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ACCOMMODATION CLIENTS

*Douglas R. Richmond**

I. INTRODUCTION

The designation “client” is significant in several aspects of the law.¹ As a matter of evidence law it is the client who holds the attorney-client privilege. With rare exception only clients may sue lawyers for malpractice. Lawyers are fiduciaries to their clients. When it comes to professional responsibility law, the term “client” has special meaning.² “Although it is true that lawyers may owe some duties to third persons who are not clients, and to the legal system and the law generally, the most basic duties run to clients.”³ It is clients to whom lawyers owe continuing duties of loyalty and confidentiality.

Lawyers sometimes represent more than one client in a matter. A lawyer may represent a second client as an accommodation to the lawyer’s regular client to avoid duplication of effort and the

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1. *Black’s Law Dictionary* defines a client as “[a] person or entity that employs a professional for advice or help in that professional’s line of work.” BLACK’S LAW DICTIONARY 247 (7th ed. 1999). This definition is flawed in the context of a person’s or entity’s relationship with an attorney because it suggests that client status depends on payment for the professional’s advice or help. The existence of an attorney-client relationship, however, does not turn on payment for the attorney’s services. “The attorney’s right to be compensated for his advice and services arises from [the attorney-client] relationship; it is not the definitional basis of that relationship.” *Macomb County Taxpayers Ass’n v. L’Anse Creuse Pub. Schs.*, 564 N.W.2d 457, 462 (Mich. 1997). Rather, “[a]n attorney-client relationship is created when a person seeks advice or assistance from an attorney, the advice or assistance sought pertains to matters within the attorney’s professional competence, and the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.” *Richardson v. Griffiths*, 560 N.W.2d 430, 435 (Neb. 1997).

2. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 2.1 (3d ed. 2001).

3. *Id.*

accompanying expense.⁴ For example, a lawyer may regularly represent an organization and, in a case in which the organization and one of its officers are named as defendants, also represent the officer. If a conflict later develops between the organization and the officer, the lawyer may seek to withdraw from the officer's representation but continue to represent the organization on the theory that the officer was a mere "accommodation client" who understood and impliedly consented to this arrangement. A similar situation may arise where a lawyer represents two corporate defendants in a suit, one of which is the lawyer's regular client and the true target, and accordingly controls the litigation, and the other corporation is sued because its joinder gives the plaintiff some strategic advantage or is otherwise necessary. The lawyer may consider the non-target defendant to be only an accommodation client. Alternatively, a lawyer may want to take on a new case in which he would be adverse to a current client in a different matter. If the facts permit, he might argue that because the current client is merely an accommodation client, he can drop that representation and litigate against the former accommodation client on behalf of his new client.⁵ "Accommodation client" status is most likely to be claimed where the lawyer has long represented the regular client, the accommodation client's representation is of limited duration or scope, and the accommodation client allegedly has no reasonable expectation that the lawyer will keep his confidences from the regular client.⁶

Accommodation clients typically are the creation of lawyers facing possible disqualification in litigation, although professional discipline and malpractice liability may also be concerns. They are also the creation of courts who believe that slavish adherence to conflict of interest rules sometimes produces unfair results in disqualification disputes. Ethics rules do not distinguish between "primary" clients and accommodation clients.⁷ Clients are clients. Or are they?

II. APPLICABLE ETHICS RULES

Conflicts of interest are at the heart of accommodation client claims and disputes. Most jurisdictions regulate conflicts under the American

4. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. i (2000) [hereinafter RESTATEMENT].

5. See, e.g., *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449, 453-55 (S.D.N.Y. 2000) (discussing expert opinion offered by Professor Charles W. Wolfram).

6. RESTATEMENT, *supra* note 4, at § 132 cmt. i.

7. *Insurance Co. of N. Am. v. Westergren*, 794 S.W.2d 812, 815 (Tex. App. 1990).

Bar Association's *Model Rules of Professional Conduct*.⁸ Model Rule 1.7 addresses conflicts of interest involving current clients, or concurrent representations. The rule provides:

(a) A lawyer shall not represent a client if the representation of that client will be 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.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.⁹

Rule 1.7 applies when the representation of a client is directly adverse to another client,¹⁰ when a client's representation would be materially limited by the lawyer's responsibilities to another client or to a third person,¹¹ and when a client's representation may be materially

8. MODEL RULES OF PROFESSIONAL CONDUCT (2001) [hereinafter MODEL RULES].

9. *Id.* at Rule 1.7.

10. *See, e.g.*, Florida Bar v. Mastrilli, 614 So. 2d 1081, 1082 (Fla. 1993) (suspending lawyer for violating Rule 1.7(a) by suing a current client); *In re Horine*, 661 N.E.2d 1206, 1207 (Ind. 1996) (reprimanding lawyer for violating Rule 1.7(a) by negotiating the sale of a client's car to another client without first obtaining the purchaser's consent to the representation); *In re Disciplinary Proceedings Against Whitnall*, 619 N.W.2d 926, 928, 930 (Wis. 2000) (holding that lawyer violated Rule 1.7(a) by representing both wife and husband in divorce proceedings); *In re Disciplinary Proceedings Against Ratzel*, 578 N.W.2d 194, 195-98 (Wis. 1998) (holding that attorney violated Rule 1.7(a) by representing both personal representative of estate and claimants).

11. *See, e.g.*, *In re Shannon*, 876 P.2d 548, 553-58 (Ariz. 1994) (holding that lawyer violated Rule 1.7(b) when he represented two defendants with conflicting interests in civil case), *modified on other grounds*, 890 P.2d 602 (Ariz. 1994); *People v. Ginsberg*, 967 P.2d 151, 153 (Colo. 1998) (suspending lawyer who prepared loan documents in transaction in which both borrower and lender were his clients); *In re Geeding*, 12 P.3d 396, 400-02 (Kan. 2000) (censuring lawyer who simultaneously represented mortgage defendants and company which specialized in locating and

limited by the lawyer's own interests.¹² Rule 1.7(a) forbids concurrent adverse representations even where the opposing clients' matters are wholly unrelated.¹³ The rule thus recognizes the basic principle that a lawyer's duty of loyalty is indivisible.¹⁴

A lawyer may accept or continue a representation in the shadow of Rule 1.7 with his clients' consent if he reasonably believes that he can fulfill his professional obligations to the clients notwithstanding his competing interests or obligations. The "reasonable belief" requirements in Rules 1.7(a) and (b) make clear that the standard by which a lawyer must gauge his fidelity is an objective one.¹⁵

While Rule 1.7(a) prohibits concurrent adverse representations even in unrelated matters, Rule 1.7(b) is not so limiting. Rule 1.7(b) focuses on the extent to which the quality of the lawyer's representation will be lessened by competing interests. The rule thus permits simultaneous representation of opposing interests in unrelated matters on the right facts.¹⁶ As a general rule, however, a lawyer who finds himself representing adverse interests in violation of Rule 1.7 must, in the absence of consent, withdraw from both representations.¹⁷ The lawyer may not cure the problem "simply by dropping the disfavored client like a 'hot potato.'"¹⁸

Rule 1.9 addresses conflicts of interest in consecutive

selling foreclosed properties); *Barkley v. City of Detroit*, 514 N.W.2d 242, 247-48 (Mich. Ct. App. 1994) (holding that Rule 1.7(b) prevented attorney from city's law department from representing both the city and one of its employees in tort action).

12. *See, e.g., In re Personal Restraint of Stenson*, 16 P.3d 1, 17 (Wash. 2001) (explaining that the reference to a "lawyer's own interest" in Rule 1.7(b) "denotes a financial or familial interest or an interest arising out of the lawyer's exposure to culpability").

13. *Daniels v. State*, 17 P.3d 75, 81 (Alaska Ct. App. 2001).

14. *See Flatt v. Superior Court*, 885 P.2d 950, 953 (Cal. 1994) (stating that "[a]n attorney's duty of loyalty to a client is not one that is capable of being divided"); *Barkley*, 514 N.W.2d at 246 (stating that "[a]n attorney owes undivided allegiance to a client"); *Schuff v. A.T. Klemens & Son*, 16 P.3d 1002, 1012 (Mont. 2000) (expressing the "fundamental principle that an attorney, as a fiduciary, owes a duty of undivided loyalty to his or her client").

15. *People v. Mason*, 938 P.2d 133, 136 (Colo. 1997); *see, e.g., Robertson v. Wittenmyer*, 763 N.E.2d 804, 807-08 (Ind. Ct. App. 2000) (finding that lawyer could not have reasonably believed that representation of one client against another was permissible and affirming trial court's disqualification order).

16. *See, e.g., Jagers v. Shake*, 37 S.W.3d 737, 740 (Ky. 2001) (holding that there was no Rule 1.7(b) conflict because there was no showing that the lawyers' representations would be materially limited).

17. RONALD D. ROTUNDA, *LEGAL ETHICS* § 8-5 (2000).

18. *Id.* (quoting *Picker Int'l, Inc. v. Varian Assocs., Inc.* 670 F. Supp. 1363 (N.D. Ohio 1987)); *see also infra* notes 138-41 and the accompanying text.

representations; it is intended to protect former clients.¹⁹ An attorney's loyalty to his client survives the termination of the attorney-client relationship.²⁰ Were it otherwise, a lawyer might be tempted to terminate a representation and use his former client's confidences to make himself more valuable to a new client who is adverse to the first. One of the primary aims of Rule 1.9, then, is the protection of client confidences.²¹ Rule 1.9(a) provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.²²

The scope of a "matter" for Rule 1.9(a) purposes depends on the facts of the particular case.²³ Determining whether successive matters are "substantially related" likewise requires an analysis of the facts, the circumstances, and the legal issues involved.²⁴ The greater the similarities between the facts and the legal issues, the greater the chance that the two representations will be deemed to be substantially related. The nature and extent of the attorney's involvement in the two cases can also be a significant factor.²⁵ Once matters are determined to be substantially related, the attorney's receipt of confidential information from the client is presumed.²⁶

19. 1 HAZARD & HODES, *supra* note 2, § 13.2.

20. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 303 (5th ed. 1998).

21. *See* Griffith v. Taylor, 937 P.2d 297, 301 (Alaska 1997) (stating that the Rule 1.9(a) substantial relationship test is a prophylactic rule obviating the former client's need to demonstrate the disclosure of confidential information in the prior representation); Flatt v. Superior Court, 885 P.2d 950, 954 (Cal. 1994) (stating that "the chief fiduciary value jeopardized [in successive representations] is that of client confidentiality").

22. MODEL RULES, *supra* note 8, at Rule 1.9(a). "Another person" as used in Rule 1.9(a) means "another client." Wood's Case, 634 A.2d 1340, 1342-43 (N.H. 1993).

23. MODEL RULES, *supra* note 8, at Rule 1.9 cmt. 2; *see, e.g.*, Misemer v. Freda's Restaurant, Inc., 961 S.W.2d 120, 122-23 (Mo. Ct. App. 1998).

24. *See* Fox Searchlight Pictures, Inc. v. Paladino, 106 Cal. Rptr. 2d 906, 912 (Ct. App. 2001); Schwartz v. Cortelloni, 685 N.E.2d 871, 878-80 (Ill. 1997); State v. Crepeault, 704 A.2d 778, 783 (Vt. 1997) (quoting State *ex rel.* McClanahan v. Hamilton, 430 S.E.2d 569, 572-73 (W. Va. 1993)).

25. San Gabriel Basin Water Quality Auth. v. Aerojet-General Corp., 105 F. Supp. 2d 1095, 1103-04 (C.D. Cal. 2000) (quoting H.F. Ahmanson & Co. v. Salomon Bros., Inc., 280 Cal. Rptr. 614 (Ct. App. 1991)); *Fox Searchlight*, 106 Cal. Rptr. 2d at 912.

26. State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 632-34 (Fla. 1991) (holding that presumption is irrefutable); Robertson v. Wittenmyer, 736 N.E.2d 804, 809 (Ind. Ct. App. 2000); Chrispens v. Coastal Ref. & Mktg., Inc., 897 P.2d 104, 114 (Kan. 1995) (holding that

Rule 1.9(a) also requires that the current and former clients' interests be "materially adverse" in order to force the lawyer's disqualification.²⁷ In other words, not all competing interests are conflicts of interest for Rule 1.9(a) purposes; an actual conflict does not arise until the material adversity requirement is met.²⁸ Again, the determination of whether current and former clients' interests are materially adverse requires case-specific inquiry.²⁹

A few states adhere to the *Model Code of Professional Responsibility*.³⁰ The *Model Code* governs lawyers' conduct by way of general axiomatic norms referred to as "Canons," aspirational standards referred to as "Ethical Considerations" ("EC's"), and "black letter" requirements known as "Disciplinary Rules" ("DR"). The *Model Code* addresses conflicts of interest under Canon 5, which generally requires lawyers to exercise independent professional judgment on their clients' behalf.³¹ DR 5-101(A) is the *Model Code's* basic conflict of interest provision. It provides:

DR 5-101 Refusing Employment When the Interests of
the Lawyer May Impair His Independent Professional
Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial

presumption is irrebuttable); *Sullivan County Reg'l Refuse Disposal Dist. v. Town of Acworth*, 686 A.2d 755, 758 (N.H. 1996) (holding that presumption is irrebuttable); *Crepeault*, 704 A.2d at 783; *State ex rel. McClanahan v. Hamilton*, 430 S.E.2d 569, 573 (W. Va. 1993); *In re Guardianship of Tamara L.P.*, 503 N.W.2d 333, 338 (Wis. Ct. App. 1993) (holding that presumption is irrebuttable).

27. *Sullivan County*, 686 A.2d at 757; *see, e.g., Straub Clinic & Hosp. v. Kochi*, 917 P.2d 1284, 1291 (Haw. 1996).

28. *See, e.g., Fiddelman v. Redmon*, 623 A.2d 1064, 1070 (Conn. App. Ct. 1993) (holding that trial court did not err in refusing to disqualify lawyer partly because successive representations were not adverse).

29. Although it never mentioned Rule 1.9(a), the court in *Hunter v. State*, 770 So. 2d 232 (Fla. Dist. Ct. App. 2000), summed up the substantial relationship and material adversity requirements well: "[T]here is no blanket continuing duty of loyalty by the mere fact of some representation which translates to automatic disqualification any time the prior client is in any way involved in a subsequent case. Each case must be reviewed on its specific facts and circumstances." *Id.* at 235.

30. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1986) [hereinafter MODEL CODE].

31. *Id.* at Canon 5 ("A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client").

business, property, or personal interests.³²

DR 5-101(A) is augmented by DR 5-105(C), which provides that “a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of such representation on the exercise of his professional judgment on behalf of each.”³³ As with Model Rule 1.7, courts interpreting DR 5-101(A) and (C) must balance the lawyer’s duty of loyalty to the client, the lawyer’s economic interests, and the public’s interest in the availability of legal services. Such balancing seldom favors the lawyer, however, as concurrent adverse representations are presumptively improper.³⁴

The *Model Code* has no direct counterpart to Model Rule 1.9(a).³⁵ In *Model Code* states, conflicts of interest in successive representations are prohibited under DR 4-101, which requires attorneys to preserve clients’ confidences and secrets, and under Canon 9, which obligates attorneys to avoid even the appearance of impropriety.³⁶ EC 9-2 provides that “[w]hen explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes confidence in the integrity and efficiency of the legal system and the legal profession.”³⁷ A court might also invoke DR 5-105(C) to discipline a lawyer for a conflict of interest in successive

32. *Id.* at DR 5-101.

33. *Id.* at DR 5-105(C).

34. *Hatfield v. Seville Centrifugal Bronze*, 732 N.E.2d 1077, 1080 (Ohio Misc. 2000) (stating that “[s]imultaneous representation is prima facie improper”).

35. *See Adoption of Erica*, 686 N.E.2d 967, 970 & n.3 (Mass. 1997) (explaining that analyzing conflicts in successive representations is difficult in *Model Code* states because the *Model Code* does not specifically address the issue, and noting that Model Rule 1.9 explicitly addresses former client conflicts). A few *Model Code* states have formulated their own disciplinary rules akin to Model Rule 1.9(a). *See, e.g., Kassis v. Teacher’s Ins. & Annuity Ass’n*, 717 N.E.2d 674, 677 n.* (N.Y. 1999). New York’s DR 5-108 prohibits an attorney “‘who has represented the former client in a matter’ from ‘represent[ing] another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client’ unless the former client consents.” *Id.* (alteration in original) (quoting the rule).

36. *See Bergeron v. Mackler*, 623 A.2d 489, 493 n.9 (Conn. 1993). With limited exceptions DR 4-101(B) provides that a lawyer shall not knowingly reveal a client’s confidence or secret, use a client’s confidence or secret to the client’s disadvantage, or use a client’s confidence or secret for the advantage of himself or a third person unless the client consents after full disclosure. *See MODEL CODE, supra* note 30, at DR 4-101(B). Canon 9 states succinctly: “A Lawyer Should Avoid Even the Appearance of Professional Impropriety.” *Id.* at Canon 9.

37. *Id.* at EC 9-2.

representations.³⁸

The *Model Code* and Rule 1.9(a) standards for disqualification are similar.³⁹ The successive matters must be substantially related; successive representations pose no ethical problems in the absence of a substantial relationship between the matters.⁴⁰ If the matters are substantially related, *Model Code* states also presume that confidences have passed.⁴¹ The problem in the *Model Code* analysis is the meaning and significance of a claimed “appearance of professional impropriety” under Canon 9. This is at best an imprecise measure of attorney conduct. The appearance of impropriety, standing alone, generally should be insufficient to disqualify an attorney in a dispute stemming from successive representations.⁴²

III. CASES

The case most often cited to support an accommodation client theory is *Allegaert v. Perot*,⁴³ decided by the Second Circuit. Winthrop Allegaert was the trustee in bankruptcy of Walston, once a large Wall Street brokerage firm. He moved to disqualify two law firms, Weil, Gotshal and Leva, Hawes, who represented some of the defendants in a preference action brought by Allegaert. The preference action arose out of Walston’s realignment with another struggling brokerage, DGF, in what amounted to a joint venture.⁴⁴ Weil, Gotshal and Leva, Hawes had

38. See, e.g., *In re* Conduct of Sawyer, 13 P.3d 112, 113 (Or. 2000).

39. See *Bergeron*, 623 A.2d at 493.

40. See *Kala v. Aluminum Smelting & Ref. Co.*, 688 N.E.2d 258, 264 (Ohio 1998).

41. See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Walters, 603 N.W.2d 772, 777-78 (Iowa 1999); *Clinard v. Blackwood*, 46 S.W.3d 177, 184 (Tenn. 2001).

42. See *Bergeron*, at 494 (Conn. 1993); *State v. Reddick*, 534 S.E.2d 473, 479 (Ga. Ct. App. 2000) (quoting *Reese v. Georgia Power Co.*, 381 S.E.2d 110 (Ga. Ct. App. 1989)), *vacated by* 546 S.E.2d 68 (Ga. Ct. App. 2001); *State v. Dimaplas*, 978 P.2d 891, 893-94 (Kan. 1999) (quoting *In re Estate of Koch*, 849 P.2d 977 (Kan. Ct. App. 1993)); *Adoption of Erica*, 686 N.E.2d 967, 973 (Mass. 1997); *Hatfield v. Seville Centrifugal Bronze*, 732 N.E.2d 1077, 1081 (Ohio Misc. 2000); *Stowell v. Bennett*, 739 A.2d 1210, 1212 (Vt. 1999). *But see* *Lovell v. Winchester*, 941 S.W.2d 466, 469 (Ky. 1997) (reasoning that the appearance of impropriety remains an independent basis for disqualification because it serves to protect the reasonable expectations of current and former clients, and because it promotes public confidence in the integrity of the legal profession); *Brown v. Eighth Judicial Dist. Court*, 14 P.3d 1266, 1269 n.4 (Nev. 2000) (observing that an attorney’s “disqualification may be warranted if an appearance of unfairness or impropriety is great enough to undermine public trust and confidence in the judicial system”); *Clinard*, 46 S.W.3d at 186-89 (retaining the appearance of impropriety as an independent basis for disqualification in order to protect client confidences and to assure the public of the integrity of the legal profession).

43. *Allegaert v. Perot*, 565 F.2d 246 (2d Cir. 1977).

44. *Id.* at 248-49.

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represented DGF and other interested parties related to DGF in the Walston-DGF realignment.⁴⁵ Weil, Gotshal and Leva, Hawes had thereafter represented Walston in a derivative action known as *Nella Walston*, which was substantially similar to the case at bar.⁴⁶ In both cases Allegaert alleged that payments made by Walston to DGF were unlawful preferences, and that DGF had otherwise defrauded and looted DWI through their alignment.⁴⁷ Allegaert based his disqualification motion on Weil, Gotshal's and Leva, Hawes' representation of Walston in the *Nella Walston* litigation. The district court declined to disqualify the law firms and Allegaert took an interlocutory appeal.

The *Allegaert* court noted the basic rule that an attorney may be disqualified if he accepts an engagement adverse to a former client's interests and the new engagement is substantially related to the prior matter.⁴⁸ Once the substantial relationship is established the attorney's receipt of the former client's confidences is presumed. Before the substantial relationship test is implicated, however, it must be shown that the attorney could have received information which his former client might reasonably believe that he would withhold from the current client.⁴⁹

The court reasoned that the substantial relationship did not apply because Walston knew that information given to Weil, Gotshal and Leva, Hawes "would certainly be conveyed to their *primary* clients," i.e., DGF and its affiliates, in view of the realignment agreement.⁵⁰ Neither Walston nor anyone associated with it reasonably could have believed that Weil, Gotshal and Leva, Hawes would withhold from DGF and its affiliates information shared with the law firms by Walston.⁵¹ Walston always had the law firm of Shearman & Sterling as its own counsel and, with the exception of the *Nella Walston* litigation, Weil, Gotshal and Leva, Hawes always represented DGF and its affiliates.⁵² As the court explained:

Integral to our conclusion that Weil, Gotshal and Leva,
Hawes were not positioned to receive information intended

45. *Id.* at 248.

46. *Id.* at 249.

47. *Id.*

48. *Allegaert v. Perot*, 565 F.2d 246, 250 (2d Cir. 1977).

49. *Id.*

50. *Id.* (emphasis added).

51. *Id.*

52. *Id.*

to be withheld from DGF is the law firms' continuous and unbroken legal relationship with their primary clients [T]he attorneys sought to be disqualified here have not changed sides from a former client to a current, adverse client [A]t all times Weil, Gotshal and Leva, Hawes represented [DGF's and its affiliates'] interests. Any representation of Walston was done with Walston's knowledge that the firms were still representing [DGF's and its affiliates'] interests and would continue to do so. Weil, Gotshal and Leva, Hawes never changed sides.⁵³

The court thus affirmed the district court's decision not to disqualify the law firms.⁵⁴ The *Allegaert* court never reached the substantial relationship question, although it did note the trustee's failure to argue that Weil, Gotshal and Leva, Hawes failed to reveal and explain their potential conflict of interest.⁵⁵ Having raised the point, however, the *Allegaert* court quickly dispelled any notion that such a claim might be viable based on the fact that "the parties were not only aware of their mutual relationship, but also were as sophisticated, perhaps, as the American corporate community can be."⁵⁶

Several courts have followed *Allegaert*,⁵⁷ and some of those courts have gone beyond the issue of client confidences to examine the problems posed by lawyers' duty of loyalty under Canon 5 and Rule 1.9,⁵⁸ which the *Allegaert* court did not reach. The most interesting of those cases for present purposes is *American Special Risk Insurance Co. v. Delta American Re Insurance Co.*⁵⁹

American Special Risk was a complex breach of contract action arising out of various reinsurance contracts entered into by plaintiff American Special Risk Insurance Corp. (ASRIC) and defendant Delta

53. *Allegaert v. Perot*, 565 F.2d 246, 251 (2d Cir. 1977).

54. *Id.*

55. *Id.* (referring to Canon 5 of the *Model Code*).

56. *Id.*

57. See, e.g., *Skidmore v. Warburg Dillon Read*, No. 99 Civ. 10525 (NRB), 2001 WL 504876, at *4 (S.D.N.Y. May 11, 2001); *Host Marriott Corp. v. Fast Food Operators, Inc.*, 891 F. Supp. 1002, 1006-08 (D. N.J. 1995) (discussing Rule 1.9(a)); *Kempner v. Oppenheimer & Co.*, 662 F. Supp. 1271, 1276-78 (S.D.N.Y. 1987); *American Special Risk Ins. Co. v. Delta Am. Re Ins. Co.*, 634 F. Supp. 112, 120-21 (S.D.N.Y. 1986); *C.A.M. v. E.B. Marks Music, Inc.*, 558 F. Supp. 57, 59 (S.D.N.Y. 1983); *Anderson v. Pryor*, 537 F. Supp. 890, 895-96 (W.D. Mo. 1982).

58. *Skidmore*, 2001 WL 504876, at ** 4-5; *Kempner*, 662 F. Supp. at 1278-80; *Am. Special Risk*, 634 F. Supp. at 121-22.

59. *American Special Risk*, 634 F. Supp. 112 (S.D.N.Y. 1986).

American Re Insurance Co. (Delta). An additional defendant in ASRIC's suit against Delta was DR Insurance (DRI). The law firm of Le Boeuf, Lamb, Leiby & MacRae (Le Boeuf) represented ASRIC.⁶⁰ During the events leading up to the litigation, DRI had assumed responsibility for Delta's reinsurance obligations.⁶¹ Problems arose because Delta hired Le Boeuf to represent it in unrelated administrative proceedings in Kentucky after Le Boeuf had sued it on ASRIC's behalf in New York.⁶²

Delta and DRI moved to disqualify Le Boeuf in the New York litigation despite the fact that Delta did not believe itself to be adverse to ASRIC in the New York litigation and did not expect Le Boeuf to withhold its secrets from ASRIC.⁶³ The *American Special Risk* court easily dispatched any hope of disqualification on shared confidence grounds, stating: "Delta cannot hire its opponent's law firm and then disqualify the firm to protect confidences it may have imparted to the firm's attorneys."⁶⁴ Relying in large part on *Allegaert*, the court concluded that the substantial relationship test and Canon 4 did not apply to Le Boeuf's representation of Delta.⁶⁵

The *American Special Risk* court noted that "a more vexing problem [was] presented by the fact that Le Boeuf [was] ostensibly suing its own client."⁶⁶ The court resolved this problem by looking to DRI's assumption of Delta's reinsurance obligations. Because DRI had assumed its contractual obligations, Delta was "only a nominal party" which "could not be injured by Le Boeuf's dual representation."⁶⁷ Accordingly, and because Delta had hired Le Boeuf after the firm had sued it on ASRIC's behalf, the court concluded that Le Boeuf need not be disqualified for suing a client.⁶⁸

A Pennsylvania federal court embraced the accommodation client concept in *In re Rite Aid Corp. Securities Litigation*.⁶⁹ In March 1999, pharmacy giant Rite Aid announced disappointing earnings and, when

60. *Id.* at 113.

61. *Id.* at 116.

62. *Id.* at 121.

63. *Id.*

64. *Id.*

65. *Am. Special Risk Ins. Co. v. Delta Am. Re Ins. Co.*, 634 F. Supp. 112, 121 (S.D.N.Y. 1986).

66. *Id.*

67. *Id.* at 122.

68. *Id.*

69. *In re Rite Aide Sec. Litig.*, 139 F. Supp. 2d 649 (E.D. Pa. 2001).

its stock price fell dramatically as a result, it was sued by shareholders in several class actions. The suits initially named as defendants Rite Aid and its CEO, Martin Grass. Rite Aid's General Counsel, Elliot Gerson, retained Alan Davis of the law firm of Ballard Spahr to represent both Rite Aid and Grass.⁷⁰ At the time he retained Davis and Ballard Spahr, Gerson had also retained the law firm of Wilmer Culter & Pickering to represent Grass personally after the *Wall Street Journal* published an article indicating that Grass had entered into several transactions involving Rite Aid that benefitted him and his family.⁷¹

Davis memorialized his representation of Rite Aid and Grass in an engagement letter to Gerson. Davis explained to Gerson in the engagement letter that while there did not appear to be a conflict of interest that would prevent Ballard Spahr from representing both the company and Grass, it was possible that such a conflict might arise in the future.⁷² If it did, Davis wrote, it was "understood" that Grass would retain separate counsel and that Ballard Spahr would continue to represent Rite Aid.⁷³

Shortly after Davis sent Gerson his engagement letter, new class action complaints were filed. These new suits also named Rite Aid executives Frank Bergonzi and Timothy Noonan as defendants.⁷⁴ Gerson asked Ballard Spahr to represent Bergonzi and Noonan on the same terms as its representation of Rite Aid and Grass. Ballard Spahr thus entered its appearance for Rite Aid, Grass, Bergonzi and Noonan.⁷⁵

In October 1999, Davis learned that Grass and Bergonzi had engaged in conduct that apparently breached their fiduciary duties to Rite Aid. Davis told Gerson that he and his firm could no longer represent Bergonzi and Grass. He also advised Bergonzi that he could no longer represent him and urged him to replace Ballard Spahr with personal counsel.⁷⁶ Bergonzi heeded Davis' advice. Finally, Davis told Wilmer Culter of the conflict and that Ballard Spahr could no longer represent Grass.⁷⁷

The litigation proceeded and, for more than one year, Grass did not

70. *Id.* at 652.

71. *Id.* at 653

72. *Id.* at 652-53 (quoting engagement letter).

73. *Id.* at 653(quoting engagement letter).

74. *Id.*

75. *In re Rite Aid Corp. Sec. Litig.*, 139 F. Supp. 2d at 653.

76. *Id.* at 654

77. *Id.*

object to Ballard Spahr's continued representation of Rite Aid.⁷⁸ Davis finally settled the case on behalf of Rite Aid in November 2000, but that settlement did not encompass any of the individual defendants or Rite Aid's accountants.⁷⁹ Grass and Bergonzi objected to the settlement, arguing that the settlement was "the fruit of a tree poisoned by the allegedly unethical participation of Ballard Spahr in its negotiation and consummation."⁸⁰ They also moved to disqualify Ballard Spahr, although Bergonzi later withdrew from the dispute, leaving Grass to press the motion alone.

Grass argued that Ballard Spahr, which had previously represented him in the litigation, had taken a position adverse to him by negotiating the partial settlement favoring Rite Aid, and that the firm did so without his consent. Thus, Ballard Spahr clearly violated Rule 1.9(a) and should be disqualified.⁸¹ The *Rite Aid* court disagreed.

The *Rite Aid* court pronounced that "Rite Aid was clearly the 'primary' client."⁸² This was particularly so because Ballard Spahr represented Grass through Rite Aid; the company engaged Ballard Spahr on Grass's behalf, and the firm typically communicated with Grass through Gerson or in his presence.⁸³ Ballard Spahr did not drop Grass as a client to represent a more desirable client in Rite Aid; any change in position was occasioned by Grass.⁸⁴

The court bolstered its conclusion that Ballard Spahr did not violate Rule 1.9(a) by looking to the *Restatement (Third) of the Law Governing Lawyers*,⁸⁵ which countenances similar conduct by describing a client such as Grass as an "accommodation client."⁸⁶ Comment (i) to Section 132 of the *Restatement* provides:

i. *Withdrawal from representing an "accommodation" client.* With the informed consent of each client . . . a lawyer might undertake representation of another client as an accommodation to the lawyer's regular client, typically for a limited purpose in order to avoid

78. *Id.*

79. *Id.* at 655.

80. *Id.* at 652.

81. *In re Rite Aid Corp. Sec. Litig.*, 139 F. Supp. 2d at 656.

82. *Id.* at 658 (quoting *Allegaert v. Perot*, 565 F.2d 246 (2d Cir. 1977)).

83. *Id.*

84. *Id.*

85. *Id.* at 659.

86. See RESTATEMENT, *supra* note 4, at § 132 cmt. i.

duplication of services and consequent higher fees. If adverse interests later develop between the clients, even if the adversity relates to the matter involved in the common representation, circumstances might warrant the inference that the “accommodation” client understood and impliedly consented to the lawyer’s continuing to represent the regular client in the matter. Circumstances most likely to evidence such an understanding are that the lawyer has represented the regular client for a long period of time before undertaking representation of the other client, that the representation was to be of limited scope and duration, and that the lawyer was not expected to keep confidential from the regular client any information provided to the lawyer by the other client The lawyer bears the burden of showing that circumstances exist to warrant an inference of understanding and implied consent⁸⁷

The *Rite Aid* court believed that the dispute before it was analogous to the situation described in the *Restatement* comment. It therefore deemed Grass to be an “accommodation client,” and inferred that he had consented to Ballard Spahr’s continued representation of Rite Aid after it had stopped representing him because of potential conflicts of interest.⁸⁸

Leaving aside Grass’s accommodation client status, it also was apparent that he had consented to Ballard Spahr’s continued representation of Rite Aid. The nature and scope of Ballard Spahr’s engagement could not have been clearer. Davis’ engagement letter to Gerson made it “pellucid that Ballard Spahr would, in the event of a conflict between Rite Aid and Grass, cease to represent Grass but continue to represent Rite Aid.”⁸⁹ The court was unmoved by Grass’s claim that he never saw the letter, because his decision to engage counsel through Gerson bound him to the letter’s terms and as Rite Aid’s CEO he was constructively on notice of its contents.⁹⁰

Finally, and for good measure, the *Rite Aid* court concluded that Grass had waived his right to object to Ballard Spahr’s continued representation of the company. There were a number of facts and circumstances that should have alerted Grass to any claimed conflict

87. *Id.*

88. *In re Rite Aid Corp. Sec. Litig.*, 139 F. Supp. 2d 649, 660 (E.D. Pa. 2001).

89. *Id.*

90. *Id.*

long before the partial settlement in November 2000.⁹¹ Grass waited somewhere between nine and thirteen months from the time he reasonably should have been aware of Ballard Spahr's conflict to file his motion to disqualify.⁹² He was represented by sophisticated independent counsel the entire time. This delay was undue and easily constituted a waiver.⁹³

In *Meyers v. Lipman*,⁹⁴ a recent opinion devoid of facts, a New York court hinted that it might endorse accommodation client status. Affirming the trial court's denial of the appellants' motion to disqualify the respondents' attorneys, the *Meyers* court wrote:

The motion was properly denied on the ground that appellants could not have reasonably expected that respondents' attorneys would withhold from respondents information imparted by appellants in the context of litigation in which appellants and respondents were jointly represented by the attorneys and involving business entities in which appellants and respondents were jointly represented.⁹⁵

Unfortunately, the opinion is so factually deficient that it affords no real guidance. A lawyer confronted with *Meyers* as unfavorable precedent can legitimately complain that it is vague to the point of being valueless.

A Texas court rejected the accommodation client concept in *Insurance Co. of North America v. Westergren*.⁹⁶ The attorney whose conduct was challenged in *Westergren*, James Harris, argued that he could represent a contractor in litigation against a surety, INA, even though he had earlier represented INA in substantially related matters in which the contractor was also a party. Harris argued that there was no conflict of interest because his representation of INA was "merely an accommodation or pro forma relationship."⁹⁷ He did not consider INA to be his client because it did not pay his fees, and "at no time did he

91. *Id.* at 660-62.

92. *Id.* at 661-62.

93. *Id.* at 662.

94. *Meyers v. Lipman*, 726 N.Y.S.2d 547 (App. Div. 2001).

95. *Id.* at 547.

96. *Insurance Co. of N. Am. v. Westergren*, 794 S.W.2d 812 (Tex. App. 1990).

97. *Id.* at 815.

receive confidential information from or give advice to INA.”⁹⁸ The trial court denied INA’s motion to disqualify Harris based on the lack of an attorney-client relationship and INA appealed.

The appellate court acknowledged Harris’ accommodation or pro forma representation argument, but concluded that he shared an attorney-client relationship with INA.⁹⁹ While the duties or specifics of the relationship might be disputed, the court could “find nothing in the disciplinary rules which permits a pro forma representation of a client.”¹⁰⁰ The *Westergren* court thus held that the trial court erred in failing to disqualify Harris.¹⁰¹

*Universal City Studios, Inc. v. Reimerdes*¹⁰² was a copyright action in which Time Warner sought to enjoin the defendants from posting on an Internet web site a computer program that allegedly defeated the encryption system used by Time Warner on its DVDs. Time Warner moved to disqualify defendants’ new counsel, the Frankfurt firm, roughly one month after it entered its appearance on the ground that it was representing Time Warner in another case.¹⁰³ The other case was known as *Stouffer*.

Stouffer was another copyright case, albeit unrelated to *Universal City*. In *Stouffer*, the Frankfurt firm represented Time Warner and two other clients, Scholastic and Rowling. While Scholastic selected the Frankfurt firm as defense counsel and, in doing so, essentially foisted the firm on Time Warner, there was no doubt that Time Warner and Frankfurt shared an attorney-client relationship in that dispute.¹⁰⁴

Before moving to disqualify Frankfurt in the *Universal City* litigation, Time Warner called the Frankfurt partner handling the *Stouffer* case, Edward Rosenthal, to discuss the perceived conflict.¹⁰⁵ Rosenthal replied that there was no conflict of interest because the two matters were unrelated. He suggested that Time Warner retain separate counsel in *Stouffer* if it was concerned about a conflict.¹⁰⁶

The *Universal City* court rejected Frankfurt’s argument that it could

98. *Id.* at 814.

99. *Id.* at 815.

100. *Id.*

101. *Id.*

102. *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449 (S.D.N.Y. 2000).

103. *Id.* at 450-51 (discussing *Scholastic, Inc. v. Stouffer*, No. 99 Civ. 11480 (AGS), 2000 U.S. Dist. LEXIS 11516 (S.D.N.Y. Aug. 14, 2000)).

104. *Universal City Studios, Inc.*, 98 F. Supp. 2d at 453.

105. *Id.* at 451.

106. *Id.*

represent Time Warner in *Stouffer* and in the case before it because the cases were unrelated. Once Frankfurt agreed to represent Time Warner along with Scholastic and Rowling in *Stouffer*, it surrendered its ability to represent another client in litigation against any of them.¹⁰⁷ The court was also unimpressed with Frankfurt's attempt to avoid disqualification by offering to withdraw from Time Warner's representation in *Stouffer*. The court suggested that if suing a current client was indeed a dramatic act of disloyalty by a lawyer, as some courts have concluded, the act of trying to drop a client so that the lawyer could pursue a newer and more attractive engagement was at least as offensive.¹⁰⁸

In an effort to address these issues, the Frankfurt firm submitted a declaration by Cornell Law School Professor Charles W. Wolfram. Relying on *Allegaert* and the *Restatement (Third) of the Law Governing Lawyers*, Professor Wolfram opined that Time Warner was "a 'non-primary' or 'accommodation' client, that only 'primary' clients may seek disqualification of counsel affected with conflicts, and in any case that a lawyer representing a non-primary client 'can drop the accommodation client (like a hot potato, or otherwise) and file suit against the former accommodation client.'"¹⁰⁹ Professor Wolfram did not defend Frankfurt's concurrent representations for and against Time Warner.¹¹⁰ Rather, he stated only that disqualification is an inappropriate remedy when the aggrieved client is an accommodation client.¹¹¹

The *Universal City* court rejected Professor Wolfram's opinion for at least two reasons. First, his opinion rested on a series of inaccurate factual assumptions. Professor Wolfram assumed that Time Warner assumed that Frankfurt's ultimate allegiance was to Scholastic in the event of a conflict between the two companies; that Time Warner could not reasonably expect that Frankfurt would keep its confidences from Scholastic; that Time Warner had no economic stake in *Stouffer* because its interests were fully protected by virtue of a contract of indemnity with Scholastic; that Time Warner was named as a plaintiff in *Stouffer* only at Scholastic's direction and played only a minor role in the case; and that Time Warner played no part in directing counsel's activities in

107. *Id.* at 453.

108. *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449, 453 (S.D.N.Y. 2000).

109. *Id.*

110. *Id.* at 453-54.

111. *Id.* at 454.

Stouffer.¹¹² These assumptions were either demonstrably wrong or unproven, or reflected unwarranted inferences drawn from claims or statements made by members of the Frankfurt firm.¹¹³

Second, even if Time Warner were Frankfurt's accommodation client in *Stouffer* in the sense that Professor Wolfram used the term, that did not mean that Frankfurt was entitled to drop its representation when it "found a case more to its liking."¹¹⁴ To allow a lawyer to fire a client for the lawyer's own advantage would offend "Canon 5's requirement of the lawyer's obligation of utmost fidelity to the client."¹¹⁵ The *Universal City* court thus concluded that Professor Wolfram's reliance on *Allegaert* was misplaced, as there the issue was a former client relationship and the Canon 4 requirement that lawyers preserve their clients' confidences.¹¹⁶

The fact that the Frankfurt firm had acted improperly in representing the defendants in *Universal City* despite its representation of Time Warner in *Stouffer* did not mean, however, that the firm should be disqualified.¹¹⁷ The *Universal City* court believed that Time Warner's disqualification motion was motivated at least in part by tactical considerations.¹¹⁸ Time Warner waited nearly one month after learning of Frankfurt's conflict before moving to disqualify the firm. Moreover, there was no indication that Frankfurt's disloyalty would taint the litigation or prejudice Time Warner.¹¹⁹ The court thus denied Time Warner's disqualification motion, while stating ominously that "[t]he proper place for this controversy is in the appropriate professional disciplinary body."¹²⁰

IV. ANALYSIS

The Second Circuit's decision in *Allegaert v. Perot*¹²¹ does not broadly authorize the recognition of accommodation clients as a new subcategory of clients. The case should be limited to its facts, as several

112. *Id.*

113. *Id.*

114. *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449, 454 (S.D.N.Y. 2000).

115. *Id.* at 454-55.

116. *Id.* at 454.

117. *Id.* at 455.

118. *Id.*

119. *Id.* at 455-56.

120. *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449, 456 (S.D.N.Y. 2000).

121. *Allegaert v. Perot*, 565 F.2d 246 (2d Cir. 1977).

courts have recognized.¹²² Additionally, the case was decided by application of Canon 4 of the *Model Code*, which specifically deals with client confidences,¹²³ rather than under the broader Model Rule 1.9(a). While certainly intended to protect client confidences, Rule 1.9(a) also safeguards public confidence in the legal system and a client's broader expectation of his lawyer's loyalty.¹²⁴ The *Allegaert* court did not address lawyers' duty of loyalty in successive representations.¹²⁵ Finally, *Allegaert* should find no application in concurrent adverse representations.

A lawyer may take on the representation of a second client in a matter at the request of a regular client. That means only that the lawyer represents co-clients. There is not a category of inferior clients known as accommodation clients to whom lawyers owe diminished professional duties. The *Restatement's*¹²⁶ apparent creation of such a breed of client is at best an ill-considered description of some attorney-client relationships that are characterized by unusual facts or defined by well-crafted engagement letters.

There is no need for the potential confusion the accommodation client moniker creates. A lawyer who wishes to avoid a disqualifying conflict in the representation of multiple clients often can avoid trouble by obtaining the clients' consent,¹²⁷ and by detailing the scope and nature of his representation of each client in a clear and thorough engagement letter.¹²⁸ If a lawyer does these things and is thus able to continue to represent a favored client after withdrawing from the representation of a second client, that does not retroactively transform the second client into an "accommodation client." The second client is nothing more than a former client who has waived the lawyer's conflict of interest. The second client has, for whatever reason, decided that any advantage to be gained by insisting on his lawyer's loyalty is

122. See, e.g., *Universal City*, 98 F. Supp. 2d at 454; *Koch v. Koch Indus.*, 798 F. Supp. 1525, 1534 (D. Kan. 1992); *Prisco v. Westgate Ent., Inc.*, 799 F. Supp. 266, 271 (D. Conn. 1992); *Straub Clinic & Hosp. v. Kochi*, 917 P.2d 1284, 1290-91 (Haw. 1996).

123. MODEL CODE, *supra* note 30, at Canon 4 ("A Lawyer Should Preserve the Confidences and Secrets of a Client").

124. *Koch*, 798 F. Supp. at 1534; *Prisco*, 799 F. Supp. at 271.

125. *Koch*, 798 F. Supp. at 1534.

126. See RESTATEMENT, *supra* note 4, at § 132 cmt. i.

127. See, e.g., MODEL RULES, *supra* note 8, at Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client *unless the former client consents after consultation.*") (emphasis added).

128. See, e.g., *In re Rite Aid Corp. Sec. Litig.*, 139 F. Supp. 2d 649, 660 (E.D. Pa. 2001).

outweighed by other considerations.

If accommodation client status is thought to be characterized by the accommodation client's assumed or implied expectation or understanding that his confidences may pass to the primary client through their common lawyer, courts should ask why that is significant, or how it is important. Model Rule 1.6(a) provides in pertinent part:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized to carry out the representation,¹²⁹

A lawyer may be impliedly authorized to share a client's information with a co-client in any case in which the clients are mounting a joint defense. If that happens in a case in which one of the clients is the defense lawyer's regular client and the other client is not, that does not mean that the lawyer owes the second client any less loyalty. Moreover, in order for the second (accommodation) client to have impliedly authorized the lawyer's disclosure of his confidences, he must have understood that the possibility of disclosure existed.¹³⁰ To presume that the so-called accommodation client could have no reasonable expectation of confidentiality vis-à-vis the would-be primary client is to ignore the lawyer's duty under Model Rule 1.4(b) to explain confidentiality principles and the concept of impliedly authorized disclosures to both clients.¹³¹ Communication is critical here, as the New Jersey Supreme Court explained in *A. v. B.*:¹³²

[A]n attorney, on commencing joint representation of co-clients, should agree explicitly with the clients on the sharing of confidential information. In such a "disclosure agreement," the co-clients can agree that any confidential information concerning one co-client, whether obtained from a co-client himself or herself or from another source, will be shared with the other co-client. Similarly, the co-clients can agree that unilateral confidences or other

129. MODEL RULES, *supra* note 8, at Rule 1.6(a).

130. This conclusion is mandated by common sense and the commentary to Rule 1.6, which provides: "A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, *except to the extent that the client's instructions or special circumstances limit that authority.*" *Id.* at Rule 1.6 cmt. 7 (emphasis added). A client obviously cannot limit his lawyer's impliedly authorized disclosures unless he knows of the possibility.

131. *Id.* at Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

132. *A. v. B.*, 726 A.2d 924 (N.J. 1999).

confidential information will be kept confidential by the attorney. Such a prior agreement will clarify the expectations of the clients and the lawyer and diminish the need for future litigation.¹³³

It is also important to understand that Rule 1.9(a) may bar successive representations even where the lawyer gained no confidences in the first representation or where the confidences have been publicly disclosed.¹³⁴ This is because the Rule 1.9 substantial relationship test “is concerned with both a lawyer’s duty of confidentiality and his duty of loyalty.”¹³⁵ It is therefore unwise to make the expected sharing of confidential information the sole or critical base for accommodation client recognition and related disqualification decisions.

Finally, the recognition of accommodation client status runs contrary to long-standing principles of client loyalty in concurrent representations. Absent prior consent, a lawyer cannot accept a new representation adverse to an existing client.¹³⁶ A lawyer cannot simply discontinue an existing representation in order to represent a more favored client.¹³⁷ As the court in *Picker International, Inc. v. Varian Associates, Inc.*,¹³⁸ observed: “A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client.”¹³⁹ Yet that is exactly what proponents of accommodation client status would permit lawyers to do.

In this day of transient client loyalty the “hot potato” issue is increasingly important.¹⁴⁰ A lawyer understandably may want to convert an existing client to a former client out of economic self-interest, and deeming the existing client to be an accommodation client may be the means to accomplish this goal. It remains unreasonable, however, to endorse the accommodation client concept. The simple fact is that some clients impose an opportunity cost on lawyers measured by the new clients that the lawyer cannot accept while representing the original

133. *Id.* at 929.

134. *Centerline Indus., Inc. v. Knize*, 894 S.W.2d 874, 876 (Tex. App. 1995).

135. *Id.* (citing *In re Am. Airlines Inc.*, 972 F.2d 605, 619 (5th Cir. 1992)).

136. See MODEL RULES, *supra* note 8, at Rules 1.7(a) and (b); MODEL CODE, *supra* note 30, at EC 5-16.

137. *Stratagem Dev. Corp. v. Heron Int’l N.V.*, 756 F. Supp. 789, 794 (S.D.N.Y. 1991).

138. *Picker Int’l Inc. v. Varian Assoc., Inc.*, 670 F. Supp. 1363 (N.D. Ohio 1987).

139. *Id.* at 1365.

140. ROTUNDA, *supra* note 17, § 8-5, at 207.

client.¹⁴¹ This means that lawyers should be selective when accepting new business; it does not justify the creation of a new class of clients whose lesser business worth arguably leaves them at their lawyers' mercy.

V. CONCLUSION

There clearly are cases of dual representation where the disqualification of the clients' common lawyer would be unfair to one of the clients, to the lawyer, or both. A lawyer's professional discipline and exposure to malpractice liability in cases of dual representation can also be unfair. And, these cases may involve one client who has a long-time relationship with the lawyer, a situation where the lawyer's representation of the second client is limited in duration or scope, and circumstances in which the second client does not expect that the lawyer will keep his confidences inviolate. That does not mean, however, that the "accommodation client" is anything less than an ordinary client, or should be treated differently under ethics rules or the law of lawyering. Courts deciding disqualification motions in such cases can avoid any threatened unfairness by examining the facts and applying established legal principles. A court that believes a disqualification motion has been filed to gain some sort of tactical advantage in the case can always exercise its discretion to deny the motion for that reason. To create a new breed of client – the accommodation client – in an effort to avoid unfairness is unnecessary and confusing. Worse yet it is imprudent, because it makes it too easy to excuse lawyers' ethical failures. Clients' expectations of confidentiality and loyalty are worthy of protection in all representations.

Lawyers can head off the problems that accommodation client status is intended to avoid or mitigate by crafting appropriate engagement letters or by obtaining appropriate waivers.¹⁴² If a lawyer fails to explain matters to his clients or fails to memorialize his agreements with his clients, he ought to expect that there may be unfortunate consequences.

141. *Id.*

142. *See, e.g., Zador Corp. v. Kwan*, 37 Cal. Rptr. 2d 754, 762-63 (Cal. Ct. App. 1995).