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# Rethinking Attorney Conflict of Interest Doctrine

KEVIN MCMUNIGAL\*

Dissatisfaction with the subject of attorney conflict of interest appears to be widespread. A leading scholar reports that much of attorney conflict of interest doctrine is "arcane, a subspecialty whose interpretation can seem as abstruse as explicating the Dead Sea Scrolls."<sup>1</sup> A recent treatise introduces the subject with the assessment that attorney conflict of interest problems "are not only pervasive, but intractable."<sup>2</sup> Such sentiments are not uncommon. Indeed, the regularity and frequency with which words such as "arcane," "abstruse," "intractable," "difficult,"<sup>3</sup> "troublesome,"<sup>4</sup> "confusion"<sup>5</sup> and "morass"<sup>6</sup> occur in reference to attorney conflict of interest suggest widely felt frustration with current treatment of the subject.<sup>7</sup>

The subject of attorney conflict of interest in recent years has "dramatically increased in importance and in the frequency with which it is litigated."<sup>8</sup> It has been described as presenting "the most litigated questions

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1. Stephen Gillers, *Conflicts: Risky New Rules*, AM. LAW., Sept. 1989, at 39.

2. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 1.7:101, at 217 (2d ed. Supp. 1991) ("Some of the most difficult problems in the law of lawyering are problems of conflict of interest. These problems are not only pervasive, but intractable; many of them can at best be ameliorated — not 'solved.'").

3. *See id.*

4. *See* L. RAY PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* § 4.01, at 4-1 (1982) ("The lawyer's duty to avoid conflicts of interest in the representation of a client is one of the most troublesome for the profession.").

5. *See* Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 212 (1982) ("One of the most fertile sources of confusion has been the rules dealing with multiple representation of clients with conflicting interests.").

6. *See* Robert P. Lawry, *The Meaning of Loyalty*, 19 CAP. U. L. REV. 1089, 1090 (1990) (referring to "the present morass of the rules surrounding conflict of interest issues").

7. For other expressions of dissatisfaction with current conflict of interest doctrine, see, e.g., MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 194 (1990) (describing the *Model Code* and *Model Rules* conflict of interest provisions as using "confusing language and multiple standards of what constitutes a conflict of interest"); MARC I. STEINBERG & TIMOTHY U. SHARPE, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1, 2 (1990) ("[T]he rules of professional ethics and decisions in [the conflict of interest] area are far from acceptable.").

8. Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. LEGAL ETHICS 195, 207 (1987).

of professional responsibility"<sup>9</sup> and as a subject which has grown "enormously, geometrically, exponentially."<sup>10</sup> Lawyers encounter conflict of interest problems in every area of practice<sup>11</sup> and face the possibility of professional discipline,<sup>12</sup> disqualification,<sup>13</sup> civil damages<sup>14</sup> or loss or reduction of fees<sup>15</sup> if they violate conflict of interest rules. The monetary consequences of violating conflict of interest rules have been dramatically illustrated by multi-million dollar judgments and settlements.<sup>16</sup> Given the pervasiveness and potential consequences of conflict of interest questions, one would expect the "arcane" and "intractable" nature of conflict of interest issues to cause concern among lawyers today. In fact, leading ethics consultants report conflict of interest as the subject about which lawyers most frequently

9. Andrew L. Kaufman, *Introduction: A Professional Agenda*, 6 HOFSTRA L. REV. 619, 625 (1978).

10. See Chris Goodrich, *Ethics Business*, CAL. LAW., July 1991, at 36, 37 (quoting Judge Simon H. Rifkind as stating that "[w]ith the growth of the size of law firms, the problem of conflict [of interest] has grown enormously, geometrically, exponentially. The possibility that lawyers will cross wires is almost inevitable.").

11. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.1.1, at 313 (1986) ("Conflict of interest problems are probably the most pervasively felt of all the problems of professional responsibility that might haunt lawyers.").

12. See, e.g., *In re Brownstein*, 602 P.2d 655 (Or. 1979) (upholding reprimand for a lawyer charged with conflict of interest arising out of transaction involving small, closely held corporation, its stockholders and a third party); *In re Dolan*, 384 A.2d 1076 (N.J. 1978) (reprimanding an attorney for concurrently representing buyer and seller in purchase of low and moderate income housing units).

13. See, e.g., *Unified Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339 (9th Cir. 1981) (upholding denial of motion to disqualify law firm for alleged violations of the Code of Professional Responsibility); *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987) (finding failure to disqualify counsel because of conflict of interest to be abuse of discretion).

14. See, e.g., *Ishmael v. Millington*, 50 Cal. Rptr. 592 (Cal. Dist. Ct. App. 1966) (acknowledging conflict of interest as possible basis for malpractice action and reversing grant of summary judgment because of existence of disputed issues of fact); W.R. Habeeb, Annotation, *Malpractice: Liability of Attorney Representing Conflicting Interests*, 28 A.L.R. 3d 389, 391-92 (1969). For a discussion of the applicability of the ethics provisions on conflict of interest in a civil suit for damages, see Charles C. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 304-07 (1979).

15. *Financial General Bankshares, Inc. v. Metzger*, 523 F. Supp. 744, 762-63 (D.D.C. 1981) (referring to the Disciplinary Rules of the *Code of Professional Responsibility* to determine whether breach of common law duty of fiduciary and ethical obligations has occurred), *vacated for lack of jurisdiction*, 680 F.2d 768 (D.C. Cir. 1982).

16. Kirk Victor, *Venable Agrees to \$27M Accord*, NAT'L L.J., May 25, 1987, at 3 (reporting \$27 million settlement by the Baltimore firm of Venable, Baetjer and Howard of case alleging conflict of interest violations in simultaneously representing the Maryland Savings-Share Insurance Corporation (MSSIC) and Old Court Savings and Loan, a financial institution regulated by the MSSIC.) The article reports the settlement as "believed to be the country's second largest malpractice settlement." *Id.*; Stephen J. Adler, *Texas Law Firm Agrees to Pay Widow \$4.3 Million After Suit for Malpractice*, WALL ST. J., May 17, 1988, at 6 (reporting (1) \$24.4 million jury verdict, reduced by trial judge to \$16.7 million, against a law firm based in part on allegations of conflict of interest relating to the firm's drafting of a will that permitted one of the firm's lawyers to act as executor and the executor to hire his own firm to perform the estate's legal work and (2) that the case was settled on appeal for \$4.3 million).

seek their advice.<sup>17</sup>

This article focuses on conflict of interest doctrine dealing with concurrent conflict of interest issues.<sup>18</sup> Its thesis is that a primary source of confusion in conflict of interest doctrine is its failure to clearly articulate and answer the central questions which lie at the heart of the subject. In essence it argues that to remedy this confusion we need to rethink attorney conflict of interest doctrine so that it focuses more clearly on articulating and answering these central questions.

Part I briefly examines the types of questions we normally label "conflict of interest" and concludes that the common element which brings such questions within this doctrinal niche is concern with the existence of incentives which threaten to impair the effective and ethical functioning of a lawyer. It concludes that the primary task of conflict of interest doctrine is to formulate an appropriate response to situations which threaten impairment of an attorney's functioning.

Part II examines possible responses to situations which pose such threats. It concludes that a fundamental ambiguity in conflicts doctrine is its uncertainty about what approach to adopt in formulating this response. It concludes that three different approaches compete for expression in current conflicts doctrine. A *risk avoidance* approach conveys the message that the boundary between permissible and impermissible conduct is determined by the degree of risk presented. A *resulting impairment* approach conveys the message that the boundary between permissible and impermissible conduct is the point at which the attorney's functioning is either actually impaired or certain to be impaired. An *appearance* approach conveys the message that the boundary between permissible and impermissible conduct is determined by reference to the appearance of some impropriety. The conceptual dissonance created as each of these approaches competes for expression is a primary source of confusion in attorney conflict of interest doctrine. Part II argues that in order to bring structure and clarity to the amorphous area of conflict of interest we must clearly articulate and distinguish these competing approaches.

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17. Goodrich, *supra* note 10, at 37 (reporting that Monroe Freedman, Stephen Gillers and Geoffrey Hazard agree that in their role as ethics consultants "lawyers most often ask them about conflicts of interest, especially whether a lawyer or firm can be disqualified from an ongoing case"); cf. Richard A. Zitrin, *Attorney, Heal Thyself*, CAL. LAW., July 1991, at 38 ("Some ethics experts engage in . . . case-specific and interactive consultation, particularly in emergency situations. Conflict of interest crises are the most frequent . . .").

18. This Article does not directly address conflict of interest doctrine dealing with successive conflict of interest issues. For economy of expression, the phrase "conflict of interest doctrine" is used in this Article to refer to conflict of interest doctrine dealing with concurrent conflicts. On the distinction between concurrent and successive conflict of interest, see STEPHEN GILLERS & NORMAN DORSEN, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS, Chapters XI - XII (2d ed. 1989).

Part III examines in detail the risk avoidance approach. It concludes that another primary source of confusion in conflicts doctrine is the failure of the risk avoidance approach to fully develop the analytical components required for risk analysis. Part III lays out the essential risk analysis questions which must be asked and answered in order to resolve conflict of interest problems from the risk avoidance perspective. Its premise is that the basic task of the risk avoidance approach is one of judgment about risk of lawyer impairment. In exercising this judgment, one needs to analyze the risk presented by asking a series of fundamental questions: What facets of the lawyer's function should conflict of interest doctrine protect? What risks to those facets should it define as acceptable? Should it tolerate any risk? If so, how *much* risk is acceptable? Should conflict of interest doctrine tolerate greater risk if there are good reasons for taking the risk? In other words, should the acceptability of the risk be a function of both the *magnitude* and the *justifiability* of the risk? If so, what factors should conflict of interest doctrine take into account in assessing the justifiability of the risk? Finally, who should decide what risks are acceptable? Should we defer to client preferences regarding trade-offs between magnitude and justifiability of risk? Or should we override client preference in order to protect or advance the interests of the client, the interests of lawyers or third parties or broader societal interests? Who should be charged with this authority to override? The lawyer? The trial judge in a litigated case? Part III argues that current doctrine does a poor job of articulating and answering these questions.

How the questions raised in Parts II and III should finally be answered is beyond the scope of this article. Although clearly articulating the central questions which lie at the heart of conflict of interest should remove a good deal of the confusion in attorney conflict of interest doctrine, it is only a beginning. Part IV discusses difficulties which remain once we have accomplished this task.

## I. THE COMMON ELEMENT IN CONFLICT OF INTEREST: THREAT OF IMPAIRMENT

### A. THE CONTEXTUAL INCLINATION

One encounters a powerful impulse in the field of attorney conflict of interest to compartmentalize the subject into categories keyed to specific factual contexts.<sup>19</sup> Such a contextual inclination is seen in parts of the

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19. Similar tendencies are found in many areas of law. Oliver Wendell Holmes illustrated a tendency akin to the contextualist inclination with the story of "a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to

*Model Code* and *Model Rules* which utilize a number of conflict of interest rules applicable only to certain narrowly prescribed factual situations, such as lawyer media rights transactions,<sup>20</sup> lawyers appearing as witnesses<sup>21</sup> or lawyer-client business deals.<sup>22</sup> Courts and ethics committees have created other context-specific rules not found in the *Model Code* or *Model Rules*, such as the rule found in some jurisdictions against joint representation of both buyer and seller during negotiation of a real estate agreement of sale.<sup>23</sup> Professional Responsibility texts and treatises, as well as articles dealing with conflict of interest, frequently organize treatment of conflict of interest by headings keyed to factual context.<sup>24</sup> And articles focusing exclusively on conflict of interest questions limited to narrow factual settings, such as joint representation of criminal defendants, are a common feature of the academic literature on attorney conflict of interest.<sup>25</sup> At times, a

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consider, and then said that he had looked through the statutes and could find nothing about churns, and gave judgment for the defendant." O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 474-75 (1897). Holmes commented on the pervasiveness of this "state of mind," found in legal digests and textbooks, which analyzes and catalogues cases according to individual factual idiosyncrasies rather than legal principles which transcend the factual context of a particular case. This approach results in cases being "tucked away under the head of Railroads or Telegraphs" rather than under the governing legal rules. *Id.* at 475. Holmes urged a more universalist approach, looking beyond the factual idiosyncrasies of particular cases to discern the rule which provides the basis for prophesying the resolution of future cases. *Id.*

20. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(d) (1991) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-104(B) (1983) [hereinafter MODEL CODE].

21. MODEL RULES Rule 3.7; MODEL CODE DR 5-102.

22. MODEL RULES Rule 1.8(a); MODEL CODE DR 5-104(A).

23. See, e.g., New Jersey Advisory Committee on Professional Ethics Opinion 243, 95 N.J.L.J. 1145 (1972) (in a real estate transaction "in all circumstances it is unethical for the same attorney to represent buyer and seller in negotiating the terms of a contract of sale"); see also Moore, *supra* note 5, at 224-225 ("Most attempts to guide practitioners merely set forth guidelines to govern specific situations in which multiple representation is common." *Id.* at 224. "Specific guidelines can be found in litigated court cases, in advisory ethical opinions addressed both to individual and categories of cases, and in professional commentaries which confine themselves to particular situations . . . Unfortunately, most commentaries which purport to give more general guidance usually end up merely summarizing what courts and ethics committees are actually doing in narrow categories of cases." *Id.* at 224 n.62 (emphasis added). As examples of such guidelines tailored to "specific situations," Professor Moore cites *In re Farr*, 340 N.E.2d 777 (Ind. 1976) (representation of host-driver and guest-passenger in action against other driver); Ohio B. Ethics Comm., Formal Op. 30, reprinted in [1973] 1 FAM. L. REP. (BNA) No. 34 AT 3110 (JULY 15, 1975) (standards for representation of spouses in no-fault divorce); John Stewart Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, at 157-62 (1978) (discussing the ethical propriety of representing criminal codefendants); D. Kent Meyers, *Ethical Considerations in the Representation of Multiple Creditors Against a Single Debtor*, 51 AM. BANKR. L.J. 19, 26-30 (1977) (representing multiple parties in bankruptcy actions); Note, *Simultaneous Representation: Transaction Resolution in the Adversary System*, 28 CASE W. RES. L. REV. 86, 94-116 (1977) (uncontested divorce, formation of close corporation and sale of real estate); Moore, *supra* note 5, at 224 n.62).

24. See, e.g., Robert H. Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807 (1977).

25. See, e.g., Gary T. Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64

particular factual context, such as joint representation in criminal cases, is further subdivided into even smaller niches, such as joint representation of witnesses appearing before a grand jury and joint representation of charged criminal defendants. The contextual inclination reflects the attitude that each particular context presents conflict of interest problems which are unique.<sup>26</sup>

A contextual approach to attorney conflict of interest issues has much to recommend it. Dividing any complicated subject makes pragmatic sense in attempting to conquer it. Partitioning the seemingly limitless variety of attorney conflict of interest problems renders them more manageable, and one way to partition them is by factual context. The contextual approach may aid in developing rules which are sensitive to the nuances and needs of particular factual settings, such as divorce or joint criminal representation. In addition, compartmentalization by factual context may facilitate comparison of cases within a particular context and thus promote consistency of treatment within that particular context.

Despite its appeal, and perhaps in part because of it, the contextual inclination has its dangers. In the broad landscape of conflicts doctrine, it may produce what appears from a panoramic perspective to be a patchwork with little consistency from one factual setting to another and no discernible relationship to any larger view about how conflict of interest should be handled.<sup>27</sup> In other words, while a contextual approach may promote consistency within a particular factual setting, it runs the risk of reducing consistency between different contexts and of undermining the development of a clear larger picture. Energy and attention may become so focused on questions arising in particular contexts that treatment of the common elements which all conflict of interest questions present may be given short shrift. Treating the rules for each context as *sui generis* may distract and discourage one from developing a consistent and uniform general approach to conflict of interest problems. A leading treatise states that:

[C]onflict of interest problems are pervasive in law practice and can arise early, late, and at intermediate points throughout a representation in a

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VA. L. REV. 939 (1978); Geer, *supra* note 23.

26. See, e.g., Aronson, *supra* note 24, at 808-09 ("Within each area of the law and form of legal practice the conflict of interest problems are unique, calling for individualized and imaginative treatment.").

27. See Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 670 (1978) ("The lack of definite answers to professional questions can in large part be explained by the absence of a general, coherent theory of professional behavior for lawyers . . . One consequence of the absence of any general theory is that lawyers often respond to professional problems in ad hoc, pragmatic ways, redefining the issues to avoid reaching the ethical question. Such an approach, while not manifestly illegitimate, is a very limited and intellectually unsatisfactory way of responding to professional problems.").

bewildering variety of shapes and sizes. *One should not, therefore, press too hard the question of general standards in a search for underlying ordering principles.*<sup>28</sup>

This article takes the position that we have not pressed hard enough the question of "general standards" and the "search for underlying ordering principles" in the area of conflict of interest. It seeks to facilitate the development of a broader perspective to balance conflict of interest doctrine's predilection to contextualism. Its purpose is not to displace the contextual approach but rather to balance it. The problem is not so much with the contextual approach itself but rather that we have ignored simultaneously developing a more universal framework within which to fit particular ad hoc rules. It may be wise to maintain or even to increase our reliance upon context specific rules. Nonetheless, we need a universal vocabulary and framework within which to fit contextual rules.

As the prior paragraphs make clear, one of the dangers of contextual thinking is that it may keep us from discerning the elements which are common to all conflict of interest problems. A necessary first step in developing a clear and structured approach to a problem is to understand the nature of the problem. It is to this topic that we next turn.

#### B. THE COMMON ELEMENT IN CONFLICT OF INTEREST

Questions involving attorney conflict of interest vary in apparent form and arise in widely disparate factual settings. Indeed, it is this feature of variability which makes conflict of interest lend itself readily to a contextual approach. Consider, for example, the following motley assortment of attorney conflict of interest issues. May a prosecutor sell the media rights to portrayal of her character in a highly publicized case?<sup>29</sup> Is it permissible for a defendant in a civil rights case to propose a settlement offer conditioned on the plaintiff's waiver of attorney's fees?<sup>30</sup> May a single lawyer represent both husband and wife in a divorce,<sup>31</sup> the buyer and seller in a

28. WOLFRAM, *supra* note 11, § 7.1.3, at 316 (emphasis added).

29. See N.Y. State Bar Ass'n Op. 606, 21-89 (Nov. 1, 1990). (Upon completion of a criminal prosecution, assistant district attorney may sell her media rights and participate in the development of her character in a screenplay or other literary medium, so long as client's confidential information is not revealed.)

30. See *Evans v. Jeff D.*, 475 U.S. 717 (1986). (Civil Rights Attorney's Fees Awards Act of 1976 interpreted as not generally prohibiting settlements conditioned on waiver of plaintiff's attorney's fees. *Id.* at 737-38). Cf. Bar Ass'n of the City of N.Y. Op. 80-94 (1980) (stating that it is unethical for a defendant to make an offer of settlement in "public interest" cases conditioned on waiver of plaintiff's attorney's fees) (Withdrawn after *Evans* opinion. Bar Ass'n of the City of N.Y. Op. 87-4 (1987)).

31. See *Levine v. Levine*, 436 N.E.2d 476 (N.Y. 1982) (holding that the joint representation of a husband and wife in a separation proceeding by a single attorney is insufficient alone to require rescission of the agreement).



residential real estate transaction<sup>32</sup> or companies which are business competitors?<sup>33</sup> Should sexual involvement with a client,<sup>34</sup> the spouse of a client<sup>35</sup> or opposing counsel<sup>36</sup> preclude the lawyer from representing the client? If a lawyer represents a brokerage firm under investigation for securities fraud, may he simultaneously represent an individual employee of the firm appearing before the grand jury which has targeted the employee as a source of information about the firm's alleged wrongdoing?<sup>37</sup> If a lawyer is herself under criminal investigation and cooperating with investigating authorities, may she represent clients in criminal matters?<sup>38</sup> Must a law firm remove a lawyer from a case because the lawyer's race, sex, religion or ethnic background is likely to arouse the prejudice of a particular judge or jury?<sup>39</sup>

What do attorney media rights transactions have in common with settlement offers conditioned on fee waivers, the sexual relations of lawyers, or joint representation of a company and one of its employees during the investigatory phase of a criminal proceeding? A contextualist might well answer that these questions are more dissimilar than they are alike, empha-

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32. See *In re Lanza*, 322 A.2d 445 (N.J. 1974) (holding that an attorney merits reprimand for representing both vendor and purchaser without fully advising the parties of areas of potential conflict and for failing to withdraw when conflict arose).

33. See *Curtis v. Radio Representatives, Inc.*, 696 F. Supp. 729, 734-37 (D.D.C. 1988) (holding that no violation of conflict of interest rules exists in the simultaneous representation of business competitors).

34. See *United States v. Babbitt*, 26 M.J. 157 (C.M.A. 1988); *In re McDow*, 354 S.E.2d 383 (1987); Cal. Formal Op. 1987-92; Al. Op. 88-01 (1988). California has recently considered enacting the first absolute ban in the United States on lawyer-client sexual relations. See Philip Hager, *Lawyer-Client Sex May Be Banned by State Bar*, L.A. TIMES, Jan. 21, 1991, at A3, col. 5. For a discussion of the issue of sexual relations between lawyer and client in the context of divorce representation, see Lawrence Dubin, *Sex and the Divorce Lawyer: Is the Client Off Limits*, 1 GEO. J. LEGAL ETHICS 585 (1988).

35. See *People v. Singer*, 275 Cal. Rptr. 911 (Cal. Ct. App. 1990) (holding that defendant's right to effective assistance of counsel was violated by conflict of interest arising from undisclosed affair between defense counsel and defendant's wife).

36. See *People v. Jackson*, 213 Cal. Rptr. 521 (Cal. Ct. App. 1985) (holding that a defendant's right to effective assistance of counsel was violated by conflict of interest arising from undisclosed "sustained dating relationship" between defense counsel and prosecutor).

37. See Laurie P. Cohen, *Issue of Lawyer's Loyalty is Raised by Drexel Employee's Conviction*, WALL ST. J., March 24, 1989, at B3.

38. See *United States v. Aiello*, 900 F.2d 528 (2d Cir. 1990) (holding that the fact that defense counsel was under investigation before and during defendant's trial for crimes unrelated to the crimes with which the defendant was charged did not constitute a sufficient conflict of interest to result in a *per se* violation of defendant's right to effective assistance of counsel); *Commonwealth v. McCloy*, 574 A.2d 86 (Pa. Super. 1990) (holding that the fact that defense counsel was cooperating in an FBI investigation unrelated to the charges against the defendant did not constitute a sufficient conflict of interest to amount to a violation of defendant's right to effective assistance of counsel); *United States v. Cancillo*, 725 F.2d 867 (2d Cir. 1984) (reversing criminal conviction on the grounds that trial counsel may have engaged in criminal conduct related to the conduct for which the defendant was on trial).

39. See GILLERS & DORSEN, *supra* note 18, at 613-15 (simulated case history).

sizing the considerable variations in the factual contexts of each of these questions. Despite wide variations in form and context, however, the common feature which brings each of these questions within the doctrinal niche labeled "conflict of interest" is concern with the existence of some particular incentive which threatens the effective and ethical functioning of a lawyer.

Take, for example, the question whether a prosecutor should be permitted to sell the media rights to portrayal of her character.<sup>40</sup> Allowing such a sale creates a financial incentive for the prosecutor to increase the value of those rights in order to advance her own economic self-interest. This financial incentive puts at risk a number of different facets of the prosecutor's professional functioning, since many of the prosecutor's decisions and actions affect the value of her media rights.

The prosecutor's initial exercise of prosecutorial discretion whether or not to prosecute the case, for example, is threatened since a decision not to prosecute would in most instances reduce the value of the prosecutor's media rights. As the portrayal of lawyers in popular media makes clear, a trial makes for more interesting and dramatic media fare than a guilty plea,<sup>41</sup> raising concern that the prosecutor's decision whether and on what terms to enter into plea negotiations with the defendant is at risk of being influenced by concern for media value. Similar concerns may be raised about the prosecutor's ethical obligations of confidentiality, public comment to the press and strategic decisions such as what witnesses to call at trial or what matters to emphasize during closing argument. Each of these decisions and actions presents the prosecutor with an opportunity to yield to the incentive to promote her financial self-interest.

All of the conflict of interest questions posed at the outset of this section raise the issue of some particular incentive which threatens to impair an attorney's functioning. A settlement offer in a civil rights case conditioned on the plaintiff's waiver of attorney's fees creates a financial incentive which threatens the plaintiff's lawyer's function in providing impartial ad-

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40. For discussion of the issue of media rights transactions, see, e.g., Richardson R. Lynn, *Restricting Attorney Speech about Matters of Recent Employment*, 24 ARIZ. L. REV. 531 (1982); Martin S. Goldberg, Note, *Publication Rights Agreements in Sensational Criminal Cases: A Response to the Problem*, 68 CORNELL L. REV. 686 (1983); Jill A. Sperber, Note, *Publication Rights Fee Contracts Between Attorneys and Criminal Defendants: Waiving the Right to Counsel*, 17 U.S.F. L. REV. 549 (1983); Keith Noel Bond, Note, *Contracting for Publication Rights in Lieu of Attorney's Fees in Criminal Cases*, 31 BUFF. L. REV. 483 (1982); Claire Hamner, Note, *Conflict of Interests When Attorneys Acquire Rights to the Client's Life Story*, 6 J. LEG. PROF. 299 (1981); Bruce I. Favish, Note, *Conflicting Interests in Lawyer-Client Publication Rights Agreements—The Story of Bobby Joe Maxwell*, 42 U. PITT. L. REV. 869 (1981).

41. See Kevin McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 834 (1990) ("Images of lawyers in trial dominate popular media such as novels, films, and television.").

vice to his client about the settlement offer.<sup>42</sup> The fact that the settlement offer leaves the plaintiff's lawyer uncompensated gives the plaintiff's lawyer a financial incentive to advise against the settlement. Sexual involvement by a lawyer with the spouse of a client in a criminal case may give the lawyer an emotional incentive to reduce the efforts expended in defense of the client. Simultaneous representation of a brokerage firm and an employee of the firm during a grand jury investigation threatens the functioning of the lawyer providing the joint representation in a number of ways.<sup>43</sup> For example, if the individual employee were called before a grand jury seeking information about her employer's alleged wrongdoing, the fact that the lawyer also jointly represents the employing firm, a future source of business for the lawyer, creates an incentive for the lawyer not to urge the individual client to tell the truth to the grand jury. Such action would protect the employer but place the individual at risk of a perjury conviction.<sup>44</sup>

Each of these questions raises the issue of threat posed to an attorney's functioning. In other words, these questions require one to deal with the issue of risk of impairment of an attorney's functioning. Factual permutations on this basic theme of threatened impairment are virtually inexhaustible. The questions above suggest just a few of the possible variations. In some, the source of the threat is the financial or personal interest of the lawyer. In others, it is the interests of another client or of a third party. In some, the threat seems narrowly focused on a particular facet of the attorney's functioning, such as performance as trial advocate or as advisor in connection with a grand jury appearance. In others, the risk involves multiple facets of the lawyer's representation.

Another way of describing the common element of conflict of interest is through the language of economics. Economists use the term "agency cost" to express the concern that an agent may not always act in the best interests of the principal, even though the agent is legally required to do so.<sup>45</sup>

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42. See *infra* Part III.B.1.b.

43. For discussion of some of the problems which arise in representing multiple clients during a grand jury investigation, see Nancy J. Moore, *Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense*, 27 UCLA L. REV. 1 (1979).

44. For a discussion of the tension between a corporation's interests and those of its employees during a criminal investigation, see Kathryn W. Tate, *Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than the Model Rules Provide?*, 23 INDIANA L. REV. 1 (1990).

45. See, e.g., Michael C. Jensen and William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976). Agency costs are typically defined to include both the costs of monitoring the agent's fidelity to his obligations as well as the residual losses incurred when the agent is unfaithful to his obligations. See, e.g., Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1263 n.11 (1982) ("A firm's agency costs include monitoring costs that arise from the agency relationship, as well as the agent's bonding expenditures and the residual loss attributable to the divergence in interest between principals and agents.").

The problem of agency cost is inherent in any agency relationship,<sup>46</sup> including that between lawyer and client. The concept of agency cost has been described as "essentially a formal statement of a problem that the law has long recognized and addressed under the heading of conflict of interest."<sup>47</sup>

Whatever the terminology used, the primary task of conflict of interest doctrine is to formulate a response to situations which pose a threat of impairment to an attorney's functioning. Perhaps the most fundamental ambiguity in conflict of interest doctrine is its uncertainty about what approach to adopt in responding to such threats, a subject examined in the following section.

## II. THE RESPONSE TO THREAT OF IMPAIRMENT

Why do we need conflict of interest rules? The simple, intuitive response is that we need to protect the integrity of an attorney's functioning. But one might view a separate set of conflict of interest rules as unnecessary for achieving this goal. In other words, it could be argued that existing constraints other than conflicts rules are sufficient to check any impairment threat. A particular incentive giving rise to conflict of interest concerns is only one of a constellation of incentives and constraints which simultaneously exert pressure on a lawyer. A number of incentives and constraints reinforce the attorney's resistance to impairment pressure, helping to check incentives which threaten to compromise the lawyer's functioning. Sanctions for violation of lawyer rules of conduct separate from the conflict of interest rules, such as those imposing the substantive obligations of competence and confidentiality, are available through professional discipline, civil liability and loss or reduction of fees if the lawyer actually provides impaired service. Competition in the market for legal services also provides an incentive for the lawyer not to accede to impairment pressure, lest he lose the client to another lawyer.<sup>48</sup> One might view such incentives and constraints as powerful enough to keep risk of impairment from materializing into actual impairment. If more preventive power is needed, an adherent to this viewpoint would argue that we need simply to increase either the severity or the certainty of the sanctions for violation of the rule of conduct violated. A response to threats of attorney impairment based on this view would draw the boundary line between permissible and impermissible conduct at the point of actual impairment of the lawyer obligations which exist

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46. Fischel, *supra* note 45, at 1263 n.10.

47. Melvin Aron Eisenberg, *New Modes of Discourse in the Corporate Law Literature*, 52 GEO. WASH. L. REV. 582, 594 (1984).

48. See Fischel, *supra* note 45, at 1263 ("The market also plays a valuable role in minimizing agency costs.").

apart from the conflict of interest provisions.

The very fact that conflict of interest doctrine exists demonstrates implicit rejection of the view sketched above. Rather, the doctrine seems based on the assumption that we need something more to protect against threats of impairment. Its very existence seems to demonstrate a felt need for something more than what is offered by the position sketched above. Just as in criminal law the development of various inchoate crimes demonstrates a felt need to supplement sanctions focusing on resulting harm, the existence of conflicts rules seems to indicate a feeling that the rules which define and protect various roles and obligations of lawyers aside from the conflict rules, are insufficient to protect against threats of attorney impairment.<sup>49</sup> Exactly what else is needed, however, has proven elusive.

Three different conceptions of the appropriate response to incentives which threaten attorney impairment compete for expression in current conflict of interest doctrine. Each provides a distinct reference point for establishing the boundary between permissible and impermissible attorney conduct in conflict of interest situations. An *appearance* approach prohibits conduct which appears improper. A *risk avoidance* approach prohibits conduct which creates unacceptable risk of impairment. A *resulting impairment* approach prohibits conduct which either results in or is certain to result in impairment.

The thrust of Part II is that current doctrine does a poor job of utilizing these conceptual approaches. It fails to distinguish them clearly and to recognize their inconsistencies. Competition among these approaches results in conceptual confusion which is a primary source of ambiguity in current conflict of interest doctrine. This conceptual confusion is mirrored in the verbal confusion found in the terminology of conflict of interest doctrine.

#### A. THE THREE COMPETING CONCEPTIONS

In examining current doctrine's utilization of these three approaches, this Part begins with the resulting impairment and risk avoidance approaches and then proceeds to the appearance approach. In order to understand and distinguish between the risk and resulting impairment approaches, it is critical to grasp the distinction between conduct which creates risk of impairment and conduct which actually results in impairment. Failure to recognize this relatively simple distinction between risk

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49. Sometimes conflicts rules are justified on the ground that they are preventive in rationale. But it is important to note that the approach just sketched is, in fact, a preventive approach. It seeks to prevent impairment by reinforcing internal constraints with penalties for actual impairment, just as the criminal penalty for murder with its requirement of a resulting death may be justified on the ground of deterring intentional killing.

and result is a fundamental and pervasive problem in conflict of interest doctrine.<sup>50</sup> The distinction has proved so elusive in the conflict of interest area that some elaboration on the distinction at this point is useful in order to make certain it is firmly grasped. Analogies from criminal law are helpful to illustrate this distinction and its implications for formulating conflict of interest doctrine.

Certain crimes by definition require a particular result. A vehicular homicide statute punishing reckless or negligent driving which causes a death provides an example of this sort of crime.<sup>51</sup> Other crimes are defined without reference to the occurrence of a particular result. Such crimes focus instead on risk, the tendency of the conduct in question to cause a particular result. A reckless driving statute punishing driving which creates an unacceptable level of risk provides an example of this sort of crime.<sup>52</sup>

The question of whether and to what degree the criminal law should rely on risk or resulting harm in formulating criminal offenses and prescribing punishment has been the focal point of considerable debate. In both defining and grading offenses, the criminal law has traditionally tended to attach great significance to resulting harm. Under both the common law and traditional American criminal codes, the incorporation of a resulting harm requirement was a standard feature, while prosecution of conduct which created risk but did not actually cause resulting harm was left to ad hoc statutory crimes "narrowly focused on limited classes of conduct."<sup>53</sup> In the area of grading, this same philosophy was exemplified in the law of attempt. Attempts have traditionally been, and in many jurisdictions still are, punishable at only a small fraction of the punishment assigned to completed crimes.<sup>54</sup>

The criminal law's traditional emphasis on resulting harm has been challenged by scholars questioning why the occurrence of a particular result

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50. See *infra* Part II.B. At times the distinction is clearly recognized. For a particularly clear treatment of the distinction between risk and resulting impairment in attorney conflict of interest doctrine, see FREEDMAN, *supra* note 7, at 175.

51. See, e.g., OHIO REV. CODE ANN. § 2903.07 (Baldwin 1991) ("(A) No person, while operating or participating in the operation of a motor vehicle, motorcycle, snowmobile, locomotive, watercraft, or aircraft, shall negligently cause the death of another. (B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree").

52. See, e.g., OHIO REV. CODE ANN. § 4511.20 (Baldwin 1991) ("No person shall operate a vehicle, trackless trolley, or streetcar on any street or highway in willful or wanton disregard of the safety of persons or property.").

53. Sanford H. Kadish & Stephen J. Schulhofer, *CRIMINAL LAW AND ITS PROCESSES* 498 (5th ed. 1989).

54. *Id.* at 621-22. ("At common law attempts were misdemeanors. Today the usual punishment grading system for attempt involves making it punishable by a reduced factor of the punishment for the completed crime. In California (Cal. Penal Code § 664) attempt carries a maximum term of not more than one-half of the highest maximum term authorized for the completed offense.")

should affect criminal liability. Examination and debate of the issue of the role of resulting harm has given rise to a substantial body of scholarship.<sup>55</sup> Critics of the criminal law's traditional emphasis on resulting harm argue that the proper focus of penal law is on risk creation rather than resulting harm. From both the deterrence and incapacitation points of view, conduct which creates undue risk is an appropriate object of criminal sanction regardless of whether it happens to result in harm on a particular occasion. From a retributive point of view, the moral blameworthiness of a defendant derives from his conduct and the mental state which accompanies that conduct, not from the fact that harm in fact results, which often turns on some fortuity outside the control of the defendant.<sup>56</sup>

What is there to learn from the criminal analogy? First, criminal law has achieved clarity as to when results are required and when they are not. In other words, we know what role resulting harm plays under a vehicular homicide statute and under a reckless driving statute. It is a prerequisite in vehicular homicide and irrelevant for reckless driving. Second, there has been extensive debate on the question of the role of resulting harm in criminal law, a debate which has informed the evolution of substantive criminal law doctrine. In the area of conflict of interest, we have failed to achieve either one. Conflict of interest doctrine frequently is unclear about the dis-

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55. For a discussion of attitudes favoring an emphasis on actual harm, see GLANVILLE WILLIAMS, *CRIMINAL LAW—THE GENERAL PART*, § 49, at 136 (2d ed. 1961) ("The only theory of punishment that explains the present law [punishing attempts less severely than the completed crime] is a crude retaliation theory, where the degree of punishment is linked rather to the amount of damage done than to the intention of the actor."); Meir Dan Cohen, *Causation*, in 1 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 165 (Sanford H. Kadish ed., 1983) ("That the actual death of the victim is somehow relevant to determining the accused's criminal liability is nonetheless a widely shared and deeply entrenched intuition . . . Although [this] intention itself resists rationalization by reference to the goals of criminal law, it can still be demonstrated that the fact of its existence and pervasiveness is relevant to the criminal law's ability to discharge its main functions . . ."). For a discussion of attitudes favoring an emphasis on risk creation, see Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 *U. PA. L. REV.* 1497 (1974). See also Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 *HARV. L. REV.* 1097, 1106 (1952) ("From the preventive point of view, the harmfulness of conduct rests upon its tendency to cause the injuries to be prevented far more than on actual results; results, indeed, have meaning only insofar as they may indicate or dramatize the tendencies involved."); H.L.A. HART, *THE MORALITY OF THE CRIMINAL LAW* 52-53 (1965); SIR JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 311 (1883); Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law*, 19 *RUTGERS L. REV.* 725 (1988); J.C. Smith, *The Element of Chance in Criminal Liability*, 1971 *CRIM. L. REV.* 63, 74-75 (1971).

56. A similar debate has recently emerged concerning the role of resulting harm in tort law. See Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 *UCLA L. REV.* 439, 439 (1990) (arguing that "corrective justice requires, as a regulative ideal, that we be held liable when we have increased the risk of harm occurring, whether or not it eventually does"); see also Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 *UCLA L. REV.* 113 (1990); Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 *UCLA L. REV.* 143 (1990).

inction between resulting impairment of a lawyer's functioning and risk of impairment. Nor has there been extensive debate on the roles of resulting impairment and risk in formulating conflict of interest doctrine.

### 1. The Resulting Impairment Approach

A pure resulting impairment approach dictates concern only with actual impairment of a lawyer's functioning. The idea here is to monitor the actual point of impairment, making sure no lawyer goes beyond it. Like a criminal statute which prohibits only conduct resulting in actual harm, this approach draws the boundary between permissible and impermissible conduct at the point where the lawyer's functioning is actually compromised.

Just such a pure resulting impairment approach seems to be reflected in the attorney conflict of interest rules concerning business transactions between an attorney and a client. Such transactions pose a high risk of impairing the lawyer's obligations to his client. In such transactions, the lawyer's business interest in the transaction gives him a financial incentive to take advantage of his client. His professional training and access to client information often provide a ready means for the lawyer to yield to this incentive.<sup>57</sup> In addition, due to the professional relationship, the client is likely to be dependent on the lawyer and assume that the lawyer is protecting the client's interests, making the client particularly vulnerable.<sup>58</sup> Nonetheless, such transactions are not prohibited. Rather, the rule generally is that the lawyer shall not enter into such dealings with a client unless "the transaction and terms . . . are fair and reasonable to the client."<sup>59</sup> In other words, the lawyer may enter into such high risk transactions as long as he avoids actually harming the business interests of his client.

In addition to the basic rule that the transaction must be fair and reasonable to the client, other ancillary rules triggered by attorney-client business deals offer the client added protection. Some of these rules operate retrospectively. For example, courts typically closely scrutinize such transactions after the fact to assure their fairness.<sup>60</sup> Also, when such a transaction is examined by a court after the fact, the burden of proof is often on the attorney to prove that the deal was in fact fair and equitable.<sup>61</sup> Some courts presume undue influence unless the attorney proves otherwise.<sup>62</sup> Other rules operate prospectively. Requirements of full disclosure<sup>63</sup> as well

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57. GILLERS & DORSEN, *supra* note 18, at 607.

58. *Id.*

59. See, e.g., MODEL RULES Rule 1.8(a)(1).

60. WOLFRAM, *supra* note 11, § 8.11.3, at 481-82.

61. GILLERS & DORSEN, *supra* note 18, at 607.

62. *Id.*; see also WOLFRAM, *supra* note 11, § 8.11.3, at 481.

63. See, e.g., MODEL RULES Rule 1.8(a)(1); MODEL CODE DR 5-104(A).



as independent advice<sup>64</sup> make it easier for the client to protect his own business interests from being impaired by the lawyer. But despite these ancillary procedural protections, the final test is whether the client's business interests are actually impaired by the lawyer. In short, the approach adopted in dealing with attorney-client business transactions seems to be a resulting impairment approach coupled with procedural safeguards to help in monitoring the boundary line of actual impairment.

Joint representation of criminal defendants is another situation which poses high risk of impairment of a criminal defense attorney's functioning.<sup>65</sup> Accordingly, academic commentators have urged the adoption of an absolute rule prohibiting such joint criminal representation.<sup>66</sup> Such an absolute rule has not generally been adopted, however.<sup>67</sup> The United States Supreme Court has explicitly adopted a resulting impairment approach for delineating a criminal defendant's Sixth Amendment rights in such joint representation situations. "[I]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance."<sup>68</sup>

A different version of the resulting impairment approach than the one outlined above seeks to anticipate those situations in which resulting impairment is certain to occur and prevent them before the point of actual impairment is reached. Such an "anticipatory" resulting impairment approach maintains a focus on resulting impairment but adds a temporal buffer by providing a means for preempting conduct which is certain to result in actual impairment.

Portions of the general conflict of interest provisions of the *Model Code* seem to reflect this anticipatory approach. DR 5-101(A) sets forth the prohibition that a lawyer shall not accept employment if "his professional judgment on behalf of his client *will be . . . affected* by his own financial, business, property, or personal interests."<sup>69</sup> DR 5-105(A) instructs that a lawyer must decline employment if "the exercise of his independent professional judgment in behalf of a client *will be . . . adversely affected* by the

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64. See, e.g., *Goldman v. Kane*, 329 N.E.2d 770, 773 (Mass. 1975) (holding that lawyer was under a duty not to proceed with business deal with client "until he was satisfied that [the client] had obtained independent advice on the matter"). The *Model Rules of Professional Conduct* require only that the client be given "a reasonable opportunity to seek the advice of independent counsel in the transaction." MODEL RULES Rule 1.8(a)(2).

65. For discussion of the risks entailed in joint criminal representation, see Lowenthal, *supra* note 25; Geer, *supra* note 23; Moore, *supra* note 5.

66. See *id.*

67. See, e.g., MODEL RULES Rule 1.7 cmt.; MODEL CODE EC 5-17.

68. *Cuyler v. Sullivan* 446 U.S. 335, 350 (1980).

69. MODEL CODE DR 5-101(A) (emphasis added).

acceptance of the proffered employment . . . .”<sup>70</sup> DR 5-105(B) similarly instructs that a lawyer shall not continue multiple employment if “the exercise of his independent professional judgment in behalf of a client *will be . . . adversely affected* by his representation of another client . . . .”<sup>71</sup>

## 2. The Risk Avoidance Approach

A typical response to an allegation of attorney conflict of interest is an assertion by the attorney whose conduct is at issue that she either did not or will not alter her representation of her client in any way.<sup>72</sup> In other words, the attorney asserts that no actual impairment of her functioning either has occurred or will occur. For purposes of this article, the interesting part of such a response is not the validity of the assertions about either past or future impairment. The attorney may in fact be able to resist whatever incentives pose risk in the particular situation. Rather, the interesting aspect of such a response is the implicit view it reflects that conflict of interest requires resulting impairment. If one adopts a risk approach to conflict of interest, as outlined in the following paragraphs, such a response by a lawyer is analogous to a driver charged with reckless driving asserting as a defense that she did not harm anyone. Lack of resulting harm is legally irrelevant to a reckless driving charge. Similarly, lack of actual impairment is irrelevant to conflict of interest when viewed from a risk avoidance perspective.

The risk avoidance approach views conflict of interest rules as a rough equivalent in legal ethics to crimes of risk creation in criminal law. Just as these criminal statutes prohibit certain unacceptable risks to persons or property, attorney conflict of interest rules are viewed from the risk avoidance perspective as prohibiting unacceptable risks to the various roles and obligations of lawyers defined outside the conflict of interest rules. In short, the risk avoidance approach views conflict of interest rules as telling lawyers that in addition to not actually violating the obligations set forth outside the conflict of interest rules, they must also avoid unacceptable risks of violating these obligations.

Much of conflict of interest doctrine reflects a risk avoidance approach. Indeed, it is probably the dominant theme among the three competing ap-

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70. MODEL CODE DR 5-105(A) (emphasis added).

71. MODEL CODE DR 5-105(B) (emphasis added).

72. See, e.g., Torassa & Holthaus, *Prosecutor Confirms Tie to 2nd Probe Figure*, CLEV. PLAIN DEALER, June 30, 1991, at 1-A (reporting county prosecutor's friendship and political connections with the potential target of a grand jury welfare fraud investigation. The story reports that in response to suggestions that she withdraw from active involvement in the investigation due to conflict of interest, the prosecutor stated that she did not feel the need to step aside and that “[f]riendship *will not impair* the job I have to do.” *Id.* at 4-A (emphasis added)).

proaches. *Model Code* DR 5-101(A) sets forth the prohibition that a lawyer shall not accept employment if “his professional judgment on behalf of his client . . . *reasonably may be affected* by his own financial, business, property, or personal interests.”<sup>73</sup> DR 5-105(A) states that a lawyer must decline employment if “the exercise of his independent professional judgment in behalf of a client . . . *is likely to be adversely affected* by the acceptance of the proffered employment . . . .”<sup>74</sup> DR 5-105(B) requires that a lawyer shall not continue to represent multiple clients if “the exercise of his independent professional judgment in behalf of a client . . . *is likely to be adversely affected* by his representation of another client . . . .”<sup>75</sup> *Model Rule* 1.7(b) instructs that “[a] lawyer shall not represent a client if the representation of that client *may be materially limited* by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests . . . .”<sup>76</sup> These passages, with their use of “may” and “likely,” clearly suggest a concern with avoidance of the risk of impairment.

A similar risk approach is reflected in passages from cases dealing with attorney conflict of interest. Courts have explicitly held, for example, that “[l]ack of actual injury to the client or profit to the attorney is no defense to a fiduciary’s breach of his duty of loyalty; the harm is in the attorney exposing himself to the potential conflict.”<sup>77</sup> What these passages from both the ethics codes and case law indicate is that “[c]onflicts of interest can exist even though no substantive impropriety has in fact occurred . . . . [T]he concept of conflict of interest turns upon reasonable possibility based upon experience and common sense.”<sup>78</sup> Just as there were variations on the resulting impairment approach, there are multiple variations on the risk approach expressing a wide range of views about how much risk is acceptable. These variations are treated in detail in Part III.B, *infra*.

### 3. The Appearance Approach

The resulting impairment approach is concerned with harm to the lawyer’s obligation which either has in fact occurred or is certain to occur. The risk approach is concerned with risk of impairment which is, in fact, posed by a particular situation. As its name suggests, the appearance approach by contrast is concerned with the appearance of some impropriety.

73. MODEL CODE DR 5-101(A) (emphasis added).

74. MODEL CODE DR 5-105(A) (emphasis added).

75. MODEL CODE DR 5-105(B) (emphasis added).

76. MODEL RULES Rule 1.7(b) (emphasis added).

77. *Financial General Bankshares, Inc. v. Metzger*, 523 F. Supp 744, 768 (D.D.C. 1981), *vacated for lack of jurisdiction*, 680 F.2d 768 (D.C. Cir. 1982).

78. FREEDMAN, *supra* note 7, at 177-178 (1990).

The *Model Code's* Disciplinary Rules which follow Canon 5 and concern conflict of interest make no mention of an appearance rationale. The *Model Code's* Ethical Considerations concerning conflict of interest, however, contain passages which reflect this approach. EC 5-6, for example, in discussing the issue of a lawyer naming himself as executor or trustee in an instrument he is drafting, advises that "care should be taken by the lawyer to avoid even the appearance of impropriety."<sup>79</sup> The primary authority under the *Model Code* for invocation of the appearance approach, however, is Canon 9 of the *Model Code* which states that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."<sup>80</sup>

The appearance approach has generated a good deal of critical academic commentary.<sup>81</sup> The *Model Rules's* provisions do not incorporate language which reflects an appearance approach. Deletion of Canon 9's language was intentional. "The framers of the . . . *Model Rules* plainly meant to abandon it as an independently operating standard."<sup>82</sup> Nonetheless, the appearance approach continues to be applied in some jurisdictions which have adopted the *Model Rules*.<sup>83</sup>

The case law of conflict of interest contains innumerable passages which

79. MODEL CODE EC 5-6.

80. MODEL CODE Canon 9.

81. See, e.g., Victor H. Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 MINN. L. REV. 243, 264-65 (1980); Howard M. Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 NW. U.L. REV. 996 (1979); Neil D. O'Toole, *Canon 9 of the Code of Professional Responsibility: An Elusive Ethical Guideline*, 62 MARQ. L. REV. 13 (1979). See also Anthony G. Flynn, Note, *Disqualification of Counsel for the Appearance of Professional Impropriety*, 25 CATH. U.L. REV. 343 (1976); Regina Zelonker, Note, *Appearance of Impropriety as the Sole Ground for Disqualification*, 31 U. MIAMI L. REV. 1516 (1977).

82. WOLFRAM, *supra* note 11, § 7.1.4, at 322.

83. See, e.g., *First American Carriers, Inc. v. Kroger Co.*, 787 S.W.2d 669, 672 (Ark. 1990) ("While Canon 9 is not expressly adopted by the Model Rules, the principle applies because its meaning pervades the Rules and embodies their spirit."); *Burnette v. Morgan*, 794 S.W.2d 145, 148 (Ark. 1990) (The Arkansas Supreme Court recognized and "reassert[ed] that the principle is yet alive and, though not controlling, is a rock in the foundation upon which is built the rules guiding lawyers in their moral and ethical conduct."); *Dewey v. R.J. Reynolds Tobacco Co.*, 536 A.2d 243, 249 (N.J. 1988) ("Contrary to the recommendations of [the Court's Commission on the *Model Rules of Professional Conduct*], this Court added paragraph (c) to the Model Rule 1.7 to preserve in certain instances the 'appearance of impropriety' doctrine. . . . That doctrine therefore has continuing vitality in this state in situations covered by RPC 1.7, and in those situations covered by other Rules that incorporate RPC 1.7, e.g., RPC 1.9."); *McCarthy v. Henderson, Inc.*, 587 A.2d 280, 283 (N.J. Super. 1991) ("Subparagraph (c) of RPC 1.7 was added to the ABA model rule by our Supreme Court when the RPCs were adopted. Its purpose is to retain the 'appearance of impropriety' doctrine in situations covered by RPC 1.9."); *Gomez v. Superior Court*, 717 P.2d 902, 904 (Ariz. 1986) ("It would appear, however, that 'appearance of impropriety,' however weakened by case law and its omission in the new Rules of Professional Conduct, survives as a part of conflict of interest and an appearance of impropriety should be enough to cause an attorney to closely scrutinize his conduct. . . . Where the conflict is so remote that there is insufficient appearance of wrongdoing, disqualification is not required.")

reflect the appearance approach.<sup>84</sup> California cases, for example, utilize an "informed speculation" standard under which conduct is prohibited if it "naturally and reasonably gives rise to speculation that the professional judgment of counsel[,] as well as . . . zealous representation[,] . . . has been compromised."<sup>85</sup> Different versions of the appearance approach appear in the doctrine.

Courts that invoke the appearances standard in conflicts cases typically cite Canon 9 of the 1969 Code, which states that "a lawyer should avoid even the appearance of impropriety." Beyond the initial invocation of Canon 9, approaches vary. Some decisions describe the appearance that is to be avoided in terms of a violation of a more specific rule, such as the confidentiality rules of Canon 4 or the conflict of interest rules of Canon 5. Still other courts purport to base disqualification solely on Canon 9, even if the court is not prepared to say that any specific mandatory rule has been violated. . . . Another approach has been to take appearances of impropriety into account as one of several factors but, at least implicitly, to refuse to rest disqualification solely upon it.<sup>86</sup>

## B. THE CURRENT CONFUSION

The treatment of culpable mental states, often referred to by the Latin phrase *mens rea*, is "the source of no end of confusion in the study and practice of criminal law."<sup>87</sup> One of the problems has been the "variety, disparity and confusion" of judicial definitions of "the requisite but elusive mental element."<sup>88</sup> This ambiguity in terminology reflected a failure to identify and distinguish various underlying conceptual approaches to defining the *mens rea* for a particular offense. A phrase such as "willful, wanton negligence," for example, creates ambiguity, because it suggests three different and inconsistent culpability states. Negligence suggests inadvertence. Wanton suggests recklessness (i.e. conscious risk creation). Willful suggests intention.<sup>89</sup>

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84. See generally WOLFRAM, *supra* note 11, § 7.1.4, at 319-22 (description of how an appearance approach has been utilized by various courts).

85. See *People v. Jackson*, 213 Cal. Rptr. 521, 523 (Cal. Ct. App. 1985); *People v. Singer*, 275 Cal. Rptr. 911, 921 (Cal. Ct. App. 1990) ("Even a potential conflict may require reversal if the record supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected.")

86. WOLFRAM, *supra* note 11, § 7.1.4, at 319-20.

87. Harold Edgar, *Mens Rea*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1028 (Sanford H. Kadish ed., 1983).

88. See *Morisette v. U.S.*, 342 U.S. 246, 252 (1952) ("The unanimity with which [courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element.")

89. MODEL PENAL CODE AND COMMENTARIES, § 2.02 cmt.4 (1985) ("As Jerome Hall has put it, the

The Model Penal Code jettisoned an accumulation of archaic and ill-defined verbiage relating to mens rea, terms such as "malice," "scienter," "general criminal intent" and "specific criminal intent." The Model Penal Code then replaced this "quagmire of legal refuse" with four clearly defined terms: "purpose," "knowledge," "recklessness" and "negligence."<sup>90</sup> Each term reflects a different conceptual approach to defining culpability and the definitions clearly distinguish between these concepts.<sup>91</sup> By simplifying and clarifying both the terms and the concepts relating to culpability, the Model Penal Code "introduced both reason and structure to a previously amorphous area of Anglo-American law."<sup>92</sup>

Conflict of interest doctrine is currently in a state similar to that of the criminal law's treatment of mens rea prior to the Model Penal Code. The following section demonstrates that the three responses to threat of attorney impairment set forth above and their various permutations compete for expression in conflict of interest doctrine in the same way that ideas such as negligence, recklessness and intention competed for expression in mens rea doctrine before the Model Penal Code. Conflict of interest doctrine's failure to identify and distinguish clearly these three conceptual approaches and to acknowledge their inconsistencies results in a state of conceptual dissonance.

## 1. Terminology

A good place to begin in examining the ambiguity and inconsistency of current doctrine is with some examples of basic doctrinal terminology.

### a. The Meaning of "Conflict of Interest"

Obviously, the most basic item in the vocabulary of conflict of interest doctrine is the phrase "conflict of interest." Although frequently used, it is seldom defined.<sup>93</sup> Neither the *Model Code* nor the *Model Rules*, for exam-

judicial 'opinions run in terms of 'wanton and wilful negligence,' 'gross negligence,' and more illuminating yet, 'that degree of negligence that is more than the negligence required to impose tort liability.' The apex of this infelicity is 'wilful, wanton negligence,' which suggests a triple contradiction—'negligence' implying inadvertence; 'wilful,' intention; and 'wanton' recklessness.'")

90. Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, at 575 (1988) ("Of the many advances in the law contributed by the drafters of the Model Penal Code, none appears to be of greater immediate or long-term significance than that in the area of culpability. . . . For centuries, the approach to mental components of crimes had been a quagmire of legal refuse. . . ."); Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 815 (1980) ("In 1953 the Model Penal Code drafters presented what may be their most significant and enduring achievement, a thoughtful definition of distinct levels of culpability.")

91. See MODEL PENAL CODE AND COMMENTARIES § 2.02 (1980).

92. Gainer, *supra* note 90, at 575.

93. Cuyler v. Sullivan, 446 U.S. 335, 356 n.3 (1980) ("'Conflict of interests' is a term that is often

ple, define the term. Treatments of the subject in treatises and casebooks frequently begin not with a definition of conflict of interest, but by providing examples of situations in which interests "conflict." The reader is then left with the task of extracting the essential characteristics of a conflict of interest from these examples.

Perhaps the classic attempt at establishing the meaning of the term conflict of interest is that found in Canon 6 of the American Bar Association's 1908 *Canons of Professional Ethics*: "a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."<sup>94</sup> This language from Canon 6 has been described as the way in which "conflict of interest is most commonly defined"<sup>95</sup> and is cited in many modern cases.<sup>96</sup>

But this alleged "definition" is not a definition. To "define" something is "to give the distinctive properties or characteristics of a thing" or "to determine or describe the limits of" something.<sup>97</sup> The language from Canon 6 makes no attempt to describe the "distinctive properties or characteristics" of conflict of interest. It simply provides an example of one type of conflict, that between two clients. Nor does it "determine the limits" of conflict of interest. It excludes situations in which the lawyer's own interests or the interests of a third party threaten the lawyer's fulfillment of her obligation to her client, both of which are commonly included within the usage of "conflict of interest."

A more interesting aspect of this language from Canon 6 for the purposes of this article is that it suggests a resulting impairment approach. The lawyer in the Canon 6 example is in a situation in which he must choose between disserving one client or disserving the other. Thus, he has reached the point of either resulting impairment or certainty of resulting impairment of his obligations to one or the other of his clients. This suggests that conflict of interest does not exist until the point of impairment is reached.

The closest the *Model Code* comes to explaining the term is in its defini-

used and seldom defined.").

94. CANONS OF PROFESSIONAL ETHICS Canon 6 (1908).

95. L. Ray Patterson, *An Analysis of Conflict of Interest Problems*, 37 MERCER L. REV. 569, 570 (1986) ("[C]onflict of interest is most commonly defined as a situation in which the lawyer has a duty to contend for one client that which his duty to another client requires him to oppose.").

96. E.g., *Cuyler*, 446 U.S. at 356 n.3; *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1347 (9th Cir. 1981); *Woodruff v. Tomlin*, 593 F.2d 33, 39 (6th Cir. 1979), *cert. denied*, 449 U.S. 888 (1980); *In re Gopman*, 531 F.2d 262, 265 n.3 (5th Cir. 1976); *Committee on Professional Ethics & Grievances v. Johnson*, 447 F.2d 169, 172 n.4 (3d Cir. 1971); *State v. Manross*, 532 N.E.2d 735, 738 (Ohio 1988), *cert. denied*, 490 U.S. 1083 (1989).

97. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 476-77 (Unabridged 2d ed. 1979) [hereinafter WEBSTER'S].

tion of "differing interests" which states that such interests "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."<sup>98</sup> Use of the words "will adversely affect" suggests again certainty of future impairment and, thus, the term's concern with resulting impairment rather than with risk.

At other times, the term conflict of interest is defined as a situation which poses risk of impairment. One treatise instructs that "any factor that *might* interfere with the exercise of [the lawyer's] independence of judgment creates a conflict of interest."<sup>99</sup> A leading article in the field also defines conflict of interest in terms of risk:

A conflict of interest exists whenever the attorney, or any person represented by the attorney, has interests adverse in any way to the advice or course of action which should be available to the present client. A conflict exists whenever this tension exists even if the attorney eventually takes the course of action most beneficial to the present client.<sup>100</sup>

Similarly, the Restatement defines a conflict of interest as "a substantial risk that the lawyer's representation of the client would be materially and adversely affected."<sup>101</sup>

Treatment of the definition of the basic term "conflict of interest," thus, has not maintained a clear distinction between risk and resulting harm. Perhaps because of this ambiguity, resort has been made to an array of modifiers. Conflicts of interest have been described, among other things, as: "potential," "actual,"<sup>102</sup> "latent," "acute,"<sup>103</sup> "deep,"<sup>104</sup> "relevant,"<sup>105</sup> "subjective," "objective,"<sup>106</sup> "per se."<sup>107</sup> Occasionally adverbs are called upon in drawing distinctions regarding conflict of interest. For example, language from a Supreme Court case attempts to draw a distinction on the basis of a lawyer "actively" representing conflicting interests. This language suggests

98. MODEL CODE Definition (1) (emphasis added).

99. L. PATTERSON, *supra* note 4, at 4-1 (emphasis added).

100. Aronson, *supra* note 24, at 809.

101. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 201 (Tentative Draft No. 4, 1991) [hereinafter RESTATEMENT].

102. E.g., MODEL RULES Rule 1.7 cmt. [1]; *In re Porter*, 584 P.2d 744, 747 (Or. 1978).

103. *In re Lanza*, 322 A.2d 445, 447 (N.J. 1974).

104. HAZARD & HODES, *supra* note 2, § 1.8:501, at 271 n.1 (referring to the case of *Maxwell v. Superior Court*, 639 P.2d 248 (Cal. 1982), "the conflict of interest was so *deep* that a waiver should have been prohibited as a matter of public policy") (emphasis added).

105. *Cuyler*, 446 U.S. at 355 (Marshall, J., dissenting) ("The appropriate question under the Sixth Amendment is whether an actual, *relevant* conflict of interests existed during the proceedings.") (emphasis added).

106. RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 12.2, at 705-08 (3d ed. 1989) (using the terms "subjective" and "objective" to describe conflicts of interest).

107. Patterson, *supra* note 95, at 572.



that some form of “passively” representing conflicting interests is allowable.<sup>108</sup> These adjectives and adverbs, in turn, are seldom defined.

#### b. The “Actual” vs. “Potential” Distinction

Two adjectives frequently used to modify the term conflict of interest are “potential” and “actual.”<sup>109</sup> The adjective “potential” means something “that can, but has not yet, come into being.”<sup>110</sup> Since risk itself refers to harm which is capable of occurring but has not yet occurred, use of the term “potential” connotes a focus on risk. This seems clear enough if the term “conflict of interest” itself is thought of as requiring resulting impairment. Then the phrase “potential conflict of interest” would simply mean risk of impairment. Thus, a potential conflict is sometimes defined as describing a situation in which impairment is likely.<sup>111</sup> However, the phrase “potential conflict of interest” becomes ambiguous if one thinks of the term “conflict of interest” itself, as it is often used, as describing a situation presenting a risk of impairment. If the term “conflict of interest” is understood in this risk sense, as it often is, then adding the word “potential” seems redundant. Taken literally, it would mean the potential of potential harm, that is, a risk of a risk.

The adjective “actual” means “existing at the present time.”<sup>112</sup> This term suggests a concern with actual impairment. As with the adjective “potential,” however, ambiguity arises when “actual” is combined with the term “conflict of interest.” If the term “conflict of interest” is understood itself to mean a situation of resulting impairment, then the adjective “actual” seems redundant. If “conflict of interest” is understood to describe a situation presenting a risk of impairment, then use of the term “actual,” implying that something already has happened, seems contradictory since risk suggests something in the future which is threatening but has not yet happened.

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108. See *Burger v. Kemp*, 483 U.S. 776, 783 (1987) (“We have never held that the possibility of prejudice that ‘inheres in almost every instance of multiple representation,’ justifies the adoption of an inflexible rule that would presume prejudice in all such cases . . . Instead, we presume prejudice ‘only if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’”) (quoting *Cuyler*, 446 U.S. at 348, 350; *Strickland v. Washington*, 466 U.S. 688, 692 (1984)).

109. See, e.g., MODEL RULES Rule 1.7 cmt. [1] (“The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are *actual* or *potential* conflicts of interest.”) (emphasis added).

110. WEBSTER’S, *supra* note 97, at 1409.

111. See *In re Porter*, 584 P.2d 744, 747 (Or. 1978)(stating that a “potential” conflict of interest is one in which the lawyer’s independent professional judgement “is *likely* to be adversely affected. . .”) (emphasis added).

112. WEBSTER’S, *supra* note 97, at 20.

“Actual” conflict of interest is sometimes used to refer to impairment which has already taken place. Indeed, a leading commentator states that “[w]hen commentators refer to an ‘actual’ conflict of interest, they ordinarily mean that the substantive impropriety that the conflict of interest rule was designed to prevent *has in fact taken place*.”<sup>113</sup> At other times, actual conflict is defined as meaning a prospective certainty of impairment.<sup>114</sup> At still other times, the word “actual,” when used to modify conflict of interest, has been explicitly defined as referring to a situation presenting an intolerable amount of risk, not actual impairment or certainty of actual impairment. The Supreme Court, for example, has stated that “[a]n arrangement represents an actual conflict of interest if its potential for misconduct is deemed intolerable. The determination of whether there is an actual conflict of interest is therefore distinct from the determination of whether that conflict resulted in any actual misconduct.”<sup>115</sup> It is a poor word to convey the idea of prospective impairment regardless of the degree of probability, because it suggests that whatever it modifies has already happened.

Rather than clarifying the ambiguity in the phrase “conflict of interest,” the words “potential” and “actual” simply continue and compound the confusion.

## 2. Commentators and Codes

The confusion found in the vocabulary of conflict of interest reflects an underlying conceptual confusion as to the appropriate response to situations which threaten attorney impairment found both in commentators and ethics codes dealing with conflict of interest. Both ethics codes and commentators have treated the choice of appropriate response ambiguously.

### a. Commentators

Take, for example, the treatment of choice of response found in one of the classic works in the field, Henry Drinker’s *Legal Ethics*.<sup>116</sup> Published in 1953, it is cited in modern conflict of interest cases and commentary.<sup>117</sup> In his section on conflict of interest, Drinker notes that the lawyer is forbidden

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113. FREEDMAN, *supra* note 7, at 181 (emphasis added).

114. See *In re Porter*, 584 P.2d at 747 (an “actual” conflict of interest is one in which “the lawyer’s independent professional judgment . . . will be adversely affected”).

115. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807-08 n.18 (1987).

116. HENRY DRINKER, *LEGAL ETHICS* (1953). Drinker was chairman of the American Bar Association Standing Committee on Ethics and Grievances from 1944 to 1958.

117. See, e.g., *In re Porter*, 584 P.2d at 748 (citing DRINKER, *supra* note 116, in regard to a conflict of interest issue); Aronson, *supra* note 24, at 813; Patterson, *supra* note 95, at 570 n.4.

to accept representation "from others in matters *adversely affecting* any interest of the client with respect to which confidence has been reposed."<sup>118</sup> Use of the words "adversely affecting" in this passage suggests a pure resulting impairment approach. Drinker quotes from a case which provides that "[t]he test of inconsistency is . . . whether his accepting the new retainer will require him . . . to do anything which *will injuriously affect* his former client . . . ."<sup>119</sup> Again this language is consistent with a resulting impairment approach, though this time in its anticipatory form. Drinker also quotes the passage from Canon 6 of the 1908 *Canons* discussed in the preceding subsection of this article on the vocabulary of conflict of interest, Part II.B.1.a *supra*, stating that "a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."<sup>120</sup> As noted earlier, this passage suggests a resulting impairment approach since the lawyer in the example in the quoted passage is at the point of actual impairment of his obligations to one or the other of the two clients he represents.

Drinker also instructs that the duty to avoid conflict of interest requires "not only the avoidance of a relation which will obviously and presently involve the duty to contend for one client what his duty to the other presently requires him to oppose, but also the *probability* or *possibility* that such a situation will develop."<sup>121</sup> Here a risk avoidance approach is clearly expressed. The fact that this sentence simultaneously expresses two different versions of a risk approach, one prohibiting probable and the other possible impairment, adds to the ambiguity. Drinker returns to the risk approach with the admonition that a lawyer "should avoid not only situations where a conflict of interest is actually presented, but also those in which a conflict is *likely* to develop."<sup>122</sup> Drinker also quotes Justice Story in *Williams v. Reed* asserting that "[w]hen a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which *interfere, in any degree*, with his exclusive devotion to the cause confided to him; that he has no interest, which *may betray* his judgment or *endanger* his fidelity."<sup>123</sup> This sentence seems simultaneously to express both resulting impairment and risk approaches.

Leaving no source of conceptual inconsistency untapped, Drinker also suggests an appearance approach. "[E]ven where all parties agree, the appearance of a lawyer on both sides of the same controversy, particularly in

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118. DRINKER, *supra* note 116, at 103-04 (emphasis added).

119. *Id.* at 105 (quoting *In re Boone*, 83 F. 944, 952-53 (1897)) (emphasis added).

120. *Id.* at 103 (quoting CANONS OF PROFESSIONAL ETHICS Canon 6 (1908)).

121. *Id.* at 104 (emphasis added).

122. *Id.* at 105 (emphasis added).

123. *Id.* (quoting *Williams v. Reed*, 3 Mason 405, 418 (1824)) (emphasis added).

cases of some notoriety, will often give an *impression to the public* which is most unfortunate for the reputation of the bar, and *which of itself should be decisive.*"<sup>124</sup> In sum, Drinker's treatise in the space of three pages suggests simultaneous use of an appearance approach, multiple versions of a resulting impairment approach, and multiple versions of a risk approach, with no seeming awareness of the inconsistency.

Similar ambiguities are found in more modern scholarship on conflict of interest. Take, for example, a more recent article on attorney conflict of interest, described in conjunction with another article in a recent edition of a leading treatise as "[t]he best general analysis of conflicts of interest problems."<sup>125</sup> The article<sup>126</sup> begins by quoting the Canon 6 language mentioned previously which suggests a resulting impairment approach.<sup>127</sup> It follows this language by stating that the *Model Code* "defines conflict of interest in terms of the inherent dilution of a lawyer's loyalty toward his client."<sup>128</sup> Mention of "dilution" of the lawyer's loyalty here seems to suggest that this passage like the passage from Canon 6 concerns resulting impairment. In the next paragraph, the author refers to the use by courts and ethics committees of "certain basic ethical principles . . . in determining which situations *cause or are likely to cause* a dilution of the loyalty or impairment of the independent judgment of an attorney."<sup>129</sup> The use of the "cause . . . a dilution . . . or impairment" language suggests a resulting impairment approach. The use of the "likely to cause . . . a dilution . . . or impairment" language suggests a risk avoidance approach.

Two paragraphs later, despite the fact that these earlier passages suggest either a resulting impairment approach or a choice between resulting impairment and risk avoidance approaches, the author defines conflict of interest in a way which clearly adopts a risk avoidance approach and explicitly rejects a resulting impairment approach:

A conflict of interest exists whenever the attorney, or any person represented by the attorney, has interests adverse in any way to the advice or course of action which should be available to the present client. A conflict exists whenever this tension exists even if the attorney eventually takes the course of action most beneficial to the present client.<sup>130</sup>

Having just defined conflict of interest in terms of risk avoidance, the author in the next sentence describes the possible courses of action which a

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124. *Id.* (emphasis added).

125. HAZARD & HODES, *supra* note 2, at 217 n.1.

126. Aronson, *supra* note 24.

127. *Id.* at 808.

128. *Id.*

129. *Id.* at 809 (emphasis added).

130. *Id.*

conscientious lawyer may take when “a conflict or potential conflict” arises.<sup>131</sup> Using the alternatives of “conflict or potential conflict” after having just defined conflict of interest as potential impairment introduces the ambiguity, discussed above, inherent in the term “potential conflict of interest.” Either the word “potential” is simply redundant, or it literally suggests a focus on avoiding the risk of risk. Later the author, citing Drinker’s treatise, instructs that “[t]he key to preventing unintentional or unwitting violations lies in anticipating the *probability* or *possibility* that a conflict situation will develop.”<sup>132</sup> This passage again suffers from the ambiguity of suggesting concern with risk of risk. It also expresses two different versions of the risk avoidance approach, one based on probable risk and the other on possible risk.

The author also uses the term “perceived conflicts” without any explanation or definition.<sup>133</sup> The use of the word “perceived” suggests an appearance approach. The author then explicitly adopts an appearance approach, urging that it is “particularly applicable to potential conflicts of interest”<sup>134</sup> but not acknowledging its inconsistency with the suggestions of other approaches in the prior paragraphs. As with the Drinker treatise, the author simultaneously suggests multiple approaches without clearly distinguishing between them.

#### b. Ethics Codes

One finds similar problems in the *Model Code’s* provisions on conflict of interest. Language from the *Model Code’s* DR 5-101(A) and DR’s 5-105(A) & (B) barring situations in which the lawyer’s professional judgment “will be” affected was quoted in Part II(A)(1), *supra*, as exemplifying an anticipatory resulting impairment approach. Language from these same DR’s barring situations in which the lawyer’s professional judgment “reasonably may be” or “is likely to be” affected was quoted in Part II(A)(2), *supra*, as exemplifying a risk avoidance approach. The result and risk language in each of these rules is phrased in the disjunctive. The lawyer must avoid situations in which his independent judgment “will be or reasonably may be affected” according to DR 5-101(A) and situations in which his independent judgment “will be or is likely to be” affected according to DR’s 5-105(A) & (B). The language of the *Model Code’s* EC’s makes multiple references to both actual impairment and risk of impairment, mirroring the bifurcation found in the DR’s.

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131. *Id.*

132. *Id.* at 813 (emphasis added).

133. *Id.* at 810.

134. *Id.* at 810-11.

The *Model Code's* general conflict of interest rules thus contain suggestions of two different approaches, resulting impairment and risk avoidance, without clearly distinguishing between them. To compound this ambiguity, the *Model Code's* Canon 9, as mentioned previously, provides for an appearance approach. Many courts, commentators and ethics committees have freely imported an appearance standard from Canon 9 into analysis of conflict of interest issues arising under Canon 5's provisions.<sup>135</sup>

The *Model Rules* conflict provisions are not as ambiguous as those of the *Model Code* in terms of references to multiple standards. The *Model Rules'* general conflict of interest provision, Rule 1.7, provides in part (b) that "[a] lawyer shall not represent a client if the representation of that client may be materially limited," a clear reference to a risk avoidance approach. There is no language in the actual Rule similar to the "will be . . . affected" language in the *Model Code's* DR 5-101(A) and DR's 5-105(A) & (B).

However, the Comments to Rule 1.7 are more ambiguous. Comment [1] to Rule 1.7 refers to "actual or potential conflicts of interest" without defining those terms. As mentioned previously, these terms have been treated quite ambiguously in terms of underlying conceptual approach. Comment [4] also contains some ambiguity. It provides:

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

The first sentence clearly provides an example of resulting impairment: the lawyer's functioning is impaired because he "cannot consider, recommend or carry out an appropriate course of action for the client . . . ." In the next sentence, the Comment mentions that "[t]he conflict in effect forecloses alternatives," suggesting resulting impairment. Comment [4]'s statement that one of "[t]he critical questions" is whether the conflict "will materially interfere with the lawyer's independent professional judgment" also indicates a focus on resulting impairment. Comment [6] states that "[t]he lawyer's own interests should not be permitted to have *adverse effect*

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135. See WOLFRAM, *supra* note 11, § 7.1.4, at 319-22.

on representation of a client. . . . A lawyer may not allow related business interests to *affect* representation . . . ." Comment [9] states that "[a] lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client *would be adversely affected*." These passages from the Comments to Rule 1.7 seem to reflect a resulting impairment approach with their emphasis on effect on the lawyer's representation.

Other passages from the Comments reflect a risk approach, similar to that seen in the actual text of Rule 1.7. Comment [4] uses the phrase "a possible conflict." Again, this introduces the ambiguity found in the phrase "potential conflict."

The Restatement represents a significant step forward in clarity with regard to conceptual approach. Its definition of conflict of interest, for example, clearly adopts a risk approach.<sup>136</sup> But elsewhere in the Restatement one still finds remnants of the same sorts of ambiguities found in the sources treated above. In the Reporter's Memorandum accompanying Tentative Draft No. 3 of the Restatement's conflicts provisions, for example, a passage provides that the black letter rules in the conflicts chapter state "two important concepts." First, "the general conflict-of-interest standard assesses whether a 'substantial risk' of a conflict exists. . . ."<sup>137</sup> Since a conflict is defined by the Restatement as a substantial risk, use of the phrase "'substantial risk' of a conflict" repeats the ambiguity explored earlier in the phrase "potential conflict of interest" when conflict of interest itself is defined in terms of risk. Literally, the phrase "substantial risk of a conflict" as conflict is defined by the Restatement means substantial risk of a substantial risk. This same ambiguity is seen in the Comments following Section 201, which refer several times to "potential conflicts."

The second of the "two important concepts" mentioned in the Reporter's Memorandum is that "the test for a conflict is whether a 'material and adverse effect' *will befall* a client's representation because of stated interests."<sup>138</sup> Choice of the words "will befall" conveys the anticipatory version of the resulting impairment approach and seems to contradict both the immediately preceding "risk" concept put forth in the Reporter's Memorandum and the Restatement's basic definition of conflict of interest as involving "substantial risk."

A resulting impairment approach is also suggested by the hypothetical

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136. RESTATEMENT § 201 (a conflict of interest exists if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, to a former client, or to a third person).

137. RESTATEMENT (Tentative Draft No. 3, 1990) Reporter's Memorandum to the Members of the Institute at xxi.

138. *Id.* (emphasis added).

posed in Illustration 1 of the Comments following Section 201. Illustration 1 presents a situation in which the “[l]awyer’s representation *will have an “adverse effect”* on both [clients] A and B . . . .”<sup>139</sup> This illustration thus suggests a situation of certainty of impairment, rather than one presenting one of substantial risk. Illustration 1 also provides that “[l]awyer will have duties to A that restrict the zeal with which the lawyer urges B’s position.”<sup>140</sup> Again this suggests certainty rather than substantial risk of impairment.

### C. REMEDIES FOR THE CONCEPTUAL CONFUSION

The previous sections have demonstrated that a primary source of confusion in conflict of interest doctrine is its failure clearly to distinguish resulting impairment, risk avoidance, and appearance approaches in formulating its response to threats of attorney impairment. Based on the view that one must understand a problem before one can hope to cure it, the primary point of Part II is to demonstrate this confusion and the ambiguity it introduces into conflicts doctrine.

Resolution of the question of choice of conceptual approach is beyond the scope of this article. My primary argument here is that we must remedy this confusion as a first step toward building a comprehensible doctrine of attorney conflict of interest. Clearly distinguishing different conceptual approaches is an essential part of that process. We must reach some agreement on what conceptual approach or approaches are appropriate and then clearly communicate that choice.

Conflict of interest doctrine could continue to utilize multiple approaches and just do a better job of articulating and distinguishing them. To draw again on the criminal analogy, the Model Penal Code in its treatment of mens rea clearly defines and distinguishes four different conceptual approaches to defining mens rea in an introductory section: purpose, knowledge, recklessness and negligence. In later sections when defining particular offenses, it then is explicit about which type of mens rea is required for each offense. Thus, its crime of negligent homicide is clear that negligence is the required level of culpability and the meaning of the term negligence is clearly set out in the introductory definition.

If conflict of interest doctrine took a similar approach, the ethics codes might start their treatment of conflict of interest with a set of definitions of different approaches to the boundary between permissible and impermissible attorney conduct in conflict of interest situations. In later sections, the ethics codes could then choose which approach was appropriate for a par-

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139. RESTATEMENT § 201 cmt. 6.

140. *Id.*



ticular situation and by using the terms defined in the introductory section send a clear message about the choice of conceptual approach to be used in that setting. Resulting impairment might be used in some situations, risk in others, and appearance in still others.

A different way to clarify the confusion about conceptual approach would be to eliminate certain approaches in favor of one unifying approach to be used in all situations.

### III. RISK AVOIDANCE: THE ESSENTIAL QUESTIONS

Part II argued that a primary source of confusion in conflict of interest doctrine is its failure clearly to distinguish various conceptual approaches in formulating its response to threat of attorney impairment. The following section argues that another primary source of confusion is current doctrine's failure to develop clearly and completely the analytical components of the risk avoidance approach. Analyzing attorney conflict of interest issues from a risk avoidance perspective involves a series of questions concerning what is at risk, the definition of acceptable risk, and who decides these questions. Current doctrine does not clearly articulate or answer these essential questions.

#### A. WHAT IS AT RISK?

In order to assess risk, one must first determine what is at risk. What facets of a lawyer's functioning do conflict of interest rules seek to protect from impairment? The answer to this preliminary question provides the logical and necessary focal point for analyzing the risk of attorney impairment presented in any particular situation. Lack of a clear answer to the question of what is at risk is a source of confusion in present conflict of interest doctrine.

Comparison with a criminal statute utilizing a risk approach is a useful device for illustrating conflict of interest doctrine's lack of clarity in providing a focal point for risk analysis. The Model Penal Code, for instance, defines the crime of reckless endangerment as recklessly engaging in conduct which creates an unacceptable risk to another person of "death or serious bodily injury."<sup>141</sup> This statute clearly states the risks with which it

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141. Model Penal Code § 211.2, Recklessly Endangering Another Person, provides:

A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.

MODEL PENAL CODE § 2.02(2)(C) defines recklessly as follows:

is concerned, those of "death or serious bodily injury." What is the analog in conflict of interest doctrine to "death or substantial bodily injury" in the reckless endangerment statute?

There are many components to the functioning of a lawyer which may be threatened with impairment and might comprise this analog. These components may be described in a variety of ways. One descriptive method is to focus on the various roles a lawyer plays, such as advisor, negotiator, or advocate. Another method is to focus on the set of obligations which a lawyer must fulfill in performing these various roles. This set of obligations includes many which are owed to the lawyer's client, such as the obligations of confidentiality,<sup>142</sup> diligence,<sup>143</sup> competence<sup>144</sup> and zeal<sup>145</sup> in pursuing client interests. It also includes obligations owed to institutions of the legal system within which the lawyer works, such as the duty of candor toward a tribunal<sup>146</sup> and the duty to monitor the factual and legal basis of claims asserted before a tribunal.<sup>147</sup> The lawyer owes still other obligations to third parties, such as the obligation to communicate with a represented party only through counsel.<sup>148</sup>

Which of these roles and obligations is conflict of interest doctrine concerned with protecting? Unfortunately, current doctrine answers this question in rather ambiguous fashion. There are several sources of ambiguity.

### 1. Lack of Clarity in Conflict of Interest Doctrine

Since formulating an appropriate response to risk of impairment of an attorney's roles and obligations is the central task of attorney conflict of interest doctrine, one might expect conflict of interest provisions such as those found in the *Model Code* and *Model Rules* to make direct and explicit reference to the various roles and obligations which comprise the functioning of a lawyer. Taking a role approach, such a provision might instruct that lawyers are to avoid unacceptable risks of impairing their

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A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

142. MODEL RULES Rule 1.6; MODEL CODE Canon 4, DR 4-101.

143. MODEL RULES Rule 1.3; MODEL CODE DR 6-101(A)(3), EC 6-4.

144. MODEL RULES Rule 1.1; MODEL CODE DR 6-101(A).

145. MODEL CODE Canon 7. See also MODEL RULE 1.3 cmt. ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.")

146. MODEL RULES Rule 3.3.

147. MODEL RULES Rule 3.1; MODEL CODE DR 7-102(A)(1), (2); FED. R. CIV. P. 11 (1969).

148. MODEL RULES Rule 4.2; MODEL CODE DR 7-104(A)(1).

roles such as advisor, negotiator, and advocate. Taking an obligation approach, it might instruct that lawyers are to avoid unacceptable risks of impairing obligations such as confidentiality, diligence, competence and zeal.

Cases and ethics opinions regarding conflict of interest often make explicit reference to the underlying obligations and roles of the lawyer.<sup>149</sup> But conflict of interest doctrine in stating its general principles, such as the *Model Code's* DR's and the *Model Rules'* black letter rules, typically does not take such an approach. Instead of using the roles or obligations which comprise the standard terminology for describing the lawyer's functioning, the conventional approach of conflict of interest doctrine is to express what is at risk in terms of positive obligation, which appear nowhere in the ethics codes except in the conflict of interest provisions, such as obligations of "loyalty" and "independent professional judgment."

Probably the term most often used to describe what conflict of interest rules seek to protect is the word "loyalty."<sup>150</sup> It is unclear what the term "loyalty" means.<sup>151</sup> Neither the *Model Code* nor the *Model Rules* define or explain it.<sup>152</sup> One possibility is that "there is no distinct ethical imperative of loyalty."<sup>153</sup> According to this interpretation, loyalty is simply a short-

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149. See, e.g., *Fiandaca v. Cunningham*, 827 F.2d 825, 829 (1st Cir. 1987) (In relation to a conflict of interest involving the terms of a settlement, the court focused on the obligations owed by the lawyer to the client in the context of settlement. It noted that as counsel for a class of plaintiffs the lawyer "owed plaintiffs a duty of undivided loyalty: it was obligated to present the offer to plaintiffs, to explain its costs and benefits, and to ensure that the offer received full and fair consideration by the members of the class." *Id.*).

150. See, e.g., GILLERS & DORSEN, *supra* note 18, at 603 ("ensuring loyalty is a primary concern of rules that prohibit concurrent conflicts"); WOLFRAM, *supra* note 11, at 316 ("It is clear that there are two broad principles underlying all conflict rules for lawyers: the principle of loyalty and the principle of confidentiality."); MODEL CODE EC 5-1 ("Neither [the lawyer's] personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.") and EC 5-14 ("Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client."); Model Rule 1.7 cmt. [1]-[4] (describing the requirements of the *Model Rules'* general conflict of interest provision, Rule 1.7, in terms of "loyalty to a client").

151. Lawry, *supra* note 6, at 1089, suggesting that the concept of loyalty:

[I]s not defined or explicated in any of the various codes of ethics that have dominated the governing of American lawyers in the 20th Century. In these codes, the concept is almost exclusively utilized in the setting of discussions about conflicts of interest. It is referred to in those settings as if the concept itself were clear, and difficulties only arise when an issue of divided or conflicting loyalties is present. My premise is that the concept is not clear at all. When the conflict of interest issues arise, the use of the principle of loyalty is problematic because we really do not have a firm grasp on the concept itself.

See also ANDREW L. KAUFMANN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 38 (3d ed. 1989) ("What we mean when we say a lawyer owes a 'duty of loyalty' to a client is at the core of our notion of what kind of adversary system we have. There is no obvious answer.").

152. Lawry, *supra* note 6, at 1089.

153. FREEDMAN, *supra* note 7, at 174. Freedman states that "[a]lthough loyalty is sometimes cited

hand way of describing the entire set of lawyer obligations imposed by rules outside conflict of interest doctrine.<sup>154</sup> A variation on this interpretation is that loyalty is a shorthand term for some subset of these obligations.<sup>155</sup> If this is the intended meaning, surely there is a clearer way to convey it. Describing the focal point for conflicts analysis using terms found only in the conflict of interest provisions and nowhere else in the ethics codes conveys the confusing message that conflict of interest is something unrelated to the roles and obligations found elsewhere in the ethics codes, rather than something intimately connected with protecting those roles and obligations.

Does loyalty include only those obligations running to the client? In other words, is risk of impairment of those attorney obligations running to legal institutions or to third parties beyond conflict of interest doctrine's sphere of concern? A lawyer's loyalty is normally described as being owed to the client and the obligations most often mentioned in connection with it are ones owed to the client, suggesting that the obligations to legal institutions and to third parties are beyond the province of attorney conflict of interest doctrine. Yet *Model Code* EC 5-9, in describing the reasons for inclusion of the advocate-witness rule among the *Model Code's* conflict of interest provisions, mentions among other rationales for the rule that "opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case," a rationale clearly grounded in the notion of fairness to an opposing party rather than some obligation to the client.

Does loyalty include all of the obligations a lawyer has toward a client, or just some of them? One recent treatise offers the alternatives of equating the term simply with the obligation of zeal or with the obligations of zeal, competence, communication and confidentiality conjunctively.<sup>156</sup> Another recent treatise offers the interpretation that "loyalty relates to zeal or diligence" disjunctively, without explaining what it means by the term "relates."<sup>157</sup> Unlike the first treatise, which expressly includes confidentiality

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as a separate ethical concern in discussions of conflicts of interest, there is no distinct ethical imperative of loyalty." *Id.*

154. See Lawry, *supra* note 6, at 1102-03. Lawry quotes philosopher Josiah Royce, who defines loyalty as "the willing . . . and thorough going devotion of a person to a cause. . . [D]evotion to a cause' encompasses *all of the duties* owed by the one loyal to that which, or to whom, the duties are owed." (emphasis added). *Id.*

155. See FREEDMAN, *supra* note 7, at 174 (stating loyalty "can be equated with zeal, or it can serve as a convenient way of saying confidentiality, zeal, competence, and communication."); ROBERT H. ARONSON & DONALD T. WECKSTEIN, *PROFESSIONAL RESPONSIBILITY IN A NUTSHELL* 224 (2d ed. 1991) (asserting that "[L]oyalty relates to zeal or diligence").

156. FREEDMAN, *supra* note 7, at 174.

157. ARONSON & WECKSTEIN, *supra* note 155, at 224.

in one of its definitions of loyalty, the second treatise treats confidentiality as not being included in the definition of loyalty.<sup>158</sup>

Perhaps we should jettison the term loyalty from conflict of interest terminology and substitute a term, such as "the representation" or "the lawyer's professional functioning" which would serve more clearly as an aggregate term for the lawyer's set of ethical obligations. Referring directly to the more concrete roles and obligations found outside the conflict rules would simplify the analysis by allowing us to resort directly to those roles and obligations in assessing risk without stumbling over how to interpret loyalty.

Yet another possibility is that there is a distinct ethical imperative of loyalty, that it adds some dimension to the set of obligations of a lawyer not imposed by rules outside conflict of interest doctrine.<sup>159</sup> Michael Bayles, for example, treats loyalty as an obligation distinct from such other obligations as diligence and competence.<sup>160</sup> If we interpret loyalty as adding a distinct substantive dimension and reject the "shorthand" interpretation advanced above, what is this added dimension?<sup>161</sup> Does adoption of this "substantive" interpretation mean that conflict of interest doctrine is not concerned with impairment of other lawyer obligations?

The problem with a "substantive" interpretation of loyalty in terms of the clarity of conflict of interest doctrine is that it burdens conflict of interest rules with the task of expressing two complex ideas: the appropriate response to threat of attorney impairment and whatever discrete dimension loyalty is intended to add to the lawyer's set of obligations. Each alone is a difficult task. Relying on conflict of interest doctrine to do both is simply asking for confusion. One need not abandon the idea of giving loyalty a distinct substantive meaning in order to cure this problem. But if loyalty is to add some new dimension to the lawyer's obligations, devoting a separate section of the ethics code to establishing its meaning, just as we do for example with confidentiality, would promote clarity.

So far we have been looking at loyalty as the analog to "death or substantial bodily injury" in the crime of reckless endangerment. In other words, we have looked to it as supplying the answer to the question of what is protected by conflict of interest doctrine. The term loyalty is sometimes construed as supplying the answer to a different question. Sometimes loy-

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158. *Id.* at 223-224 (treating loyalty and confidentiality under separate headings and stating that "[w]hereas loyalty relates to zeal or diligence, confidentiality relates to information which the client has entrusted to her lawyer.").

159. See, e.g., MICHAEL D. BAYLES, *PROFESSIONAL ETHICS* 77-83 (2nd ed. 1989) (describing loyalty as an obligation distinct from those such as diligence and competence).

160. *Id.*

161. See generally, Lawry, *supra* note 6; L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L.J. 909 (1980) (both discussing the possible meaning of the concept of loyalty).

alty is viewed as supplying the answer to the question of what is the appropriate response to threat of attorney impairment, the issue examined in Part II, *supra*. Michael Bayles, for example, states that loyalty means "Don't allow your own interests or the interests of others to divert, dilute, or diminish your efforts."<sup>162</sup> This sounds like the resulting impairment approach to responding to threats of attorney impairment. Kenneth Penegar writes that "[t]he duty of undivided loyalty could be construed to mean that the lawyer's personal life should be regulated to prevent the impression that personal opinions are at cross-purposes with the legal position of the client."<sup>163</sup> This sounds like the appearance approach to responding to threats of attorney impairment.

Greater clarity in this area might be accomplished by providing clearer definitions for existing terms such as "loyalty." Or perhaps it would be best to jettison these terms in favor of some new and clearly defined terminology. Either way, we need to have the question of what is at risk clearly asked and answered by conflict of interest doctrine in order to have a focal point for analyzing risk of attorney impairment.

## 2. Lack of Clarity in Defining the Underlying Roles and Obligations

Once we have answered the question of what aspects of the lawyer's functioning the conflict of interest provisions seek to protect, problems still remain in establishing a clear focal point for analyzing risk of attorney impairment. A separate source of confusion in establishing this basic focal point derives from the fact that many of the underlying obligations we are concerned with protecting are neither static nor well defined themselves. The assertions that lawyers owe their clients duties such as confidentiality, diligence, competence and zeal are not controversial as abstract propositions. Closer examination of such obligations, however, often reveals considerable disagreement about both the descriptive question of what the contours of such obligations presently are as well as the prescriptive question of what the contours of those obligations ought to be.<sup>164</sup> The contours of many of these obligations are and have been poorly defined, in a state of transition and subject to variation from jurisdiction to jurisdiction.<sup>165</sup> In

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162. BAYLES, *supra* note 159, at 79.

163. Kenneth L. Penegar, *The Five Pillars of Professionalism*, 49 U. PITT. L. REV. 307, 323 (1988).

164. See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1084-86 (1988). Professor Simon describes two broad tendencies in this debate about the content of lawyer obligations as the "libertarian" and "regulatory" approaches.

165. STEPHEN GILLERS & ROY D. SIMON, JR., *REGULATION OF LAWYERS: STATUTES AND STANDARDS* vii-viii (1992). Gillers and Simon note that more than 35 jurisdictions have adopted the *Model Rules*, but "there are notable variations among the jurisdictions, especially with respect to such crucial matters as conflicts and confidentiality . . . These state variations graphically illustrate the disagree-

other words, these points of reference often are themselves blurred and sometimes moving targets.

Consider, for example, the following hypothetical taken from the conflict of interest section of a leading professional responsibility casebook.<sup>166</sup> An associate at a large firm has been working on a large and complicated civil case for the past two years. His firm represents a defendant in the case which is pending in a trial court in an area of the country known for substantial anti-semitism among the local population from which the jury will be chosen. Although the associate has done excellent work on the case and would be a logical member of the trial team, the firm is considering removing him from the case because he is Jewish and thus likely to arouse the prejudice of the jurors.

What is at risk in this hypothetical is the courtroom effectiveness of the team of trial lawyers in the face of the jury's prejudice. While all would agree that a firm owes a client a duty to have its lawyers perform competently and effectively in their role as courtroom advocates, the precise limits of this obligation are unclear. Does the duty of competent courtroom advocacy encompass an obligation to cater to the prejudices of particular jurors or judges? There is no clear answer to this question. The proper boundaries of courtroom advocacy have been and continue to be much debated.<sup>167</sup>

The important point is that how this obligation of effective courtroom advocacy is defined is critical for the conflict of interest analysis. If it does encompass an obligation to cater to a jury's prejudices, then it is certainly put at risk by keeping the associate on the case. If it does not, then what is at risk is beyond the scope of the conflict of interest rules. The point is that we must look to the contours of the underlying obligations lawyers owe their clients in terms of effective courtroom performance in order to have a point of reference for judging risk under the conflicts rules. The starting point for answering this problem requires us to answer a question which is outside the realm of conflict of interest. If such a question is not clearly answered by the rules dealing with the underlying obligation, that ambiguity transfers onto the conflict of interest analysis.

This problem should not be overstated. Many, perhaps most, conflict of interest scenarios put at risk aspects of lawyer obligations which are well established and defined. But as long as there is ambiguity in defining underlying obligations and roles of lawyers, this ambiguity will continue to

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ments over how lawyers should conduct themselves. . . . *Id.*

166. GILLERS & DORSEN, *supra* note 18, at 613.

167. The arguments for and against reassignment of the associate are set forth *id.* at 613-14. A "regulatory" approach to advocacy would probably argue that lawyers owe their clients no such duty, while a "libertarian" approach might well argue in favor of such a duty. See Simon, *supra* note 164.

plague conflict of interest analysis which touches on these gray areas.

## B. WHAT RISKS ARE ACCEPTABLE?

Perhaps the central question for a risk approach to conflict of interest is defining which risks are acceptable and which are unacceptable. At what point does the risk of impairment of an attorney's functioning become unacceptable? In turn, this question leads to several subsidiary questions having to do with both the *magnitude* and the *justifiability* of the risk.

### 1. What Magnitude of Risk Is Acceptable?

Current doctrine sends a wide range of inconsistent messages about how much risk should be tolerated. At times it expresses abhorrence of any risk. At times it is accepting of substantial risk. At still other times, it displays various intermediate degrees of risk aversion falling between these extremes.

#### a. The Zero Risk Fallacy

One possible answer to the question of what magnitude of risk is acceptable is the simple answer that none is acceptable. In other words, conflict of interest doctrine might adopt an attitude of "zero risk tolerance," insisting that lawyers avoid situations which create any risk of impairment of a professional role or obligation. Such an attitude of "zero risk tolerance" has initial intuitive appeal, since risk of impairment certainly seems like something we would want to discourage. Expression of such an attitude would also make a useful rhetorical device for those seeking to defend the image and reputation of the bar.

One finds expression of zero risk tolerance in conflict of interest doctrine in varying guises. In an "exhortation" form, it appears as a caution to lawyers to avoid all risk. In an "assertion" form, it appears as a claim that certain recommended courses of conduct in fact achieve a state of zero risk.

Upon examination, both forms of the zero risk tolerance notion usually are misleading rhetorical overstatements. The exhortation form holds out the goal of what is usually an unrealizable norm and the assertion form makes false claims about actually achieving that norm. Both forms are based on the implicit assumption that an appropriate standard for judging the real world of risk in which lawyers routinely operate is an ideal risk free state. In adopting a point of view which implicitly presents the relevant choice as that between the ideal and the actual, the zero risk tolerance notion succumbs to the nirvana fallacy often mentioned in the literature of



law and economics.<sup>168</sup> The nirvana fallacy consists of “comparing the imperfect to the ideal and concluding that the ideal dominates.”<sup>169</sup> Ideal states such as zero risk are typically either unattainable or too costly to attain and thus it is usually fallacious to compare the real with the ideal as if the ideal were an available option.

A recent New York State Bar Opinion dealing with media rights provides examples of both forms of this fallacy.<sup>170</sup> An assistant district attorney requested guidance concerning her sale of media rights allowing her character to be portrayed in television and movie presentations based on a highly publicized murder case she had prosecuted. The threat which allowing such a sale presents to various facets of the prosecutor’s effective and ethical functioning has been examined in Part I.A., *supra*. In sum, the risk results from the combination of the prosecutor’s financial “interest in seeing the case sensationalized” and her control of the “means of sensationalizing it” through her handling of the case.<sup>171</sup> The Opinion demonstrates awareness of this obvious threat by citing language from the *Model Code’s* EC 5-4 warning that “[a] lawyer who gains an interest in publica-

168. Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969).

The view that now pervades much public policy economics implicitly presents the relevant choice as between an ideal norm and an existing “imperfect” institutional arrangement. This *nirvana* approach differs considerably from a *comparative institution* approach in which the relevant choice is between alternative real institutional arrangements. In practice, those who adopt the nirvana viewpoint seek to discover discrepancies between the ideal and the real and if discrepancies are found, they deduce that the real is inefficient. Users of the comparative institution approach attempt to assess which alternative real institutional arrangement seems best able to cope with the economic problem; practitioners of this approach may use an ideal norm to provide standards from which divergences are assessed for all practical alternatives of interest and select as efficient that alternative which seems most likely to minimize the divergence.

*Id.* For examples of use of the concept of nirvana fallacy in critiques of various areas of legal doctrine, see the articles cited *infra* note 169.

169. See, e.g., Jeffrey O’Connell & David Partlett, *An America’s Cup for Tort Reform? Australia and America Compared*, 21 U. MICH. J.L. REF. 443, 452 (1988) (stating that “[t]he real world of torts with all its warts cannot be compared with the idealized reformed world.”); Richard A. Epstein, *Two Fallacies in the Law of Joint Torts*, 73 GEO. L.J. 1377, 1377-1378 (1985) (“The right intellectual orientation is not to set the aspirations of the system too high. Trying to get the right result in all cases is noble, but it is also unattainable. It is another manifestation of the Nirvana fallacy, by which the defects in one proposed set of institutions are compared to an unrealizable ideal instead of to their feasible alternatives.”) (quoting Demsetz, *supra* note 168); Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1272 (1982) (asserting that “it is a form of the nirvana fallacy to conclude that the structure of corporations or corporation law should be changed because existing insitutional arrangements are imperfect.”) (quoting Demsetz, *supra* note 168).

170. New York State Bar Op. 606-1/11/90 (21-89).

171. HAZARD & HODES, *supra* note 2, §1.8.501, at 271 (“A lawyer holding media rights to the story of the very case in which he is involved has an interest in seeing the case sensationalized. The lawyer also has the means of sensationalizing it, by his choice of tactics and by the recommendations he makes to the client.”).

tion rights relating to the subject matter of employment may be tempted to compromise the interest of the client for the lawyer's own anticipated pecuniary gain."<sup>172</sup>

The Opinion concludes that sale of media rights by the prosecutor is impermissible while the case is pending. Such a sale is permissible, however, once the representation has terminated. This delayed sale rule is conflict of interest doctrine's standard resolution of such media rights issues. The *Model Code* and *Model Rules* have provisions which parallel the result in the Opinion,<sup>173</sup> and are cited in the Opinion as support for its adoption of the delayed sale rule.<sup>174</sup>

A moment's reflection reveals that requiring the prosecutor to wait until after the representation is terminated to sell the rights does not eliminate the threat that her financial interest in increasing the value of the media rights will compromise fulfillment of her professional roles and obligations. The requirement simply converts the incentive from one of present financial gain to one of future financial gain. Nonetheless, the Opinion states that "[a]fter the representation, the potential conflict with which the rule is concerned disappears,"<sup>175</sup> suggesting that delaying the sale has eliminated the risk. This sort of zero risk claim is not an isolated phenomenon. The *Model Code's* EC 5-4 states that media deals should be delayed until after "termination of all aspects of the matter" in order "to prevent . . . potentially differing interests."<sup>176</sup> Similarly, a leading treatise in legal ethics claims that the delay rule *removes* the temptation to be found in lawyer media deals.<sup>177</sup>

This same New York Bar Opinion demonstrates the exhortation version

172. New York State Bar Op. 606-1/11/90 at 28 (21-89).

173. MODEL RULES Rule 1.8(d); MODEL CODE DR 5-104(B) *cited with approval in* New York State Bar Op. 606-1/11/90, at 27-28 (21-89).

174. New York State Bar Op. 606-1/11/90 at 27-28 (21-89).

175. *Id.* at 27.

176. MODEL CODE EC 5-4 reads:

If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of the client to his own anticipated pecuniary gain. For example,<sup>a</sup> a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. *To prevent these potentially differing interests*, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

(emphasis added)

177. HAZARD & HODES, *supra* note 2, § 1.8.501, at 271 ("Both the Code and the Rules of Professional Conduct *remove* the temptation by prohibiting the arrangement altogether, at least until the representation is terminated.") (emphasis added).

of the zero risk fallacy. After indicating that the prosecutor may sell her media rights after the representation is terminated, the Opinion adds some cautionary notes. First, it warns against the lawyer being actually influenced in her handling of the case, a statement reflecting realization of the continuing existence of the very risk which the portion of the Opinion cited in the previous paragraph claimed would disappear.<sup>178</sup> The Opinion then adds a second caution. "Counsel must *avoid even the temptation* to take a course of action that might enhance the value of the lawyer's publication or media rights at the risk of impeding the client's cause."<sup>179</sup> Obviously, though, the very course of conduct which the Opinion approves, sale of the media rights after termination of the representation, creates the very temptation which the lawyer is advised to avoid.<sup>180</sup>

Avoidance of all risk of impairment for lawyers is an unattainable goal. A lawyer's fees, for example, no matter what form they take are a source of incentives which threaten to impair a lawyer's functioning. These incentives cannot be eliminated without eliminating compensation for lawyers, an unlikely prospect. Similarly, a lawyer's political views and his representation of other clients are sources of incentives which threaten impairment and cannot practically be eliminated.

However, certain specific sources of risk could be eliminated by the adoption of rules absolutely banning particular types of attorney conduct. Model Rule 1.8(c), for example, provides an instance of this sort of approach with its absolute ban on a lawyer's preparing a legal instrument which gives the lawyer or certain relatives any substantial gift from the client.<sup>181</sup> Usually, though, conflict of interest doctrine chooses not to eliminate the risk entirely. For example, it would be possible to eliminate the threat posed by lawyers selling media rights concerning their cases by absolutely banning any such sales. Such an absolute ban would be costly and conflict of interest doctrine in fact does not adopt such an approach.

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178. New York State Bar Op. 606-1/11/90 at 28 (21-89).

179. *Id.* (emphasis added).

180. For other examples of expression of the exhortation form of the zero risk fallacy, see *Estates Theatres, Inc. v. Columbia Pictures Indus., Inc.*, 345 F. Supp. 93, 99 (S.D.N.Y. 1972) ("A lawyer should not be permitted to put himself in a position where, even unconsciously he will be tempted to 'soft pedal' his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another."); RAYMOND L. WISE, *LEGAL ETHICS* 273 (2d ed. 1970) ("If there is the slightest doubt as to whether or not the acceptance of professional employment will involve a conflict of interest between two clients or with a former client, or a conflict between the interests of any client and that of the attorney, or may require the use of information obtained through service of another client, the employment should be refused.").

181. MODEL RULE 1.8(c) states:

A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

Rather, the existing delayed sale rule seems to represent an implicit judgment that delay reduces the risk such media deals present to an acceptable level. Or perhaps it simply looks better and thus the delayed sale rule might be explained as consistent with an appearance approach. In either case, it is clear that the delayed sale rule does not eliminate all risk arising from such deals and thus the actual rule contradicts both the exhortation and the assertion forms of the zero risk fallacy.

Expression of the zero risk fallacy does conflict of interest doctrine a disservice. Conflicts issues and their resolution would be more understandable if we were candid about the fact that a certain amount of risk of impairment is tolerable, either because we have no practical alternative or because we think that there are sufficient reasons justifying the risk. Failure to candidly admit that we allow such risk and adopting instead the verbal posture that lawyers must entirely avoid risk is harmful in two ways. One, it lends the conflicts rules an air of pontification and obvious contradiction between what they say and what they do. Second, failure to openly address the risk questions fails to provide lawyers or the bodies enforcing the conflicts rules with guidance about the real questions of acceptability of risk which must be and in fact are resolved every day by lawyers, courts, and disciplinary boards in the conflicts area.

#### b. Acceptance of Substantial Risk

In the previous section, we saw that conflict of interest doctrine, despite its articulation at times of a preference for avoidance of all risk, through its rules actually finds certain risks acceptable, such as those posed by delayed media rights sales. Sometimes it finds acceptable situations posing substantial risk of impairment of a lawyer's functioning. *Evans v. Jeff D.*,<sup>182</sup> a relatively recent Supreme Court case widely cited and excerpted in professional responsibility texts as an example of treatment of attorney-client conflict of interest,<sup>183</sup> provides a prime example of such an attitude.

The issue in *Evans* was the propriety in civil rights cases of defense settlement offers conditioned on waiver of payment of the plaintiff's attorney's fees by the defendant. Acceptance of such a conditional offer leaves the

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182. 475 U.S. 717 (1986).

183. The *Evans* case is excerpted at length in GILLERS & DORSEN, *supra* note 18, at 740-57; GEFREY HAZARD & SUSAN KONIAK, *THE LAW AND ETHICS OF LAWYERING* 536-56 (1990); JOHN F. SUTTON & JOHN S. DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY OF LAWYERS* 408-15 (1989). The *Evans* case is summarized in THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY* 481-82 (5th ed. 1991) and in MORTIMER SCHWARTZ & RICHARD WYDICK, *PROBLEMS IN LEGAL ETHICS* 323 (2d ed. 1988). The fact pattern of *Evans* has been used as the basis for a problem in KAUFMAN, *supra* note 151, at 463, and the conflict of interest dimensions of *Evans* are discussed in this work at 477.

plaintiff's lawyer uncompensated for the time invested in the case, which may be worth hundreds of thousands of dollars.<sup>184</sup> Obviously, such offers create a significant financial incentive for the plaintiff's lawyer to recommend against the settlement, even if the settlement is in his client's best interest. Take, for example, the lawyers in *City of Riverside v. Rivera*,<sup>185</sup> a civil rights case decided by the Supreme Court during the same term as *Evans*. In *Rivera*, the Court approved an award by the trial court to the lawyers of \$245,456.25 for nearly 2,000 hours of time the plaintiff's attorneys expended on the case.<sup>186</sup> In such a case, a conditional settlement offer of the sort approved in *Evans* would have faced the plaintiff's lawyers with the prospect of losing over \$245,000, representing time *already* invested, if they advised their client to settle. The risk accordingly is great that the lawyer will react, as the lawyers did initially in the *Evans* case,<sup>187</sup> by ignoring his client's interest and rejecting out of hand any settlement offer conditioned on such a waiver. In short, there is substantial risk of impairment of the lawyer's obligation to provide advice untainted by his own financial self-interest concerning what is in his client's best interest.<sup>188</sup>

A number of jurisdictions prior to *Evans* prohibited such settlement offers.<sup>189</sup> The Supreme Court in *Evans*, however, interpreted the civil rights statute in question as not prohibiting such settlement offers. The primary rationale for the Court's ruling was the public policy of encouraging the settlement of civil rights cases by providing the defense with a significant financial incentive to settle in order to avoid payment of the large attorney's fees.

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184. See, e.g., *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (approving award of \$245,456.25 in attorney's fees).

185. *Id.*

186. *Id.* at 565, 581.

187. *Evans*, 475 U.S. at 722 (noting that initially the waiver of attorney's fees sought by the defendant "was unacceptable to the Idaho Legal Aid Society, which had instructed Johnson to reject any settlement offer conditioned upon a waiver of fees, but Johnson ultimately determined that his ethical obligation to his clients mandated acceptance of the proposal.").

188. Matthew G. Bertani, Comment, *Attorney Fees: Simultaneous Negotiation and the Conditioning of Settlement Offers on the Merits Upon Waiver of Statutory Attorney's Fees: An Ethical and Policy Analysis*, 29 ARIZ. L. REV. 517, 527 (1987) (noting that courts have found "the potential conflict of interest between plaintiffs and their counsel [created by simultaneous negotiations] to be so acute that bifurcated negotiations [are] necessary where statutory attorney's fees [are] available."); Peter H. Woodin, Note, *Fee Waivers and Civil Rights Settlement Offers: State Ethics Prohibitions After Evans v. Jeff D.*, 87 COLUM. L. REV. 1214, 1216 (1987) (arguing that "[a] defendant's demand for a fee waiver during settlement negotiations can create a conflict of interest between the civil rights plaintiff and attorney that can harm the plaintiff's interests."); Comment, *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 264 (1986) (asserting that the Court in *Evans* "failed to consider the practical effect of its holding: that attorneys will be tempted as a matter of course to violate their ethical obligations.").

189. See, e.g., District of Columbia Bar, Op. 147 (1985); Grievance Commission on Board of Overseers of the Bar of Maine, Advisory Op. No. 17 (1983).

ney's fees which can accrue in such cases.<sup>190</sup> The case may be criticized on a number of grounds.<sup>191</sup> Of primary interest for the purposes of this article, however, is the attitude it displays about the appropriate response to incentives which create risk of attorney impairment.

One of the arguments advanced in *Evans* against the propriety of conditional settlement offers was one based on concern for attorney conflict of interest. The *Evans* Court responded to the argument that the civil rights statute in question should be interpreted so as not to put the plaintiff's lawyer in a conflict of interest situation as follows:

Although respondents contend that Johnson, as counsel for the class, was faced with an "ethical dilemma" when petitioners offered him relief greater than that which he could reasonably have expected to obtain for his clients at trial (if only he would stipulate to a waiver of the statutory fee award), and although we recognize Johnson's conflicting interest between pursuing relief for the class and a fee for the Idaho Legal Aid Society, we do not believe that the "dilemma" was an "ethical" one in the sense that Johnson had to choose between conflicting duties under the prevailing norms of professional conduct. Plainly, Johnson had no *ethical* obligation to seek a statutory fee award. His ethical duty was to serve his clients loyally and competently. Since the proposal to settle the merits was more favorable than the probable outcome of the trial, Johnson's decision to recommend acceptance was consistent with the highest standards of our profession. The District Court, therefore, correctly concluded that approval of the settlement involved no breach of ethics in this case.<sup>192</sup>

This passage expresses the attitude that situations which pose high risk of attorney impairment if they arise from the attorney's financial interests are simply not an ethical concern. The Court seems to be saying that the plaintiff's lawyer has a clear ethical obligation not to allow his advice to be tainted by his own financial self interest and that we can count on lawyers

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190. *Evans*, 475 U.S. at 732-38. The Court emphasized that "a general proscription against negotiated waiver of attorney's fees in exchange for a settlement on the merits would itself impede vindication of civil rights, at least in some cases, by reducing the attractiveness of settlement." *Id.* at 732.

191. One criticism is that such waivers, by making civil rights cases less financially attractive to potential plaintiff's lawyers, will make it more difficult for civil rights plaintiffs to obtain counsel. See, e.g., *Evans*, 475 U.S. 754-59 (Brennan, J., dissenting) (predicting that "allowing defendants in civil rights cases to condition settlement of the merits on a waiver of statutory attorney's fees will diminish lawyers' expectations of receiving fees and decrease the willingness of lawyers to accept civil rights cases."); Margaret A. de Lisser, Comment, *Giving Substance to the Bad Faith Exception of Evans v. Jeff D.: A Reconciliation of Evans with the Civil Rights Attorney's Fees Awards Act of 1976*, 136 U. PA. L. REV. 553, 567 (1987) (arguing that "*Evans* creates a structure favoring the individual client at the expense of the attorney, and ultimately at the expense of future civil rights litigants, who, because of the inadequate fee generating alternatives, depend on the Fees Act's uniform and consistent operation to attract counsel to represent them.").

192. *Evans*, 475 U.S. at 727-28 (footnotes omitted).

to follow their ethical obligation no matter how great an incentive threatens to impair that obligation.

A similar attitude seems apparent in the Court's discussion of its decision's impact on promoting settlement. Obviously, settlement requires the agreement of both sides in litigation. But the Court examined only the incentives which conditional settlement offers create for defendants. Unexamined was the disincentive to settle created by such settlement offers for plaintiffs' lawyers. This may simply have been a failure to think the problem through. Or it may reflect the same implicit attitude expressed in the previous paragraph, that we can simply trust lawyers to resist such financial incentives no matter how substantial they may be.

The attitude toward how much risk of impairment a lawyer should be permitted to encounter expressed by *Evans v. Jeff D.* is precisely the opposite of that found in the zero risk fallacy. The zero risk fallacy tells us that lawyers should avoid situations which pose any risk. The attitude found in *Evans* indicates that situations which pose even very high risk are acceptable because we can count on lawyers simply to resist the incentives giving rise to the risk. Where one expresses dread of encounters between lawyers and risk, the other expresses bravado at such encounters.

### c. Other Signals About Acceptable Risk Levels

Between the extremes illustrated in the previous sections, one finds all sorts of signals about how much risk is acceptable. Some authorities speak in terms of prohibiting *possible* impairment. A treatise defines conflict of interest as anything which "might interfere" with the lawyer's judgment.<sup>193</sup> The *Model Rules* prohibit situations in which the representation "*may* be materially limited."<sup>194</sup> Variations on this "possibility" approach include *Model Code DR 5-101(A)*'s inclusion of a reasonableness requirement in the phrase "reasonably may be affected."<sup>195</sup> Another variation is the prohibition of the "mere possibility" of impairment.<sup>196</sup> Other authorities seem to require a higher level of risk by using terms which suggest *probable* rather than possible impairment. The *Model Code DR's 5-105(A)* and (B) prohibit situations in which the lawyer's judgment is "likely" to be affected.<sup>197</sup> Still other authorities seem to require something greater. The Restatement, for example, defines conflict of interest as a "substantial risk" of impair-

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193. PATTERSON, *supra* note 4, at § 4.01, 4-2.

194. MODEL RULES Rule 1.7.

195. MODEL CODE DR 5-101(A).

196. *In re Lantz*, 442 N.E.2d 989, 990 (Ind. 1982) (ordering reprimand of a state prosecutor who represented both the state in a criminal case and the named defendant in a separate civil action).

197. MODEL CODE DR 5-105(A)-(B).

ment.<sup>198</sup> In sum, current doctrine gives a wide range of inconsistent messages about what likelihood of attorney impairment is tolerable, ranging from none, to possible, to probable, to substantial.

## 2. What Role Should Justifiability of the Risk Play?

What role should justifications for taking risk play in defining acceptable risk levels? In many areas of the law utilizing risk analysis, the standard for determining acceptable risk is determined by using a cost-benefit analysis which balances the magnitude of risk in terms of the gravity and probability of harm against the utility of the conduct which creates the risk.<sup>199</sup> The Model Penal Code provides an illustration of this sort of standard. Recklessness under the Model Penal Code requires that the risk be both "substantial" and "unjustifiable."<sup>200</sup> Thus, a doctor who performs an operation which entails a very high degree of risk of death to a patient will not be reckless under the Model Penal Code regardless of the degree of risk if the operation is the only means of saving the patient's life.<sup>201</sup> In other words, the social utility of using the only means to save the patient's life justifies what would otherwise be an unacceptably high level of risk.

How does this idea of the justifiability of risk figure into attorney conflict of interest analysis? Notions of justifiability pervade cases, opinions and commentary about attorney conflict of interest. The *Model Code's* EC 5-7 in discussing the propriety of contingent fees states that although a contingent fee arrangement gives a lawyer a financial interest in the outcome of the litigation, the arrangement is permissible because "it may be the only means by which a layman can obtain the services of a lawyer of his choice."<sup>202</sup> In other words, the *Model Code* expresses the idea that the de-

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198. RESTATEMENT § 201.

199. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 171 (5th ed. 1984) (enunciating the balancing of probability and gravity of any risk against the "utility of the type of conduct in question."); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 7.4, at 619 (2d ed. 1986) (stating that not only must the risk be substantial, but that "it must also under the circumstances be unjustifiable for [the individual] to take the risk," the "social utility" of the conduct must be examined as well).

200. MODEL PENAL CODE § 2.02(2)(c) (1962) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.").

201. MODEL PENAL CODE § 2.02 cmt. ("The risk of which the actor is aware must of course be substantial in order for the recklessness judgment to be made. The risk must also be unjustifiable. Even substantial risks, it is clear, may be created without recklessness when the actor is seeking to serve a proper purpose, as when a surgeon performs an operation that he knows is very likely to be fatal, but reasonably thinks to be necessary because the patient has no other, safer chance.").

202. MODEL CODE EC 5-7.



gree of risk presented by contingent fees is acceptable once the justifiability factors of access to counsel and choice of counsel are entered into the equation. In the area of conflicts dealing with simultaneous representation of two clients, the justifications of saving each client time and money appear repeatedly in cases, opinions and commentary. In the area of joint representation in a litigated case, the justification of maintaining a unified front features prominently. Justice Frankfurter's words are frequently quoted to express this justification for allowing joint representation: "a common defense . . . gives strength against a common attack."<sup>203</sup>

The conflicts problem considered above in Part III.A.2. concerning re-assignment of an associate on a case because the religious background of the associate is likely to arouse the prejudice of the jury presents a conflict of interest situation in which the idea of justifiability of risk may prove critical. Previously, we asked whether or not catering to the prejudice of the jury to increase the client's chance of winning is within the sphere of obligations owed by the law firm to the client and if so whether it was one which was protected by the conflict of interest rules. If one assumes for purposes of argument an affirmative answer to both of those questions, and we assume that the jury pool is such that there is a substantial risk of prejudice against the associate, then the key question becomes one of justifiability.

The associate to be removed from the case might argue a number of factors as potential justifications for taking this risk. First, the associate might argue her own career interest in the experience to be provided by handling the case. The experience may provide her with increased marketability and mobility as well as increase her value to the firm and thus increase her chances for making partner. She may also assert an interest in being treated on an ethnically neutral basis in terms of being assigned work. The conflicts question then turns on whether attorney conflict of interest rules include within the concept of justifiability either the associate's economic and career interests or the interest in being treated on an ethnically neutral basis. If so, then how much weight do we give them in offsetting the risk of impairment of the attorney's courtroom effectiveness in acting for the client?

The issue of justifiability breaks down into subsidiary questions. Should justifiability play a role at all? If so, how do we define what factors should be incorporated in the idea of justifiability? Should we limit it to factors which provide benefit to the client, such as saving time or money or preserving a unified front? Should it also include factors which provide benefit to attorneys, such as the attorney being treated in an ethnically or racially

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203. *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting).

non-discriminatory way? Should it include factors which benefit society or the administration of justice generally, like promoting settlement of cases and easing crowded dockets? Once we decide these questions, then we must confront the final question of how much weight to give these factors in offsetting magnitude of risk.

There is virtually no guidance on any of these questions in the *Model Code* or *Model Rules*. Neither of these even mentions the idea of justifiability in their rule formulations, much less do they provide any guidance on any of the other questions mentioned above. Cases frequently utilize justifiability factors, but almost no explicit discussion is given to the notion of justifiability, how it is defined, or how much weight it is to be given in the final determination of the acceptability of the risk presented.

### C. WHO DECIDES?

Part III so far has advanced a series of risk analysis questions having to do with defining acceptable levels of risk of impairment of an attorney's functioning. The next question we need to turn to is who gets to choose the answers to the previous questions. Who sets the level of acceptable risk? The client? The individual lawyer? The organized bar? The judge if the conflict of interest question arises in a litigated case?

The issue of the proper balance of authority and responsibility between lawyer and client has received considerable attention among academic commentators.<sup>204</sup> One of the points which present doctrine is clear about is that it does grant the client a degree of decisionmaking authority and responsibility regarding conflict of interest. One of the prominent features of modern conflicts doctrine is the disclosure and consent formula.<sup>205</sup> Under this formula, the lawyer is obligated to disclose to the client the existence of certain incentives which threaten impairment and after such disclosure the lawyer may proceed with the representation if the client consents. The existence of this disclosure and consent formula might be described as reflecting a "market model" of professional regulation in which the individual client as a consumer of legal services exercises her own preference for

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204. See, e.g., GILLERS & DORSEN, *supra* note 18, at 415-430; WOLFRAM, *supra* note 11, at 154-159; D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C.L. REV. 315 (1987); David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454; Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979); Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV., 1049 (1984).

205. See, e.g., MODEL CODE DR 5-101(A), DR 5-105(C); MODEL RULES Rule 1.7(a)(2), (b)(2); WOLFRAM, *supra* note 11, at 337-349.

risk.<sup>206</sup> In short, this formula gives the client some choice about the questions of both magnitude and justifiability of the risk she is willing to have her lawyer encounter.

The range of choice which a client may exercise under the disclosure and consent formula is, however, limited. At a certain point under current doctrine, one reaches a zone of "nonconsentable" conflicts.<sup>207</sup> In this zone, the rules override client choice about risk preference. The *Model Code* uses an "obviously adequate" test to define the zone of nonconsentable conflicts.<sup>208</sup> The *Model Rules* use a "reasonable belief" test to define this zone.<sup>209</sup>

Although the basic notions that the client has a role in making choices about conflict questions and that the range of client choice about these questions is circumscribed by the notion of nonconsentable conflicts are well established, the line between "consentable" and "nonconsentable" conflicts is murky. Neither the "obvious adequacy" nor the "reasonable belief" tests provide much guidance on where to draw the boundary of client autonomy in the area of conflict of interest.<sup>210</sup>

Another area which is unclear is precisely what is required by disclosure and consent. One might well have doubts, for example, about both the quality and quantity of information available to the client in making her choice about risk. These doubts seem particularly well founded in the conflicts area where the lawyer is the one who supplies the information to the client. The lawyer has an economic incentive not to fully disclose all the information which might dissuade the client from consenting to the conflict so that he can keep the client's business in order to increase his own income. Conflicts doctrine provides little guidance on the question of how much information must be disclosed.

One might argue that a market or consumer sovereignty model overstates the ability of the client to use the information available to her. This argument focuses on the client's lack of expertise rather than lack of raw information. Particularly when the choice involves an area such as professional services like law or medicine, this argument would assert that the consumer simply lacks the expertise to understand and choose between the risks associated with various courses of action. The very existence of the disclosure and consent formula represents at least a partial rejection of this

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206. See John Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021 (1982) (describing a market model of professional reform which looks to private contract and market mechanisms rather than outside regulation to prevent lawyer abuses).

207. See WOLFRAM, *supra* note 11, at 337-343.

208. See MODEL CODE DR 5-105(C), WOLFRAM, *supra* note 11, at 339-343.

209. See MODEL RULES Rule 1.7(a)(1), (b)(1); WOLFRAM, *supra* note 11, at 339-343.

210. For discussion of the ambiguities and inadequacies of the *Model Code's* "obviously adequate" and the *Model Rules's* "reasonable belief" provisions, see WOLFRAM, *supra* note 11, at 341; Moore, *supra* note 5, at 220-230.

argument. But the argument about lack of expertise raises a number of problems. For example, may or must the lawyer in making disclosure also give the client advice on the wisdom of consenting? When is the advice of an independent lawyer on the question of consenting to a conflict required, if ever? Present doctrine leaves these questions largely unaddressed.<sup>211</sup>

Another argument which might be raised against a market or consumer sovereignty model is that even if the client has adequate information and expertise to make a decision about risk of attorney impairment, the quality of that choice is frequently impaired because of lack of alternatives. For example, when an individual employee of a company consents to joint representation of the individual employee and the company by lawyers paid for by the company, is this choice a truly voluntary one when she lacks the resources to pay for her own lawyer?

Other factors may also undermine the quality of voluntariness underlying the consent. If the conflict comes up not at the outset of the representation, but during the representation, the fact that the client has already invested time and money in the lawyer's services may undermine the client's freedom of choice. Post-retainer fee agreements between lawyers and clients raise a similar problem and courts review such fee agreements under a different and more demanding standard than that applied to fee agreements negotiated at the outset of the relationship.<sup>212</sup> Whether there should be a similar distinction between client consent regarding conflict of interest obtained at the outset of the representation as opposed to during the representation is an interesting and unresolved question.

Another interesting and important question unanswered by current doctrine is whether the same boundary for nonconsentable conflicts should be set for all clients. One could argue, for example, for more relaxed or even no limits on the range of choice regarding risk preference for clients who have considerable ability to assess and monitor risk, such as a corporate client with in house counsel. We might recognize a "sophisticated client" exception to the normal rules about nonconsentable conflicts.<sup>213</sup> Similarly, one could also argue for more stringent limits on the range of choice regarding risk preference for clients whose abilities to monitor and assess risk

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211. The *Model Rules* Rule 1.8(a)(2) does provide some guidance on the question of independent advice by requiring that the client be given "a reasonable opportunity to seek the advice of independent counsel" before entering into a business transaction with his lawyer.

212. See GILLERS & DORSEN, *supra* note 18, at 112 ("When the fee agreement is reached after the attorney-client relationship is formed, courts are especially strict in reviewing it for fairness . . . After retainer, the client is presumed to be less free to go elsewhere and the attorney is assumed to be in a significantly superior bargaining position.").

213. An analogous "sophisticated investor" notion is mentioned in the field of securities law. See, e.g., Fletcher, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393, 427-31 (1987).

are questionable, such as criminal defendants.<sup>214</sup>

So far we have referred to two possible answers to the question about who sets the level of acceptable risk in situations which threaten attorney impairment, the client or the organized bar through its rules about nonconsentable conflicts. Another source of ambiguity in conflicts doctrine is its suggestion of other possible answers to this question of who decides about such risks. For example, in *Holloway v. Arkansas*,<sup>215</sup> the United States Supreme Court stated that an "attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial."<sup>216</sup> Similarly, the Advisory Committee notes to Federal Rule of Criminal Procedure 44 state that "[a]voiding a conflict-of-interest situation is in the first instance a responsibility of the attorney."<sup>217</sup> These passages may simply suggest that the individual lawyer has the responsibility to monitor and enforce the bar's rules about disclosures and consent and nonconsentable conflicts. But these passages also seem to suggest some measure of authority, perhaps even discretion, on the part of the attorney about determining the line between consentable and nonconsentable conflicts because of the attorney's unique vantage point and familiarity with the facts of the particular case.

A different message about who gets to decide the essential risk preference questions is sent by Federal Rule of Criminal Procedure 44 and recent Supreme Court authority concerning joint representation in criminal cases. Both Rule 44(c) and *Wheat v. United States*<sup>218</sup> grant the trial judge considerable authority to override a criminal defendant's choice about joint representation. The boundary line, though, between the trial judge's sphere of authority and the defendant's sphere of autonomy concerning the joint representation is blurred. Rule 44(c), for example, simply provides that the "the court shall take such measures as may be appropriate to protect each defendant's right to counsel."<sup>219</sup> The *Wheat* case applies a discretionary standard of review to the trial judge's decision whether to override a criminal defendant's choice about joint representation<sup>220</sup> but provides virtually

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214. See Moore, *supra* note 5 (arguing for an absolute ban on post-indictment joint representation of criminal defendants because of problems relating to capacity to consent).

215. 435 U.S. 475 (1978).

216. *Id.* at 485 (quoting *State v. Davis*, 514 P.2d 1025, 1027 (Ariz. 1973)).

217. FED. R. CRIM. P. 44 Notes of Advisory Committee on Rules re: 1979 Amendment.

218. 486 U.S. 153 (1988).

219. FED. R. CRIM. P. 44(c).

220. *Wheat*, 486 U.S. at 163 ("we think the district court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses").

no guidance on how this discretion is to be exercised.

In short, there are many unanswered questions under current doctrine relating to the main question of allocation of decisionmaking authority with respect to setting acceptable risk levels.

#### IV. REMAINING DIFFICULTIES

The suggestions set forth in this article are intended as first steps toward improving the clarity and sophistication of attorney conflict of interest doctrine. Developing a clear vocabulary, distinguishing risk of impairment, resulting impairment, and appearance of impairment, and breaking down risk analysis into components such as magnitude and justifiability will all help in understanding the basic issues. Once this foundation is in place, many difficulties remain.

##### A. ACHIEVING CONSENSUS

The thrust of this article is that we lack clear concepts and terminology language for dealing with attorney conflict of interest. One explanation for the present ambiguities of conflict of interest doctrine is that the problem is simply one of language. Once lawyers gain adequate conceptual and terminological means for discussing and formulating doctrine, they will be able to achieve consensus on how to answer questions about the role of risk, about defining acceptable risk levels, and about who gets to decide these questions. One might call this the "Babel" thesis, conjuring up the image of a legal profession which is plagued by a simple inability to communicate.

Another possible explanation is that the present conceptual and terminological confusion, rather than being simply a problem of language, is the product of a more fundamental lack of professional consensus about the standards which should govern the questions addressed in Parts II and III. One may view the doctrinal confusion as reflecting the fact that lawyers have widely differing feelings on questions such as the magnitude of acceptable risk, the justifiability factors which should be included in setting acceptable risk levels,<sup>221</sup> and who should get to make the decisions about these questions.<sup>221</sup> "The profession's inability to reach consensus on the pro-

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221. See Moore, *supra* note 5, at 225 ("The profession's inability to reach consensus on the propriety of even the most common instances of multiple representation also suggests serious disagreement regarding the significance of the policy considerations thought to underlie the current ABA Code conflict of interest rule.") (footnotes omitted); Professor Hazard suggests a similar possible explanation for the difficulties which have plagued efforts to arrive at ethical standards for lawyers in negotiation.

The fundamental difficulty appears to stem from the lack of a firm professional consensus regarding the standard of openness that should govern lawyers' dealings with others and the

priety of even the most common instances of multiple representation”<sup>222</sup> is an index of a lack of consensus on the proper resolution of conflict of interest questions. The variation from state to state in ethics codes is an index of a lack of consensus regarding ethical standards for lawyers generally.<sup>223</sup> Such disagreements may be exacerbated with the increasing demographic diversity of the legal profession.<sup>224</sup> Lack of consensus among lawyers may be indicative of lack of consensus among society as a whole.<sup>225</sup> Such a lack of consensus would cause obvious difficulties in formulating the answers to the questions set forth in this article.

#### B. VAGUENESS IN THE DEFINITION OF ATTORNEY ROLES AND OBLIGATIONS

Part III.A., *supra*, addressed the issue of providing a clear focal point for analyzing risk to an attorney's various roles and obligations. One of the problems described in that Part is that conflict of interest doctrine does not clearly describe which roles and obligations are the concern of conflict of interest doctrine. A second problem is that it is difficult to measure the possibility of impairment unless we have a fairly clear idea of the definitions of those roles and obligations, yet many of the roles and obligations

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lack of settled and homogeneous standards of technique in the practice of law. This lack of consensus indicates that lawyers, at least nationally, do not share a common conception of fairness in the process of negotiation. The lack of this consensus means that lawyers lack the language to express norms of fairness in negotiation and the institutional means to give effect to these norms.

Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to be Trustworthy When Dealing With Opposing Parties*, 33 S.C. L. REV. 181, 190-193 (1981) (discussing the rejection of the Kutak Commission's 1980 proposal of an ethical rule of fairness in negotiations which encompassed a duty to disclose material facts).

222. Moore, *supra* note 5, at 225.

223. GILLERS & SIMON, *supra* note 165, at vii-viii (“More than 35 jurisdictions have now adopted the Model Rules or significant provisions from them in some form, and there are notable variations among the jurisdictions, especially with respect to such crucial matters as conflicts and confidentiality. . . . These state variations graphically illustrate the disagreements over how lawyers should conduct themselves.”).

224. For discussion of demographic developments in the legal profession, see Richard L. Abel, *The Transformation of the American Legal Profession*, 20 LAW & SOCIETY REV. 7 (1986) (describing divisions of race, gender, age, class and types of practice which make professional consensus increasingly problematic); Barbara A. Curran, *American Lawyers in the 1980's: A Profession in Transition*, 20 LAW & SOC'Y REV. 19 (1986); Terence C. Halliday, *Six Score Years and Ten: Demographic Transition in American Legal Profession, 1850-1980*, 20 LAW & SOC'Y REV. 53 (1986).

225. See *supra* note 221. Professor Hazard follows his comments quoted in footnote 221, *supra*, with the observation that the disagreement among lawyers about standards of fairness in negotiation is not difficult to understand when viewed against a larger social backdrop. “Lawyers standards of fairness are necessarily derived from those of society as a whole, and subcultural variations are enormous. . . . Against this kaleidoscopic background, it is difficult to specify a single standard that governs the parties and thus a correlative standard that should govern their legal representatives.” Hazard, *supra* note 221, at 193.

which provide the focal point for conflicts analysis are themselves poorly defined.

This problem cannot be cured by reformulating conflict of interest doctrine. Clearer formulation of the rules defining the lawyer's roles and obligations apart from the conflict of interest rules is needed to mend this problem. In short, because conflict of interest doctrine must incorporate by reference other rules which define attorney roles and obligations, the conflict rules are affected by whatever ambiguity those rules contain. Consequently, conflict of interest doctrine will continue to struggle with these vague definitions even if it does clearly state its own concerns.

### C. ACHIEVING CLEAR EXPRESSION

Part IV.A., *supra*, mentioned the possible problems which might be encountered in achieving consensus on the answers to the questions posed in Parts II and III, such as setting the parameters of acceptable risk and client decision making authority in the conflicts area. Even if consensus can be achieved, it will nonetheless be difficult clearly to express the answers to many of these questions. For example, it will be difficult verbally to express the line between acceptable and unacceptable levels of risk of impairment, the parameters of justifiability and the proper sphere of client autonomy in deciding about acceptable risk.

### V. CONCLUSION

Threats of impairment of an attorney's functioning may arise from an almost limitless number of sources. Such threats are an inevitable and ever present part of the work lives of lawyers. The hard questions which lie at the heart of the subject of attorney conflict of interest concern how to respond to these threats, how to distinguish risks which are acceptable from those which are unacceptable. If attorney conflict of interest doctrine is to provide guidance to lawyers in encountering such risk situations and to courts and disciplinary committees applying conflict of interest standards to lawyers, it must articulate and answer these essential questions. This article has sought to demonstrate the need for rethinking attorney conflict of interest doctrine so that it focuses unambiguously on these central questions. It has also sought to provide the first steps toward a clearer, more sophisticated treatment of attorney conflict of interest doctrine.