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Articles

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> "A foolish consistency is the hobgoblin of small minds."[2]

> "But it was my view that lawyers don't stand in the shoes of their clients and that good lawyers can give advice and argue any side of a case."[3]

Anyone who has observed a law school moot court competition knows that a lawyer can argue both sides of an issue, and sometimes

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2. RALPH WALDO EMERSON, *Self-Reliance, in* ESSAYS AND ENGLISH TRAITS 70 (P F Collier & Son 1909).

3. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, 109th Cong. 158 (Sept. 13, 2005) (Roberts discussed his pro bono work).

extremely well. In a moot court competition, teams of law students proceed through the contest arguing first one side of a case, then the other. Often these contradictory arguments are within hours of each other. The contestants suffer no loss of credibility for their side-switching.

In the practice of law, of course, conflict of interest rules prevent lawyers from being on both sides of the same case. But should lawyers be allowed to take contradictory legal positions in unrelated cases? Although there is concern about such "positional conflicts" today, in 1872 the answer was yes. Lawyer and Senator Matthew Hale Carpenter argued contradictory interpretations of the Fourteenth Amendment's privileges and immunities clause to the Supreme Court in two famous cases. Carpenter represented a woman denied admission to the bar in *Bradwell v. Illinois*[4] and in the *Slaughter-House Cases*[5] he defended the state of Louisiana's grant of a butchering monopoly.

In *Bradwell*, Carpenter argued that the privileges and immunities clause protected his client's right to pursue an avocation in law. But in the *Slaughter-House Cases*, he argued that the clause did not impair the state's authority to regulate and restrict the "butchering industry."[6] The

4. Bradwell v. Illinois, 83 U.S. 130, 136 (1873).

5. Slaughter-House Cases, 83 U.S. 36, 48 (1873).

6. Senator Carpenter argued first in the *Bradwell* case that the "privileges and immunities" protected by the Fourteenth Amendment (then only 5 years old) included the right to pursue all avocations. Bradwell, 83 U.S. at 138-39. While he conceded the state had the authority to prescribe qualifications for a profession, he argued that it could not exclude an entire class of citizens from any avocation. *Id.* at 137, 21 L.Ed. 442, 444. (The Lawyer's Edition reporter of the Supreme Court decisions includes the arguments of counsel). "I maintain that the fourteenth amendment opens to every citizen of the United States, male or female, black or white, married or single, the honorable professions as well as the servile employments of life; and that no citizen can be excluded from any one of them." *Id.*

Yet, in the *Slaughterhouse Cases*, only two weeks later, he argued that the privileges and immunities clause of the Fourteenth Amendment did not impair the authority of Louisiana to grant one company the exclusive right to sell and butcher animals for food in a certain area. *See* Slaughter-House Cases, 83 U.S. at 66. Carpenter argued, "The privileges and immunities here contemplated are those which are fundamental, as, for instance the right of going into any state for the purpose of residing therein; the right of taking up one's residence therein, and becoming a citizen; the right of free entrance and exit, and passage through; the protection of the laws affecting personal liberty." 21 L.Ed. 394, 402.

The conflict seems clear. In maintaining in *Bradwell* that the privileges and immunities protected by the Fourteenth Amendment included professions and avocations, he undermined the argument that the state had the authority to exclude certain citizens from the avocation of butchering. Bradwell, 83 U.S. at 138-39. In addition, Carpenter's eagerness to show that the Court could decide for Bradwell without granting women the right to vote ended up cutting against his argument in the *Slaughter House Cases* that the privileges and immunities of the Fourteenth Amendment included only those that were "fundamental" such as the right to travel. Slaughter-House Cases, 83 U.S. at 52. (Surely

arguments were within weeks of each other. Carpenter prevailed in the *Slaughter-House Cases* but lost in *Bradwell*. The *Bradwell* decision relied almost exclusively on the precedent set in the *Slaughter-House Cases* one day earlier.[7]

Carpenter's contradictory legal positions before the same court were not seen as an ethical problem at the time; in fact, the cases brought him fame and a thriving Supreme Court practice.[8] Carpenter's actions were consistent with the lawyerly ideals of independence, detachment and professionalism. Yet under the ethics rules in most American jurisdictions today, Carpenter's dual representations would be seen as a conflict of interest, and therefore, an ethical violation.

Since an ethical concern with legal positional conflicts was raised in the 1983 comments to the ABA Model Rules of Professional Conduct, legal authorities have analyzed positional conflicts as potential conflicts of interest. According to most authorities today, a positional conflict is not a per se ethical violation, but may become a conflict of interest if the issue is important enough to the clients and there is a risk that one representation will materially limit the other; for example, by leading to precedent from one case that will adversely control the other (as was true with Senator Carpenter's cases).[9]

Positional conflicts are rarely the subject of litigation and there are few published cases on the subject. It is the author's belief that lawyers suppress most positional conflicts and that business conflicts are the greater force. Business conflicts are not necessarily ethical code violations, but the term used to describe economic pressures lawyers face to favor one case over another. For example, where a client provides repeat business, a lawyer would not want to offend that client by taking on a case or making an argument of which that client disapproves.

The presence of a positional conflict is actually evidence that a business conflict may have been overcome. It is when a lawyer decides

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the right to vote is a fundamental privilege of citizenship). One can imagine ways to reconcile the arguments in the two cases, but the need for such reconciliation is further evidence of the conflict. At any rate, the conflict was made even clearer when Carpenter won the *Slaughterhouse Cases*, but lost *Bradwell*, and when the decision in *Bradwell* cited heavily his victory in the *Slaughterhouse Cases*.

Carpenter was paid for his representation in the *Slaughter-House Cases*, but took on Myra Bradwell's case pro bono. *See* Jane M. Friedman, *Myra Bradwell: On Defying the Creator and Becoming a Lawyer*, 28 VALPARAISO UNIV. L. REV. 1287, 1293-97 (1994).

7. Bradwell, 83 U.S. 130, 139 (1873).

8. *See* E. BRUCE THOMPSON, MATTHEW HALE CARPENTER: WEBSTER OF THE WEST 102-03 (Vail-Ballou Press, Inc. 1954). "His courage in the conduct of a cause was the sublimity of heroism, and his fidelity to his clients was never open to suspicion." MEMORIAL ADDRESSES ON THE LIFE AND CHARACTER OF MATTHEW H. CARPENTER 70 (Washington, Govt. Print. Off., 1882).

9. *See* section III, *infra*.

not to make a contrary argument for one client in order to avoid offending or harming another client that an ethical problem is likely to be present. The real ethical concern should be the possibility that a lawyer's interest in, loyalty to, or dependence on, a particular client may limit the representation of other clients. Too much focus on a rule against positional conflicts creates incentives for lawyers to avoid the positional conflict by bowing to business conflicts and suppressing arguments for or dropping the less favored client. There is some evidence that this is exactly what has happened in many law practices, which may explain why there are so few cases raising the question of positional conflicts. Thus, an ethical rule against positional conflicts seems counterproductive.

Even for lawyers who practice without business conflicts, (e.g., public defenders or legal services lawyers), a rule against positional conflicts does not help clients. An excessive concern with avoiding positional conflicts in these kinds of cases could lead to unnecessary withdrawal of quality counsel, which is generally scarce.[10]

At the same time, positional conflicts can raise serious attorney credibility questions. Depending on the importance of the issue to both cases, and the proximity of the arguments in time and place, the lawyer presenting conflicting legal arguments may face credibility problems with clients, the court(s) and the public.

Underlying this credibility concern is ambivalence in the profession about lawyer sincerity. According to the traditional "cab rank" view of law practice, a lawyer honorably takes the position of whatever client jumps in his cab.[11] Under this view, a lawyer is an independent professional who does not necessarily endorse the viewpoints or goals of his or her clients, but nevertheless makes the best arguments possible for them. It is this view of the profession that permeates the Model Rules and most legal authorities. Allowing legal positional conflicts seems perfectly consistent with the independent cab rank view of lawyering.

But even under this traditional "independent" view of the profession, a positional conflict presents credibility problems, suggesting

10. *See* AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENSE, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE—A REPORT ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS 38 (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf; ACLU OF WA REPORT ON INDIGENT DEFENSE (2004), *available at* http://www.aclu.org/FilesPDFs/indigentdefenserpt.pdf; Deborah Rhode, *Essay: The Pro Bono Responsibilities of Lawyers and Law Students*, 27 WM. MITCHELL L. REV. 1563 (2002).

11. *See, e.g.*, Philadelphia Bar Association Professional Guidance Committee, Guidance Opinion No. 89-27 at 2 (1990), *available at* http://www.phillybar.org/public/ethics/displayethics.asp?id=8015282000.

that lawyers and judges hold simultaneous contradictory ideas about the lawyer's role. Under the traditional view, advocates usually choose their positions not because they believe in them but because these positions best serve their clients. We also know that many lawyers would represent either side of a controversy and take the first client who approaches them. Lawyers who do so suffer no loss in credibility. Why then should their credibility be diminished if they argue a contrary position in an unrelated case? This concern about credibility cannot be simply reasoned away—there is something about the lawyer's performance that demands at least a semblance of loyalty to the argument. A lawyer who argues on both sides of an issue may have difficulty establishing a persuasive character or ethos. Nevertheless, eliminating an ethical rule against positional conflicts, and making clear that a lawyer can argue both sides of a question ethically, will greatly reduce these credibility problems.

This article argues that a legal positional conflict is not a true conflict of interest, and should not be the subject of an ethical prohibition. Because of the incentives it creates, a rule against positional conflicts gives greater control to wealthy clients over the availability of legal services without significantly protecting the rights of poor or middle income clients. Business conflicts already exert significant pressure on lawyers; too much concern with potential positional conflicts only increases that pressure.

This article also argues that eliminating an ethical prohibition against positional conflicts could mitigate much of the credibility concerns raised by contradictory legal arguments. But even if the profession fully endorsed the ethic of independence and eliminated a rule against positional conflicts, some credibility problems would inevitably remain. Thus, while there should be no rule against positional conflicts, a court should respect an appointed attorney's decision to withdraw because of credibility concerns.

Part I of this article defines a legal positional conflict, and distinguishes between legal and factual positional conflicts. Part II surveys the historical evolution of the ABA position on positional conflicts while Part III describes the approaches of the Restatement on the Law of Lawyering, case law, state ethics opinions and state ethical codes. Part IV critiques the predominant analysis of positional conflicts as potential conflicts of interest, arguing that it exacerbates business conflicts and creates harmful incentives. This section also acknowledges the credibility concerns with positional conflicts, and illustrates the operation of a positional conflict with the example of a public defender. Part V sets forth a proposal to amend the comments to Model Rule 1.7.

I. What Is a Positional or Issue Conflict?

The American Bar Association defines the question of positional or issue conflicts as "whether a lawyer can represent a client with respect to a substantive legal issue when the lawyer knows that the client's position on that issue is directly contrary to the position being urged by the lawyer (or the lawyer's firm) on behalf of another client in a different, and unrelated pending matter."[12] A seminal article on the topic states: "A positional conflict of interest occurs when a law firm adopts a legal position for one client seeking a particular legal result that is directly contrary to the position taken on behalf of another present or former client, seeking an opposite legal result, in a completely unrelated matter."[13]

In a positional conflict, because the matters and parties are unrelated, there would be no conflict of interest but for the contrary arguments the lawyer asserts.[14] A positional conflict will rise to the level of a conflict of interest if it creates a "significant risk that the representation of [a] client will be materially limited" by the lawyer's opposing arguments in an unrelated matter.[15] If there is a conflict of interest, then the attorney and the attorney's firm may not represent both clients, unless both clients give reasonable, informed consent.[16] If an attorney with a conflict of interest continues with both representations absent such consent, he or she may be subject to a disqualification motion and/or disciplinary proceedings.[17] A conflict of interest may also support a malpractice action by showing a breach of the standard of care.[18] Thus, whether a positional conflict constitutes a conflict of interest under the ethical rules is a critical question.

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12. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 at 1 (1993).

13. John S. Dzienkowski, *Positional Conflicts of Interest*, 71 TEX. L. REV. 457, 460 (1993).

14. Rule 1.7(a) of the Model Rules of Professional Conduct provides that a concurrent conflict of interest exists if: "(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." MODEL RULES OF PROF'L CONDUCT R. 1.7 (2005). Subsection (1) does not apply to a positional conflict because it refers to situations where the attorney is proceeding directly against one client on behalf of another client. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 6 (2004).

15. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2005).

16. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2005).

17. MODEL RULES OF PROF'L CONDUCT R. 8.4 cmt. 1 (2005); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS—THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.10-7 (West Group 2005).

18. ROTUNDA & DZIENKOWSKI, *supra* note 17, § 1-9(c)(3).

Sometimes lawyers and others use the term "positional conflict" to describe what is really a business conflict[19] that will never ripen into a positional conflict. For example, in one survey, lawyers in different firms repeatedly used the term to refer to a problem in accepting clients or cases that more valuable clients would object to, regardless of whether such representation would entail making arguments that actually conflict with arguments made on behalf of these valuable clients.[20] In a case that made the front page of the *New York Times*, a large law firm withdrew from pro bono representation of New York City against gun manufacturers because of, in the words of a firm statement, "certain potential 'positional conflicts' involving the position of long-term existing clients and those being advanced in the gun case."[21] Legal experts commented, however, that the firm's decision was based upon economic, not ethical, pressures.[22] The firm was not actually faced with taking contrary positions, just the disapproval of powerful clients.[23]

Use of the term "positional conflict" to cover business conflicts is confusing, and actually lumps together situations where lawyers *argue* conflicting positions on behalf of different clients, and situations where lawyers *refuse* to make the conflicting arguments or suppress the problem for economic reasons. When the term "positional conflict" is used in this article, it refers to the former situation. Of course, a true positional conflict may exist together with—or cause—a business conflict, but it may also occur without any significant conflicting

19. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 61-62 (1988) (citing MODEL CODE OF PROF'L RESPONSIBILITY EC 7-17 (1981)). A business conflict does not usually rise to the level of an ethical violation. Business conflicts have been defined as "not a properly disqualifying conflict of interest, but merely the risk of loss of business from having a firm member be perceived to adopt a policy position that one of the firm's clients might not like." *Id.* Gordon adds, "What is especially interesting about such prohibitions is not so much that partners impose them, but that the partners are so unembarrassed about doing so, even though the practice violates—in addition to the formal provisions of some codes of ethics—every conceivable traditional ideal of independence their profession has ever entertained." *Id.*

20. Susan P. Shapiro, *Everests of the Mundane: Conflict of Interest in Real-World Legal Practice*, 69 FORDHAM L. REV. 1139, 1166-1168 (2000).

21. *Top Law Firm Withdraws from City's Gun Suit*, N.Y. TIMES, Apr. 17, 2004 at A1, A17.

22. *Id.* The firm may have wished to make its withdrawal look motivated by ethical rather than business considerations.

23. *See, e.g.*, Jonathan Ringel, *Conflict Gives Bork a Starr Turn: Kirkland & Ellis forced to give up role in Festo*, LEGAL TIMES, Apr. 16, 2001, at 6. Another firm in a high-profile case used the term "positional conflict" to describe a situation where one client asked the firm to withdraw from a case in which it was appealing to the Supreme Court an appellate decision that was favorable precedent for the client in another case in which the firm was not involved. *Id.* This situation is more accurately labeled a business conflict, since the firm was not making conflicting legal arguments, only one argument that another client did not like.

economic pressure on the attorney.

A positional conflict may be legal or factual.[24] That is, a lawyer may take contradictory positions with respect to an issue of fact or an issue of law. Examples of legal positional conflicts are: arguing for one client that the Federal Sentencing Guidelines are constitutional, while arguing for another client that the Guidelines are unconstitutional;[25] arguing that jury recommendations in a capital case are entitled to great weight in one case, and arguing in another case that such recommendations are not entitled to great weight.[26] An example of a factual positional conflict is arguing in one case that the United States uranium market is competitive, while arguing in another that it is not.[27]

This article is concerned primarily with legal, rather than factual, positional conflicts because a factual positional conflict is more likely to meet the definition of a conflict of interest even without a special rule against positional conflicts. A factual overlap in two cases is more likely to require the lawyer to attack and defend the same evidence and witnesses, and is also likely to present the danger of misusing confidential information.[28] To the extent a factual conflict does not create a clear conflict of interest because of the factual overlap, it may raise the same ethical issues as a pure legal positional conflict. It is difficult to separate fact from law, and legal arguments are tightly entwined with and dependent upon characterizations of the facts.[28]

The classic example of a factual positional conflict is *Fiandaca v. Cunningham*,[29] where New Hampshire Legal Assistance represented two class clients: mentally retarded citizens and women prisoners. When the state offered to settle the prisoner litigation by offering a facility already being used for the mentally retarded, the previously unrelated lawsuits became related and the NHLA found itself unable to advocate two different uses of the same facility. Had the lawyers agreed to the

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24. *See, e.g.*, Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. OF APP. PRAC. & PROCESS 101 (2005). Of course, the line between fact and law is notoriously difficult to draw at times. *Id.*

25. *See* Fed. Defenders of San Diego Inc. v. United States Sentencing Comm'n, *infra* note 89.

26. *See* Williams v. State, *infra* note 89.

27. *See* Westinghouse Elec. Corp. v. Kerr-McGee Corp., *infra* note 98. The court did not find a factual positional conflict, but ruled on other grounds.

28. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(b), 3.3, 3.4 (2005). By a factual conflict I mean a conflict about what the facts are (*e.g.*, what happened, who is telling the truth), rather than a conflict about the significance or characterization of similar facts (*e.g.*, whether a shoe is a deadly weapon).

28. Louis E. Wolcher, *Pavcnik's Theory of Legal Decisionmaking: An Introduction*, 72 WASH. L. REV. 469, 472-73 (1997).

29. Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987), discussed in ROTUNDA & DZIENKOWSKI, *supra*, note 17, at § 1.7-6(o)(6).

settlement offer, the settlement would have had a direct and immediate impact upon their other class clients. And, as with any factual conflict, there would be the danger of misusing a client's confidential information, another basis for finding a conflict of interest.[30]

A positional conflict of interest can arise in litigation, transactional work, lobbying, or some combination thereof.[31] The litigation context is the paradigm example, because there the lawyer is asserting two contrary legal arguments as correct. The lobbying context presents similar concerns where the lawyer asserts conflicting positions about what the law should be. In a transactional context, the lawyer may be advising clients to take a position or course of action as a tactical matter and can explain the risks—thus, where both matters are transactional there is little real conflict.[32] But where one matter is transactional and the other involves litigation, a serious positional conflict can develop. In the litigation matter the lawyer may advocate a position that undercuts the position the lawyer helped the transactional client take.[33] The present analysis focuses primarily on positional conflicts in a litigation context because it is the "paradigm example" and brings into focus the debates about lawyer sincerity and loyalty.

The most troublesome aspect of defining positional conflicts is determining when arguments conflict. Not every contrary legal position constitutes a positional conflict: some are innocuous. "[L]awyers take contrary legal positions all the time. They sometimes take conflicting legal positions in the same case."[34] For example, a lawyer may argue in one case that legislative intent is a proper source of statutory interpretation even where the text is clear, but in another case urge the court not to look beyond the plain text of the statute despite clear evidence of a different statutory intent. Such a "conflict" would not strike most lawyers as noteworthy; in fact a lawyer who stubbornly stuck to one view of statutory interpretation in every representation, no matter what the result for the client, would probably be viewed as inept. Whether conflicting arguments rise to the level of a positional conflict

30. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(b) (2005); *see also Westinghouse*, *infra* note 98, where the firm's conflicting positions on the competitiveness of the uranium industry created a factual positional conflict and the danger of misusing confidential information.

31. Dzienkowski, *supra* note 13, at 464. Dzienkowski first identified these three categories of conflicts, but used the litigation positional conflict as the "model for analyzing all positional conflicts of interest." *Id.*

32. Dzienkowski, *supra* note 13, at 467.

33. *See* Dzienkowski, *supra* note 13, at 468 (discussing conflict of interest involving the law firm of Skadden, Arps, Slate, Meagher & Flom).

34. ROTUNDA & DZIENKOWSKI, *supra* note 17, at § 1.7-6(o)(4).

36. Dzienkowski, *supra* note 13, at 509.

will depend at least in part on how important the issues are to each representation.[36] Some argue that positional conflicts can only arise with substantive, as opposed to procedural, legal arguments;[35] although the line between substance and procedure is tricky to draw, and some "procedural" issues can be of great significance to the clients.[36] The difficulty in distinguishing between innocuous and significant positional conflicts is one argument against requiring lawyers to avoid them.[37]

Most authorities say that a conflict with a position taken on behalf of a former client raises no ethical concerns—that a positional conflict can only arise between concurrent clients.[38] If the former representation has concluded, then, especially in the litigation context, the lawyer's subsequent representation can do no harm to the former client's case. Provided that the former and current representations do not run afoul of other ethical prohibitions, a lawyer is free to change positions or clients over time.[39] Were this not the case, lawyers would have difficulty changing their practice and, for example, moving from defense work to plaintiff's work in a particular area.

The prevalence of positional conflicts is difficult to gauge. Some sources suggest that lawyers commonly practice with positional conflicts; that arguing different sides of the same legal issue is part of everyday lawyering. Ethics opinions from California and Philadelphia state that positional conflicts are common.[40] One commentator seems to

35. *See* Dzienkowski, *supra* note 13, at 484, n. 219-220; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377, n.1 (1993).

36. *See, e.g.*, Sibbach v. Wilson, 312 U.S. 1, 8-12, as amended 312 U.S. 655 (1941) (discussing whether plaintiff could be found in contempt for refusing to submit to a physical examination was a matter of procedure).

37. *See* Part III(C), *infra*.

38. *See* discussion of ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993), *infra*. *But see* Dzienkowski, *supra* note 13, at 496-498.

39. Dzienkowksi, *supra* note 13, at 496. Dzienkowski notes that an exception might arise where the former client is a repeat player whom the lawyer expects to represent again. *Id.* In such a situation, the former client might be considered more of a continuing client than a former client. *Id.* Dzienkowski also notes that a lawyer switching sides on an issue might have credibility problems with the court. *Id.* at 497. In addition, transactional lawyers who develop contractual provisions for clients should not be able to attack those provisions later even in unrelated cases. *Id.* at 530-531. But he concludes that limitations on successive positional conflicts should be limited: "To give former clients a right to prevent lawyers from taking different positions in the future would give the past too much of a claim on the future." *Id.* at 498.

40. *See* California Ethics Opinion No. 1989-108, *available at* http://calbar.ca.gov/calbar/html_unclassified/ca89-108.html; Philadelphia Ethics Opinion 89-27, *supra* note 11. The California Committee stated that positional conflicts are "common and prolific in our adversarial system of justice." California Ethics Opinion No. 1989-108 at 3. The Philadelphia opinion states that "[p]ractices throughout the country all have lawyers who go into court on one day and argue an interpretation of the law for custody for a mother and the next day go into a different court in a different case and argue a different interpretation for a father. This is the essence of what a lawyer does." Philadelphia

accept that "[i]t is the job of the lawyer to argue in one way for client A on Monday and in the opposite way for client B on Tuesday."[41] An article in a family law journal states that divorce lawyers commonly represent both husbands and wives, as well as other family members or interested parties so that "it is common for divorce lawyers to represent clients with antagonistic legal, as distinguished from factual, positions."[42] Arguments against requiring firms to screen for positional conflicts often assume that such conflicts are numerous, if mostly insignificant.

Yet other sources suggest that while lawyers often feel the pressure of potential positional conflicts, they frequently resolve the problem by refusing the second representation—in other words, the positional conflict never materializes.[43] In an age of increasing competition and specialization, many lawyers have abandoned the cab rank view and instead practice on one side of an area, thereby avoiding many significant positional conflicts and keeping their clients happy. Certainly, there is very little litigation over positional conflicts.

It may be that these seemingly contradictory observations about the prevalence of positional conflicts can be reconciled by distinguishing between minor positional conflicts over less important legal issues (of which there are many) and major positional conflicts over issues of great significance to the parties (of which there are few). It may also be that lawyer independence and the prevalence of positional conflicts varies with practice types and legal communities.

II. Historical Context and the Evolution of the ABA Position on Positional Conflicts

Although lawyers' conflicts of interest have been the subject of regulation since medieval times,[44] there is little, if any, discussion of

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Ethics Opinion 89-27 at 2. A Maine opinion, on the other hand, says positional conflicts are rare (perhaps meaning consequential conflicts). Maine Ethics Opinion No. 155 (1997) at 4.

41. J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 887 (1993).

42. David Walther and Anne Kass, *Positional Conflict: Considering a One-Side-Representation Rule*, 13 AM. J. OF FAM. L. 137 (1999).

43. Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395 (1998); Shapiro, *supra* note 20, at 1166. These sources contain interviews with lawyers indicating that fear of alienating important clients causes them to reject cases that would require arguing against these clients' institutional interests. For example, during one of Shapiro's interviews, the managing partner of a large Philadelphia law firm observed, "My theory is that, of every three phone calls I get, I get to take one on as a client. I've always said that somebody could have a law firm about the size of [this firm] just taking on our conflicted representations." Shapiro, *supra* note 20, at n.16.

44. As early as 1280, a London Ordinance forbade attorneys from representing

positional conflicts of interest before the adoption of the ABA Model Rules of Professional Conduct in 1983. Neither the 1908 Canons of Professional Ethics nor the 1969 Model Code of Professional Responsibility mentioned the issue, except arguably in the general prohibitions of conflicts of interest,[45] and in the pro bono context by allowing lawyers to advocate law reform contrary to the interest or desires of a client.[46] One commentator has suggested that broad language in Canon 6[47] of the 1908 Canons caused positional conflicts to be "given an overly zealous application,"[48] but there is little evidence of that zeal in the case law or other written record.[49] According to Professor Hazard, "the traditional concept of the advocate's role did not recognize positional conflicts as worthy of serious concern."[50] This traditional concept included a "fierce insistence" on a lawyer's independence and the "so-called cab rank rule."[51] Senator Carpenter's dual representation in the 1872 Supreme Court supports Hazard's conclusion.[52] The English bar, always more committed to the cab rank rule than American lawyers, had historical examples of lawyers arguing whatever position was assigned them—including trial lawyers who

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adverse parties in the same action and from dropping one client to represent another in the same case. Jonathan Rose, *The Ambidextrous Lawyer: Conflict of Interest and the Medieval and Early Modern Legal Profession*, 7 U. CHI. L. SCH. ROUNDTABLE 137, 146-147 (2000).

45. Dzienkowski, *supra* note 13, at 469.

46. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-17 (1980). *See* ROTUNDA & DZIENKOWSKI , *supra* note 17, at § 1.7-6(o)(2). The law reform provision addresses positions a lawyer might take not in his capacity as a legal representative, and does not focus on situations where the lawyer takes contrary legal positions for different clients. *See also* MODEL RULES OF PROF'L CONDUCT R. 6.3, 6.4 (2005) (allowing lawyers to serve as directors, officers or members of law reform organizations without creating a lawyer-client relationship); Dzienkowski, *supra* note 13, at 531-536 (discussing positional conflicts in the context of a lawyer's personal law reform activities).

47. ABA CANONS OF PROFESSIONAL ETHICS, Canon 6 (1908). Canon 6 defined a conflict to include "when, in behalf of one client, it is [the lawyer's] duty to contend for that which duty to another client requires him to oppose." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.3 (West Publishing Co. 1986).

48. WOLFRAM, *supra* note 49. Professor Dzienkowski notes that this assertion was not supported by specific examples other than the case of *Estates Theatres, Inc. v. Columbia Pictures Industries, Inc.*, 345 F. Supp. 93 (S.D.N.Y. 1972). Dzienkowski, *supra* note 13, at 469 n.47.

49. Dzienkowski notes a 1981 Legal Ethics Forum in which the participants discussed what appeared to be a hypothetical positional conflict (without naming it as such), but notes the participants seemed most concerned about the positional conflict developing into a standard conflict of interest if the two clients ended up on opposite sides of a lawsuit. Dzienkowski, *supra* note 13 at 470 n.49 (discussing *Legal Ethics Forum*, 67 A.B.A. J. 1692 (1981)).

50. GEOFFREY C. HAZARD, JR., W. WILLIAM HODES, THE LAW OF LAWYERING § 10.10 (Aspen Publishers, 3d ed. 2004 & Supp. 2005).

51. *Id.*

52. *See supra* note 6.

traveled with judges and took sides as needed.[53]

Before the ABA's first express statement on positional conflicts in 1983, the American legal profession underwent significant changes. The end of the nineteenth century was a time of increasing professionalism for lawyers, as legal education evolved under Christopher Langdell.[54] Newly formed bar associations created barriers to entry through educational and bar examination requirements.[55] The lawyer-to-population ratio remained relatively stable until the 1970's, when law schools "nearly doubled their enrollments."[56] During the first half of the century, the overwhelming majority of lawyers was in private practice, and most practiced solo.[57]

Beginning in the 70's, the barriers to entry ceased to keep down the number of new lawyers. Between 1951 and 1995, the number of lawyers increased more than fourfold.[58] Between 1970 and 1991, the lawyer-to-population ration went from 1:572 to 1:313.[59] The number and percentage of lawyers working for the government increased significantly, and the percentage of solo practitioners went from 61.2 in 1948 to 33.2 in 1988.[60] More and more lawyers became employees rather than independent professionals.[61] The increase in lawyers was accompanied by an increase in competition and specialization. At the same time, lawyers began practicing in ever-larger groups, as the number and size of large private firms grew.[62] Within these large firms, lawyers

53. *See* Shaffer, *infra* note 204, at 150 n.14 (citing Geoffrey C. Hazard, *A Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1071 (1978)). Shaffer argues that American lawyers were always more identified with their clients than English lawyers, who maintained more independence—and that an ethic of independence (or separation from client) grew up later. *Id.*

54. Philip Gaines, *The "True Lawyer" in America: Discursive Construction of the Legal Profession in the Nineteenth Century*, 45 AM. J. LEGAL HIST. 132, 133, 152-153 (2001).

55. Richard L. Abel, *The Transformation of the American Legal Profession*, 20 LAW & SOC'Y REV. 7, 9 (1986).

56. ROBERT W. GORDON, *The Legal Profession*, *in* LOOKING BACK AT LAW'S CENTURY 292 (Austin Sarat, Bryant Garth, and Robert A. Kagan, eds., 2002); Abel, *supra* note 57, at 9.

57. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 461-62 (Yale University Press 2002).

58. *Id.* at 457.

59. John P. Heinz, Edward O. Laumann, Robert L. Nelson, & Ethan Michelson, *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751, 771 (1998).

60. GORDON, *supra* note 58, at 293.

61. Abel, *supra* note 57, at 16.

62. FRIEDMAN, *supra* note 59, at 462. In the late 50's, there were only 38 firms with more than 50 lawyers. In 1995 there were 702 firms, and the largest, Baker & McKenzie, had 1,754 lawyers. *Id.*

became increasingly segregated by area of substantive expertise.[63] Thus, the typical lawyer's employment changed from a solo, general practice to employment by a large institution, government agency, or firm. The typical lawyer was no longer a general practitioner, but likely to be a specialist on one side of a class of cases. A rule against positional conflicts is consistent with such specialization.

Along with the enormous growth and specialization of the legal profession that occurred between Senator Carpenter's time and the 1983 Model Code, there was a significant shift in the profession's understanding of the law and how it worked. An early Nineteenth Century belief in natural law gave way to a classical view of law as the objective application of known principles.[64] Thus, judges were viewed as constrained by rules, rules that could be determined correctly through reason.[65] This objective conception of law gave way in the early twentieth century to legal realism.[66] The legal realists, whose influence persists, attacked legal objectivity and formalism as a facade.[67] They argued that "rules are malleable" and that law is never neutral but inextricably bound up with politics.[68] This realist view gradually gained hold with the bar at large, and today, its central tenets are considered unremarkable.[69] The change in the predominant view of the working of the law is also consistent with a change in the attitude toward positional conflicts.[70]

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63. John P. Heinz, Edward O. Laumann, Robert L. Nelson, & Ethan Michelson, *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751, 759-60 (1998). This article compares characteristics of law practice in Chicago based on surveys in 1975 and 1995. The 1975 study showed a bar divided by prestige between corporate lawyers and those who served individuals. In 1995 the division was more complicated due to increased specialization and competition. *Id.*

64. ELIZABETH MENSCH, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 19-26 (David Kairys ed.,1982). As Mensch explains, these predominant views were complicated and always evolving.

65. *Id.* at 24.

66. FRIEDMAN, *supra* note 59, at 489-93.

67. FRIEDMAN, *supra* note 59, at 490-93.

68. *See* FRIEDMAN, *supra* note 59, at 490-93; MENSCH, *supra* note 66, at 26-29.

69. FRIEDMAN, *supra* note 59, at 493.

70. Under the earlier view of the law as objective, a lawyer's role in the creation of law would be considered minimal, and a purely legal positional conflict would not be thought likely to affect the outcome of either case. After the legal realist view had pervaded the bar, with a sense of the indeterminacy of law and outcomes, it makes sense that the lawyer's role in the creation of law would be seen as greater. Strategic choices about arguments are seen as critical when there is no objectively correct outcome to be found through the exercise of judicial reason. Lawyers and judges together create the law. Under this view, a lawyer arguing two sides of a legal question has the potential to do more harm to one of her clients, than would a lawyer who, under the earlier view, is simply helping the court uncover the objectively correct outcome. *See* SPAULDING, *supra* note 45, at 1400 (citing GEOFFREY HAZARD, *Ethics in the Practice of Law*, *in* THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION (Foundation Press, Inc., 3d ed. 1994).

Against this backdrop of growth, specialization, competition, and philosophical change, the ABA promulgated the 1983 Model Rules of Professional Responsibility. These rules included Model Rule 1.7, which addressed current conflicts of interest. The rule stated that a lawyer shall not represent a client "if the representation of that client will be directly adverse to another client" or "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 the lawyer reasonably believed that the representation would not be affected and the client consented after consultation.[71] The rule itself did not mention positional conflicts, but the comments to Model Rule 1.7 included a short discussion that seemed to allow positional conflicts except under certain circumstances:

> A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.[72]

Comment 9 did not set down a rigid rule, but introduced the idea of positional conflict as an ethical issue. The comment was criticized for recognizing a positional conflict only before an appellate court when trial court decisions could also be influential with other judges.[73] It was also criticized for using the term "adversely affected" rather than the "directly adverse" or "materially limited" language of the rule: "This ambiguity essentially allows lawyers to decide for themselves when a litigational positional conflict requires the independent determination of the effect on the client and the clients' consent after disclosure."[74] Another criticism was that the comment said nothing about notice and disclosure of positional conflicts to clients.[75] Thus, the criticisms urged a stronger rule against positional conflicts.

A 1993 ABA Ethics opinion departed from the Model Rule comment in analyzing positional conflicts of interest. The authors of that opinion rejected the comment's distinction between appellate and trial

71. MODEL RULES OF PROF'L CONDUCT R. 1.7 (1983). The rule was rewritten in 2002, but the "directly adverse" and "materially limited" language remains, as do the concepts of informed but objectively reasonable consent. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2005).

72. MODEL RULES OF PROF'L CONDUCT R.1.7, cmt. para. 9 (1983).

73. WOLFRAM, *supra* note 49, at 355 n.41; Douglas R. Richmond, *Choosing Sides: Issue or Positional Conflicts of Interest*, 51 FLA. L. REV. 383, 390 (1999).

74. Dzienkowski, *supra* note 13, at 473.

75. *Id.* at 473-74.

courts, noting:

> [E]ven if both cases were in the trial court, but assigned to different judges, the decision in the first-decided case would, in all likelihood, carry at least some precedential or persuasive weight in the second case. And if both cases should happen to end up before the same judge, the situation would be even worse. For although judges well understand that lawyers, at various stages of their careers, can find themselves arguing different sides of the same issue, the persuasiveness and credibility of the lawyer's arguments in at least one of the two pending matters would quite possibly be lessened, consciously or subconsciously, in the mind of the judge.[76]

The opinion advised that the lawyer should not represent both clients without their consent after full disclosure if there was a "substantial risk" that one representation would create a legal precedent, which would be "likely materially to undercut the legal position urged on behalf of the other client."[77]

Where the two matters would not be litigated in the same jurisdiction, the opinion suggested the following considerations in deciding whether representation of either client would be materially limited:[78]

> (a) Is the issue one of such importance that its determination is likely to affect the ultimate outcome of at least one of the cases?
>
> (b) Is the determination of the issue in one case likely to have a significant impact on the determination of that issue in the other case? (For example, does the issue involve a new or evolving area of the law, where the first case decided may be regarded as persuasive authority by other courts, regardless of their geographical location? Or: is the issue one of federal law, where the decision by one federal judge will be given respectful consideration by another federal judge, even though they are not in the same district or state?)
>
> (c) Will there be any inclination by the lawyer, or her firm, to "soft-pedal" or de-emphasize certain arguments or issues—which otherwise would be vigorously pursued—so as to avoid

76. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993).

77. *Id.*

78. *Id.* at n.4. The Committee concluded that the "materially limited" language of then Model Rule 1.7 (b), rather than the "directly adverse" language of then Model Rule 1.7(a) applied, since in a positional conflict the attorney's clients are not involved in the same litigation and are not therefore ever directly adverse to one another.

impacting the other case?

> (d) Will there be any inclination within the firm to alter any arguments for one, or both clients, so that the firm's position in the two cases can be reconciled—and, if so, could that redound to the detriment of one of the clients?[79]

The Committee limited its analysis to positional conflicts between current clients, noting that lawyers were free to change positions from those advanced for former clients and that such changes raised no ethical issues.[80]

In response to criticism, and in light of the 1993 Opinion, the comment to Rule 1.7 was amended in 2002 as part of the large-scale amendments to the model rules. (The text of the rule was also amended).[81] The new comment 24 on positional conflicts states:

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

79. *Id.* The pressure to reconcile arguments so that the positional conflict never materializes is an important concern. But including this factor in the analysis of a positional conflict does not seem all that helpful if the real problem is that this pressure results in the suppression of a positional conflict. If there is no positional conflict, there will be no need to look at the factors. Instead, lawyers should think about this factor whenever they consider related issues in otherwise unrelated cases. *See infra* section IV (A).

80. *Id.* at 1. *See* Richmond, *supra* note 75, at 397, and HAZARD & HODES, *supra* note 52 (concluding that lawyers should be free to advance positions contrary to those they advanced for former clients). *But see* Dzienkowski, *supra* note 13, at 480, and n.111 (expressing some reservations about allowing positional conflicts in subsequent representation).

81. MODEL RULES OF PROF'L CONDUCT R.1.7 (2005). *See supra* note 73.

> significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.[82]

Thus, the official statements of the ABA, in the form of its 1993 opinion and the comments to the Model Rules, indicate that a positional conflict is not per se an ethical violation, but that an attorney should look carefully at the attendant circumstances to determine whether a significant risk of material limitation of either representation exists. According to the ABA, a material limitation may result where the issue is sufficiently important to the clients and victory in one case will create adverse precedent for the other. While the 1993 opinion mentions credibility concerns, these are not the focus of the suggested analytical framework either in the opinion or the rule comments.

III. Other Legal Authorities on Positional Conflicts

A. The Restatement of the Law Governing Lawyers

The approach of the Restatement (Third) of the Law Governing Lawyers to positional conflicts is very similar to the new comment 24 to Model Rule 1.7.[83] The comment to the Restatement suggests the same factors for determining whether a positional conflict creates a conflict of interest and begins with the presumption that taking inconsistent positions in different courts is acceptable.[84] The Restatement factors for evaluating a positional conflict focus on the significance of the legal issue and the risk of creating adverse precedent for one of the clients. The illustrations emphasize the distinction between appellate and trial

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82. MODEL RULES OF PROF'L CONDUCT R.1.7, cmt. para. 24 (2005).

83. MODEL RULES OF PROF'L CONDUCT R.1.7, cmt. para. 24 (2005).

84. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 128, cmt. f. (2000). The official comment to section 128 provides:

> A lawyer ordinarily may take inconsistent legal positions in different courts at different times. While each client is entitled to the lawyer's effective advocacy of that client's position, if the rule were otherwise law firms would have to specialize in a single side of legal issues.
>
> However, a conflict is presented when there is a substantial risk that a lawyer's action in Case A will materially and adversely affect another of the lawyer's clients in Case B. Factors relevant in determining the risk of such an effect include whether the issue is before a trial court or an appellate court; whether the issue is substantive or procedural; the temporal relationship between the matters; the practical significance of the issue to the immediate and long-run interests of the clients involved; and the clients' reasonable expectations in retaining the lawyer. If a conflict of interest exists, absent informed consent of the affected clients under § 122, the lawyer must withdraw from one or both of the matters.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 128, cmt. f. (2000).

courts, as well as substance and procedure.[85]

B. Case Law Addressing Positional Conflicts

There is next to no case law on purely legal positional conflicts, in striking contrast to the enormous number of decisions on conflicts of interest in general.[86] What case law exists provides little guidance. The two cases that discuss purely legal positional conflicts are criminal cases involving public defenders, and they reach very different conclusions.[87] The cases usually cited by commentators on positional conflicts actually present factual positional conflicts.

One such case frequently cited in writings on positional conflicts is the 1972 *Estates Theatres, Inc., v. Columbia Pictures Indus.*[88] In this antitrust action, the lawyer for plaintiff Estates Theatres also represented United Artists Theatre Circuit ("UATC") as a plaintiff in another antitrust action. Although UATC was not a defendant in the first action, in his role as counsel for Estates Theatres the lawyer had named UATC as a co-conspirator in a letter, alleging that a theater owned by UATC was receiving more favorable treatment than plaintiff's theatre.[89] The defendant moved to disqualify plaintiff's counsel, arguing that "to support its claim he would necessarily be required to offer evidence that . . . one of the theatres owned by UATC, was the beneficiary of

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85. *Id.* illustrations 5, 6:

> 5. Lawyer represents two clients in damage actions pending in different United States District Courts. In one case, representing the plaintiff, Lawyer will attempt to introduce certain evidence at trial and argue there for its admissibility. In the other case, representing a defendant, Lawyer will object to an anticipated attempt by the plaintiff to introduce similar evidence. Even if there is some possibility that one court's ruling might be published and cited as authority in the other proceeding, Lawyer may proceed with both representations without obtaining the consent of the clients involved.
>
> 6. The same facts as in Illustration 5, except that the cases have proceeded to the point where certiorari has been granted in each by the United States Supreme Court to consider the common evidentiary question. Any position that Lawyer would assert on behalf of either client on the legal issue common to each case would have a material and adverse impact on the interests of the other client. Thus, a conflict of interest is presented. Even the informed consent of both Client A and Client B would be insufficient to permit Lawyer to represent each before the Supreme Court.

86. *See* ROTUNDA & DZIENKOWSKI, *supra* note 17, at § 1.10-7(d) (discussing the many trial court decisions on motions to disqualify, but noting the lack of appellate cases).

87. *See* Williams v. State, 805 A.2d 880 (Del. 2002) and Fed. Defenders of San Diego., Inc., v. U.S. Sentencing Comm'n, 690 F.Supp. 26 (D.D.C. 1988), discussed at *infra* notes 108-123 and accompanying text.

88. 345 F. Supp. 93 (S.D.N.Y. 1972), *cited in* Dzienkowski, *supra* note 13, at 470; WOLFRAM, *supra* note 49, at 355; Richmond, *supra* note, 75 at 398-99.

89. Estates Theatres, 345 F. Supp. at 96.

unlawful conduct at the expense of plaintiff, his other client."[90] The defense also argued that Estates Theatres' efforts to unearth evidence of UATC's unlawful conduct would help the government in its own separate antitrust action against UATC.[91] Thus the case seems to present a factual positional conflict because the plaintiff's attorney would be forced to develop and argue facts that would damage his other client.

But it is perhaps the court's "sweeping language"[92] that has led to its frequent citation:

> A lawyer should not be permitted to put himself in a position where, even unconsciously he will be tempted to "soft pedal" his zeal in furthering the interests of one client in order to avoid an obvious clash with those of another, at least in the absence of the express consent of both clients. . . . The attorney cannot at one and the same time be the prosecutor of the plaintiff's claim . . . and the defender of the target, UATC. . . . To allow such conflicting positions under the facts here presented would impair the confidence and respect of the community towards its bench and bar.[93]

Arguably, such language could be applied to legal positional conflicts as well as factual conflicts. The danger that a lawyer may modify arguments to accommodate both representations exists in both a factual and legal positional conflict.[94]

Two other factual positional conflict cases, *Fiandaca v. Cunningham*[95] and *Westinghouse Electric Corp. v. Kerr-McGee Corp.*,[96] are also sometimes cited as examples of positional conflicts.[97] In *Fiandaca*, as discussed earlier, the New Hampshire Legal Assistance represented two class action clients and was faced with a conflict when the state offered to settle one class action by offering a facility then used by the other class.[98] NHLA responded to the settlement offer by stating it was unwilling to agree to an offer that was "against the stated interests" of its other clients,[99] clearly flagging its conflict of interest.

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90. *Id.* at 97.
91. *Id.*
92. Dzienkowski, *supra* note 13, at 471.
93. Estates Theatres, 345 F. Supp. at 99.
94. This is the lesson that Professors Rotunda and Dzienkowski suggest taking from the factual positional conflict in *Fiandaca*. ROTUNDA & DZIENKOWSKI , *supra* note 17, at § 1.7-6(o)(6).
95. 827 F.2d 825 (1st Cir. 1987).
96. Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978).
97. ROTUNDA & DZIENKOWSKI, *supra* note 17, at § 1.7-6(o)(6); Richmond, *supra* note 75, at 400-03.
98. Fiandaca, 827 F.2d at 827, discussed *supra* at p. 108.
99. *Id.*

The First Circuit Court of Appeals held that the NHLA should have been disqualified because its representation of one class was materially limited by its responsibilities to another, at least with respect to the settlement offer.[100] "In short, the combination of clients and circumstances placed NHLA in the untenable position of being simultaneously obligated to represent vigorously the interests of two conflicting clients."[101] The factual conflict in *Fiandaca* seems quite clear. While there may be policy reasons to argue against disqualification—most notably the lack of alternative counsel for an indigent class—it is difficult to argue that NHLA's representation was not compromised by its conflicting loyalties with respect to the facility that was the subject of the settlement offer. In addition, as with any factual conflict, there was probably a risk that confidential information from one client would be used against another client.

The possible misuse of confidential information was a large part of the court's rationale in disqualifying counsel in the *Westinghouse* case. The law firm of Kirkland & Ellis represented plaintiff Westinghouse in an antitrust case alleging an illegal conspiracy in restraint of trade in the uranium industry.[102] At the same time, Kirkland and Ellis represented the American Petroleum Institute, of which three defendants in the *Westinghouse* suit were members, and lobbied Congress on API's behalf.[103] As part of that lobbying effort, Kirkland and Ellis took the position that the uranium industry was competitive and not in need of regulation. Thus its positions on the competitiveness of the uranium industry conflicted. However, the Seventh Circuit Court of Appeals ordered disqualification not so much because of these conflicting positions, but because Kirkland and Ellis had entered into a fiduciary relationship—if not a full-fledged attorney-client relationship—with the individual members of API (including those who were defendants in the Westinghouse litigation).[104] The law firm had solicited confidential business information from those members and led them to believe it would remain protected.[105] The *Westinghouse* case is thus more about a

100. *Id* at 831. The *Fiandaca* case has generated considerable discussion about the scarcity of legal services and disqualification motions. *See, e.g.*, Stephen Gillers, *More About Us: Another Take on the Abusive Use of Legal Ethics Rules*, 11 GEO. J. LEGAL ETHICS 843, 845 (1998); Kathy E. Hinck, Note, *Second Class Prisoners: New Hampshire's Placement Policy for Female Offenders*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 225, 226-27 (1989).

101. 827 F.2d at 829.

102. Westinghouse Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1313 (7th Cir 1978).

103. *Id.* at 1314.

104. *Id.* at 1320-21.

105. *Id.* at 1321.

lawyer's fiduciary duty than positional conflicts.

The first case to address a straightforward purely legal positional conflict is *Williams v. State*.[106] In that case, the attorney appointed to represent a client on appeal from his conviction and death sentence for murder moved to withdraw.[107] The attorney asserted that his client had an arguable issue for appeal that the trial court erred when it gave "great weight" to the jury's non-unanimous recommendation of the death penalty.[108] However, the attorney had already filed a brief in another case before the same court (the highest court of Delaware) arguing that the trial court erred when it *failed* to give great weight to the jury's non-unanimous recommendation against the death penalty.[109] The attorney argued that he had a conflict of interest because of the risk that he would create unfavorable precedent for one client, that his credibility with the court would be undermined, and that his clients would question his loyalty to them.[110] The State agreed that the attorney had a conflict of interest.[111]

The court permitted the attorney to withdraw, holding that "[i]t would be a violation of the Delaware Rules of Professional Conduct for [the attorney] to advocate conflicting legal positions in two capital murder appeals that are pending simultaneously in this Court."[112] Delaware had adopted the Model Rules, including Rule 1.7 and the earlier comment that emphasized the inappropriateness of a positional conflict in an appellate court.[113] The court also alluded to the criminal clients' constitutional rights to effective assistance of counsel on appeal.[114] However, because there was no opposition to the motion to withdraw, either from the state or the client, the decision does not test the arguments for or against a positional conflict under these circumstances.

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106. Williams v. State, 805 A.2d 880 (Del. 2002).

107. *Id.*

108. *Id.* at 881.

109. *Id.*

110. The arguments in the two cases could be reconciled, of course, by arguing in both cases that only a jury recommendation of leniency should be given great weight. By the time the attorney received the second case, it may have been too late to tailor the arguments in the first case. Moreover, to change the arguments in this way would have been to allow one representation to limit the other. *See infra* Section IV.

111. *Williams*, 805 A.2d at 881.

112. *Id.* at 882.

113. *Id.* at 881.

114. "Given his clients' disparate legal arguments, [the attorney's] independent obligations to his clients may compromise the effectiveness of his assistance as appellate counsel for one or both clients unless his motion to withdraw is granted." *Id.* at 882. Interestingly, the attorney who was later appointed to represent Williams did not even raise the jury recommendation issue, but obtained a reversal of the death penalty on another ground. *See* Williams v. State, 818 A.2d 906 (Del. 2002) (reversing death sentence).

Another criminal case discussed positional conflicts in an adversarial setting, but with different results. In *Federal Defenders of San Diego, Inc. v. U.S. Sentencing Commission*,[115] organizations of federal public defenders brought suit challenging the constitutionality of sentencing guidelines issued by the United States Sentencing Commission. The case was dismissed for lack of standing.[116] As part of their argument for standing, the plaintiffs had claimed injury in fact based on positional conflicts that would be created by the sentencing guidelines. The lawyers argued that because some of their clients would be better off under the guidelines while the majority would be worse off, a successful challenge to the guidelines on behalf of the majority would injure the minority.[117] They noted that the ethical dilemma would be "exacerbated" because a public defender would rarely know until well into a case whether a particular client fell into the disadvantaged group.[118] The court rejected the argument, doubting the significance of the number of conflicting cases.[119]

The court also expressed doubt about whether a positional conflict was an ethical problem. "In addition, with all due respect to [plaintiff's expert], I am not at all convinced that the taking of inconsistent positions in separate cases raises the sort of ethical dilemma that [the expert] suggests."[120] But the court recognized the discomfort individual attorneys may feel and recommended that they be allowed to recuse themselves "when they consider it appropriate."[121]

The paucity of case law discussing legal positional conflicts does not mean such conflicts do not arise. There is evidence both for and against the prevalence of positional conflicts in practice.[122] The lack of case law may be explained by, among other reasons: (1) scarcity of positional conflicts; (2) the ability of lawyers to make conflicts go away through careful tailoring or distinguishing of arguments; (3) such conflicts are suppressed when an attorney bows to pressure from a powerful client; (4) such conflicts go undetected because they are in different courts or jurisdictions; or (5) an opponent detecting such a conflict would rather impeach the lawyer with the conflict than move to disqualify. For whatever reason, positional conflicts do not seem to give

115. Fed. Defenders of San Diego Inc., v. U.S. Sentencing Comm'n, 680 F. Supp. 26 (D.D.C. 1988). Seventeen years later, mandatory application of the guidelines was ruled unconstitutional. United States v. Booker, 543 U.S. 220 (2005).

116. 680 F. Supp. at 32.

117. *Id.* at 29.

118. *Id.*

119. *Id.* at 30.

120. *Id.*

121. *Id.*

122. *See supra* pp. 110-11.

rise to significant litigation, and therefore cases do not provide significant guidance in this area. The most recent cases involve public defenders, who cannot be fired, who cannot quietly drop one client to eliminate a problem, and who have no financial conflict between clients that might cause them to suppress a positional conflict.

C. State Ethics Opinions

State and local bar opinions that address positional conflicts have drawn heavily from the ABA's ethics opinion, the Model Rules and the Restatement. Like these authorities, most bar associations have concluded that a positional conflict before the same judge may create a conflict under Rule 1.7, but one to which clients may usually consent after full disclosure. On the other hand, wary of the practical implications of an ethical prohibition on positional conflicts, and aware of the difficulty of separating innocuous conflicts from the more serious, two states have concluded that a legal positional conflict is not a conflict of interest. Even those states that do not find a positional conflict to be a conflict of interest, however, recommend that attorneys disclose the problem to affected clients.

No conflict. The Bars of California and Maine have determined that a legal positional conflict is not a conflict of interest, even when the attorney argues opposite sides of an issue before the same court. The 1989 opinion of the California State Bar Standing Committee on Professional Responsibility and Conduct was based on a scenario in which the attorney had to argue contrary legal positions in two cases pending in federal court, assigned to the same judge. The committee characterized these facts as the "'worst case' scenario presented by the so-called 'issues conflict' conundrum."[123] The committee noted the possibility of creating adverse precedent for a client, and the damage to the attorney's credibility before the court, but nevertheless refused to find an ethical violation.

The committee noted that positional conflicts are "common and prolific in our adversarial system of justice. Almost daily the litigator or transactional attorney finds himself or herself taking positions on behalf of clients which are antithetical to another client."[124] The committee concluded that to impose a burden of disclosure and consent on all positional conflicts would be extreme and diminish the availability of attorneys. It also determined that it would be impossible to craft a rule that could distinguish between serious and trivial positional conflicts:

123. Cal. State Bar Comm. on Prof'l Responsibility and Conduct, Formal Op. No. 1989-108 1, 2 (1989).

124. *Id.* at 3.

> If it were possible to proscribe the nondisclosure and non-consensual representation defined by our hypothetical without improperly infringing on the types of inherent "issues conflicts" which occur commonly and which cannot even be fairly detected by even the most dedicated practitioner, we would not hesitate to do so. We must conclude that these most rare and extreme scenarios where potential harm is high nevertheless must yield, as they have in other instances, to higher priorities.[125]

The committee did recommend, however, that the prudent attorney disclose a positional conflict where there was reason to believe clients might otherwise be harmed, and noted that there might be civil liability for such harm in certain circumstances.[126] (The committee did not explain what that harm might be, and it is difficult to imagine, absent some additional act or omission by the attorney). Thus the committee seemed to recognize a potential for harm, but deemed a rule against positional conflicts unworkable.

Similarly the Maine Professional Ethics Commission rejected the approach of the ABA 1993 ethics opinion and concluded that "an 'issue conflict,' without more, is not a conflict of interest."[127] The commission was in part influenced by its view that screening for positional conflicts would be extremely burdensome, and that there was little real need: "We decline to interpret [the conflict rules] to require the bar to adopt screening procedures for issue conflicts which experience tells us are, in any event, extremely rare."[128] But while the commission did not find a conflict of interest, it noted that arguing opposite sides of the same issue before the same judge or judges could violate other rules requiring the lawyer to employ "reasonable care and skill" and to "employ the lawyer's best judgment."[129] The Maine Commission found that it would not be possible to define in advance when these rules of competence and judgment would be implicated by a positional conflict, but that it would depend on the particular facts.[130]

May be Conflict of Interest. A number of state ethics opinions find that while not all positional conflicts present an ethical problem, arguing

125. *Id.* The committee also rejected arguments that the positional conflict violated the ethical requirements of competence and loyalty. *Id.* at 4-5.

126. The committee did not elaborate on the potential for civil liability, but merely stated, "beyond client considerations, the attorney must keep in mind the potential for civil liability if harm to the clients does occur which might have been avoided by timely disclosure." *Id.* at 4.

127. Board of Overseers of the Bar, Prof'l Ethics Comm'n, Op. No. 155 (Me. 1997), citing Reporter's Notes to Maine Bar Rule 3.4(b), 1993 revision.

128. *Id.*

129. *Id.* (citing Maine Bar Rule 3.6).

130. *Id.*

opposite sides of the same legal issue before the same appellate court is a conflict of interest. Most, but not all, find that it may be cured by client consent.

Arizona and Philadelphia bar opinions find that arguing contrary legal positions before the same appellate court creates a conflict of interest that must be disclosed and consented to by both clients. Like the California Committee, the Philadelphia committee assumed that positional conflicts were common:

> Practices throughout the country all have lawyers who go into court on one day and argue an interpretation of the law for custody for a mother and the next day go into a different court in a different case and argue a different interpretation for a father. This is the essence of what a lawyer does.[131]

Unlike the California committee, the Philadelphia committee saw no difficulty in recognizing a conflict of interest, but limited the ethical problem to contrary legal arguments in the same appellate court. The Philadelphia opinion finds that the conflict is imputed to all of the lawyer's partners and suggests that there may be instances when even consent would be inadequate to cure the conflict, but does not elaborate on what those circumstances might be.[132] The Arizona opinion, on the other hand, states that a legal positional conflict can always be cured by consent:

> [W]e do not believe that the presentation of purely legal arguments before an appellate court is the sort of situation that automatically vitiates the informed consent of the clients involved to Law Firm A's continued involvement. Appellate judges are presumably trained to recognize that advocates are often required to take positions contrary to those previously taken by their partners, when the interests of a client so require. We cannot conclude that the judges of the Ninth Circuit will be prejudiced against one side or the other in either of the two cases at issue simply because of Law Firm A's involvement. The questioning at oral argument may be somewhat uncomfortable for the lawyers involved, but we cannot conclude that the situation will necessarily prejudice either of the clients.[133]

A District of Columbia Bar opinion illustrates some of the problems with the prevailing approach to positional conflicts. The opinion responded to an inquiry by a private attorney who regularly represented children and foster parents involved in the child welfare system and had

131. Philadelphia Ethics Op. No. 89-27 *supra* note 11.
132. *Id.*
133. Ariz. Ethics Op. No. 87-15 (1987).

been asked to serve as outside general counsel to an association of foster parents.[134] The bar opinion began with the assumption that same day contrary legal arguments in the same appellate court would be a conflict of interest. For less stark situations, the court referred to the factors set forth in the ABA ethics opinion, and suggested that with far-flung offices in large firms, the conflict might not always be imputed.[135] The opinion implied that client consent could cure any positional conflict.[136] The opinion did not address what would seem to be the greater danger: that a positional conflict would *not* materialize because the attorney's greater allegiance would be to the larger, repeat client.

The District of Columbia opinion concluded that because most of the attorney's work was in one or two city courts, "[i]t would be ethically impermissible for her to take simultaneously inconsistent positions on issues of law on behalf of different clients in those two courts without the informed consent of all of her affected clients where the representation of one client creates a substantial likelihood that her success on behalf of one client might substantially impact another client adversely."[137] The opinion thus seems to strengthen incentives not to raise conflicting arguments.

The opinion recommended that the attorney alert her individual clients that she represented the foster parent organization, inasmuch as she may become identified in the eyes of the court as the representative of that organization's interests. It also suggested the possibility of a prospective waiver by the organization, although it did not advise such advance waivers by individual clients, who were "unsophisticated consumer[s] of legal services."[138]

Faced with a similar power imbalance between clients, the New York City Bar Association addressed pro bono representation of complainants before the City Human Rights Commission by attorneys who also represented respondents before the Commission on unrelated cases.[139] The opinion advised the attorneys to make an independent determination of any perceived conflict but otherwise approved of such

134. D.C. Ethics Op. No. 265 (1996).
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. Ass'n of the Bar of the City of N.Y. Formal Ethics Op. No. 1990-4 (1990). The Association adopted an earlier draft of the Restatement comment on positional conflicts, which distinguished between "representation with 'indirect precedential effect on another client's legal position' (which presents no conflict) and 'arguing both sides of an unsettled point of law before the same tribunal on behalf of different clients' (which presents a conflict because 'the argument in each case would inevitably affect the other.')." *Id.* (quoting ALI Proposed Restatement, THE LAW GOVERNING LAWYERS, § 209, cmt. (f) (tent. Draft No. 3, April 10, 1990)).

pro bono representation. As in the District of Columbia situation, the greater danger here seems to be not positional conflicts but that the pro bono attorneys would *not* raise issues likely to annoy paying clients. Like the District of Columbia opinion, the New York opinion does not address this danger.

A Michigan ethics opinion takes the most rigid stance against positional conflicts, finding that arguing opposite sides of the same issue before the state supreme court would create a conflict requiring the lawyer to withdraw from both cases, regardless of client consent.[140] That rigid stance is no doubt explained by the attorney's extreme situation. In the facts before the Committee the lawyer found himself arguing conflicting legal positions in consolidated cases before the same court.[141] Similarly, a New Mexico ethics opinion takes the position that a positional conflict in the same trial or appellate court would violate the rule against conflicts of interest, regardless of consent.[142] Attorney credibility seems to be the implicit concern with these "same court" positional conflicts.

D. State Professional Conduct Rules

The majority of states that adopted the 1983 Model Rules also adopted the original comment that maintained the distinction between positional conflicts in trial and appellate courts. But a number have amended their rules to adopt the 2002 ABA comment.[145]

One state had addressed positional conflicts in the text of the rule

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140. State Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. No. RI-108 1, 2 (1991). "Under these circumstances a disinterested lawyer could not reasonably conclude that the representation of the client would not be adversely affected." *Id.*

141. *Id.* at 1.

142. The New Mexico decision states that the lawyer "should not attempt the dual representation." New Mexico Advisory Opinion No. 1990-3. Where the positional conflict is in some other context, the lawyer should seek the consent of the clients to proceed. *Id.*

145. MODEL RULES OF PROF'L CONDUCT R.1.7, cmt. para. 24 (2005). At least sixteen states have adopted the new comment to rule 1.7: ARK. RULES OF PROF'L CONDUCT R. 1.7, cmt. 24 (2006); ARIZ. RULES OF PROF'L CONDUCT R. 1.7, cmt. 23 (2006); DEL. PROF'L CONDUCT R. 1.7, cmt. 24 (2006); IDAHO RULES OF PROF'L CONDUCT R. 1.7, cmt. 24 (2005); BURNS IND. RULES OF PROF'L CONDUCT R. 1.7, cmt. 24 (2006); IOWA RULES OF PROF'L CONDUCT R. 32:1.7, cmt. 24 (2005); MD. R. 1.7, cmt. 24 (2006); MINN. RULES OF PROF'L CONDUCT R. 1.7, cmt. (abbreviated version of Model Rule comment); NEB. CT. RULES, CODE OF PROF'L RESP. R. 1.7, cmt. 24 (2006); N.C. PROF'L CONDUCT R. 1.7, cmt. 24 (2006); PENN. RULES OF PROF'L CONDUCT R. 1.7, cmt. 24 (2006); S.C. APP. CT. R. 407, R. 1.7, cmt. 22 (2005); S.D. RULES OF PROF'L CONDUCT R. 1.7, cmt. 24 (2005); TENN. SUP. CT. R. 1.7, cmt. 13 (2006); UTAH CODE JUD. ADMIN. R. 1.7, cmt. 24 (2006); WYO. PROF'L CONDUCT R. 1.7, cmt. 24 (2006). Massachusetts has provided its own comment, stressing that occasionally a positional conflict may be non-consentable. MASS. RULES OF PROF'L CONDUCT R. 1.7, cmt. 9.

itself. Oregon's former Code of Professional Responsibility stated that a positional conflict constitutes a conflict of interest only if a lawyer knows his or her firm represents conflicting positions and knows that one representation will adversely affect the other:

> A conflict of interest is not present solely because one or more lawyers in a firm assert conflicting legal positions on behalf of different clients whom the lawyers represent in factually unrelated cases. If, however, a lawyer actually knows of the assertion of the conflicting positions and also actually knows that an outcome favorable to one client in one case will adversely affect the client in another case, the lawyer may not continue with both representations or permit the other lawyers at the same firm to do so unless all clients consent after full disclosure.[143]

Under the former Oregon rule, the certainty of adverse precedential effect made a positional conflict a conflict of interest, but only where the lawyer knew of the certainty. Thus, firms would not be responsible for unwitting positional conflicts. But might such a rule encourage lawyers to avert their eyes and try not to learn of the positions taken by their partners? The rule required "actual" knowledge; constructive knowledge was not enough.[144]

The District of Columbia rejected a much broader rule on positional conflicts in 1986:

> Proposed Rule 1.7(b)(5) would have required a lawyer to make full disclosure and to seek client consent where other interests of a client will be or are likely to be adversely affected by the lawyer's assumption of such representation, and the proposed commentary said that the protected client interests would be as broad as business rivalry or personal differences between two potential clients.[145]

The proposed rule met with strong opposition on the grounds that it threatened lawyer independence as well as lawyers' willingness and ability to represent unpopular and pro bono clients.[146] The rule ultimately adopted went in the opposite direction of the proposed rule and affirmed lawyer independence.[147]

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143. OR. CODE OF PROF'L RESPONSIBILITY DR 5-105(A)(3)(2004), *superseded by* OR. RULES OF PROF'L CONDUCT R. 1.7 (2005).

144. Another approach might be to require actual knowledge, but also consider the reasonableness of the lawyer's knowledge in light of whether the lawyer maintained an effective system for checking conflicts. *See* D.C. RULES OF PROF'L CONDUCT R. 1.7, cmt. 11.

145. D.C. Ethics Op. No. 265 (1996).

146. *Id.*

147. *Id.* The current District of Columbia rule instead contains language limiting client control over the positions attorneys take in unrelated matters:

Neither the proposed nor adopted rule expressly mentioned positional conflicts, although both could be read to cover them. The real target of the final rule is business conflicts and preserving lawyers' independence from powerful clients. The D.C. Bar correctly gave prominence to this concern; the ethics rules cannot force lawyers to act independently of their powerful clients, but they should not forbid them from doing so.

IV. The Real Dangers: Business Conflicts and Credibility Concerns

The preceding review of authorities on positional conflicts shows that a positional conflict is not presently seen as a per se conflict of interest and therefore not a per se ethical violation. These authorities cite several key factors in analyzing whether a positional conflict rises to the level of an ethical violation: (1) the issue's importance to the cases and clients, (2) the potential that one representation will lead to adverse precedent for the other, and, to a lesser extent, (3) incentives to favor one client over the other and (4) credibility problems.

This prevailing approach to positional conflicts is wrong because it diverts attention away from the real ethical dangers. In fact, business pressures are the more prevalent force in practice, and even a soft rule against positional conflicts serves to aggravate these economic conflicts.

> A client may, on occasion, adopt unreasonable positions with respect to having the lawyer who is representing that client also represent other parties. Such an unreasonable position may be based on an aversion to the other parties being represented by a lawyer, or on some philosophical or ideological ground having no foundation in the rules regarding representation of conflicting interests. Whatever difficulties may be presented for the lawyer in such circumstances as a matter of client relations, the unreasonable positions taken by a client do not fall within the circumstances requiring notification and consent. Clients have broad discretion to terminate their representation by a lawyer and that discretion may generally be exercised on unreasonable as well as reasonable grounds.
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> . . .
>
> A lawyer retained for a limited purpose may not be aware of the full range of a client's other interests or positions on issues. Except in matters involving a specific party or parties, a lawyer is not required to inquire of a client concerning the full range of that client's interests in issues, unless it is clear to the lawyer that there is a potential for adversity between the interests of clients of the lawyer. Where lawyers are associated in a firm within the meaning of Rule 1.10(a), the rule stated in the preceding sentence must be applied to all lawyers and all clients in the firm. Unless a lawyer is aware that representing one client involves seeking a result to which another client is opposed, Rule 1.7 is not violated by a representation that eventuates in the lawyer's unwittingly taking a position for one client adverse to the interests of another client. The test to be applied here is one of reasonableness and may turn on whether the lawyer has an effective conflict checking system in place.

D.C. RULES OF PROF'L CONDUCT, R. 1.7, cmt. 8 & 11.

The focus on positional conflicts as potential conflicts of interest only reinforces the power of wealthy clients and restricts client access to counsel of choice, especially for poor or low income clients. (This restrictive effect is magnified by the concentration of attorneys in large firms where a conflict is imputed to hundreds of other lawyers). The concern with creating adverse precedent has more to do with strategic credibility than with true conflicts of interest. Thus, a rule against positional conflicts is ill-advised.

At the same time, positional conflicts raise credibility problems that cannot be ignored by the prudent lawyer. There is a tension between the conclusion that there should be no rule against positional conflicts and the acknowledgment of these credibility problems. This tension cannot be entirely eliminated but is best resolved by allowing positional conflicts. Where clients or lawyers are uncomfortable with the credibility implications of the conflict, the lawyer may withdraw. Where counsel is appointed, courts should grant a motion to withdraw from a positional conflict, as will be shown by the example of the public defender. Thus, the ethics rules should not force lawyers to treat a positional conflict as a disqualifying conflict of interest, but neither should a lawyer be forced to proceed with a positional conflict over the objection of the client and/or attorney where it creates strategic credibility problems.

A. Business Conflicts—Not Positional Conflicts—Are the Problem

Since the ABA first addressed positional conflicts in the 1983 comments to Model Rule 1.7, positional conflicts have been analyzed primarily as a particular kind of conflict of interest. This focus has lead to some confusion about the nature of the problem, however, as a legal positional conflict by itself is a faulty indicator of a conflict of interest. In fact, when a lawyer actually takes conflicting positions on behalf of separate clients, it shows that any conflict may have been overcome. Absent any significant self-interested reason for a lawyer to favor one client over the other, a positional conflict does not present a true conflict of interest.[148]

The more serious problem occurs when a lawyer favors one client over the other for business reasons and therefore suppresses a positional

148. The lawyer may be faced with competing objectives by clients and other conflicts for his time, etc., but the representation itself is not infected with the temptation to use confidential info. *See* SAMUEL ISSACHAROFF, *Legal Responses to Conflicts of Interest*, ch.13 *in* CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 191 (Moore, Cain, Loewenstein, Bazerman, eds., Cambridge University Press 2005) (noting that law is most concerned with conflicts infected by self-interest).

conflict by either not raising the argument for the less favored client or by tailoring it so that it does not conflict with the argument for the more favored client.[149] There are many ways in which this may happen. The lawyer may leave out a meritorious argument, make a much narrower argument than he or she otherwise would, or argue for a much broader interpretation of a rule than would an attorney who did not have the business conflict. A lawyer who argues for a broad interpretation of a rule so that it will include both clients may be foregoing a narrow argument for one client, a narrow argument that a court would be more likely to accept. On the other hand, a lawyer who makes only a narrow argument may be forgoing a broad policy argument that might appeal to some decision-makers.[150] And of course, lawyers may also avoid a positional conflict by simply dropping or refusing the representation of the less favored client.

A clever lawyer can often figure out how to avoid a positional conflict by narrowing the arguments in each representation or by distinguishing the cases factually. Such strategies may be in the best interests of the clients; it may be strategically wise to ask for the narrowest ruling. A lawyer may sincerely believe the distinctions are sound and that there is no conflict between the positions. But where the strategy is influenced by the lawyer's duties to another client a conflict may be present. Such a conflict will be difficult to detect. Where the arguments are not in direct conflict, it will be hard to show a positional conflict of interest.[151] Thus, the more serious threat to disinterested representation is business conflicts in general, not positional conflicts per se.

A business conflict between clients is not usually a disqualifying conflict of interest, nor should it be. A business conflict is defined as "the risk of loss of business from having a firm member be perceived to adopt a . . . position that one of the firm's clients might not like."[152] In our capitalist system, lawyers are expected to face and overcome economic pressures to the extent they must provide disinterested and competent representation to all clients. The rules do not require lawyers to avoid business conflicts,[153] but lawyers are expected not to let such

149. *See* Dzienkowski, *supra* note 13, at 509-10.

150. *See* Dzienkowski, *supra* note 13, at 484-85 (discussing more examples).

151. *See, e.g.*, Advanced Display Sys., Inc. v. Kent State Univ., Nos. 3-96-CV-1480-BD, 3-96-CV-1608-BD, 2001 WL 1524433 at *6 (N.D. Tex. Nov. 29, 2001) (denying disqualification motion where attorney could reconcile potentially conflicting arguments about corporate alter ego doctrine).

152. *See* Gordon, *supra* note 19, at 61.

153. The rules do restrict the economic stake an attorney can have in a case and limit business transactions with clients. MODEL RULES OF PROF'L CONDUCT R. 1.8. But the rules do not forbid the kind of economic pressure a lawyer will feel from wanting to keep

economic pressure actually materially impair representation.

Nevertheless, research has shown the strength of these business conflicts in suppressing positional conflicts. Attorneys in larger firms face significant pressure from clients not to undertake cases that go against their interests, even if unrelated to their representation by the firm.[154] As one large firm lawyer put it, "We know what side our bread is buttered on, and we stay there."[155] This pressure is particularly strong when it comes to considering pro bono representation that might conflict with the interests of paying clients, and the pressure may come from other lawyers in the firm who simply fear alienating important clients.[156]

Lawyers will tend to conform their conduct to their own business interests, which are the same as those of their valuable clients. This conformity in many instances will be almost unthinking and automatic. Psychological research shows that when a person's self-interest is involved in a decision, the self-interest operates automatically and outside of conscious awareness to cause the person to prefer a certain course of action. Conscious reason then rationalizes this choice.[157] Such research supports the hypothesis that lawyers faced with potential positional conflicts will find a way to avoid them without much agonizing by reframing arguments or refusing representation.[158] The positional conflict will never materialize, and the lawyer's business interest in one or both clients is maintained.

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or attract business.

154. Shapiro, *supra* note 20, at 1167. Using the term "positional conflict" to mean simply clients with differing interests, the author writes:

> Positional conflicts are world-class business conflicts, especially when the positions in contention are deeply held by large, powerful, repeat-playing institutions—the staple of large law firms. Again, the difficulties engendered by positional conflicts are rarely legal ones; they are about business, client relations, and intra-firm politics, about how to serve the needs of important clients without undermining or alienating others.

Id.

155. Spaulding, *supra* note 45, at 1409 (quotations omitted).

156. *See id.* at 1415. In another survey,

> One question asked attorneys how their organizations dealt with matters that might prove objectionable to clients, other lawyers, or the community. Another question asked how satisfied attorneys were with the types of cases that were permitted. A relatively small number of lawyers answered these questions. Of those who did, about two-fifths were in organizations that discouraged work likely to advance positions inconsistent with client interests or values.

Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL ED. 413, 452-3 (2003). *See also* Gordon, *supra* note 19 (arguing that market forces cause law firms to prohibit their lawyers from pro bono or other activities that could be perceived as adopting a policy position that a client might not like).

157. Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES., 189, 190-991 (2004).

158. *See* discussion of Matthew Hale Carpenter, *supra* pp. 101-03.

If business conflicts and the lawyer's own self-interest in maintaining valuable clients are more prevalent than true legal positional conflicts, a rule against positional conflicts becomes at best another rationalization that supports the operation of the business conflict. (We see this rationalization even in the confusion of the terms: many lawyers use the term "positional conflict" to mean simply a business conflict).[159] At worst, the mere possibility of a positional conflict becomes a reason to tailor, limit, or refuse representation, all in the service of the lawyer's economic interests. An over-emphasis on avoiding positional conflicts thus creates another incentive to behave in ways that favor powerful clients at the expense of less powerful clients.

Of course, it is possible that where a lawyer has a positional conflict, together with a business reason to favor one client over the other, a true conflict of interest may arise. Where the attorney retains both cases despite a significant business conflict, the danger is that the attorney will soft-pedal the arguments in the less-favored case or engineer the timing of arguments so that the favored case is decided first, lessening the chance of adverse precedent *from* the disfavored case, but potentially creating adverse precedent *for* the disfavored case.[160] If the positional conflict and the business conflict operate together in this way, a conflict of interest under Rule 1.7 may exist—but not necessarily.

Attorneys face conflicting business incentives all the time—in determining which cases to prioritize, how much time to put into a case, etc. Ironically, where a business conflict and a positional conflict co-exist, it may actually mean that the business conflict has been overcome to the extent that the positional conflict has not been suppressed. Senator Matthew Hale Carpenter's 1872 positional conflict is an example of an attorney arguing a pro bono case in a way that undermined the arguments he made for his paying client.[161] The danger that the attorney will make the argument ineffectively seems less of a threat to clients than the danger that the lawyer will not make the argument at all; allowing a positional conflict seems better than disallowing it and encouraging lawyers to suppress the problem.

Thus, while business conflicts are pervasive and powerful, an overly fastidious attention to business conflicts may lead to even greater specialization and client identification, decreasing lawyer independence and the general availability of legal services to unpopular or poorly paying clients.

159. *See* N.Y. TIMES, *supra* note 21; Ringel, *supra* note 23.
160. Dzienkowski, *supra* note 13, at 488.
161. *See supra* note 6.

B. Risk of Adverse Precedent is Not Conflict of Interest

If the lawyer has no business reason to favor one client over the other, a positional conflict is not a conflict of interest but rather an indication that there is no conflict preventing the attorney from making the contrary arguments. Yet, the ABA comments and much of the other authority on positional conflicts state that a positional conflict will rise to the level of a prohibited conflict of interest if there is a significant risk that a "decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client."[162] These authorities reason that where a lawyer's argument is meant to create precedent favorable to one client but adverse to another, the "representation of [the second] client will be materially limited by the lawyer's responsibilities to another client," in violation of Model Rule 1.7.

It is not clear how the risk of creating adverse precedent materially limits representation of another client. One might argue that the creation of adverse precedent does not really demonstrate a conflict of interest because the precedent would have been created regardless of who made the arguments. "It is for the court to sort out and apply the correct legal principles. That being so, the involvement of a single lawyer on both sides of an issue is no different from two lawyers who argue two different sides before the same tribunal."[163] Of course, such a conclusion requires one to assume that all lawyers are equally competent.[164] A disparity in legal resources and lawyering skills might mean that the potential of creating adverse precedent should be a greater concern for the better or well-funded lawyer. If a particularly good lawyer works on both sides of a legal issue equally well, that lawyer runs a risk of creating adverse precedent that would not have been suggested by a less competent lawyer. That might be a practical reason for a client to oppose a positional conflict, but is it an ethical problem?

The rules of professional responsibility are usually blind to economic or skill disparities.[165] We have yet to condition the operation

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162. MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 24 (2005).

163. Walther & Kass, *supra* note 44, at 139.

164. *But see* Dzienkowski, *supra* note 13, at 488. Dzienkowski refutes this argument with the observation that the lawyer can to some extent control the timing of the decision by making or forgoing motions, and that "the strength of the facts and the lawyer's persuasiveness in the first case to be decided may significantly influence the second representation." *Id.* But Dzienkowski's refutation seems to rely on the workings of a business or other conflict to influence a lawyer to favor one case over the other. If there is really no business conflict between the two cases, then theoretically it should make no difference to the outcome of the cases whether one or two lawyers or firms make the contradictory arguments—if we assume that all lawyers are equally skilled.

165. Fred C. Zacharias, *The Future Structure and Regulation of Law Practice:*

of the ethical rules on the resources of individual clients and lawyers, usually assuming that all lawyers are equally competent and that alternative counsel is always available, although it is clear these assumptions are not empirically valid.[166] In any event, the varying skill levels of attorneys are unrelated to the harm a positional conflict rule is directed at: the rule is not to ensure skilled representation, but to prevent a lawyer from working against the client's interest.

More importantly, while lawyers certainly have a hand in shaping the law, ultimately it is not the lawyer who "causes" the precedent, but the court that issues it. The authorities agree that adverse precedent resulting from an earlier representation does not create a conflict of interest,[167] nor does adverse precedent that might result from a concurrent representation in another (unpersuasive) jurisdiction. It is difficult to see how the risk of creating adverse precedent in one case really "materially limits" the *representation*, although the precedent may certainly negatively affect the second client—especially if the creation of adverse precedent before the representation does not materially limit it.[171]

The real problem with representation that may lead to adverse precedent for another client—regardless of whether it is in the trial or appellate court—is one of credibility. The client, and perhaps the public, will understandably be upset to learn that the lawyer has been working successfully against the client's interests. A client is entitled to know that the risk of such precedent exists—as a matter of courtesy and as part of the lawyer's obligation to "reasonably consult" with the client about

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Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation, 44 ARIZ. L. REV. 829, 838 (2002), noting "fictions of symmetry" in the Model Rules, including the fiction that all lawyers are equally competent.

166. *See, e.g.*, Walther & Kass, *supra* note 44, at 139 ("Assuming equal competence, neither client is more harmed by a single lawyer arguing a conflicting position than by two lawyers doing so.").

167. *See* note 82, *supra*, and accompanying text.

171. A less frequently mentioned risk in positional conflicts is the danger that the lawyer will be doing the opponent's legal work. Dzienkowski discusses the danger of sending opposing arguments out into "the public domain." Dzienkowski, *supra* note 13, at 490. He notes this is more of a problem when there is a great difference in legal resources—*i.e.* when the positionally conflicted lawyer is particularly well-funded or good. *Id.* An opponent who discovers these public arguments from another case will realize an advantage he or she would not otherwise have had. The growth of the internet since Dzienkowski originally made this point in 1993 has significantly increased the likelihood that one's opponent will have easy access to all one's publicly submitted documents.

Most discussions of positional conflicts assume that the law and arguments about the law are equally accessible to all lawyers. In real life, of course, there can be great disparities in legal resources and the quality of lawyering. If these disparities exist, an opponent's discovery of an attorney's contrary arguments in another case might not only allow the opponent to question the attorney's credibility, but also provide the opponent with arguments and briefing the opponent would not otherwise have developed.

how to accomplish the client's objectives.[168] However, the mere fact that a lawyer's legal argument in one case might lead to precedent adverse to another client does not create a conflict of interest where one otherwise would not exist.

C. Credibility Concerns

Even if a pure legal positional conflict is not by itself a conflict of interest, and even if the greater problem is business conflicts, a positional conflict creates problems of credibility. While these concerns do not rise to the level of an ethical violation, a lawyer arguing out of both sides of her mouth may have credibility issues with her client, the court, and the public at large. How we evaluate these credibility problems turns on our ideal of law practice and whether we value more greatly lawyer independence from or loyalty to clients. An ethics code that clearly allowed positional conflicts would do much to reduce these credibility problems, but some credibility concerns would remain even for the fiercest advocate of lawyer independence.

Both loyalty and independence can be portrayed as virtues or vices: loyalty to the downtrodden but deserving client is a virtue, but loyalty to the soulless corporation in its quest to avoid just compensation is "selling out." A lawyer like Atticus Finch who has the independence to represent with honor disparate interests in the same community is virtuous;[169] a lawyer who will represent any side of a question as long as he is paid is merely an unprincipled hired gun.

Commentators who come down more on the side of enforcing client loyalty tend to urge recognition of positional conflicts. John Dzienkowski, who wrote a seminal article on positional conflicts, recommended that the Model Rules be amended to suggest analyzing positional conflicts in light of several factors similar to those eventually adopted in the 1993 ABA ethics opinion and Restatement.[170] Professor Dzienkowski believed that material positional conflicts violate client expectations of loyalty and damage the legal profession in the eyes of the public. Others have echoed these concerns.[171]

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168. MODEL RULES OF PROF'L CONDUCT R. 1.4; Cal. Ethics Op. No. 1989-108 at 4.

169. While Atticus seemed willing to represent various interests—the wrongly accused black man as well as some of the poor whites who wanted to hang him—one suspects that he would not have pursued a dishonorable goal for his clients. *See* HARPER LEE, TO KILL A MOCKINGBIRD (Perennial Classics 1960).

170. Dzienkowski, *supra* note 13, at 529.

171. *See* J. Vincent Aprile, II, *Positional Conflicts and Criminal Justice Litigators*, CRIM. JUST. (Winter 2000) 56, 58. Aprile was really more concerned with the detrimental effect such a conflict would have on the representation itself by undercutting credibility. But he also believed that public defenders should not have positional conflicts imputed to

Others, particularly those concerned about the availability of lawyers for pro bono work, emphasize the need for attorney independence from powerful clients. To these commentators, an ethical prohibition of positional conflicts would exacerbate the difficulty legal services organizations already face in trying to recruit lawyers to take on cases that may go against the business or political interests of their important clients.[172] In their view, clients already exert too much power over their attorneys.

Obviously, not all clients have this kind of power. Lawyers whose client base is primarily individuals ("personal plight cases")[173] may be quite independent from the clients. Clients such as indigent criminal defendants, legal services clients, or insureds—whose legal bills are paid by others—may also have very little leverage over their attorneys.

Related to the tension between loyalty and independence is a more fundamental question about the nature of the lawyer's work: should lawyers mean what they say, or is it honorable to make arguments simply because they serve the client's cause?[174] This question also is important to the concerns raised about the lawyer's credibility in the context of positional conflicts: if lawyers are hired guns, why does it undermine their credibility to take conflicting legal positions? On the other hand, does an attorney enjoy more or less credibility if she is clearly identified with one kind of client?

In thinking about the question of attorney sincerity, it is helpful to imagine the two extremes of practice: the hired gun (or, more positively, the taxi cab driver) who will argue anything within the bounds of the law and ethical rules; and the "true believer,"[175] always convinced of the

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their entire firm.

172. *See* Spaulding, *supra* note 45, at 1433 (proposing that positional conflicts be narrowly construed when the conflict is between a paying and a pro bono client). Dzienkowski also recognized the pro bono problem, supporting a positional conflict exception for law reform activities, but stopped short of an exception for litigation. Dzienkowski, *supra* note 13, at 461. *See also* Ester F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 FORDHAM L. REV. 2279 (1999).

173. "Personal plight" cases have been defined as criminal defense, personal injury plaintiffs work and divorce. Heinz et al., *supra* note 61, at 760.

174. This recurring debate surfaced again with the nomination of Judge John Roberts to the Supreme Court. *See* Anne E. Kornblut, *Judging John Roberts; The Briefcase Carries Briefs, Not Necessarily Ideologies*, N.Y. TIMES, Aug. 14, 2005, § 4, at 5 (discussing whether lawyers should be held accountable for the positions they advocate on behalf of clients).

175. "True Believer" was also the name of a 1989 movie about a former civil rights lawyer who ended up defending drug dealers. TRUE BELIEVER (Columbia Pictures 1989). *See also* Carl M. Selinger, *Dramatizing on Film the Uneasy Role of the American Criminal Defense Lawyer: True Believer*, 22 OKLA. CITY U. L. REV 223 (1997). When I practiced criminal defense law this term was frequently used to describe dedicated

righteousness of his or her position.

The hired gun or taxicab is more in line with the traditional professional ideal. The ethical canons emphasized, "[t]he obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client."[176] This view has been repeated in the Restatement[177] and Model Rules.[178] Independence and detachment from client causes are part of the character of the honorable lawyer put forth by Chief Justice Roberts at his confirmation hearings.[179]

The hired gun attorney certainly has his critics. Richard Wasserstrom has criticized the lawyer's role-differentiated morality and specifically the practice of arguing positions in which the lawyer does not believe:

> If the lawyer does not in fact believe what is urged by way of argument, if the lawyer is only playing a role, then it appears to be proper to tax the lawyer with hypocrisy and insincerity. To be sure, actors in a play take on roles and say things that the characters, not the actors, believe. But we know it is a play and that they are actors. The law courts are not, however, theaters, and the lawyers both talk about justice and they genuinely seek to persuade. The fact that the lawyer's words, thoughts, and convictions are, apparently, for sale and at the service of the client helps us, I think, to understand the peculiar hostility which is more than occasionally uniquely directed by lay persons toward lawyers.[180]

Wasserstrom argues that the lawyer pays a heavy price for living this way.

At the other end of the continuum from the hired gun, the "true believer" identifies strongly with the client's cause. Some true believers are motivated by pre-existing political beliefs.[181] Others may come to

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defense attorneys who were always completely convinced of the correctness of opposing the prosecution, and contrasted to those more agnostic attorneys who could often see the merits of their opponents' position.

176. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-17 (1980).

177. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 125, cmt. e (2000) ("Moreover, it is a tradition that a lawyer's advocacy for a client should not be construed as an expression of the lawyer's personal views.").

178. MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2004).

179. *See supra* note 3.

180. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS, 1-15 (1975), *reprinted in* THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 159 (Geoffrey Hazard and Deborah L. Rhode, eds., Foundation Press 3d ed., 1994).

181. Legal services lawyers, for example, may be drawn to their jobs by their strong beliefs in social justice. Once there, a true believer will take on an identity and "mission"

identify with their clients as a result of representing them over time. In the end the lawyer who began as a hired gun persuades him or herself of the client's position. As one commentator suggests, "[o]ne way that lawyers deal with the problem of opportunism is to come to believe in the arguments they make on behalf of their clients. For example, defenders of tobacco companies may come to believe that the hazards of smoking really have not been demonstrated sufficiently."[182] Another observer suggests that many lawyers "do not perceive any disjunction between personal morality and professional identity. . . . Such lawyers may improperly discount their professional obligations to third parties by so closely identifying with their clients' ends and interests."[183]

Although the "true believer" is sincere—unlike the hired gun—she can also be perceived as a menace because she lacks detachment and professionalism. Writing in opposition to the 2000 changes to the Model Rule comments on positional conflicts, a family law lawyer and judge claimed that positional conflicts rules would "deprive the court, and the legal system, of the objectivity that the representation of both classes of parties provides in this particularly emotion-laden field. . . . Lawyers will undoubtedly do a better job of dispute resolution if they do not practice or model polarized thinking, which, after all, is recognized in mental health circles to be a thought disorder."[184]

Rather than advocating the ethics of a true believer, many writers

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to which their arguments must conform. *See* Peter Margulies, *Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer*, 67 FORDHAM L. REV. 2339 (1999). "Cause lawyers" are "activist lawyers who use the law as a means of creating social change in addition to a means of helping individual clients. . . . The worry for the cause lawyer is that the pursuit of her 'cause' may at times conflict with the client's interest." Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1197 (2005).

182. J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869, 887 n.24 (1993). He goes on to say:

> Of course, this is a solution to the problem of opportunism only if one believes that reduction of cognitive dissonance by itself counts as a solution. Moreover, it cannot serve as a solution for the lawyer who continually represents clients with contradictory interests. Such a lawyer is more likely to come to believe in the process rather than the client—that zealous representation of whatever client is before her is adequate justification for her actions. The repeated experience of being a hired gun causes her to believe in the propriety of being a hired gun.

Id.

183. Spaulding, *supra* note 45, at 1429; Karl Llewellyn, too, noted the ease with which lawyers come to believe in the justness of their clients' causes, especially when the clients' cases are particularly profitable. KARL LLEWELLYN, BRAMBLE BUSH 178 (Oceana 1930).

184. Walther & Kass, *supra* note 44, at 138.

defend the lawyer's role-differentiated ethics of argument.[185] Yet they also acknowledge the accusations of dishonesty that will not go away. James Boyd White has written an eloquent defense of the advocate who does not necessarily endorse his client's cause.[186] In a dialogue based on Plato's *Georgias*, the lawyers' defender states that while he may be "insincere" in a certain sense when making an argument, he is nevertheless honest because the judges and other advocates understand his role. He argues that he acts with integrity because his implicit and honest statement is that this is the best argument he can make for his client given his resources.[187] At the same time, White gives voice to the contrary argument that a lawyer is little better than a prostitute who serves neither his client's best interests nor justice.[188] Geoffrey Hazard writes that while it is "profoundly unattractive" to admit that the advocate's presentation is a theatrical enterprise rather than the lawyer's honest assessment of the case, requiring lawyers to take on the truth-finding function of the judge would not result in justice.[189] Yet he acknowledges that many involved are unhappy with the theatrical role-playing: "The judges are unhappy knowing that the best they can get is verisimilitude. . . . Many lay critics and some academicians condemn both the advocates' artifice and the artificers, without coming to terms with the fundamental difficulty that begets the role of advocate in the first place."[190] These comments reflect a widespread discomfort with the adversarial process to which we are nevertheless committed.

On the spectrum between hired gun and true believer, most lawyers probably fall somewhere in the middle or travel between the poles. Most advocates acknowledge the importance of demonstrating a belief in one's

185. Note HAZARD & HODES, *supra* note 52 at § 10.10, illustration 10-2, discussion of a positional conflict before the same judge:

> Although some might say that the spectacle of the same lawyer arguing both sides of the same proposition damages the image of the legal profession, it can also be said that it instead shows the profession at its best. So long as there are non-frivolous arguments to be made, lawyers should be proud to acknowledge that as detached professionals they are capable of asserting either side.

Id. With respect to legal education, Anthony Kronman defends the case method as teaching students to entertain multiple positions, "strengthening their moral imagination and encouraging them to take a more cosmopolitan view of the diversity of human goods. . . ." ANTHONY T. KRONMAN, THE LOST LAWYER 160 (Belknap Press 1993). He notes that many students experience this education as unmooring them from their former ideals.

186. JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 215-37 (The University of Wisconsin Press 1985).

187. *Id.* at 225.

188. *Id.* at 218-19.

189. GEOFFREY C. HAZARD, JR., *Law Practice and the Limits of Moral Philosophy, in* ETHICS IN PRACTICE 83, (Deborah L. Rhode ed., 2000).

190. *Id.* at 83.

case in order to be persuasive.[191] Yet several also warn against the danger of becoming too closely identified with the case: "Once a lawyer starts crusading, he loses the objectivity he needs, he begins to slop over, he rapidly diminishes his effectiveness, and he becomes that stock, hackneyed and yet constantly reappearing character, the lawyer who represents himself and who in consequence has a fool for a client."[192] When advocates discuss the need to have a belief in the correctness of one's case, they often discuss how to induce this belief through preparation.[193] The "sincere belief" of the advocate comes to resemble the sincere beliefs that an actor conveys after similar preparation.

Thus, there is far from unanimity on the proper attitude of the attorney toward the sincerity of his or her position. Karl Llewellyn has suggested that there is no agreement on the proper attitude because all lawyers are sometimes happy with the hired gun ethic and sometimes earnest believers in their clients' causes. He told law students in his 1930 lecture that the two ethical norms are "completely respectable, accepted, impeccable, and *either* of which is always available," depending on which appears convenient to the lawyer at the time.[194] This ambivalence makes it difficult to develop a clear rule for lawyer credibility with positional conflicts, and may help explain the varying approaches taken by different jurisdictions. Nevertheless, a positional conflict will raise credibility questions even for the staunchest defenders of the hired gun or taxicab ethic. These problems will arise for three principle audiences: the court(s), client(s), and the public.

The Court. "[T]he most important object of inquiry in a study of persuasion is not the author but the audience to whom the argument is addressed. After all, those who make arguments, whether manipulatively or with conviction, do so in order to influence others."[195] Judges well understand that lawyers are not necessarily arguing in accord with their personal opinions when they take a position in court. At least one bar ethics opinion declined to find that appellate judges would be prejudiced against either side when presented with opposing arguments by the same firm: "Appellate judges are presumably trained to recognize that advocates are often required to take positions contrary to those previously taken by their partners, when the interests of a client so

191. GERRY SPENCE, HOW TO ARGUE AND WIN EVERY TIME 58-59 (St. Martin's Press 1995); DAVID C. FREDERICK, THE ART OF ORAL ADVOCACY 33 (West Group 2003); FREDERICK BERNAYS WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 359 (Bureau of National Affairs, Inc. 1967).

192. WIENER, *supra* note 195, at 357.

193. SPENCE, *supra* note 195; FREDERICK, *supra* note 195, at 34; WIENER, *supra* note 195.

194. LLEWELLYN, *supra* note 187, at 180.

195. Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 881 (1988).

require."[196] Hazard and Hodes, by defending the ethics of a pure legal positional conflict before the same judge, also seem to assume that the advocate's credibility will not suffer with the court.[197]

But several authorities and commentators state the opposite: consciously or subconsciously, judges will question the credibility of an advocate who makes contrary legal arguments before the same tribunal.[198] Other sources, while not expressly commenting on a loss of credibility before the court, seem to assume such a problem when drawing the ethical line at presenting opposing arguments in the same court.[199]

Could any credibility problem from a positional conflict be eliminated by mutual agreement between bench and bar that a positional conflict poses no ethical concern? That is, if we all agreed that lawyers should be allowed to argue contrary positions—even in the same court—would judges adopt Hazard's position that to argue contrary positions actually shows the profession in its noblest light? It is unlikely that the profession could get rid of the entire credibility problem in this way.[200] The practice of law is not like a moot court competition or debate round. Judges in real cases are trying to decide what is right—it is a serious enterprise, "tak[ing] place in a field of pain and death."[201] Given the seriousness of the enterprise, most judges (consciously or not) prefer lawyers who at least appear to also be serious as well. Nevertheless, if there were mutual agreement, as apparently existed in the Nineteenth Century, it could greatly diminish the credibility problems associated with a positional conflict.

Some credibility problems will remain, however, because of the importance of ethos or character in argument. While "[t]he daily experience of using arguments and counterarguments interchangeably gives lawyers and judges such a distant (sometimes cynical) attitude

196. Arizona Ethics Opinion No. 87-15 (1987).

197. HAZARD & HODES, *supra* note 52, at 10-33.

198. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993); Dzienkowski, *supra* note 13, at 489-90; Aprile, *supra* note 175, at 58.

199. *See supra* Part III(C).

200. In an article criticizing the rule against lawyers vouching for clients, Thomas L. Shaffer argues that modern American lawyers have attempted unsuccessfully to take the character of the advocate out of advocacy, mostly in order to prevent the inconvenient consequences of vouching on lawyer's careers. These consequences include that lawyers would have to vouch in every case or the courts would wonder at the absence of vouching, and that lawyers who were not known in the community would have a disadvantage. Thomas L. Shaffer, *The Legal Profession's Rule Against Vouching for Clients: Advocacy and "The Manner That is The Man Himself,"* 7 NOTRE DAME J. L. ETHICS AND PUB. POL'Y 145, 158-59 (1993). Shaffer argues that it is impossible to remove the influence of the advocate's character.

201. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

toward arguments that their arguments often seem characterless,"[202] character is nevertheless important.[203] As Aristotle wrote,

> Persuasion is achieved by the speaker's personal character when the speech is so spoken as to make us think him credible. We believe good men more fully and more readily than others: this is true generally whatever the question is, and absolutely true where exact certainty is impossible and opinions are divided.[204]

An effective argument causes the listener or reader to identify with the character of the advocate.[205] If the character of the advocate is that of a chameleon who can argue two sides of the same question, how will that character help persuade the decision-maker? To the extent that argument is based on a particular type of character (e.g., champion of entrepreneur, defender of the little guy) can these two types be credibly represented by the same person or same firm? Is it too much to ask the court to see it as a performance? Is not the very two-facedness of the positional conflict revealing of a bad character?[206]

When discussing an advocate's character, one might refer to character in a number of senses: reputational character the advocate brings; the character of the advocate revealed through the argument; and the character of the argument itself. The lines between these different kinds of character will not always be clear, and character itself can be multidimensional and always changing.[207] Reputational character might include such things as the speaker's background, education, and firm association. Justice Blackmun's notes on oral arguments demonstrate that this kind of character could definitely influence his assessment of credibility.[208] But the argument itself, as Aristotle noted, will also reveal

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202. Frug, *supra* note 199, at 896.

203. Frug, *supra* note 199; AMANDA ANDERSON, THE WAY WE ARGUE NOW: A STUDY IN THE CULTURES OF THEORY 134-60 (Princeton University Press 2006).

204. ARISTOTLE, RHETORIC 7 (W. Rhys Roberts trans., 2004).

205. Frug, *supra* note 199.

206. By several accounts, the Solicitor General and his attorneys have the highest credibility as advocates before the Supreme Court. *See, e.g.*, Rebecca Deen & Joseph Ignagni, *Individual Justices and the Solicitor General: The Amicus Curiae Cases, 1953-2000*, 89 JUDICATURE 68, 69 (2005); Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J. L. & POL. 33, 47 (2004). One important reason for that credibility is probably that the Solicitor General's positions are the considered positions of the executive branch, and not paid for by private actors. (Of course, some will argue that these positions are influenced by powerful private interests). The Solicitor General's office cannot have a positional conflict because it has only one client.

207. Frug, *supra* note 199, at 876.

208. *See generally* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN, (2005), showing that Blackmun graded oral argument performances. Political scientists who have analyzed his grades show a strong connection between the advocate's social status

character. Even the most stellar reputation and background will not make up for an argument that is churlish, sullen or disrespectful. Finally, the terms of the argument itself may appeal to a certain kind of character: authoritarian, vengeful, merciful, etc. A positional conflict will not necessarily diminish the lawyer's *performance* of character in all of these senses, but it might affect the court's *acceptance* of that performance.

No matter what one's position on whether a good lawyer must believe what she says, the sense of commitment is an important asset for an advocate. Judges committed to an ethic of independence can ignore positional conflicts up to a point, but the advocate's credibility will suffer—or at least the advocate will lose a strategic asset—if the judge is faced with the same lawyer arguing opposing positions. To a lesser extent this might also be true if two lawyers from the same firm take opposing positions.[209]

While these credibility problems can never be completely eliminated, removing the ethical rule against positional conflicts could reduce them greatly. If the profession were to unequivocally endorse the character of the taxi-driver, the honest advocate, as it did more fully in Senator Carpenter's time, the credibility problems associated with positional conflicts would lessen.

The Client. A client is unlikely to understand why he or she should tolerate a positional conflict, especially in the same court. Perhaps some clients can be made to understand the value of an independent bar, but most will prefer a lawyer who is not at cross-purposes with their case. To a client, a lawyer with a positional conflict will appear less than entirely loyal.

(background, education, status of employer) and Blackmun's grade. Timothy R. Johnson, Paul J. Wahlbeck , James F. Spriggs, II , *Legal Argumentation before the U.S. Supreme Court*, at 29-30. Paper prepared for presentation at the 2004 annual meetings of the American Political Science Association, Chicago, IL, September 2-5. One reason for this reputational advantage might be that advocates who went to Ivy League schools and practiced with large Washington firms were more like the justices themselves and therefore easier for the justices to identify with. Frug, *supra* note 199 (on the importance of identifying with the speaker).

209. Given the importance of credibility to advocacy, should the impairment to credibility caused by a positional conflict be analyzed as a threat to lawyer competence? In some ways competency seems like a better analysis than conflict of interest because the problems with credibility are strategic. But competency refers to "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004), and it would seem to be a stretch to include credibility within that definition. *See* California Ethics Opinion No. 1989-108 (rejecting argument that positional conflict violates competency rule) and Maine Ethics Opinion No. 155 (1997) (finding no per se conflict of interest from a positional conflict, but suggesting that a contemporaneous positional conflict before the same court could impair the lawyer's effectiveness to the extent that it would violate the duty to employ "reasonable care and skill").

Given this credibility problem with clients, do clients even need to be told about positional conflicts? If a positional conflict is not a real conflict of interest, as I've argued, then there is no requirement under Model Rule 1.7 that clients be told about it. But lawyers also have an obligation under Model Rule 1.4 to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Thus, lawyers should inform clients of significant positional conflicts, especially where a victory for one client will result in adverse precedent for the other, or where the lawyer's credibility will be detrimentally affected by the conflict. The client can then choose whether to proceed with the positional conflict or retain a different attorney. The California Ethics committee opinion suggests that there might even be malpractice liability if harm to the client "might have been avoided by timely disclosure" of the positional conflict.[210]

The Public. Lawyers already have significant credibility problems with the public, and many lawyer jokes seem based on the lawyer's lack of honesty.[211] The negative effect of even a factual positional conflict was a primary concern of the court in *Estates Theatres, Inc., v. Columbia Pictures Indus.*[212] The public is not impressed with the ethic of "independence" when lawyers talk out of both sides of their mouths.[213]

In addition to these potential credibility problems with the courts, clients and the public, the lawyer with a positional conflict may have a credibility problem with the lawyer self—the lawyer's self-respect. The lawyer's discomfort with a positional conflict will depend on where the attorney falls on the hired-gun/true believer continuum. For true believers, if the positional conflict involves an issue important to the case, it will be difficult to achieve that state of "sincere belief" that many say is necessary for effective advocacy.[214] Others, who endorse the taxicab ethic, may have little or no difficulty.[215] Where a positional

210. California Ethics Opinion 1989-108 at 4. *See supra* notes 125-28 and accompanying text.

211. *E.g.,* Q: How can you tell when a lawyer is lying? A: His lips are moving. This and other jokes about lawyer dishonesty are collected in MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE 31-63 (2005).

212. *See* p. 119-20, *supra.*

213. For example, when the well-known lawyer Edward Bennett Williams made one characterization of this client's sentence to the court and another to the press, one reporter wrote in disgust, "words for hire. Words not for expression but for manipulation. Words that do not emanate from some deep and honest center of a man, but rather from a bag of tricks well learned." Jack Fuller, *Words for hire add a disturbing note to the Helms case,* CHI. TRIB., Nov. 13, 1977 (quoted in Robert Pack, Edward Bennett Williams for the Defense, 37 (1983)).

214. WIENER, *supra* note 195; Federal Defenders of San Diego, Inc., v. United States, 680 F. Supp. 26 (D.C. DC 1988).

215. Roberts, Confirmation Hearings, *supra* note 3.

conflict is imputed between firm members, rather than with a single lawyer, the problem of credibility with the lawyer self disappears in most instances.

D. An Example: The Public Defender

It may be helpful to examine a particular positional conflict in litigation to understand how a positional conflict might work. A recent Delaware case, *Williams v. State*,[216] provides a good example. The positional conflict in that case was apparently a stark legal one. The court described the conflict as follows:

> [The lawyer] asserts that, on appeal, Williams could raise an arguable issue that the Superior Court erred when it concluded it was required to give "great weight" to the jury's 10-2 recommendation in favor of the death penalty for Williams. [The lawyer] contends, however, that he may have a conflict in presenting this argument because he has advocated a contrary position on behalf of a different client in another capital murder appeal pending before this Court. In Garden v. State, Nos. 125 & 162, 2001, [the lawyer] argued in his opening brief that the Superior Court erred when it failed to give great weight to the jury's 2-10 vote rejecting the imposition of the death penalty for Garden.

The lawyer in this case was a public defender who had no business conflict between the two capital clients.[217] Neither case would be more profitable than the other; neither client paid for the representation. Thus the real concern in representing both clients was the lawyer's credibility. Along with the traditional concern with creating adverse precedent for one client, the lawyer cited concerns about his credibility with the court and his clients.[218]

The credibility problem is especially acute for a public defender, whose credibility is somewhat tarnished to begin with. The public defender does not choose cases, and there is a widespread impression—both with the public and many on the bench—that most public defender clients are guilty. The ethical rules regarding attorney truthfulness and avoiding frivolous claims properly include exceptions for criminal defense counsel in light of the criminal defendant's constitutional

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216. 805 A.2d 880 (Del. 2002).

217. Confirmed in telephone interview with Bernard J. O'Donnell, attorney for appellant in *Williams v. State*, *supra* note 220.

218. "O'Donnell is concerned that his representation of both clients on this issue will create the risk that an unfavorable precedent will be created for one client or the other. O'Donnell also is concerned that it may invite questions about his credibility with this Court and his clients' perception of his loyalty to each of them." 805 A.2d at 881.

rights,[219] and the danger to these rights if counsel were to become too concerned with avoiding frivolous arguments. (For example, if defense counsel had to worry about sanctions for frivolous claims, they might err on the side of not raising arguable issues, and second-guessing their client's testimony). But one effect of relaxing rules for truthfulness and frivolity for criminal defense counsel is that the credibility of defense counsel may be undermined. Courts may assume that an attorney is simply "going through the motions" in a particular case, regardless of whether the attorney is arguing in all sincerity. Thus, a public defender cannot afford any additional credibility problem that a positional conflict might add.

The public defender's credibility with clients can also be strained since the client cannot choose or fire the attorney. A dedicated public defender can overcome initial client skepticism by demonstrating her commitment and competence, but a positional conflict will certainly undermine those efforts.

The pubic defender's self-respect (credibility with herself) is also an important concern. The public defender does not choose her cases, and part of the ethic of public defense is the idea that everyone deserves constitutional due process and a good defense. Most public defenders believe that their work is honorable, whether their clients are guilty or not. They do not judge or turn down clients. But to have a positional conflict forced upon them may be too much for this sense of honor and self-respect, especially if they believe it undermines their credibility with their audience and clients.

In *Williams*, the state supported the attorney's motion to withdraw, and the court allowed it. This was proper, and courts should grant such motions even were the state to oppose them.[220] One reason to grant such motions is that although the credibility problem is very real for a public defender, the client(s) will have no way to challenge the positional conflict's effect on their case. Unlike paying criminal clients or civil clients, a public defense client cannot fire the attorney to prevent the positional conflict from materializing, even if the client comes to know of the problem in time to act. Nor will the client have any post-trial remedy. A positional conflict will probably not rise to the level of

219. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2004) (prohibiting frivolous claims and defenses, but allowing criminal defense lawyers to require proof of every element of a crime); MODEL RULES OF PROF'L CONDUCT R. 3.3, cmt. 6-10 (2004) (discussing the different possible approaches for criminal defense counsel, as distinguished from other lawyers, when false evidence has been offered).

220. The court in *Federal Defenders of San Diego, Inc., v. United States Sentencing Commission* also advised that public defenders who were uncomfortable with a positional conflict be allowed to withdraw. 680 F. Supp. at 30.

ineffective assistance of counsel in violation of the Sixth Amendment, despite the Delaware court's statement that the attorney's positional conflict "may compromise the effectiveness of his assistance as appellate counsel."[221]

To show a violation of the Sixth Amendment through ineffective assistance of counsel, the defendant must show (1) deficient performance, and (2) prejudice, that the outcome of the proceeding more probably than not would have been different.[222] It is notoriously difficult to show ineffective assistance.[223] Even if one could show that proceeding with a purely legal positional conflict was deficient performance—a difficult showing given the disagreement among authorities as to whether such a conflict is an ethical violation—it will be impossible to show prejudice in most cases. If the prejudice claim is based on impaired credibility, courts will presume that judges are able to look past any credibility issue presented.[224] If the claim of prejudice is based on the creation of adverse precedent, it will also be impossible to show that the court would have reached a different result had different counsel been representing each case.

One might argue that a defendant asserting ineffective assistance of counsel based on a positional conflict should not have to show prejudice. Where a claim of ineffective assistance is based on a conflict of interest adversely affecting performance, prejudice need not be shown.[225] But with such claims the defendant must nevertheless show the adverse effect on performance. Again, it will be difficult to show exactly how the conflict adversely affected the arguments made.[226]

Because a later challenge to the conviction based on a positional conflict is unlikely to succeed, but the credibility impairment may be

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221. 805 A.2d at 882.

222. Strickland v. Washington, 466 U.S. 668 (1984).

223. *See also* Jacqueline McMurtrie, *Unconscionable Contracting for Indigent Defense: Using Contract Theory to Invalidate Conflict of Interest Clauses in Fixed-Fee Contracts*, 39 U. MICH. J. L. REFORM ___ (2006); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARVARD L. REV. 2062, 2063. Jeffrey L. Kirchemeyer, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425 (1996).

224. *See* Arizona Ethics Opinion No. 87-15 (1987).

225. Mickens v. Taylor, 535 U.S. 162, 168 (2002); United States v. Schwarz, 283 F.3d 76 (2nd Cir. 2002).

226. The defendant might show an adverse effect based on timing of arguments, delays that put one case ahead of the other, etc. *See* Dzienkowski, *supra* note 13. But where there are other explanations for the timing, it will be hard to show the effect of the conflict. If the defendant could show an economic reason for the lawyer to prefer one case over the other, and that the preference caused the timing decisions, the defendant could perhaps show a conflict with the lawyer's self-interest. *See* Schwarz, 283 F.3d 76. But absent such proof, the defendant will have a tough time demonstrating a conflict.

real, courts should grant motions by appointed counsel to withdraw due to positional conflicts. There is little danger of abuse: the moving attorney would have to show the conflict to the court. Direct legal positional conflicts, especially in the same court, are likely to be rare. In addition, such conflicts need not be imputed. Because the chief concern is with the lawyer's credibility, not with financial incentives or divided loyalties, public defenders from the same agency should be allowed to take contrary positions on legal questions.[227] Thus, the impact of a policy to grant such motions to withdraw should be minimal.

For the same reasons that counsel's motion to withdraw should be granted, public defenders should tell their clients about a positional conflict so that the client might also protest—an argument after the fact will be too late.[228] Because the positional conflict is not a true conflict of interest, the client therefore has no right under the ethics rules or the constitution to demand a lawyer without a positional conflict. But if a client objects strenuously, the lawyer could move to withdraw in the interests of client relations, or a court might grant the client's motion for substitution of counsel.

Yet while such motions should be granted, it would not be advisable to make withdrawal mandatory where the attorney has a positional conflict. Just as the rule against positional conflicts seems to have caused civil lawyers and firms to suppress such conflicts in various ways, a more rigid rule against positional conflicts even for public defenders might cause an abundance of caution that could deprive clients of good quality counsel. In many jurisdictions, the supply of good public defenders is limited, and conflict counsel might not always be of good quality.[229] The assumption behind the conflict of interest rules—that another competent lawyer is always available—is simply not warranted,

227. "Indeed, when two individual public defenders are arguing contrary legal positions in separate cases, the integrity and independence of the defender agency is apparent." Aprile, *supra* note 175, at 57.

228. Moreover, under MODEL RULES OF PROF'L CONDUCT R. 1.4 (2005), lawyers have an obligation to "reasonably consult" with clients about how to achieve client goals. Such reasonable consultation should include discussing a positional conflict about a significant issue, especially where credibility might be detrimentally affected.

229. *See* AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENSE, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE—A REPORT ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS 38 (2004); ACLU OF WA REPORT ON INDIGENT DEFENSE, *supra* note 10. The report provides another reason not to require public defenders to withdraw for positional conflicts. However ill-advised, it is not uncommon for public defense contracts to penalize the recognition of a conflict of interest so that the contractor must pay for any conflict counsel out of the contract fee. Just as with private civil attorneys, with such contracts a rule against positional conflicts can create a financial reason to suppress the conflicting legal argument. *See* McMurtrie, *supra* note 227.

234. *See* criticisms of *Fiandaca*, *supra* note 102.

especially for poor clients.[234]

V. Proposal to Amend Model Rule 1.7 Comment 22

The current comment on positional conflicts, comment 22 to Model Rule 1.7, should be amended to say:

> Ordinarily a lawyer may take inconsistent legal positions on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest.[230] Regardless of whether a lawyer actually takes inconsistent legal positions in different cases, if the legal arguments in unrelated cases are connected in such a way that a lawyer is under pressure to shape, modify or drop arguments in one case in light of the other case, the lawyer should assess whether there is a significant risk that the representation of either or both case[s] will be materially limited. Lawyers cannot always avoid such pressure in their practice, but they should not undertake representation that creates such pressure if they are unable to withstand it.
>
> If a lawyer determines to argue contrary legal positions in unrelated cases, the lawyer should consider the credibility implications with respect to the court(s) and the affected clients. Where the inconsistent positions involve issues important to either case, and especially where the positions are advocated in the same jurisdiction, the prudent attorney will inform the affected clients. See Rule 1.4.
>
> Where it is a single attorney, rather than different attorneys in a firm, presenting contrary legal arguments, a court should grant an appointed attorney's motion to withdraw for credibility concerns. But the attorney should not be required to withdraw.

This proposal would change the current comment in several important ways. First, it removes the suggestion that a legal positional conflict by itself can be a conflict of interest in violation of the Model Rules. Second, it would advise lawyers to consider the risk of material impairment of representation from reconciling, modifying or dropping arguments in one case to please or keep another client. The current comment only advises lawyers to scrutinize positional conflicts—a faulty indicator of conflict of interest. The proposal would also advise the lawyer to consider the credibility implications of a positional conflict,

230. These first two sentences are from the current version of comment 24 to Model Rule 1.7.

and to inform the clients where the arguments are sufficiently important and likely to affect credibility. The current comment does not address credibility. Finally, the proposed comment advises that an appointed lawyer's request to withdraw because of credibility concerns should be respected, even though the lawyer cannot be required to withdraw as there should be no ethical prohibition against positional conflicts.

VI. Conclusion

It is not easy to craft a rule for positional conflicts since the conflict sits astride a fault-line of fundamental ambivalence in law practice and theory about lawyer sincerity, loyalty and independence. The absence of litigation about positional conflicts and the evidence of the much greater force of business conflicts suggests that a stronger prohibition of positional conflicts is not advisable. A positional conflict is actually a faulty indicator of a conflict of interest—the real harm is when a lawyer succumbs to pressure to drop or change arguments in one case in order not to harm another client or case. But while a rule against positional conflicts is therefore counterproductive, counsel's decision to withdraw in the face of a positional conflict should be respected.

Positional conflicts can raise credibility concerns for individual lawyers and firms, despite the widely held professional ideal of independence, an ideal that is consistent with lawyers arguing both sides of a legal issue in unrelated cases. Because of the importance of the advocate's character or ethos to argument, a lawyer arguing both sides of a legal issue may present a diminished sense of commitment to the case—affecting credibility with the court, the clients and possibly the public. The example of the public defender, whose clients are powerless and who may not withdraw without court permission, illustrates these credibility problems. While these credibility concerns do not rise to the level of ethical violations, the prudent lawyer will carefully consider them in determining whether to proceed with a positional conflict.