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INTRODUCTION

From time to time, a lawyer will find herself representing clients at two law firms simultaneously.[1] That happenstance is becoming more and more common, especially with the rise in the lawyer-gig economy.[2] Often, the lawyer will act as a "temp," floating among several placements with discrete projects. At times, the lawyer will be ensconced primarily at one firm while offering more limited services at a second firm, perhaps as a consultant or a volunteer. In a similar fashion, and quite commonly, a law student will work part-time at a law firm or agency while also participating in a law school clinic. When a lawyer or a certified law student represents clients in two settings at once, a question inevitably arises about how the lawyer, the student, and the law firms address potential conflicts of interest. That question has no easy answer, especially if one were to honor the substance of the American Bar Association's Model Rules of Professional Conduct, whose conflicts provisions have been adopted by many states. I refer to this as the "simultaneity puzzle," and this Article will unpack it and explore possible solutions to it.[3]

The puzzle is a direct consequence of the imputed conflicts principle, combined with the Model Rules' prohibition, except for

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1. *See* N.J. Advisory Comm. on Pro. Ethics, Formal Op. 632 (1989) ("There is no legal or ethical prohibition against working for more than one law firm, even at the same time . . . .").

2. *See, e.g.*, Naomi Cahn et al., *Discrimination by Design*, 51 ARIZ. ST. L.J. 1, 4 (2019) ("We increasingly live our lives in a digital world . . . offering our own services as . . . lawyers in the gig economy . . . ."); Kathleen Harrell-Latham & Daniel Spicer, *Think Like a Lawyer, Act Like a Mogul: Tackling Practical Business Problems in a Changing Legal Landscape*, 43 MITCHELL HAMLINE L. REV. 1014, 1025 (2017) ("[L]awyers and law firms feel forced to adapt to the gig economy and the contingent workforce.").

3. For earlier treatment of this topic, albeit in more sustained shared settings than those described here, see David D. Dodge, *Multiple Law Firm Affiliations*, 50 ARIZ. ATT'Y 10, 10 (2014); Thomas B. Mason & Semra Mesulam, *Legal Polygamy: Ethical Considerations Attendant to Multiple Law Firm Affiliations*, BLOOMBERG L. (Mar. 26, 2013, 12:00 AM), https://news.bloomberglaw.com/us-law-week/legal-polygamy-ethical-considerations-attendant-to-multiple-law-firm-affiliations.

lateral firm moves, on unconsented-to screening of lawyers to manage potential client conflicts. When a lawyer works in a law firm and represents clients there, she "represents" all of that firm's clients for conflict purposes. She may not oppose another client of the firm, even on an entirely unrelated matter and even if she knows nothing at all about that other client. If she is associated with two firms, she will be deemed to represent all of the clients at each of the firms. The two firms effectively become one firm for conflict purposes. In theory, every prospective client at one firm should be identified and evaluated to ensure the absence of any conflict at either firm. In many, and perhaps most, situations where simultaneity occurs, that double-firm conflict checking does not take place—at least in a uniform, comprehensive fashion.[4] Considering the nature of the respective firms' work and the use of selected screens, the clients are usually quite safe for reasons we shall examine. But some risk of an inadvertent, if technical, conflict remains, and the use of screens, while likely effective in practice, is not an authorized strategy.

This Article will explore in some detail the dynamics of a simultaneity arrangement and will explain why the usual arrangements are safe but not necessarily ethical.[5] This Article will also contrast simultaneity involving a lawyer against that involving a law student. We encounter an attractive argument that the law student arrangement is less unethical because of the way the Model Rules address nonlawyer firm participants. But that argument, when applied to students whose simultaneity includes a clinical program in

4. I make the assertion in the text without sound empirical evidence at my disposal, but I am pretty confident in its accuracy. For an example of the simultaneity phenomenon where the lawyers involved conceded that full, multiple-firm conflict checks would be unmanageable, see N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 794 (2006) (concluding that law firm lawyers participating as supervisors in a law school clinic must still conduct conflict checks across settings, even though these checks may be burdensome).

5. I use the term "ethical" to mean acceptable under the prevailing law of lawyering, including the rules of professional conduct applicable in a given jurisdiction. I expressly do not intend to imply that acts that are not ethical in that fashion are necessarily wrong, hurtful, or otherwise problematic. *See, e.g.*, Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 886 ("[D]ifferences between some types of legal analysis and ethical deliberation yield different answers about how to act."). My use of the term "ethical" here therefore differs from its use by others. *See, e.g.*, Alice Woolley, *Is Positivist Legal Ethics an Oxymoron?*, 32 GEO. J. LEGAL ETHICS 77, 80 n.11 (2019) (citing H.L.A. HART, THE CONCEPT OF LAW 168 (2d ed. 1994)) ("[A] decision properly made exclusively through law is not an 'ethical' decision. Ethics always references morality; Hart referred to ethics as a term 'nearly synonymous' with morality.").

which the student practices as a certified law student, is not as persuasive once unpacked.

This Article, having concluded that simultaneity as typically practiced is difficult to square with the literal requirements of the Model Rules, proceeds to examine the "jury-rigged," functional arrangements found in practice. Those arrangements are likely to be quite client-protective and therefore could be approved (or not rejected) by disciplinary authorities and judges entertaining motions to disqualify. However, that proposition invites consideration of the question of whether a lawyer who proceeds outside of the strictures of her state's rules of professional conduct, albeit in a client-protective way, has acted in a defensible manner. In addition, this Article questions, with some deep skepticism, whether some law-of-lawyering guidance might expressly permit some form of simultaneity lawyering under some articulated circumstances.

I. SIMULTANEITY CONTEXTS

Lawyers who represent clients in multiple placements at the same time, whom we might call "moonlighting" attorneys, typically fall into one of three types—the lawyer temp, the lawyer volunteer, and the certified law student enrolled in a law school clinic.[6] In this Part, this Article introduces three thin hypotheticals to set the stage for the following discussion.

First Story: The Lawyer Temp

Lawyer A is a recent law school graduate searching for full-time employment after having passed the bar examination in his state. Lawyer A earns a modest wage by working contractually for law firms needing added legal help. Lawyer A has been working for the Parikh Law Firm performing civil rights research as a contract attorney for several months. He recently accepted a contract offer from the Holper Law Firm to perform immigration research and advocacy on one asylum matter. Each law firm offers a variety of legal services to clients. Unbeknownst to Lawyer A, the Parikh and Holper firms have been engaged for some time in an extended and unfriendly litigation matter involving the control of a family business. The Parikh firm has now filed a motion to disqualify the Holper firm from any continued

6. Of course, a certified law student is not a "lawyer" as such, but, as the Article considers in some depth below, the student will be treated as a lawyer for conflicts purposes. *See infra* note 213 and accompanying text.

representation of its side of the family because of the presence of Lawyer A in the firm.[7]

Second Story: Semi-Retired Law Firm Partner Volunteers at Legal Aid

Lawyer B is a partner in the litigation group of a large, multinational law firm with twelve offices around the world. Lawyer B has worked for many years in the Boston office and is now semi-retired. She maintains an office at the law firm and continues to represent three long-standing clients as they wrap up some loose ends on the matters which she litigated on their behalf. Lawyer B's path to retirement permits her the time to offer her talents to Montrose Community Legal Assistance (MCLA), a civil legal services organization in her home city. Lawyer B arranges to volunteer at MCLA three half-days per week, representing individuals in employment and unemployment matters. MCLA will not allow Lawyer B access to its full client database, and she will not have access to MCLA's paper files, except for the files on which she works. Lawyer B will check for any conflicts related to the clients she represents, including ensuring that her firm does not represent the employer or similar opposing party in the matters for which she is the counsel of record. She will, though, regularly attend bimonthly Employment Unit staff meetings and spend 10–15 hours per week physically in the MCLA offices.[8]

Lawyer C is a full-time staff attorney in the Housing Unit of MCLA. Lawyer C actively represents a family facing an eviction action brought by Wells Fargo Bank after a foreclosure. Wells Fargo

7. As we shall see below, the temporary or contract lawyer's presence should not give rise to a disqualifying conflict. *See infra* notes 79–93, 133–38 and accompanying text.

8. I suspect that this story is not uncommon. A comparable story, although with a full-time, not semi-retired, lawyer volunteering his time at an MCLA-type organization, appears in a prominent book on judgment and decision making in law practice. *See* PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS 4 (2010) (discussing a fictional account of a partner at a mid-sized law firm in Orange County, California who does pro bono work for the Los Angeles Volunteer Legal Services Association); *see also* David B. Wilkins, *Some Realism About Legal Realism for Lawyers: Assessing the Role of Context in Legal Ethics*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 25, 29 (Leslie Levin & Lynn Mather eds., 2011) (offering an example of a lawyer from a "large multicity law firm" temporarily working at a neighborhood legal services clinic).

has ongoing nonlitigation representation from the tax department of Lawyer B's law firm.[9]

Third Story: A Clinic Student Works Part-Time at a Law Firm

Student X is a third-year student at Essex University Law School (EULS). During the summer after her second year, Student X worked as a legal intern at a small, three-lawyer law firm in Andover. The Andover firm asked her to continue to work part-time during the school year, and Student X agreed because the income matters a lot to Student X. For the fall semester of her third year, Student X enrolled in the Entrepreneurship and Innovation Clinic at EULS, where she represents emerging startup businesses in transactional matters. Student X is certified to practice under her state's student practice rule.[10] EULS has a separate clinic, the Civil Rights and Litigation Clinic, which, like the Entrepreneurship and Innovation Clinic, is part of the law school's clinical law firm. All clinic students have access to the electronic and paper files of the firm.

When Student X joined her clinic, she reviewed the list of all open client matters to ensure that no clinic client was a name she recognized from her law firm work. If a "hit" were to occur, the clinic would screen Student X from any access to that client's files and materials. Student X recognized no names. Later in that semester, the Andover law firm accepted the representation of Paul Ricoeur to assist him in forming a limited liability company with two other founders. Student X did no work on the Ricoeur matter at the Andover firm and knew nothing about it. At the same time, the Civil Rights and Litigation Clinic at EULS (part of the same clinic-wide law firm at the school) agreed to represent Ellen Berger, the spouse of Paul Ricoeur, to protect her from Ricoeur's domestic violence. Berger's student

9. As we shall see below, the arrangement described in the Second Story is problematic under the Model Rules of Professional Conduct. *See infra* notes 122–31 and accompanying text.

10. Some, but not all, jurisdictions include transactional practice within their student practice rules, which traditionally applied only to court-related practice. *See* Deborah Burand, *Crossing Borders to Create Value: Integrating International LL.M.'s into a Transactional Clinic*, 19 LEWIS & CLARK L. REV. 441, 448–49 (2015) ("[S]tudent practice rules adopted by states are rarely . . . clear, particularly if the law clinic is engaged in a transactional practice."); Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 WASH. U. J.L. & POL'Y 85, 116 (2013); Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice Within Law Firms*, 85 IND. L.J. 653, 698–99 (2010) (discussing the disparities).

attorney, Student Q, has begun to research the availability of a restraining order that would remove Ricoeur from the family home.[11]

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The forthcoming discussion will address how each of the lawyers and law firms in these three settings ought to proceed in light of the existing Model Rules of Professional Conduct. To develop that analysis, we first need a brief introduction to the imputation principle as established both by the Rules and common law precedent and to the uniquely American ban on unrelated, concurrent conflicts of interest.

II. HOW IMPUTATION WORKS

A. The Elegance of Rule 1.10(a) and the Awkwardness of Rule 1.7(a)

The simultaneity puzzle is a direct byproduct of two essential conceptions within professional legal ethics—the imputation of conflicts of interest among lawyers sharing a firm, captured by Rule 1.10(a), and the ban on unrelated concurrent conflicts of interest, imposed by Rule 1.7(a). This Subpart reviews the well-understood operation of imputation, from its simplest application to a most challenging application, with a note along the way about the one significant exception to the principle, an exception that offers no help on the simultaneity puzzle. This review considers the imputation principle in the setting of an *unrelated* concurrent conflict.[12]

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11. As we shall see below, the arrangement described in the Third Story is potentially problematic under the Model Rules of Professional Conduct. *See infra* notes 206–26 and accompanying text.

12. When a law firm represents a client and, at the same time, opposes that client's interests in a different matter, the two matters will either be related to one another or unrelated. If the two matters are *related*, such that the representation of the client in the first instance has some relevance to the opposition to the client in the second instance, the law firm plainly should not remain in both matters, unless the affected client consents and the firm can provide genuinely capable service to the client on the first matter. *See, e.g.*, Michael J. DiLernia, *Advance Waivers of Conflicts of Interest in Large Law Firm Practice*, 22 GEO. J. LEGAL ETHICS 97, 138 (2009) (proposing that this kind of conflict be forbidden by the Model Rules, rather than forbidding both related and unrelated concurrent conflicts). If, on the other hand, the conflicts are *unrelated* and have no bearing on one another, the worries are dramatically reduced—but prevailing ethics standards continues to prohibit the firm from engaging in both matters unless the client consents. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.7(a)(1), (b)(4) (AM. BAR ASS'N 2020). For a sustained critique of

1. The Prohibition on Unrelated Concurrent Conflicts

The discussion begins with the baseline understanding of unrelated concurrent conflicts. Rule 1.7(a)(1) declares that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client."[13] The Rule also identifies a different concurrent conflict, where "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . ." or other interests of the lawyer.[14] The latter prohibition does not concern us here, but the former concerns us a great deal. The implication of the Rule is quite clear—the lawyer may not oppose a current client (Rule 1.7(a)(1)), even if there is no material limitation on the lawyer's representation of that client (Rule 1.7(a)(2)), and even if the opposition is unrelated to the work the lawyer is performing for the client. The ban discussed here is almost always overcome with a client's informed consent,[15] but, as we will address below, client consent will not be available in any practical way in the most common simultaneity situations.[16]

Rule 1.7 applies to all clients, regardless of size. A small-town lawyer who represents a local church minister to recover a tax refund intercepted by an identity thief cannot (without the minister's permission) represent a neighbor to sue the minister for damage caused by a tree falling onto the neighbor's property, even if the latter suit would cause no impairment at all on the lawyer's performance on

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those ethical standards, see Daniel J. Bussel, *No Conflict*, 25 GEO. J. LEGAL ETHICS 207, 207–08 (2012); *Developments in the Law: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1297–1303 (1981); *see also* Ronald D. Rotunda, *Resolving Client Conflicts by Hiring "Conflicts Counsel"*, 62 HASTINGS L.J. 677, 680 (2010) ("[S]ituations arise when the simultaneous representation rule and the imputation rule impose costs that greatly exceed their benefits.").

13. MODEL RULES OF PRO. CONDUCT r. 1.7(a)(1) (AM. BAR ASS'N 2020).
14. *Id.* r. 1.7(a)(2).
15. *Id.* r. 1.2(c).
16. *See infra* notes 47, 124, 153 and accompanying text.

the former action.[17] But the rule also demands that a "BigLaw"[18] lawyer in San Francisco representing Chase Bank on a multinational merger agreement may not (again, absent Chase's informed consent) represent a Chase credit card holder to defend a claim by the bank for nonpayment of her bill.[19] It is important to emphasize that Rule 1.7(a)(1) is not aimed to protect the lawyer's independent professional judgment: that is the work of Rule 1.7(a)(2), addressing the material limitations a lawyer might suffer. Nor is it intended to protect a client's confidences, as it applies to entirely unrelated matters, as illustrated by the two examples we just saw. In the differently handled *former* client context, where the aim is to protect confidences,[20] the ban applies only to the same or substantially related matters.[21] Not so with Rule 1.7(a)(1). The interest to be protected here is an amorphous idea of *loyalty*.[22] We can agree that, especially compared to the goals of ensuring effective representation

17. *See, e.g.*, Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 264 F. Supp. 2d 914, 919 (N.D. Cal. 2003) ("[A]n attorney (and his or her firm) cannot simultaneously represent a client in one matter while representing another party suing that same client in another matter."); Jeffry v. Pounds, 67 Cal. App. 3d 6, 11 (1977) ("A lay client is likely to doubt the loyalty of a lawyer who undertakes to oppose him in an unrelated matter. . . . [The basis of the conflict] is the client's loss of confidence, not the attorney's inner conflicts.").

18. The term "BigLaw" has become an accepted shorthand for major national and international law firms. *See, e.g.*, Michael Guihot, *New Technology, The Death of the BigLaw Monopoly and the Evolution of the Computer Professional*, 20 N.C. J.L. & TECH. 405, 411 n.21 (2019); Eli Wald, *BigLaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509, 2510 n.3 (2015).

19. *See, e.g.*, Int'l Bus. Machs. Corp. v. Levin, 579 F.2d 271, 280 (3d Cir. 1978) ("A serious effect on the attorney-client relationship may follow if the client discovers from a source other than the attorney that he is being sued in a different matter by the attorney."). In *Levin*, IBM's in-house counsel did not even know about the simultaneous representation until five years after Levin's law firm filed its lawsuit against IBM, but the court still disqualified that firm. *Id.* at 277, 283.

20. *See* Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN. ST. L. REV. 381, 416 (2005) ("One of the primary purposes of Rule 1.9 is to protect former clients' confidences.").

21. MODEL RULES OF PRO. CONDUCT r. 1.9(a) (AM. BAR ASS'N 2020).

22. Bussel, *supra* note 12, at 234–36; Nathan M. Crystal, *Disqualification of Counsel for Unrelated Matter Conflicts of Interest*, 4 GEO. J. LEGAL ETHICS 273, 275 (1990). The leading case establishing the principle that directly adverse representation in an unrelated matter is a conflict of interest is *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976). A subsequent Third Circuit case solidified that rule's place in the law governing lawyers. *Levin*, 579 F.2d at 280.

and maintaining client confidences, the notion of loyalty is considerably more slippery and ambiguous.[23]

The loyalty interest concededly has some relevance to the example of the small-town lawyer representing the minister, but it strains one's understanding of interpersonal dynamics to apply that same analysis to the Chase Bank example, where the bank's constituents are different people and very likely would never know about the other's representation. Nevertheless, perhaps as a prophylactic measure installed to avoid worries about imperfect line drawing,[24] the ban applies uniformly regardless of the context.[25]

2. Imputation of the Conflict

When a lawyer is prohibited from unrelated, concurrent adverse representation, every attorney in the lawyer's firm will also be prohibited from taking on the second client. Rule 1.10(a) expresses a fundamental attribute of American legal ethics which equates any given lawyer with her entire law firm: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule[] 1.7 . . . ."[26] This imputation principle has a couple of exceptions, one of which (those disqualifications based on personal interests of a lawyer)[27] has little relevance here, and the second of which (for

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23. *See* Bussel, *supra* note 12, at 209–10 ("This rule is unique to the American legal profession; no other profession imposes a comparable restriction."). For criticism of the application of Rule 1.7 to purely unrelated conflicts, see James B. Kobak, Jr., *Dealing with Conflicts and Disqualification Risks Professionally*, 44 HOFSTRA L. REV. 497, 529–30 (2015); Cassandra Burke Robertson, *Conflicts of Interest and Law-Firm Structure*, 9 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 64, 88 (2018).

24. Stephen E. Kalish, *An Instrumental Interpretation of Model Rule 1.7(a) in the Corporate Family Situation: Unintended Consequences in Pandora's Box*, 30 MCGEORGE L. REV. 37, 52 (1998) ("One possible purpose of Rule 1.7(a) may be prophylactic."); *see also* SWS Fin. Fund A v. Salomon Brothers, Inc., 790 F. Supp. 1392, 1401 (N.D. Ill. 1992) ("There are basically two purposes behind Rule 1.7. First it serves as a prophylactic to protect confidences that a client may have shared with his or her attorney. . . . The second purpose behind Rule 1.7 is to safeguard loyalty as a feature of the lawyer-client relationship.").

25. For an analysis and critique of the uniform application of Rule 1.7(a)(1), see Bussel, *supra* note 12, at 209–10; Robertson, *supra* note 23, at 81; W. Bradley Wendel, *Pushing the Boundaries of Informed Consent: Ethics in the Representation of Legally Sophisticated Clients*, 47 U. TOL. L. REV. 39, 50 (2015) (citing Bussel, *supra* note 12) ("[A]rguably, the law of lawyering in the United States took a wrong turn when it prohibited all 'directly adverse' representation.").

26. MODEL RULES OF PRO. CONDUCT r. 1.10(a) (AM. BAR ASS'N 2020).

27. *Id.* r. 1.10(a)(1).

migrating lawyers)[28] we explore below.[29] Applying Rule 1.10(a) to the minister story described above, we see that once the minister's lawyer is barred from suing the minister on behalf of the tree-damaged property owner, the lawyer's associate may not accept the latter representation either. As the Model Rule's comment declares, "a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client[.]"[30] Correspondingly, if the tax lawyer representing Chase Bank may not accept the case of the credit card holder, neither may any one of the hundreds or thousands of other lawyers in her firm, even if the other lawyer is in a different office, a different state, or a different country.[31]

As we saw with Rule 1.7(a), the uniform application of the imputation principle is reasonably sensible in the small firm setting but harder to justify in the large firm context. Of course, for disqualifications based on a serious risk of harm—where independent professional judgment is endangered and where secrets must be protected—the imputation principle is a no-brainer because law firms are shared environments, both in terms of information and financial

28. *Id.* r. 1.10(a)(2).

29. *See infra* notes 130–31 and accompanying text.

30. MODEL RULES OF PRO. CONDUCT r. 1.10 cmt. 2 (AM. BAR ASS'N 2020).

31. *See, e.g.*, Stephanie L. Kimbro, *Regulatory Barriers to the Growth of Multijurisdictional Virtual Law Firms and Potential First Steps to Their Removal*, 13 N.C. J.L. & TECH. 165, 213 (2012); Robertson, *supra* note 23, at 81 (noting the presumption that "every attorney in the firm shares the confidences known by every other attorney in the firm—even when the firm has more than a thousand attorneys spread across offices all over the globe"). In the large firm context, the constraining effect of Rules 1.7 and 1.10 may be mitigated by the use of advance waivers of unrelated, concurrent conflicts. Because, in national or international settings, the risk of harm from some unrelated, distant adverse representation is so small, firms often request that a new client agree in advance that the new client will not use Rules 1.7 and 1.10 to prevent the firm from later unrelated, adverse representation. If the new client is sophisticated (and, in BigLaw world, the clients typically are) and the advance waiver is negotiated fairly, it will often work. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 (AM. L. INST. 2000) (permitting advance waivers in settings where client protection and understanding are assured); ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 05-436 (2005) (same); Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 289 (2000) (discussing "circumstances in which lawyers and clients should be permitted to contractually set . . . their own rules governing future conflicts of interest"). But "often" is the operative term here. In many instances, an advance waiver will not work, leading to a disqualification months or years later. *See, e.g.*, Lennar Mare Island, LLC v. Steadfast Ins. Co., 105 F. Supp. 3d 1100, 1118 (E.D. Cal. 2015) (refusing to enforce conflict waiver); Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., 425 P.3d 1, 1 (Cal. 2018) (rejecting advance waiver); Michael J. DiLernia, *Advance Waivers of Conflicts of Interest in Large Law Firm Practice*, 22 GEO. J. LEGAL ETHICS 97, 103–09 (2009) (discussing advance waiver examples).

and other interests.[32] Where the disqualification is grounded instead on the more amorphous "loyalty" concern, as it is with representation that is adverse, unrelated, and concurrent, imputation rests on less sturdy ground.[33]

3. An Exception to the Uniform Ban and a Resulting "Functional Analysis"

As mentioned above, Rule 1.10 does include a significant exception that might play an important analogous role in our assessment of the simultaneity puzzle. The exception applies to former representations with lateral hires and therefore operates in an entirely different conflicts arena, but its reasoning might be useful to our project here. After considerable debate within the profession,[34] in 2009, the American Bar Association ("ABA") amended Rule 1.10 to add a provision eliminating imputation for lateral hires in most instances.[35] Rule 1.10(a)(2) allows a law firm to represent a client even though one of its lawyers would be disqualified from that representation under the former-client conflicts rule, Rule 1.9, which forbids representation adverse to a former client "in the same or a substantially related matter[.]"[36] The freedom from imputation is only available if the disqualified lawyer's taint arose from a previous law firm and if the new firm effectively screens the lateral lawyer.[37] The former client has

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32. *See* Bussel, *supra* note 12, at 216–21 (explaining the traditional underpinnings of Rule 1.7(a)'s applicability to unrelated conflicts).

33. Courts occasionally concede that the concurrent conflict rule is not connected to worries about prejudice or harm. *See, e.g.*, Bryan Corp. v. Abrano, 52 N.E.3d 95, 102 (Mass. 2016) (quoting McCourt Co. v. FPC Props., Inc., 434 N.E.2d 1234, 1235 (Mass. 1982)) ("[I]t is 'irrelevant [to our analysis] that the lawsuits are unrelated in subject matter and that it appears probable that client A will not in fact be prejudiced by the concurrent participation of the law firm in both actions.'").

34. *See, e.g.*, Ted Enarson, *Lateral Screening: Why Your State Should Not Adopt Amended Model Rule of Professional Conduct 1.10*, 37 J. LEGAL PRO. 1, 8–19 (2012) (summarizing the objections); Jeffrey B. Tracy, *Model Rule 1.10 Amendments Affect Lateral Moves*, A.B.A. LITIG. NEWS, Spring 2009, at 4; *see also* Erin A. Cohn, *The Use of Screens to Cure Imputed Conflicts of Interest: Why the American Bar Association's and Most State Bar Associations' Failure to Allow Screening Undermines the Integrity of the Legal Profession*, 35 U. BALT. L. REV. 367, 377–78 (2006) (reporting on and criticizing earlier rejection of screens by the ABA).

35. Edward A. Adams, *ABA House OKs Lateral Lawyer Ethics Rule Change*, AM. BAR ASS'N J. (Feb. 16, 2009, 9:04 PM), https://www.abajournal.com/news/article/aba_house_oks_lateral_lawyer_ethics_rule_change.

36. MODEL RULES OF PRO. CONDUCT r. 1.9(a), 1.10(a)(2) (AM. BAR ASS'N 2020).

37. *Id.* r. 1.10(a)(2)(i) cmt. 7.

no right to object.[38] As of 2021, a majority of states have implemented a version of Rule 1.10(a)(2).[39]

For example, imagine that a lawyer actively and aggressively defends a client in litigation brought by a plaintiff. After two years of nonstop work on the matter, she accepts an offer to join the law firm that has been just as actively and aggressively representing the plaintiff. To her client, this lawyer has switched sides in the middle of an actively litigated lawsuit. The rules permit exactly that. The migrating lawyer cannot work on the matter at the new law firm and must be screened to avoid any contact on that matter with her formerly opposing counsel. If the proper screen is effectuated, any motion to disqualify the law firm will not succeed.[40]

The 2009 amendment adding this exception recognized emerging common law developments in which courts, in deciding whether a lateral lawyer's presence in a new firm warranted disqualifying the new firm from some ongoing litigation, applied a "functional analysis" to discern whether any serious risk of harm existed if the representation were to continue.[41] In those lateral hire contexts where

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38. The firm must give the former client certain notices and the opportunity to examine or challenge the screening. *Id.* r. 1.10(a)(2)(ii)–(iii) cmt. 7; *see also id.* r. 1.0(k) (describing the requirements for an effective screen).

39. *See State Adoption of Lateral Screening Rule*, AM. BAR ASS'N (Dec. 8, 2015), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/lateral_screening.pdf (reporting that Colorado, Connecticut, Delaware, Washington, D.C., Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Montana, New Mexico, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Washington, West Virginia, and Wyoming have adopted rules permitting lateral screens similar to Rule 1.10(a)(2), further finding thirty states adopted rules permitting lateral screens similar to Rule 1.10(a)(2) while eighteen states do not permit lateral screens); *see also Rule 1.10 Imputation of Conflicts of Interest: General Rule*, STATE BAR OF CAL. 1, 3 n.3 (Nov. 1, 2018), https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_1.10-Exec_Summary-Redline.pdf (stating that, as of 2018, only Connecticut, Idaho, Iowa, and Wyoming had adopted Rule 1.10(a)(2) verbatim).

40. *See, e.g.*, Arista Recs. LLC v. Lime Grp. LLC, No. 06 CV 5936(KMW), 2011 WL 672254, at *8 (S.D.N.Y. Feb. 22, 2011); Intelli-Check, Inc. v. Tricom Card Techs., Inc., No. 03 CV 3706, 2008 WL 4682433, at *6 (E.D.N.Y. Oct. 21, 2008). Note that both of these decisions relied on common law, not a version of Model Rule 1.10(a)(2), but that rule would provide the same result.

41. *See, e.g.*, Lutron Elecs. Co. v. Crestron Elecs., Inc., No. 2:09-CV-707, 2010 WL 4720693, at *4–5 (D. Utah Nov. 12, 2010) (applying a "functional analysis" to conflict matters); *see also* N.Y. RULES OF PRO. CONDUCT r. 1.10 cmt. 4A ("For these reasons, a functional analysis that focuses on preserving the former client's reasonable confidentiality interests is appropriate in balancing the competing interests."). For decisions applying such an analysis in the absence of the explicit screening authority found in Model Rule 1.10(a)(2), see Wrubel v. John Hancock Life Ins. Co., No. 11 CV

the at-risk actor is a former client, the profession has gradually accepted the proposition that law firms may be trusted to implement an honor system and not exploit the opportunity to learn valuable strategy insights from the adversary's former counsel.[42] The profession has also gradually acknowledged, in the lateral setting at least, that the value of loyalty is not so dear as to justify limits on lawyer mobility.[43]

No such screening exception exists in the Model Rules for conflicts involving current clients, even if the concurrent representations involve unrelated matters.[44] Perhaps curiously, the prohibitions covered by the Rule 1.10(a)(2) screening exception *always* involve matters that are either the same as, or substantially related to, the work performed by the lateral lawyer.[45] The risks of harm to the affected client is surely greater in related matters, where confidential information is almost always available and relevant, than in unrelated matters, where only loyalty is at issue.[46] The message we might take away from that exception's development is that, if a functional analysis is appropriate there, it ought to be appropriate in the simultaneity context.

1873(WFK)(LB), 2012 WL 2251116, at *1–2 (E.D.N.Y. June 15, 2012); American Int'l Grp., Inc. v. Bank of Am. Corp., 827 F. Supp. 2d 341, 345 (S.D.N.Y. 2011); Intelli-Check, Inc. v. Tricom Card Techs., Inc., No. 03 CS 3706(DLI)(ETB), 2008 WL 4682433, at *4 (E.D.N.Y. Oct. 21, 2008); Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 645–48 (Cal. Ct. App. 2010).

42. *See* Lee A. Pezzimenti, *Screen Verité: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?*, 52 U. MIA. L. REV. 305, 329–37 (1997).

43. The ABA Report explaining the adoption of Rule 1.10(a)(2) emphasized the importance of lawyer mobility. *See* ABA Standing Comm. on Ethics & Pro. Responsibility, Report No. 109 (2009) [hereinafter ABA Report], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/report109rule.pdf. Commentators have similarly promoted that benefit; *see, e.g.*, James M. Fischer, *Large Law Firm Lateral Hire Conflicts Checking: Professional Duty Meets Actual Practice*, 36 J. LEGAL PRO. 167, 223–24 (2011); James W. Jones et al., *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?*, 30 GEO. J. LEGAL ETHICS 125, 193 (2017).

44. The screening exception adopted by the ABA in 2009 applies to prohibitions on representation "based upon Rule 1.9(a) or (b)[,]" both subsections referring to former-client representation. MODEL RULES OF PRO. CONDUCT r. 1.10(a)(2) (AM. BAR ASS'N 2020). Rule 1.7 conflicts receive no mention in that Rule or its comments.

45. *Id.* r.1.9(a)–(b).

46. *See* Kobak, *supra* note 23, at 529.

B. Imputation in Practice

Before we address the three simultaneity stories which introduced this Article, we should confirm how Rule 1.10(a) works in practice. Consider an "International Law Firm Story":

> Lawyer D is a partner in the litigation group of a large, multinational law firm with twelve offices around the world. Lawyer D works full time in the Boston office. Lawyer D agreed, pending a conflict check, to represent an emerging Massachusetts biotech company in a patent infringement action against a Germany-based conglomerate. The firm's conflict check reports that its Moscow office represents the German conglomerate in a small real estate matter, which should wrap up in the next few months. The real estate deal has nothing at all to do with the subject matter of the patent infringement dispute, and Lawyer D has never met nor corresponded with the lawyers in the Moscow office. The Boston office agrees with Lawyer D that he should accept the patent infringement matter, which is very lucrative. The firm will screen Lawyer D and the Boston office (which is very easily accomplished) from any access to the Moscow real estate matter.

The firm's strategy in this story is problematic. The Model Rules forbid the law firm to accept the patent infringement plaintiff's case unless the German company consents.[47] The representation is a direct violation of Rule 1.7(a)(1): "A lawyer shall not represent a client if . . . the representation of one client will be directly adverse to another client[.]"[48] Once the law firm files its lawsuit, the defendant may, and

47. *See* MODEL RULES OF PRO. CONDUCT r. 1.9(a)(2) (AM. BAR ASS'N 2020). An advance directive, signed by the German company at the time of its retainer in Moscow, would solve this problem. *See* Audrey I. Benison, Note, *The Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants*, 13 GEO. J. LEGAL ETHICS 699, 733–34 (2000); DiLernia, *supra* note 31, at 134; Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship–A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 972–73 (2001); Painter, *supra* note 31, at 326–29. Because we need to explore how imputation works, we will assume no advance waiver exists.

48. MODEL RULES OF PRO. CONDUCT r. 1.7(a)(1) (AM. BAR ASS'N 2020).

may have good reason to,[49] file a motion to disqualify the firm from continuing the representation. While the court hearing the motion is not required to disqualify the firm once the defendant demonstrates a violation of Rule 1.7,[50] it surely has the authority to do so, and disqualification in such circumstances is common.[51]

The law firm might consider a few strategies to accept the matter and avoid disqualification, but none will work. If the patent litigation opportunity is sufficiently lucrative, the firm could consider withdrawing from the Moscow matter (while aiding the German company to find adequate successor counsel), thereby converting a *concurrent* client conflict to a *former* client conflict. If Rule 1.9, governing former client conflicts, could serve as the relevant authority, the firm would be able to accept the new litigation because a lawyer may freely oppose a former client on an unrelated matter, and the patent matter is not at all related to the Moscow work.[52] That

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49. Disqualification motions have considerable value in the transactional costs they impose on the other party. *See* Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 441 (1985) (Brennan, J., concurring) (stating that "the tactical use of attorney-misconduct disqualification motions is a deeply disturbing phenomenon in modern civil litigation"); Steven H. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227, 279–80 (1987) ("The time and energy consumed, the delay in the courts, the monetary costs to clients, the rule's documented potential for abuse by lawyers, the added fuel that the motion brings to an already overheated adversary system, and the possible devastating effect on the client's ability to continue with the litigation outweigh any positive effect of the [most common form of disqualification]."); *cf.* Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 74 (2014) (challenging the "widespread understanding that [disqualification] motions are sinisterly 'strategic,' 'harassing,' or otherwise malignant," but noting the costs they impose).

50. Even if a court determines that a conflict has arisen, the court may choose a remedy other than disqualification, which creates significant costs on the law firm's client. *See, e.g.*, *In re* Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1775, 2016 U.S. Dist. LEXIS 22228 (E.D.N.Y. Feb. 23, 2016) (noting that disqualification motions are "disfavored"); Bruce Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 117–19 (1996); Swisher, *supra* note 49, at 111–12.

51. *See, e.g.*, W. Sugar Coop. v. Archer-Daniels-Midland Co., 98 F. Supp. 3d 1074, 1077–79, 1093 (C.D. Cal. 2015) (disqualifying entire firm because one of the firms that merged to form plaintiff's counsel had an ongoing relationship with the opposing parties); Filippi v. Elmont Union Free Sch. Dist. Bd. of Educ., 722 F. Supp. 2d 295, 298, 315 (E.D.N.Y. 2010) (disqualifying entire firm because one of its lawyers had an going relationship with the opposing party); Kabi Pharmacia AB v. Alcon Surgical, Inc., 803 F. Supp. 957, 958, 964–65 (D. Del. 1992) (same).

52. MODEL RULES OF PRO. CONDUCT r. 1.9(a) (AM. BAR ASS'N 2020) (limiting prohibition to "the same or a substantially related matter"). Of course, the story offered for our purposes ensured that the Moscow legal work was entirely unrelated to the Boston patent litigation. Therefore, if the German company qualified as a former client, the representation would be proper. *Id.*

seemingly clever strategy fails, however, on what the legal ethics world knows as the "hot potato" doctrine.[53] A lawyer may not drop a client "like a 'hot potato'" to transform current representation into former representation.[54] Second, by the time the German company files its disqualification matter, the representation will be completed. So the firm's backup strategy would be to rely on Rule 1.9.[55] That strategy will also fail. Courts have held that a period of concurrent representation triggers the ban, even if the relationship has ended by the time the matter is ripe for a ruling on a Rule 1.7 disqualification motion.[56]

The third strategy the firm might attempt to accept the patent litigation matter has the most relevance to the simultaneity puzzle. The litigation partner is in Boston. The real estate matter and its lawyer are in Moscow. The two lawyers likely know nothing of one another, so the firm could effectively, and with little effort, prevent either lawyer from knowing about the other matter. The firm could set up a screen—and a good one. The firm might prepare to argue that its size, the distance between the two lawyers and between the two matters, and the establishment of a sophisticated screen together should justify nonimputation. This strategy also falters, at least under the Model Rules. As we saw, the distinct and distant offices of a large, international law firm have not consistently been treated as separate firms for conflict purposes,[57] nor has screening in concurrent conflict matters been permitted.[58]

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53. The phrase was coined in *Picker International, Inc. v. Varian Associates, Inc.* 670 F. Supp. 1363, 1365–66 (N.D. Ohio 1987).

54. Swisher, *supra* note 49, at 78 n.17 ("Typically, courts also preclude the lawyer or firm from dropping (i.e., firing) a current client like a 'hot potato' in order to sue that client."); *see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. c, reporter's note to cmt. c (AM. L. INST. 2000). For an insightful review and critique of the doctrine, see generally John Leubsdorf, *Conflicts of Interest: Slicing the Hot Potato Doctrine*, 48 SAN DIEGO L. REV. 251 (2011).

55. *See* MODEL RULES OF PRO. CONDUCT r. 1.9(a) (AM. BAR ASS'N 2020).

56. *See, e.g.*, Merck Eprova AG v. ProThera, Inc., 670 F. Supp. 2d 201, 209 (S.D.N.Y. 2009); Bryan Corp. v. Abrano, 52 N.E.3d 95, 97–102, 104 (Mass. 2016).

57. *See* Robertson, *supra* note 23, at 83 ("In the mega-firm context, imputing a single lawyer's conflict to the entire global entity has the effect of conflicting out a very large number of attorneys. And it is not at all clear that there are truly gains in the protection of loyalty or confidentiality to make such a limitation worth it."); *see also, e.g.*, *In re* Project Orange Assocs., LLC, 431 B.R. 363, 365–66, 368, 379 (Bankr. S.D.N.Y. 2010) (holding DLA Piper LLP disqualified for an unrelated concurrent conflict and the effort to offer a separate "conflict counsel" unsuccessful).

58. *In re* Cendant Corp. Sec. Litig., 124 F. Supp. 2d 235, 248 (D.N.J. 2000) ("Rules in jurisdictions which permit ethics screens in limited circumstances apply only to situations involving former clients. They do not treat situations involving

The absence of *ex ante* authority permitting such a screen does not mean that law firms will not engage in that strategy, however. Recognizing the availability of a functional analysis of conflict disputes,[59] law firms take chances and establish screens in the absence of express authority. Using a fact-driven, pragmatic approach to motions to disqualify such firms, courts in jurisdictions where the professional conduct rules do not permit screening nevertheless deny motions to disqualify firms on occasion.[60]

This reality may have some helpful relevance to the simultaneity puzzle, but we need to acknowledge two caveats here. First, the available cases appear to arise exclusively in efforts to protect a lateral hire from what has just become a former client conflict.[61] It appears courts have not approved screens for concurrent conflicts barred by Rule 1.7(a)(1).[62] Second, even in those settings, a court's approval of a screen *nunc pro tunc* did not necessarily establish in the jurisdiction a right to employ screens with assurance that the strategy would protect the firm from disqualification[63] (or the other consequences of such a rule violation, including malpractice).[64]

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simultaneous representation of two clients where a violation of any subsection of Rule 1.7 is present. There is simply no basis to accept the use of such screens in cases of *concurrent* representation.") (citations omitted); *see also* Bussel, *supra* note 12, at 209; Wendel, *supra* note 25, at 50.

59. *See supra* note 41 and accompanying text.

60. *See, e.g.*, Hughes v. Paine, Webber, Jackson & Curtis, Inc., 565 F. Supp. 663, 672–73 (N.D. Ill. 1983); *see also* Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493, 538–39 n.171 (2002) (listing cases where courts recognized ethical screening and denied motions to disqualify firms).

61. A screening arrangement can prevent disqualification arising in contexts where an attorney has made a lateral move, and the new firm opposes that lawyer's (or her firm's) former client. MODEL RULES OF PRO. CONDUCT r. 1.10(a)(2) (AM. BAR ASS'N 2020).

62. Firms implementing screens to avoid disqualification in concurrent conflict settings do not succeed. *See, e.g.*, S. Visions, LLP v. Red Diamond, Inc., 370 F. Supp. 3d 1314, 1319, 1321, 1337, 1340–41 (N.D. Ala. 2019) (holding loyalty factor requires disqualification, notwithstanding an ethical screen). Many disqualification disputes involving unrelated, concurrent representation settings arise in the context of advance waivers and their validity or lack thereof. *See supra* note 31 and accompanying text.

63. *See, e.g.*, *In re* Cnty. of L.A., 223 F.3d 990, 995 (9th Cir. 2000) (recognizing the uncertainty of a state court's precedent on screening absent an authorizing rule).

64. A failure to honor Rule 1.7(a)(1) risks a disqualification order, and such an order invites a malpractice claim if the now-former client has suffered harm as a result of the disqualification of its long-standing counsel. *See, e.g.*, Bella Monte Owners Ass'n, Inc. v. Vial Fotheringham, LLP, No. 2:19-cv-00212-TC-JCB, 2020 WL 3489647, at *1, *3 (D. Utah June 26, 2020) (holding that continued representation of the client during a malpractice action initiated by the client created a conflict of interest); Podor v.

With that background in place, we may proceed to examine the imputation implications of "moonlighting" lawyers who serve in multiple settings at the same time.

III. THE SIMULTANEITY PUZZLE ASSESSED FOR MULTIPLE-FIRM LAWYERS

Having now reviewed the established baseline of concurrent conflict bans and the concomitant imputation of the ban to all of the other lawyers in the banned lawyer's law firm, we may begin our analysis of the simultaneity puzzle. The puzzle might (or might not) require different analysis if the disqualified actor is a licensed lawyer, as compared to a law student. This Part explores each of these situations separately.

A. Simultaneity with a Lawyer

Simultaneity in the lawyer context arises in two separate ways—where the lawyer has a primary "home" and where the lawyer has no primary home. The former presents the most exquisite challenges. The profession has responded to the latter with relative clarity. Understanding the easy case will aid us in exploring the simultaneity puzzle in the harder case. Therefore, we begin with temporary lawyers, who ordinarily have no primary home.

1. Temporary or Contract Lawyers

In 1988, the ABA's Standing Committee on Ethics and Professional Responsibility (the Committee) issued Formal Opinion 88-356, an influential opinion on the ethical issues arising from "the increasing use by law firms of temporary lawyers."[65] Sometimes through the services of a placement agency or sometimes on a freelance basis, law firms were using lawyers who were not their employees for discrete, limited legal services when the resources at the law firm were not sufficient for the work to be done.[66] The opinion

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Harlow, No. 106442, 2018 WL 4931468, at *1–2, *4–5 (Ohio Ct. App. Oct. 11, 2018) (finding a malpractice action based on concurrent representation); Paulsell v. Gaffney, No. 74744-4-I, 2017 WL 4155367, at *1, *5 (Wash. Ct. App. Sept. 18, 2017) (same). *See generally* RONALD E. MALLEN, 2 LEGAL MALPRACTICE § 17:2 (2021 ed.).

65. ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 88-356 (1988).

66. *Id.* For a discussion of the evolving role of part-time and contract lawyers in the legal profession, see generally John O. McGinnis & Russell G. Pearce, *The Great*

addressed a number of confidentiality, fee, client-disclosure, and conflicts issues arising from this arrangement.[67] The Committee noted that a temporary lawyer "may work simultaneously on other matters for other firms[,]"[68] so its reasoning has relevance here. In 1988, the Model Rules did not authorize any screening of lawyers to address conflicts worries, except in the context of former government lawyers,[69] a reality that actually renders the opinion more, rather than less, useful for our purposes, given that it recognized the benefits of and approved, even at that time, some screening arrangements despite the absence of any explicit authority for that arrangement.[70]

The 1988 ABA opinion recognized that "[t]he most difficult conflict of interest questions involving temporary lawyers arise under the imputed disqualification provisions of Rule 1.10[.]"[71] The Committee concluded that everything turned on whether the temporary lawyer was "associated in a firm" per the language of Rule 1.10(a).[72] If the temporary lawyer is associated with the firms she works with, then she would be subject to the same imputation as any associate or partner.[73] While the opinion does not say so explicitly, it implicitly concludes that, if such a temporary lawyer were "associated in" two firms at the same time, the imputation would reach across the two settings.[74] However, critically for the simultaneity puzzle, working at a law firm as a temp does not automatically mean that the lawyer is "associated" with the firm.[75] Relying on comment language from Rule 1.10 applicable only to lateral lawyers, the opinion concluded that "a

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Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services, 82 FORDHAM L. REV. 3041 (2014); Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2181–91 (2010).

67. ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 88-356 (1988).

68. *Id.*

69. Prior to the amendment of Rule 1.10, screening was permitted only for former government lawyers. *See* Cohn, *supra* note 34, at 386–88.

70. ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 88-356 (1988).

71. *Id.*

72. *Id.*; MODEL RULES OF PRO. CONDUCT r. 1.10(a) (AM. BAR ASS'N 2020). Later, Rule 1.10(b) uses the phrase "associated with a firm," as opposed to "in" a firm. *Id.* r.1.10(b). The opinion declared that the two phrases mean the same thing. ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 88-356 (1988).

73. ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 88-356 (1988).

74. *Id.* ("Ultimately, whether a temporary lawyer is treated as being 'associated with a firm' while working on a matter for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure or misuse of information relating to representation of other clients of the firm.").

75. *Id.*

rule based on functional analysis is more appropriate for determining imputed disqualification,"[76] even with concurrent clients.[77] The functionality test connects directly to access to information:

> Ultimately, whether a temporary lawyer is treated as being "associated with a firm" while working for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure or misuse of information relating to the representation of other clients of the firm.[78]

Therefore, the solution is to isolate the lawyer from client information beyond what the lawyer is working on as a temporary helper.[79] "[I]n order to minimize the risk of disqualification, the firms should, to the extent practicable, screen each temporary lawyer from all information relating to clients for which the temporary lawyer does no work."[80] Simultaneity can work, but only if the firm establishes screens to insulate the temporary lawyer from the rest of the firm's client work.[81]

This helpful, if creative, reading of the Model Rules regime offers an opening for a solution to the simultaneity puzzle, albeit a crabbed and limited solution, as we shall see below.[82] Furthermore, the ABA opinion on how to handle temporary lawyers has a substantial following within the ethics committee universe.

A year after the ABA promulgated its opinion, the New Jersey Supreme Court Advisory Committee on Professional Ethics followed the ABA in an opinion entitled "Temporary Attorneys and Temporary Attorney Placement Agencies."[83] Recognizing that "[t]here is no legal or ethical prohibition against working for more than one law firm, even at the same time," the New Jersey committee agreed that "to minimize the risk of imputed disqualification, firms employing

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* ("[I]n order to minimize the risk of disqualification, firms should, to the extent practicable, screen each temporary lawyer from all information relating to clients for which the temporary lawyer does no work.").
80. *Id.*
81. *Id.*
82. *See infra* notes 139–41, 229 and accompanying text.
83. N.J. Advisory Comm. on Pro. Ethics, Formal Op. 632, 124 N.J.L.J. 926 (1989).

temporary lawyers should shield such lawyers from all information relating to clients for whom the temporary lawyer does no work."[84] An opinion from the State Bar of California, addressing temporary lawyers as "contract attorneys," offered the same advice,[85] as have ethics opinions from Alabama,[86] the District of Columbia,[87] Kentucky,[88] and New York.[89] Courts have been silent regarding the imputation effect of temporary or contract lawyer work at multiple firms in a disqualification dispute (unlike in the context of lawyers serving in an "of counsel" role, discussed next).[90] That fact appears to indicate some uniformity of agreement that a properly screened and isolated temporary lawyer should not trigger broader imputation consequences.

Applying this accepted understanding to the first Lawyer Temp Story above,[91] Lawyer A, working as a temporary employee for the Holper law firm and the Parikh law firm at the same time, and working on discrete matters in each setting without access to other client matters at either placement, will not create a disqualification worry for either firm while the two actively litigate against one another.[92] That conclusion appears reliable, but only if each firm

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84. *Id.*

85. State Bar of Cal. Standing Comm. on Pro. Responsibility & Conduct, Formal Op. 1992-126 (1992) ("[T]he firm must make a concerted effort to screen the contract attorney from confidential information that is unnecessary to the attorney's assignment at the firm.").

86. Ala. State Bar, Ethics Op. 2007-03 (2007).

87. D.C. Bar Ass'n Comm. on Ethics & Pro. Responsibility, Ethics Op. 352 (2010).

88. Oliver v. Bd. of Governors, Ky. Bar Ass'n, 779 S.W.2d 212, 217–18, 220 (Ky. 1989).

89. N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 715 (1999) ("[I]f the firm has adopted procedures to ensure that the Contract Lawyer is privy only to information about clients he or she actually serves, then, in most cases, the Contract Lawyer should not be deemed to be 'associated' with the firm for purposes of vicarious disqualification.").

90. *See* WILLIAM L. DECKELMAN, JR. & MARY B. WINTER, 2 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 24.63, Westlaw (updated April 2020) (reviewing the ethical implications of using temporary lawyers and citing only ethics opinions). The advisory opinion from the Kentucky Supreme Court qualifies as a court ruling, but not in a disqualification dispute. *See Oliver*, 779 S.W.2d. at 213.

91. *See supra* note 7 and accompanying text.

92. *See Oliver*, 779 S.W.2d at 214, 217 (agreeing with the conflicts of interest guidance of ABA Formal Op. 88-356); D.C. Bar Ass'n Comm. on Ethics & Pro. Responsibility, Ethics Op. 284 (1998) (agreeing that ABA Formal Op. 88-356's "analysis of the conflicts, undivided loyalty, and confidentiality issues as they pertain to temporary lawyers has met with uniform acceptance and is persuasive"); Kathleen Maher, *The Permanent Legacy of the ABA Opinion on Temporary Lawyers*, 13 PRO. L. 18, 18 (2001).

takes careful measures to ensure that Lawyer A does not have access to other client information beyond the matters he is working on.[93]

There are good and not-so-good lessons for the simultaneity puzzle solution from these consistent ethics committee messages. The comforting lesson from the analogous temporary lawyer context is that the absence of language within the Model Rules (and, of course, in the corresponding state provisions) authorizing screening of lawyers in concurrent client settings should not be fatal. Screening can serve, and does serve, as an effective tool to preclude prophylactically any disqualification worries for lawyers who are in fact not true members of a firm. That good faith "functional[ity]"[94] approach will assist in our examination of the simultaneity puzzle.

Yet, the functionality approach as it appears in the temporary lawyer context requires a pretty stringent test to avoid imputation, especially in concurrent matters. The several ethics committee and court advisory opinions speak with one voice, and the message is this: A law firm may assign overflow matters to a contract attorney and not worry about that temporary lawyer infecting the firm, as long as the contract lawyer works only on the matters assigned and only knows about the facts of the matters assigned and nothing more. The contract lawyer should avoid sitting in on department or unit meetings, consulting with other associates, partners, or staff, or otherwise serving as a member of the firm community.[95] It appears safer if the contract lawyer works from his own home or office and not in the firm, although the latter is not necessarily fatal.[96]

The limitations of the functionality approach are even more apparent when we review the parallel authority in the "of counsel" context. We turn to that context now.

2. "Of Counsel" Lawyers

The "temporary lawyer" stories represent the setting where the lawyer in question has no home. In the next Subpart, we will compare that to the setting where the lawyer has an undeniable primary home. In between those two settings, we encounter the slippery "of counsel"

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93. ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 88-356 (1988).

94. *Id.* ("[A] rule based on functional analysis is more appropriate for determining imputed disqualification.").

95. *See* Emily Eichenhorn, *Do Your Homework When Hiring Temporary Lawyers*, OR. STATE BAR BULL. (Apr. 2008), https://www.osbar.org/publications/bulletin/08apr/practice.html (stating that contract lawyers' work should be limited to individual cases).

96. *See id.* (describing office arrangements for temporary lawyers, including confidentiality protections within the firm).

examples, where the primary home question may be a bit unclear. The treatment of lawyers designated "of counsel" serves as a valuable resource for our understanding of the simultaneity puzzle. Unlike the contract lawyer setting (and perhaps understandably so), several courts have addressed disqualification motions triggered by the presence of a lawyer who is not *really* part of a firm but identifies herself as "of counsel" to the firm. Usually—but not uniformly—the lawyer's presence triggers disqualification.[97]

To be sure, we need to define our terms here. The designation "of counsel" can mean different things in different contexts, as noted by a 1990 ABA ethics opinion, which listed four typical uses of the designation,[98] two of which have relevance here. The most common use "is that of a part-time practitioner, who practices law in association with a firm, but on a basis different from that of the mainstream lawyers in the firm."[99] Another resembles Lawyer B in the Second Story, the semi-retired BigLaw partner working in the legal services office: "[A] retired partner of the firm who, although not actively practicing law, nonetheless remains associated with the firm and available for occasional consultation."[100] In each of those settings, the firm could easily arrange its affairs such that the of counsel lawyer could have limited access to the firm-wide business. The firm could treat that lawyer sufficiently differently from the typical firm lawyers to functionally make a difference when the question of imputation arises.

As noted above, motions to disqualify are not uncommon in cases where a lawyer designated as of counsel has some tainting attribute.[101] Because the relationship between the firm and the lawyer is typically more robust here than with a temporary or contract lawyer, the firm opposing imputation has a much harder time resisting disqualification.[102] Courts often apply a true functional

97. *See* Mustang Enters., Inc. v. Plug-In Storage Sys., Inc., 874 F. Supp. 881, 882, 890 (N.D. Ill. 1995) (holding two law firms identified as "affiliated" "on an of-counsel basis" treated as one firm for imputation purposes). For a discussion of the cases, see MALLEN, *supra* note 64, § 5:33.

98. ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 90-357 (1990).

99. *Id.*

100. *Id.* The remaining two uses of the term are "a probationary partner-to-be: usually a lawyer brought into the firm laterally with the expectation of becoming partner after a relatively short period of time" and "a permanent status in between those of partner and associate[.]" *Id.*

101. *See, e.g.*, MALLEN, *supra* note 64, § 5:33.

102. *See, e.g.*, Roberts & Schaefer Co. v. San-Con, Inc., 898 F. Supp. 356, 357–58, 360, 364 (S.D. W. Va. 1995); People *ex rel.* Dep't of Corps. v. SpeeDee Oil Change Sys., Inc., 980 P.2d 371, 374, 385 (Cal. 1999) (holding of counsel arrangement required

approach, which is helpful generally for the simultaneity puzzle. The functional approach will often conclude that the risk of information sharing is substantial, and disqualification will consequently be required.[103] But this is not always true. For example, in a 2006 New York state court decision, the prior representation of the opposing party by a lawyer who had an office-sharing "of counsel" arrangement with the law firm did not require the disqualification of the law firm.[104] Treating that office-sharing lawyer as "associated" with the law firm would require disqualification under the New York version of Rule 1.10, but an examination of the risks involved demonstrated that there was no worry about confidential information being shared because the lawyer in question "did not perform any legal work for the firm or its clients[.]"[105]

Similarly, a Rhode Island Supreme Court Ethics Advisory Panel recommended such a functional approach for of counsel relationships.[106] The opinion addressed an inquiry from a solo lawyer with an of counsel affiliation with a separate solo practitioner.[107] The two attorneys maintained separate offices, had separate law practices, and did not have access to each other's client files. The first lawyer desired to sell business services to the second lawyer's clients, which Rhode Island's ethics rules forbade the second lawyer from doing.[108] The Ethics Advisory Panel concluded that because the two lawyers were not "associated" for purposes of Rule 1.10, the first lawyer may proceed with the business arrangements.[109] The lack of association derived entirely from the clear separation of the practices: "Although the inquiring attorney states that he/she is affiliated with [the other lawyer] on an 'of counsel' basis as needed, the facts disclose that the two attorneys maintain separate offices, have separate law practices, and do not have access to each other's client files."[110]

One prominent court decision on the "of counsel" implication expressly rejected the functional approach and replaced it with an

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disqualification); Cho v. Superior Court, 45 Cal. Rptr. 2d 863, 864, 869–70 (Cal. Ct. App. 1995); *In re* Fuerst, 157 So. 3d 569, 577 (La. 2014).

103. *See* United States *ex rel.* Bahsen v. Bos. Sci. Neuromodulation Corp., 147 F. Supp. 3d 239, 245 (D.N.J. 2015) ("One consistent principle emerges; a firm cannot hold out a lawyer as one of its own and then later hide behind a functional analysis of that lawyer's duties to avoid ethical conflicts.")

104. Calandriello v. Calandriello, 819 N.Y.S.2d 569, 570–71 (N.Y. App. Div. 2006).

105. *Id.*

106. R.I. Bar Ass'n Ethics Advisory Panel, Op. 99-09 (1999).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

approach that relies more on perception than access to information or conflicting financial interests. In *United States ex rel. Bahsen v. Boston Scientific Neuromodulation Corp.*,[111] a former in-house lawyer for the defendant joined the plaintiff's law firm with an "associate" title, but the court likened the lawyer's position to an "of counsel" designation.[112] The defendant sought disqualification of the plaintiff's law firm. The magistrate judge, applying a functional approach to test whether the defendant's secrets were at risk, concluded that they were not and denied the motion.[113] The district court judge disagreed.[114] A functional approach may be appropriate with a temporary or contract lawyer, but that test is not proper when the lawyer is "associated with" a firm, such as in an of counsel arrangement.[115] It quoted language from a Virginia ethics opinion that "[o]nce the lawyer and the firm begin to hold the lawyer out as 'of counsel' to the firm, conflicts will be imputed between the two regardless of whether the lawyer actually has any information about the clients of the firm or vice-versa."[116] It also noted language from the ABA ethics opinion quoted earlier stating that the use of the title "of counsel" by a firm generally renders the "of counsel" lawyer "associated with the firm."[117]

In *Bahsen*, the "of counsel" lawyer, who had deep connections to the litigation at issue, also had deep connections to the law firm, so concluding that Rule 1.10 applied to her seems, to an outside reader, to have been an easy call.[118] But for purposes of the simultaneity puzzle, the opinion's approach is instructive. In most instances, as the ABA opinion confirms, listing a lawyer as "of counsel" implies some more robust connection to the firm and its identity.[119] It is, as the court notes, different from a temporary or contract lawyer

111. 147 F. Supp. 3d 239 (D.N.J. 2015).

112. *Id.* In fact, the arrangement was intriguingly complicated, with the lawyer joining a different company in-house after leaving the defendant, and then arranging to become connected to the law firm while being "seconded" back to the company, a client of the firm. *Id.* at 242.

113. *Id.* at 242–45.

114. *Id.* at 245–47.

115. *Id.*

116. *Id.* at 245–46 (citing Va. State Bar Ass'n Comm. on Legal Ethics, Ethics Op. 1866 (2012)).

117. *Id.* at 245 (citing ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 90-357 (1990)).

118. Applying Rule 1.10 in 2015 in New Jersey, one might expect the plaintiff's law firm to have relied on the lateral lawyer screening opportunity, which the rule allows. *See* MODEL RULES OF PRO. CONDUCT r. 1.10(a) (AM. BAR ASS'N 2020). The firm tried that, but its screen was weak and untimely. *Bahsen*, 147 F. Supp. 3d at 247–48.

119. ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 90-357 (1990).

arrangement.[120] If the imputation principle operates less on actual access to information or incentives to betray an adversary and more on prophylactic considerations and something resembling "an appearance of impropriety[,]"[121] then it does not surprise us to see the "of counsel" designation tying a lawyer to a firm more closely than would the "contract lawyer" or "temporary lawyer" designations.

3. A Lawyer with a Primary Home

Our review of the temporary or contract lawyer setting and the of counsel setting now permits us to apply the available insights to that of the lawyer in the Second Story (the semi-retired partner engaged in pro bono). If there were any question about a primary "home" for the contract or of counsel lawyers above, there is no such question here. Lawyer B remains on the books and letterhead of her BigLaw firm.[122]

In the Second Story,[123] Lawyer B is a semi-retired partner at a large law firm in Boston. Lawyer B has a very limited practice, but

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120. *Bahsen*, 147 F. Supp. 3d at 245 ("Generally, the firm's use of the 'of counsel' title renders the lawyer associated with the firm."). One helpful thought experiment would be to imagine an ordinary contract lawyer who received a gig assignment from an established law firm, lasting two weeks. During those two weeks, the contract attorney identifies herself on her LinkedIn page as "of counsel" to the law firm because of the assignment. Our immediate instinct is to conclude that doing so is just not right. It is surely not right if the firm has not given its permission, which tells us that "of counsel" means something in the legal marketplace and community. And if we were to imagine the contract lawyer asking the firm for permission, our confident prediction is that the firm will refuse that request—again, because to call someone "of counsel" implies some meaningful connection to the law firm.

121. *Id.* at 247 n.2 (emphasizing—although not terribly persuasively—that its decision "does not revive" the appearance-of-impropriety standard). The opinion in *Bahsen* was not unmindful of its approach resembling the appearance-of-impropriety basis by which to evaluate conflicts of interest, a basis soundly rejected by most, if not all, jurisdictions in recent years. *See, e.g.*, Bd. of Educ. of N.Y. v. Nyquist, 590 F.2d 1241, 1246–47 (2d Cir. 1979) ("[A]ppearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. c(iv) (AM. L. INST. 2000); CHARLES WOLFRAM, MODERN LEGAL ETHICS § 7.1.4 (1986) (noting the allure of the appearance-of-impropriety standard for resolving conflicts of interest but cautiously instructing about its erroneous results); Peter Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593, 602 (1992) (noting the legal community's reluctance to apply the appearance-of-impropriety standard to itself).

122. The BigLaw setting offers nothing distinctive to the analysis, of course. The important conception is that the lawyer has a "home." That home could be a smaller firm, although not a solo practice because the focus is on imputed conflicts.

123. *See supra* note 8 and accompanying text.

she maintains her office in the law firm's building, and she has access to the law firm's client database and its electronic files. Given our understanding of the concurrent conflict rules and the imputation rules, we know that no lawyer in her large firm could oppose her remaining clients, even on an unrelated matter, and even if the other firm lawyer were 6,000 miles away on a different continent, absent informed consent by both affected clients.[124] If a new prospective client approached the law firm for assistance in a matter adverse to lawyer B's client, the firm would (a) check for that conflict in its database[125] and (b) address the resulting conflict by seeking consent from the existing and the prospective client or by declining the engagement. Similarly, if the new prospective client asked for legal help in a matter adverse to one of Lawyer B's former clients and related to her work for that former client, the same process would occur. If Lawyer B had left the firm and had no further connection to it, then the firm might have permission to accept the substantially related matter even over the objection of the former client.[126] But Lawyer B has not left the firm. That is why we have a simultaneity puzzle.

The problem arises when Lawyer B begins to volunteer at Montrose Community Legal Assistance (MCLA), the local legal aid office. MCLA employs its own staff attorneys, and their conflict and imputation experiences operate precisely as they do for Lawyer B at the large downtown firm.[127] Lawyer C, an MCLA staff lawyer, will be forbidden to accept a new matter that is adverse to his existing clients, and his ban will impute to all of the other staff lawyers at MCLA. Lawyer C may not accept a new client if that matter is adverse to any other matter within MCLA. MCLA is a law firm, and all of the

124. Robertson, *supra* note 23, at 81.

125. The duty to avoid conflicts of interest is central to a lawyer's fiduciary duty. *See, e.g.*, ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 09-455 (2009) (emphasizing the duty); Crystal, *supra* note 22, at 273.

126. Model Rule 1.10(b) offers this separate exception to the imputation principle. MODEL RULES OF PRO. CONDUCT r. 1.10(b) (AM. BAR ASS'N 2020). No imputation is imposed only if: (1) Lawyer B has left the firm; (2) no other lawyer or staff member in the firm has information about the former representation; and (3) the firm has no remaining files or other information available. *Id.* Especially in a large firm, that happenstance would seem to be rare. *See, e.g.*, Marc I. Steinberg & Timothy U. Sharpe, *Attorney Conflicts of Interest: The Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1, 19 (1990) (noting that it is uncommon to have only one lawyer with knowledge of a matter).

127. As an aside, whether MCLA must check for conflicts involving work at a different neighborhood office of the agency will depend on the availability of shared files and databases between the units of the organization. *See* MODEL RULES OF PRO. CONDUCT r. 1.10 cmt. 1 (AM. BAR ASS'N 2020).

imputation principles reviewed above will apply to its day-to-day business.[128]

When Lawyer B volunteers at MCLA on any kind of regular basis, the ordinary analysis would conclude that she becomes associated with the firm. If so, Lawyer B is deemed to represent all of MCLA's clients. The clients that Lawyer B represents at MCLA will appear in the organization's conflict-checking database and cannot be opposed concurrently. Lawyer B may not accept a new client if that client is adverse to another MCLA client. Nothing in the rules as written would treat Lawyer B at MCLA any different from her experience at her law firm if she is deemed to be associated with MCLA and not isolated as a temporary or contract lawyer. In our story, to remain realistic, Lawyer B is not so isolated but participates in Employment Unit strategy sessions and works in the MCLA office.

We now see the depth of the simultaneity puzzle. Lawyer B is deemed to represent every client at her large, international law firm. Lawyer B is also deemed to represent every client at MCLA. For conflicts purposes, the two law firms are effectively one.[129] If every new prospective client of MCLA were run through the international law firm's conflict-checking database, and every new prospective client at the law firm, including in its international locations, were run through MCLA's conflict-checking database, that would solve, or at least minimize, the conflict worry. That will not happen, of course. Ignoring for the moment the immense transactional costs of such a

128. It is worth noting that the community-based mission of MCLA invites a suggestion that it should operate with different conflict of interest principles compared to purely private law firms. *See, e.g.*, DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 129 (1988); Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 281, 322–23 (1982) (arguing for a less community-based role for legal services); Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554, 1620 (2017) (reviewing the debate over community-based legal aid as a solution to legal outreach); Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529. 1629–30 (1995); David H. Taylor, *Conflicts of Interest and the Indigent Client: Barring the Door to the Last Lawyer in Town*, 37 ARIZ. L. REV. 577, 579 (1995); Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1129–30 (1990). That interesting suggestion has no bearing on the simultaneity puzzle, however.

129. *See* ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 90-357 (1990) (discussing of counsel relationships and noting that a shared lawyer would "entail complete reciprocal attribution of the disqualifications of all lawyers in each firm"); State Bar of Cal. Comm. on Pro. Responsibility & Conduct, Formal Op. 1993-129 (1993) ("[I]f two or more law firms shared one or more common partners, shareholders or associates[,] . . . they will all be viewed effectively as constituents of one de facto firm for purposes of [the imputation rule] of the California Rules of Professional Conduct.").

dual-conflict check, the processes just described raise ethical issues that may be insurmountable. Neither provider will wish to disclose to the other the names and limited information needed to check for conflicts,[130] and that disclosure likely violates Rule 1.6, given that the two providers are not *really* one seamless law firm.[131]

Of course, the chances of there being any conflict at all between the clients of MCLA and those of the large law firm are extremely small. Regardless, the chances are not zero. Indeed, in the Second Story used as the example for our analysis, we see that Wells Fargo Bank is an opposing party in an MCLA eviction matter and concurrently a client of Lawyer B's law firm on an entirely unrelated and geographically distant matter. So, the puzzle needs a solution.

Analytically, four solutions come to mind, and we might assess each. The first two are easily swept aside. One solution is for the law firm and MCLA to check conflicts each time a new matter comes into either firm. We just rejected that possibility as impractical and likely risking a violation of each firm's confidentiality duties. A second solution is that Lawyer B ceases volunteering at MCLA. We obviously reject that solution for our present purposes and for access-to-justice reasons.[132] The remaining two solutions warrant more serious consideration. The third prospect is that Lawyer B arranges her volunteer work in order to qualify as a temporary or contract lawyer in her work at MCLA. The fourth possible solution is that MCLA employ reliable, "jury-rigged" screening mechanisms to implement a

130. For a discussion of the kinds of information that may permissibly be shared in order to check for conflicts with lateral attorney applicants, see ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 09-455 (2011); Paul R. Tremblay, *Migrating Lawyers and the Ethics of Conflict Checking*, 19 GEO. J. LEGAL ETHICS 489, 500–05 (2006) [hereinafter Tremblay, *Migrating Lawyers*]. *But see* Bussel, *supra* note 12, at 233 n.119 (accepting without discussion a lawyer's disclosure of ongoing client identity to respond to concurrent conflict); Mason & Mesulam, *supra* note 3, at 4–5 (reading Model Rule 1.6(b)(7) as applicable by analogy to concurrent conflict checks).

131. Free sharing of client lists appears to contravene the Model Rules because Rule 1.6 only permits disclosure of client identity to check for conflicts when a lawyer changes firms. *See* MODEL RULES OF PRO. CONDUCT r. 1.6(b)(7) (AM. BAR ASS'N 2020); Tremblay, *Migrating Lawyers*, *supra* note 130, at 506–07 (explaining that, in these situations, the two placements are not a single firm, and the identity of each respective firm's clients is protected by Rule 1.6).

132. The importance of pro bono by law firms to the access-to-justice enterprise is well-accepted. *See, e.g.*, Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83, 83 (2013); Rebecca Nieman, A *Fraction of a Percent: A Call to Legal Service Providers to Increase Assistance to Community Nonprofits Using Biglaw Pro Bono*, 40 U. ARK. LITTLE ROCK L. REV. 355, 368–73 (2018); Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79, 89 (2007).

"functional analysis" of the possible conflicts, taking the kind of chances that we saw firms doing in the past. Examining each of the last two strategies will permit us to consider the role, if any, that client consent might play in our search for a sensible solution.

a. Lawyer B as a temporary lawyer

Contract lawyers or temporary lawyers will not trigger conflict of interest imputation and resulting disqualification risks if the arrangement is structured properly.[133] "Properly" means quite rigid isolation of the contract lawyer from the remaining firm activity. According to the relevant ethics opinions,[134] a temporary lawyer must only work on and know anything about the client matters on which he works. While he may work at the law firm assigning him the work, he must remain isolated at that firm from discussions and materials concerning other client matters.[135] With those policies and procedures in place, any other work he performs for a different firm (operating in similar fashion) will not be imputed to the first law firm for conflicts or disqualification purposes.

Perhaps Lawyer B could offer her services to MCLA as a contract lawyer. If that works, we have discerned a plausible solution to the simultaneity puzzle. But that strategy may not work for two reasons. First, if ethically defensible, it would be so much more valuable for Lawyer B to have a presence in the MCLA office, to attend employment unit strategy meetings, and to be available to aid in the ongoing work of the agency. It is, of course, better than nothing for Lawyer B to accept referrals from MCLA and work on them in isolation, but it is far from ideal.[136]

Furthermore, the contract arrangement may be unsuitable for this setting. Recall that we envisioned the contract and temporary lawyer as lawyers with no home base. Except for the discrete matters on which they worked in isolation, they have no imputed or actual other client commitments. Here, Lawyer B has a very visible home—her law firm. By the process of imputation, she represents Wells

133. *See supra* text accompanying notes 78–96.

134. *See* sources cited *supra* notes 78–96. As noted there, research has uncovered no court decisions addressing disqualification arising from a temporary lawyer arrangement, a fact that appears to support the reasoning of the advisory ethics opinions.

135. DECKELMAN & WINTER, *supra* note 90, § 24.63.

136. In their fictional story of a law firm lawyer volunteering at a local legal aid office, Paul Brest and Linda Hamilton Krieger imagine the lawyer actively participating in case rounds and discussions at the legal services agency. *See* BREST & KRIEGER, *supra* note 8, at 4–5.

Fargo, whether she knows of that matter or not.[137] That asymmetry compared to the usual contract lawyer setting may not be fatal, however. We saw in the of counsel cases that some lawyers with a home base but designated "of counsel" at a different firm were found by courts as not necessarily "associated" as a result of the of counsel label if the of counsel presence was very limited.[138] But little, if any, authority exists where a lawyer has an active practice with imputed representation responsibilities and also serves as a contract lawyer. Therefore, isolating Lawyer B in a rigorous fashion not only serves MCLA's interests poorly, but it may not offer the assurance that MCLA (or the large law firm) desires.

b. Jury-rigged screening as a strategy

The fourth possible solution entails what we might consider a "jury-rigged"[139] strategy, using screening in a way comparable to examples one finds of law firms screening lateral hires without explicit *ex ante* authority.[140] It is a strategy that offers low risk to the clients of the respective firms, even if it is difficult to square with the language of available Model Rules provisions or ethics opinions. Imagine, then, that the two firms (or Lawyer B as the intermediary) agree on something like the following arrangement.

Lawyer B will perform a law firm-based conflict check on any matter she is assigned to work on directly at MCLA. Lawyer B will never accept a case assignment from MCLA without checking to make sure that the case she is working on does not oppose any client of the

137. According to the imputation principle, a lawyer represents every client of her law firm, regardless of any actual knowledge or connection. *See* Robertson, *supra* note 23, at 81.

138. *See, e.g.*, Gray v. Mem'l Med. Ctr., Inc., 855 F. Supp. 377, 378–80 (S.D. Ga. 1994) (finding no conflict of interest where the plaintiff's attorney had extremely limited and sporadic involvement with the defendant firm).

139. That adjectival phrase seems to capture the innovative, does-the-trick approaches outlined here. *See* Karrigan S. Börk, *An Evolutionary Theory of Administrative Law*, 72 SMU L. REV. 81, 98 (2019) (quoting M.B.W. Sinclair, *The Use of Evolution Theory in Law*, 64 U. DET. L. REV. 451, 475 (1987)) (referring to the "kind of jury-rigged adaptation that characterizes evolutionary phenomena"). Some sources employ the alternative phrase "jerry-rigged." *See, e.g.*, Daniel Farber, *Symposium Introduction: Navigating the Intersection of Environmental Law and Disaster Law*, 2011 BYU L. REV. 1783, 1812 (2011).

140. *See, e.g.*, Hughes v. Paine, Webber, Jackson & Curtis, Inc., 565 F. Supp. 663, 671–73 (N.D. Ill. 1983) (upholding screening where no confidential information was obtained by lawyer in question during prior work); INA Underwriters Ins. Co. v. Rubin, 635 F. Supp. 1, 5–6 (E.D. Pa. 1983) (approving screening where lawyer's prior involvement was minimal).

firm, even if unrelated to the work she is performing. If Lawyer B knows (without conducting complete cross-firm conflict checks)[141] that the prospective client is adverse to a client of the firm but not of Lawyer B, she will be screened from any contacts involving that client. If a prospective MCLA client is adverse to a client represented by Lawyer B directly, then MCLA must reject that matter and refer it to a different agency.[142] So, for example, if Lawyer B meets a worker employed by Wells Fargo Bank, and if she happens to know that her firm represents Wells Fargo on any matter anywhere in the world, Lawyer B will decline representation by her. She will also be sure not to discuss that matter with the MCLA lawyer or staff who will take on that client. She will sign a confidentiality agreement committing her not to disclose any information about the Wells Fargo matter she might inadvertently encounter while at the firm.[143] Correspondingly, as her home firm performs its own conflict checks, Lawyer B will be sure to check that the firm does not oppose one of her actual, direct MCLA clients—a remarkably unlikely event, given the differing worlds of BigLaw and community legal aid practice.[144] If, for some

141. This arrangement mimics the process expressly permitted by Model Rule 6.5, involving limited representation, "lawyer-for-the-day" programs. *See* MODEL RULES OF PRO. CONDUCT. r. 6.5 (AM. BAR ASS'N 2020). Under the terms of Rule 6.5, a lawyer's firm's conflicts will not be imputed when the lawyer offers "short-term limited legal services" on a pro bono basis through a program sponsored by a nonprofit or a court, except for those the lawyer knows about. *See also* Rachel Brill & Rochelle Sparko, *Limited Legal Services and Conflicts of Interest: Unbundling in the Public Interest*, 16 GEO. J. LEGAL ETHICS 553, 560–64 (2003) (discussing the effects of Rule 6.5).

142. While most legal services providers have geographic monopolies, it is common for an office covering a different locality to accept a referral when necessary to address a conflict of interest. Also, most communities have access to more than one provider of free legal services, given the presence of those programs funded by the Legal Services Corporation (LSC) and those that have refused to accept LSC funding because of its many federal law restrictions on practice. *See, e.g.*, Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 FORDHAM L. REV. 2187, 2240 (1999) (examining the numerous ethical dilemmas brought on by these restrictions and concluding that more may arise in the future); Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J.L. & PUB. POL'Y 571, 586–90 (2011) (advocating for the elimination of many of the aforementioned restrictions); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 220–26 (2003).

143. Those ethics opinions addressing the permitted screening of nonlawyers and contract lawyers often indicate that the use of confidentiality agreements would be prudent practice to supplement the screens. *See, e.g.*, ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 08-451 (2008).

144. Lawyer B can accomplish this conflict check through one of two, and likely both, avenues. First, Lawyer B likely will report to the BigLaw firm the names of her

reason, a prospective client were to seek the BigLaw firm's assistance with a matter adverse to one of Lawyer B's direct MCLA clients, the firm must reject that matter rather than assign it to a different attorney in the same firm. As with her MCLA presence, Lawyer B will be wise to treat *her own work* as subject to the imputation of Rule 1.10 across placements, even if she does not treat her colleagues' work as effecting the same imputation.

Note how the above "functional analysis" arrangement satisfies the interests, if not the language, of the conflict rules. We just acknowledged that the chances of any conflict arising are minimal. Even if Lawyer B does not recognize Wells Fargo as a client of her firm or (more likely) does not learn that MCLA opposes Wells Fargo on a matter handled by another MCLA lawyer, there is little-to-no risk for the participants at either firm. The BigLaw firm might easily have some Wells Fargo business, and an MCLA tenant could encounter a Wells Fargo post-foreclosure eviction.[145] But if the matters are unrelated (as in the Second Story) and handled by different lawyers, there is no risk whatsoever of confidences being shared. Wells Fargo will also have no legitimate complaint about

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MCLA clients to enter them into the firm database. Like with the screens discussed here, that disclosure may be literally improper under Model Rule 1.6(a) because the fact of representation by MCLA and Lawyer B is "information related to the representation" and therefore cannot be disclosed outside of MCLA. *See* Tremblay, *Migrating Lawyers*, *supra* note 130, at 506. Under the Restatement, though, that disclosure would be proper. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(1)(a) (AM. L. INST. 2000). As an aside, this minor challenge might be overcome if Lawyer B were to ask her MCLA clients for permission to enter their names in the BigLaw firm database. Second, Lawyer B could simply monitor all new prospective client names to flag any that relate to her MCLA work. It is well-accepted that a law firm cannot rely only on its client and opposing party database to check for conflicts. The firm needs to be sure that a lateral hire, or the lateral hire's former firm, did not previously represent the opposing party on a new prospective matter. That information will not appear in a firm's database, so the firm must also poll its lawyers to be sure that a former firm matter gets appropriately caught. *See* Fischer, *supra* note 43, at 199–200.

145. Wells Fargo has been sued repeatedly over the past decade for discriminatory and predatory lending practices leading to excessive foreclosures of properties owned by minority families. *See, e.g.*, Michael Haber, *CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions*, 43 FORDHAM URB. L.J. 295, 342 (2016) (reporting that "nearly one thousand people protested at a Wells Fargo branch, helping a family to avoid foreclosure" in a New York community). Lawsuits against Wells Fargo for unlawful practices involving housing and foreclosure are common. *See, e.g.*, County of Cook v. Wells Fargo & Co., 115 F. Supp. 3d 909 (N.D. Ill. 2015); City of Los Angeles v. Wells Fargo & Co., 22 F. Supp. 3d 1047 (C.D. Cal. 2014); City of Memphis v. Wells Fargo Bank, N.A., No. 09-2857-STA, 2011 WL 1706756 (W.D. Tenn. May 4, 2011); Mayor and City Council of Balt. v. Wells Fargo Bank, N.A., 677 F. Supp. 2d 847 (D. Md. 2010).

divided loyalty in the work done by the BigLaw firm merely because one of its retiring partners happens to volunteer at a program where a colleague lawyer opposes a Wells Fargo eviction. The profession's reputation is hardly sullied by the vaguely connected Wells Fargo representation and opposition. The arrangement works rather well, and all of the possible justifications for imputation have been addressed.

The jury-rigged screening strategy has the acknowledged disadvantage of not having any authority in the Model Rules. By MCLA's not pigeon-holing her into a contract lawyer classification, Lawyer B would likely be deemed to be "associated" with MCLA for purposes of Rule 1.10, which imputes to her the representation responsibilities for all MCLA clients. Lawyer B is without question "associated" with her BigLaw firm, so she represents every client there, whether she knows the client or not. Consequently, the two firms would be treated as one firm for conflicts purposes.[146] It is true that Rule 1.10(a) imputes conflicts when a lawyer "knowingly" represents a client opposed elsewhere in her firm.[147] The jury-rigged strategy just described only calls for screening or refusal of representation when Lawyer B recognizes a conflicting client, so perhaps MCLA might contend that no imputation arises because no lawyer at either firm is "knowingly" engaged in conflicted representation. While our research has uncovered little, if any, direct authority on this question,[148] prudence compels the conclusion that a law firm may not avoid imputation by failing to perform conflict checks, thereby never learning of the otherwise disqualifying conflicts. The duty to perform conflict checking is well-established as an element of a lawyer's fiduciary responsibility and the standard of

146. *See, e.g.*, N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 794 (2006) (emphasis omitted) (opining that when lawyers moonlight to supervise law students in a law school clinic and have access to the clinic's files, "the clinic's entire set of conflicts are imputed to the lawyers' firms, and vice versa").

147. MODEL RULES OF PRO. CONDUCT r. 1.10(a) (AM. BAR ASS'N 2020) (emphasis added) ("While lawyers are associated in a firm, none of them shall *knowingly* represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . . .").

148. For example, the Annotated Model Rules of Professional Conduct explains the working of Rule 1.10(a) and its imputation principles, but aside from quoting the rule with the term "knowingly," the resource says nothing about the meaning of or limitations arising from that adverb. *See* ELLEN J. BENNETT & HELEN W. GUNNARSSON, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT r. 1.10 (9th ed. 2019). *But see In re* Wenz, 87 P.3d 376, 380 (Mont. 2004) (holding that, where a lawyer was disciplined for conflict of interest, lack of knowledge arising from lack of investigation was not a valid defense).

care.[149] Willful blindness is unlikely to serve as a proper defense, at least under the Rules.[150]

If the jury-rigged or functional strategy is not expressly permitted by the Rules of Professional Conduct, the question inevitably arises regarding the ethical stance of lawyers who choose to develop a pragmatic approach to conflict prevention notwithstanding the language of the governing authorities. We encounter that question in Part IV below. Meanwhile, before we turn to the separable law student puzzle, we must address the nagging question of the role of client consent in the firms' strategy development.

c. The impracticality of consent

The simultaneity puzzle as described here would be solved elegantly with consent of the affected clients. With very limited exceptions, none of which has any relevance here,[151] an otherwise disqualifying conflict will not be problematic if the affected clients provide intelligent, informed consent.[152] Especially in light of the prominent theme of the above discussion that the risks of any harm generated by Lawyer B's volunteering at MCLA is miniscule, the chances of obtaining consent of the affected clients would seem to be quite favorable. So why is consent not the best answer to the puzzle?

Consent is not an answer to this version of the simultaneity puzzle, primarily because the affected parties will most often be unknown. The jury-rigged strategy calls for Lawyer B not to check globally and successively to see if the clients whom she is deemed to represent (or to have represented in the past) at her law firm might be opposing parties (or were previously opposing parties) to an MCLA

149. *See, e.g.*, Healthnet, Inc. v. Health Net, Inc., 289 F. Supp. 2d 755, 763 (S.D. W. Va. 2003) (contending that "a thorough conflicts check would have uncovered this problem" and holding the entire firm disqualified); Bank Brussells Lambert v. Credit Lyonnais (Suisse), S.A., 220 F. Supp. 2d 283, 287–88 (S.D.N.Y. 2002) ("[T]he purpose of the conflict review . . . is to maintain the fiduciary duties of loyalty and confidentiality owed to the client."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. g (AM. L. INST. 2000) (describing the duty to perform conflict checks).

150. *See* Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1, 48 n.288 (2010) (arguing that lawyers cannot fail to check conflicts and then claim lack of knowledge); *see also* Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 189 (2011).

151. Even with client consent, some conflicts are nonwaivable if the lawyer could not offer both clients competent legal services or if one client will oppose another client in the same litigation. *See* BENNETT & GUNNARSSON, *supra* note 148, r. 1.7.

152. MODEL RULES OF PRO. CONDUCT r. 1.7(b)(4) cmt. 18–20 (AM. BAR ASS'N 2020).

client. It is no answer to suggest that any such affected clients should be solicited for their informed consent because the strategy rejected cross-firm conflict checks, thus leaving any deemed, imputed conflicts undetected and ignored.

In the settings where Lawyer B has an actual, recognized conflict, the strategy calls for her to reject the proffered assignment or for MCLA to refer the prospective client elsewhere. Of course, Lawyer B might seek instead to obtain informed consent from her firm client and the MCLA client in that rare setting, but, as a practical matter, the more likely solution is simply not to accept representation.

That leaves us with the remaining situation: where Lawyer B knows of an unrelated and imputed conflict involving a different lawyer at her home firm and a different MCLA lawyer. In that situation, the suggested strategy recommends screening Lawyer B from all contact with the MCLA side of that dispute. The Wells Fargo story is exemplary of this kind of situation, as a different MCLA lawyer opposes Wells Fargo and a different lawyer at Lawyer B's firm represents Wells Fargo on an unrelated matter. Lawyer B could request that her law firm colleague approach Wells Fargo, represented far away on an unrelated matter, to ask its general counsel for consent for MCLA to continue to represent the tenant in the housing matter. At the same time, the MCLA housing lawyer could ask his client for permission to continue to represent him notwithstanding Lawyer B's presence in the firm and her colleague's distanced interaction with the bank. We can predict the result of the latter conversation. The former, by contract, is much more worrisome. Wells Fargo has every incentive, once alerted, to insist that MCLA stop its representation of the tenant disputing the bank's actions.

Because Wells Fargo is not harmed at all by the imputed conflict but has strategic incentives to exploit the rules, Lawyer B and MCLA will not ask for Wells Fargo's consent. That strategy has some supportive precedent. Recall that courts around the country have on many occasions approved proactive screens by law firms of technically tainted lawyers even where no rule of professional conduct authorized such a screen.[153] We know of those cases because the opposing lawyers sought to disqualify the screening firm, implying with considerable confidence that the opposing lawyers and their clients never gave consent to the screening arrangement.[154] In virtually all of those settings, the screened lawyer had worked on *related matters*, so the

153. *See* cases cited *supra* notes 41, 56–58.

154. *See, e.g.*, *In re* Cendant Corp. Sec. Litig., 124 F. Supp. 2d 235, 238 (D.N.J. 2000) (discussing situation where one client consented to dual representation, but the other client did not).

risks to the party seeking disqualification were not illusory.[155] Here, the risk is nonexistent.

For these reasons, the pragmatic, functional analysis of the conflict situation in the Fourth Story would conclude that MCLA would screen Lawyer B whenever there is a hint of an imputed conflict and would not seek the consent of the theoretically affected clients to the screening arrangement. For the same considerations just outlined, MCLA and Lawyer B would not even offer notification (without requesting consent) to the theoretically affected clients.[156]

Below, we encounter a more focused analysis of the jury-rigged strategy, including its ethical defensibility. But before that discussion, let us consider the story of a moonlighting law student.

B. Simultaneity with a Law Student

Our Third Story above[157] imagined a very common scenario—a third-year law student, Student X at Essex University Law School, working as an intern at a small law firm in Andover during a semester when she is participating in her law school's Entrepreneurship and Innovation Clinic. The questions we explore here involve whether Student X's status as a nonlawyer makes any difference in our analysis of the simultaneity puzzle. This topic has received attention in the past within the clinical community, but its most serious attention occurred a couple of decades ago, before some important changes to the Model Rules.[158] It behooves us to examine the questions in light of the current conflict of interest doctrines.

1. Law Students as Nonlawyers Generically

To begin with, the most pertinent observation is that for conflicts and imputation purposes the Model Rules recognize, and have for many years, that nonlawyers in general, and law students in particular, ought to be treated differently for imputation purposes.

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155. *See, e.g.*, UMG Recordings, Inc. v. MySpace, Inc., 526 F. Supp. 2d. 1046, 1063–64 (N.D. Cal. 2007); Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418, 422 (D. Del. 1986).

156. The Model Rules arrangements permitting active screening require notice to, but not consent of, the affected former clients. *See* MODEL RULES OF PRO. CONDUCT r. 1.10(a)(2)(ii), 1.0(k) cmt. 9 (AM. BAR ASS'N 2020).

157. *See supra* text accompanying notes 10–11.

158. *See* Joy & Kuehn, *supra* note 60, at 533–42 (discussing imputed conflicts involving law students in clinics and the options for screening in these scenarios); James E. Moliterno, *In-House Live-Client Clinical Programs: Some Ethical Issues*, 67 FORDHAM L. REV. 2377, 2393–94 (1999) (same).

The underlying reason is that law students, like clerical staff and paralegals, are not "associated with" a law firm in the way that lawyers are, largely because of their restricted access to information and their limited engagement in the life of the law firm. Therefore, Model Rule 1.10, in Comment 4, describes the differential treatment:

> The [imputation] rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, *work that the person did as a law student.* Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect.[159]

The ABA added Comment 4 to the Model Rules in 2002, along with other amendments to Rule 1.10.[160] That comment language confirmed and made more explicit what the ABA Committee on Ethics and Professional Responsibility had concluded in Informal Opinion 88-1526.[161] The 1988 Informal Opinion recognized that lawyers (at that time) could not be screened when moving to a new law firm with information about an ongoing matter, but it concluded that:

> [A] functional analysis . . . is more appropriate than would be a rule requiring automatic disqualification once the nonlawyer is shown to have acquired information in the former employment relating to the representation of the opponent. . . . It is important that nonlawyer employees have as much mobility in

159. MODEL RULES OF PRO. CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2020) (emphasis added).

160. *See* AM. BAR ASS'N CTR. FOR PRO. RESP., A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, at 260–67 (Art Garwin ed., 2013). The other two changes were to remove "personal interests" conflicts from the general imputation rule and add paragraph (d) to clarify that Rule 1.11, and not Rule 1.10, applies to former government lawyers. *Id.*

161. ABA Comm. on Ethics & Pro. Responsibility, Informal Op. 88-1526 (1988).

> employment opportunity as possible consistent with the protection of clients' interests.[162]

For purposes of addressing the simultaneity puzzle with law students, two observations arise here. One is that Informal Opinion 88-1526 serves as an elegant illustration of the functional approach to conflicts of interest, given its approval of a screening protocol without any explicit authority from the Model Rules. The second is to note that, despite the Model Rules' adoption in 2002 of clear language treating nonlawyers differently from lawyers for imputation purposes, common law has not followed the ABA consistently.[163] A leading case on the nonlawyer imputation question, *Hodge v. URFA-Sexton, LP*,[164] summarized the state of the law in 2014, which has not changed as of 2021[165]:

> There is a split of authority among the courts on this issue. The minority approach . . . is to treat nonlawyers the same way we treat lawyers. Under this approach, when a nonlawyer moves to another firm to work for opposing counsel, the nonlawyer's conflict of interest is imputed to the rest of the firm, thereby disqualifying opposing counsel. . . . After reviewing both approaches, we join today with "the majority of professional legal ethics commentators, ethics tribunals, and courts[, which] have concluded that nonlawyer screening is a permissible method to protect confidences held by nonlawyer employees who change employment."[166]

For the proceeding assessment of the law student strategy, we will accept as the basis of our analysis the authority of Model Rule 1.10's Comment 4, which also, as we have just seen, represents the majority view but not the unanimous view. In those jurisdictions representing

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162. *Id.*

163. *See* GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 15.16 (4th ed. Supp. 2016) (citing cases where imputation rules have been stringently applied to nonlawyers); Cecile C. Edwards, *Law Firm Disqualification and Nonlawyer Employees: A Proposal for a Consistent Analysis*, 26 MISS. COLL. L. REV. 163, 168–73 (2006).

164. 758 S.E.2d 314 (Ga. 2014).

165. *Id.*; *see also* HAZARD ET AL., *supra* note 163, § 15.16 (summarizing the current state of the law on the nonlawyer imputation question).

166. *Hodge*, 758 S.E.2d at 319 (alteration in original) (internal citations omitted) (quoting Leibowitz v. Eighth Jud. Dist. Ct. of Nev. *ex rel.* Cnty. of Clark, 78 P.3d 515, 520 (Nev. 2003)).

the minority perspective, the following considerations will not easily apply.

2. Nonlawyer Imputation in Concurrent Conflict Settings

Substantively, and purposely, Model Rule 1.10's Comment 4 applies most sensibly to imputed disqualification because of a nonlawyer's *former* employment arrangement.[167] Read literally, it applies to concurrent conflicts as well, but it is not at all apparent that such a reading was intended. Consider, say, a legal secretary. The secretary used to work for the defendant's law firm, and now works for the plaintiff's law firm. Her previous position was such that she might have learned relevant information about the ongoing lawsuit while there. Comment 4 states that the plaintiff's law firm will not be disqualified by reason of the secretary's being imputed to have learned information earlier and to be sharing it now but only if the current employer screens her effectively.[168] The Comment expressly arrives at that same result when considering a current lawyer who, while a law student, worked at the opposing party's law firm.[169] In 2002, the Comment's language was a helpful gloss on a rule that otherwise would not have permitted screening.[170] Today, Comment 4's language simply restates the process for a full-fledged lawyer who used to work at the adversary's law firm.[171] No imputation and no disqualification will occur if the lawyer is screened.[172]

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167. All of the cases reviewed by Edwards, *supra* note 163, and by the *Hodge* court involved lateral moves by nonlawyers with potential access to a former client's information. *See* 758 S.E.2d at 319. None of those authorities addressed whether the lack of imputation would apply to a concurrent conflict. *See also* HAZARD ET AL., *supra* note 163, § 15.16 (discussing only former employment settings).

168. *See, e.g.*, Hayes v. Cent. States Orthopedic Specialists, Inc., 51 P.3d 562, 563–65 (Okla. 2002) (reversing order disqualifying a firm that had screened a secretary who had moved from an opposing party's firm).

169. MODEL RULES OF PRO. CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2020) ("Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student.").

170. *Id.*; *see* David A. Green, *Balancing Ethical Concerns Against Liberal Discovery: The Case of Rule 4.2 and the Problem of Loophole Lawyering*, 8 GEO. J. LEGAL ETHICS 283, 284 n.6 (1995) ("Comments [to the Model Rules] are not binding, but provide persuasive authority."). The ABA's Standing Committee on Ethics and Professional Responsibility, in its published ethics opinions, relies on comments regularly in offering guidance to lawyers about ethical practice standards. *See, e.g.*, ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 08-451 (2008) (advising on outsourcing of legal services).

171. MODEL RULES OF PRO. CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2020).

172. *Id.* r. 1.10(a); *see supra* note 40 and accompanying text.

But what about concurrent conflicts? Comment 4 states that "paragraph (a) [of Rule 1.10] . . . does not prohibit representation by others in the law firm where *the person prohibited from involvement in a matter* is a nonlawyer[.]"[173] Rule 1.10(a) applies to disqualifications triggered by a conflict of interest under either Rule 1.7 or 1.9.[174] Therefore, it appears that concurrent conflicts triggered by a nonlawyer, including a law student, may not be disqualifying where the law firm has established appropriate screening. A confidentiality agreement accompanying the screening would, no doubt, help in any later challenge.

Because Comment 4 only offers as an example where screening would be allowed based on a lawyer's previous experience as a law student, and therefore in the context of assistance to a *former* client, the fairness of a reading of that Comment to include *concurrent* conflicts deserves our attention. No reported case or ethics opinion has stated directly that a law firm may screen a law student to prevent imputation in a concurrent client context.[175] But Comment 4 treats a law student as one example of a nonlawyer worker in a law firm.[176] And some authority, albeit perhaps not as crystal clear as one would hope, exists supporting the notion that nonlawyers may be screened to avoid imputed disqualification in concurrent matters. The most closely applicable support appears in the context of lawyers sharing office space.

When multiple lawyers share an office suite while operating their own separate practices, the lawyers will not be treated as constituting a firm or an association of lawyers, which would trigger imputation under Rule 1.10(a).[177] If those lawyers do not establish effective protocols to ensure that their practices are indeed separate or if their public presentation implies that the lawyers are associated, then they risk a finding that the lawyers are "associated" for purposes of Rule

173. MODEL RULES OF PRO. CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2020) (emphasis added).

174. *Id.* r. 1.10(a).

175. *See* Edwards, *supra* note 163, at 163–64, 168, 172, 176–78 (discussing only instances where the nonlawyer changed positions); *cf.* Daniel Haley, Comment, *Conflicts of Interest for Former Law Firm Clerks Turned Lawyers*, 7 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 376, 377–79, 381, 386–87 (2017) (reviewing the conflict implications of law student work and citing no instances of concurrent conflict disputes or disqualifications).

176. MODEL RULES OF PRO. CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2020).

177. *See, e.g.*, ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 310 (1963); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. e (AM. L. INST. 2000).

1.10(a).[178] Among the most important protocols that office-sharing lawyers must establish are those that are effective in protecting the confidences of the respective lawyers' clients.[179] It is fair to say that the most significant risk office-sharing lawyers face is that of leaked confidences or the possibility of such leakage.[180] While the loyalty concern is important, so that lawyers who in fact practice separately but present to the public as though they are a firm will be treated as

178. *See, e.g.*, Fla. Bar v. Hastings, 523 So. 2d 571, 572 (Fla. 1988) (explaining that an attorney "offered himself out to the public as having a partnership with [another attorney]" because he practiced under a firm name that included both of their last names); Attorney Grievance Comm'n of Md. v. Crowther, 453 A.2d 140, 141 (Md. 1982) ("The correspondence between [the attorney] and [his] client was on the letterhead of 'Merriman, Crowther & Merriman', thereby leading his clients to believe that the Respondent was in a partnership. . . . [E]veryone involved was under the assumption that Mr. Crowther was an associate."); *In re* Laubenheimer, 335 N.W.2d 624, 625 (Wis. 1983) ("[A]dvertisements, stationery letterhead and office signs identified the 'firm' as 'Laubenheimer and Campbell.' The Board alleged this designation was misleading, as it represented to the public that [Laubenheimer] was a partner . . . ."); N.C. State Bar Ass'n Comm. on Ethics & Pro. Responsibility, Formal Op. 116 (1991) ("The partnership agreement in question is largely concerned with shared office expenses. . . . If . . . the arrangement is not a bona fide partnership, it would be unethical for the attorneys involved to continue to represent that they are partners."); *see also* D.C. Bar Ass'n Comm. on Ethics & Pro. Responsibility, Ethics Op. 303 (2001) (providing guidance for attorneys sharing office space to avoid appearing associated); George C. Rockas, *Lawyers for Hire and Associations of Lawyers: Arrangements That Are Changing the Way Law Is Practiced*, 40 BOS. BAR J. 8, 18 (1996).

179. *See In re* Sexson, 613 N.E.2d 841, 842–43 (Ind. 1993) ("Attorney file cabinets could be observed by the clients of the other attorneys from a common hallway and conversations in the individual offices could be heard [from the] hallway."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. e (AM. L. INST. 2000); R.I. Bar Ass'n Ethics Advisory Panel, Op. 91-43 (1991) ("The Panel is of the opinion that [the attorney's] association with [another attorney] creates an appearance of impropriety because the attorneys share administrative staff, secretarial services, and have 'access' to each other's files."); N.Y. Cty. Lawyers' Ass'n. Comm. on Pro. Ethics, Formal Op. 680 (1990) ("[Lawyers] may be treated as if they [are] partners for some purposes . . . if their office sharing arrangements give them access to each other's files and, thus, to the confidences and secrets of each other's clients."); *cf. In re* Custody of a Minor, 432 N.E.2d 546, 555 (Mass. App. Ct. 1982) (holding no disqualification of office-sharing lawyer where files were protected and no confidences were available), *vacated*, 436 N.E.2d 172 (Mass. App. Ct. 1982).

180. *See* Thomas D. Morgan, *Conflicts of Interest and the New Forms of Professional Associations*, 39 S. TEX. L. REV. 215, 222–23, 237–38 (1998) (stating expectations of confidentiality are critical in determining what constitutes a firm for imputation purposes).

a firm,[181] that worry is substantively far less than the concern that an adversary may have access to a client's confidential information.

The critical question for the simultaneity puzzle analysis is how to treat shared staff. Of course, the most common reason for office sharing is economic. It can be prohibitively expensive to practice law, especially as a solo practitioner, and office-sharing can make one's practice palpably more affordable.[182] As the ethics committee of the District of Columbia Bar explained, "Through such sharing arrangements, an individual attorney's overhead expenses for *receptionists, support staff*, meeting rooms, copy and fax machines, and the like can be proportionately reduced . . . ."[183] The D.C. Bar opinion confirmed that "nothing in the rules of professional conduct prohibits attorneys from sharing office space, personnel, equipment, or expenses."[184] The Restatement of the Law Governing Lawyers agrees, noting that a common attribute of office-sharing is shared personnel.[185]

The authorities that confirm the acceptability of office-sharing acknowledge that a proper sharing arrangement will leave the separate lawyers as not associated with one another for purposes of conflicts of interest.[186] Given that office-sharing typically includes shared staff (such as a receptionist and perhaps a secretary) and given that the authorities agree that a well-managed office sharing arrangement will avoid imputation, the conclusion is clear that shared staff, properly screened or trained, will not defeat the goal of establishing separate firms.

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181. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. e (AM. L. INST. 2000); D.C. Bar Ass'n Comm. on Ethics & Pro. Responsibility, Ethics Op. 247 (1994) (holding lawyer subject to imputed disqualification where office sharer was listed as "of counsel" to office-mate); R.I. Bar Ass'n Ethics Advisory Panel, Op. 93-66 (1993) (stating there is imputed disqualification where office-sharing lawyers list themselves as "Law Offices" followed by "An Association of Independent Attorneys"); Donald R. Lundberg, *A Firm by Any Other Name Is Just as Conflicted: Quasi-Law Firms and Imputed Conflicts of Interest*, 53 RES GESTAE 36, 36 (2009) (discussing whether lawyers constitute a firm should depend upon reasonable public perception rather than internal financial arrangements).

182. *See* Deane Beth Brown, *From Office Sharing to Letterhead: The Ethics of Holding Yourself Out to the Public*, 89 ILL. BAR J. 369, 369–71 (2001) (discussing a situation where attorneys shared expenses but not profits).

183. D.C. Bar Ass'n Comm. on Ethics & Pro. Responsibility, Ethics Op. 303 (2001) (emphasis added).

184. *Id.* (stating that "other jurisdictions have recognized" this reality).

185. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. e (AM. L. INST. 2000) (emphasis added) ("When lawyers share office space, they typically share some common costs such as rent, library, and *office salaries*, but not income from work on cases.").

186. *Id.*; ABA Comm. on Ethics & Pro. Responsibility, Informal Op. 543 (1981).

But here is where the authorities muddy the waters for our analysis. The collective authorities agree that a shared receptionist, a staff member who answers the telephone and greets visitors (including, of course, clients), is proper.[187] The arrangements where the shared receptionist fails the test are those where the receptionist treats the sharing lawyers as working together.[188] Presumably a shared receptionist will learn information about the separate lawyers' clients, information otherwise protected by Rule 1.6,[189] but as long as the arrangement ensures that the receptionist will not share any client information with the other lawyers not representing the client, no imputation will arise.[190] The assurance most likely would require some version of a confidentiality agreement.[191]

The language about "shared staff" would also include a secretary, and some authorities have endorsed shared lawyers using a common secretary, even though that individual would certainly learn much more delicate information than a receptionist.[192] Those examples

187. The authorities here tend to be state bar ethics opinions. *See, e.g.*, Ind. State Bar Ass'n Legal Ethics Comm., Unpublished Op. U3 (1991) (announcing attorneys may share a common receptionist who answers the telephone by saying "law offices" "so long as [the attorneys] obtain consent from their respective clients in matters involving a conflict of interest"); Pa. Bar Ass'n Comm. on Legal Ethics & Pro. Responsibility, Ethics Op. 88-55 (1988) (announcing that attorneys sharing a common receptionist must institute procedures to ensure that the receptionist will not divulge any client secrets from one attorney to another).

188. *See, e.g.*, D.C. Bar Ass'n Comm. on Ethics & Pro. Responsibility, Ethics Op. 303 (2001) (answering the telephone with "[l]aw [o]ffices of A, B, and C" would be improper); *see also* La. State Bar Ass'n Rules of Pro. Conduct Comm., Pub. Op. 07-RPCC-013 (2007); Supreme Court of Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 95-1 (1995); Conn. Bar Ass'n Comm. on Pro. Ethics, Informal Op. 89-23 (1989); R.I. Bar Ass'n Ethics Advisory Panel, Op. 88-5 (1988); State Bar of Mich., Informal Op. CI-1045 (1984); Ann E. Thar, *Don't Be Sued for Another Attorney's Malpractice*, 83 ILL. BAR J. 199, 200 (1995) (advising that if common telephone number is used by office sharers, receptionist should answer telephone with a "generic" greeting such as "law offices").

189. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2020) (describing the protection of "information relating to the representation"); *see also* Joy & Kuehn, *supra* note 60, at 534 n.150 (canvassing the authority).

190. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. f (AM. L. INST. 2000) ("[N]onlawyers have an independent duty as agents to protect confidential information, and firms have a duty to take steps designed to assure that the nonlawyers do so[.]").

191. *See id.* (implying firms should use confidentiality agreements by stating "firms have a duty to take steps designed to assure that the nonlawyers [protect confidential client information]").

192. *See, e.g.*, United States v. Badalamente, 507 F.2d 12, 21 (2d Cir. 1974); Anwar v. United States, 648 F. Supp. 820, 827 (N.D.N.Y. 1986) (explaining that there must

notwithstanding, commentators urge against using a common secretary. The ABA/BNA Manual on Professional Conduct states bluntly, "Although it is generally acknowledged that office-sharers may use a common receptionist, ethics committees strongly advise that the lawyers not share secretaries or other support personnel who have access to sensitive or privileged materials."[193] A review of the underlying authority shows, however, that the message here is more nuanced than that expressed by the Manual's authors. The concern to be addressed is not secretaries having access to sensitive information but ensuring that such an employee not have access to disqualifying information. That implies effective screening.

An apt example of such an opinion is that of the State Bar of Oregon addressing shared offices with directly conflicting representations.[194] The opinion agrees that a properly separated shared office arrangement would not prohibit two lawyers from representing two adverse parties in one lawsuit.[195] But, if the two lawyers shared a secretary with access to the two adverse clients' information, that fact would be disqualifying.[196] Implicit in the opinion's analysis is that if that common secretary were screened from

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be something more significant than a mere showing that the lawyers "worked in close proximity" or "shared an office and perhaps a secretary" to support a conflict of interest claim), *aff'd*, 823 F.2d 544 (2d Cir. 1987); Dodson v. Floyd, 529 F. Supp. 1056, 1062, 1065 (N.D. Ga. 1981) (holding that disqualification is not imputed under DR 5-105(D) with shared office space, secretary, and expenses); *In re* Recker, 902 N.E.2d 225, 226, 228–29 (Ind. 2009) ("One of the secretaries who served as the office manager kept all public defender files in a central location and allowed files to be checked out only to attorneys who had entered an appearance in that particular case.").

193. Or. State Bar Ass'n Comm. on Legal Ethics, Formal Op. 2005-50 (2005) (rev. 2014); R.I. Bar Ass'n Ethics Advisory Panel, Op. 93-99 (1994); Utah State Bar Ass'n Ethics Advisory Op. Comm., Op. 125 (1994); Lawyers' Manual on Pro. Conduct (ABA/BNA), 91:601 Sharing Office Space, § 20.30.30 (2020) (citing Ind. State Bar Ass'n Legal Ethics Comm., Unpublished Op. U4 (1990)); *see also* State Bar of Mich., Informal Ethics Op. CI-1184 (1988) (explaining that a lawyer who shares offices and expenses but not secretarial help or confidential materials may represent client who has interest adverse to office-mate's client).

194. Or. State Bar Ass'n Comm. on Legal Ethics, Formal Op. 2005-50 (2005) (rev. 2014). In 2005, the Board of Governors of the Oregon State Bar reissued 175 opinions from previous years, updated with reference to the Oregon Rules of Professional Conduct, numbered as 2005-1 through 2005-175. *Find an Ethics Opinion*, OR. STATE BAR ASS'N, https://www.osbar.org/ethics/ethicsops.html (last visited Oct. 19, 2021). Op. 2005-50 represents an earlier opinion of unknown origin. It was later revised in 2014. Or. State Bar Ass'n Comm. on Legal Ethics, Formal Op. 2005-50 (2005) (rev. 2014).

195. Or. State Bar Ass'n Comm. on Legal Ethics, Formal Op. 2005-50 (2005) (rev. 2014).

196. *Id.*

one of the two client matters, the representations would be acceptable.[197]

The Rhode Island Bar Ethics Opinion cited by the Manual is equally open to a more liberal interpretation.[198] In that Opinion, a lawyer describes an office-sharing arrangement with four other attorneys, sharing, among other overhead, telephone lines and "secretarial services."[199] The state bar committee, knowing that the lawyers share some personnel serving in the role of legal secretary, declines to determine whether the lawyers may accept conflicting representations because the committee cannot conclude on the facts before it whether the arrangement is a firm or not. If it qualifies as a firm, the conflicted engagements will be forbidden; if not, the conflicted arrangements would be acceptable.[200] The implication from that Opinion is actually contrary to the assertion of the Manual—the presence of a common secretary does not require imputation.[201]

Here's the best read of the authority regarding nonlawyers in law firms for imputation purposes in majority jurisdictions (which follow the Model Rules' guidance)[202] and for the minority jurisdictions that permit lawyer screening consistent with Model Rule 1.10(a)(2).[203] For former client conflicts, nonlawyers will be treated as lawyers would

197. *See id.* (explaining that the problem arises from "a secretary or other employee who is in possession of the confidences or secrets of both Lawyer A's clients and Lawyer B's clients").

198. R.I. Bar Ass'n Ethics Advisory Panel, Op. 93-99 (1994) ("[T]he Panel is unable to determine whether the attorneys constitute a law firm.").

199. *Id.*

200. *Id.*

201. *See* Lawyers' Manual on Pro. Conduct (ABA/BNA), 91:601 Sharing Office Space, § 20.30.30 (2020). I will acknowledge a possible, if strained, reading of the Rhode Island Ethics Opinion that would support, rather than undercut, the Manual's description. The inquiring lawyer in Op. 93-99 reports sharing "secretarial services" and not necessarily one secretary at any given time. R.I. Bar Ass'n Ethics Advisory Panel, Op. 93-99 (1994). Perhaps sharing a service means that one service provides secretarial help through different people to the independent lawyers, such that no one person has access to the papers and information of more than one lawyer. Given the typical operation of a suite of offices shared by lawyers, that arrangement seems remarkably unlikely. I read Op. 93-99 as if the lawyers share a secretary or two.

202. *See supra* note 39 and accompanying text (reporting the majority and minority approaches to lateral lawyer imputation and screening).

203. The majority/minority distinction addressed by *Hodge v. URFA-Sexton, LP* only has relevance for former client work in those jurisdictions that do not allow lawyer screening to preempt otherwise disqualifying former client conflicts. 758 S.E.2d 314, 319 (Ga. 2014). The minority jurisdictions identified in *Hodge* did not accept screening for nonlawyers if screening was not permitted for lawyers. *Id.* For minority jurisdictions with Model Rule 1.10(a)(2) in place, there would be no need for a separate nonlawyer treatment. MODEL RULES OF PRO. CONDUCT r. 1.10(a)(2) (AM. BAR ASS'N 2020).

be. That is, if a nonlawyer formerly worked with or on behalf of an adverse party on a matter that is substantially related to the new matter coming into the law firm, the nonlawyer will require screening, just as any lawyer would.[204] That screen will be the limited, single-purpose screen contemplated by Rule 1.10(a)(2).

For concurrent clients, Comment 4 to Rule 1.10 appears to authorize the nonlawyer to be screened if he would otherwise serve as a disqualifying agent. Therefore, if a law student interns for two law offices at the same time, and those law offices directly oppose one another or have clients who are adverse on unrelated matters, the student's presence at both firms is not automatically disqualifying.[205] He may be screened in such a way that he will be unable to share confidences, intentionally or inadvertently, between the two work settings. Part C below describes in greater detail how such a screen might operate. But there is no reason to believe that the screen here is any different from how it would operate with former clients. It will also be the limited, single-purpose screen and not a comprehensive, firm-wide screen applicable to contract and temporary lawyers.

Before we review the screening logistics for Student X, we have one more important consideration to dispose of: whether the fact that a student has been designated by the state's courts as a certified law student makes any difference to this "nonlawyer" analysis. The next Subsection examines that question.

3. The Imputation Implications of Being a Certified Law Student

If the above analysis is sound, then Student Z's working two part-time intern jobs at separate small law firms will not trigger disqualification if the firms happen to represent adverse parties in unrelated matters (to begin with the easy case). For prophylactic and optics reasons, Student Z will be screened, even though no confidential information is at risk. The same should be true if the matters were related (to move to the less easy case). Imagine that Bellow sues López on a breach of contract claim for failing to pay for

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204. *See* MODEL RULES OF PRO. CONDUCT r. 1.10(a)(2) cmt. 4 (AM. BAR ASS'N 2020). As noted above, for former client conflicts, Comment 4 is superfluous, having been written before the lawyer screening provision under Rule 1.10(a)(2) was added to the rule.

205. For a seemingly contrary position, see Alexis Anderson et al., *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*, 10 CLINICAL L. REV. 473, 511–12 (2004) (treating a law student's commitments as imputed to all members the law firm). That article, however, expressly commits in its introduction to treat externship law students as lawyers for its ethical analysis. *Id.* at 478.

a sailboat, and Moulton represents López to defend that lawsuit. Student Z's presence in both the Bellow and the Moulton law firms does not give either party the right to seek disqualification of the other firm based on her dual commitments. Here, also, and more understandably, Student Z will be screened from any participation in or access to information about either side of the lawsuit.[206] Both of these results are justified by the fact that Student Z is a nonlawyer with less control within the firm and less access to information generally.[207] And, for purposes of the following analysis, we understand that if Student Z was instead Lawyer L, no screening would be permitted in either of those scenarios because the conflict is concurrent and not successive.[208]

The question that remains is whether a student who is certified to practice law in a jurisdiction should be treated as a nonlawyer, like Student Z, or a lawyer, like Lawyer L.[209] Every state in the country, along with many state and federal agencies,[210] certifies law students who meet certain criteria to assume the role of counsel despite not having passed the bar or obtained a proper, formal license.[211] Once certified through a student practice rule, the law students assume the role of counsel with most, and sometimes all, of the rights and responsibilities of a licensed lawyer.[212] Those courts, ethics opinions, and commentators that have addressed the issue have concluded, and sensibly so, that a certified law student is subject to the same ethical responsibilities as a licensed attorney.[213]

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206. This also results from the straightforward reading of Comment 4 to Rule 1.10. MODEL RULES OF PRO. CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2020).

207. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 (AM. L. INST. 2000); Haley, *supra* note 175, at 394–95.

208. *See* discussion *supra* notes 58, 60–63 (describing the absence of screening availability for conflicts generated by Rule 1.7).

209. This question is addressed by Peter Joy and Robert Kuehn. *See* Joy & Kuehn, *supra* note 60, at 534–35.

210. *See, e.g.*, 8 C.F.R. § 292.1(a)(2)(ii)–(iv) (2021); 38 C.F.R § 14.629(c)(3) (2021); *Law School Clinic Certification Program*, U.S. PAT. & TRADEMARK OFF. https://www.uspto.gov/learning-and-resources/ip-policy/public-information-about-practitioners/law-school-clinic-1 (last visited Aug. 1, 2021).

211. *See generally* Wallace J. Mlyniec & Haley D. Etchison, *Conceptualizing Student Practice for the 21st Century: Educational and Ethical Considerations in Modernizing the District of Columbia Student Practice Rules*, 28 GEO. J. LEGAL ETHICS 207, 210–13 (2015) (reviewing the history of student practice rules).

212. Teresa Biviano, *Practical Lawyering: Intervention in Law School Curriculum Requirements to Prepare New Lawyers for Ethically Competent Practice*, 30 GEO. J. LEGAL ETHICS 619, 624 (2017).

213. *See In re* Hatcher, 150 F.3d 631, 636 (7th Cir. 1998) (stating a certified law student is equivalent to a lawyer for purposes of a recusal statute); Ayyad v. Gonzales,

Let us then return to the Third Story, involving Student X at EULS. Student X is certified to practice in her jurisdiction.[214] She is, in the setting of EULS and her clinic, acting as a lawyer. In her internship work at the private law firm, however, she is not acting as a lawyer. Her student practice certification will only apply to her clinic work.[215] If her law firm supervising attorney asked her to cover a court appearance on her own, she would not be able to do so; she would be engaged in the unauthorized practice of law.[216] In her work at the law firm, then, she is a nonlawyer as understood by Comment 4 to Rule 1.10.

Let us attempt to understand how this juxtaposition of lawyer and nonlawyer roles would play out in Student X's work life. Recall the development in our Third Story:

> Later in Student X's clinical semester, the Andover law firm where she interns accepted the representation of Paul Ricoeur to assist him in forming a limited liability company with two other founders. Student X did no work on the Ricoeur matter at the Andover firm and knew nothing about it. At the same time, the Civil Rights and Litigation Clinic agreed to represent Ellen Berger, the spouse of Paul Ricoeur, to protect her from Ricoeur's domestic violence. Berger's student has begun to research the availability of a restraining

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No. 05-cv-02342-WYD-MJW, 2008 WL 203420, at *6 (D. Colo. Jan. 17, 2008) (citing *In re Hatcher*, 150 F.3d at 636) ("[W]here there is a regulation permitting law students to serve as counsel, they act as a lawyer and bear the same ethical responsibilities towards their clients as a lawyer would."); Conn. Bar Ass'n Comm. on Pro. Ethics, Informal Op. 97-10 (1997) (explaining that a law clinic student is considered a lawyer for purposes of conflict of interest considerations); Mass. Bar Ass'n Comm. on Pro. Ethics, Op. No. 80-1 (1980) (stating that a clinic student representing clients is subject to state's code of professional responsibility); Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV. 815, 832 (2004) ("[M]ost jurisdictions' student practice rules . . . support[] the conclusion that a student-lawyer should be treated as a lawyer for ethics purposes."); Joy & Kuehn, *supra* note 60, at 510 (reviewing authority treating law students as lawyers).

214. *See supra* notes 10–11 and accompanying text.

215. Virtually every student practice rule limits the student's ability to practice law to a setting connected to either a law school clinic or a pro bono or nonprofit provider. *See, e.g.*, ILL. SUP. CT. R. 711(b); MASS. SUP. JUD. CT. R. 3:03(1)–(2). *But see* CAL. R. CT. 9.42 (not limiting practice to such settings or such clients).

216. *See* Tremblay, *supra* note 10, at 695–96. By contrast, a certified law student in many states may appear in court alone if acting within her clinical program. *See, e.g.*, MASS. SUP. JUD. CT. R. 3:03(2).

> order that would remove Ricoeur from the family home.

For now, and for purposes of understanding this part of the simultaneity puzzle, our analysis will assume that Student X becomes aware of both of these developments. (We will attempt to sketch out the protocols of the dual practice experiences, and how one might responsibly monitor for conflicts, in the next Subpart.[217]) When Student X learns at the Andover firm about the new Ricoeur business matter and its connection to the clinic's work, the Andover firm will screen her from any contact with Paul Ricoeur, as required by Comment 4. At the EULS clinic, the puzzle is more pronounced. Once Student X learns of the Ellen Berger matter with Paul Ricoeur as the adverse party, her program will, of course, wish to screen her from that litigation. The *only* authority (aside from some possible common law in her state)[218] for screening Student X is Comment 4. But relying on Comment 4 is less elegant here because, at the EULS clinic, Student X is a lawyer-equivalent and not a law student. If Student X is serving as a lawyer within the EULS clinic, she is, at least arguably, no longer a "nonlawyer" for purposes of Comment 4.[219]

We continue to appreciate why the simultaneity experiences deserve the "puzzle" tag. Student X is a nonlawyer in Andover but also a lawyer at the EULS clinic. Nonlawyers may be screened to respond to concurrent conflicts, but lawyers may not be screened. In the clinic setting, the lessons from the contract or temporary lawyer settings, where some common law authority authorizes comprehensive, firm-wide screens for lawyers consulting in a focused, provisional way, offer little help. Clinic students resemble law firm associates far more than temporary or contract lawyers. They actively participate in the law firm's ongoing work and share experiences freely with one another. Indeed, it is central to the clinical teaching mission that students share client confidences and lawyering experiences as they develop a professional identity.[220] Clinic students typically have full access to

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217. *See infra* note 228 and accompanying text.

218. As we have seen above, courts have often accepted proactive screening by a law firm as a reason not to disqualify or otherwise sanction the law firm, even when no rule of professional conduct authorized screening at the time, but those decisions almost uniformly involve former—not concurrent—conflicts. *See supra* note 60 and accompanying text.

219. *See* Joy & Kuehn, *supra* note 60, at 534.

220. *See* Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201, 212–15 (2016) (providing examples of clinics serving as a space for effective social justice education); Susan Bryant & Elliott S. Milstein,

law firm files[221] and participate actively in client selection and strategy sessions.[222]

Let us imagine a common response to the detection within the EULS clinical law firm of the potentially imputed conflict. Once Student X learns that her Andover law firm represents Paul Ricoeur and that the Civil Litigation Clinic at her school represents Ellen Berger against Paul Ricoeur, the clinic law firm will establish a wall, or a screen, ensuring that Student X has no contact at all with the Berger matter or discussions of that matter.[223] Because Student X is enrolled in the Entrepreneurship and Innovation Clinic and Berger is represented by the Civil Litigation Clinic, the separation is easier.[224] With Student X screened at both the Andover firm and the clinic, and, with the two respective representations fully unrelated, the secrets of both clients will be protected and few, if any, loyalty concerns would arise.

If Student X is deemed a nonlawyer law student, that arrangement complies with the language of the Model Rule's comment.[225] If, however, Student X is treated as a lawyer, the arrangement just described is not ethical. Put another way, no authority—surely not the Model Rules (or any state version),[226] no

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Rounds: A "Signature Pedagogy" for Clinical Education?, 14 CLINICAL L. REV. 195, 208–13 (2007) (explaining that clinic rounds are an opportunity for collaborative learning); Moliterno, *supra* note 158, at 2392–93 (describing the disadvantages of separate clinics without shared experiences); Tomar Pierson-Brown, *(Systems) Thinking Like a Lawyer*, 26 CLINICAL L. REV. 515, 542–43 (2020) (describing the benefits of shared clinic discussions about systemic forces affecting client matters).

221. Alexi Freeman & Katie Steefel, *Uniting the Head, Hands, and Heart: How Specialty Externships Can Combat Public Interest Drift*, 25 CLINICAL L. REV. 325, 357 (2019) (comparing clinics, where confidences are freely shared, with externship programs, where client confidences from the various outside placement must be protected).

222. *See* Alina S. Ball, *Disruptive Pedagogy: Incorporating Critical Theory in Business Law Clinics*, 22 CLINICAL L. REV. 1, 39–40 (2015) ("[C]linicians' strategic client selection is an effective pedagogical tool to promote critical learning[.]").

223. This is the arrangement recommended by Peter Joy and Robert Kuehn. *See* Joy & Kuehn, *supra* note 60, at 537–42.

224. If Student X were enrolled in the Civil Rights and Litigation Clinic, the screening would be more challenging. Two possibilities would emerge. One, the Civil Rights and Litigation Clinic faculty member could cabin off the Berger matter (separating the paper file, password-protecting the electronic documents, etc.) and ensure that Berger's clinic student never discussed that matter in seminar or in other supervision sessions. Or two, simply not accepting Berger as a client or, if already a client, searching for new pro bono counsel.

225. MODEL RULES OF PRO. CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2020).

226. *See* Lawyers' Manual on Pro. Conduct (ABA/BNA), 51:2001, Imputed Disqualification (2020) (reviewing screening availability and not identifying any jurisdiction permitting screening in concurrent conflicts).

available ethics opinion, and no court decision directly on point—has approved of the arrangement just described. It is safe, but not expressly authorized, if Student X has lawyer status. In Part IV, we examine whether it ought to be considered a breach of a lawyer's ethical duties to establish protocols that fit that description—safe, reasonable, but not expressly permitted. The advantage—and it is a considerable one—for the EUSL clinical program is that no authority has addressed the question whether, for imputation purposes, Comment 4's reference to "law student" excludes certified law students.[227]

The arrangement proposed by the EULS clinical program only works if it is matched with a similar arrangement at the private Andover law firm.[228] The protocol would work as follows. Once she is in place at both settings, Student X checks the names of any clients assigned to her, or about which she is learning information, against the roster of both firms. If a client that she has been assigned to assist is adverse at the other placement, she will decline the assignment, and she will be screened from any information about that client's matter at both offices. If Student X learns of adverse representation but not on a matter to which she is assigned, a similar screen will operate. So, for example, in the Ricoeur/Berger matters, Student X will not work on Paul Ricoeur's small business matter at the Andover firm, and she will be screened from any information about Berger or Ricoeur at both firms. Otherwise, Student X will have no need to check proactively for inter-firm conflicts on a periodic basis. If she stumbles upon a cross-firm "hit," the two placements will respond with appropriate screens.

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227. As noted earlier, several authorities have confirmed that, for client representation purposes, a law student certified through a state's student practice rule is treated as a lawyer for professional responsibility purposes when representing clients. *See supra* notes 214–16 and accompanying text. None of those authorities, however, has addressed whether the reference to law students in Comment 4 should apply equally to certified law students, and no commentary has touched on that subject. *See supra* notes 214–16 and accompanying text.

228. This arrangement assumes that Student X will obtain buy-in from both placements to the screening and conflict checking protocols described here. The simultaneity puzzle becomes even more thorny if we were to hypothesize a scheme where one placement—most likely the private law firm—either does not agree to, or does not know about, the screening arrangements. For our present purposes, let us assume that if both placements cannot agree to the screens described here, the student ought not work at both firms at the same time.

C. *The Jury-Rigged Conflict Check: A Summary*

1. The Jury-Rigged Strategy

Let us summarize the steps that a moonlighting lawyer and her dual placements might take to minimize the risks or disqualifying conflicts and to make the simultaneous associations work. Then, we will review the reasons why such a strategy is comparably safe.

The jury-rigged protocols suggested here would include the following components, applicable to both our BigLaw lawyer and our clinical law student (collectively, for this purpose, referred to as the Lawyer):

> 1) When beginning her second placement, the Lawyer will review active matters by client and client adversary names to discern whether she represents, opposes, or has access to information about any client or adversary. If she identifies a "hit" representing a potential conflict, she will be screened from any access to that work at the new placement.
>
> 2) As the Lawyer later learns of new clients and their opponents, the Lawyer will review the names to determine whether she opposes that client, represents the opponent, or has access to information about one or the other. If any "hit" involves her direct, conflicted representation, the placement must either turn the prospective client away, if feasible, or screen the Lawyer from any access to that matter.
>
> 3) If a newly discovered "hit" is more troublesome and screening will not be effective to protect information from leaking to the other firm, the firm may need to withdraw from representation. That is an inherent risk of simultaneity.
>
> 4) The Lawyer ought to sign a confidentiality agreement—the suspenders to accompany the belt of her professional duties—confirming that she will not share any information between placements except as she has explicit permission to do so.

It might be important to note that the jury-rigged arrangement described here would not work for a more conventional of counsel arrangement described earlier.[229] A lawyer with an active and public association with two firms will need to treat the two placements as

229. *See supra* text accompanying notes 101–05.

one firm for conflict checking or accept much greater risk than that described here.

2. Situating the Simultaneity Screening in a Taxonomy of Conflict Settings

In some settings, the profession, through its common law and the Model Rules, accepts screening as reliably safe if implemented well. In other settings, screening cannot serve to avoid imputation among lawyers in a firm. Here, we describe a taxonomy of those settings and situate the simultaneity strategy within it. This exercise shows that the jury-rigged strategy just identified is as safe, all things considered, as those accepted by the profession.

Imagine, then, the following five scenes:

(Scene 1) *Opposing a former law-firm client on a related matter.* Lawyer 1 formerly represented Client 1 while at the firm, and now Lawyer 2 at that firm seeks to represent Client 2 against Client 1 in a substantially related matter. A strategy to screen Lawyer 1 and then permit the new representation ought to fail, and all authorities agree.[230] The law firm itself likely has relevant information to use against Client 1, and separating Lawyer 1 from Lawyer 2 cannot adequately provide comfort to Client 1 that it will not be betrayed.

(Scene 2) *Opposing a new lawyer's former client on a related matter.* Lawyer 3 joined the law firm after working elsewhere. At her former employment, she represented Client 1. Lawyer 4 at the new law firm now seeks to represent Client 2 to oppose Client 1 on a matter related to the work that Lawyer 3 performed for Client 1. Rule 1.10(b), following considerable common law examples, allows the screening of Lawyer 3.[231] While Lawyer 3 has the same incentives to share information and help Lawyer 4 as in Scene 1, she is the only person in the firm with useful information, and the firm itself is not betraying its former client. Client 1 in this story is better protected than in Scene 1.

(Scene 3) *Opposing a current law firm client on an unrelated matter.* Lawyer 5 represents Client 1 on a matter. Her associate, Lawyer 6, seeks to represent Client 2 against Client 1 on an unrelated matter. Because the matters are unrelated, none of Client 1's

230. Lawyers' Manual on Pro. Conduct (ABA/BNA), 51:2001, Imputed Disqualification (2020).

231. MODEL RULES OF PRO. CONDUCT r. 1.10(b) (AM. BAR ASS'N 2020).

information would be useful to Client 2, and Lawyer 5 has no incentive to soft-pedal her representation of Client 1. If the firm is large enough and the two lawyers geographically distant, the rules ought to permit both representations, but, as we have seen, the authorities pretty uniformly forbid this dual representation. If the concurrent adverse representation were permitted, separating the two lawyers through a screen might add a soupçon of comfort to Client 1. However, without information to protect, it would be essentially irrelevant.

(Scene 4) *Opposing a lawyer's moonlighting volunteer associate's other firm's client on an unrelated matter.* Lawyer 6 represents Client 1 against Opposing Party. Lawyer 7 is a partner at a separate law firm but is volunteering at Lawyer 6's firm. Lawyer 8 is Lawyer 7's associate at the other law firm and represents Opposing Party on an unrelated matter. Because of strict imputation, Lawyer 6 is deemed to represent Client 1 (through her volunteer presence) and Opposing Party (through her association with her law firm). If the moonlighting Lawyer 7 has no contact at all with Lawyer 6, and no contact at all with Lawyer 8 or the Opposing Party, neither of the clients faces any risk of leaked information or diminution of loyalty. While screening is seemingly irrelevant, it adds to the comfort of the clients and the optics of the arrangement.

(Scene 5) *Opposing a lawyer's moonlighting volunteer associate's other firm's client on a related matter.* Same story as in Scene 4, with the matters now related. Lawyer 6 represents Client 1 against Opposing Party. Lawyer 7 is a partner at a separate law firm but is volunteering at Lawyer 6's firm. Lawyer 8 is Lawyer 7's associate at the other law firm, and Lawyer 8 represents Opposing Party on a related matter. Moonlighting Lawyer 7 has no involvement in either matter at either placement. She is imputed to know about both matters, but she has no actual information. Any worries about conflicts rely on the double-imputation of information. Here, a screen is just as safe—and indeed safer—than in Scene 2, where screening is permitted.

Scenes 4 and 5 represent the simultaneity contexts. If we accept the safety considerations of Scene 2, the simultaneity strategies ought to be equally acceptable. Scene 2 has developed, over the years, substantial supporting authority. Scenes 4 and 5 have little-to-no supporting authority yet. The question that remains, then, is whether a lawyer who opts for a jury-rigged strategy in a moonlighting setting has acted ethically, in light of the absence of clear *ex ante* authority to do so. We now turn to that question.

IV. ETHICAL RESPONSIBILITIES IN RESPONSE TO THE SIMULTANEITY PUZZLE

A. The Ethics of a Pragmatic, Functional Response

If we were to advise a lawyer or law firm about whether it would be acceptable practice to manage a moonlighting lawyer in the ways described in this Article, what would we offer? There are three separable ways to approach that question, and the following sections briefly address each such consideration.[232] First, it may be of use to this enterprise to recognize that lawyers have acted in such an entrepreneurial manner in the past and have received a court's blessing where the arrangement proved to be consistent with the goals of conflict doctrine. Second, there is near-consensus that questions of professional ethics are best understood in context and that the facts and circumstances of the practice setting matter. Assessing ethical propriety in context includes consideration of risk management, and the jury-rigged approach is a paradigm of a risk management strategy. Third, we see that identification and evaluation of conflicts of interest, among ethical issues more generally, are especially dependent on pragmatic considerations and functional realities. If the realists and contextualists are correct about their approach to legal ethics generally, they are even more spot-on when it comes to addressing conflicts of interest and, even more pointedly, disqualification efforts.

Let us consider each of these responses briefly.

1. Entrepreneurial Law Firms and Screening Stories

Screening of lateral hires to avoid former client conflicts of interest has been lawful under the Model Rules since 2009.[233] Before 2009, neither the Model Rules, its predecessor Model Code, nor the state versions of those laws of lawyering offered an avenue to avoid imputed conflicts among law firm members. Nevertheless, law firms, acting entrepreneurially and with a careful appreciation for risk, set up

232. The question of how one assesses lawyer actions that are not fully compliant with the professional conduct rules warrants a more robust consideration than this Section of the Article may provide. A forthcoming project of mine will explore that question more directly and deeply in the context of the juxtaposition of Model Rule 1.6(a) and the Restatement's guidance to lawyers to adopt a less protective stance regarding information related to a lawyer's representation.

233. Lawyers' Manual on Pro. Conduct (ABA/BNA), 51:2001, Imputed Disqualification (2020).

screens in the face of potential conflicts of interest anyway. Those screens very often worked.

Consider one such story. In 1985, a Wilmington, Delaware law firm learned that one of its associates, Bradley, had performed legal work for one of the opposing parties in an ongoing construction litigation lawsuit while at his previous firm.[234] In 1985, both the outgoing Delaware Code of Professional Responsibility and the incoming, new Delaware Rules of Professional Conduct imputed his disqualification to the rest of the firm.[235] The firm did not withdraw from the litigation, however. It immediately established a high-quality screen to avoid Bradley's sharing of any actual information, even if his information was imputed by the ethics rules. The firm had no direct authority to do so, but it assessed the risks and benefits of that strategy and took its chances. The plan worked. The opposing party filed the expected motion to disqualify, and the U.S. District Court disqualified Bradley but did not disqualify the firm.[236]

It is difficult to identify an argument that would conclude that the Wilmington firm acted *wrongly*, even if it dodged a bullet and proceeded proactively without *ex ante* authority. Indeed, the firm acted responsibly, albeit in the face of some risk. Other stories, certainly more than a few, exist where an entrepreneurial law firm tried the same move in similar circumstances, and it did not work.[237] In some of those settings the firm acted "badly" because it really did not safeguard information or avoid distorting influence,[238] but, in

234. Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418, 420–21 (D. Del. 1986).

235. *Id.* at 424.

236. *Id.* at 428. The district court referred to the screening arrangement as a "cone of silence" in preference to the then-common phrase "Chinese Wall." *Id.* It rejected the latter not because of any worry about cultural insensitivity but because the former captured better the process of isolating the disqualified lawyer from the rest of the firm. *Id.*

237. For a discussion of screening based on common law considerations before the ABA added Rule 1.10(b), see Erik Wittman, *A Discussion of Nonconsensual Screens as the ABA Votes to Amend Model Rule 1.10*, 22 GEO. J. LEGAL ETHICS 1211, 1219–21 (2009).

238. *See, e.g.*, LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 257–59 (7th Cir. 1983) (holding screening not forbidden, but screen in question was ineffective); Beltran v. Avon Prods., Inc., 867 F. Supp. 2d 1068, 1083 (C.D. Cal. 2012) (holding lateral screening ineffective); Stimson Lumber Co. v. Int'l Paper Co., No. CV 10-79-M-DWM-JCL, 2011 WL 124303, at *9 (D. Mont. Jan. 14, 2011) (noting that, even if "an ethical screen could have been implemented," the screen was ineffective).

other such stories, the firm took a reasoned, calculated risk with the understanding that it might not pay off.[239]

Of course, the fact that entrepreneurial law firms have acted without express authority and at times succeeded does not answer with any confidence the question posed here. But that history does support the argument that reliance solely on the language of the rules in place at the time is not the only measure of proper ethical conduct. That recognition invites consideration of the views of the legal realists and contextualists on the question of proper ethical lawyering.

2. Connecting Entrepreneurial Lawyering with Legal Realism and Risk Management

a. The contextual and realist view of ethical duties

One way to perceive the actions of the entrepreneurial lawyers is as contextual, pragmatic responses to professional challenges.[240] David Wilkins, among many other scholars,[241] has advocated the proposition that ethical responsibilities are best understood in context, and that uniform, lockstep mandates ought to be disfavored compared to more sensitive and factually appropriate responses.[242] Relying on philosophical understandings nurtured by pragmatism,[243] legal realism,[244] and critical legal studies,[245] these observers argue

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239. *See, e.g.*, United States v. Stites, 56 F.3d 1020, 1025 (9th Cir. 1995) (explaining implementation of a "Chinese Wall" is not a defense to disqualification); Smith v. Whatcott, 757 F.2d 1098, 1102 (10th Cir. 1985) (declining to judge the acceptability of screening procedures).

240. For a discussion of the role of pragmatic thinking within the legal profession, see Jonathan T. Molot, *Purism and Pragmatism in the Legal Profession*, 31 GEO. J. LEGAL ETHICS 1, 9–11 (2018).

241. *See, e.g.*, Douglas N. Frenkel et al., *Bringing Legal Realism to the Study of Ethics and Professionalism*, 67 FORDHAM L. REV. 697, 697–98 (1998); Bruce A. Green, *Less Is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357, 379 (1998); Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1603 (1989); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

242. Wilkins, *supra* note 8, at 25; David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1150–51 (1993); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 470 (1990) [hereinafter Wilkins, *Legal Realism for Lawyers*].

243. *See generally* David Luban, *What's Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43 (1996); Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 VT. L. REV. 1 (1998).

244. Wilkins, *Legal Realism for Lawyers*, *supra* note 242, at 470.

245. Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567, 2647–48 (1993).

that context always matters in ethical decision making and that abstracting context from practical judgments will result in poorer decisions and often unjust results.[246] While the pragmatist perspective often connects to proposals for policy changes,[247] including improved rules or enforcement,[248] pragmatists and realists often focus on the actions of individual lawyers in the moment.[249]

The realists' view has relevance to our inquiry. As David Wilkins writes:

> [E]ven in cases in which the relevant rules appear on their face to be mandatory, the presence of arguably conflicting rules or mitigating facts may still give the lawyer substantial freedom to advance more than one plausible account of what conduct is actually required under the circumstances of a particular case.[250]

The realist/pragmatist perspective recognizes, and perhaps honors, ethics in action—how lawyers on the ground understand their duties and act accordingly within the context of their practice lives. If that understanding and action are faithful to the aims of professional responsibility, then we may accept them as worthy of our respect.[251]

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246. *See* Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 492–93 (1999) [hereinafter Tremblay, *The New Casuistry*].

247. *See, e.g.*, Melanie B. Abbott, *Seeking Shelter Under a Deconstructed Roof: Homelessness and Critical Lawyering*, 64 TENN. L. REV. 269, 307–09 (1997) (discussing legislative changes to address homelessness).

248. Wilkins, *Legal Realism for Lawyers*, *supra* note 242, at 479–83 (discussing the role of ethics rules amidst the need for context).

249. *See* WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS 9–10 (1998) (developing a strategy for discretionary, justice-focused decision making by lawyers).

250. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 861 (1992) (footnotes omitted).

251. Of course, many of those understandings and actions are not so faithful and deserve our criticism. The recognition of "ethical fading," where law firm culture slowly erodes commitments to lawyering ideals, evidences the worries about the propriety of much ethics-in-action. For a discussion of ethical fading, see, e.g., Deborah L. Rhode, *Legal Ethics in Compliance*, 56 GONZ. L. REV. 211, 213 (2020) (citing Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 224, 227–28 (2004)); *see also* Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285, 299, 302 (2004) (coining the term "ethical plasticity," representing traits of organizational executives including "over-optimism, an inflated sense of self-efficacy and a deep capacity for ethical self-deception").

There is broad acceptance of the stance that the exercise of ethical discretion to achieve the most appropriate or sensible solution to moral challenges must include deep attention to context and particularity.[252] The clinical ethicists and casuists understand that different factual settings require different ethical responses[253] and that application of broad principles can be counterproductive.[254] This approach supports the idea of a more context-driven, flexible approach to conflict of interest questions.[255] And context in law firm experience usually means some form of risk assessment.

b. Risk management as an element of contextual, ethical decision making

Evaluating professional ethics in context invites consideration of the strategy of risk management and risk governance in law firm culture.[256] As Tony Alfieri,[257] Mitt Regan,[258] and others[259] have

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252. In the bioethics world, the term for individualized, particularity-focused reasoning is "clinical ethics." *See* John C. Fletcher et al., *Clinical Ethics: History, Content, and Resources*, *in* INTRODUCTION TO CLINICAL ETHICS 4–5 (John C. Fletcher et al. eds., 2d ed. 1997); ALBERT R. JONSEN ET AL., CLINICAL ETHICS: A PRACTICAL APPROACH TO ETHICAL DECISIONS IN CLINICAL MEDICINE 3 (7th ed. 2010). The clinical ethics approach has important connections to casuistry, both in bioethics and law. *See* Albert R. Jonsen, *Casuistry as Methodology in Clinical Ethics*, 12 THEORETICAL MED. 295, 297 (1991); Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 230 (2002); Tremblay, *The New Casuistry*, *supra* note 246, at 512–16.

253. Scherr, *supra* note 252, at 230.

254. *See* Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 423 (2005).

255. Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 853–54 (1992).

256. Tony Alfieri distinguishes risk management, which he connects to law firm structural systems, and risk governance, which he identifies as commitments to norms such as diversity, equal opportunity, and workplace equity. Anthony V. Alfieri, *Big Law and Risk Management: Case Studies of Litigation, Deals, and Diversity*, 24 GEO. J. LEGAL ETHICS 991, 993 (2011).

257. *Id.* at 1003–05; Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1910–11 (2006) [hereinafter Alfieri, *The Fall of Legal Ethics*].

258. Milton C. Regan, Jr., *Nested Ethics: A Tale of Two Cultures*, 42 HOFSTRA L. REV. 143, 146–47 (2013) [hereinafter Regan, *Nested Ethics*]; Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957, 1966 (2006).

259. *See, e.g.*, Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 692 (2002); Anthony E. Davis, *Legal Ethics and Risk*

described, the ethical infrastructures of law firm practice are crafted with an eye to managing various forms of risk, including the risks related to conflicts of interest and client retention.[260] The engaging recent debates about whether risk management priorities tend to be corrosive to ethical commitments[261] or whether they inspire and institutionalize healthy attitudes[262] need not concern us here. What is relevant for the simultaneity puzzle is the prevalence of risk assessment within a firm's ethical infrastructure. That risk management strategy includes, of course, attention to the substantive rules of professional conduct in the firm's jurisdiction[263] but not exclusively or slavishly so. As one commentator notes, "[A] firm with an ethical culture should promote: . . . [t]he standards set out in the rules and law on professional conduct (trying to follow the rules is just one approach to ethical decision-making) . . . ."[264]

In managing conflicts of interest, law firms regularly assess the level of risk when accepting a client, a representation matter, or a new lawyer into the fold.[265] Lawyers strategize to avoid conflicts of interest with two primary goals in mind: avoiding disqualification from representation and protecting clients from actual harm.[266] The vast majority of conflicts trouble involves disqualification motions, but the

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Management: Complementary Visions of Lawyer Regulation, 21 GEO. J. LEGAL ETHICS 95, 95–96 (2008); Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 468–69 (2008); William H. Simon, *The Ethics Teacher's Bittersweet Revenge: Virtue and Risk Management*, 94 GEO. L.J. 1985, 1985–92 (2006).

260. One scholar terms this "the tension between lawyer as law applier and lawyer as risk manager." Molot, *supra* note 240, at 5.

261. *See* Alfieri, *The Fall of Legal Ethics*, *supra* note 257, at 1910–11.

262. *See* Davis, *supra* note 259, at 96.

263. *See* Susan Saab Fortney, *The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms*, 4 SAINT MARY'S J. LEGAL MALPRACTICE & ETHICS 112, 119 (2014); W. Bradley Wendel, *The Regulatory Perspective and Systems Thinking in Legal Ethics*, 56 GONZ. L. REV. 243, 252 (2020).

264. Regan, *Nested Ethics*, *supra* note 258, at 158 (citing Christine Parker et al., *The Ethical Infrastructure of Legal Practices in Larger Law Firms: Values, Policy and Behaviour*, 31 U. N.S.W. L.J. 158, 184 (2008)).

265. Davis, *supra* note 259, at 101.

266. A third goal, protecting against bar discipline for breach of the jurisdiction's rules of conduct, does not concern lawyers separately from the first two goals; a lawyer whose firm was not disqualified and whose client has suffered no harm will seldom be subject to discipline. There are exceptions to that broad generalization, of course. *See, e.g.*, Subin Assocs., P.C. v. Two Ninety One Broadway Realty Assocs., 510 N.Y.S.2d 588, 589 (N.Y. App. Div. 1987); State *ex rel.* Clifford v. W. Va. Off. of Disciplinary Couns., 745 S.E.2d 225, 231–32 (W. Va. 2013).

worry of a civil suit or a bar complaint by an injured client or former client is not insignificant.[267]

Avoiding both of those consequences, disqualification and an action or complaint by an injured client, requires pragmatic, risk-based analysis. Indeed, the baseline question of whether a conflict even exists turns on an assessment of risk. The Restatement of the Law Governing Lawyers makes that clear.[268] The Restatement describes impermissible conflicts "in terms of factual predicates and practical consequences that are reasonably susceptible of objective assessment[.]"[269] The Restatement "employs an objective standard by which to assess the adverseness, materiality, and substantiality of the risk of the effect on representation."[270] This standard looks to the "facts and circumstances that the lawyer knew or should have known at the time of undertaking or continuing a representation."[271] The Restatement echoes the earlier ABA position that "a rule based on functional analysis is more appropriate for determining imputed disqualification."[272]

Courts ruling on disqualification motions most often apply that functional analysis.[273] Disqualification is generally disfavored, both because that action deprives a litigant of its choice of counsel and because some litigants use that tactic for strategic gain.[274] But even courts that do not profess to a strong aversion to granting motions to disqualify still assess conflicts and remedies in light of the facts and circumstances of the litigation.

While some disqualifications might occur in the absence of any real harm to the moving party, a civil action by an objecting client

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267. *See* SWS Fin. Fund A v. Salomon Bros. Inc., 790 F. Supp. 1392, 1400 (N.D. Ill. 1992) (stating that malpractice actions may be a more apt remedy for a violation of the ethics rules than disqualification); HAZARD ET AL., *supra* note 163, §11.13.1.

268. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. c(iii) (AM. L. INST. 2000).

269. *Id.* § 121 cmt. c.

270. *Id.* § 121 cmt. c(iii).

271. *Id.* § 121 cmt. c(iv).

272. ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 88-356 (1988).

273. *See, e.g.*, Prudential Ins. Co. of Am. v. Anodyne, Inc., 365 F. Supp. 2d 1232, 1237 (S.D. Fla. 2005) ("Rather than reflexively requiring disqualification for an ethical infraction, the better approach is to employ a balancing test.").

274. *See* SWS Fin. Fund A v. Salomon Bros. Inc., 790 F. Supp. 1392, 1399 (N.D. Ill. 1992) (disqualification does not automatically follow from a finding that a law firm violated a conflict of interest rule). "Although disqualification is ordinarily the result of a finding that a disciplinary rule prohibits an attorney's appearance in a case, disqualification is never automatic." *Id.* at 1400 (quoting United States v. Miller, 624 F.2d 1198, 1201 (3d Cir. 1980)).

cannot survive without a showing of injury.[275] Therefore, a risk analysis that takes into consideration the minimal or nonexistent likelihood of a client suffering any adverse consequences will satisfy the goal of avoiding any civil or disciplinary proceedings.

3. A Summary of the Assessment of Lawyering Strategy

This brief review of the actions of a lawyer or law firm engaging in a functionally safe screening protocol in light of simultaneous legal activity shows that, done with careful judgment, the strategy can be justified. This is true even if the lawyer or law firm cannot identify language from a professional rule authorizing that strategy. The entrepreneurial lawyers engaging in screening of tainted lawyers before the regulating authorities approved of that strategy offer support for engaging in this innovative approach. The recognition that all conflict of interest assessments must consider risk or harm and are evaluated in context rather than in lock-step fashion adds further support for the conclusion that the lawyers in question are not deserving of criticism for gaming the system.

B. Imagining Permission Within the Rules or Ethics Opinions

The pragmatic approach appears to the best one can hope for in the face of the simultaneity puzzle. Given the appreciation for context and situated decision making, combined with careful attention to risk assessment, the prospect of a broad pronouncement authorizing the kind of screening described above seems challenging. Of course, some guidance from the professional regulators would be better than none.

It is difficult to imagine language in Model Rule 1.10 itself that would adequately address the nuances of the simultaneity puzzle. Commentators have criticized the Model Rules in the past in a general fashion for using strict, black-letter rules in settings when more flexible standards would suffice.[276] The simultaneity puzzle fits that critique well. Guidance added to the Comments to that Rule, an ethics opinion from the ABA's Committee on Ethics and Professional

275. *See* HAZARD ET AL., *supra* note 163, §11.13.1.

276. *See, e.g.*, Gurney Pearsall, *Revisiting Antigone's Dilemma: Why the Model Rules of Professional Conduct Need to Become Model Presumptions That Can Be Rebutted by Acts of Ethical Discretion*, 67 S.C. L. REV. 163, 166 (2015); Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 228 (2014); Wilkins, *Legal Realism for Lawyers*, *supra* note 242, at 499–500. For a review of the operation of finite rules versus flexible standards, see Eyal Zamir & Ian Ayres, *A Theory of Mandatory Rules: Typology, Policy, and Design*, 99 TEX. L. REV. 283, 318 (2020).

Responsibility, or an opinion from some jurisdiction's ethics committee or disciplinary authority would be more promising. We have already seen how a Comment can add a welcome gloss to a Model Rule to guide some knotty conflict situations,[277] as well as ABA ethics opinions performing the same task.[278]

Let us imagine, at least preliminarily, the elements of such a Comment or ethics opinion. The following principles, if articulated by a relevant professional authority, would offer some practical guidance and, therefore, comfort to lawyers who find themselves practicing in two settings at the same time.

> (a) A lawyer practicing within a law firm is deemed to represent all of the clients of that law firm, regardless of the size, geographical locations, and working arrangements of the law firm. That lawyer is presumed, absent the exceptions otherwise outlined in the Model Rules, to have access to the confidential information of each client of the law firm. Some of the information will be actual; other information will be imputed.
>
> (b) A lawyer who practices at the same time in two law firms,[279] referred to for convenience here as Firm A and Firm B, is deemed to represent all of the clients of each respective law firm in the same fashion as if the lawyer were working only in each such firm, subject to Paragraph (c) below.
>
> (c) The lawyer's knowledge of client information from Firm A will be imputed to the other lawyers in Firm B only where the lawyer has actual information. Where the lawyer has reason to know that imputed information from Firm A may have relevance to work performed at Firm B, Firm A may screen the lawyer to prevent any imputed information from becoming actual information. Such a screen shall follow the procedures, including the timing, described in Model Rules 1.10(a)(2) and 1.0(k).
>
> (d) A lawyer practicing in two firms at the same time has the responsibility to attend to client and opposing party identities in each respective firm to anticipate and then respond to any

277. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.10 cmt. 4 (AM. BAR ASS'N 2020) (addressing nonlawyers and law student screening).

278. *See, e.g.*, ABA Comm. on Ethics & Pro. Responsibility, Formal Op. 88-356 (1988) (permitting screening of temporary or contract lawyers).

279. For simplicity, let us limit any Model Rule treatment of the puzzle to lawyers practicing in two firms but not more than two firms.

potential conflicts between the clients of one firm and those of the other firm.

(e) Nothing in this guidance shall be understood to alter prior opinions or authority addressing the responsibilities of law firms employing temporary or contract lawyers, nonlawyers, and law students.

This attempt to identify some broad principles applicable to the simultaneity puzzle in some ways demonstrates the difficulty of that enterprise, precisely because the individual moonlighting stories will depend so deeply on the context of the overlapping practice settings. It may be, in the end, that no such *ex ante* guidance could provide the comfort that moonlighting lawyers and their firms would seek. Instead, those lawyers and firms will be left to the pragmatic, risk-management assessments outlined above.

CONCLUSION

The simultaneity puzzle is indeed a puzzle for the lawyers, law students, and clinical supervisors who encounter it. We have seen that, in many circumstances, it is virtually impossible for a lawyer to spend some meaningful time at two law firms or legal settings and comply with the strictures of the Model Rules of Professional Conduct and the principles of imputation which imbue conflict of interest doctrine. A law firm lawyer volunteering in a robust way at a community public interest agency is not able to avoid being deemed to represent all of the agency's clients, which in turn means that all of her law firm colleagues represent all of the agency's clients, and so forth. That, in short, is the challenge of the simultaneity puzzle.

This Article has recognized that a moonlighting lawyer might arrange for what this Article has termed a "jury-rigged" screening approach which protects clients in a practical and reliable way. That approach has no formal authority to which the lawyer might point if challenged, but then again, she will likely never be challenged. The Article has also argued that such a contextualized, pragmatic approach to conflicts of interest and to legal ethics challenges more generally is neither uncommon in our jurisprudence nor deserving of criticism. There would be value in having guidance from an authoritative source, perhaps a jurisdiction's ethics committee, articulating a structured way to permit simultaneous practice in selected contexts while adequately protecting the interests of clients. But the challenge of developing any meaningful guidance appears daunting. The simultaneity puzzle may only be resolved by the

exercise of pragmatic judgments by thoughtful lawyers attentive to the risks to their clients.