CONFLICTS OF INTEREST AND THE INDIGENT CLIENT: BARRING THE DOOR TO THE LAST LAWYER IN TOWN

David H. Taylor*

INTRODUCTION

In the world of legal services practice,[1] the decision to decline or discontinue representation due to a conflict of interest results in a consequence for the indigent client that is both extreme and unique.[2] Unlike the client who has sufficient financial resources to retain other counsel, the indigent legal services client is unable to walk around the corner to the next available attorney when there is a disqualifying conflict.[3] Thus, a conflict of interest can place the

---

* Associate Professor, Northern Illinois University College of Law. The author wishes to thank College of Law students Lisa Boughton, Dan Del Genio and Lisa Stozek for their research assistance; College of Law staff members Connie Johnson and Julie Oster for their assistance in compiling and analyzing the data collected for the survey conducted as part of this article; and colleagues Dean and Professor James Alfini, Professor Rodolphe J.A. de Seife and Professor Daniel Reynolds for their helpful comments on drafts of this project. This article was written with support from a summer research grant provided by the Northern Illinois University College of Law.

1. For the purposes of this article, the term legal services refers to any non-profit law firm that provides free representation to indigent persons in matters other than criminal law. As the choice of language connotes, offices funded, in whole, or in part, through the Legal Services Corporation are the most obvious example and will serve for purposes of this article as the model of the provider of free legal services to the indigent. 42 U.S.C. §§2996-2996l (1994) (establishing the Legal Services Corporation to provide funding for the provision of legal assistance to indigent persons in civil matters). Nevertheless, the discussion herein is intended to be equally applicable to all providers of free legal services to the indigent, not just to those funded through the Legal Services Corporation.

2. As seen from the survey discussed herein *infra* notes 24-32 and accompanying text, and attached as Appendix, the most common way that a conflict of interest question is raised in legal services is by the legal services office itself declining to represent a client due to the conflict. *See* app. *infra*, questions 16-25A, at 625-26 (ranking disqualification motions among the least frequent occurrences when a conflict of interest is present). Motions to disqualify, though often discussed by commentators, are a very infrequent occurrence in legal services practice. *See, e.g.*, Steven H. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227 (1987) (discussing attorney disqualification because of prior representation of opposing party and concluding that such disqualifications do not advance interests of the adversary system); Howard M. Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 NW. U. L. REV. 996 (1979) (tracing the development of attorney disqualification); Harva Ruth Dockery, *Motions to Disqualify Counsel Representing an Interest Adverse to a Former Client*, 57 TEX. L. REV. 726 (1979) (discussing and criticizing the criteria used by courts to determine whether attorney disqualification is warranted when representation is undertaken that is adverse to the interest of a former client).

3. *See* Marshall J. Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U. L. REV. 1115, 1123 (1982) ("Conflicted legal aid clients, however, are likely

legal services client in the position that the only possible source of legal representation is unavailable due to the ethical constraints of the legal profession. In fact, the denial of representation due to a conflict of interest most often results in a denial of any representation for the legal services client.[4] No other client is placed in a similar position by a conflict of interest.[5]

The gravity of this consequence might lead one to think that conflict of interest principles should be applied differently in the legal services context; if not because of the impact upon the client, then because the lack of economic self-interest of the attorneys involved lessens the danger or incentive that the client's interests will be compromised. Though a different approach to conflicts of interest in legal services has been suggested by a few commentators[6] and adopted by a handful of courts in the analogous context of representation of indigent persons by public defenders,[7] criticism of the concept in legal services

---

to go without legal assistance if a legal aid office cannot represent them, as significant alternatives to legal aid and supplemental modes of legal representation for indigents exist in only a few areas of the country.").

A perusal of THE 1993/1994 DIRECTORY OF LEGAL AID AND DEFENDER OFFICES IN THE UNITED STATES AND TERRITORIES (1993) indicates that for the vast majority of locations, there is only one organization that provides free legal services to the indigent. There are, however, some locations, such as large metropolitan areas, where there is both a legal services office funded by the Legal Services Corporation and a separate office independent of the Legal Services Corporation, or a legal clinic chartered by a law school that may provide free legal services to the indigent. *See, e.g., id.* at 33-35 (listing for Chicago, eight branch offices of the Legal Assistance Foundation of Chicago, which is funded by the Legal Services Corp.; several non-LSC funded programs providing free legal services; and legal clinics at four law schools in the city). In such locations, a person dependent upon a legal services or legal aid agency for representation may have an option if a conflict of interest prevents a particular office from providing representation to that person. Thus, in that situation, which the author asserts is the exception to the rule, a conflict of interest may not necessarily mean a denial of any representation.

4. *See* app. *infra*, question 23, at 626 (going without representation is the most frequent consequence for the conflicted legal services client).

See, e.g., Robert H. Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807, 856-57 (1977) (discussing the serious consequence to the legal services client when representation can not proceed due to a conflict of interest); Thomas Jessee Goff, *Legal Aid Divorce Representation and Conflict of Interest*, 6 U.C. DAVIS L. REV. 294, 303 (1973) (discussing in the context of a divorce action that the effect on a legal services client when a conflict of interest exists can be the elimination of any legal assistance for one of the parties).

5. *See infra* notes 145-51 and accompanying text (discussing the availability of alternative counsel for the indigent client of a public defender who has a disqualifying conflict of interest).

6. *See, e.g., Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1397-1413 (1981) (calling for a reexamination of conflict of interest rules as applied to legal services for the indigent in order to avoid the consequence of "the legal profession ... purchasing its ethical integrity at the expense of equal justice." *Id.* at 1400); Aronson, *supra* note 4, at 807, 855-56, 857 n.228 (1977) (calling for a relaxed approach to vicarious disqualification of legal services attorneys).

7. *See, e.g.*, People v. Wilkins, 268 N.E.2d 756, 757-58 (N.Y. 1971) (holding that the rationale for the vicarious disqualification rule was inapplicable to a large scale legal services program with many offices throughout New York city); *see also infra* note 145 (listing an example of cases finding that attorneys from the same public defender office may represent co-defendants).

practice has carried the day,[8] and most courts have rejected it.[9] Two principles have prevailed in rejecting a different application for conflict principles in the legal services context. The first is that the practice of law is a single profession to which ethical constraints must be applied in a uniform fashion to all kinds of practice, and the second is that a different application of conflict principles would subject indigent persons to legal representation that is "second-rate."[10]

In order to revisit the application of conflict of interest principles to legal services practice, this article employs a survey of legal services providers. In addition to setting a context for discussion by determining the nature of the conflicts most frequently encountered by legal services offices, the survey resulted in two significant findings. First, the legal services client who is denied representation due to a conflict of interest most often is left without any source of representation.[11] Second, the conflicts that most frequently lead to the denial of representation of the indigent client often do not involve any actual prejudice to the client.[12]

Building upon the findings of the survey, this article argues that the presumption of prejudice inherent in conflict principles serves to unnecessarily deny the legal services client access to the only available source of representation. It examines and compares the interests involved in the legal services attorney-client relationship to that involved in the for-profit attorney-client relationship. That examination shows that the lack of pecuniary interests of the legal services attorney, when coupled with the unique interest of the legal services client in representation from the only available source, makes the presumptions of prejudice necessary for the protection of the for-profit client unnecessary and therefore inappropriate to the legal services attorney-client relationship. Consequently, this article argues that, in the legal services context, the application of conflict of interest principles should be based upon a standard of actual prejudice rather than on the present presumption of prejudice standard.

This article also will address the arguments of courts and commentators who have claimed that a different application of conflict of interest principles in legal services would result in an unacceptable compromise of client interests. By exploring examples from the *Model Rules of Professional Conduct*, this

---

8. *See, e.g.*, Breger, *supra* note 3 (writing at the Heritage Foundation and rejecting all suggestions that the legal services attorney may provide representation in light of a conflict of interest that would prevent a private attorney from doing so and therefore proposing a "judicare option" for conflicted indigent clients).

9. *See, e.g.*, Borden v. Borden, 277 A.2d 89, 90-91 (D.C. 1971) (rejecting the argument that the peculiar nature of legal services practice, including the lack of pecuniary interests, warranted relaxing the vicarious disqualification rule), *overruled in part on other grounds*, *In re* Estate of Tran Van Chuong, 623 A.2d 1154 (D.C. 1993).

See also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1233 (1972) (discussing the impropriety of a legal services office representing both individual Native Americans and their tribe due to the possibility of later divergent interests).

But see Flores v. Flores, 598 P.2d 893, 896-7 (Alaska 1979) (discussing ways that attorneys from one legal services office could represent adverse parties in a child custody case consistent with established standards of professional ethics).

10. *See, e.g.*, Breger, *supra* note 3, at 1127-31 (1982) (arguing that legal aid attorneys should be subject to the same ethical obligations as the rest of the profession in order to ensure no downgrading in the quality of legal services to indigent clients).

11. *See infra* note 32 and accompanying text.

12. *See infra* notes 44-45 and accompanying text.

article demonstrates that the risks to the interests of the legal services client in shifting conflict application to an actual prejudice standard are no greater than those to which the for-profit client is exposed in order to accommodate interests of free choice of counsel and attorney mobility. An indigent client's interest in representation from the "last lawyer in town" must certainly equal the interests of free choice of counsel and attorney mobility. Similar accommodation of the interests of the indigent client in obtaining representation from the only available source is then seen not to result in an attorney-client relationship that is second-class in terms of protecting client interests.

The difficulty with the utilization of an actual prejudice conflict standard is how to properly determine when such prejudice is present and how to make that determination without compromising client confidences sought to be protected. Therefore, this article makes specific proposals for approaching conflict situations in legal services and proposes a mechanism for making determinations of actual prejudice.

I. WHY EVEN THINK ABOUT A DIFFERENT APPLICATION OF CONFLICTS OF INTEREST FOR LEGAL SERVICES?

At the outset, it should be considered what, if anything, would be gained by a different application of conflict principles in the legal services context so as to allow representation in situations where representation by the for-profit attorney would be prohibited. Though some indigent persons are denied the opportunity for legal services representation because of conflicts of interest, the demand for legal services for the indigent greatly exceeds the supply.[13] Assuming present maximum utilization of resources, providing representation for the conflicted client merely would displace the representation of another client. Therefore, a different application of conflict principles for legal services, one that would allow for representation for an indigent client who would otherwise not be represented due to a conflict, would not result in a greater total number of indigent persons receiving representation. Why then should established principles of professional responsibility be applied differently if nothing is gained in terms of the number persons who are able to obtain free legal services? Would applying conflict of interest principles in a different fashion for legal services be a compromise of the standards of the profession for a Pyrrhic Victory, if a victory at all?[14] What would be gained is

13. *See Developments in the Law-Conflict of Interest in the Legal Profession, supra* note 6, at 1397-1400 (discussing the limited availability of legal services for the poor); FINDINGS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 18, 37 (Institute for Survey Research at Temple University ed., 1994) (reporting that during 1992, though 47% of low-income households experienced a new or ongoing legal need, only 23% of those households had contact with the judicial system that most often would have involved the assistance of a lawyer); ILLINOIS LEGAL NEEDS STUDY 133 (1989) (finding that 80% of the need of poor persons for civil legal services is unmet on an annual basis); TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY 37 (1989) (concluding that 80% of poor persons nationwide had a legal problem for which they had no legal help).

14. Critics of a different application of conflict principles in the legal services context have based their opposition, in most part, upon the notion that legal services clients deserve the same quality of legal representation as the for-profit client. *See* Breger, *supra* note 3, at 1128 (stating that "[l]egal aid clients should receive the same quality of legal care as private clients").

Comments received by respondents to the survey conducted in conjunction with this article expressed opposition to different conflict of interest principles being applied to legal services. *See* app. *infra*, Comment 41, at 627 ("I appreciate the conflict problems. However, I

that decisions concerning who is the recipient of finite resources could be based entirely on the merit of the client's case and not upon a professional restriction of the attorney.

Because the demand for legal services for the indigent greatly exceeds the supply, most providers employ a case acceptance method that limits areas in which representation may be provided to certain substantive areas;[15] most commonly, public benefits, housing and family law.[16] A client seeking representation is first screened for categorical eligibility in terms of income,[17] assets,[18] and citizenship.[19] A client who is categorically eligible for services, and who is seeking representation in regard to a matter within a substantive area in which services are provided, has her case screened for merit. The relative strengths and merits of the numerous cases for which service is requested are weighed to determine which case will obtain the limited services available. The cases with the most merit have the greatest likelihood of being accepted by the office for representation.[20]

A conflict of interest can cause a case of great merit to be declined by the office in favor of one with lesser substantive merit or lesser personal need. Therefore, a client in need of services will be denied them simply because she had the bad luck of seeking services from an office that is prevented from providing services to the client due to the rules of the profession.[21] The

---

am very much opposed to creating a different ethical standard for legal services and non legal services clients."); *See also* app. *infra,* Comment 49, at 627 ("Conflict of interest is a constant problem that would most likely be made worse by the application of different standards to legal services.").

As discussed herein, *infra* notes 154-175 and accompanying text, the application of conflict principles in legal services practice urged in this article is not a compromise to any standards of professionalism. Rather, because of the different nature of the interests of the legal services attorney and client, representation can be provided within established standards of the profession where it would not be allowed for the for-profit practitioner.

15. 45 C.F.R. §§1620.1-1620.5 (1992). *See also* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1358 (1976) (approving the use of prioritizing the substantive areas in which services will be provided by legal services offices). *See also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974) (discussing that "[a]s a practical matter, the resources of a legal services office are always limited, and some allocation of them upon a basis of priorities must be made if they are to be effectively utilized"). For a discussion of caseload priorities as a method of allocating limited legal services resources, see *Developments in the Law-Conflict of Interest in the Legal Profession, supra* note 6, at 1405-08 (1981).

16. *See* LEGAL SERVICES CORPORATION ANNUAL REPORT 5 (1992) (providing a breakdown of types of legal issues encountered by offices funded by The Legal Services Corporation and listing as the three areas in which services are most frequently sought as "family" (33%), "housing" (21%) and "income maintenance" (17%)).

17. 45 C.F.R. §1611.5 (1994).

18. 45 C.F.R. §§1611.6-1611.7 (1994).

19. 45 C.F.R. §§1626.1-1626.12 (1994).

20. For discussion of case acceptance methods for purposes of resource allocation, *see generally* Carrie Menkel-Meadow and Robert G. Meadow, *Resource Allocation in Legal Services: Individual Attorney Decisions in Work Priorities*, 5 LAW & POL'Y Q. 237 (1983); Marshall J. Breger, *Legal Aid for the Poor: A Conceptual Analysis*, 60 N.C. L. REV. 282 (1982); Gary Bellow and Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978).

21. *See Developments in the Law-Conflict of Interest in the Legal Profession, supra* note 6, at 1407 (stating that "the indigent who is turned away because of a conflict is refused proper representation because of bad luck.").

Some jurisdictions have found a state constitutional due process right to appointed counsel in certain civil actions, most notably child custody. *See e.g.,* Flores v. Flores, 598 P.2d

consequence to the legal services client of this denial of services cannot be overstated. By far, the most frequent result is that the indigent client is left without any representation.[22]

Certainly there are situations where the conflict presented is such that representation cannot be undertaken without a compromise to the interests of the client seeking services, or a compromise to the interests of a past or present client. Nevertheless, many conflict situations are based upon a presumption of prejudice to the interests involved, but not upon an actual prejudice.[23] If a conflict of interest problem presents no actual risk of prejudice to the client, denying that client the only representation available makes little sense, particularly in light of the serious consequences for the indigent client. Therefore, an examination of the interests of the legal services attorney and

---

893 (Alaska 1979); *and see* Azzarello v. Legal Aid Society of Cleveland, 185 N.E.2d 566 (Oh. Ct. App. 1962). In such limited situations, the indigent client who is prevented from obtaining representation from a legal services office due to a conflict of interest is not precluded from any representation.

22. An anecdotal response to the survey best summarizes the plight of the conflicted legal services client:

> Our program's lack of adequate resources and the lack of any requirement on the private bar to engage in pro bono representation results in a very substantial number of low income households being denied any free legal services due to conflicts of interest we have which prevent our assisting the client.

App. *infra*, Comment 17, at 620.

See also, app. *infra*, question 6-25A, at 622-26. Respondents were asked to rate the relative frequency of certain enumerated consequences that befall the legal services client who presents the provider with a conflict of interest. 23, which stated, "Client goes without representation" received, by far, the highest frequency rating." *Id.* at 620.

Of the 75 responses to #23, only three indicated that the conflicted client "never" is left without representation. It was somewhat surprising to the author that those responses, R3, R35 and R38, had little in common in terms of either demographic background or approach as to where the conflicted client would be referred. R3 was received from an office that practices only in the area of juvenile law and is located in a community of 100,000 - 500,000. R3 rated 16, 17 and 18, in all of which an attorney is found for the conflicted client from, respectively, a list maintained by the legal services provider, a volunteer attorney or judicial appointment, as "frequently" occurring. It could be inferred that the relatively large population center provides a sufficiently large pool of attorneys for conflicted clients. Nevertheless, 23 responses were received from offices from communities with like or larger populations. R3 was the only one of the 23 to indicate that the conflicted client "never" is left without representation. Therefore, one could conclude that the area of practice, juvenile law, where counsel may be statutorily required, makes R3 an anomaly.

The other "never" responses were received from offices in smaller sized communities. R35 indicated that the conflicted client was "most often" referred to a "volunteer attorney program." *See* Breger, *supra* note 2, at 1153-55 (arguing against a different application of conflict principles to legal services practice because such would constitute a compromise to the fiduciary relationship between attorney and client and discussing options for providing representation for conflicted indigent clients, including "lawyer referral programs"). The Legal Services Corporation requires each grantee to expend 12.5% of its funding on private attorney involvement (PAI). *See*, 45 C.F.R. §§1614.1-1614.5 (1994). Mr. Breger concludes that "[i]t is highly unlikely that referral programs will have the capacity to accommodate all conflicted indigents." Breger, *supra* note 3, at 1155.

It is most common for PAI funds to be expended, not on representation for conflicted clients, but on representation in a designated substantive area, such as default divorces. Only two respondents indicated that PAI funds were used to provide representation for conflicted clients. See app. *infra*, question 5A, at 622. One of those was R38, the other "never" response to #23, "Client goes without representation." *See* Breger, *supra* note 3, at 1157-60 (discussing "the judicare option" as "an effective and comprehensive solution to the conflicts dilemma").

23. *See infra* notes 33-46 and accompanying text (discussing the role of presumptions in the conflict of interest situations most frequently encountered by the legal services attorney and client).

client is warranted to determine whether the presumptions of prejudice reflected in conflict of interest principles as applied to for-profit practice are applicable to legal services practice. If a significant difference is present in the interests involved, a conflict of interest in for-profit practice may not pose an actual threat to the interests of the legal services client. Consequently, the difference in the nature of the interests involved would make the presumptions in for-profit conflicts of interest inapplicable to legal services and, therefore, warrant their abandonment. Case acceptance decisions would then be based solely on individual case merit, and the cases of greatest merit would receive the limited available resources and indigent persons would not be denied legal services from the only available source.

II. THE NATURE OF THE CONFLICTS OF INTEREST MOST FREQUENTLY ENCOUNTERED IN LEGAL SERVICES PRACTICE

A. A Summary of the Survey

In order to develop an accurate context for an examination of the application of conflict of interest principles to legal services practice, a survey[24] was conducted of all legal services offices[25] located in the Seventh and Eighth Federal Appellate Circuits that receive funding from the Legal Services Corporation.[26] After soliciting background demographic information in questions A-E, the survey encompassed three main parts.[27] First, in questions 1-12, the survey asked respondents to rate the relative frequency that certain types of conflicts of interest are encountered.[28] In addition to rating relative

24. The survey instrument and summarized results are appended hereto. All responses received are on file with the author.

The survey does not purport to be statistically rigorous. It is a qualitative account of self-reported impressions of a diverse group of legal service providers, not a truly randomized, quantitative study. While the survey provides abundant confirmation of the author's experience in legal services, and, in my view, the consequent need for the kind of rethinking of conflicts argued for here, the survey results can not be extrapolated beyond what they purport to be.

25. The offices, numbering 144, were identified by consulting THE 1993/1994 DIRECTORY OF LEGAL AID AND DEFENDER OFFICES IN THE UNITED STATES AND TERRITORIES (1993), a biannual publication of the National Legal Aid & Defender Association. The mailing list used is on file with the author.

26. The survey was sent to 144 offices identified as described, *supra* note 25. As of the date of writing, 83 responses were received. Of the responses, 6 were from offices that do not directly provide legal services but rather perform an administrative function. Those responses were not tabulated in the results.

The Seventh and Eighth Circuits were chosen as the target area of the survey for two main reasons. First, the area represents widely varied demographics, ranging from large metropolitan areas to small towns. Second, the author previously practiced for ten years with legal services within the target area, and it was hoped that kindly former colleagues would be cooperative in taking the time to respond to the survey, thereby increasing the number of responses.

27. The survey initially sought demographic information from the respondents. The responses to those questions demonstrated the varied demographics of the survey target area in terms of community size, ranging from 6 responses from offices in communities that have populations exceeding 500,000 to 13 responses from offices in communities having populations below 10,000. Similar distributions also were present in the program size, office size, and number of years of practice in legal services by the respondents. *See* app. *infra*, questions A-E, at 620.

28. The enumerated conflict of interest circumstances described in the survey represent the conflict of interest situations the author encountered during his experience in legal services.

frequency, the survey also asked for a rating of the frequency that the specific conflict of interest involves actual prejudice to the client(s) involved. The intention was to determine if indigent persons are precluded from obtaining legal services in circumstances that do not protect the client from actual prejudice. This proved to be the case.[29]

Second, in questions 13-15, the survey sought information as to the frequency that the conflicts of interest encountered arose by means of the imputation rule.[30] If so, the survey then asked about the frequency that the imputed conflict involved attorneys in a single office and attorneys in different offices of a multi-office legal services program. The results indicated that conflicts are imputed between attorneys in one office more frequently than when they involve only one attorney in an office or are imputed between attorneys in different offices in a program.[31]

Third, in questions 16-25, the survey sought information as to the relative frequency that certain enumerated consequences befall the legal services client who presents the office with a conflict of interest. By far the

---

Joseph Dailing, Executive Director, and Bernie Shapiro, Director of Litigation, Prairie State Legal Services, provided much helpful assistance in reviewing drafts of the survey and making many useful suggestions.

The survey asked respondents to rate relative frequency by assigning each situation a number 1-5, with 1 indicating that the situation never occurs, and 5 indicating that the situation occurs most frequently. The responses were tabulated by totaling the responses and dividing the total by the number of responses received in order to determine a "frequency rating," the average response received. The number of respondents selecting each numerical relative frequency value and frequency ratings are printed in italics and placed in brackets on the Survey and Supplemental Responses directly following each inquiry. All responses are on file with the author.

In the event that the survey did not enumerate all conflict situations and client consequences that the respondent might have encountered, the survey offered the respondent the opportunity to describe additional situations in questions 10-12 and 24-25. The supplemental responses received were reviewed and categorized into categories of comparable situations enumerated in the document entitled Supplemental Responses, 10-12C, and 24-25A. The alphabetical designation only represents that the author underestimated the number of supplemental responses that would be received.

Many supplemental responses represented a conflict situation that the author considered to be the functional equivalent of that described in the Survey, though the response described the conflict situation in terms of a factual scenario that differed from the example given in the Survey. Because the respondent considered the factual situation in the supplemental response to vary from the situation described in the survey, those responses were tabulated separately. Those responses are designated with the numerical designation of the original question and the alphabetical designation "D," intended to designate duplicate.

Also, supplemental responses described situations that were substantially similar to the enumerated questions but that presented a factual situation that the author considered to vary sufficiently to warrant separate tabulation. Those responses are described at Supplemental Response 1A, 1P and 3A.

Finally, the survey offered each respondent the opportunity to make narrative comments. Those comments that relate to the issues discussed herein are appended hereto. All responses are on file with the author.

29. *See infra* notes 44-45 and accompanying text (discussing that the survey demonstrated that actual client prejudice is not present in all instances that a conflict of interest occurs).

30. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1992) (providing that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of then practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.").

31. *See* app. *infra*, questions 13-15, at 625.

most frequent result is that the legal services client who presents the office with a conflict of interest is unable to secure representation from any source.[32]

B. The Conflicts Encountered by the Legal Services Attorney and the Role of Presumptions Therein

Two conflict situations were identified by the survey as those most frequently encountered by the legal services office. In the first, "simultaneous adverse representation,"[33] each opposing party seeks representation from the same legal services provider, most likely in the context of a husband and wife, each seeking representation in a family law matter.[34] This situation involves the prohibition against representation that is directly adverse to another client contained in *Model Rule* 1.7(a)[35] and the rule of vicarious, or imputed

32. *See* app. *infra*, questions 16-25A, at 625-26 (identifying in #23, "Client goes without representation" as the most frequent consequence for the legal services client who presents the office with a conflict of interest); *See also, supra* note 22 (discussing the consequence to the legal services client who presents the office with a conflict situation).

33. *See* app. *infra*, questions #1, 1A, 1D and 1P, at 621 (identifying the "dual representation" situation as the most frequently occurring conflict situation for legal services attorneys); *see also* app. *infra*, Comment 50 at 627 ("We really don't reject many cases based on conflicts - most common is the race to the phone between fighting spouses.").

34. The dual representation situation is largely, if not entirely limited to family law cases. By definition, the majority of cases handled by the legal services attorney do not have a possibility of having a legal services eligible client as the opposing party. The retrenchment that took place in Legal Services in the early 1980's left case acceptance priorities limited to three main substantive areas: public benefit related matters, housing matters and family law. Public benefit cases, of course, have a governmental agency as the opposing party, and housing cases have either a governmental agency or a financially ineligible private party as the opposing party.

As indicated in the supplemental responses received, the dual representation conflict has several variations. In #1A, three respondents indicated that the opposing parties approach the office at the same time (as opposed to sequentially as posed in the original survey question) seeking representation. *See* app. *infra*, question 1A, at 621. In such case, the consent mechanism of *Model Rule* 1.7(a)(1) and (2) would appear to allow representation to proceed. *See* MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.7(a)(1) & (2) (1992) ("A lawyer shall not represent a client if the representation of the client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation).

See Breger, *supra* note 3, at 1120 n.26 (citing cases upholding dual representation when consent is obtained). *But see id.* at 1135-36 (questioning the use of consent to dual representation for the indigent client who does not have a viable alternative to the conflicted representation).

In #1P, four respondents indicated that the dual representation situation involves one or both of them seeking representation from a Private Attorney Involvement Program operated by the legal services office. Some states have adopted an approach that does not consider this situation to countenance an impermissible conflict of interest. *See, e.g.*, Professional Ethics Comm. of the Florida State Bar Association, Op. 92-1 (11-1-92) (allowing a legal aid agency to assign opposing parties to separate pro bono attorneys, or represent one party while assigning the opposing party to a pro bono attorney); Standing Comm. of the Virginia State Bar, Op. 1460 (4-13-92) (allowing attorney participating in legal services pro bono program to represent a client in a family law matter where the opposing party is represented by the legal services program).

35. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1233 (1972) (legal services office may not represent individuals in action against Native American Tribe while at same time representing the Tribe); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1309 (1975) (stating that attorneys from two legal services programs, one of which serves as the conduit for funds to the other but that are otherwise unconnected are not prevented from representing adverse parties, but that result would be different in attorneys were part of same organization).

But see ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1235 (1972) (discussing simultaneous representation by military attorneys providing free legal services to military personnel and concluding that there was not a blanket disqualification from

disqualification contained in *Model Rule* 1.10(a), thereby disqualifying all attorneys in the firm if one attorney has a conflict and prohibiting attorneys in the same legal services office or program from representing adverse parties.[36] In the second, the "former client as adverse" party situation, the client seeks representation in a matter in which the adverse party had been previously represented by the office, and the previous matter is "substantially related" to the present matter in which the client now seeks representation,[37] a situation prohibited by *Model Rule* 1.9(a).[38] As with the simultaneous adverse representation situation, the former client as adverse party also involves the rule of imputed disqualification contained in *Model Rule* 1.10(a) disqualifying all attorneys in an office or program if one previously represented the former client.[39]

These two situations certainly do not represent all of the conflict situations encountered in legal services.[40] Nevertheless, both represent the use

---

so doing because, in part, of the option of the military client to secure other, non-military counsel). For discussion of the implications of Informal Opinion 1235 to legal services for indigents, *see* Goff, *supra* note 4, at 306-07 (1973) (discussing that legal services clients should benefit from an analogous interpretation of conflict of interest principles).

See generally Aronson, *supra* note 4, at 821-32 (1977); Craig D. Grear, *Current Developments—Conflicts of Interest: Simultaneous Representation*, 2 GEO. J. LEGAL ETHICS 101, 101-13 (1988); *Developments—Conflicts of Interest*, *supra* note 5, at 1292-1315 (1981).

36. *See, Model Rule* 1.10 (a) (disqualifying all attorneys in a firm if one attorney has a conflict); and *see generally*, Aronson, *supra* note 4, at 851-58 (1977); Christopher J. Bellini, *Current Developments—Conflicts of Interest: Vicarious Disqualification: Second-Hand Taint*, 2 GEO J. LEGAL ETHICS 101, 129-37 (1988); Nancy Ribaudo, *Current Developments—Conflicts of Interest: Vicarious Disqualification: Government and Non-Profit Agencies*, 2 GEO J. LEGAL ETHICS 101, 139-42 (1988); *Developments—Conflicts of Interest*, *supra* note 5, at 1352-73 (1981).

37. *See* app. *infra*, #2 and #2D, at 621-22 (identifying the past client as adverse party situation as the second most frequently occurring conflict situation for legal services attorneys).

For example, a woman seeks representation in a family law matter from a legal services office that previously represented her husband in a claim for disability benefits. The situations could be considered substantially related if the information gained from the husband concerning his financial situation was relevant to an issue in the family law matter such as child support or division of property or debts.

38. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1233 (1972) (discussing the subsequent representation by a legal services office of a client against a former client).

See generally, Aronson, *supra* note 4, at 833-35 (1977); Rick R. Rothman, *Current Developments—Conflicts of Interest: Subsequent Adverse Representation*, 2 GEO. J. LEGAL ETHICS 101, 119-28 (1988); *Developments in the Law—Conflicts of Interest in the Legal Profession,, supra* note 6, at 1315-34 (1981).

39. *See* Model Rule 1.10(a) (providing that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9, or 2.2"); *see also* Goldberg, *supra* note 2 (criticizing the use in combination of the rule against successive representation and the rule of imputed conflicts).

40. Legal services attorneys represent clients in narrowly defined areas of the law. Additionally, the client population comprises a narrowly defined segment of the population who often live in close geographic proximity in housing projects or neighborhoods comprised of persons who are similarly situated economically. Therefore, the possibility for a conflict of interest due to a material limitation of representation of one client due to the attorney's representation of a second client is far greater than that which the private practitioner commonly faces. Three additional situations deserve mention.

The first is the "multiple client/separate defense" situation. See app. *infra*, questions 6 and 6D at 622-13 (identifying this as the third most frequently occurring conflict situation encountered in legal services). As an example, several tenants of a public housing project seek representation in regard to eviction actions that stem from one common event involving children

of each tenant seeking representation. Each may seek to defend against the eviction on the basis that their child was not a participant, or that another's child was the instigator. Unless one client sought representation prior to any of the others coming to the legal services office and the potential for conflict was spotted prior to an interview being conducted with any of the other tenants, representation would have to be declined for all.

The attorney's obligations of confidentiality, loyalty and zealous representation would be compromised toward all of the parties. Information learned from any one client in a confidential setting has the potential to be helpful or detrimental to any other client as the attorney prepares to defend each action on the basis of challenging who was the actual responsible and offending party.

The second is the "client as adverse witness" situation. See app. *infra,* questions 3 and 3A at 621 (identifying this as the fifth most frequently occurring conflict situation for the legal services attorney). As an example, the attorney represents Client One in a public benefit matter. Client Two, who is the neighbor of Client One, seeks representation in regard to an eviction from the public housing project in which both Client One and Client Two reside. Though the two actions are unrelated, during the course of representation of Client Two, the attorney learns that Client One will be called as an adverse witness to Client Two in the eviction proceeding.

Seemingly, the attorney would be placed in the situation of having to compromise obligations owed to both clients. If the attorney is to cross examine Client One, the attorney would be faced with deciding whether to make use of information she knows about Client One that was learned during the course of her representation of Client One, thereby breaching obligations of confidentiality and loyalty. If the attorney chose not to utilize such information, the attorney would then breach obligations of loyalty and zealous representation owed to Client Two.

In the third, the "organizational client" situation. See app. *infra,* questions 7 and 7D at 622 (identifying this as the sixth most frequently occurring conflict encountered in legal services). As an example, the legal services attorney represents a tenant's union in a public housing project that is active in efforts to improve the quality of life in the project by combating drug sale and use. Client, a tenant in the project, seeks representation from the office in an eviction action based on alleged drug use. The attorney's representation of the Client may be materially limited by the attorney's obligation of loyalty to the organizational client, particularly if the attorney, in the defense of the tenant, must take a position that is at least inconsistent with, or possibly even an attack on the position of the organizational client. If the attorney chooses to forgo such defense, she would be breaching her duty of loyalty and zealous representation to the tenant Client.

As will be discussed in the context of the "dual representation" and "subsequent representation" situations, these three situations also present the possibility that a conflict may exist that precludes representation, but that is not necessarily presented by the situation. Each involves reliance upon presumptions to find that conflict of interest prevents representation even though the conflict may not actually compromise the obligations owed by an attorney to her client. *See infra* notes 41-46 and accompanying text.

Though beyond the scope of this article, one additional situation merits mention, the "positional conflict" situation, in which the attorney's obligations of loyalty and zealous representation to the client are challenged by the attorney's desire to further the interests of potential future clients. See app. *infra,* question 9, at 612 (identifying the "positional conflict" situation as the fourth most frequently occurring conflict for the legal services attorney). As an example, Client faces eviction from a subsidized housing project for an alleged breach of the lease. Though Client's landlord arguably refused to accept rent from the Client in order to not waive the right to declare a forfeiture of the lease for the alleged breach, the landlord did accept the rent subsidy for the rental unit. If the law in the jurisdiction is unsettled as to whether the acceptance of the rent subsidy constitutes a waiver, the legal services attorney may wish to not raise the defense, either at trial or on appeal, if the facts are not entirely favorable. Even though the defense could be raised within the constraints of any state equivalent of Rule 11, the attorney chooses not to do so and prefers to wait for a better case in which to raise it. It is a matter of not wanting to have bad facts make bad law that will later adversely affect future clients.

Whereas in the other conflict situations discussed above, the legal services attorney may decline representation because of the conflict, in the positional conflict situation representation is not declined because of a conflict of interest recognized by any standard of professional ethics. Instead, representation is declined out of a generalized concern for the client population that the legal services attorney seeks to serve. Because the declination of representation is not dictated by conflict of interest principles, it is beyond the scope of this article which examines whether those principles should have a different application in the context of legal services due to the nature of

of a presumption of threat of compromise to the attorney-client relationship to find that representation is impermissible.[41] *Model Rule* 1.10(a), a significant principle in both the simultaneous adverse representation and former client as adverse party situations, presumes that confidential client information will be exchanged between attorneys who practice in the same office, and that it could and will be used to compromise client interests.[42] *Model Rule* 1.9(a), the crux of the former client as adverse party situation, presumes that confidential information was obtained from a former client, which is prejudicial and will be used to the detriment of the former client in representation of the present client in a substantially related matter.[43]

It is these presumptions that serve to unnecessarily cause the denial of representation for the legal services client. The survey conducted in conjunction with this article revealed that, in both situations, the frequency that actual prejudice is involved in each conflict is less than the frequency of occurrence of the conflict itself.[44] Therefore, the presumptions that give rise to finding an impermissible conflict for the for-profit attorney operate to deny representation of the indigent client in situations where proceeding with representation would not pose actual prejudice to client interests.[45] The heart of

---

attorney and client interests involved. In fact one might argue that such is not a conflict of interest at all, but rather is a decision as to the allocation of limited resources.

41. *See* Paul R. Taskier and Alan H. Casper, *Vicarious Disqualification of Co-Counsel Because of "Taint"*, 1 GEO. J. LEGAL ETHICS 155, 157-58 (1987) (discussing the role of presumptions in "two of the most common conflict situations: simultaneous representation of adverse interests and representation of interests adverse to a former client."); and *id.* at 157-59 (citing cases employing presumptions to find an impermissible conflict of interest).

42. *See* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 cmt. at 175 (2d ed. 1992) (("The rule is based upon the presumption that client confidences are shared among law firm members and that these confidences must be protected.") *Id.* (citations omitted)).

43. The circuits vary as to the effect of the presumption in the former client situation. In the Seventh Circuit, the presumption is rebuttable as to whether the attorney received confidential information during the prior representation. *See, In re* Nine West Div., 78 B.R. 187, 190 (Bankr. N.D. Ill. 1987) (discussing a "rebuttable presumption that the attorney received confidential information during his prior representation."). In the Second Circuit, the presumption that confidential information was disclosed is irrebuttable. *See*, Kempner v. Oppenheimer & Co., 662 F.Supp. 1271, 1277 (S.D.N.Y. 1987) (citing Allegaert v. Perot, 565 F.2d 335, 338 (2d Cir. 1977)) and stating that "once a substantial relationship has been established, the court need not inquire whether the attorney in fact received confidential information, because the receipt of such information will be presumed.").

44. *See* app. *infra*, question 1, at 621 (finding a frequency rating for the dual representation conflict of 3.519 and a frequency rating for the presence of actual prejudice of 3.351); and, question 2, at 614 (finding a frequency rating for the subsequent representation conflict of 3.325 and a frequency rating for the presence of actual prejudice of 2.805).

The subsequent representation situation demonstrated the greatest disparity between frequency of occurrence and prejudice. It is the anecdotal observations of the author that such a result is not at all surprising. Many persons seeking representation from a legal services office are not able to obtain them due to considerations of financial ineligibility or resource allocation decisions concerning the nature of their legal problem. The denial of legal services occurs after the client has completed an application or intake questionnaire that seeks information about income, assets, nature of legal problem, etc. Additionally, the client may have participated in an initial screening interview. Such person would be considered a former client for purposes of a *Model Rule* 1.9 determination of conflict of interest, though the limited nature or extent of the information obtained by the attorney at this early stage is unlikely to make it prejudicial to the client.

45. Comments made by respondents to the survey support the conclusion that the reliance upon presumptions in analyzing conflicts of interest results in determinations of impermissible conflicts of interest in situations where there is not actual prejudice to the client.

the question then is whether the presumption of prejudice involved in conflict of interest rules serves to unnecessarily foreclose the legal services client from the only available source of representation.[46]

III. THE INTERESTS OF THE ATTORNEY SUBJECT TO CONFLICT — A DIFFERENT PROFESSIONAL STANDARD OR A DIFFERENT PROFESSION?

A. Defining the Issue: A Different Profession

Arguably, the goal of accepting cases based entirely on considerations of merit and need does not alone justify rethinking the application of basic principles of conflicts of interest.[47] In that those principles speak to the basic concepts of zealous representation and protection of client confidences that are at the essence of the attorney-client relationship, their application should not be altered if doing so degrades the basic nature of the attorney-client relationship.[48] Much of the debate concerning conflicts of interest and legal services has centered on the question of whether, in light of legal services as the attorney of last resort, a different, and perhaps "lesser" standard of professional ethics is warranted.[49] That posturing of the question has led critics of a different conflict of interest standard for legal services to a fairly obvious

---

See app. *infra*, comment 38, at 627 ("Given the tiny community here, I often encounter conflicts that leave me frustrated because although a legal 'conflict' exists, no *real* conflict does." *Id.* (emphasis as in original)).

46. Even the critics of a different application of conflict principles in legal services have recognized the importance of denying representation to legal services clients due to a conflict of interest only where absolutely necessary to preserve the basic nature of the attorney/client relationship. *See, e.g.*, Breger, *supra* note 3, at 1131 which states:

> Care must be taken, however, to ensure that disqualifications are not compelled when they would not further the goal of preserving this [attorney/client] relationship. The extraordinary result of disqualification—the inability of the conflicted client to obtain legal counsel—dictates that disqualifications be avoided unless absolutely essential to this goal. If the fiduciary relationship would not be compromised, by permitting dual or subsequent representation, disqualification arguably should not be mandated.

Id.

47. *Id.* at 1129-30 ("Although legal aid providers must follow principles of equity in allocating their services, this obligation does not dictate that indigents be represented when attorney resources are not available to provide quality representation ... [T]he fiduciary relationship between attorney and client must not be sacrificed on the altar of caseload pressure.").

But see, Developments in the Law—Conflicts of Interest in the Legal Profession, supra note 6, at 1400 (discussing that, "[f]or that reason [the availability of the poor to obtain legal aid], if no other, it is imperative to determine whether existing [conflict] rules affect representation and, if so, whether and how they should be changed.").

48. *See* Breger, *supra* note 3, at 1128-29 ("Legal aid clients should receive the same quality of legal care as private clients, and should be ensured the loyalty and confidentiality which is characteristic of the attorney-client relationship.").

It is this argument that has lead courts to reject a different application of conflict of interests principles in legal services practice. *See, e.g.*, Borden v. Borden, 277 A.2d 89, 91, 91 n.5 (D.C. 1971); Township Bd. v. Lewis, 234 N.W. 2d 815, 819 (Minn. 1975).

49. *See* Breger, *supra* note 3, at 1128 ("These sentiments suggest that a firm adherence to the fiduciary relationship between lawyer and client may be ill-advised when juxtaposed against the possibility that otherwise eligible clients will be left unrepresented."); *Developments in the Law—Conflicts of Interest in the Legal Profession, supra* note 6, at 1408-13 (arguing for a relaxation of conflicts rules for legal services practice).

answer — no.[50] Creating a different standard of professional ethics for legal services could lead to several undesirable results.

First, legal services clients deserve the same degree of loyalty, confidentiality, client autonomy and zealous representation as do any other clients of an attorney.[51] To conclude otherwise would create a client who receives representation that is second-rate due to that person's indigency. Not only would that run contrary to the purposes for which the legal services program was created, it simply is insulting to the population served by legal services to adopt a "you get what you pay for" mentality.[52]

Second, creating a different standard of professional ethics for legal services could also serve to begin an ethical fragmentation of the profession. Many specialties, building upon the legal services model, could claim that the particular nature of their practice warrants a variation in ethical responsibilities.[53] Taken too far, the result becomes a multiplicity of ethical codes — something surely contrary to the intention of the organized profession that wrote the rules in the first place.[54] One can only imagine the less scrupulous attorney, wishing to embark on a course of conduct generally prohibited by ethical standards, bringing a claim or defense that otherwise would not have been brought in order to raise the specter of practicing within a sub-specialty of the bar whose professional code allows that which is otherwise not permissible for the general practitioner. Therefore, in order for conflict

50. *See* Breger, *supra* note 3, at 1128-31 (rejecting a different conflicts of interest standard for legal services as "superficially appealing" but "misguided"); Breger, *supra* note 3, at 1128-29 ("Legal aid clients should receive the same quality of legal care as private clients, and should be ensured the loyalty and confidentiality which is characteristic of the attorney-client relationship.").

But see Developments in the Law—Conflicts of Interest in the Legal Profession, supra note 6, at 1408-13 (arguing for relaxing conflicts rules for legal services practice).

51. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 347 (1981) (stating that "[e]ach of these mandatory obligations is applicable to all lawyers, including legal services lawyers." *Id.* (citing ABA Informal Ops. 1359 (1976) and 1428 (1979)); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1233 (1972) (stating that "[t]he professional standards regarding representation of differing interests apply to legal aid offices the same as to other lawyers." *Id.* (citing Borden v. Borden, 277 A.2d 89 (D.C. 1971)).

See also supra note 14 and accompanying text.

52. 42 U.S.C. §§2996(1)-(6) (1994) (establishing the Legal Services Corporation, in part, to provide "equal access" to the judicial system and "high quality assistance" to persons unable to afford legal representation).

53. *See, e.g.*, Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1993) (arguing in the context of corporate and securities law that specialized areas of practice need separate standards of ethical conduct).

54. It was the intention of the drafters of the MODEL RULES OF PROFESSIONAL CONDUCT that they be equally applicable to all members of the profession, no matter what the nature of their practice might be. *See*, Robert W. Meserve, Chair's Introduction, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (1992) (discussing that the MODEL RULES OF PROFESSIONAL CONDUCT "are intended to serve as a national framework for implementation of standards of professional conduct...that speaks to such a diverse constituency as the legal profession...." *Id.* at 5).

See also, 42 U.S.C. § 2996(6) (1994) ("... attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession"); *see also*, ABA Comm. on Ethics and Professional Responsibility, Formal Op. 324 (1970) (discussing, in part, that in representation of indigent clients, "[i]t goes without saying," legal services attorneys are bound by the Code of Professional Responsibility or Canons of Ethics to the same degree as would be an attorney not associated with legal services).

principles to be given a different application, there must be something in the nature of legal services practice that makes it fundamentally different from the rest of the profession.

Rather than focusing the debate on whether legal services attorneys should be held to a different set of professional standards, the debate instead should focus on whether existing professional ethical standards can be maintained while giving conflict of interest principles a different application in the legal services context. An examination of the interests involved in conflict of interest doctrine serves as the starting point for discussion of whether the nature of legal services practice warrants an application of conflict of interest principles that is different than that applied in for-profit practice.

By examining the interests of the legal services client and attorney that may be in conflict, it is seen that the threat of compromise to the legal services attorney-client relationship is not co-extensive with that in the for-profit attorney-client relationship. First, the legal services attorney does not have a pecuniary interest in the representation of a specific client. Second, the legal services attorney-client relationship is unique because of the serious result of a preclusion of representation due to a conflict of interest — the legal services client is left without any representation. It is only the legal services client who possesses this interest in procuring representation from one available source. For the indigent client, the legal services office is truly the "last lawyer in town." These fundamental differences in the interests of attorney and client set legal services apart from any other attorney-client relationship.

In light of these unique interests of the legal services attorney and client, conflict of interests principles are able to have a different application in the legal services context than in the context of for-profit practice without compromising established professional standards in terms of the duties and obligations owed to a client.[55] This conclusion is reached by giving the interests of the legal services client and attorney the same effect that such interests are given when they occur in analogous situations in other aspects of regulation of the profession, such as the prohibitions against solicitation of clients and advancing financial support to clients. It is then seen that the presumptions of prejudice, based upon the model of for-profit practice, are both inappropriate and unnecessary in legal services practice. An argument by any other specialty area of the profession for a different application of conflict principles would fail, for it is only the unique nature of legal services as the "last lawyer in town" that warrants this different application.

B. Identifying the Interests Subject to Conflict in the Ethical Standard

The question of what constitutes a conflict of interest has been explained largely by the use of situational examples,[56] or a listing of duties owed the

55. *See* Flores v. Flores, 598 P.2d 893, 896 (Alaska. 1979) (discussing ways that attorneys from one legal services office could represent adverse parties in a child custody consistent with established standards of professional ethics).

56. *See* Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 826-29 (1992) (discussing the use of narrow factual examples to explain conflicts of interest by the *Model Code*, the *Model Rules*, courts, ethics committees, treatises and articles); and, *id.* at 844 (discussing that "[t]reatments of the subject in treatises and

client by the attorney.[57] An impermissible conflict exists when an attorney's duties and obligations to her client are compromised. Nevertheless, guidance is lacking as to which attorney interests compromise which client interests, and when those interests are sufficiently in conflict so as to warrant representation not going forward.[58] Therefore, there is little definitional guidance for conflict situations that fall outside the situational examples that have been used to explain when an impermissible conflict of interest exists.[59]

This lack of definitional guidance has served to lead astray the application of conflict of interest principles in the context of legal services representation.[60] Conflicts of interest in legal services simply have been plugged into situational examples from the context of for-profit representation. The situations may be factually similar, and the duties of the attorney owed the client are the same. Nevertheless, the interests of attorney and client are different when representation is undertaken by a legal services attorney with no economic interest in the outcome of the case on behalf of a client who has limited opportunity, if any, due to indigency, to obtain representation from another source in the event that the legal services attorney has an impermissible conflict of interest.[61] Therefore, an examination of the application of conflict principles to legal services practice must begin with an examination of the interests of the client sought to be protected and of the interests of the attorney that can be in conflict with those of the client.[62] If the discussion does not take place in terms of the actual interests potentially in conflict, but rather is limited to hypothetically comparative situations or disembodied attorney duties, one does not appreciate the fundamental difference in the nature of legal services representation. The result then reached — prohibiting the conflict because of a

---

casebooks frequently begin not with a definition of conflict of interest, but by providing examples of situations in which interests 'conflict'.").

Another approach taken by treatises addressing what is a conflict of interest is to combine situational examples with broad statements defining the goals sought to be served by conflict doctrine. *See, e.g., Developments in the Law—Conflicts of Interest in the Legal Profession, supra* note 6, at 1244 (1981) (prefacing over 200 pages of situational examples with several statements of goals; such as, "...the purpose of legal ethics is to ensure that the lawyer advance certain objectives of the client," *id.* at 1252; and, "Conflict-of-interest rules attempt to ensure the lawyer's dedication to the client and the client alone." *Id.* at 1254).

57. *See, e.g., Developments in the Law—Conflicts of Interest in the Legal Profession, supra* note 6, at 1252-60 (seeking to define conflicts of interest by first exploring the purpose of professional ethics in terms of the lawyer's duties owed the client and attempting to distinguish "principal duties" from "collateral duties").

58. *See,* Cuyler v. Sullivan, 446 U.S. 335, 356 n.3 (1980) ("'Conflict of interests' is a term that is often used and seldom defined.").

59. The *Model Rules* also are devoid of a definition of what is a conflict of interest. *Model Rule* 1.7(a) states that "[a] lawyer shall not represent a client if the representation will be directly adverse to another client...." What is lacking is a definition of how to determine what interests serve to make the representation "adverse," and what raises the degree of adversity involved to the level of being "directly adverse." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a).

60. See *infra* notes 93-116 and accompanying text for discussion of Borden v. Borden, 277 A.2d 89 (D.C. 1971).

61. *See supra* notes 33-40 and accompanying text for a discussion of the conflict situations most frequently encountered by the legal services attorney and how the interests involved differ from those of the for-profit attorney in the same situation.

62. *See* McMunigal, *supra* note 56, at 826-33 (discussing that conceptual confusion exists in present conflict of interest doctrine because, instead of defining the "general standards" and "underlying ordering principles," conflicts of interest largely have been explained by the resort to categorization of specific factual contexts).

falsely perceived "compromise" in the representation to the legal services client — is predictable, but wrong.[63] When however, the different interets at stake in legal services representation are appreciated, it is then seen that there is no compromise to the duties owed to the legal services client to obtain representation in a conflict situation that would preclude representation by the for-profit attorney.

A definition from an often cited article on conflicts of interest serves as a useful starting point:[64]

> A conflict of interest exists whenever the attorney, or any person represented by the attorney, has interests adverse in any way to the advice or course of action which should be available to the present client. A conflict exists whenever this tension exists—even if the attorney eventually takes the course of action most beneficial to the present client.[65]

For the definition to be fully understood, an explication of the respective "interests" of the attorney and the client is also necessary.[66]

The "interests" of the client are commonly considered to be a preservation of confidentiality of information imparted to the attorney during the course of representation[67] and the provision of zealous representation by an attorney whose loyalty to the client is undivided.[68] The legal services client, however, has the additional interest of being able to secure representation from

---

63. *See, e.g.*, Breger, *supra* note 3, at 1127-31 (1982) (arguing that any application of conflict principles to legal services that would result in representation in situations that would be impermissible for the for-profit practitioner would be a "downgrading" of the quality of representation provided); and Borden v. Borden, 277 A.2d 89, 92-93 (D.C. 1971) (discussing that to allow two attorneys from the same legal services program to represent adverse parties in a divorce action would be an "exception from the professional norm for attorneys" that would be contrary to the expectation of an "uncompromising adherence to the profession's established standards.").

64. Professor Aronson's article on conflicts of interest has been referred to as "[t]he best general analysis of conflicts of interest problems." GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT §1.7:101, at 217 n.1 (2d ed. Supp. 1991).

For a useful review of attempts to define conflict of interest, *see* McMunigal, *supra* note 56, at 843-53.

65. Aronson, *supra* note 4, at 809.

66. *See* McMunigal, *supra* note 56, at 829-33 (describing the common element in conflict of interest doctrine as "some particular incentive which threatens the effective and ethical functioning of lawyers").

67. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.1.3 at 317 (1986) (stating that the "confidentiality principle" is the "second principle" underlying conflict of interest rules protecting against adverse use or disclosure of a client's confidential information); *See also*, Aronson, *supra* note 4, at 811-12 (discussing the preservation of client confidences as one of the "general principles" of conflict of interest rules); *Developments in the Law—Conflicts of Interest in the Legal Profession, supra* note 6, at 1255 (discussing confidentiality as a "collateral duty" owed a client by an attorney); ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7, cmt. (ABA 2d ed. 1992) (discussing the loyalty element of the lawyer/client relationship, and that loyalty prohibits undertaking representation that is adverse to the client).

68. *See* WOLFRAM, *supra* note 67, § 7.1.3 at 316-17 (discussing the "loyalty principle" in conflict of interest doctrine as a "basic tenet of the Anglo-American conception of the attorney-client relationship"); *See also*, Aronson, *supra* note 4, at 811 (discussing the prevention of the dilution of the attorney's loyalty to her client as one of the "general principles" of conflict of interest rules); *Developments in the Law—Conflicts of Interest in the Legal Profession, supra* note 6, at 1254 (stating that as the "principal duty" owed a client by an attorney is to "take that action that is best calculated to advance the client's interests....").

the only source available.[69] This interest is unique and is not shared by clients in any other context.

The interests of the attorney that can come into conflict with those of the client, thus dividing the attorney's loyalty, are several. The attorney has personal financial interests and interests owed to third persons, such as other clients or the attorney's law partners.[70] Here again, legal services practice varies from for-profit practice. The legal services attorney lacks both the personal economic interests and the economic interests owed to law partners that are present with the for-profit practitioner.[71] The lack of economic interests by the attorney are not unique to legal services. Public defenders similarly have no pecuniary interests in their attorney-client relationships or practice relationships. Nevertheless, while courts have applied conflict principles differently to public defenders based upon the lack of attorney economic interests, they have not done so in legal services practice.[72]

Though absent from the previous definition, another "interest" echoes throughout considerations of whether a conflict of interest is present — the interest of the legal profession in putting forth a good public face by seeking to have attorneys avoid the "appearance of impropriety."[73] Though it could be argued that this interest of the profession is among the interests of the attorney,[74] it is more appropriately considered an interest independent of either attorney or client because the interest of the profession in appearances can be in conflict with either attorney or client when it requires that representation must

---

69. *See infra* notes 139-53 and accompanying text for a discussion of the interest of the legal services client in securing representation, and the impact of this interest on conflict of interest analysis.

70. Aronson, *supra* note 4, at 811 (discussing the financial interests of the attorney).

71. *See infra* notes 93-138 and accompanying text for discussion of the impact upon conflict of interest analysis of the lack of pecuniary interests of the legal services attorney.

72. *See infra* notes 144-150 and accompanying text for discussion of courts that have taken the lack of economic interests of public defenders into account in conflict of interest analysis resulting in an application of conflict rules that is different than that applied to the for-profit practitioner.

73. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1233 (1972) (discussing that subsequent representation by legal services office against former client might be prohibited by appearances of impropriety even though the actions are unrelated and not a violation of any Disciplinary Rule).

See also Aronson, *supra* note 4, at 810-11 (discussing the role of the avoiding the appearance of impropriety standard in conflict of interest rules and stating, "[b]ecause the appearance of impropriety can be just as damaging as actual impropriety to public respect for the law and clients' belief in their attorney's loyalty, attorneys must ensure that their conduct does not reasonably appear to have been influenced by conflicting interests."); and WOLFRAM, *supra* note 67, § 7.1.4 at 319-23 (discussing "methodological weaknesses" in judicial reliance upon the appearance of impropriety standard and criticizing use of the standard as an independent basis for finding that a conflict of interest exists).

"Appearance of impropriety," a concept of the *Model Code of Professional Responsibility*, was specifically abandoned by the *Model Rules of Professional Conduct. See*, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.9, cmt. at 160-61 (stating that "...the term 'appearance of impropriety' is question begging" and that "...a functional analysis is more appropriate....").

74. Aronson, *supra* note 4, at 811 (discussing that the legal profession is among the third "person" interests that can serve to dilute attorney loyalty).

One might also argue that the avoidance of the appearance of impropriety is an interest of the client in that such avoidance serves to preserve client confidence in the attorney's undivided loyalty in providing zealous representation. Indeed, all interests involved overlap or blur together to some extent.

be declined.[75] In such situations, the client is not able to receive representation by the attorney of choice, and the attorney is not able to receive the financial benefit of representation of the client. Again, when this interest of the profession is balanced against the interest of the legal services client in representation from the only source available, one must seriously question whether preserving the public face of the profession justifies a total denial of representation for the indigent client.

C. The Interests of the Attorney: No Money — No Problem

As for the interests of the attorney with which conflict principles are concerned, there are two fundamental differences in legal services practice that are at the heart of that which makes the world go around - money, or more appropriately, the lack thereof. First, the legal services attorney derives no economic benefit directly from her client, but rather is compensated on a salary basis by her program.[76] The legal services attorney has no personal economic interest in the outcome of a particular case. Therefore, when confronted with a situation where the interests of two clients become adverse, there would not be an economic incentive to favor one client over another.[77] Second, the nature of the legal services office is not a partnership where the attorneys in an office have a shared economic interest in the outcome of cases.[78] Therefore, the underlying economic rationale is absent for imputing disqualification to all attorneys in an office if one attorney has a conflict.[79]

---

75. There is also disagreement as to with whom the profession is concerned observing its appearance, the profession, clients, the public, etc. *See*, WOLFRAM, *supra*, note 67, § 7.1.4 at 320.

76. *But see* Breger, *supra* note 3, at 1130-31 n.69 (discussing that attorney compensation by salary basis is not unique to legal services).

77. *But see id.* at 1130-31 (discussing that though economic motivations to favor one client over another may be absent in legal services practice, other motivations are present to do so that are rooted in "human nature" are present).

78. *See* UNIFORM PARTNERSHIP ACT § 6 (defining a partnership as an association of two or more persons conducting a business for profit).

In cases undertaken by legal services attorneys where there is a possibility of being awarded attorneys' fees, the attorneys in an office or program do have a shared economic interest in the outcome of the case. Though the award does not go to the individual attorney involved in the case, or to supplement existing salaries, *see* 45 C.F.R. §§1609.1-1609.8 (1992), an award of attorneys' fees is not an insignificant line item in an office or program budget. *See, e.g.*, PRAIRIE STATE LEGAL SERVICES, INC.: REPORT TO THE COMMUNITY 7 (1994) (reporting that 5.7% of its 1993 revenues came from court awarded attorneys' fees).

Because awards of attorneys' fees are seldom sought from an adverse party who is financially or categorically eligible to be a legal services client, the shared economic interest in attorneys' fees situation will seldom present an adverse-parties conflict, or the past-client as former-adverse-party conflict, the two situations most frequently encountered in legal services. *See, e.g.*, 42 U.S.C. §1988(b) (supp. 1993) (providing, in part, for an award of attorneys' fees in cases brought against persons acting under color of state law pursuant to 42 U.S.C. §1983 (supp. 1993)). Nevertheless, there may be situations where a conflict exists because a past or present client is called as an adverse witness to a present legal services client in an action that seeks attorneys' fees. In such case, the shared economic interest may cause the legal services attorney to be considered in the same fashion as the for-profit attorney if that interest would cause the disclosure of confidential information of the adverse witness obtained during the course of the prior representation.

79. *See* WOLFRAM, *supra* note 67, at § 7.6.2, pg. 391 (discussing the shared economic interests of attorneys in a partnership that have led to the adoption of the imputation rule).

The absence of these two economic interests, on its face, indicates that legal services practice is a different creature than private practice.[80] The question then to be considered is whether these differences form a sufficient basis for rethinking when a conflict of interest is present that prevents representation of an indigent person who has no other opportunity to obtain representation.

In several areas of professional regulation the absence of economic incentives does allow the legal services attorney to be treated differently than the rest of the profession.[81] Two exceptions to long established prohibitions against certain unprofessional conduct, the prohibition against solicitation of clients and the prohibition against providing financial assistance to a client, provide the strongest examples of how the lack of economic interests on the part on an attorney alters the application of a principle of professional conduct.

Solicitation of prospective clients has long been considered attorney conduct that is highly improper, and even illegal.[82] Because of the opportunity for fraud, overreaching and undue influence on the part of an attorney who seeks to solicit a client, solicitation is among the most mortal of sins the attorney can commit.[83] Nevertheless, solicitation is not prohibited when it occurs in a situation where the attorney involved lacks the economic incentives that are feared to lead to the evils that the prohibition against solicitation seeks to prevent.[84] Therefore, *Model Rule* 7.3(a) does not prohibit solicitation of a member of the attorney's family, and does not prohibit solicitation when the attorney's pecuniary gain is not the motive for the solicitation.[85]

---

80. *See* Goff, *supra* note 4, at 298-306 (discussing, largely in the context of *Borden v. Borden*, how the lack of economic interests of the legal services attorney distinguishes legal services practice from for-profit practice); *see also* Donald E. Woody, Note, *Professional Responsibility — Conflicts of Interest Between Legal Aid Lawyers*, 37 MO. L. REV. 346 (1972) (discussing how the absence of economic interests distinguishes legal services practice from for-profit practice).

81. *See* Michael B. Roche, Note, *Ethical Problems Raised by the Neighborhood Law Office*, 41 NOTRE DAME L. REV. 961 (1966) (discussing several unique aspects of the nature of legal services practice, such as the prohibition against corporations practicing law, that create ethical problems and are therefore treated differently for legal services than they are treated for the for-profit practitioner).

82. *See* WOLFRAM, *supra* note 67, § 14.2.5 at 785-88.

83. *Id.*, at § 14.2, pp. 787-88 (discussing two sides to solicitation of clients, one involving potentially improper competitive motivations by the attorney, and the other involving providing injured persons with important information as to how to seek redress for their injuries); *see also* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 cmt. 1 (1992) (commentating on the potential for abuse inherent in the solicitation of clients).

84. MODEL RULE 7.3(a) provides: "A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."

While the *Model Rules* speak in terms of the attorney's motive for pecuniary gain as the determining factor as to whether solicitation is prohibited and do not expressly exempt legal services practice from the prohibition on solicitation, the *Model Code* in fact did expressly exempt legal services practice. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(D).

85. *See* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 7.3 cmt. (1992) (stating that, "There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in *Model Rule* 7.3(a) and the requirements of *Model Rule* 7.3(c) are not applicable in those situations.").

The very different nature of the attorney's interests in each situation, notably the apparent perception of a greater loyalty to a member of the attorney's family and the lack of an economic interest, lessens the perceived degree of risk to the interests of the client to an acceptable level. Though decided on First and Fourteenth Amendment grounds, two solicitation decisions of the Supreme Court, *In re Primus*,[86] and *NAACP v. Button*,[87] in dicta, have discussed that the lack of economic interests on the part of a non-profit provider of legal services who solicits persons for representation who are unable to secure representation on their own exempts such situations from the prohibition against solicitation.[88] Consequently, situations involving an attorney who lacks an economic interest in the matter are exempted from the solicitation prohibition.[89] Similar to the exception to the solicitation prohibition is the exception to the prohibition against providing financial assistance to a client. Though *Model Rule* 1.8(e) "continues the general common law prohibition against advancing financial aid to a client in connection with pending or contemplated litigation" in order to prevent "encourag[ing] a client to pursue lawsuits that might otherwise be forsaken," the rule contains an express exception for attorneys representing indigent clients.[90] The exception of *Model Rule* 1.8(e)(2) recognizes that to continue the prohibition for indigent persons could operate to bar a client from pursuing litigation of her rights in a situation where "there will be little unseemly competition among lawyers to outbid each other for the right to represent parties."[91] Therefore, in order to allow access to the judicial process, the exception is created because the indigency of the client may serve to lesson the economic incentives of the attorney to engage in unprofessional conduct.[92]

---

86. 436 U.S. 412 (1978).

87. 371 U.S. 415 (1963).

88. *See In re* Primus, 436 U.S. 423, 437 n.31 (1978) (overturning the professional discipline of an attorney who, for purposes of providing legal representation at no charge, had contacted a woman who had been sterilized as a condition of receiving medical assistance and stating "... the ethical rules of the legal profession traditionally have recognized an exception from any general ban on solicitation for offers of representation, without charge, extended to individuals who may be unable to obtain legal assistance on their own." (citations omitted)); and NAACP v. Button, 371 U.S. 415, 442-43 (1963) (holding Virginia statutes that prohibit solicitation unconstitutional in declaratory action brought by the NAACP which sought to solicit clients for school desegregation and stating, "There has been no showing of a serious danger here of professionally reprehensible conflicts of interest which rules against solicitation frequently seek to prevent. This is so partly because no monetary stakes are involved, and there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself or an outside sponsor.")

89. For a discussion of permissible solicitation by not-for-profit providers of legal services, see ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 7.3 cmt. at 523-24 and 529-30; *see also* WOLFRAM, *supra* note 67, § 14.2 at 788-89 (analyzing "permissible solicitation").

90. MODEL RULE 1.8(e)(2) provides, "a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client." MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.8(e)(2) (1992).

91. WOLFRAM, *supra* note 67, § 9.2.3 at 508.

92. *See* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 cmt. at 143-146 (noting that exceptions exist to general prohibitions).

D. No Money — No Problem: Except in Conflicts of Interest as Applied to Legal Services Practice

In the context of solicitation and providing financial assistance to the client, the lack of competing economic interests of the attorney involved serves to transform a situation that is impermissible for the financially interested attorney into a situation that is permissible for the attorney without a financial interest. Nevertheless, the lack of economic interests of the legal services attorney has been rejected as a justification for allowing representation in conflict of interest situations. One case, *Borden v. Borden*,[93] has been cited most frequently for the rejection of the lack of pecuniary interests argument.[94] Unfortunately, this case, which has served as the flash point for the discussion, is a poor example of the conflict situations most frequently encountered by legal services attorneys. Two factual quirks served to compel its holding that the lack of economic interests does not allow a different application of conflict principles for legal services practice, a holding whose underlying arguments were neither fully presented or examined.

In *Borden*, the court rejected the argument that the different economic structure of legal services practice warranted a finding that there was not an impermissible conflict of interest for two attorneys from the same legal services program to represent adverse parties in a divorce.[95] The Neighborhood Legal Services Program (NLSP), located in the District of Columbia, represented Ms. Borden in an action seeking a divorce from Mr. Borden.[96] Pursuant to a local ordinance that provided for court appointed counsel in certain divorce actions,[97] the NLSP, on behalf of Ms. Borden, moved for the appointment of counsel for Mr. Borden.[98] The trial court, in a stroke of one-upsmanship, the reason for which one can only hazard a guess,[99] appointed

93. 277 A.2d 89 (D.C. 1971).

94. *See, e.g.*, WOLFRAM, *supra* note 67, at § 7.6.5, pg. 406 (referring to *Borden* as the "leading" case for the "general approach" of rejecting the argument that the lack of pecuniary interests in legal services representation removes threats to confidentiality and loyalty present in imputed conflicts when adverse parties each seek representation from the same legal services organization); *see also* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1309 (1975).

But see People v. Wilkins, 268 N.E.2d 756, 757-58 (N.Y. 1971) (holding that the rule imputing vicarious disqualification does not apply to a large, geographically separated, multi-office, legal aid agency where it is unlikely that client information would be shared among agency attorneys).

95. For discussion of *Borden*, *see generally*, Goff, *supra* note 4, at 298-305; Woody, *supra* note 80, at 346-50.

96. *Borden*, 277 A.2d at 90.

97. *Id.* at 90 n.1.

98. *Id.* at 90.

99. Being willing to hazard a guess, the author would say that because the applicable ordinance involved provided for the compensation of appointed counsel to be "paid by the parties as the court directs," and that the motion for appointment of counsel for Mr. Borden was accompanied by a motion by Ms. Borden, proceeding in forma pauperis, to have applicable fees waived, the trial court may have been seeking to avoid the appointment of an attorney whose fees did not have a realistic chance of being paid by either party. *Id.* at 90. It is the author's anecdotal observation that Boddie v. Connecticut, 401 U.S. 371 (1971) (holding that a state may not deny access to judicial remedies in divorce proceedings to persons unable to pay filing fees due to indigency) was a bitter pill for some judges to swallow. One could guess that the trial court appointed the NLSP to represent Mr. Borden in an effort to avoid the appointment of an attorney who would not receive compensation from the parties and who would then turn to the court for compensation. Therefore, the court turned to the organization established to provide free legal services to do so for both parties.

an attorney from the NLSP to represent Mr. Borden.[100] In issuing the order of appointment, the trial court relied upon its own previous ruling in which it found that the absence of an economic relationship between attorney and client, and between attorneys in the NLSP, among other unique aspects of legal services practice, caused there to be no conflict of interest.[101]

What followed, is one of the two distinctive quirks about *Borden* that should prevent the case from being considered dispositive of the issue of whether the lack of an economic relationship between attorney and client, and between attorneys in an office, allows for a different application of conflict of interest principles in the context of legal services. The two NLSP attorneys, each representing one of the adverse parties, moved to have the trial court's order of appointment set aside arguing that they could not proceed in light of the conflict created by the court's appointment.[102] Though the trial court denied the motion to set aside the order of appointment,[103] the District of Columbia Court of Appeals reversed and set aside the appointment of counsel for Mr. Borden.[104]

Though *Borden* is most often cited for the proposition that the absence of economic relationships and incentives in the free representation of indigents by legal services attorneys does not alter the application of conflict of interest principles,[105] it is unclear to what extent the court of appeals actually considered the issue. Because the NLSP attorney representing Mr. Borden had argued an "inability to represent the cause of their clients and remain faithful to the Code of Professional Responsibility,"[106] it would seem to have been impossible for the court to have reached any result other than to reverse the appointment of NSLP to represent Mr. Borden. To uphold the order of the trial court would have forced an attorney to represent a client whom the attorney had said he ethically could not represent. Representation should not go forward when the attorney involved believes that professional obligations would be compromised.[107]

The appellate court did briefly mention and reject the argument that the lack of economic incentives altered the nature of the interests that are ordinarily in conflict when members of the same firm seek to represent adverse parties.[108] Yet, in so doing, the appellate court did not engage in any analysis of

100. *Borden*, 277 A.2d at 90. *Borden* thus involves the opposing adverse parties conflict situation discussed *supra* notes 33-36 and accompanying text.

101. *Id.* at 90 ("Since, therefore, no economic conflict exists, no corporate interest is in any way involved and no legal partnership as such has been disclosed it would appear that in fact and objectively speaking there is no conflict of interest.") (quoting, McGee v. McGee, 98 Wash. L. Rptr. 929 (1970).

102. *Borden*, 277 A.2d at 90.

103. *Id.*

104. *Id.* at 93. On appeal, Borden was consolidated with two other cases: *In re* Rabin, 276 A.2d 729 (D.C. Cir. 1971); and N.L.S.P. v. Ryan, 276 A.2d 728 (D.C. Cir. 1971).

105. See *supra* note 94 for discussion of court and commentator reliance on Borden.

106. *Borden*, 277 A.2d at 90.

107. In order for representation to continue in light of a conflict of interest, *Model Rules* 1.7(a) and (b) both require that the lawyer "reasonably believes" that the client will not be adversely affected. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a)(1) and Rule 1.7(b)(1) (1992).

108. *Borden*, 277 A.2d at 91 (stating that: "Lawyers who practice their profession side-by-side, literally and figuratively, are subject to subtle influences that may well affect their professional judgement and loyalty to their clients, even though they are not faced with the more easily recognized conflicts of interest.").

whether the interests involved were in fact altered by the attorney's lack of economic interests, and the court was hard pressed to explicate the precise nature of the interests that were in conflict when the attorneys representing the adverse parties were from legal services.[109] The appellate court could only manage to find "subtle influences that may well affect [the NSLP attorneys'] professional judgment,"[110] and appeared to agree that the economic interests that give rise to conflicts in private practice were absent.[111] Therefore, the appellate court was not protecting any present threat to client confidences, but was anticipating the possibility of a threat to attorney loyalty and zealous representation.

In light of the fact that the NLSP attorneys involved represented to the court that they could not proceed with representation of adverse parties, the court would seem to have been unable to reach any other result. It is interesting that the opinion does not state that the attorneys could not remain faithful to their clients, but only could not remain faithful to the *Code*. One could wonder whether the NLSP attorneys were responding to an ethical constraint they felt was imposed upon them but did not affect their ability to zealously represent their clients. [112]

The second factual quirk of *Borden* perhaps served to make the court unappreciative of the consequence of its decision to the legal services client. The decision to find an impermissible conflict of interest most likely would not have prevented Mr. Borden from obtaining representation, as there were other avenues available to indigent persons in the District of Columbia to obtain free representation.[113] If the case had occurred outside a large urban area, it is doubtful that there would have been any alternatives available. As the survey indicated, by far the most frequent consequence for the legal services client who presents the office with a conflict situation is to not receive any representation at all.[114] If the case had occurred outside of a large, urban area, the court would have had to decide whether it should protect Mr. Borden from a conflict of interest in his representation when the price was no representation

109. Commentators who have criticized the absence of pecuniary interests argument also have failed to engage in any specific analysis of the interests. *See, e.g.*, Breger, *supra* note 3, at 1130-31 (rejecting the lack of "economic impetus" argument without any analysis).

110. *Borden*, 277 A.2d at 91.

Commentators who have argued against any different application of conflict of interest principles to legal services practice have had an equally difficult time explaining what interests remain in conflict when there are no economic interests. *See* Breger, *supra* note 3, at 1130-1131 (arguing that in the absence of a conflict of economic interests, interests dictated by human nature, such as "ideological...personal or emotional interests" and "fighting spirit," are those that are in conflict).

111. *Borden*, 277 A.2d at 91 ("...they are not faced with the more easily recognized economic conflict of interest.").

112. It is unclear from the opinion what was the precise nature of the attorneys' reason for stating that each could not proceed with representation, as the opinion only recites that the attorneys involved, "have stated upon the record their inability to represent the cause of their clients and remain faithful to the Code of Professional Responsibility." Borden v. Borden, 277 A.2d at 90.

As discussed, it was only the *Model Code of Professional Responsibility* that spoke in terms of avoiding the "appearance of impropriety." *See supra* note 74.

113. *Id.* at 92 n.9 (noting that a panel of numerous lawyers was available to provide representation without compensation). *See, e.g.*, Goff, *supra* note 4, at 303-304 (discussing that the finding of a conflict of interest in *Borden* did not result in a denial of any legal services due to other programs available in the area to provide free legal services to the indigent).

114. *See* app. *infra*, question 23 at 626.

at all.[115] Nevertheless, the broad holding of *Borden* is that dual representation is an impermissible conflict of interest in the context of legal services.[116]

The crux of the issue, whether the lack of economic interests involved in legal services representation changes the interests in the attorney client relationship to a degree that warrants allowing representation in situations where a private attorney would have an impermissible conflict of interest, for the most part, was not examined in *Borden* or by the commentators who have dismissed that argument.[117] Whereas in other situations where the attorney lacks the customary economic incentives of the for-profit attorney that could lead to dilution of loyalty to the client, such as solicitation and financial assistance to the client, otherwise impermissible attorney conduct is allowed. The same rationale should be extended to conflicts of interest. This becomes apparent by examining the interests of the attorney who lacks the traditional economic interests of the for-profit attorney.

The commentator who has written the most extensive work on the application of conflict of interest principles to legal services practice has sought to identify the non-economic interests of the legal services attorney that pose a sufficient threat to the "attorney's independent judgment" so as to warrant the finding of an impermissible conflict of interest even though pecuniary interests are not present.[118] Those interests are identified as "ideological interests in the results obtained,"[119] "personal and emotional interests in the results of lawsuits they undertake,"[120] and "the fighting spirit required in zealous representation."[121] It is difficult to see how those attorney interests serve to compromise the interests of the client in receiving zealous representation. Instead, it would seem that they would all indicate the converse, for they speak to an attorney's dedication to her client and to results obtained for her client, rather than to a compromise of dedication to one's client. That is, unless the attorney is opposed to the result which the client seeks—a situation not often present for ideologically oriented legal services attorneys. Additionally, those interests arguably are present in every attorney-client relationship. If those results-oriented interests were sufficient in and of themselves to create a conflict, representation would then be precluded in every situation where it is possible that they are present. Therefore, the exceptions for non-economic

115. See *infra* notes 139-153 and accompanying text for a discussion of how the client's interest in being able to secure representation from the only available source should be considered in the calculus of when a conflict situation should preclude representation.

Apparently, the potential availability of other free counsel for Mr. Borden was relied upon by the court in distinguishing *NAACP v. Button*. *Borden*, 277 A.2d at 92 ("Also we fail to find in this case the extraordinary circumstances present in *NAACP v. Button* ... where legal representation to vindicate constitutional rights of a group of citizens was simply unavailable except in the form of group legal services...").

116. *Borden*, 277 A.2d at 92.

117. See *supra* notes 108-12 for a discussion of the deficiency of court and commentator analysis of conflicts of interests in light of the unique lack of economic interests of the legal services attorney.

118. Breger, *supra* note 3 at 1130-31 (acknowledging that economic motivations that give rise to conflicts of interest are absent in legal services practice but arguing that other attorney interests are present that threaten client interests).

119. *Id.* at 1131; *see also, supra* note 110, and accompanying text.

120. Breger, *supra* note 3, at 1131.

121. *Id.*

solicitation and financial assistance to the client could not be justified.[122] An attorney could never be allowed to enter a contract with her client, for the attorney's contrary result oriented interest apparently would be self-serving and, therefore, obviously detrimental to the client.[123]

The *Borden* court took a different tack in attempting to identify the "subtle influences"[124] that affect the professional judgment of the legal services attorney and create a conflict.[125] It looked to the interpersonal relationships of legal services attorneys who practice in the same office as having the potential for affecting "their professional judgement and loyalty to their clients."[126] This could take several forms. Joint supervision of attorneys representing opposing parties could pose a threat to client confidences.[127] A senior attorney opposing a junior attorney could cause the junior attorney to feel pressure to compromise client interests in order to acquiesce to a senior colleague.[128]

While it can not be disputed that such influences on attorney interests might be present, it does not necessarily follow that those influences are always present to a degree that should give rise to an impermissible conflict of interest. The threat to confidentiality by joint supervision can be easily alleviated by adjusting supervisory responsibilities.[129] The situation of pressure on the junior attorney is more accurately couched in terms, not of a conflict of interests of the adverse parties, but rather in terms of a limitation of the attorneys' ability to provide representation due to their personal interests.[130] In such case, the disqualification is not required in every situation where adverse parties sought representation from the same legal services organization. In the event that the attorneys felt that their ability to provide representation would not be affected by the "subtle influences" involved, disqualification would not be necessary.

---

122. See *supra* notes 76-92 and accompanying text for a discussion of the how the lack of economic interests by the attorney involved justifies the exceptions to otherwise impermissible conduct. If the interests identified by Mr. Breger did in fact pose a threat to an attorney's independent judgment so as to warrant a preclusion of representation in conflict situations, representation would also have to be precluded in non-economic solicitation and financial assistance situations, for those compromising interests would also be present.

123. See *infra* notes 168-76 and accompanying text for discussion of *Model Rule* 1.8 and the accommodation of risk to client interests contemplated thereunder.

124. *Borden*, 277 A.2d at 91.

125. The court also acknowledged the absence of economic interests in legal services practice that give rise to conflicts in for-profit practice. *Id.* at 91.

126. *Id.*

127. Legal services offices customarily have a senior attorney designated to have supervisory responsibility over the legal work of the other attorneys in the office. *See, e.g., id* (describing the supervisory structure of legal services offices as "much like a law firm's senior partner working with his associates.").

128. The court in *Borden* also identified among the "subtle influences" that "... attorneys participate in office meetings and receive intra-office communications on substantive law, litigation techniques and tactics, and office policy." *Id.* Such activities are more accurately characterized as in-house continuing legal education programs on areas of substantive law that are not specific to a particular client, rather than opportunities for breach of client confidences.

129. *See* Flores v. Flores, 598 P.2d 893, 896-97 (Alaska 1979) (discussing that the implementation of regulations that might be developed by a legal services that could segregate client files, supervision and offices and would be sufficient to allow attorneys from the same legal services office to represent opposing parties without a compromise to professional responsibilities).

130. *See* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. at 114-16 (2d ed. 1992) ("Paragraph (b): Conflicts that Affect the Quality of Representation") (discussing conflicts that affect the quality of representation, including "Lawyer's Own Interests", "Lawyer's Personal Relationships" and "Influence of a Third Party").

Therefore, the disqualification would not be *per se*, with the result that she who gets to the legal services office first wins the prize of representation, while the runner up is foreclosed from the only available source of representation.

The lack of economic interests on the part of the legal services attorney should effect several ends. First, because the attorneys in an office have no shared economic interests, a legal services office should not be considered a "firm" for purposes of *Model Rule* 1.10(a). Whether a legal services office constitutes a "firm" within the meaning of the rule has been largely considered to be a question of proximity, in terms of offices and information.[131] This view of the issue mostly addresses prevention of inadvertent disclosures of client confidences. In that such situations can be warded against by means of screening mechanisms, this is an unnecessarily onerous measure of whether an office constitutes a "firm," particularly when it is considered that indigent persons are denied access to their only source for legal representation.[132]

Second, *Model Rule* 1.10(a) appears to speak to purposeful compromises of client confidences rather than inadvertent disclosures.[133] The purpose could be either innocent sharing of information in furtherance of common enterprise or malevolent sharing for economic gain. Because physical separation would seem to be an ineffective impediment to attorneys bent on malevolent conduct, the physical separation test is considered superfluous in regard to for-profit practice.[134] Therefore, *Model Rule* 1.10(a) utilizes the presumption of shared information to impute the disqualification of one attorney to all who might be predisposed to utilize that information.[135] The existence of that predisposition is apparently measured by the "firm" concept, rooted in shared economic interests.[136] Because the legal services attorney lacks shared economic interests, the presumption of shared information is inappropriate. Therefore, instead of basing imputation of conflict of interest on an inapplicable presumption that

131. *See* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 cmt. at 180 (2d ed. 1992), "Definition of 'Firm'" (discussing whether legal services organizations constitute a firm in terms of whether they are employed by the same "unit," but not giving any definitional guidance as to what constitutes a unit); *see also*, ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1309 (1975) (discussing whether legal services offices may represent opposing sides in a lawsuit in terms of their possible "connections," physical, supervisory and informational).

See also Flores v. Flores, 598 P.2d 893, 896 (Alaska 1979) (discussing that representation of opposing parties by one legal services office would not compromise professional ethics if procedures were enacted to ensure separation of "files, supervision and ... offices").

132. *See* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.10 cmt. at 187-8 (1992) (Screening to Avoid Disqualification) (discussing the use of screening mechanisms to protect client confidences and avoid disqualifications).

133. *See*, ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.10 cmt. at 175 (1992) (stating that "[t]he rule is based upon the presumption that client confidences are shared among law firm members....").

134. *See* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.10 cmt. at 180 (1992) (stating that: "The definition of a 'firm' adopted by Rule 1.10 includes the separate branch offices of a traditional private firm...") (citing Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1321 (7th Cir. 1978).

135. *See* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.10 cmt. at 175 (1992) ("Legal Background: Reason for the Rule").

136. *See* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.10 cmt. at 184 (1992) ("Lawyers in Continued Association Are Treated as One") (stating that all lawyers in a firm are treated as one lawyer for conflict purposes).

serves to deny the only source of services to indigent clients, imputation should be based on a standard of actual prejudice to client interest.

Arguably, the situation of the sharing of information for a common enterprise would seem to meet the test of a "firm," thereby imputing disqualification. Nevertheless, the use of the presumption to guard against the innocent sharing of information, particularly in the legal services context, seems unnecessary. If information had in fact been shared that would prejudice a client, the attorney who would be in a position to use that information to the detriment of a client should disqualify herself.[137] But there is no reason for extending the disqualification beyond the attorney in actual possession of the information. Additionally, if the sharing had occurred for no improper purpose, must it be presumed that the attorney or attorneys involved would not disqualify themselves? The presumption upon which *Model Rule* 1.9(a) is based is similarly inapplicable to legal services practice. If an attorney is in possession of confidential information about a former client who is now an adverse party of a present client, that attorney should be relied upon to disqualify herself.[138] Perhaps economic incentives make presumptions of prejudice necessary, but when those incentives are absent, the presumptions serve little purpose, particularly when balanced against client interests of securing representation.[139]

IV. NO ATTORNEY — BIG PROBLEM: THE OVERLOOKED INTEREST OF THE LEGAL SERVICES CLIENT

A. No Other Attorney Available = No Presumption of Prejudice

While the legal services client has the same interests as the client of the for-profit attorney in the preservation of confidences and obtaining zealous representation, the legal services client has an important additional interest that is absent from the for-profit attorney-client relationship—obtaining representation from the only available source.[140] Whereas the non-indigent client may simply find another attorney when a conflict prevents representation by the attorney of choice, a conflict of interest most often serves to prevent the

137. This is the approach taken in *Model Rule* 1.10(b) which does not impose a presumption-based disqualification in situations where a firm seeks to represent a party that has interests adverse to a party represented by a former member of the firm. Instead, in order to accommodate attorney mobility, *Model Rule* 1.10(b) bases disqualification upon the actual possession of confidential information. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10(b)(2) (1992).

138. Similar to *Model Rule* 1.10(b), *Model Rule* 1.9(b) also is not presumption based, but instead looks to whether information is actually possessed in order to not unnecessarily hamper lawyer mobility and the free choice of counsel. *See* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.9 cmt. at 161 ("Confidentiality") ("Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c)").

139. The absence of presumptions from *Model Rules* 1.9(b) and 1.10(b) are, in large part, an accommodation to attorney mobility in changing places of employment. *See* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.9 cmt. at 160 ("[T]he rule should not unreasonably hamper lawyers from forming new associations, and taking on new clients after having left a previous association"); *id.* at Rule 1.10 cmt. at 178 (discussing "Mobility of Lawyers"). Certainly, availability of legal representation for the indigent is a far greater concern than the employment prospects of attorneys.

140. See *supra* notes 67-68 and accompanying text discussing the client interests sought to be protected by conflict of interest principles.

legal services client from obtaining any representation.[141] It is this consequence that makes the legal services client unique.[142] Any realistic evaluation of protecting the various interests involved in the attorney-client relationship must take that interest into account as well. Otherwise, the rules of professional conduct become punitive, rather than protective of the legal services client, leaving the client without representation.

Conflict rules seek to balance "the lawyer's duty of loyalty to the client, the economic interests of the lawyer, and the public's interest in the availability of legal services."[143] Because the absence of available counsel is the most frequent consequence for the conflicted indigent client, the interest of the indigent client in the availability of legal services is a much stronger consideration than for any other client group. Nevertheless, this primary interest of the legal services client is afforded less weight in the balancing than that afforded to the interest of the indigent criminal defendant, or even than that afforded the interest of the for-profit client in free choice of attorney and the interest of lawyers themselves in occupational mobility. To account for the interest of the legal services client in securing representation from the only available source, disqualifying conflicts of interest should be found to exist only where there is an actual prejudice to the client, and the notion of presumptions of prejudice should be discarded from conflict analysis in the legal services context.[144] Thus, representation would not unnecessarily be prevented.

---

141. *See* app. *infra,* questions 16-25A at 625-27. The survey inquired as to the frequency that certain consequences occur for the client who presents the legal services office with a conflict of interest. Question #23 "Client goes without representation," received a frequency rating significantly higher than any of the other consequences inquired about. Only three of the seventy-five responses to #23 indicated that the conflicted client "never" is left without representation.

See also Aronson, *supra* note 4, at 856 (stating: "For wealthy clients, disqualification of an attorney means hiring another. For indigent clients, however, disqualification of an entire legal aid or defender organization has far more serious consequences."); Breger, *supra* note 3, at 1123 (noting: "Conflicted legal aid clients, however, are likely to go without legal assistance if a legal aid office cannot represent them, as significant alternatives to legal aid and supplemental modes of legal representation for indigents exist in only a few areas of the country."); Goff, *supra* note 4, at 303 (contending: "Disqualification of an entire legal services program in a given community from representing opposing parties to a divorce action can have the effect of eliminating any legal assistance at all for one of the parties."); Woody, *supra* note 80, at 350 (arguing that "disqualification of an entire legal services program in a given community from representing opposing parties to an action may eliminate the availability of the legal services for one of the parties, making it more difficult for the poor to obtain legal counsel in civil matters"), *Developments—Conflicts of Interest, supra* note 5 at 1402 (stating that "...conflicts rules may have the perverse effect of saving individual pro bono clients from inadequate representation at the cost of denying them representation altogether").

142. See *infra* notes 146-49 and accompanying text for the distinction between representation of indigents by public defenders and legal services attorneys. See also *supra* note 21 for examples of jurisdictions that have found a state constitutional right to representation for indigent clients in certain limited, non-criminal law areas.

143. ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7 cmt. at 109 (1992).

144. *See* Aronson, *supra* note 4, at 851-58 (discussing that considerations of public policy, including, but not limited to, the unavailability of alternative counsel, warrant a limitation in the application of the rule of vicarious disqualification to situations where actual, rather than presumed prejudice exists).

It is interesting to note that Marshall Breger, who argued against any different application of conflict principles for legal services, *see supra* notes 8, 50, & 63, made an argument that sounds similar to that of discarding presumptions of prejudice. *See* Breger, *supra* note 3, at 1131 ("Care must be taken, however, to ensure that disqualifications are not compelled when

In the context of the representation of indigent criminal defendants by public defenders, some jurisdictions have discarded the notion of presumptions in conflict of interest analysis when representation of co-defendants by attorneys in the same office is undertaken.[145] This approach has been adopted by examining the interests of the attorneys and clients involved to find that the different interests involved warrant discarding the notion of presumptions in conflict analysis. In direct analogy to the interests of the legal services attorney, the interests of the public defender are devoid of pecuniary motivation.[146] The interests of the indigent criminal defendant, however, are not directly analogous to those of the legal services client. If an attorney in a public defender office has a conflict that is imputed to all the attorneys in the office, the indigent criminal defendant is not left without representation.[147] The Sixth Amendment guarantee of counsel necessitates that funds be expended to obtain

---

they would not further the goal of preserving this relationship [attorney/client]. The extraordinary result of disqualification—the inability of the conflicted client to obtain legal counsel—dictates that disqualifications be avoided unless absolutely essential to this goal. If the fiduciary relationship would not be compromised by permitting dual or subsequent representation, disqualification arguably should not be mandated.").

Though Mr. Breger recognizes the significance of the interest of the legal services client in obtaining representation and that denial of representation should only occur when there is prejudice to the attorney/client relationship, he fails to recognize the role played by presumptions in determining when a conflict of interest is present. Therefore, he draws the line far too narrowly as to the application of conflict principles to legal services.

145. *See, e.g.*, State v. Bell, 447 A.2d 525, 527-29 (N.J. 1982) (holding that a public defender office may represent co-defendants); People v. Robinson, 402 N.E.2d 157, 161-63 (Ill. 1979) (finding that an office of a public defender is significantly different than a law firm so as not to subject the public defender to the rule of per se disqualification); People v. Wilkins, 268 N.E.2d 756, 757-58 (N.Y. 1971) (holding there not to be a per se conflict of interest when a non-profit provider of legal services to criminal defendants represents both a criminal defendant and a witness against the defendant in an unrelated matter).

But see People v. Pinkins, 272 Cal.Rptr. 100, 104-07 (Ct.App. 5th. Dist. 1990) (holding that public defenders and private practitioners should be held to the same conflict of interest standard); Babb v. Edwards, 412 So. 2d 859, 861 (Fla. 1982); Commonwealth v. Westbrook, 400 A.2d 160, 162 (Pa. 1979) (treating two public defenders as two members of a private firm); State v. Stevenson, 264 N.W.2d 848, 853 (Neb. 1978) (overturning a trial court's order that a single attorney represent co-defendants who intended to implicate each other); Allen v. District Court in and for Tenth Jud. Dist., 519 P.2d 351, 353 (Colo. 1974) (finding that an attorney must withdraw in the face of a motion based on actual or potential conflict of interest); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1418 (1978) (informing a public defender with offices in two cities that attorneys from the program may not represent co-defendants with conflicting interests).

For discussion of the conflict of interest problems created by the representation of criminal co-defendants and the implication for the indigent defendant, see John Stewart Greer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119 (1978) (proposing a prohibition on representing multiple defendants in criminal matters).

But see id. at 161 n.170 (discussing screening mechanisms that could be used by public defender offices to mitigate the harshness on indigent defendants of a prohibition against representation of indigent co-defendants).

146. *See* People v. Robinson, 402 N.E.2d at 160-62 (examining and contrasting the interests of a public defender office to a private practice office and rejecting a per se rule of disqualification for public defenders seeking to represent co-defendants); State v. Bell, 447 A.2d at 528 (discussing that: "Public interest firms have no financial incentive in retaining the cases of joint defendants who might thereby be prejudiced.").

147. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1418 (1978) (discussing that a public defender office is disqualified from representing co-defendants and concluding that because of the availability of alternative counsel, there is nothing "unique" in the conflict).

counsel outside of the conflicted office.[148] No such protection exists for the legal services client who, most often, is denied the only available source of representation if a conflict exists.[149] Nevertheless, the fact that the conflicted criminal defendant may be faced with representation by an attorney from outside the office of the public defender, who may not possess the same degree of expertise in criminal defense as the public defender, has been considered a factor of enough significance to abandon the use of presumptions in conflict situations in order to accommodate client interests.[150] The result is no per se disqualification of public defenders. Instead, the facts of each conflict situation are examined to determine if the representation would result in actual prejudice to the client.[151]

For-profit representation also encompasses a shift from a presumption based per se disqualification to an actual prejudice standard in order to accommodate client interest in the choice of counsel and to accommodate attorney interest in employment mobility. Thus, in both *Model Rule* 1.9 and 1.10 the per se disqualifications contained in paragraph (a) of each, become disqualifications based upon actual prejudice in paragraph (b) if the conflict situation is based upon a lawyer's prior association with a law firm.[152] Representation is only precluded when confidential information is actually in the possession of an attorney who stands in a position to use it to the prejudice of a client interest.[153]

Whereas the legal services attorney and the public defender possess the same lack of economic interests, the interest of the legal services client in obtaining representation is a greater interest than for the criminal defendant due to the unavailability of alternative counsel.[154] In comparison to the

148. The cynic might suggest that it is this expenditure of public funds that is the motivation for the abandonment of the presumption of prejudice. The finding that a conflict situation does not unduly prejudice the criminal defendant therefore avoids the additional expense of retaining outside counsel. Similarly, that same cynic might suggest that the rejection of per se rule of imputed disqualification operates to negate claims of ineffective assistance of counsel due to the existence of a conflict of interest where there has been no actual prejudice to the criminal defendant.

149. *See supra* note 22 (discussing that the most frequent consequence for the indigent client who presents the legal services office with a conflict of interest is to be left without any source of representation).

150. *See* People v. Robinson, 402 N.E.2d at 162 ("In many instances the application of a per se rule would require the appointment of counsel with virtually no experience in the trial of criminal matters, thus raising, with justification, the question of competency of counsel."); State v. Bell, 447 A.2d at 528 ("A per se rule requiring counsel from separate offices would therefore needlessly deprive many defendants of competent local public defenders.").

151. *See* People v. Robinson, 402 N.E.2d at 163-69 (rejecting a presumption of per se disqualification and examining the factual circumstances of three consolidated cases and finding no impermissible conflict of interest); State v. Bell, 447 A.2d at 529-30 (rejecting a presumption of per se disqualification and examining the factual circumstance of the situation to find no impermissible conflict of interest).

152. *See* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.9 cmt. at 160-61 (1992) ("Lawyers Moving between Firms"); and Rule 1.10 cmt. at 177-78 ("Countervailing Policy Considerations: Client's Right to Free Choice of Counsel").

153. *See* MODEL RULES OF PROFESSIONAL CONDUCT 1.9(b)(2) and Rule 1.10(b)(2) (1992).

154. In another context, the lack of alternative representation for legal services clients has served to be a significant factor in determining the course of ethical behavior. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 347 (1981) (discussing the ethical obligations owed clients of legal services attorneys and offices in light of a closing of the offices

accommodation for attorney mobility and free choice of counsel reflected in *Model Rules* 1.9(b) and 1.10(b), the interest of the legal services client is of far greater social importance. Therefore, the abandonment of presumptions in conflict analysis should be extended to all conflict occurrences in legal services practice.

B. Allocation of Risk In Conflicts of Interest/Same Standard + Different Profession = A Different Application

Critics of allowing legal services representation in conflict situations where representation by the for-profit attorney would be prohibited have argued that the legal services client deserves the same quality of representation as is received by the paying client.[155] To them, removing presumptions from the conflict of interest calculus would result in a lesser quality of representation.[156] Though a standard of actual prejudice to the client would provide protection to client interests from actual harm, the absence of presumptions could be argued to expose the legal services client to a risk to her interests that is greater than the risks to which the for-profit client is exposed. For example, although attorney economic interests are absent, representation of adverse parties by a single office does expose the client to risk from the "subtle influences" discussed in *Borden* that can adversely affect zealous representation, or, perhaps, even expose the client to risks of inadvertent or purposeful disclosure of client confidences.[157] Therefore, it could be argued that the existence of such risks to which the client would be exposed if presumptions of prejudice were removed from legal services conflict analysis would cause the legal services client to receive a lesser quality of representation. That argument ignores the fact that the principles of professional ethics countenance the acceptance of varying degrees of risk in order to accommodate a balancing of the interests of attorney and client. Similarly, the interest of the legal services client in obtaining representation, as well as the absence of attorney interests that could lead to prejudice to the client, together should operate to countenance whatever risk to the legal services client is inherent in discarding the presumption of prejudice. An examination of the application of the *Model Rules* to for-profit practice shows that an analogous risk to client interests is commonly accepted.

One might glean from the previously cited definition of conflict of interest,[158] that any time the interests of the attorney and client have the potential for being adverse, or any time that a possible compromise of client interests is present, a conflict of interest exists that mandates representation should not proceed.[159] The definition speaks in terms of a conflict existing

due to a termination of funding and concluding that the absence of alternative counsel may make it acceptable to take a new case where it otherwise would not be acceptable).

155. *See, e.g.*, Breger, *supra* note 3, at 1127-31.

156. It is interesting to note that the courts that have abandoned presumptions in conflict situations involving the public defender have done so in order to provide high quality representation. *See supra* note 150 and accompanying text.

157. *See supra* notes 118-30 and accompanying text (discussing non-economic interests of the attorney that may serve to compromise client interests).

158. *See supra* note 65 and accompanying text.

159. An oft quoted quip perhaps best describes the risk approach of seeking to avoid any possibility of compromise to the client's interest: "[W]hen a practitioner is in doubt on an ethical question, the best answer is usually No ..." John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 709 (1965).

whenever interests are adverse "in any way," even though the representation of the client is not affected. This is echoed throughout conflict of interest analysis, as one encounters phrases using words such as "potential conflict,"[160] and "insulation from...temptations, or...distractions."[161] Nevertheless, the existence of a conflict of interest does not always require that the attorney decline representation.

Because conflict of interest doctrine seeks to balance the "duty of loyalty to the client, the economic interests of the lawyer, and the public's interest in the availability of legal services,"[162] representation is not prevented in every situation that a conflict exists.[163] Instead, conflict doctrine countenances a spectrum of risk to client interests that range from tolerating zero possibility of risk to client interests, to allowing for representation when a significant risk to client interests are present in order to accommodate the aforementioned balancing.[164] The zero risk approach is reflected in *Model Rule* 1.10(a),[165] which imputes the disqualification of any member of a firm to all members of the firm, and *Model Rule* 1.9(a),[166] which has been interpreted by courts to contain a presumption, irrebuttable in some circuits, that information has been received and will be used by the attorney to the prejudice of her former client.[167]

Yet, in order to accommodate "the economic interests of the lawyer," for example, an obvious risk to the interests of the client is tolerated in *Model Rule*

---

160. ARONSON, *supra* note 4, at 809 (stating that "[w]hen a conflict or potential conflict arises, a conscientious attorney usually faces three possible courses of action: [inform and obtain consent, withdraw from representation of one client, withdraw from representation of both clients]").

161. *Developments in the Law—Conflicts of Interest in the Legal Profession, supra* note 6, at 1255 ("Confidentiality rules thus insulate lawyers from a set of temptations, or at least distractions.").

162. ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7 cmt. at 109 (1992).

163. *See* WOLFRAM, *supra* note 67, § 7.1.3 at 318 (discussing countervailing principles to an approach to conflicts of interest that would require disqualification "whenever the possibility of an impairing these interests [loyalty and confidentiality] appeared.").

164. One commentator has discussed at length that a major conceptual inconsistency exists in conflict of interest doctrine because of the spectrum of risks to client loyalty and confidentiality contemplated in such doctrine. *See* McMunigal, *supra* note 56, at 837-42 (discussing three different risk formulations contemplated in present conflict doctrine that range from acceptance of risk to client interests to zero tolerance of risk: first, "the resulting impairment approach," that accepts risk to client interests other than that which would result in actual impairment, *id.* at 837-39; second, "the risk avoidance approach," that avoids a certain degree of risk to client interests, *id.* at 839-40; and third, "the appearance approach," that finds acceptable no appearance of risk, *id.* at 840-42).

165. *See* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.10 cmt. at 184 (discussing "the presumption that lawyers associated in a firm have access to confidential information about each other's clients").

For cases rejecting the "safeguard" of screening the tainted attorney from the rest of the firm by use of screening devices, see, e.g., Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) (noting that despite all efforts to separate attorneys, a reasonable possibility of compromise to client interests remained thereby warranting that representation not proceed); Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263 (7th Cir. 1983) (stating that "no matter what screens it sets up," a law firm may not represent a client against a former client in a substantially related matter).

166. For a discussion of the role of presumptions in conflict of interest situations, see Taskier & Casper, *supra* note 41.

167. *See supra* notes 40-46 and accompanying text (discussing the role of presumptions in the conflict situations most frequently encountered by the legal services attorney).

1.8(a) that allows for an attorney to enter into a business transaction with a present client.[168] In order to accommodate the public's interest in the availability of legal services, *Model Rule* 1.7(a) and (b) allows for a client to consent to representation by her attorney of choice even though an otherwise disqualifying conflict is present.[169] In order to accommodate attorney mobility, *Model Rules* 1.9(b) and 1.10(b) abandon the zero risk approach of *Model Rules* 1.9(a) and 1.10(a) in favor of an actual prejudice standard.

In these situations, a degree of risk to client interests in confidentiality and zealous representation is accepted. Admittedly, the degree of risk involved is tolerated because there are "safeguards" perceived to make the degree of risk acceptable. For example, *Model Rule* 1.8 requires, as "mandatory safeguards...that transactions between a lawyer and client be objectively fair to the client and that the client be given a written explanation of the terms, have an opportunity to consult independent counsel, and consent to the arrangement in writing."[170] *Model Rule* 1.7(a) and (b) require, for a client to consent to a conflict situation, that the attorney "reasonably believes" that the consented to conflict will be not "adversely affect" the client.[171] *Model Rules* 1.9(b) and 1.10(b) require attorney disqualification when a client's confidential information is known. The absence of such "safeguards," though the degree of risk to the client is arguably no greater on its face,[172] leads to a presumption of prejudice to the client that requires per se disqualification in the case of *Model Rule* 1.10(a), and an irrebuttable presumption of prejudice in *Model Rule* 1.9(a).

In essence, these safeguards amount to nothing more than a standard that no actual prejudice to the client occur. Although risk to the "duty of loyalty to the client" is inherent, it is tolerated to accommodate "the economic interests of the lawyer, and the public's interest in the availability of legal services." A similar accommodation for the unique, and more important interest of the legal services client in "the availability of legal services" has not been struck.

As client interest in the free choice of counsel shifts risk allocation to allow for a client to consent to representation even though a direct conflict is present, client interest in the legal services context of obtaining the only source of representation, when combined with the absence of economic interest of the legal services attorney, should operate to alter the allocation of risk from the zero tolerance approach reflected in the application of presumptions to conflict analysis to an approach of actual prejudice. Doing so does not place the legal

168. For a discussion of the risk tolerated in such situation, see, McMunigal *Rethinking Conflict of Interest*, *supra* note 56, at 837-38 (discussing that "a pure resulting impairment approach or actual impairment to lawyer functioning "seems to be reflected in the attorney conflict of interest rules concerning business transactions between an attorney and a client.").

169. *See* WOLFRAM, *supra* note 67, §7.2.2 at 339-40 (discussing the use of consent in conflict doctrine, as based, in part, upon "... the ground of personal autonomy of a client to choose whatever champion the client feels is best suited to vindicate the client's legal entitlements.").

170. ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 cmt. at 132 (1992).

171. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7(a)(1) and 1.7(b)(1) (1992).

172. When a conflict is imputed to all members of a firm, many or all of whom may have no knowledge of the situation that gives rise to the conflict, it is difficult to see how such situation poses a greater threat to client interests than when an attorney enters a business transaction with her own client about whom she knows confidential information and with whom she has an established relationship of trust.

services client in a position of receiving a lesser quality of representation. Instead, it merely recognizes that the legal services client has similar, albeit greater, interest in the availability of legal services than does the for-profit client. Without giving proper weight to this interest of the legal services client, the balance between the "duty of loyalty to the client, the economic interests of the lawyer, and the public's interest in the availability of legal services," gets struck inequitably, resulting in the unnecessary denial of representation for the indigent client seeking legal services.

A change in conflict application for legal services clients from a presumption based, zero-risk approach, to a standard of actual prejudice that is devoid of presumptions and accepts some element of risk would have a dramatic effect on the ability of the legal services client to obtain representation. The two conflict situations most frequently encountered by legal services attorneys would not cause a denial of representation for the conflicted client unless actual prejudice were present. The imputation rule would not presume that confidential client information will be available to, or shared by, attorneys in the same office, and, therefore, would not prevent representation of adverse parties by attorneys from the same office or program.[173] Similarly, the representation of a client against a former client in a substantially related matter would not be prevented by the presumptions that confidential information was obtained from the former client and will be used to compromise that client's interests.[174] An analogous actual prejudice standard is contained in *Model Rules* 1.9(b) and 1.10(b). If for-profit practitioners, who have an economic interest in the outcome of cases may be trusted to disqualify themselves when in possession of protected client information, should not legal services attorneys, who lack any economic interest, be similarly entrusted?

Of course, one risk remains unaddressed, the risk to the profession of a lack of public confidence when attorneys from the same office represent adverse parties, or represent a party whose case is substantially related to that of a former client who is now the adverse party.[175] The interest of the

173. *See* Aronson, *supra* note 4, at 851-58 (discussing developments in the application of the rule of vicarious disqualification in both for-profit and legal services practice and concluding that the nature of legal services practice warrants the application of a standard based upon actual prejudice rather than vicarious disqualification based upon a presumption of prejudice).

See also Goff, *supra* note 4, at 302-03 (criticizing an inflexible approach to "imputed knowledge" in both private practice and legal services practice); Woody, *supra* note 80, at 349-50 (arguing for a relaxation of the rule of vicarious disqualification in legal services).

174. Some courts have rejected a per se, presumption-based disqualification of representation adverse to that of a former client. *See e.g.,* Black v. State of Missouri, 492 F. Supp. 848, 873-74 (1980) (W.D. Mo. 1980) (refusing to disqualify plaintiffs' pro bono counsel in school desegregation case who had previously represented the defendant school district, absent a showing that actual prejudice would incur to defendant because to do so would be "a triumph of regimented rule over reason" and "the alleged conflicts are more technical than real.").

175. *See supra* notes 93-128 and accompanying text (discussing Borden v. Borden, 277 A.2d 89 (D.C. 1971)). After examining the lack of economic interests on the part of legal services attorneys, and considering the argument that a different application of conflict principles was therefore warranted, the court, as discussed, appeared unclear as to how to handle the interests argument and resorted to a decision based, largely on the belief that it just didn't look right for attorneys in the same office to represent opposing parties. ("We are reluctant ever to make an exception from the professional norm for attorneys employed by the government or others who provide legal representation without compensation from the client because then we might encourage a misapprehension that the special nature of such representation justifies departure from the profession's standards. We should always avoid any action that would give

profession in its public perception, however, should not operate to be the source of denial of the only source of representation available to a vulnerable segment of society. Otherwise, the profession is sacrificing service to the public to enhance its own appearance.[176]

V. DEFINING AND APPLYING AN ACTUAL PREJUDICE STANDARD

A. Defining the Standard

With presumptions removed from conflict of interest analysis in legal services in favor of a standard declining representation only when actual prejudice is present, actual prejudice must be defined. A definition must address both of the interests of the client sought to be protected by conflict of interest principles — the interest in the preservation of client confidences and the interest in receiving zealous representation. To address the protection of client confidences, the legal services attorney should not proceed with representation if she is in possession of prejudicial information about the adverse party that was obtained from the adverse party in a confidential attorney-client communication with an attorney in the same office or program.[177] There are two significant aspects to the test. The first is in possession of, as opposed to access to prejudicial information. Though the information may be in a file in another attorney's office or a central file room, it should not be presumed that the attorney will avail herself of it.[178] Of course, care must be taken to prevent inadvertent disclosures.[179] The second, is that the information obtained in a

---

the appearance that government attorneys are 'legal Hessians' hired 'to do a job' rather than attorneys at law. On the other hand, we should expect always from these attorneys uncompromising adherence to the profession's established standards."). *Id.* at 92-93.

176. With apologies to Fernando, as portrayed by Billy Crystal, looking "marvelous," even for the legal profession, should not be more important than serving societal needs, or, stated differently, it should not be better to look good, than to do good.

177. Of course, information imparted by the client to a member of an office who is not an attorney is afforded the same degree of confidentiality as if it had been disclosed to an attorney. ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6 cmt. at 92 (2d ed. 1992) (discussing that the duty of confidentiality extends to nonlawyer members of the law office).

178. *But see* ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.9 cmt. at 181 (2d ed. 1992) (discussing the preservation of client confidences in terms of access to information and presumptions that accessible information will be utilized by the attorney to the detriment of the client).

179. *See* Flores v. Flores, 598 P.2d 893, 896-97 (Alaska 1979) (holding that there is a state constitutional right to counsel in a child custody proceeding and that a legal services office could represent both sides in such matter if regulations were in place to assure separation of access to files, offices and supervision).

See also, Aronson, *supra* note 4, at 851-58 (discussing that public policy interests, including allowing access to legal services by indigent clients, should allow for flexibility in the application of conflict principles, particularly in the area of imputed disqualification, and analyzing Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581 (E.D.N.Y. 1973), *aff'd* 518 F.2d 751 (2d Cir. 1975) as an enlightened use of screening mechanisms, to insulate various departments of a law firm in order to avoid imputed disqualifications). *See also, Developments in the Law — Conflicts of Interest and the Legal Aid Attorney, supra* note 5, at 1408-13 (calling for increased use of screening mechanisms in the poverty law context).

Use of screening mechanisms to ward against the exchange of client information with an attorney who is considered "tainted" due to a conflict of interest is not, in and of itself, the solution to the problem of conflicts of interest for the indigent client. As indicated by the

confidential setting must be prejudicial.[180] How prejudice is defined is crucial. In order to not unnecessarily prevent legal services clients from obtaining representation, prejudice should be measured by content. Principles of confidentiality should not be extended to every communication received by the attorney.[181] Though the communication took place in a confidential setting, if the content is not subject to any privilege that otherwise would prevent its disclosure through discovery, it should not be considered prejudicial so as to create a conflict of interest.[182]

For example,[183] Attorney One conducted an initial client interview of Client One who seeks representation in a disability matter. The case is discussed by all attorneys in the office at a case acceptance meeting. A decision is made not to represent Client One. Thereafter, Client Two, the spouse of Client One seeks representation in a family law matter in which Client One will be an adverse party. Attorney Two, who participated in the discussion of Client One's case should not be presumed to be precluded from representing Client Two pursuant to *Model Rule* 1.9(a), imputed to her by means of *Model Rule* 1.10(a).[184]

Even though Attorney Two may have gained information about Client One, that information should not be considered prejudicial unless two factors

---

demographic information sought by the Survey, the majority of legal services programs are comprised of fewer than five offices and the majority of offices employ fewer than five attorneys. *See* app. *infra*, questions A and B, at 620. As indicated by an anecdotal response, "We have 2 offices — a conflict for one attorney is a conflict for all — No attempt at "Chinese Wall" — in small office with lots of communication — this is not feasible." *Id.* R67 at 620.

The screening device solution has not been discussed more extensively herein because of its limited usefulness in small legal services office, as well as an additional reason. The screening device continues recognition of the presumptions upon which imputed disqualifications are based. Such screening mechanisms merely seek to prevent attorneys from accessing the information that it is presumed they will access. It is the thesis of this article that such presumptions are inapplicable to legal services practice.

180. Confidentiality as defined by Model Rule 1.6 is an extremely broad concept mandating that "[a] lawyer shall not reveal information relating to representation of a client..." MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6 (1992).

For discussion of the breadth of confidentiality contemplated by *Model Rule* 1.6, *see* WOLFRAM, *supra* note 67, §§ 6.7.1, 6.7.2, 6.7.3 at 296-301. Professor Wolfram describes *Model Rule* 1.6 as "prohibit[ing] a lawyer from revealing all client information, the good or neutral along with the potentially harmful." *Id.* at 301.

181. *See* Goldberg, *supra* note 2, at 230 (criticizing conflict of interest disqualifications when an attorney seeks to represent an interest adverse to a former client, as well as criticizing the overbreadth of the principle of confidentiality).

182. *But see* WOLFRAM, *supra* note 67, § 7.4.2 at 359-61 (discussing that the scope of what should be protected by principles of confidentiality encompasses all communications between attorney and client and should not be limited to that which is covered by an evidentiary privilege); ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6 cmt. at 90-91 (1992) ("Thus, the fiduciary obligation of confidentiality encompasses more than the attorney-client privilege since it can include the client's confidences and secrets even if the same information may be discoverable from other sources.") (citing Buntrock v. Buntrock, 419 So. 2d 402 (Fla. Dist. Ct. App. 1982).

183. For a discussion of a somewhat comparable example, though not in the context of legal services representation, that reaches the opposite conclusion than that argued herein, see WOLFRAM, *supra* note 67, § 7.4.2, at 359-66 (discussing, as an example, that a lawyer who previously represented one spouse in a divorce should not subsequently represent the other spouse in an action that seeks to set aside the divorce judgment).

184. It is the representation of the subsequent adverse party by a different attorney in the same legal services office, as opposed to a single attorney representing both parties, that significantly changes the factual scenario from that of Professor Wolfram's example. *See id.* at 359.

are present. The information must be both prejudicial to Client One and not otherwise subject to discovery.[185] Therefore, basic financial information imparted to Attorney One in order to determine financial eligibility for legal services would not cause actual prejudice for it would be otherwise discoverable.[186] But, information about Client One's alleged disability that may be subject to a physician/patient privilege and would be prejudicial to Client One in the family law matter, such as evidence of substance abuse that could impact child custody or visitation issues, however would be considered to cause actual prejudice if in possession of Attorney Two. Therefore, Attorney Two must decline to represent Client Two if she is privy to such prejudicial information.

As to the client interest in receiving zealous representation, the lack of pecuniary interests of the legal services attorney alleviates concern that compromise will occur in this regard to either of the clients. There is no incentive to the legal services attorney to favor one client over the other in expectation of future business and fees.[187] Additionally, as with any other situation where the personal interests of the attorney prevent the attorney from proceeding with representation, the legal services attorney must not proceed if in fact she feels that the kind of "subtle influences" considered in *Borden* would operate to compromise the quality of the representation provided the client.[188] If Attorney Two feels that the nature of her status in the office vis-a-vis Attorney One, who previously represented Client One, will result in pressures being brought upon her to represent Client Two less than zealously, an impermissible conflict exists in the subsequent representation.[189] Nevertheless, representation of Client Two by another attorney in the office should not be

185. Professor Wolfram's example would not limit disqualification only to situations where prejudicial information was communicated to the attorney. Instead, he argues for disqualification when any information was communicated that would be considered confidential. It is his position that "[t]here is public interest in assuring every client that communications to a lawyer will not be used adversely in the lawyer's later work. Situations that create a realistic risk that will occur are those in which the former-client conflict rules should require disqualification." *Id.* at 360.

The factual difference in the examples of Professor Wolfram and that of this article — where one attorney represents a client in a matter adverse to a former client, as opposed to two attorneys in the same office — alters the importance of the "public interest" factor. It would seem a much less significant inhibitor on full and forthright client communication when it is a different attorney in the office, who the client may not have ever even seen, who is representing the subsequent adverse interest.

Additionally, Professor Wolfram discusses the confidentiality reason for attorney disqualification as rooted in the prevention of the adverse use of client information. It is the position of the author that it is only prejudicial information, as defined herein, that can be used adversely. The concept of confidentiality in *Model Rule* 1.6 extends beyond adverse use and past no use all the way to presumption of adverse use. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992).

186. See *supra* notes 15-20 and accompanying text for a discussion of eligibility determinations and case acceptance criteria for legal services.

187. In discussing his example, Professor Wolfram considers lawyer disloyalty resulting from economic self-interest as warranting attorney disqualification. *See* WOLFRAM, *supra* note 67, at 361.

188. See *supra* notes 107, 118-130 and accompanying text for a discussion of the personal interests of the attorney giving rise to a disqualifying conflict of interest.

189. It is difficult to see how the "subtle influences" of *Borden* would be applicable in a subsequent representation situation. It would be in the context of dual representation that such would become a more realistic consideration. *See supra* note 110 and accompanying text.

automatically precluded. If Attorney Three is not encumbered by the subtle influences of *Borden*, she should be able to proceed with representation.

B. Applying the Standard

Before proceeding with the application of a conflict of interest standard of actual prejudice, an initial determination should be made by the legal services provider. That is, are there other available counsel for the client who presents the office with a conflict of interest? If so, the client should be referred to that counsel for representation. Because, for example, the risk inherent in representation of adverse parties by attorneys in the same office becomes acceptable only in light of the unique circumstance of the legal services attorney being the attorney of last, or perhaps better stated, only resort, that risk is not justified when it is not necessary to provide representation from the only available source. Therefore, if other counsel is available, either through another legal services program, or through a referral mechanism to private counsel, representation by the alternative counsel must take precedence in order to best serve client interests.[190]

If no alternate source of representation is available, two difficulties then lie at the heart of applying a conflict of interest standard of actual prejudice rather than a standard of presumption of prejudice. First, there is the timing of when a determination must be made as to whether a conflict of interest prevents representation. In the two most frequently encountered conflict situations, representation of adverse parties and past client as opposing party, the determination would be made most often at the most initial stage of representation. The attorneys involved are then required to project into the future what issues will arise that could result in prejudice to the client because of information known to opposing counsel.[191] An inaccurate projection could give rise to the disqualification of counsel in mid-litigation for both parties, as opposed to turning away only one client.[192]

Consideration must also be given to the difficulty of the decision the attorneys involved are being asked to make. It involves a choice between engaging in a course of representation that could possibly be considered

---

190. See app. *infra*, questions 16-19 and 24-25A at 618-19 for a listing of various sources from which alternate counsel is available for the legal services client who presents the office with a conflict of interest and a rating of the relative frequency at which representation is obtained from each. The most frequently availed source of representation for the conflicted client is from a list, maintained by the legal services office, of private attorneys who have volunteered to provide pro bono representation in conflict situations. See *id.* 16 at 618. Nevertheless, 29 of the 88 respondents indicated that clients "never" attain representation from such a conflicts list.

191. Courts that have adopted an actual prejudice standard in the context of representation of co-defendants by public defenders of the same office have carefully reviewed the record to determine whether a particular defendant was prejudiced by the representation received. Such a hindsight review can be much more easily and accurately undertaken than can a projection at the outset of representation. *See, e.g.*, People v. Robinson, 402 N.E.2d 157, 162-72 (Ill. 1979) (examining the records of three consolidated cases, including transcripts of trial testimony, to determine whether each defendant had been prejudiced). Determining what testimony had been is a very different task than trying to determine what it will be.

192. *See e.g.* State v. Bell, 447 A.2d 525, 535-37 (N.J. Sup. Ct. 1981) (Pashman, J., dissenting) (though agreeing with the majority "that public interest attorneys and private attorneys should not automatically be treated the same way," disagreeing that it is not an impermissible conflict of interest for attorneys from the same public defender office to represent co-defendants, in large part, because conflicts may not be evident at the outset of representation and discussing the unfortunate consequences of latter discovered conflicts).

unethical, and denying representation to a client who has no other place to turn for legal assistance. Not an easy decision. One commentator has argued that when faced with such decision, the legal services attorney may feel an obligation to provide services and will do so even though the quality of representation is diminished.[193] That argument is the opposite of reality. It is the tendency of the legal services attorney, who chooses public interest work out of sense of values rather than an interest in economic gain, to further those values by striving strictly to adhere to the ethical standards of her profession.[194] Therefore, this tendency, if given too strict adherence, may result in an actual prejudice standard not allowing access to representation to a significantly increased number of legal services clients who would otherwise be denied representation due to a conflict of interest.

Second, in both the adverse parties and past client as opposing party situations, it must be determined how to assess whether actual prejudice would be present without disclosing the confidential information that is sought to be protected by conflict of interest principles. If one of two clients represented by the same office wishes to challenge whether the opposing attorney has availed herself of prejudicial information, a dilemma is faced of how to claim such information is possessed without disclosing that which the client wishes to remain confidential.[195]

Any realistic attempt to invoke an actual prejudice approach to conflicts of interest in legal services must address these difficulties. In the public defender context, jurisdictions that have adopted an actual prejudice approach to representation of co-defendants employ a mechanism to obtain judicial approval at the outset of representation.[196] In order for the profession to best accommodate the legal needs of indigent persons, jurisdictions should adopt an analogous procedure for civil actions involving parties represented by

---

193. Breger, *supra* note 3, at 1123, and 1127-31 and 1127 n.60 ("This tendency to give all indigents some, although perhaps inadequate, service is premised both on philosophical notions of equal treatment and subjective responses to the strain of legal aid practice.").

194. Responses to the Survey, both empirical and anecdotal, support this conclusion. Question 22 asked respondents to rate the frequency that the "[o]pposing party moves to disqualify your office/program from representation of client due to conflict of interest." Of the 77 responses to that inquiry, 43 rated that it "never" happened, and 32 rated that it "rarely" happened. The highest frequency rating, "occasionally," was assessed by only 2 respondents. No respondents assessed to this situation the "frequently" or "most often" frequency. The conclusion to be drawn is that initial determinations as to whether representation may proceed in light of a conflict are conservatively made, resulting in few challenges. *See* app. *infra*, question 22 at 626.

A telling comment noted: "The degree of concern by staff attorneys is far higher than the problem warrants. Staff have a higher awareness of conflict principles than many private attorneys." *Id.* Comment 68 at 620.

195. *See* Taskier and Casper, *supra*, note 41, at 166-68 (discussing the dilemma a court faces in determining whether an opposing attorney possesses confidential information in a manner that does not require disclosure of the information sought to be protected).

196. *See, e.g.*, N.J. Rev. Crim. Pract. 3:8-2. Joint Representation:

> No attorney or law firm shall be permitted to enter an appearance for or represent more than one defendant in a multi-defendant indictment without securing, upon motion brought before the Assignment Judge or his designee upon notice to the prosecuting attorney, permission of the court.
>
> Such motion shall be made in the presence of the defendants sought to be represented as early as practicable in the proceedings so as to avoid delay of the trial. For good cause shown, the court may allow the motion to be brought at any time.

providers of legal services. If an action is pending at the time the question of conflict occurs, a motion seeking judicial approval of the representation can be brought.

Of course, the majority of civil actions in which parties seek representation do not involve litigation.[197] Therefore, there is not necessarily a tribunal with jurisdiction over the interested parties or the subject matter of their dispute which can make the determination whether a conflicts situation involves actual prejudice that should prohibit representation. The legal services office itself could make the determination, much like the common practice in a large, for-profit firm confronted with a potential conflict of interest.[198] Two problems are inherent in that approach. First, the impartiality of such a determination could be subject to question, especially in light of the nature of the decision involved. The office must determine not just whether a conflict exists as does the for-profit office, but the legal services office must decide whether a conflict is prejudicial. Second, the noted tendency of the legal services office to be overzealous in its adherence to the ethical mandates of the profession might skew the determination towards non-representation.[199]

Both problems speak to the need for an independent entity to provide a review equivalent to that of a judicial tribunal. A variety of persons might be looked to for the performance of this function. A member of the local bar wishing to perform this function as pro bono work could be asked by the legal services office,[200] as could a lawyer member of the legal services program governing body.[201] Alternatively, each program maintains a grievance committee for the purpose of resolving client dissatisfactions.[202] The grievance committee could perform the conflict review. The mechanics do not seem insurmountable. The independent reviewer would have the authority to examine the proposed representation for approval or rejection. Attorney concerns of maintaining ethical standards are alleviated by obtaining a ruling as to the presence or absence of prejudice in the proposed representation. Client concerns of not having to disclose confidential information in order to challenge a proposed representation can be addressed by *in camera* inspection of the information alleged to be in the possession of opposing counsel.

In the event it is determined that a conflict does not actually prejudice the clients involved and that representation may proceed, the clients, of course,

197. *See* LEGAL SERV. CORP. ANN. REP. 9 (1992) (discussing that of the cases in which representation is undertaken, 36% are situations where the client receives "counsel," 22% are situations where the client receives "brief service," and 9% are situations that result in "court decision").

198. *See* ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT, 301: 1003-04 (discussing "screening" of cases prior to acceptance of representation).

199. *See supra* note 194 and accompanying text. Caseload pressures may provide an added incentive for the legal services office to find an impermissible conflict of interest. It is easier to deny services from the "last lawyer in town" on the basis of external rules of the profession than on limited internal resources.

200. *See* 45 C.F.R. § 1614 (1994) (mandating the expenditure of 12.5% of a program's annual LSC allocation on private attorney involvement in the delivery of legal services).

201. *See* 45 C.F.R. § 1607 (1994) (mandating the establishment by each recipient of LSC funds of a governing body comprised of practicing attorneys, eligible clients and nonattorneys).

202. *See* 45 C.F.R. § 1621 (1994) (providing for the establishment of grievance committees by each program to resolve client dissatisfactions and insure client accountability).

would need to consent to the representation.[203] Representation would not be provided for a client who refused to consent to a conflict determined to be non-prejudicial by the independent reviewer. Otherwise, that client would be able to win the race to the door of the "last lawyer in town" simply by refusing to give consent.

In conducting the review proceeding, a different mindset is required when considering whether an impermissible conflict of interest exists in legal services. Conflicts are approached in for-profit representation from an attitude of "[w]hen...in doubt,...the best answer is usually No...."[204] The question considered is: Is there any possible reason why representation should be declined? For legal services practice, because of the unique position of the client in not having anywhere else to turn for representation, the conflict approach should be different. The question should be: Is there a way that representation can be provided without actual prejudice to the parties involved? The economic interests of the for-profit attorney may serve to cause any error in conflict inquiry to be on the side of inclusion, thereby justifying a very cautious approach. The absence of economic interests of the legal services attorney nullifies the rationale for such approach. Therefore, in light of the dire consequence to the client, representation should be prohibited only when necessary to protect the client's interests.

More importantly, the presumption of prejudice to the client should be supplanted by a presumption of professional integrity. Presumptions of prejudice assume a very dim view of human nature. Perhaps an attorney's pecuniary motivations warrant that view. The legal services attorney, however, should be counted on to decline representation when she in possession of confidential information that would be prejudicial to the opposing party. Further, the legal services attorney should be trusted to be able to refrain from secreting confidential information about an opposing party from the files of another attorney in the same office. It is such presumptions of integrity that should lie at the heart of standards of professional ethics, particularly at a time when the profession is seeking to regain public respect and reestablish a sense of civility in practice,[205] while at the same time concerning itself with the unmet legal need of indigent persons.[206] If not, the profession is saying to the public that we do not trust ourselves enough to provide professional services for the less fortunate.

---

203. *See* MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 1.7(b) (1992) (mandating client consent when representation proceeds when a conflict of interest is present).

204. Frank, *supra* note 158, at 709.

205. *See, e.g.*, Marvin E. Aspen, FINAL REPORT OF THE COMMITTEE ON CIVILITY OF THE SEVENTH FEDERAL JUDICIAL CIRCUIT (1992) (reporting on the look of civility demonstrated by members of the profession); R. William Idle III., *Regaining the Public's Confidence: Legal Profession Must Respond to Image Problems, Erosion of Trust*, 79 A.B.A J. 8 (Nov. 1993) (advocating changes in the legal profession in order to bring a halt to the erosion of the public's trust).

206. See *supra* note 13 for a discussion of studies identifying the unmet legal needs of low-income persons.

CONCLUSION

Conflict of interest principles were developed to serve two ends. First, conflict of interest principles protect the client by both assuring zealous representation from an attorney whose interests are not divided and by protecting the client from disclosure of client confidences. Second, conflict of interest principles seek to maintain a perception to the public of the integrity of the profession.

Analysis of conflict of interest situations in the legal services context has not correctly identified that the interests involved that may conflict are different than those involved in for-profit representation. The legal services attorney lacks the economic incentives to compromise client interests that conflict rules seek to protect. The most important interest of the legal services client, to be able to secure representation from the only available source, is a factor that has been left out of the calculus of previous considerations of whether representation must be declined in legal services practice due to a perceived conflict of interest.

Because the interests involved are different, the risks of compromise to client interests that are sought to be protected are also different. Therefore, the presumptions of prejudice in conflict analysis and application in the context of for-profit representation are neither necessary nor applicable in the legal services context. Only where the client's interests are actually compromised, as opposed to situations where representation may not proceed due to factors that are considered to provide incentive for a compromise of client interests, should representation be declined. To decline or deny representation for reasons other than actual prejudice to the client is to grossly ignore the fundamental importance of receiving some representation versus none. Further, to decline representation in order to maintain a perception of integrity of the profession, is to sacrifice the interests of the client on the altar of putting forth a good public face. Such a decision would appear to itself be motivated by a conflict of interest that exists between the profession as a whole and the individual client. Also, it sacrifices client needs of a specific population for the bettering of general goals of the profession. Surely, the interest of the profession must be made subservient to the interests of the clients that the profession seeks to serve.

Survey of Conflicts of Interest in Legal Services[207]

For each of the following, choose one response that best describes your office and the community in which it is located

A. How many offices are in your program? (Check one only)

(0) 16+
(1) 11 - 15
(29) 6 - 10
(34) 2 - 5
(13) 1

B. What is the number of attorneys in your office? (Check one only)

(3) 16+
(3) 11 - 15
(14) 6 - 10
(48) 2 - 5
(10) 1

C. What is the size of the community in which your office is located?(Check one only)

(6) 500,000+
(17) 100,000 - 500,000
(17) 50,000 - 100,000
(25) 10,000 - 50,000
(13) less than 10,000

D. Which best describes the nature of your program? (Check one only)

(75) General legal services practice
(3) Practice limited to one substantive area

E. How many years have you been in legal services?

(11) 16+
(28) 11 - 15
(25) 6 - 10
(11) 2 - 5
(3) 1

For each of the following, please provide two estimations.

First, of the conflicts that you encounter, please estimate the *comparative* frequency with which your program or office is confronted with each of the following situations by circling a numerical value of 1 - 5, ranging from "never" occurs to "most often" occurs.

This conflict occurs:

1------2------3------4------5
never rarely occasionally frequently most often

Second, on the space marked "actual prejudice," using the same scale as above, please estimate the frequency that the conflict, when it occurs, involves a risk of actual prejudice, such as privileged information available to the office or attorney with the conflict that would be detrimental to the client who creates the conflict (as opposed to a conflict that is based upon a per se rule of disqualification, but that presents no actual risk of prejudice to the client).

For example: client 1 completes an application for services and is determined to be ineligible due to excess income. Client 2, who is the spouse of client 1, seeks representation in a divorce. There is no information on the application of client 1 that would not be discoverable. Therefore, the conflict would be considered to not present an actual risk of prejudice to client 1.

207. The survey document is that which was used to survey legal services providers in the Seventh and Eighth Circuits with the following alterations. The number of responses to a particular category are indicated in parentheses. Questions 1D, 1A, 1P, 2D, 3A, 6D, 7D, 9D, 12A, 12B, 12C, 16A, 24, 25, and 25A represent compilations of like responses that respondents described as "other." Relevant narrative comments are included. The number preceding each comment is a reference number only. The numbers in brackets represent an average of the responses. The survey methodology is discussed at notes 24-32.

Actual prejudice is involved:

1	2	3	4	5
never	rarely	occasionally	frequently	most often

---

1. The opposing party of the client/applicant is represented by your program. (*Example*: office represents wife in a family law matter, and husband then seeks representation.)

This conflict occurs: [3.519]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(1)	(6)	(35)	(22)	(13)

Actual prejudice is involved: [3.351]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(3)	(21)	(21)	(10)	(22)

1D. Supplemental response determined to be the same conflict situation as described in 1, though respondent has described it using a different factual setting.

This conflict occurs: [3.400]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(1)	(2)	(1)	(1)

Actual prejudice is involved: [4.200]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(0)	(1)	(2)	(2)

1A. The opposing party of the client/applicant and the Client both seek representation at the same time. (*Example*: husband and wife seek representation in a family law matter.)

This conflict occurs: [3.667]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(1)	(0)	(0)	(2)

Actual prejudice is involved: [4.333]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(0)	(1)	(0)	(2)

1P. The opposing party of the client/applicant seeks representation from the program's Private Attorney Involvement Program (PAI Program) in the same matter in which the Client is being represented. (*Example*: office represents wife in a family law matter, and husband seeks representation from PAI Program.)

This conflict occurs: [3.750]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(0)	(2)	(1)	(1)

Actual prejudice is involved: [2.750]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(2)	(1)	(1)	(0)

2. The opposing party of the client/applicant is or was represented by your program in a different but substantially related matter. (*Example*: office previously represented husband in an SSI case, and wife now seeks representation in a family law matter.)

This conflict occurs: [3.325]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(11)	(37)	(22)	(7)

Actual prejudice is involved: [2.805]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(3)	(30)	(28)	(11)	(5)

2D. Supplemental response determined to be the same conflict situation as described in 2, though respondent has described it using a different factual setting.

This conflict occurs: [3.286]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(1)	(3)	(3)	(0)

Actual prejudice is involved: [3.167]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(1)	(3)	(2)	(0)

3. A present client will be called, or may be called, as an adverse witness to another client in an unrelated matter. (*Example*: Client 1 is being represented in an AFDC matter and will be an adverse witness to Client 2 who faces eviction.)

This conflict occurs: [2.260]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(8)	(45)	(21)	(2)	(1)

Actual prejudice is involved: [2.480]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(12)	(32)	(19)	(7)	(5)

3A. A *past* client will be called, or may be called, as an adverse witness to another client in an unrelated matter. (*Example*: Client 1 previously was represented in an AFDC matter and will be an adverse witness to Client 2 who faces eviction.)

Actual prejudice is involved: [2.480]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(2)	(2)	(0)	(1)

Actual prejudice is involved: [3.600]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(1)	(1)	(2)	(1)

4. The opposing party of the client/applicant is represented by an attorney who is the spouse or significant other of an attorney in your office.

This conflict occurs: [1.390]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(58)	(10)	(8)	(0)	(1)

Actual prejudice is involved: [1.577]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(50)	(11)	(4)	(2)	(4)

5. The opposing party of the client/applicant is represented by an attorney with whom an attorney in your program previously practiced.

This conflict occurs: [1.714]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(34)	(33)	(8)	(2)	(0)

Actual prejudice is involved: [1.557]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(40)	(24)	(4)	(1)	(1)

6. Two clients seek representation in regard to a related matter in which their interests have the possibility of becoming adverse. (*Example*: Client 1 and Client 2 face eviction for an alleged incident involving a child of each, and a potential defense is to claim the other's child was the instigator.)

This conflict occurs: [2.831]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(2)	(24)	(37)	(13)	(1)

Actual prejudice is involved: [3.026]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(6)	(18)	(26)	(22)	(5)

6D. Supplemental response determined to be the same conflict situation as described in 6, though respondent has described it using a different factual setting.

This conflict occurs: [3.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(1)	(0)	(1)	(0)

Actual prejudice is involved: [2.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(1)	(0)	(0)	(1)

7. Client seeks representation in regard to a matter that requires taking a position that is adverse to the interests of a community group which is a client. (*Example*: Client is facing eviction for alleged drug use, and office represents a tenants' organization that is actively working to reduce drug usage in the development in which Client lives.)

This conflict occurs: [2.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(27)	(28)	(17)	(5)	(0)

Actual prejudice is involved: [2.437]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(22)	(19)	(13)	(11)	(6)

7D. Supplemental response determined to be the same conflict situation as described in 7, though respondent has described it using a different factual setting.

This conflict occurs: [3.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(0)	(1)	(0)	(0)

Actual prejudice is involved: [4.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(0)	(0)	(1)	(0)

8. Client seeks representation in regard to a matter that conflicts with attorney's personal interests. (*Example*: Client seeks representation to obtain a divorce and the religious beliefs of the attorney do not accept divorce.)

This conflict occurs: [2.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(26)	(31)	(15)	(4)	(1)

Actual prejudice is involved: [1.486]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(47)	(19)	(7)	(1)	(0)

9. Client seeks representation in regard to a matter that conflicts with the interests of the general client population. (*Example*: Representation of Client would involve raising a unique, though meritorious issue, and attorney prefers to forgo such argument in favor of awaiting a later client whose case presents the issue in a better factual context.)

This conflict occurs: [2.442]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(13)	(25)	(32)	(6)	(1)

Actual prejudice is involved: [2.342]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(17)	(30)	(18)	(8)	(3)

9D. Supplemental response determined to be the same conflict situation as described in 9, though respondent has described it using a different factual setting.

This conflict occurs: [3.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(0)	(1)	(0)	(0)

Actual prejudice is involved: [4.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(0)	(0)	(1)	(0)

Please describe any other conflict situations that you have encountered and provide the same estimations as you provided above.[208]

10. The opposing party of the client/applicant previously was represented by a present attorney in your office during previous employment. (*Example*: Client seeks representation in an eviction from a housing development that attorney in office represented in previous employment).

This conflict occurs: [2.600]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(3)	(1)	(1)	(0)

Actual prejudice is involved: [3.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(2)	(2)	(0)	(1)

11. An attorney or her family member has a financial interest that is adverse to the Client. (*Example*: Client seeks representation in an eviction action from a development in which the spouse of an attorney in the office has an ownership interest).

This conflict occurs: [3.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(1)	(1)	(1)	(0)

Actual prejudice is involved: [2.667]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(1)	(1)	(0)	(0)	(1)

12. The office has a contractual relationship with the opposing party of the Client. (*Example*: Client seeks representation in a collection action brought by a health care provider, and office has a contract with that provider to provide legal services to other patients relative to their obtaining medical assistance payments).

This conflict occurs: [3.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(1)	(0)	(1)	(0)

Actual prejudice is involved: [3.500]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(1)	(0)	(0)	(1)

12A. The opposing party of the Client is represented by an attorney who previously worked in the legal services office. (*Example*: Client seeks representation in an eviction action, and landlord is represented by attorney who formerly worked in legal services office).

This conflict occurs: [4.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(0)	(0)	(1)	(0)

Actual prejudice is involved: [2.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(1)	(0)	(0)	(1)

208. For a discussion of the methodology used in this section, *see supra* note 28.

12B. Person comes to office on behalf of eligible client for the purpose of obtaining representation for that person and has an interest adverse to that of the client on whose behalf the persons has come to office. (*Example*: Adult child comes to office on behalf of parent who is allegedly incapacitated and in need of appointment of a guardian, but parent opposes the appointment of a guardian).

This conflict occurs: [4.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(0)	(0)	(1)	(0)

Actual prejudice is involved: [2.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(1)	(0)	(0)	(0)

12C. Client seeks representation in regard to a matter that previously was subject of mediation in which office acted as mediator. (*Example*: Office mediates disputes between local housing authority and tenants. Client has dispute with housing authority that was mediated by office. Client now seeks representation in same dispute).

This conflict occurs: [3.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(0)	(1)	(0)	(0)

Actual prejudice is involved: [4.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(0)	(0)	(1)	(0)

When conflict situations have occurred in your program, please estimate the frequency of the following.

13. The conflict involves only one attorney in one office.

This occurs: [2.947]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(8)	(23)	(20)	(15)	(10)

14. The conflict is imputed between attorneys within *one office* in your program.

This occurs: [3.145]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(10)	(14)	(17)	(25)	(10)

15. The conflict is imputed between attorneys in *two different offices* in your program.

This occurs: [2.781]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(7)	(25)	(24)	(11)	(6)

In situations in which your program has not been able to proceed with representation due to a conflict of interest, please estimate the frequency with which the following have occurred.

16. Client obtains representation from a private attorney on a conflicts list maintained by your office or program.

This occurs: [2.377]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(29)	(13)	(15)	(17)	(3)

16A. Client obtains representation from a private attorney on a conflicts list maintained by local bar association.

This occurs: [5.000]

1	2	3	4	5
never	rarely	occasionally	frequently	most often
(0)	(0)	(0)	(0)	(2)

17. Client obtains representation from a private attorney who is not on a conflicts list maintained by your office or program but who agrees to provide pro bono representation.

This occurs: [2.197]

1 never	2 rarely	3 occasionally	4 frequently	5 most often
(15)	(38)	(17)	(5)	(1)

18. Client obtains representation from an attorney appointed by a judicial tribunal.

This occurs: [1.558]

1 never	2 rarely	3 occasionally	4 frequently	5 most often
(43)	(26)	(7)	(1)	(0)

19. Client obtains representation from an attorney appointed by an administrative tribunal.

This occurs: [1.208]

1 never	2 rarely	3 occasionally	4 frequently	5 most often
(61)	(16)	(0)	(0)	(0)

20. A "Chinese Wall" is built around attorney with conflict in order to provide representation to client.

This occurs: [1.487]

1 never	2 rarely	3 occasionally	4 frequently	5 most often
(47)	(22)	(6)	(1)	(0)

21. Client consents to the conflict and is represented.

This occurs: [2.312]

1 never	2 rarely	3 occasionally	4 frequently	5 most often
(10)	(35)	(31)	(0)	(1)

22. Opposing party moves to disqualify your office/ program from representation of client due to conflict of interest.

This occurs: [1.468]

1 never	2 rarely	3 occasionally	4 frequently	5 most often
(43)	(32)	(2)	(0)	(0)

23. Client goes without representation.

This occurs: [3.697]

1 never	2 rarely	3 occasionally	4 frequently	5 most often
(3)	(9)	(19)	(22)	(23)

Please describe any other results that have occurred when your program has encountered a conflict and provide the same estimations as you provided above.

24. Client obtains representation from a neighboring, different legal services program that provides free legal services to indigent persons.

This occurs: [3.500]

1 never	2 rarely	3 occasionally	4 frequently	5 most often
(0)	(1)	(3)	(3)	(1)

25. Client obtains representation from a private, for-profit attorney whom the client agrees to compensate for the services provided.

This occurs: [4.000]

1 never	2 rarely	3 occasionally	4 frequently	5 most often
(0)	(0)	(1)	(1)	(1)

25A. Client obtains representation from a private attorney who is paid by the office with the conflict utilizing PAI Program funds.

This occurs: [4.500]

1 never	2 rarely	3 occasionally	4 frequently	5 most often
(0)	(0)	(0)	(1)	(1)

Please feel free to make comments: (The following comments were gleaned from all that were received. They are included herein because they address the issues discussed in the article. The number in the left-hand margin is for reference purposes. All of the comments received are on file with the author.)

#17 Our program's lack of adequate resources and the lack of any requirement on the private bar to engage in pro bono representation results in a very substantial number of low income households being denied any free legal services due to conflicts of interest we have which prevent our assisting the client.

#37 I obtained an opinion from the Ethics committee which in domestic cases allows my program under circumstances to refer both parties to PAI attorneys. But there are inherent problems with this system.

#38 Given the tiny community here, I often encounter conflicts that leave me frustrated because although a legal "conflict" exists no *real* conflict does. (Emphasis as in original).

#41 I appreciate the conflict problems. However, I am very much opposed to creating a different ethical standard for legal services and non legal services clients.

#42 I am very interested in the results of your survey. [Our office] has only two attorneys and we have very few attorneys in the community as a whole. Those attorneys are overloaded with pro bono cases.

#49 Conflict of interest is a constant problem that would most likely be made even worse by the application of different standards to legal services.

#50 We really don't reject many cases based on conflicts - most common is the race to the phone between fighting spouses.

#55 I feel the most troublesome potential conflicts are when we have a former client as the potential opposing party. It is hard to know where to draw the line in terms of Rule 1.9(a)(2) at times.

#66 As indicated in #16, this is our Program's Solution to some of these problems, namely using PBI $ to pay local attorneys in conflict situations. I get the impression that it is a unique approach, but perhaps not. PBI requests are approved by Executive Director on a case-by-case basis, and is available only for as long as our PBI 12 1/2% money lasts. PBI funds have been known to run out as early as June, but they usually last well into the Fall/early Winter.

#67 We have 2 offices - a conflict for one attorney is a conflict for all - No attempt at "Chinese Wall" - in small office with lots of communication this is not feasible.

#68 The degree of concern by staff attorneys is far higher than the problem warrants. Staff have a higher awareness, of conflict than many private attorneys.

#71 We most often see conflict in the housing area because of the nature of our practice is a neighborhood office. Although we have 3 offices in [our program], our Family Law Conflicts have been minimized by having all of our Family Law Cases handled by our Family Law part which is only one office. The Juvenile/Family conflicts are *very* rare occurrences. The largest dilemma is the neighborhood group interest in drug free and safe environment compared to an individuals interest in sharing their housing where drugs are alleged, but there is no proof and may be prejudice.

#73 Our program has wrestled with the matter of conflicts again and again. I'm looking forward to reading you article. In Iowa, there is an opinion which indicates LSCI can destroy files and intakes after 5 years, and no longer count them as conflicts, so long as no attorney actually recalls items creating a conflict. Please let me know if you'd like a copy.