO. CONDUCT r. 1.9.

9. *Id.* at r. 1.9(a) cmt. 2–3 (discussing confidential information in comment 3 and explaining in comment 2 that Rule 1.9's "underlying question is whether the lawyer . . . can be justly regarded as . . . changing . . . sides"); *see also* Sullivan Cnty. Reg'l Refuse Disposal Dist. v. Town of Acworth, 686 A.2d 755, 757 (N.H. 1996) ("[E]ven in the absence of any confidences, an attorney owes a duty of loyalty to a former client that prevents that attorney from attacking, or interpreting, work she performed, or supervised, for the former client.").

10. "The scope of a client's interests is normally determined by the scope of work that the lawyer undertook in the former representation." RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 132 cmt. e (AM. L. INST. 2000).

11. *See* Analytica, Inc. v. NPD Rsch., Inc., 708 F.2d 1263, 1266 (7th Cir. 1983) ("[A] lawyer may not represent an adversary of his former client if the subject matter of the two representations is 'substantially related,' which means: if the lawyer could have obtained confidential information in the first representation that would have been relevant in the second."). *Analytica* involved tax advice followed by an antitrust claim. If the matters are substantially related, the lawyer is presumed to have learned information in the first matter relevant to the second matter. *See* MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 3.

12. MODEL RULES OF PRO. CONDUCT r. 1.9(a); *see, e.g.*, Plotts v. Chester Cycles LLC, No. CV-14-00428-PHX-GMS, 2016 WL 614023, at *6 (D. Ariz. Feb. 16, 2016). The court in *Plotts* disqualified the plaintiff's counsel on the following facts:

> Thomas Longfellow is an attorney at Burch & Cracchiolo, P.A. . . . . Attorneys of Plaintiff's Counsel represent Plaintiff in this matter; however, Mr. Longfellow has not appeared in this case. Nonetheless, Mr. Longfellow represented E.B. Chester . . . in his 2011–12 marital dissolution. Mr. Chester is not a party to this action, but he owns approximately a one-third interest in Chester Group, LLC. Chester Group is the parent company that owns Defendant Chester Cycles . . . . During the former representation, Mr. Chester communicated "confidential information about the business and assets of Chester Group, LLC" to Mr. Longfellow as part of a property settlement related to the divorce proceedings. Defendant now seeks the imputed disqualification of Plaintiff's Counsel pursuant to Arizona Rules of Professional Conduct 1.9 and 1.10 due to Mr. Longfellow's former representation of Mr. Chester in his divorce.

Id. at *6 (internal citations omitted).

13. *In re* Carey, 89 S.W.3d 477, 496 (Mo. 2002) (en banc).

By confusing Rule 1.9(a)'s protection of a former client's "interests" with Rule 1.7(a)(1)'s prohibition of "direct adversity" to a current client, courts have rewritten Rule 1.7(a)(1) as if it said, "A matter may be directly adverse to a current client if work a lawyer is doing for a second client could harm the first client's interests." This expansive reading ignores or misunderstands the word "directly" and substitutes the "interests" analysis of Rule 1.9(a) for the positional prohibition in Rule 1.7(a)(1). This error may seem a mere misreading of text—an interpretive mistake of linguistic interest and no more—but it can lead (and has led) to the wrongful denial of chosen counsel.

The Model Rules do not define "directly adverse." When, if ever, is a matter directly adverse to a nonparty client simply because the outcome could harm its interests? The answer to that question, the subject of this Article, is where the boundaries of Rule 1.7(a)(1) have been blurred, leaving the courts and the bar without adequate guidance. As a result, interpretations of the rule are overbroad and unpredictable.[14] Try identifying a governing principle that will give a consistent answer in the following four situations, three of which have been addressed by courts or bar ethics committees and one of which I have imagined.

- Law Firm represents Company *CD* on unrelated matters. May it represent a party suing *CD*'s independently operated and wholly owned corporate subsidiary *EF*, which Law Firm does not represent, if victory would cause substantial economic harm to *EF* and therefore to *CD*? In the language of the rule: Is Law Firm's work against party and nonclient *EF* directly adverse to client and nonparty *CD* because of possible, or even certain, economic harm to *CD* if the firm prevails?[15]

- Law Firm represents *GH* suing nonclient *JK* for violating *GH*'s patent in the manufacture of a particular product. *GH* seeks injunctive relief against *JK*'s sale of the product. *JK*'s biggest customer for the product is *LM*, a Law Firm client on unrelated matters. *LM*'s business depends on the uninterrupted supply of *JK*'s product. Is the infringement action against party and nonclient *JK* directly adverse to client and nonparty *LM* because of possible harm to *LM*'s business—such as increased costs—if the injunction is granted?[16]

- May Law Firm help client *E* build an office tower that will block views and sunlight to client *F*'s nearby office building,

14. *See infra* Part III.
15. *See infra* Section II.C.
16. *See infra* Section II.A.

reducing its rental value by a third?[17] Law Firm represents *F* on unrelated matters.

- Law Firm sues nonclient *G*. *H*, a client on unrelated matters but not a party, is contractually obligated to indemnify *G* if *G* loses. Is Law Firm directly adverse to *H*?[18]

Identifying whether a party to a dispute or negotiation is a client is straightforward: Search the party's name in the firm's database of clients. Imagine that Companies *A*, *B*, and *C* plan to sue Companies *D*, *E*, and *F*. Company *A* asks a law firm to represent it. To clear conflicts, the firm will search the names of the parties and corporate affiliates. If Company *D*'s name comes up as a current firm client, the representation will violate Rule 1.7(a)(1) unless *D* consents.[19] Assume instead that victory for Company *A* will financially harm Company *X*, a firm client, because *X* has commercial ties to the defendants. Company *X*'s name will not appear in the search. Although the firm will not be directly adverse to *X* as a party, a court today, misreading Rule 1.7(a)(1), might find a current client conflict because of the possible harm.

How can a law firm protect itself from what its lawyers may not, and perhaps cannot, know or easily discover? To what extent should the difficulty in determining whether a nonparty client has a commercial or other interest in a matter define the scope of directly adverse?

So far as I can tell, only one (rather short) law review article from 2007[20] has sought to seriously grapple with the questions posed here, mainly in the context of "fixed-pie" matters, where two or more clients are making claims against a limited fund and their claims total more than the value of the fund, or "single-winner" matters, where two or more clients are seeking the same goal (e.g., a government contract), which only one can win.[21]

Surely, it is remarkable that a phrase so consequential for law firms and clients remains so unclear. While a formula is impossible, we should be able to give lawyers and courts more guidance than the rule and its comments now do. We might begin by asking why we forbid direct adversity to a current client in the first place. The answer to that question should aid in defining directly adverse.

Part I describes conflict rules for current clients and compares the different descriptions of the forbidden adversity in former-client conflict rules, the rule governing the work of former government lawyers, and the

17. *See infra* text accompanying note 190.
18. *See infra* text accompanying notes 122–25.
19. *See* MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 3 (AM. BAR ASS'N 2020).
20. Charles W. Wolfram, *Competitor and Other "Finite-Pie" Conflicts*, 36 HOFSTRA L. REV. 539, 539–40 (2007).
21. *See infra* Section II.E.

rule describing duties to prospective clients. Part I also examines the reasons for the prohibition on direct adversity—what do we want to protect? Part II reviews and questions court and ethics opinions that have construed directly adverse. Part III further explains how the courts have erred in defining directly adverse and offers a set of principles for a proper interpretation of the term. Applying these principles, the Conclusion sets out six circumstances where a representation should be considered directly adverse to a current client.

I. MODEL RULE 1.7(A)(1) AND JURISDICTIONAL VARIATIONS

ABA Model Rule 1.7(a)(1) forbids a lawyer to represent a client if there is a "concurrent conflict of interest," which the rule says is present if "the representation of one client will be directly adverse to another client."[22] The rule's comments call this an aspect of "loyalty and independent judgment."[23] There need be no threat to client confidences. "Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent."[24] The examples given are obvious: representation in a dispute[25] or in a transactional matter,[26] where another client, with different counsel, opposes the client whom the lawyer represents. Cross-examination of and discovery aimed at a current client are also forbidden.[27]

Calling the prohibition part of the duty of loyalty tells us little. It tells us neither the rule's scope nor the policy behind it. Knowing both would help law firms comply with the rule and courts apply it. The comments to the rule further explain: "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

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22. MODEL RULES OF PRO. CONDUCT r. 1.7(a)(1). This provision must be distinguished from Rule 1.7(a)(2), which provides that a "concurrent conflict of interest exists if . . . 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." *Id.* at r. 1.7(a)(2). Rule 1.7(a)(2) is broader than Rule 1.7(a)(1). It operates even if there is no direct adversity toward a current client. It would violate the rule, for example, for a lawyer to represent a client in seeking substantial money damages from a company whose president was the lawyer's spouse. Rule 1.7(a)(1) might be read as a specific application of Rule 1.7(a)(2).

23. *Id.* at cmt. 1.

24. *Id.* at cmt. 6.

25. *Id.*

26. *Id.* at cmt. 7.

27. *Id.* at cmt. 6 (discussing cross-examination); ABA Comm. on Ethics & Pro. Resp., Formal Op. 92-367 (1992). The ABA Opinion concluded that:

> [A] lawyer's examining the lawyer's client as an adverse witness, or conducting third party discovery of a client, will ordinarily present a conflict of interest that is disqualifying absent consent of one or both of the clients involved (depending, as will be explained, on the nature and degree of the conflict), and that the individual lawyer's disqualification will, again in the absence of consent, be imputed to all other lawyers in the lawyer's firm as well.

Id.

ability to represent the client effectively."[28] This is an empirical prediction based on intuition. The comment goes on to reject some feelings of betrayal, not because they are or are not "likely," but as an implied policy. "[S]imultaneous representation in unrelated matters of clients whose interests are only economically adverse," the comment says, "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."[29] Although some clients may also "feel betrayed" if they discover that their law firm is representing their toughest competitor, "ordinarily" that will not be a conflict. The adverb further complicates matters. When is representing a competitor on an unrelated matter not ordinary?

The comment, though brief, does clarify at least one point: A client's subjective feelings are not the test of the meaning of "directly adverse."[30] The test is objective.[31] If it were subjective, its application would be even less predictable and depend on the sensibilities of each client. It would favor more suspicious clients. And it would invite tactically feigned feelings of betrayal. Only those feelings of betrayal that the rule, and ultimately the courts, deem worthy of protection count as a betrayal.[32] But which feelings are they?

Whatever the merits of the objective test when the adverse client is a party to the matter—something a lawyer should readily be able to learn—an objective test leaves lawyers in a state of uncertainty, and therefore at risk, if a matter may be found to be directly adverse to the interests of a client who is not a party. If the lawyer is aware of that nonparty client's interest in the matter, the lawyer must decide whether the representation qualifies as directly adverse.[33] If the lawyer is not aware of a nonparty client's interest in the matter, is there a duty to investigate? The rule does not identify a culpable state of mind. Its text categorically forbids direct adversity.[34] Is it then an absolute liability rule? Or should we read it to say that the lawyer must know, or at least reasonably should know, of a nonparty client's interest in a matter before we even ask whether work on it is directly adverse? The answers to these questions

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28. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 6. The comment continues: "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." *Id.*

29. *Id.* Courts have rejected clients' civil claims against lawyers based solely on their representation of a competitor of the client. *See* Curtis v. Radio Representatives, Inc., 696 F. Supp. 729, 736 (D.D.C. 1988); Maling v. Finnegan, Henderson, Farabow, Garett & Dunner, LLP, 42 N.E.3d 199, 207–08 (Mass. 2015).

30. *See* MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 6.

31. *See id.*

32. Where the court finds a representation disloyal, but the client does not, the client will almost always be able to give informed consent to the representation. *See id.* at r. 1.7(b)(4).

33. *See id.* at r. 1.7(a)(2), cmt. 2.

34. *See id.* at r. 1.7(a)(1).

should depend on the context in which the questions arise. Is the context professional discipline or a motion to disqualify? My research discloses no case in which lawyers have been disciplined when they did not know, and could not reasonably have known, of a conflict.[35]

No other client conflict rule in the Model Rules employs the term "directly adverse" and only one comment does.[36] Rules 1.9(a), 1.9(b), and 1.10(b) all use the term "materially adverse."[37] Rule 1.9(a) forbids a lawyer to represent a client in a matter that is "materially adverse" to the "interests" of a former client, but only if the matter is "substantially related" to the former representation.[38] Rule 1.9(b) forbids the same if the lawyer's work was done at a former firm or if the lawyer received relevant confidential information while at a former firm.[39] Rule 1.10(b) ends imputation of a lawyer's conflict to others in the firm if the lawyer has left the firm.[40]

The prohibition on material adversity in Rule 1.9 may initially appear broader than the prohibition on direct adversity in Rule 1.7(a)(1). It purports to protect the interests of the former client even when there is no direct adversity.[41] But the rule's seeming breadth is significantly narrowed by the requirement that the new matter be substantially related to a former matter for the client.[42]

A. Jurisdictional Variations

Rules in Georgia, New York, North Dakota, Texas, and the District of Columbia do not identify or contain the phrase "directly adverse" as a basis to prohibit concurrent client conflicts. Each, however, has generic language that could forbid direct adversity in some circumstances, and

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35. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 121 cmt. f (AM. L. INST. 2000) ("When a lawyer undertakes a representation that is later determined to involve a conflict of interest that could not reasonably have been and in fact was not identified at an earlier point . . . the lawyer is not liable for damages or subject to discipline.").

36. *See infra* note 40 and accompanying text.

37. MODEL RULES OF PRO. CONDUCT r. 1.9(a)–(b), 1.10(b).

38. *Id.* at r. 1.9(a). The former client conflict rule would also apply to a former matter for a current client. For example, if a firm represented client *M* on a now concluded matter, Rule 1.9(a) would not allow it to be materially adverse to *M* on a new substantially related matter. If, as it happens, *M* is also (or then becomes) a firm client on a different matter, it does not thereby lose the separate protection of Rule 1.9(a). Rule 1.18(c) imposes limitations similar to those of Rule 1.9(a) if a lawyer has gained information from a "prospective client" who does not thereafter become a client and about whom the lawyer has received information "that could be significantly harmful to that person" in the same or substantially related matter. *Id.* at r. 1.18(c); *see also* ABA Comm. on Ethics & Pro. Resp., Formal Op. 492 (2020).

39. MODEL RULES OF PRO. CONDUCT r. 1.9(b).

40. Rule 1.10(b) uses the same test as Rule 1.9(a) and (b)—"materially adverse"—but Rule 1.10 comment 5 provides, "Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm." *Id.* at r. 1.10 cmt 5. The purpose of Rule 1.10(b) is to remove the imputation of both Rule 1.7 and Rule 1.9 conflicts when the lawyer whose work would have created the conflict under either rule has left the firm. *See id.*

41. *Id.* at r. 1.9(a).

42. *See id.*

the "directly adverse" phrase may appear in court opinions.[43] A brief look at these sources will be useful.

Georgia. While Georgia's black letter rules do not contain an equivalent to ABA Model Rule 1.7(a)(1), comment [4] to Georgia Rule 1.7 does.[44]

New York. New York's Rule 1.7 retains confusing language from the former Code of Professional Responsibility (Code). "Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests . . . ."[45] The definition of "differing interests" in the former Code, carried over to the current New York Rules, makes interpretation even more of a challenge. "Differing interests," it is said, "include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."[46] Federal case law in New York forbids direct adversity and interprets New York state courts to do the same.[47]

North Dakota. North Dakota's Rule 1.7(a) does not specifically prohibit direct adversity.[48] However, the comments imply restrictions broader than the text of the rule.[49]

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43. *See, e.g.*, Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc., 687 F. Supp. 2d 381, 388 (S.D.N.Y. 2010) ("It is prima facie improper for an attorney to simultaneously represent a client and another party with interests directly adverse to that client." (quoting Hempstead Video, Inc. v Inc. Vill. of Valley Stream, 409 F.3d 127, 133 (2d Cir. 2005) (internal quotations omitted))).

44. GA. RULES OF PRO. CONDUCT r. 1.7 cmt. 4 (GA. BAR ASS'N 2020) ("As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.").

45. N.Y. RULES OF PRO. CONDUCT r 1.7(a)(1) (N.Y. BAR ASS'N 2018). Disciplinary Rule 5-105(A) and (B) of New York's former Code of Professional Responsibility had provided:

> A. A lawyer shall decline proffered employment if the exercise of 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 the lawyer in representing differing interests . . . . B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests . . . .

STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 1076 (2009).

46. N.Y. RULES OF PRO. CONDUCT r 1.0(f) (internal quotations omitted). For the former N.Y. Code, see GILLERS ET AL., *supra* note 45, at 1021.

47. Discotrade Ltd. v. Wyeth-Ayerst Int'l, Inc., 200 F. Supp. 2d 355, 358 (S.D.N.Y. 2002) ("An attorney owes his client a duty of 'undivided loyalty.' Thus, the Second Circuit has instructed us that it is prima facie improper for lawyers to take on a representation that is directly adverse to a current client." (citing Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386–87 (2d Cir. 1976) (citations omitted))).

48. N.D. Rule 1.7(a) does have language equivalent to Model Rule 1.7(a)(2). *Compare* N.D. RULES OF PRO. CONDUCT r. 1.7(a) (N.D. COURTS 2016), *with* MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2) (AM. BAR. ASS'N 2020).

49. Comments 9 and 15 envision that the rule would forbid some direct adversity in litigation and negotiation, respectively. N.D. RULES OF PRO. CONDUCT r. 1.7 cmt. 9, 15. Comment 9 provides in part, "Ordinarily, a lawyer may not act as an advocate against a client the lawyer represents in

Texas. Texas allows lawyers to be "materially and directly adverse" to a client whom the lawyer represents on another matter so long as that matter is not "substantially related" to the adverse matter, and the representation will not be "adversely limited" by responsibilities to the other client.[50]

Washington, D.C. Washington, D.C., avoids confusion over the meaning of the word "directly" by not using it. Instead, its version of Rule 1.7 limits the forbidden adversity to situations where another client is a party to the matter and taking an adverse position.[51]

> Except as permitted by paragraph (c) . . . a lawyer shall not represent a client with respect to a matter if . . . [t]hat matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer.[52]

B. The Restatement of Law Governing Lawyers

The Restatement does not use the phrase "directly adverse" in its current client conflict rules. It does, however, prohibit certain representations adverse to a current client.[53] Specifically, Section 128(2) forbids a lawyer in civil litigation from "represent[ing] one client to assert or defend a claim against or brought by another client currently represented by the lawyer, even if the matters are not related."[54] In civil matters outside litigation, representation is forbidden "if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by . . . the lawyer's duties to another current client."[55]

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some other matter, even if the other matter is wholly unrelated . . . . The propriety of concurrent representation can depend on the nature of the litigation." *Id.* at r. 1.7 cmt. 9. Comment 15 provides in part, "Conflict questions may arise in transactional matters . . . . In a negotiation, a lawyer may not represent multiple parties whose interests are fundamentally antagonistic to each other." *Id.* at r. 1.7 cmt. 15.

50. TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 1.06(b)(1)–(2) (TEX. BAR ASS'N 2019). Comment 6 to the Rule provides:

> Within the meaning of Rule 1.06(b), the representation of one client is "directly adverse" to the representation of another client if the lawyer's independent judgment on behalf of a client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client.

Id. at r. 1.06 cmt. 6. This language restates the "significant risk" test in Rule 1.7(a)(2). MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2).

51. D.C. RULES OF PRO. CONDUCT r. 1.7(b)(1) (D.C. BAR 2020).

52. *Id.* The subject of subsection (c)(1) is consent. *Id.* at r. 1.7(c)(1). The Washington, D.C. rules come closest to the position in this Article.

53. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 128(2) (AM. L. INST. 2000).

54. *Id.*

55. *Id.* § 121 (setting forth the general rule against conflicts of interest). Section 130 addresses representation of multiple clients in the same matter outside litigation. *Id.* § 130. In criminal litigation, a lawyer may not represent "two or more defendants or potential defendants in the same matter" or represent any defendant if there is a substantial risk that the representation "would be materi-

II. WHEN ARE MATTERS "DIRECTLY ADVERSE" TO A NONPARTY CLIENT?

This Part discusses court and bar opinions that address, and sometimes recognize, claims that a law firm's work on a matter was, or would be, directly adverse to a current client, even when that client is not a party to the matter. For each, the overriding question is whether the rules should treat the work as disloyal, and therefore directly adverse, to the nonparty client because of a prediction of the effect of the work on its interests?

A. Celgard *and* Freedom Wireless*: An Injunction's Effect*

Celgard, LLC v. LG Chem, Ltd.[56] was not the first opinion to ask when a matter can be directly adverse to a client who is not a party to the matter, but it may have been the first to alert the bar to the importance and ambiguity—and therefore the dangers—of the word "directly" and the phrase "directly adverse."[57] No prior opinions, some of which are described below, seem to have made as much of a splash. Perhaps this is because *Celgard* was a federal circuit court opinion; because it identified no clear boundary; and because the court failed to recognize, let alone grapple with, the implications of its ruling. The court seems to have considered the issue easy. It did not select the opinion for publication.[58] But the issue is not easy.

Celgard had won a preliminary injunction preventing LG Chem from selling lithium batteries that Celgard claimed violated its patent.[59] Apple, which was not a party, was a substantial customer for the LG Chem batteries.[60] If the appellate court affirmed the injunction (it was stayed pending appeal), Apple would face "not only the possibility of finding a new battery supplier, but also additional targeting by Celgard in an attempt to use the injunction issue as leverage in negotiating a business relationship."[61] The court anticipated such "targeting" because Celgard had sent Apple a copy of its motion seeking to enjoin LG Chem.[62]

Apple was a current Jones Day client.[63] The firm did not represent Celgard in the district court but appeared for it on appeal.[64] Jones Day

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ally and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person." *Id.* §§ 121, 129(1).

56. 594 F. App'x 669 (Fed. Cir. 2014).
57. *See id.* at 671–72.
58. *Id.* at 672.
59. *Id.* at 670–71.
60. *Id.* at 671.
61. *Id.* at 672. The court wrote: "Soon after [moving for a preliminary injunction], Celgard sent Apple a copy of its motion and requested to work with Apple to find a mutually beneficial business arrangement to resolve the issues around infringement of Celgard's intellectual property." *Id.* at 671.
62. *Id.* at 672.
63. *See id.* at 670.
64. *Id.* at 671.

knew that Apple was an LG Chem customer. The firm told Celgard that it could not "represent Celgard . . . against customers of LG Chem who were also Jones clients—such as Apple."[65]

Apple intervened before the Federal Circuit and moved to disqualify Jones Day.[66] The court held that "[b]ecause Jones Day's representation here is 'directly adverse' *to the interests and legal obligations* of Apple, and is not merely adverse in an 'economic sense,' the duty of loyalty protects Apple from further representation of Celgard" by Jones Day.[67] This sentence is perplexing. The court cannot mean to say that adversity to the "interests" of a current client who is not a party is a conflict without more. A client may not like the goal a law firm is pursuing for another client. That goal may not be in its financial or other interests. But no rule forbids work for one client only because the lawyer's success will be contrary to interests of another client.[68] And despite the court's conclusory statement that Jones Day was "not merely adverse [to Apple] in an 'economic sense,'" that is exactly what it was. A Celgard victory could cost Apple money.

The court also wrote that the firm's work was "directly adverse" to Apple's "legal obligations."[69] While the injunction may have created legal obligations for LG Chem that were not in Apple's "interests," specifically LG Chem's obligation to stop selling batteries that violated Celgard's patent, it did not alter Apple's own legal obligations.[70]

The court did not further explain why the perceived adversity was direct or why it violated the duty of loyalty. (The court did not identify any threat to confidential information.) Would Jones Day have been directly adverse to Apple if it had represented Celgard in buying the lithium battery patent from LG Chem? Surely not. Yet Apple's supplier would then be Celgard, not LG Chem, and Celgard could still use its ownership "as leverage in negotiating a business relationship."[71] Why should how the firm helped Celgard acquire the patent matter to the conflict analysis?

Nor is it clear why a change in suppliers—to Celgard from LG Chem—is necessarily adverse to Apple, whether accomplished through

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65. *Id.* at 672.
66. *Id.* at 671.
67. *Id.* (emphasis added).
68. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR. ASS'N 2020) (detailing conflicts of interest for current clients).
69. *Celgard*, 594 F. App'x at 671 (internal quotations omitted).
70. If the injunction were upheld, Apple would be legally obligated not to violate Celgard's patent. Perhaps that is what the court had in mind, although it did not say so. But that explanation is far too broad. Law firms routinely advocate for rules—from courts, agencies, and legislatures—that, if successful, would create legal obligations, including for other clients. A law firm may, for example, argue for an interpretation of a tax statute that would benefit one client but create legal obligations for a second client that it represents on unrelated matters.
71. *Celgard*, 594 F. App'x at 672.

litigation or an assignment of the patent. The financial terms might be the same. Whether LG Chem or Celgard owned the patent, its goal would be to maximize its profits while Apple's interest would be the same—to get the best price.[72] Celgard had an interest in Apple's continued business given its size.

By finding direct adversity because the case could—not that it would—harm a nonparty client's economic interests, the court substantially expanded the breadth of the rule without offering a standard for deciding which "interests" the rule did and did not protect.

The court cited its opinion in *Freedom Wireless, Inc. v. Boston Communication Group, Inc.*,[73] whose "grounds for disqualification," it wrote, "appl[ied] equally here."[74] In *Freedom Wireless*, after Quinn Emanuel won a $128 million judgment and a permanent injunction in a patent case, the firm issued a press release that said the injunction also bound the "current carrier customers" of one of the defendants in the case.[75] Quinn Emanuel's client, Nextel, happened to be one of those customers.[76] The court held that Quinn "has asserted a position that an injunction obtained on behalf of one client . . . should limit the activity of another client, Nextel. In this situation, a clear and direct conflict of interest has arisen."[77] In *Celgard*, Jones Day did not publicly claim that the injunction "should limit the activity of [Apple]." Or perhaps, as I write in Part III, *Freedom Wireless*, like *Celgard*, is wrong because the phrase "directly adverse" should be construed more narrowly than it was.

B. The "Parallel Proceedings" Cases

Celgard also relied on *Arrowpac Inc. v. Sea Star Line LLC.*,[78] which described a form of adversity identified in several cases and which we might call "parallel proceedings" adversity.[79] It can be illustrated schematically. Law Firm *A* represents client *B* against nonclient *C*. *B* can be a plaintiff or a defendant. Concurrently, in a separate action with different counsel, *B* is adverse to Company *X* in a matter arising out of the same facts and raising the same legal questions as those in *B* versus *C*. *X* is a client of Law Firm *A*, which is why *B* had to hire different counsel to oppose *X*. The two matters might be in the same court, even before the same judge. *X* seeks to disqualify *A*, claiming that *B* will be able to use

72. One possible disadvantage for Apple would arise if, as a result of a successful Celgard effort to enjoin LG Chem, Apple was required to negotiate a less favorable contract for the component (assuming it had a contract) whereas assignment of the patent from LG Chem to Celgard might not disturb Apple's contract rights if they existed. But that distinction is conjecture because the court cited no such contract rights, nor did it rest on any such distinction. *See id.* at 669–72.

73. Nos. 2006–1020 et al., 2006 WL 8071423 (Fed. Cir. Mar. 20, 2006).

74. *Celgard*, 594 F. App'x at 671.

75. *Freedom Wireless*, 2006 WL 8071423, at *2.

76. *Id.* at *1.

77. *Id.* at *3.

78. Nos. 3:12-cv-1180-J-32JBT et al., 2013 WL 5460027 (M.D. Fla. Apr. 30, 2013).

79. *See id.* at *8–12.

A's work against *C* in *B*'s action against *X*. The question is, when, if ever, will that make Law Firm *A* directly adverse to client *X*?[80] Answers diverge.

The *Arrowpac* court, applying Rule 1.7(a)(1), disqualified the firm in Law Firm *A*'s position.[81] The narrow ruling depended on the procedural posture of the two cases. The court predicted that "in this rather unique factual situation," Law Firm *A* would either "share information directly" with the law firm opposing *X*, its client, or "would certainly have to consult general counsel for [client *B*]," who would then "necessarily have to consult with the firm representing it in the [*X*] matter."[82] That "general counsel could not be expected to ignore research or an argument made by [*A*] . . . if that research or argument would be equally applicable" in the case against *X*.[83] In short, as the court saw it, *A*'s legal work could harm *X* through an intermediary.[84] Either its work would be passed to client *B* and by it to the firm representing *B* against *X*, or Law Firm *A* would give that work directly to the firm representing *B* against *X*.[85] The court concluded that no remedy short of disqualification would avoid the likelihood of harm to *X*.[86]

Arrowpac should be distinguished from the dramatic facts of *Fund of Funds, Ltd. v. Arthur Andersen & Co*.[87] Morgan Lewis represented Fund of Funds against several defendants but could not represent it against Arthur Andersen because Arthur Andersen was a Morgan Lewis client. Fund of Funds, therefore, retained Milgrim Thomajan & Jacobs to oppose Arthur Andersen.[88] In granting a motion to disqualify Milgrim, the court found that Morgan Lewis did more than merely pass information along to Milgrim.[89] It was actually "helpful to [Milgrim] in advancing the suit" against Arthur Andersen.[90] The court agreed with the characterization of Milgrim as Morgan Lewis's "understudy." [91] The assistance Morgan Lewis gave Milgrim in the prosecution of the claim

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80. This question is distinct from asking whether *A* has a conflict under Rule 1.7(a)(2). *See* MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2) (AM. BAR. ASS'N 2020). That rule would disqualify *A* only if there were a "significant risk" of a material limitation on its representation of either client, most likely *B* if the firm were reluctant to antagonize client *X*. *See id.* By contrast, in a directly adverse situation there is no room to argue that a "significant risk" is absent—the direct adversity is by itself disabling. *Id.* at r. 1.7(a)(1); *see supra* note 22.

81. *Arrowpac*, 2013 WL 5460027, at *2.

82. *Id.* at *10–11.

83. *Id.* at *11.

84. *See id.* at *10–12.

85. The first is more likely. The court could forbid Law Firm *A* to give its work directly to the law firm representing *B* against *X*. By contrast, a court might be reluctant to restrict what a client could communicate to its own lawyer.

86. *See Arrowpac*, 2013 WL 5460027, at *12–13.

87. 567 F.2d 225 (2d Cir. 1977).

88. *See id.* at 227.

89. *See id.* at 233.

90. *Id.* at 234.

91. *Id.* at 227 (internal quotations omitted).

against its own client[92] makes it easy to call this a case of direct adversity.

Other courts have declined to disqualify the firm in the position of Law Firm *A* because they could not confidently predict, as the *Arrowpac* court said it could, that *A*'s work for client *B* would be used to harm its client *X*.[93] These courts looked at the degree of similarity between the matters and the likelihood that *A*'s work would find its way to the law firm opposing client *X*.[94]

For example, in *In re Rail Freight Fuel Surcharge Antitrust Litigation*,[95] the court refused to remove Latham & Watkins (Latham) from defending a railroad charged with price fixing notwithstanding that a Latham client, with different counsel, had a "related" price fixing case against the same railroad.[96] Distinguishing *Arrowpac*, the court wrote that the cases before the *Arrowpac* court "were nearly identical in both substance and procedural posture, and the [*Arrowpac* court] expressed concern that work product developed by [Law Firm *A*] . . . inevitably would be used against" its client.[97] By contrast, the *Rail Freight* court found that the matters for and against the railroad were not the "same matter," which the court said was required by its reading of the applicable Washington, D.C. professional conduct rule.[98]

And in *Sumitomo Corp. v. J.P. Morgan & Co.*,[99] the court refused to disqualify Paul Weiss from representing Sumitomo in its actions against several banks (including J.P. Morgan) notwithstanding that another law firm (which Paul Weiss had recommended) was representing Sumitomo against Chase Bank, a Paul Weiss client, in a parallel (and consolidated) proceeding arising from the same facts and relying on the same legal

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92. The court wrote:

> However strenuously Morgan Lewis labored to avoid any prejudice to the interests of Andersen and the record does indicate Morgan Lewis's repeated efforts to escape sinking into the ethical quagmires its representation of the Fund invited it was a goal impossible to achieve. At every turn, lawyers in Morgan Lewis were presented with documents which touched on Andersen's potential liability in the natural resource scheme. [The district court's] delineation of the many ways in which Morgan Lewis participated in the investigation and filing of a suit against Andersen the recital of which, in our view, does not exhaustively define the evidence of their involvement amply demonstrates the wisdom of the admonition . . . that "no man can serve two masters."

Id. at 233 (quoting Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386 (2d Cir. 1976). Today, the conduct would also violate Rule 8.4(a), which forbids a lawyer to violate a rule "through the acts of another." MODEL RULES OF PRO. CONDUCT r. 8.4(a) (AM. BAR. ASS'N 2020).

93. *See, e.g.*, *In re* Rail Freight Fuel Surcharge Antitrust Litig., 965 F. Supp. 2d 104 (D.D.C. 2013); Sumitomo Corp. v. J.P. Morgan & Co., Nos. 99 Civ. 8780(JSM) et al., 2000 WL 145747 (S.D.N.Y. Feb. 8, 2000).

94. *See In re Rail Freight*, 965 F. Supp. 2d at 112; *Sumitomo*, 2000 WL 145747, at *4–5.

95. 965 F. Supp. 2d 104 (D.D.C. 2013).

96. *Id.* at 112–13, 119.

97. *Id.* at 113.

98. *Id.* at 111–13.

99. Nos. 99 Civ. 8780(JSM) et al., 2000 WL 145747 (S.D.N.Y. Feb. 8, 2000).

theories.[100] Thinly distinguishing cases where disqualification had been ordered, the court wrote that "Paul Weiss is not involved in attempting to establish wrongdoing by Chase or seeking a judgment that will directly impact Chase."[101] One could say the same about *Arrowpac.* The court turned next to its pretrial consolidation ruling:

> The Court consolidated the Chase and Morgan actions for pretrial purposes. Such consolidation prejudices neither Sumitomo nor Chase because it does not create a conflict for Paul Weiss. Upon consolidation, no conflict arises because consolidation does not merge separate lawsuits into a single action and does not make parties in one suit parties in another. Thus, consolidation does not create a situation in which Paul Weiss is representing a client who is suing another current client.[102]

Sumitomo reaches the correct result and *Arrowpac* does not. In neither case will a client need to confront its own law firm in court, on motions, or in discovery. But whatever the proper test for defining "directly adverse" in parallel proceedings cases, *Celgard*, although relying on *Arrowpac*, presented an entirely different situation. Apple did not face the threat of having its law firm's work used against it in a judicial proceeding in which it was a party. Nor did the court envision that possibility. Harm to Apple, if any, would come from a change in the supplier of a cellphone component.[103] That is economic adversity, not legal adversity. The marketplace, not the law, is where any financial harm would or would not occur, and representation of economic adversaries is not "ordinarily" a conflict.[104] What makes *Celgard* unsatisfying is the court's failure to recognize and address these distinctions. *Celgard* chose to call the work directly adverse without explaining why.[105]

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100. *Id.* at *2, *5.

101. *Id.* at *5.

102. *Id.* (citations omitted). A joint trial, in which Chase would be confronted with witnesses Paul Weiss called on behalf of Sumitomo and with the firm's legal arguments for Sumitomo, would create direct adversity.

103. *See* Celgard, LLC v. LG Chem., Ltd., 594 F. App'x 669, 671–72 (Fed. Cir. 2014).

104. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 6 (AM. BAR ASS'N 2020).

105. Three other parallel proceedings cases merit brief mention. The first is *Milwaukee Elec. Tool Corp. v. Hilti, Inc.*, Nos. 14-CV-1288-JPS et al., 2015 WL 1898393, *3–6 (E.D. Wis. Apr. 27, 2015) in which following a review of cases granting and denying disqualification, including *Arrowpac* and *Sumitomo*, the court declined to disqualify DLA Piper after finding no direct adversity against a current client because of differences between the patent case DLA Piper was prosecuting and the patent case its client was defending. Two cases whose different holdings are explained by the courts' different standards for evaluating the likelihood of harm are *Rembrandt Techs., LP v. Comcast Corp.*, No. 2:05CV443, 2007 WL 470631 (E.D. Tex. Feb. 8, 2007) and *Multimedia Pat. Tr. v. Apple Inc.*, No. 10-CV-2618 H(CAB), 2011 WL 1636928 (S.D. Cal. Apr. 29, 2011). The *Rembrandt* court disqualified Fish & Richardson (F&R) from representing the plaintiff against Comcast because of predictable harm to Time Warner, a defendant in a parallel case and an F&R client. *Rembrandt*, 2007 WL 470631, at *1, *4–5. The court saw "a likelihood that the positions taken by F&R in this case could, as a practical matter, prejudice Time Warner." *Id.* at *4. By contrast, the *Multimedia* court, distinguishing *Rembrandt*, refused to disqualify Quinn Emanuel despite a parallel proceeding in the same court against its client DirectTV. *Multimedia*, 2011 WL 1636928, at *3–4.

C. A Claim Against a Client's Affiliate Could Harm the Client

A law firm represents a plaintiff against a company that is an affiliate of a client but is not itself a client. Imagine a claim for a large sum of money against nonclient *QRS*, a subsidiary of *LMN*, which is a firm client. The representation may be forbidden if the two companies share officers or inside counsel.[106] The firm may then find itself advising *LMN*'s officers one week, and confronting some of the same people a week later in its case against *QRS*. The firm's work will properly be deemed directly adverse to *LMN*.

In *Travelers Indemnity Co. v. Gerling Global Reinsurance Corp.*,[107] LeBoeuf, Lamb, Greene & MacRae LLP was representing one subsidiary within a corporate family (GGRCA) while opposing another subsidiary (Gerling) within the same family.[108] The court disqualified the firm, citing the overlap in personnel.[109] "LeBoeuf attorneys will no doubt continue to advise GGRCA management regarding ongoing litigation, while at the same time other LeBoeuf attorneys may be preparing to depose these same individuals, in their capacity as Gerling management, for the prosecution of this case."[110]

A firm will also be viewed as directly adverse to a client's corporate affiliates if it has agreed that affiliates of its client will be deemed firm clients.[111]

But assume that the two companies operate independently, in different locations, and with different inside counsel, officers, and directors. A judgment against *QRS*, the subsidiary, will harm parent *LMN* financially. Does that make the work against *QRS* directly adverse to *LMN*? The ABA, while acknowledging contrary authority, has said no.[112] On those facts, the ABA held that Rule 1.13(a) identifies the parent as the sole client.[113]

> We conclude, then, that although in situations involving an unrelated suit against an affiliate of a corporate client, the client may be adversely affected, that adverseness is, for purposes of Rule 1.7, indirect rather than direct, since its immediate impact is on the affiliate, and only derivatively upon the client. The phrasing of Rule 1.7(a) is

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"Quinn Emanuel may not take any position in this [MPT] litigation," the court wrote, "that would necessarily be adverse to Direct TV in its [separate] MPT litigation." *Id.* at *3.

106. *See* MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 34.

107. No. 99 CIV. 4413(LMM), 2000 WL 1159260 (S.D.N.Y. Aug. 15, 2000).

108. *Id.* at *1–3.

109. *Id.* at *5–6.

110. *Id.* at *6. The court relied on the former Code of Responsibility, in effect in New York at the time. *See id.* at *4. The Code did not contain the phrase "directly adverse," but the court's holding is tantamount to a finding of direct adversity. It wrote: "[A]n attorney that seeks to simultaneously represent two adverse parties is per se disqualified." *Id.* at *4.

111. ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-390 (1995).

112. *Id.*

113. *See id.*; MODEL RULES OF PRO. CONDUCT r. 1.13(a) (AM. BAR ASS'N 2020).

> not ambiguous: the reference to a representation that is "directly adverse" clearly draws a distinction between direct and indirect adverseness, and thereby draws a bright line striking a balance between the interests of lawyer and client.[114]

The Restatement of Law Governing Lawyers, adopted some three years later, disagrees.[115] It treats a representation adverse to a corporate client's affiliate, not itself a client, as a violation of the duty of loyalty where the suit against the affiliate "will have a direct, adverse impact on the client."[116] It illustrates this position with a hypothetical in which the harm to the client member of the corporate family is solely financial.[117] The Second Circuit, on the other hand, has sided with the ABA.[118]

Where the harm to the client member of a corporate family is solely economic, the ABA and the Second Circuit reach the right result. The representation is not directly adverse to a nonparty client who may be financially harmed. The legal services market offers the nonparty client other remedies.[119] For business reasons, law firms may be reluctant to represent a client whose objective could cause another client financial harm. If the firm does so anyway, the client who will be harmed can fire the firm.[120] Court intercession, which will require predictions of the amount of harm required and how proximate and likely the harm must be, is ill-suited to police these choices in the name of ethics.

D. Other Claims Against a Nonclient Party That Could or Will Harm a Nonparty Client

A miscellany of opinions addresses other situations where success in an action against a nonclient party will harm a nonparty client.[121]

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114. ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-390 (1995).

115. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 121 cmt. d (AM. L. INST. 2000).

116. *Id.*; *see also* JPMorgan Chase Bank v. Liberty Mut. Ins. Co., 189 F. Supp. 2d 20, 23–24 (S.D.N.Y. 2002) (citing the economic harm to a client, along with other reasons, for disqualifying Davis Polk from opposing the client's subsidiary).

117. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 121 cmt. d, illus. 6.

118. GSI Com. Sols., Inc. v. BabyCenter, L.L.C., 618 F.3d 204, 211 (2d Cir. 2010) ("[W]e agree with the ABA that affiliates should not be considered a single entity for conflicts purposes based solely on the fact that one entity is a wholly-owned subsidiary of the other, at least when the subsidiary is not otherwise operationally integrated with the parent company." (citing ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-390 (1995)). While this language does not expressly exclude financial harm to a nonclient family member as a basis for finding a conflict, in context I think it should be so read.

119. *See, e.g.*, ABA Comm. on Ethics & Pro. Resp., Formal Op. 95-390.

120. *See id.*

121. *See, e.g.*, Snapping Shoals Elec. Membership Corp. v. RLI Ins. Corp., No. 1:05 CV 1714-GET, 2006 WL 1877078, at *3–4 (N.D. Ga. July 5, 2006); *In re* Bringsjord, 714 N.Y.S.2d 69, 70 (N.Y. App. Div. 2000). These cases should be distinguished from those in which a party who is not and never was a client of an opposing law firm claims standing to seek its disqualification. See, for example, *Colyer v. Smith*, 50 F. Supp. 2d 966, 968–71 (C.D. Cal. 1999), which cites a division of authority on the issue and concludes:

> It seems clear to this Court that a non client litigant must establish a personal stake in the motion to disqualify . . . . Generally, only the former or current client will have such a stake in a conflict of interest dispute. . . . [unless] the ethical breach so infects the litiga-

These opinions, some of which misread Rule 1.7(a)(1), reveal confusion over whether (and, if so, when and why) economic harm to a nonparty client will make a representation directly adverse to it and therefore disloyal.

Paul Hastings represented Snapping Shoals against Cayenta, a nonclient, in *Snapping Shoals Electric Membership Corp. v. RLI Insurance Corp.*[122] But L-3 Titan, a Paul Hastings client that had previously owned Cayenta, was obligated to indemnify Cayenta.[123] L-3 Titan intervened and moved to disqualify Paul Hastings, which argued that "L-3 Titan's financial risk is too attenuated to show direct adversity."[124] The court disagreed. It sufficed that L-3 Titan was contractually obligated to pay any judgment against its indemnitee, Cayenta.[125]

Similarly, in *Bringsjord v. Salomon Smith Barney, Inc.*,[126] Bringsjord sought to arbitrate a claim against his former employer, Smith Barney.[127] Bringsjord moved to disqualify Neal, Gerber & Eisenberg, Smith Barney's counsel, because it concurrently represented Bringsjord's current employer, nonparty Oppenheimer, on an unrelated matter.[128] Oppenheimer and Bringsjord had agreed that Oppenheimer would receive half of any award to Bringsjord above a certain sum.[129] Success for Smith Barney would be a monetary loss for Bringsjord and therefore for Oppenheimer. The court granted the motion to disqualify.[130]

A court's ruling on facts like these may depend on the sequence of events. Can a party conflict a formidable opposing firm from a matter by contracting to sell an interest in its claim to a client of that firm? A federal district court opinion said no. In *Board of Regents of the University of Nebraska v. BASF Corp.*,[131] the University of Nebraska sought a declaratory judgment that BASF Corporation (BASF) had no interest in a license for a particular technology.[132] Kirkland & Ellis represented BASF.[133] But Kirkland also represented Monsanto in unrelated litigation and, after the declaratory judgment action was filed, the university gave Monsanto an exclusive license to the technology.[134] Monsanto intervened

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> tion . . . that it impacts the moving party's interest in a just and lawful determination of her claims . . . .

122. No. 1:05 CV 1714-GET, 2006 WL 1877078, at *1 (N.D. Ga. July 5, 2006). The action was originally filed against RLI. *Id.* After RLI impleaded Cayenta as a third party defendant, Snapping Shoals amended its complaint to add Cayenta as a defendant. *Id.*

123. *Id.* at *3.

124. *Id.*

125. *Id.* at *4.

126. 714 N.Y.S.2d 69 (N.Y. App. Div. 2000).

127. *Id.* at 70.

128. *Id.*

129. *Id.*

130. *Id.*

131. No. 4:04CV3356, 2006 WL 2385363 (D. Neb. Aug. 17, 2006).

132. *Id.* at *2.

133. *Id.* at *1.

134. *Id.* at *1–2.

to disqualify Kirkland from representing BASF.[135] Monsanto argued that BASF's claimed right to use the technology was directly adverse to Monsanto's claim of an exclusive right.[136] The court denied the motion to disqualify, but not because it found no direct adversity.[137] Rather, it explained, "the conflict now facing K&E was not of its own making."[138] It arose because after the declaratory judgment claim was filed, the university granted the exclusive license to Monsanto.[139] The opinion did not say or imply that the assignment's objective was to force the disqualification of Kirkland. The sequence, not motive, was the basis for the holding.

Consider too, under this heading, two ABA ethics opinions issued the same day in 2004. Both broadly addressed the meaning of directly adverse. In one, a law firm represented an insurance company on unrelated matters while it also represented a plaintiff against a nonclient who was insured by the company.[140] The insurer would be obliged to pay any judgment. The two matters were unrelated. It might seem that this situation is indistinguishable from those in which a nonparty client has agreed to indemnify a defendant, as in *Snapping Shoals*, or has contracted for an economic interest in a plaintiff's recovery, as in *Bringsjord*. A victory for the plaintiff in the case against the company's insured would financially harm the company. Yet the ethics opinion concluded that the action against the company's insured would not be directly adverse to the company.[141] Economic harm by itself was not enough to make it so.

> In the opinion of the Committee, such simultaneous representation does not, without more, result in "direct adversity" under Rule 1.7(a)(1) unless the client liability insurer providing defense and indemnity to the defendant in the second case also is a named party in the litigation . . . . Although a liability insurer has an economic interest in the litigation that ordinarily is aligned with the interests of its insured, economic adversity alone between the insurer and the plaintiff in the second action is not, in the opinion of the Committee, the sort of direct adversity that constitutes a concurrent conflict of interest under the Model Rules. Simultaneous representation in unrelated matters of clients whose interests are only economically adverse does not ordinarily constitute a conflict of interest requiring the consent of the respective clients.[142]

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135. *Id.* at *4.
136. *See id.* at *1.
137. *Id.* at *10–12.
138. *Id.* at *11.
139. This is an example of a thrust upon conflict—one created by the conduct of others. *See infra* text accompanying note 158.
140. ABA Comm. on Ethics & Pro. Resp., Formal Op. 05-435 (2004).
141. *Id.*
142. *Id.* (footnotes omitted); *see also* Stonebridge Cas. Ins. v. D.W. Van Dyke & Co., No. 10-CV-81157, 2015 WL 8330980, at *2–3 (S.D. Fla. Oct. 23, 2015) (citing ABA Opinion 05-435).

While the committee found that there was no direct adversity, and repeated that conclusion in various ways, it did not offer a governing principle.

Paul Hastings cited Opinion 05-435 in *Snapping Shoals* in resisting disqualification based on the obligation of its client, L-3 Titan, to indemnify nonclient Cayenta.[143] The court rejected reliance on the ethics opinion.[144] "The relationship between an insured and insurer is unique," it wrote.[145] "An insurance company has thousands of policyholders that it has agreed to indemnify as a matter of course in a variety of situations causing harm to the insured."[146]

The court then cited other reasons for finding that economic adversity was the equivalent of direct adversity on the facts before it:

> L-3 Titan, agreed to indemnify Cayenta or its new parent corporation based on harm arising from the particular software contract under which plaintiff sued. Further, L-3 Titan and Cayenta shared management personnel, employees, corporate policies and headquarters at the time Paul Hastings represented L-3 Titan. Finally, Paul Hastings was aware of the indemnity agreement and a fund set aside for potential indemnity payments due, in part, to work it performed while representing L-3 Titan.[147]

The relevance of the court's distinctions here is doubtful. First, why does it matter whether or not Paul Hastings was aware of the indemnity agreement? Awareness of the effect that a victory for the plaintiff would have on a client should not turn a situation where work is not directly adverse to one where it is. Conversely, if the action had been directly adverse to L-3 Titan, Paul Hastings's ignorance of that fact should not prevent disqualification. We are protecting the client, not punishing the lawyer. Second, why does it matter that L-3 Titan previously shared management, personnel, and headquarters with Cayenta when L-3 Titan owned it? L-3 Titan did not own Cayenta when the case was filed or when the disqualification motion was made.[148] We are left with the fact that economic harm to a nonparty client can, by itself, constitute direct adversity.

In the second ABA opinion, issued the same day as Opinion 05-435, the question was whether a lawyer could represent a testator in preparing an instrument disinheriting a person who was that lawyer's client on an

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143. Snapping Shoals Elec. Membership Corp. v. RLI Ins. Corp., No. 1:05 CV 1714-GET, 2006 WL 1877078, at *3 (N.D. Ga. July 5, 2006) (citing ABA Comm. on Ethics & Pro. Resp., Formal Op. 05-435 (2004)).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* The court also disqualified Paul Hastings under Rule 1.9(a), the former client conflict rule, citing its prior work for Cayenta. *Id.* at *5–7.

148. *See id.* at *1, *3.

unrelated matter.[149] The effect of the representation was certainly financially harmful to the disinherited second client. The ABA again concluded that there was no direct adversity, distinguishing between legal and economic conflicts in language that might have enlightened the Federal Circuit in *Celgard*.[150]

> Direct adversity requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests. There may be direct adversity even though there is no overt confrontation between the clients, as, for example, where one client seeks the lawyer's advice as to his legal rights against another client whom the lawyer represents on a wholly unrelated matter. Thus, for example, a lawyer would be precluded by Rule 1.7(a) from advising a client as to his rights under a contract with another client of the lawyer, or as to whether the statute of limitations has run on potential claims against, or by, another client of the lawyer. Such conflict involves the legal rights and duties of the two clients vis-à-vis one another.[151]

E. Single-Winner Contests

Two clients, represented by the same law firm, may be angling for a contract, piece of property, or other prize that only one can win. The firm's work helping either client will be directly adverse to the goal of the other client and violate Rule 1.7(a)(1). Victory for either client is a defeat for the other, yet the firm's job is to help each client win.[152] We can call this a "dual representation." The same conflict can arise in "fixed-pie" contests, which occur when two clients have competing claims for an amount of money that is not large enough to satisfy both claims, as can happen in bankruptcy proceedings or where two or more injured plaintiffs are relying on insurance money that cannot compensate both fully.[153]

A variation occurs if a firm is advising only one client who is seeking a prize or other goal while a second client, whom the firm represents on unrelated matters, is seeking the same prize or goal with different counsel, and only one client can win (or win as much as it claims). We can call this a "single representation" to distinguish it from a dual representation. In a single representation, should we continue to say that the

149. ABA Comm. on Ethics & Pro. Resp., Formal Op. 05-434 (2004).

150. *Id.*

151. *Id.* Opinion 05-434 cites *Chase v. Bowen*, 771 So. 2d 1181, 1185–86 (Fla. App. 2000) ("If a lawyer prepares the wills of various members of a family, he thereby assumes no obligation to oppose any testator or testatrix from changing such will.").

152. There may also be a threat to each client's confidential information—each would like to know what the other is offering—but the focus of the directly adverse analysis is the scope of the lawyer's loyalty duty whether or not there is a threat to confidences.

153. *See* The Florida Bar v. Scott, 39 So. 3d 309, 316 (Fla. 2010) (finding that a lawyer's clients "were all directly adverse to one another because all had claims to the same pool of money"); *see also* Wolfram, *supra* note 20, at 558–62 (discussing "finite pie" cases in various contexts). I will assume only two clients are competing although it could be that more are—the analysis is the same.

firm is directly adverse to the second client? If we accept an analogy to litigation or negotiation, the answer will be yes.[154] A law firm cannot be adverse in litigation or negotiation to a client it represents on unrelated matters, even if a different firm represents that client in the adverse matter.[155]

A Washington, D.C. ethics opinion recognized the possibility of a conflict in a single representation in responding to "an inquiry from a lawyer practicing in a highly specialized industry."[156] The opinion described the issue:

> One of [the inquirer's] current clients, Client A, sought her advice in connection with its proposed acquisition of Company X. The transaction was subject to regulatory approval, and Client A, which is a foreign company, anticipated that its bid would generate scrutiny and opposition from the business and political communities. As a consequence, Client A asked the lawyer to keep the proposed bid confidential until the bid was formally announced.
>
> The lawyer . . . believed that once Client A's bid became public, one or more of her other clients might intervene to oppose regulatory approval of Client A's bid. Importantly, the lawyer asserts that her industry experience was the *only* basis for her assumption that other industry companies might seek to acquire Company X or oppose Client A's bid, although she could not identify which of her clients, if any, might take either position . . . .
>
> Shortly before Client A was to announce its bid, another of the lawyer's industry clients, Client B, announced that it would submit a bid to acquire Company X. Client B uses the inquiring lawyer's services in other unrelated matters, but retained a different lawyer to represent it in connection with this proposed acquisition. Once Client A's bid is made public, Clients A and B will either compete directly for the right to acquire Company X, intervene with the regulator to prevent one another from obtaining regulatory approval for their respective bids, or both.[157]

The committee's focus was not whether the lawyer was adverse to a current client, which it assumed, but whether, despite the adversity, she

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154. I am assuming that the firm is representing the client in all phases of the work, including formulating the monetary and other terms. But the work can be modest. Two clients, both interested in bidding for Defense Department work, may ask the same firm only to generally describe the bidding process. A claim of direct adversity, and a feeling of betrayal, would not then be credible. The firm can successfully fulfill its obligations to each client.

155. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 6 (AM. BAR ASS'N 2020).

156. D.C. Bar Comm. on Ethics, Formal Op. 356 (2010).

157. *Id.*

could continue to represent Client A under Washington, D.C.'s unique rule for thrust upon conflicts.[158] It concluded that she could.[159]

As noted,[160] the comment to Rule 1.7 explains that the policy behind the prohibition on direct adversity is avoidance of a situation in which a client "is likely to feel betrayed," which, if true, would make it harder for the lawyer "to represent the client effectively."[161] In a single representation, the client who is not represented but who learns that its law firm is representing a competitor for the very goal it seeks may also feel betrayed. Yet because the test is objective,[162] a client's feelings do not determine whether a representation is directly adverse. Rather, the question is, should the courts credit these feelings by characterizing the law firm's work as directly adverse and therefore disloyal? "Directly adverse" is the label we attach to the representation after concluding that we want to recognize, as worthy of protection, what we surmise will be a hypothetical client's feeling of betrayal.

I use the word "surmise" for two reasons. First, in any particular situation, it is possible that a client will not in fact feel betrayed. Our objective conclusion, in other words, may be subjectively false in particular cases. Second, when a firm is representing only one of two clients bidding for a prize, it is possible that neither client (nor the firm itself) will know about the other client. Then, the client the firm is not representing cannot feel betrayed and the quality of the firm's unrelated work for that client should not be impaired. So if we nevertheless forbid the representation, it means that the prohibition turns on a prediction of how reasonable clients would feel if they knew. Elsewhere, we do say that work may be directly adverse to a client even if the client is unaware of the work. A firm cannot secretly assist client *A* in prosecuting a claim against client *B* even if a different firm appears for *A* in court.[163]

Lobbying presents a variation on the single-winner paradigm. Can a firm represent Company *X* in its effort to persuade a legislature to pass a bill (or an agency to adopt a rule) if the firm also represents Company *Y* in its opposition to the bill or rule? Not under Washington, D.C.'s version of Rule 1.7(a), which provides that "[a] lawyer shall not advance two or more adverse positions in the same matter."[164] Washington, D.C.'s rules describe lobbying as a "matter."[165] Although it is worded

158. D.C. RULES OF PRO. CONDUCT r. 1.7(d) (D.C. BAR 2020). A thrust upon conflict occurs when, during an unconflicted representation, a client acts in a manner that creates a conflict, e.g., by intervening in a lawsuit or making an assignment. *See supra* text accompanying notes 138–39.

159. D.C. Bar Comm. on Ethics, Formal Op. 356 (2010).

160. *See supra* text accompanying notes 28–32.

161. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 6 (AM. BAR ASS'N 2020).

162. *See supra* text accompanying notes 30–31.

163. *See* Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 233–36 (2d Cir. 1977); *see also supra* text accompanying notes 87–92.

164. D.C. Bar Comm. on Ethics, Formal Op. 344 (2008).

165. D.C. RULES OF PRO. CONDUCT r. 1.0(h) (D.C. BAR 2020).

differently, it seems safe to say that ABA Rule 1.7(a)(1) would reach the same result.

The Washington lobbying opinion then asked whether a firm might represent *X* in lobbying for a law or rule where success would harm *Y*, a firm client only on unrelated matters.[166] With different counsel, *Y* opposed the law or rule. The opinion concluded that a firm could do so without violating Washington, D.C. Rule 1.7(b)(1), which otherwise prohibits a representation "adverse" to a current client.[167] This was true because Rule 1.7(b)(1) in Washington, D.C., requires that the adverse matter involve "a specific party or parties."[168] Litigation and negotiation do involve "a specific party or parties," the opinion concluded, but the "phrase . . . excludes lobbying, rulemaking and other matters of general government policy."[169]

Whether ABA Model Rule 1.7(a) would give the same answer is uncertain. That rule does not contain the "specific party" language. To give the same answer, Rule 1.7(a)(1) would have to be construed to exclude from the phrase "directly adverse" the representation of a lobbying client, even if another firm client on an unrelated matter is lobbying for a contrary rule with other counsel. In light of how some courts have expansively misinterpreted the phrase "directly adverse," a court in a Model Rules jurisdiction might, but should not, decide that the work violates Rules 1.7(a)(1), contrary to the conclusion in the Washington, D.C. opinion.

F. Competitors in "Overpopulated" Markets

A variation on the single-winner situation appears in *The Florida Bar v. Herman*,[170] an odd Florida discipline case, which this Article could safely ignore as an outlier except that it reveals the risks of an inadequately focused rule, and it does present one intriguing question.[171]

Herman represented Aero Controls in litigation over Aero's contract to buy a DC-10, which Aero planned to sell for parts.[172] Aero won the case, but then decided to lease the plane instead.[173] Thereafter, Herman became the sole owner of, and the lawyer for, Nation Aviation (Nation),

166. D.C. Bar Comm. on Ethics, Formal Op. 344.

167. *Id.* The committee wrote that the Washington, D.C. rule:

> [D]oes not prohibit a lawyer-lobbyist from advancing a position in a lobbying matter that may be opposed in that same lobbying matter by another client of the lawyer-lobbyist (or of the lawyer-lobbyist's law firm) where the other client is unrepresented in the lobbying matter or is represented by a different lobbyist who is not associated with the lawyer-lobbyist's firm.

Id.

168. *Id.*

169. *Id.*

170. The Florida Bar v. Herman, 8 So. 3d 1100 (Fla. 2009).

171. *See id.* at 1103–05.

172. *Id.* at 1102.

173. *Id.*

a company he formed and which competed with Aero in the sale of aircraft parts.[174] Herman never told Aero that he represented and owned a competitor.[175]

The court held that Herman was directly adverse to Aero by representing Nation.[176] This finding did not depend on the fact that Herman also owned Nation. That fact merely "exacerbated" the "direct conflict."[177]

To explain its finding that it was a directly adverse conflict to represent competitors, the court wrote that the aircraft parts business was "overpopulated," meaning that there were more sellers than buyers.[178] As a result, "the loss of a contract or the failure of a negotiation for one client would have created additional opportunities for the other."[179] The court offered this counterfactual hypothetical of how a conflict might have emerged: "Assuming Nation Aviation had been in the parts business at [the] time" that Herman represented Aero in the contract litigation over the DC-10, "it would have been in a better position to buy the DC-10 for its own use if the contract dispute between Aero Controls and its supplier had gone the other way."[180]

Although the court's example is only a hypothetical, it does prompt this question: When is the representation of competitors a conflict? The answer cannot be always. No rule forbids a firm to do compliance work for competing banks or trademark work for competing brands, even if the firm's good work for one competitor may give it a competitive advantage over another client for which the firm does the same kind of work. The representation of competitors in unrelated matters "ordinarily" creates no conflict.[181] So the court must have identified direct adversity based on two assumptions: (1) that Herman was representing Aero and Nation at the same time on the same aspect of their business (the sale of airplane parts); and (2) that the market for the sale of airplane parts was overpopulated.

If the court is right, direct adversity would occur not only in single-winner contests but also in markets with an oversupply of either buyers or sellers where a firm is representing two clients, both of whom are, respectively, buyers or sellers. Even though each client could still be a

174. *Id.* at 1103.
175. *Id.*
176. *Id.* at 1104–05.
177. *Id.* at 1105. The court held separately that Herman violated Rule 1.8(a) by owning a company in "direct competition" with his client without consent. *Id.*
178. *Id.* (internal quotations omitted). The court did not explain the evidentiary basis for its finding of an overpopulated market, nor did it offer any guidance for identifying when a market becomes "overpopulated" with suppliers such that the representation of two suppliers will create a directly adverse conflict.
179. *Id.*
180. *Id.*
181. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 6 (AM. BAR ASS'N 2020).

"winner," the oversupply will, to some degree, reduce the probability of winning. That leaves open the questions: What constitutes an oversupply? How great must one be to call the dual representation a conflict? On these questions, the Florida opinion is entirely unhelpful.

Consider this more focused hypothetical. A city will auction off fifty identical parcels of desirable land. Before anyone is allowed to bid, they must first qualify financially by submitting a net worth statement. One hundred people are found to have the required net worth. The top fifty bidders who also meet certain nonmonetary criteria will each get a parcel, which will be assigned by lot.

Clients *A* and *B* have qualified based on their net worth to bid and independently ask the same law firm to help them to prepare their bids. Can the firm represent both *A* and *B*? If one wins, the other still has forty-nine chances to win in competition with the ninety-eight remaining qualified bidders. But if one client's bid loses, the other client will marginally benefit. There will still be ninety-eight remaining bidders, but they will now be competing for fifty parcels, not forty-nine.

When clients *A* and *B* are competing with ninety-eight other bidders for fifty parcels, we should not call them directly adverse. The situation can be analogized to representation of market competitors. But if we change the numbers, the answer is harder. Say there are only three parcels and one hundred bidders. While *A* and *B* can both win a parcel—this is not a single-winner contest—success for either significantly decreases the chances for the other. At some point, the overpopulation of bidders relative to the scarcity of parcels will lead us to say that the two clients are directly adverse, requiring informed client consent for a law firm to represent both clients. We would need to identify when we will accept a client's feeling of betrayal as objectively reasonable. In the improbable event that the assumptions in this mind game ever arise, with three parcels and one hundred bidders we should recognize a feeling of betrayal as legitimate, but change the number of parcels to fifty and we should not.

G. Positional Conflicts

In a trial court, a lawyer who represents one client may take a position on a legal question, while another firm lawyer, representing another client in a factually unrelated case, takes a contrary position on the same issue. The firm may have a positional or issue conflict. Whether it does or not will depend on more information. Imagine that a firm is representing a client in the Seventh Circuit and a second client in a federal trial court in Wisconsin. The two matters are unrelated except on a legal question common to both. Imagine that victory for the Seventh Circuit client would mean that the district court client loses on that issue and that the ruling would eliminate its claim or defense. We could call the interests of the two clients directly adverse on the outcome of the circuit argument,

even though only one is a party to it. This situation is analogous to a single-winner contest. The legal position of only one client can prevail and the same firm is arguing both sides of it.[182]

A comment to ABA Model Rule 1.7 attempts to zero in on when there will and will not be a positional conflict in these circumstances.[183] I could find only one opinion where a positional conflict led to a lawyer's removal from a matter.[184] But the disqualification was not in response to an opponent's motion. Rather, in a criminal case a lawyer cited his own issue conflict in successfully seeking permission to withdraw from an appeal.[185]

Although the positional conflicts doctrine is more theoretical than real, it can nonetheless aid in the effort to define directly adverse.

III. IN SEARCH OF A PRINCIPLED RULE

In none of the opinions in Part II was a law firm directly adverse to its client in the sense of litigating or negotiating against a client who is a party to the matter. Nonetheless, the lawyer's work was sometimes characterized as directly adverse because of the effect it could or would have on a client's interests.[186] *Celgard* and other opinions in Part II have, in effect, rewritten Rule 1.7(a)(1) to define "adverse" to mean "could cause some measure of harm to the client's interests" and "directly," when considered at all, to mean that the harm would occur with few if any intervening causes.[187]

Celgard nicely illustrates the interpretive error. The Federal Circuit held that Jones Day could not defend a lower court's injunction against a

182. If the Wisconsin client is a more lucrative source of business, we could also see a "significant risk" that the representation of the circuit court client would be "materially limited" within the meaning of Rule 1.7(a)(2). *See supra* note 22. The firm might be reluctant to argue a position in the circuit that it knew would establish binding precedent against the Wisconsin client.

183. Comment 24 provides:

> Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 24.

184. *See* Williams v. State, 805 A.2d 880, 882 (Del. 2002).

185. *Id.* at 881.

186. *See, e.g.*, *id.* at 881–82.

187. *See* discussion *supra* Part II.

maker of cellphone components because Apple, a client on unrelated matters, purchased the components, thereby making Jones Day "'directly adverse' to the interests and legal obligations of Apple."[188] The court defined direct adversity in terms of Apple's commercial interests.[189] To see why this is an error and the mischief the court's unbounded premise can cause, contrast the following hypothetical but plausible situations. In each, a law firm's work will, if successful, harm the interests of another client, which it represents only on an unrelated matter.

- A firm has been asked to argue an antitrust appeal in the United States Supreme Court. No other party to the appeal is or has ever been a firm client. But the firm knows that success in the Supreme Court will eliminate the only defense a second firm client has in a case then pending in a district court. Alternatively, success will eliminate the sole claim that another client has in a pending district court case. Loss of the claim or defense will cause the second client great financial harm, as the firm also knows. The firm does not represent the second client in the district court, nor has it ever represented the client on an antitrust or trade matter.

- A firm is negotiating for client *A* to acquire a company that is the biggest customer of client *B*, which is *A*'s competitor. If *A* buys the company, *B* will lose substantial income.

- On behalf of client *C*, a law firm is challenging the legality of a federal program that generates significant economic benefits to client *D*.

- A law firm is helping client *E* build an office tower that will block views and sunlight to client *F*'s nearby office building and reduce its rental value by a third. Perhaps the firm is also seeking a zoning variance that will permit a tower ten stories higher, which will further reduce the value of *F's* rental income.

In none of these situations should the firm be considered directly adverse to a client. Yet what principle distinguishes them from *Celgard*? The Federal Circuit offered no analysis to explain why Jones Day's loyalty to Apple foreclosed it from seeking to affirm the injunction. It just said so.[190] Its offhand observation that Jones Day was "'directly adverse' to the interests and legal obligations of Apple" is inadequate for the rea-

188. Celgard, LLC v. LG Chem., Ltd., 594 Fed. Appx. 669, 671 (Fed. Cir. 2014).
189. *Id.* at 671–72.
190. *See id.* at 671.

sons cited earlier.[191] It sufficed for the holding that the injunction could (though it might not) cost Apple money and Jones Day knew it. But success in these four hypothetical situations could also cost clients money, maybe a lot more money. If anything, Apple was in a better position than the client in the antitrust hypothetical. If necessary, Apple can pay more for the part or find a different supplier. Or maybe the new patent owner would charge the same as the former owner. By contrast, the district court client in the antitrust hypothetical would be stuck with an adverse ruling from the Supreme Court. It cannot buy or negotiate for a different one.

I have focused on *Celgard* because its facts so clearly illustrate the error I have identified. But *Celgard* is not alone. Other rulings in Part II made the same error. It is a mistake, for example, to call the representation against a client's affiliate directly adverse to the client solely because of the financial effect on the client's interests,[192] or to forbid as directly adverse the representation of a client in a single-winner contest when a different client with separate counsel is seeking the same prize.[193] It is a mistake to call a representation directly adverse to a nonparty client because the client has agreed to indemnify the defendant for a loss or has a right to share in the plaintiff's victory.[194] In each of these circumstances, the law firm is not in a position that is directly adverse to a current client, although its work may affect a current client's interests.

When we ask whether a reasonable client in Apple's position will feel betrayed such that the representation of Celgard should be forbidden as disloyal to Apple, we are really asking a different question: How expansively or narrowly should we define a lawyer's duty of loyalty? If we think the loyalty duty requires a law firm to refrain from certain conduct, but not other conduct, we will say that a reasonable client would feel betrayed in the first instance but not the second. Searching for the meaning of Rule 1.7(a)(1) in the two words "directly adverse" is fine as a starting point but it will not get us far. Rather, the phrase is the label we attach once we have identified how broadly or narrowly we wish to define the scope of the duty of loyalty.

As a matter of loyalty, a representation should be considered directly adverse to a client in the six circumstances described in the Conclusion.[195] The focus there is on the law firm's position toward a current client or the effect of work for one client on work the firm is doing for

191. *See supra* text accompanying notes 70–73. For the same reasons, the same court's opinion in *Freedom Wireless*, on which *Celgard* relies, reaches the wrong result unless Quinn Emanuel's press release can justify a different result. *See supra* text accompanying note 75.

192. *See* discussion *supra* Section II.C.

193. *See* discussion *supra* Section II.E.

194. *See* discussion *supra* Section II.D.

195. *See infra* text accompanying notes 201–06.

another client. Conveniently, a firm will usually be able to predict when one of these circumstances is present.

In addition to predictability, a reason to define directly adverse narrowly is that once it is found to exist, the rule is absolute.[196] It respects no other interests no matter how substantial. It invites no balancing. Would our views change if Jones Day were then handling one small unrelated matter for Apple that would conclude in a few months? It should. But a broad definition of directly adverse, which the Federal Circuit adopted, means a client in Apple's position will win every time, notwithstanding the effect on the interests of the client that is denied its chosen counsel, and with no inquiry into the actual harm to Apple. Instead, the *Celgard* opinion conclusively presumes, sometimes contrary to fact, first, that a client in the position of Apple "is likely to feel betrayed," and second, that the ability of Jones Day to represent it effectively will be impaired.[197] The first reason—Apple's subjective feelings—carries no weight. A client's feelings do not define the breadth of the duty of loyalty. If Apple is unhappy with the work Jones Day accepted, the company can fire the firm. The second reason is speculative and is, in any event, addressed by Rule 1.7(a)(2).[198] If, in fact, the firm could not effectively represent Apple in other matters because of its work for Celgard, Rule 1.7(a)(2) would forbid the representation.[199]

CONCLUSION: SIX TYPES OF DIRECT ADVERSITY

In the following six circumstances the conflict rules should treat a lawyer's representation of one client as directly adverse to a second client within the meaning of Rule 1.7(a)(1). In each of these, a client's feeling of betrayal, possibly impeding its ability to have confidence in its lawyer, should be presumed and respected.[200] In each, predicting whether the rule applies should be straightforward. Apart from predictability, a narrow interpretation protects the interest in counsel of choice and promises greater judicial consistency in the rule's application. The circumstances are present when a client has to confront its lawyer as its adversary, the lawyer is using an intermediary to do what the lawyer could not

196. Court opinions cited in *supra* Part II did not engage in balancing after finding direct adversity requiring disqualification.

197. *See* Celgard, LLC v. LG Chem., Ltd., 594 F. App'x 669, 671–72 (Fed. Cir. 2014).

198. *See* MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2) (AM. BAR ASS'N 2020).

199. Rule 1.7(a)(2) will also apply in those situations where the interests of another client may materially limit a lawyer's responsibilities to the represented client. *See supra* note 22. The lawyer's devotion to the represented client (e.g., Celgard) may be diluted by a wish not to antagonize another client (e.g., Apple) who though not a party, has an interest in the matter.

200. I do not discount the possibility of idiosyncratic circumstances, other than the categorical ones listed here, which may also call for a finding of direct adversity. Nor do I argue that a finding of direct adversity will necessarily lead to the remedy of disqualification. *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 121 cmt. f (AM. L. INST. 2000) ("[W]hether a particular sanction or remedy is appropriate in a specific instance depends on the relationship between the lawyer and client or clients involved, the nature and seriousness of the conflict, the circumstances giving rise to the conflict and its avoidability, and the consequences of the particular remedy sought.").

do directly, or pursuing the objective of one client will frustrate the objective that the lawyer is seeking for another client.

First, a lawyer is directly adverse to a current client when the lawyer represents a client in a pending or potential litigation or negotiation where another client is a party or prospective party.[201]

Second, when a lawyer is adverse to a nonclient entity that is a member of a corporate family that includes a client, and the two entities share officers or inside counsel, the lawyer is directly adverse to the client even though the client is not named as a party in the matter. This is because the common officers or counsel will have to confront the lawyer both as the entity's lawyer and as its opponent.[202]

Third, direct adversity is present in single-winner contests as, for example, where two or more clients are competing for a common fund if the same firm represents both clients. Even though no client may have to confront her lawyer, the lawyer will be actively working to defeat, or at least limit, the success of one or more clients in the very matter in which the client has retained the lawyer.[203] But that will not be true if the lawyer represents only one of the claimants in asserting a claim and represents the other claimant in an unrelated matter. Then the lawyer is not working to limit the success of any client in the area of her representation.

A fourth and fifth instance of direct adversity are specific applications of the single prize or limited fund category. In each, the firm is concurrently working against the goals of a client in the matter in which it also represents that client. The first occurs when the firm is representing each of two clients who are seeking contrary outcomes from a government body, such as a legislature or agency.[204] The second arises in positional conflicts as defined in Rule 1.7,[205] where the firm is working to win a court ruling that, if successful, will cause significant harm to the position of another client in a matter in which it represents that other client.

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201. So, for example, a lawyer could not assist one client with a claim against another client even if the lawyer then leaves it to another law firm to assert the claim. Nor could a lawyer avoid the limitations here by working undisclosed through an intermediary. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(a) (forbidding a lawyer to violate a rule "through the acts of another"); *see also supra* text accompanying notes 87–92. While I refer here to "a lawyer," other lawyers in the lawyer's firm are included by imputation.

202. *See supra* Section II.C.

203. *See supra* text accompanying notes 152–63. This example of direct adversity, and the specific applications of it in the following paragraph, would likely violate Rule 1.7(a)(2) as well, *see supra* note 22, because of the "significant risk" of "materially limit[ing] . . . the lawyer's responsibilities" to each client. The advantage of using Rule 1.7(a)(1), however, is that it avoids a need to evaluate risk. The representations should be forbidden categorically because the clients would feel betrayed, objectively speaking.

204. *See supra* text accompanying notes 164–69.

205. *See* discussion *supra* Section II.G.

Sixth, there is direct adversity where a client is subpoenaed as an unwilling witness or source of discovery.[206]

My goal is predictability in the application of directly adverse and identification of the proper balance between and among the interests of current clients, potential clients, and lawyers. Because a directly adverse representation is categorically forbidden, with no room to balance competing interests, the phrase should be defined narrowly to apply in these six instances. Only then should a client's presumed feeling of betrayal prevail over all other interests.

206. *See supra* note 27 and accompanying text.