DROPPING THE HOT POTATO: RESUSCITATING THE PERMISSIVE WITHDRAWAL RULES IN THE MODEL RULES OF PROFESSIONAL CONDUCT

H. Max Kelln[+]

INTRODUCTION

Loyalty is a central tenet to a lawyer's relationship with a client.[1] Yet, the phrase "duty of loyalty" is so ubiquitous in the conflict of interest rules that the phrase has become axiomatic.[2] On the contrary, loyalty rightly has been described by some as a "fulcrum in the persistent struggle to define the nature of lawyering."[3] Inherent in the duty of loyalty are the duties to avoid conflict of interests, preserve client property, and preserve client

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[+]J.D. Candidate, 2007, Indiana University School of Law – Indianapolis; B.A., 2004, Ripon College, Ripon, Wisconsin.

[1] MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2002); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, 316 (1986).

[2] Mark L. Tuft, *Representing Current Clients in Unrelated Matters – Defining the Outer Boundaries of Client Loyalty,* 734 PLI LIT. AND ADMIN. PRACT. HANDBOOK SERIES, 9, 13 (2005).

[3] Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367, 367 (1992).

confidentiality.[4] Of the three duties, perhaps no duty provides as many ethical pitfalls as the duty to avoid conflicts of interests.[5]

In their article titled *The Practice of Law and Conflicts of Interest: Living Close to the Line*, Spellmire and Tweet succinctly outline the three basic situations where conflicts arise.[6] The three situations are described as follows:

> First, conflicts can exist between the clients' expressed interests and society's interest in the administration of justice. Second, a conflict can exist when the interests of one client may impair the independent professional judgment of the lawyer with regard to another client. Third, a conflict can exist when lawyers' own interests may impair their exercise of independent professional judgment on behalf of a client. This third situation is more accurately described as the representation of "adverse interests."[7]

As will be discussed later, circumstances giving rise to a conflict of interest necessarily involve a diminution in the ability to carry out the duties of maintaining client confidentiality and preservation of client property, even though each are considered part of the tripartite of loyalty.[8] Yet, an attorney acting under a conflict of interest also implicates the inability of the attorney to fulfill other core duties such as competence and

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[4] ABA STANDARDS OF IMPOSING LAWYER SANCTIONS, II. THEORETICAL FRAMEWORK, R. 4(a) (1986).

[5] SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE 2 (2002).

[6] George W. Spellmire and Susan A. Tweet, *The Practice of Law and Conflicts of Interest: Living Close to the Line*, 77 Ill. B.J. 472, 472 (1989).

[7] *Id.* at 472 (internal citations omitted).

[8] GEOFFREY HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 10.2 (2004 supp.).

communication to the client.[9] That is why many attorneys today "tend[] to equate all of ethics with conflicts of interests."[10]

The risks associated with practicing law are increasing.[11] Today, allegations that a lawyer has failed to exercise independent judgment on behalf of a client due to a conflict of interest are a common basis for malpractice suits;[12] in extreme cases, an attorney's statements regarding his conflicts of interest may result in jail time.[13] The increasing rate of law firm mergers[14] and attorney lateral movement between law firms,[15] coupled with the corresponding exponentional growth and expansion of law firms' corporate clients[16] creates an ethical environment nearly impossible to navigate in today's complicated legal landscape. As a

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[9] *Id.*

[10] William J. Wernz, Essay, *The Ethics of Large Law Firms – Responses and Reflections*, 16 Geo. J. Legal Ethics 175, 188 (2002).

[11] Spellmire and Tweet, *supra* note 6, at 472.

[12] *Id.*

[13] Marc Pilcher, Note, *You're Killing Independent George: When Professionalism & Business Worlds Collide*, 12 GEO. J. LEGAL ETHICS 829, 841 (1999) (citing Karen Donovan, *John Gellene Sentenced to 15 Months*, 08/10/98 NLJ A6).

[14] Jane A. Boyle, *Loyalty and Confidentiality: Attorney Obligations and Client Expectations in the 1990's*, SC42 ALI-ABA 923, 925 (1998) (internal quotes omitted).

[15] *See* SHAPIRO, *supra* note 5, at 188.

[16] Jessica Taylor O'Mary, Note, *When Business Decisions of a Client Create a Current Conflict of Interest: Implications in a Complex Ethical Landscape*, 43 B.C. L. REV. 1203, 1203 (2002).

result, law firms have expended significant resources implementing conflict-checking systems to avoid these conflicts.[17]

Given the many competing, yet coexisting ethical duties of an attorney, aggravated by the complicated network due to the shifting and ambiguous status of clients, it is a misnomer that an attorney can avoid conflicts altogether. Some conflicts are inevitable.[18] For example, Prof. Dennis Tuchler, a law professor at St. Louis University School of Law, points out in his article *Unavoidable Conflicts of Interests and the Duty of Loyalty*, that "conflicts between a client's interest arise naturally from the business relationship between them."[19] Thus, it is more accurate to say that an attorney must actually juggle competing loyalties and avoid totally only certain types of enumerated conflicts of interests.[20]

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[17] *See* Brad W. Robbins & Martin L. Stalnaker, *Large Firms Polled: Trend Toward Conflict-System Automation*, 1987 NAT'L L.J. 17, 17, 22 (describing the increasing use of sophisticated computer databases to detect potential conflicts by large firms).

[18] HAZARD & HODES**,** *supra* note 8, at § 10.1.

[19] Dennis J. Tuchler, *Unavoidable Conflicts of Interest and the Duty of Loyalty,* 44 ST. LOUIS U. L.J. 1025, 1025 (2000).

[20] HAZARD & HODES**,** *supra* note 8, at § 10.1. The fact that an attorney cannot avoid totally all conflicts illustrates the problem with the broad-brush platitudes often exhibited in court opinions such as the oft-cited *Cinema 5 Ltd. v. Cinerama, Inc*, 528 F.2d 1384 stating that "the propriety of [an attorney's conduct] must be measured . . . against the duty of undivided loyalty which an attorney owes to each of his clients." *Id.* at 1386. The quote exemplifies the hollowness of some of these conventions: by definition an attorney cannot have "undivided loyalty" to more than one object at a time.

As difficult as it is to traverse the minefields of today's ethical landscape,[21] often equally difficult is deciding the prudent course of action after one becomes enmeshed in an ethical quagmire. Although the Model Rules of Professional Conduct and the respective rules adopted by the states "admonish attorneys to avoid conflicts of interests, they provide little guidance in advising attorney how to disentangle themselves once a conflict has arisen."[22] In response to these difficulties, the Rules of Professional Conduct promulgated by the ABA and adopted by the states espouse a fairly "generous attitude towards lawyer withdrawal."[23]

The Model Rules of Professional Conduct proscribe the general rule that an attorney is free to withdraw from representation "if it can be accomplished without material adverse effect on the client's interest."[24] In other words, an attorney could terminate a client without cause as long as the client was not actually harmed.[25] Nonetheless, the rules of permissive withdrawal have been tightened where an attorney terminates the representation of a client due to the attorney's own economic interest.[26] One recently adopted limit on attorney withdrawal is described in the "hot potato rule." The so-called "hot potato rule," coined in the frequently quoted *Picker Int'l, Inc. v. Varian Ass., Inc.*, states that "a firm may not drop a

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[21] A variation of the title TRAVERSING THE ETHICAL MINEFIELDS, by Susan Martyn & Lawrence Fox, which is a casebook used in Professional Responsibility classes.

[22] Flatt v. Superior Court, 885 P.2d 950, 964 (Cal. 1995) (Kennard, J., dissenting).

[23] HAZARD & HODES**,** *supra* note 10, at § 20.10.

[24] MODEL RULES OF PROF'L CONDUCT R. 1.16(d) (2002).

[25] *Id.*

[26] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 cmt. c (2005).

client like a hot potato, especially if it is to keep happy a far more lucrative client."[27] This restriction on the permissive withdrawal rules has been adopted by nearly every state.[28] At the same time, many courts have revisited the "hot potato" rule since its adoption and have begun carving out exceptions to the rule, especially when the conflict arises through no fault of the lawyer.[29]

The rule has two applications: 1) in disciplinary proceedings, and 2) in situations where one party seeks to disqualify opposing counsel due to a conflict of interest. The hot potato rule is most often applied when an attorney enters inadvertently into a concurrent conflict of interest and seeks to avoid disqualification by converting a less favored client into a former client.[30] A common example is where firm *A* represents a client, but the firm then merges with firm *B*, who has a more desirable client engaged in litigation with the other client in a separate, but unrelated, case.[31] Under the hot potato rule, the firm must withdraw from representing both parties in the two cases, absent special circumstances, and cannot choose one client over the other.[32]

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[27] 670 F. Supp. 1363, 1365 (N.D. Ohio 1987).

[28] Anne Melissa Rossheim, *Simultaneous Representation: Cracks Begin to Appear in Per Se Disqualification Rule*, 11 No. 13 of Counsel 5, 5 (1992).

[29] *Id.*

[30] Sylvia Stevens, *Hot Potatoes*, 58 Or. St. B. Bull. 27, 27 (1998)

[31] RONALD D. ROTUNDA AND JOHN S. DZIENKOWSKI, LEGAL ETHICS – THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.7-5 (2005-2006 ed.).

[32] *Id.*

Alternatively, and more controversially, the "hot potato rule" has been applied in limited cases where an attorney pre-emptively discharges a current client, thus attempting to transform him into a former client, and then accepts representation from a new, more lucrative client.[33] In this scenario, a "preexisting client is treated as a former client if the withdrawal occurs at the time that the client and the lawyer contemplated the end of the representation: the client is former because the lawyer has completed the discrete assignment. Or, the client is former because the client has discharged the lawyer."[34]

Though utilized far more in disqualification proceedings,[35] both modes of enforcement rely purely on the fear of circumvention of the conflict of interests rules and the implications of loyalty in "switching sides"[36] of a conflict in order to secure a more lucrative client. Yet, courts find it difficult to draw such an interpretation directly from the Model Code and its progeny.[37] This Note will examine in Part I the history of the relevant Professional Cannons, Professional Codes of Professional Responsibility, and Model Rules of Professional Conduct dealing with conflicts of interests and termination of client representation. Part II summarizes

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[33] *See* Santocroce v. Neff, 134 F. Supp 2d 366 (D.N.J. 2001) (holding that a terminated client will be treated as a current client if the motive was to avoid a conflict of interest between two clients).

[34] ROTUNDA & DZIENKOWSKI, *supra* note 31, at §1.7-5.

[35] HAZARD & HODES, *supra* note 8, at §10.1.

[36] MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 2 (stating that "the underlying question is whether was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question).

[37] HAZARD & HODES, *supra* note 8, at §20.11.

the various cases where courts have adopted the hot potato rule to either disqualification or disciplinary proceedings and describe the various exceptions to the Hot Potato rule adopted by the courts. Part III will analyze the relationship, or lack thereof, between the evolution of the model rules, the relevant case law in their adoption of the hot potato rule, and the ultimate goals of the legal self-governing system. Part IV will then describe the various ways that law firms circumvent the hot potato rule and the practical effects that the hot potato rule has on today's legal environment. Finally, Part V will advocate for the abolition of the hot-potato rule as currently applied by the courts.

I. HISTORY OF THE PROFESSIONAL RULES

A. Conflicts of Interest Rules

The ethical rules promulgated by the ABA have gone through four major incarnations: the 1908 Cannons of Ethics, ABA Model Codes Of Responsibility of 1969, and the ABA Model Rules of Professional Conduct of 1983 & 2002.[38] In addition, the ALI's Restatement (Third) of The Law Governing Lawyers builds on many of the ABA's rules and draws on prevailing trends in case law from various jurisdictions.[39] Though the rules regarding conflicts of interest have largely remained the same, the requirements regarding permissive withdrawal have been marked by a trend towards giving an attorney greater discretion and

[38] Though the rules are often amended from year to year, this discussion includes only the major changes from year to year. The 2002 Model Rules are included even though they are not ground breaking, but by virtue of being the most recent.

[39] HAZARD & HODES, *supra* note 8, at § 10.2.

mobility.[40] On the other hand, both the ABA and the respective state courts continue to have difficulty concisely and simply articulating the rules regarding conflicts of interests: the topic of conflict of interests spans 181 pages in the Restatement (Third) of the Law Governing Lawyers and over eighty-five comments in the Model Rules of Professional Conduct.[41]

Interestingly, the original Cannons of Ethics, adopted by the ABA in 1908, did not use "loyalty" as a basis for the conflict of interest rules.[42] In terms of concurrent conflicts, Canon 6 merely stated that it was "unprofessional to represent differing interests."[43] The same canon also governed former-client conflicts, it reads:

> The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.[44]

Note, however, the original Canons did not reach the question of permissive withdrawal; the rules governing permissive withdrawal were not adopted until the promulgation of the Model Code of Professional Responsibility in 1969.[45] The 1969 Model Code attempted to prescribe

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[40] Compare MODEL CODE OF PROF'L RESPONSIBILITY Canon 2 and MODEL RULES OF PROF'L RESPONSIBILITY R. 1.16.

[41] Wernz, Essay, *supra* note 10, at 187 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 8 (2000) and the ABA MODEL RULES OF PROF'L CONDUCT R. 1.7).

[42] Tuft, *supra* note 2, at 14.

[43] ABA CANONS OF PROF'L ETHICS, Cannon 6 (1908).

[44] *Id.*

[45] *See* MODEL CODE OF PROF'L RESPONSIBILITY, DR 2-110 (1969) (stating in general the requirements for permissive withdrawal).

the conflict of interest rules more thoroughly, but in a "confused and confusing way."[46] Canon 5 governed concurrent representation and sought to ensure that an attorney "exercise[d] independent professional judgment on behalf of a client" by prohibiting the acceptance or continuance of concurrent representation of multiple clients when the attorney would be involved in representing "differing interests" or the attorney's professional judgment would be adversely affected by the division of loyalty.[47]

The rule also recognized that an attorney's *own* "financial, business, property, or personal interests" might affect an attorney's professional judgment on behalf of a client.[48] Oddly, former-client conflicts were not included in Canon 5 and where mentioned nowhere else in the code.[49] Instead, the rules governing confidentiality, EC 4-5, and the creation of Canon 9, which states, "a lawyer should avoid even the appearance of impropriety" were generally thought to govern, among other broad principles, former client conflicts.[50] Furthermore, neither EC 4-5, nor Canon 9 mentioned the importance of loyalty in avoiding conflict of interests.[51] Thus reading EC-4-5 and Cannon 9 together creates the inference that the sole purpose of the rules was to maintain the integrity of the client-lawyer relationship by preserving client confidences.

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[46] HAZARD & HODES, *supra* note 8, at §10.1.

[47] *See* MODEL CODE OF PROF'L CONDUCT DR 5-105(A) & (B) (1969).

[48] *Id.* at DR 5-101(A).

[49] WOLFRAM, *supra* note 1, at 315.

[50] *Id.*

[51] *Id.* at 363.

The framers of the 1983 Model Rules expanded the conflict of interests rules from one canon to six separate sections in an effort to cure many of the prior deficiencies.[52] The new locus of the modern approach to the conflict of interest rules became regulating the degree of risk that a lawyer will be unable to adequately fulfill all of the competing interests in a given matter.[53] In other words, the rules attempted to manage the degree of likelihood that a conflict of interest will actually have an adverse effect -- even if the harm never occurs – whereas the Canons were preoccupied with whether the attorney "appeared" to be acting ethically from the point of view of the client and the public.[54] The California Supreme Court in *Flatt v. Superior Court*[55] highlighted this concern in the Rules as follows:

> The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interests which he should alone represent.[56]

The Model rules abandoned the vague "appearance of impropriety"[57] standard in favor of language defining a conflict of interest in terms of its probable outcome.[58] Thus the new

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[52] *Id.* at 315.

[53] HAZARD & HODES, *supra* note 8, at §10.4.

[54] *Id.*

[55] 885 P.2d 950 (Cal. 1995).

[56] *Id.* at 958 (quoting Anderson v. Eaton, 211 Cal. 113, 116 (1930)).

[57] For an interesting discussion on the "appearance of impropriety" standard still in existence in the Judicial Cannons, see Alex Kozinski, *The Real Issues of Judicial Ethics*, 32 HOFSTRA L. REV. 1095 (2004). Judge Alex Konzinski's view on the standard is as follows:

rule stated that a conflict of interest exists where "there is a significant risk that the representation of one or more clients will be materially limited" or, in the case of former-client conflicts, case law evolved prohibiting an attorney representing a new client when the matter was "substantially related."[59] Thus, the objective method of judging conflict of interests and the concern for the public's confidence in the profession remained.[60] Also of relevance was the addition of ethical consideration 5-2 to the Model Code, which states, "[T]he lawyer's own interests should not be permitted to have an adverse effect on representations of a client."[61]

The rules governing former-client conflicts drafted in the 1983 Model Rules are substantially the same as they are today. The Model Rules still reflects that the foremost duty a lawyer owes to a former client is the avoidance of adverse use of confidential information learned during the representation.[62] The Rules officially adopted the "substantial relationship

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> My problem with the appearance of impropriety standard isn't so much that it's bad on its own terms, though I think it probably is. Rather, the standard promotes the wrong idea--that in order to keep judges from acting unethically, ethical rules must prevent judges from appearing to act unethically. It also seems to suggest the converse: that if judges appear to be acting ethically, they probably are. Nothing could be further from the truth. A judge can appear to act ethically and still betray his responsibility in essential respects, and in ways that no one will ever know about.

Id. at 1105.

[58] WOLFRAM, *supra* note 1, at 315.

[59] *Id.*

[60] *Id.*

[61] MODEL CODE OF PROF'L RESPONSIBILITY Canon 5 (1969).

[62] HAZARD & HODES, *supra* note 8, at § 13.3.

test" regarding former client conflicts as the litmus test for gauging the likelihood that confidential information could be used to the disadvantage of the client.[63] Specifically, Rule 1.9(a) prohibits representation of a client if the claim "is the same as, or substantially related to" the previous representation or where such representation would be "materially adverse" to the former client.[64] Somewhat noteworthy, the significant relationship test applied even if no confidences were divulged during the court of the representation[65] – presumably to prevent an attorney from consciously limiting the representation to leave the door open to future clients, or fail to zealously pursue the former claim to leave a client legally vulnerable in the future.[66] Thus, the principle evolved that an attorney may not attack his own work.[67]

As stated above, the provisions related to current client and former client conflict of interests remained unchanged in the new version of the Model Rules.[68] Other than reorganizing the section regarding conflict of interests with a current client, the prohibitions contained in Rules 1.7 and 1.9 remained substantively unchanged, with one caveat.[69] Among other minute changes, the Commission added a sentence in Comment 6 of Rule 1.7, "The

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[63] MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (1983)

[64] HAZARD & HODES, *supra* note 8, at § 13.3.

[65] E.F Hutton & Company v. Brown, 305 F. Supp 371 (S.D. Tex. 1969).

[66] WOLFRAM, *supra* note 1, at 362.

[67] MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 3 (1983).

[68] Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002) (describing the substantive changes between 1983 and 2002 Model Rules).

[69] *Id.* at 452, 454.

Lawyer's Interests," which states that an attorney's representation of a client may become materially limited "when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent."[70]

At first glance, the adoption of this language into the 2002 Model Rules suggests that a lawyer or firm's intent to either merge with an opposing law firm or represent an adverse party would taint any subsequent withdrawal from the current client. However, ABA formal opinion 96-400 sheds light on this new language. In the opinion, the ABA states:

> A means that may be available, in some circumstances, to avoid the conflict that would be presented by a lawyer's employment negotiations with a firm he opposes in a matter is for the lawyer to withdraw from the adverse representation before having a substantive discussion with the firm. . . . [S]uch withdrawal could be made without consent . . . if withdrawal can be accomplished without adverse effect on the interests of the client.[71]

The opinion goes on to explain that the same analysis applies with equal force to a lawyer's discussions with an opposing law firm, as long as the attorney does not discuss the subject matter of the current representation.[72]

To sum up, the core of the rules regarding attorney conflict of interests has remained relatively unchanged since the original 1908 cannons. Though the rules themselves have been re-organized from one rule paradigm to the next, the rules themselves continue to be expressed in broad terms and strive to protect a lawyer's professional independence and the conservation of client secrets.

B. Attorney Withdrawal Rules

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[70] MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 6 (2002).

[71] ABA Comm. on Ethics and Prof'l Responsibility, Fromal Op. 96-400 (1996).

[72] *Id.*

The first rules governing attorney withdrawal did not appear until the adoption of the Model Code in 1969. Canon 2 governed, *inter alia*, acceptance and withdrawal of client representation.[73] The rules for permissive withdrawal under the Code were relatively strict. The comment to Canon 2 states "A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances."[74] Consistent with the comment, the Code specifically enumerated circumstances when it was within an attorney's discretion to withdraw from a client. The Code permitted withdrawal for cause where: a client has rejected an attorney's sound advice, seeks to file a meritless claim, or where continued representation was likely to result in a violation of the Codes of Professional Conduct.[75] Thus, the Code did not allow withdrawal without client consent even if withdrawal would have no adverse affect on the client's interests.[76]

The largest difference between the 1969 Code and the 1983 Model Rules was the ability to terminate permissibly from the representation "if withdrawal can be accomplished without material effect on the interests of the client."[77] Paradoxically, a qualification accompanied the Rule which states, "A lawyer should not accept representation in a matter unless it can be performed competently, promptly . . . and to completion,"[78] thus carrying over vestiges of the Code's trepidation towards pre-mature withdrawal. Nevertheless, as noted by

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[73] MODEL CODE OF PROF'L CONDUCT Canon 2 (1969).

[74] *Id.*

[75] *Id.* at DR 2-110(C)(1) – (6) (1969).

[76] WOLFRAM, *supra* note 1, at 551.

[77] MODEL RULES OF PROF'L CONDUCT R. 1.16(b) (1983).

[78] *Id.* at R.1.16 cmt. 1.

Charles Wolfram, author of the seminal book, *Modern Legal Ethics*, "As a disciplinary rule, the approach to the Model Rules is preferable. As statement about minimal loyalty towards a client and the appropriate undertakings, the Code speaks on a higher plane."[79]

In 2000, the American Legal Institute (ALI) established The Restatement (Third) of the Law Governing Lawyers.[80] The Restatement reversed the trend set by the ABA's Model Rules and advocates more stringent guidelines for permissive withdrawal, harkening back to the traditionalist view under the old Canons. Under the Restatement, Chapter Two governs the Client-Lawyer relationship, including attorney withdrawal[81] and Chapter Eight governs conflict of interests. While the actual text of the relevant sections parallels the ABA's rules, it is comment c to Section 132, explaining the relationship between current and former client conflicts and the permissive withdrawal rules, which epitomizes the Restatement's strict approach to the attorney withdrawal rules. Commentc states that "withdrawal is effective to render a representation "former" for the purposes of this Section if it occurs at a point that the client and the lawyer contemplated as the end of the representation" or if grounds for "permissive withdrawal by the lawyer exist . . . and the lawyer is not motivated primarily by a desire to represent a new client."[82] The comment then explicitly illustrates the hot potato rule by explaining:

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[79] WOLFRAM, *supra* note 1, at 551.

[80] Note: the First and Second Restatement of the Law Governing Lawyers do not exist, the current Restatement was labeled as Third to stay consistent with the other Restatements of Law.

[81] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 (2000).

[82] *Id.* at § 132 cmt. c.

> If the lawyer is approached by a prospective client seeking representation in a mater adverse to an existing client, the present-client conflict may not be transformed into a former-client conflict by the lawyer's withdrawal from the representation of the existing client. *A premature withdrawal violates the lawyer's obligation of loyalty to the existing client and can constitute a breach of the client-lawyer contract of employment*.[83]

Thus, the Restatement radically connotes that situations more mundane than a hot potato scenario constitute a breach of loyalty; other instances of premature withdrawal, such as when an attorney discharges a client due to an unexpected increase in workload or sickness, could breach the client-lawyer contract of employment. As support for this proposition, the Report's note erroneously cites the traditional cases enunciating the hot potato rule in disqualification proceedings,[84] as will be explained in the next section, do not advocate such an extreme contract-based theory.

Much of the Restatement's approach was incorporated into the 2002 Model Rules.[85] Yet, the liberal rules regarding permissive withdrawal contained in the 1983 version of the Model Rules remains and the Restatement's comments regarding the hot potato rule were not adopted. As explained by Margaret Love, a member of the Ethics 2000 Commission, "the text [of Rule 1.16] was restructured to make clear that a lawyer may withdraw for any reason if withdrawal can be accomplished without material adverse effect on the interests of the client."[86] Particularly, Love points out that one of the considerations in adopting the new rules was "ethical restrictions on lawyer mobility" in light of "the legal profession's rapidly

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[83] *Id.*

[84] *Id.* at Reporter's Note cmt. c.

[85] HAZARD & HODES, *supra* note 8, at § 10.2.

[86] Love, *supra* note 68, at 461.

changing internal and external environment."[87] As a whole, the Commission made only "minor revisions" for the sake of clarification to the rules governing permissive withdrawal.[88]

In conclusion, the rules regarding conflict of interests pronounced by both the Restatement (Third) and the ABA have remained relatively unchanged since the first set of rules in 1908. Of those changes, the greatest development was the adoption of rules centered on a risk calculus – weighing the potential of harm to the client with the realization that the lawyer profession is rife with competing interests.[89] Specifically, the concurrent conflict of interest rules protected both the preservation of client confidentiality and the preservation of loyalty – as viewed from the eyes of the client and the community at large. Meanwhile, the rules regarding former client conflict of interests merely sought to forever preserve client confidences and the prohibition of an attorney from attacking their own work from a prior transaction. On the other hand, though the original Canons did not deal with the rules regarding attorney withdrawal from representation of a client, the first rules regarding such in the 1969 Code were relatively strict, but subsequent versions gave the attorney greater discretion when there was no adverse effect on the client.

II. EVOLUTION OF THE HOT POTATO RULE

A. Formulation and Adoption of the Hot Potato Rule

The hot potato doctrine emerged from a series of cases dealing with factual situations where an attorney failed to realize a potential conflict with a current client when accepting

[87] *Id.* at 441.

[88] *Id.* at 461.

[89] HAZARD & HODES, *supra* note 8, at §10.4.

new employment and subsequently withdrew from the representation of the prior client to avoid disqualification.[90] Though not mentioned by name, the notion that one cannot "drop" a disfavored client to avoid a conflict debuted in conflict of interest jurisprudence as early as 1980 in *Unified Sewerage Agency v. JELCO, Inc.*[91] Yet, the so-called "hot potato rule" was actually coined in the unimpressive *Picker Int'l, Inc. v. Varian Ass., Inc.* seven years later, in 1987.[92] For the next fifteen years, the principles underlying the hot potato doctrine spread throughout the states and adopted by nearly every jurisdiction.[93] However, like many other rules, courts ran into instances where formulaic application of the hot potato rule produced hollow, unjust results, and they began to carve exceptions the hot potato rule as early as 1990.[94] Finally, in 2001 with the *Santacroce v. Neff* ,[95] a decision out of the New Jersey Federal District Court, the hot potato rule was expanded to include situations where a client

[90] Stevens, *supra* note 30, at 27.

[91] 646 F.2d 1339.

[92] 670 F. Supp. 1363, 1365 (N.D. Ohio 1987).

[93]Charles W. Wolfram, *Former-Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677, 708 (1997).

[94] Rossheim, *supra* note 28, at 5. *See e.g. Gould, Inc. v. Mitsui Mining & Smelting Co*, 738 F. Supp. 1121 (N.D. Ohio 1990) (holding that a conflict that arose through no fault of the attorney did not warrant disqualification), which will be discussed more in depth later in this note.

[95] 134 F. Supp. 366 (D.N.J. 2001).

pre-emptively dismisses a client in anticipation of a more lucrative potential client that the attorney would otherwise be unable to represent concurrently.[96]

Though courts have been attempting to refine the underlying rationale of the hot potato rule for nearly fifteen years, one coherent justification has not emerged. In any event, two themes run through the garden-variety applications of the hot potato rule. First is the deterrence of the "patently base and disloyal" act of a lawyer abandoning his client in order to switch sides in the midst of litigation,[97] and second is the concern for the public view of the profession when an attorney does abandons a client out of self-interested greed.[98] However, this apparent justification does not hold water when held up against the spirit of the rules regarding conflict of interest and permissive withdrawal.

The first case to promote the doctrine that the disqualification rules cannot be circumvented by dropping the less-favored client was not based on loyalty at all. In *Unified Sewerage Agency v. JELCO*,[99] a law firm accepted representation of a contractor in a contract dispute while contemporaneously engaged in representation against that contractor in an unrelated embryonic dispute with the firm's other client. Even though both parties initially consented to the conflict, the contractor withdrew consent as litigation commenced, discharged the law firm in the first lawsuit, and then moved to disqualify the law firm in the

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[96] *Id.* at 372.

[97] Wolfram, *supra* note 93, at 708.

[98] *Harte Baltimore Ltd v. First Pennsylvania Bank, N.A.,* 655 F. Supp. 419 (S.D. Fl. 1987) is a good example of a court drawing upon the "appearance of impropriety standard" for justification of attorney disqualification in a hot-potato scenario.

[99] 646 F.2d 1339 (9th Cir. 1981).

second lawsuit.[100] The trial court applied Oregon's former client rules that utilized a primitive version of the "substantial relationship" test derived from judge-made law that states "an attorney may not represent interests adverse to a former client if the factual context of the later representation is similar or related to that of the former representation."[101] The Ninth Circuit court disagreed and instead applied Canon 5, which governed concurrent representational conflicts stating that "[Canon 5] continues even though the representation ceases prior to the filing of the motion to disqualify. If this were not the case, the challenged attorney could always convert a present client into a former client by choosing when to cease to represent the disfavored client."[102]

In the end, the law firm managed to escape disqualification, despite the court's application of the more stringent standard from Canon 5.[103] Nonetheless, the facts of this case do not appear to support the court's central proposition. The application of Canon 5 in this case didn't thwart the law firm's attempt to circumvent disqualification because the client was the party who discharged the law firm, not vice versa. Instead, the court nearly fell into the trap that many similarly situated courts do when faced with a disqualification issue: whether

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[100] *Id.* at 1352.

[101] *Id.* at 1344 (citing Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980)).

[102] *Id.* at 1345 n. 4.

[103] *Id.* at 1351. The court briefly entertained the contractor's argument that the "appearance of impropriety" argument should apply in the alternative, but as pointed out by the court, the more lenient standard of Canon 9 was never intended "to override" Canon 5. *Id.*

to allow a technical violation of the Ethical codes to be used as a weapon to deprive the opposing party of its counsel of choice.[104]

For all intensive purposes, the law firm in *Unified Sewerage Agency* attempted to do the act ethically throughout the concurrent litigation: it had obtained waivers from both parties and on three different occasions met with the contractor to discuss whether it wanted the law firm to continue to represent them in the litigation.[105] Furthermore, the contractor did not discharge the law firm until it had found a substitute, then opportunistically proceeded to wait for the litigation to proceed for another seven months until filing the motion for disqualification[106] – reinforcing evidence that the law firm's actions were either an attempt to avoid disqualification, or at the very least, a result of disloyal behavior.

In *Unified Sewerage Agency*, the potential conflict always existed, but was allowable under the Ethical Codes by virtue of the parties' consent. In other words, the law firm, though acting within the rules, was "tickling the dragon's tail"[107] throughout the course of the proceedings by representing concurrently opposite parties. However, the most difficult

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[104] Rossheim, *supra* note 28, at 5.

[105] Unified Sewerage Agency v. Jelco, Inc., 646 F.2d 1339, 1342 (9th Cir. 1981).

[106] *Id.* at 1343.

[107] Crude technique of pushing together manually two pieces of uranium to calculate critical mass used by nuclear physicists during the 1940s. For a classic description, see DEXTER MASTERS, THE ACCIDENT (New York: Knopf 1955) (depicting the famous lab accident on May 21, 1946, where Dr. Louis Slotin saved his staff when he separated two pieces of uranium with his bare hands to halt a nuclear reaction, then tragically died of radiation poisoning nine days later).

problems often arise when the conflict arises *after* the agreement to represent a new client. One of most common hot potato scenarios is created when two law firms merge. For example, in *Ransburg Corporation v. Champion Spark Plug Company,*[108] a law firm represented a patent holder in an infringement proceeding against a spark plug company. Sometime later, an attorney from a different law firm created a conflict of interest when laterally relocated into the first law firm, bringing with him the spark plug company.[109] The patent holding company, upon learning of the concurrent representation of its adversary, terminated the law firm and moved for disqualification in the initial proceedings.[110] The court, citing *Unified Sewerage Agency*, held that not only will the patent holding company be treated as a current client for the purpose of not allowing easy circumvention of the rule, bolstered by notions of a "client's right to undivided loyalty" and the fear of public distrust in "law firms that switch sides [so] nimbly."[111]

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[108] 648 F. Supp. 1040 (N.D. Ill. 1986).

[109] *Id.* at 1044.

[110] *Id.* at 1042.

[111] *Id.* at 1044-45 (citing Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1269 (7th Cir. 1983) (modification in original)). For a similar case involving the merger of a law firm that was later disqualified solely on the "appearance of impropriety" grounds see *Harte Biltmore Ltd. v. First Pa. Bank*, 655 F. Supp 419 (S.D. Fl. 1987) (noting that "[a]s mergers between law firms become more common, attorneys are increasingly likely to find themselves opposing a client after a merger" and that the "[p]ublic confidence in lawyers and the legal system must necessarily be undermined when a lawyer suddenly abandons one client in favor of another). *Id.* at 422.

A recent case in Indiana is also illustrative of this problem. In *Reed v. Hoosier Health Systems, Inc.*,[112] a 2005 opinion from the Indiana Court of Appeals, a small law firm that represented a number of shareholders in an action against Hoosier Health relocated into a law firm that represented that same corporation through an insurance company.[113] Though the firm offered to withdraw from the representation of Hoosier Health, the court held that disqualification was proper, citing that "the offense inherent in taking on the conflicting representation is compounded by seeking to 'fire' the client in pursuit of the attorney's interest in taking on a new, more attractive client."[114]

In the case of *Hoosier Health*, however, one judge concurred with the result, but emphasized the potential danger in so readily granting disqualification.[115] Most noteworthy, Judge Barnes pointed out the ambiguity in Comment 4 to Rule 1.7, also present in the Model Rules of Professional Conduct,[116] which provides, "If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation."[117] However, Judge Barnes did not include the entire comment. Taken out of context, the Comment 4 to Rule 1.7 in both the Indiana Rules and the Model Rules of Professional Conduct appear to

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[112] 825 N.E.2d 408 (Ind. Ct. App. 2005).

[113] *Id.* at 410.

[114] *Id.* at 412 (quoting Universal Studios, Inc. v. Reimerdes, 98 F. Supp. 2d 449, 453 (S.D.N.Y. 2000).

[115] *Id.* at 414 (Barnes, J. concurring in result with separate opinion).

[116] MODEL RULES OF PROF'L CONDUCT, Rule 1.7 cmt. 4 (2002).

[117] *Id.* at 414 (Barnes, J. concurring in result with separate opinion) (citing IND. RULES OF PROF'L CONDUCT, R. 1.7 cmt. 4 (2004)).

leave open the justification for disqualifying a law firm from representing either party in a lawsuit where a conflict arises after representation, as was the case in both *Hoosier Health* and *Ransburg Corporation*. However, when the comment is read in its entirety, the ambiguity is dispelled. The rest of the comment is as follows:

> Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client.[118]

Judge Barnes humbly points out the proper comment to undermine the majority's reasoning, but given the importance of the rest of the comment, he does not go far enough.

Finally, in *Santacroce v. Neff*, a court for the very first time held that a terminated client would be treated as a current client in a disqualification hearing even though there clearly was no overlap in representation.[119] The proceeding involved a law firm that had long represented multi-millionaire Arthur Goldberg in both personal matters and in many of his corporations. After a while, the law firm began to represent Goldberg's girlfriend, Santacroce, in matters related to her jewelry business.[120] Goldberg subsequently died and failed to devise anything to his girlfriend. Shortly thereafter, the firm became aware that Santacroce had the intent to bring a palimony action against the estate.[121] In anticipation of

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[118] MODEL RULES OF PROF'L CONDUCT, R. 1.7 cmt. 4 (2002) (also integrated fully into the INDIANA RULES OF PROF'L CONDUCT, R. 1.7 cmt 4 (2004)) (internal citations omitted).

[119] Santacroce v. Neff, 134 F. Supp 2d. 366, 366 (D.N.J 2001).

[120] *Id.* at 367.

[121] *Id.* at 368.

representing Goldberg's estate, the firm terminated representation of Santacroce and she filed the palimony complaint a week later.[122]

The court applied Rule 1.7(a) governing current client conflicts, not Rule 1.9, in contradiction to contrary precedent that stated that "[t]he relevant date for determining status as a present or former client is the date on which the complaint was filed."[123] Instead, the court ruled that the hot potato doctrine is the "exception to the general rule that the status of a client must be determined by the date of the filed complaint"[124] and that "the complaint's actual filing date is not particularly significant when notice of the proposed complaint is what precipitated the [withdrawal.]"[125] Again, the rationale for the court's decision rested on the dual purpose of the "duty of undivided loyalty to the client" and the possibility that the "public confidence in attorneys and the legal system would be undermined."[126]

Interestingly, the district court reiterated their holding in *Universal City Studios Inc. v. Reimerdes*[127] when it stated:

> If, as one judge has written, "the act of suing one's own client is a 'dramatic form of disloyalty,'" what might be said of trying to drop the first client in an

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[122] *Id.*

[123] *Id.* at 369 (quoting Schiffli Embroidery Workers Pension Fund v. Ryan, Beck & Co., 1994 WL 62124 (D.N.J. 1994)).

[124] *Santacroce*, 134 F. Supp. 2d at 369.

[125] *Id.*

[126] *Id*. at 317 (quoting *Schiffli*, 1994 WL 62124, at *3, n.2).

[127] 98 F. Supp 2d 449 (S.D.N.Y. 2000)

> effort to free the attorney to pursue his or her self-interest in taking on a newer and more attractive professional engagement.[128]

However, in this case the temporal element of a lawyer dropping for a client for a "newer and more attractive client" isn't even present: there is no doubt that Goldberg was the law firm's client before Santacroce.[129]

As is evident from *Unified Sewerage Agency*, *Ransburg Corporation*, and *Hoosier Health*, the circumstances under which the hot potato rule have been applied to disqualify law firms for the breach of loyalty to their clients are not as simple as the hypothetical given in the Introduction.[130] On the contrary, the hot potato rule is most often applied when the law firm or the attorney is not driven by greed, but rather faced with an ethical dilemma created by forces mainly outside his or her control.

B. Exceptions to the Hot Potato Rule

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[128] *Id*. at 453.

[129] For an earlier example of this discrepancy see *Strategem Development Corp. v. Heron Int'l N.V.* 756 F. Supp. 789 (S.D.N.Y. 1991) where a law firm that had long represented a development corporation in a series of real estate transactions, but was disqualified after it erroneously filed an action against a more recent client. The court held that "[the law firm's] obligation to Strategem do not trump those it owes to [the other client], even if they predated them" and therefore the law firm must withdraw from representing either client. *Id.* at 794.

[130] *See supra*, note 30 and accompanying text.

Even as jurisdictions were adopting the hot potato rule, other courts were already revisiting the question of whether a conflict of interest exists whenever a law firm is forced to choose between two current clients.[131] As was alluded to in *Unified Sewerage Agency*, many courts are now faced with the dilemma of the duty of the court "to enforce the ethical obligations of the profession"[132] and adherence to the hot potato exception when justice does not require it.[133] Common examples of when courts will allow a firm to drop one client in favor of another when a conflict arises due to the unilateral actions of the client, or through factors outside the control of the law firm. The exceptions have been appropriately labeled as the "happenstance rule," exemplified in *Gould v. Mitsui Mining & Smelting*[134] and *Florida Insurance Guaranty Ass., Inc. v. Carey Canada, Inc.*,[135] or the "accommodation client rule," illustrated in *In Re Rite Aid*.[136]

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[131] Rossheim, *supra* note 28, at 5.

[132]Ransburg Corporation v. Champion Spark Plug Co.,, 648 F. Supp. 1040, 1047 (N.D. Ill. 1986).

[133] Anthony Davis, *On 'Thrust-Upon' Conflicts, Advance Waivers of Future Conflicts, and the 'Hot-Potato' Rule*, 234 N.Y.L.J. 3 (2005) (contrasting the New York Committee on Professional and Judicial Ethics balancing approach to pre-mature withdrawal when a conflict arises with "mechanically applying the hot-potato rule"). *Id.*

[134] 738 F. Supp. 1121 (N.D. Ohio 1990).

[135] 749 F. Supp. 255 (S.D. Fl. 1990)

[136] 139 F. Supp 2d 649 (E.D. Pa. 2001).

In both *Gould* and *Florida Insurance Guarantee*, the law firms encountered what the New York City Bar Ethics Committee labels as "thrust upon" conflicts.[137] In order for a conflict to be considered "thrust upon" the lawyer or law firm, and therefore qualify as an exception to the hot potato rule, four elements must exist:

> 1) [the conflict must] not exist at the time either representation commenced, but arose only during the ongoing representation of both clients, where 2) the conflict was not reasonably foreseeable at the outset of the representation, 3) the conflict arose through no fault of the lawyer, and 4) the conflict is of a type that is capable of being waived.[138]

In *Gould*, Jones, Day represented the company, Gould, against Pichi ney in a patent-infringement suit. At the same time, Jones, Day represented IGT in various matters. Shortly thereafter, a conflict arose when created a conflict Picheney acquired IGT. The court held that while concurrent representation of the two parties would certainly be considered inappropriate, the court allowed Jones, Day to discontinue representation of either Gould or IGT.[139] The court supported the holding on the basis that it did not see how "the rules of ethics will be furthered" by disqualifying Jones, Day due to a conflict that it did not create."[140]

Similarly, in *Florida Insurance Guaranty*, a law firm represented a mining company in asbestos litigation in the 1970s.[141] At the same time, the law firm also represented a Florida insurance company. In the 1980s, the mining company's insurance carrier and all of the other insurance carriers in the state became insolvent. By operation of law, the lone

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[137] Davis, *supra* note 133, at 3.

[138] Davis, *supra* note 133, at 3, col. 1 (2005) (citing NYC Op. 2005-5).

[139] Gould v. Mitsui Mining & Smelting Co., 738 F. Supp. 1121, 1128 (N.D. Ill. 1990).

[140] *Id.*

[141] 749 F. Supp. 255 (S.D. Fl. 1990)

insurance company represented by the law firm was forced to assume the liability of all of the insurance companies – including an insurance company currently involved in litigation against the client mining company. Again, the court found that it would not "require disqualification for the mere happenstance of an unseen concurrent adverse representation."[142] Balancing the interests involved, the court found that a judgment in the alternative would "unfairly prevent a client from retaining counsel of choice and would penalize and attorney who had done no wrong."[143]

Courts have added a third exception to the hot potato rule individuals categorized as "accommodation clients." The irony, however, is that this same exception, more liberal than the prior two exceptions, finds its genesis in the Restatement (Third) of the Law Governing Lawyers.[144] In *Rite Aid*, a law firm represented a corporation and it's former CEO in securities class litigation.[145] As the litigation progressed, it became evident that the former CEO breached its fiduciary duty to the corporation. Upon discovery, the law firm withdrew their representation from the CEO, and he subsequently retained his own counsel. In this instance, the court found that Rule 1.9 applied to the inquiry and not the more stringent Rule 1.7, and that the representation did not warrant disqualification because the CEO was merely an accommodation client as and the corporation was the primary client.[146] In other words, the

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[142] *Id*. at 260.

[143] *Id.*

[144] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §132 cmt i.

[145] *In Re Rite Aid*139 F. Supp 2d 649 (E.D. Pa. 2001).

[146] *Id.* at 660.

representation of the CEO was by virtue of the concurrent representation of the corporation and existed for the sake of lowering attorney costs.[147]

In essence, the court held that the "primary duty of loyalty" was to the corporation and therefore the firm could withdraw without penalty.[148] On its face, it would appear that even under the more liberal "substantially relationship" test under Rule 1.9, continued representation of the corporation would be barred. However, Comment i to the Restatement (Third), which the court relied upon as authority,[149] explains in situation arises between the "primary client" and the "accommodation client," the accommodation client "impliedly consent[s] to the lawyer's continuing to represent the regular client in the matter."[150]

III. ANALYSIS OF THE INCONGRUENCE OF THE HOT POTATO RULE AND THE MODEL RULES

The adoption of the hot potato rule represents a dramatic shift in the and way that conflict of interests and attorney withdrawal has been viewed in attorney ethics and the interests the modern ethical rules seek protect. The purpose of the conflict of interest rules are three fold 1) protect client confidentiality, 2) maintain an attorney's independent judgment, and 3) maintain the client's and the public's confidence in attorneys and the legal system.[151] Meanwhile, the attorney withdrawal rules seek to balance lawyer mobility, professional

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[147] *Id.* at 658.

[148] *Id.* at 659.

[149] *Id.* (citing the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132, cmt i. (2000)).

[150] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132, cmt. i (2000).

[151] O'Mary, *supra* note 16, at 1204.

independence and an attorney's own moral constitution with the countervailing interests of preventing or minimizing harm to the client.[152] The purpose of this section is to prove that the hot potato rule does not adequately invoke any of these interests in any of these three applications.

The hot potato rule cannot be supported on the text of the conflict of interests rules or the rules governing an attorney's ability to withdraw from representation permissively. In this section, each of the scenarios where the hot potato rules have been applied will be analyzed in turn. The first scenario is when an attorney unwittingly becomes entangled in a conflict of interest between two current clients. Though this scenario is the most difficult to defend because the attorney is faced with co-equal duties of loyalty to each of his clients.[153] Any attempt to protect the interests of one of the clients necessarily causes injury to the other.[154] Thus, as one judge has noted, the effect of allowing the attorney to choose which client to drop is equivalent to "dividing clients into two classes and holding that lawyers may injure a second-class client with impunity so long as they do so to advance the interest of a first-class client."[155]

However, this fear is unavailing and fails to take into account the alternative – that is, forcing an attorney to withdraw totally from both representations. Keep in mind; just because an attorney attempts to turn one client into a "former client" vis-à-vis withdrawal, he is not immune from the repercussions of his unethical actions of concurrently representing adverse

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[152] ABA MODEL RULES OF PROF'L RESPONSIBILITY R. 1.16(b) (2002).

[153] *Flatt*, 885 P.2d at 958.

[154] *Id.* at 960 (Kennard, J. dissenting).

[155] *Id.*

clients. Rule 1.7 comment 3 of the Model Rules of Professional Conduct states that when "[a] conflict of interest [exists] before representation is undertaken . . . the representation must be declined, unless the lawyers obtains the informed consent of each client."[156] Therefore, the breach in loyalty is the result of accepting the adverse representation in the first place. In any event, the attorney is liable for sanctions, providing a "solemn denunciation of a violation of a lawyer's ethical duties."[157] Enforcement of the hot potato rule in this context only carries it into disqualification proceedings; however, at this point, the damage has already been done. The only added effect is both parties are deprived of their attorney of choice as opposed to just one.[158]

The second situation arises when a client originally consents to a conflict and subsequently withdraws that consent, as in the case of *Unified Sewerage Agency*.[159] However, the Model Rules explicitly deal with this situation in the comments and describe a different outcome than the hot potato rule.[160] Comment 21 states:

> A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked because of a material change in circumstances, the reasonable expectations of

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[156] MODEL RULES OF PROF'L CONDUCT, R. 1.7 cmt. 3 (2002).

[157] *Saloman*, 790 F. Supp at 1401.

[158] *Id.*

[159] *See*, *e.g. Unified Sewerage Agency*, 646 F.2d at 1344.

[160] MODEL RULES OF PROF'L CONDUCT, R. 1.7 cmt. 21 (2002).

> the other client and whether material detriment to the other clients of the lawyer would result.[161]

This comment is in direct opposition to the prohibition in the hot potato rule for two reasons. First, it is implicit in the comment that the attorney withdraws from the representation when a client revokes his consent. If this were not the case, the second clause stating "[w]hether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients" would be rendered inoperative because Comment 6 of the same rule states that "a lawyer may not act as an advocate in one matter against a person the lawyers represents in some other matter, even when the maters are wholly unrelated."[162] This clause is a reference, in part, to the "substantial relationship" test under rule 1.9 governing former client conflicts. Thus, a reasonable interpretation of the comment is that when the matters are wholly unrelated and a client has consented to the concurrent representation, representation of the other client will be appropriate.

Second, because withdrawal did not cause actual harm to the now-former client, that client's interests are weighed, pursuant to the last clause of the comment, against the interests of both the lawyer and the other client.[163] Here, the other client is innocent and should not have to bear the cost of the other client revoking their consent.[164] The attorney is innocent as

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[161] *Id.*

[162] *Id.* at cmt. 6.

[163] *Id.* at cmt. 21.

[164] *Salomon*, 790 F. Supp. at 1400.

well because he fulfilled his initial duty of giving both clients informed consent.[165] Forcing the attorney to withdraw from both cases entirely is a "material" detriment under Comment 21. On balance, a client's exercise of the right to revoke consent and the loyalty of their attorney does not justify depriving a second client of their choice of comments in the Model Rules of Professional Conduct address this situation.

As the concurring judge noted in *Reed*, Rule 1.7 comment 4 explains that when a conflict arises after representation commences, Rule 1.16 governs whether the attorney may continue to represent any of the clients after the attorney withdraws from the representation that caused the conflict.[166] Such a reading has two effects. First, forcing an attorney to withdraw from the other representation according to the hot potato rule would render this comment worthless. Second, the law would have the contradictory effect of prohibiting the continuation of conflicting representation while prohibiting withdrawal to avoid it.[167]

The final two scenarios raise serious questions relating to our current system of attorney ethics, loyalty, and the state of the legal marketplace. The true hot potato scenario, where there is a "gap" between the withdrawal from one client and the formation of the attorney-client relationship of the new, more lucrative client,[168] calls into question the purpose

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[165]In order for a client to consent, the MODEL RULES OF PROF'L CONDUCT, R. 1.7(b)(4) requires "each affected client [to give] informed consent, confirmed in writing."

[166]*Reed*, 825 N.E.2d at 414 (Barnes, J. concurring); MODEL RULES OF PROF'L CONDUCT, R. 1.7 cmt. 4 (2002).

[167] Tuchler, *supra* note 18, at 1029.

[168] *See Santacroce*, 134 F. Supp 2d at 366.

of loyalty in ethics jurisprudence and the risks that the rules of attorney professional conduct wish to take into consideration.

As described prior, the current approach of the ethical rules is to balance the inevitably of an attorney facing a conflict with the relative risk that an intolerable amount of harm will manifest.[169] Therefore, an analysis of what harms are likely to befall the "dropped" client and which principles seek to protect his interests under the hot potato rule is required. There is no doubt that loyalty is the central concern in the conflict of interests rules and the hot potato rule. However, pushed to its outer boundaries, notions of loyalty deprive individuals from obtaining their clients of choice[170] – ultimately leading to a shortage in supply of legal services and higher attorney's fees. Therefore, only issues of loyalty that have the potential to cause actual harm are taken into consideration. In case of the Model Rules of Professional Conduct, a breach of loyalty is intolerable when 1) there is a risk that confidential client information is shared, 2) representation will be limited due to the interests another, and 3) sufficient damage to the public's confidence will occur.[171]

Geoffrey Hazards and William Hodes, authors of *The Law of Lawyering*, are the most ardent, and arguably only, opponents of the hot potato rule.[172] Their first argument rests on the relationship between Rules 1.7 and Rules 1.9 – the rules governing current and former

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[169] HAZARD & HODES, *supra* note 8 at §10.4.

[170] *Id.* at §10.2.

[171] ABA STANDARDS OF IMPOSING LAWYER SANCTIONS, II. THEORETICAL FRAMEWORK, R. 4(a).

[172] HAZARD & HODES, *supra* note 8, at §20.10.

client conflicts, respectively.[173] Both rules deal explicitly with the protection of loyalty, but to varying degrees based on the interests involved.[174] For the most part, the analysis for whether an attorney has breached his duty of loyalty to either a former client or a present client is largely the same; the goal of the former client rules is to "provide assurance during the representation that they have no need to fear suffering adverse consequences later of having retained a lawyer currently."[175] The one exception is that an attorney cannot concurrently represent two clients, absent consent, even if those matters are unrelated.[176] In this respect, the loyalty interest regarding the representation of current client is less "concrete."[177] On the other hand, the requirement that an attorney cannot represent anyone in a matter adverse to a current client reflects the intangible harm to the ongoing client relationship when an attorney presently advocates against that client.

Second, concurrently representing two clients in unrelated matters assumes there remains a subconscious risk that the attorney's professional judgment will be compromised.[178] Conversely, under the "substantial relationship" analysis, Rule 1.9 protects attorney loyalty to former clients because it prevents the attorney from using confidential information in future,

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[173] *Id.*

[174] *Id.* at §13.4.

[175] HAZARD & HODES, *supra* note 8, at § 13.4.

[176] *Compare* MODEL RULES OF PROF'L CONDUCT R.1.7 cmt. 6 and R. 1.9(a) & (b).

[177] HAZARD & HODES, *supra* note 8, at § 13.4.

[178] *Developments in the Law – Conflicts of Interests in the Legal Profession*, *II. Models of Ethical Regulation*, 94 HARV. L. REV. 1251, 1265 n. 68 (1981)

related matters.[179] Therefore, the hot potato rule's requirement of using the current conflict of interests rules in analyzing whether there has been a breach of loyalty is erroneous because the hot potato rule does not call into question the independence of the attorney's professional judgment or harm to the ongoing attorney-client.

The largest roadblock to Hazard & Hodes structural argument is the adoption of Comment 6 to Rule 1.7 dealing with job negotiations with an adverse firm or party.[180] Recall, Comment 6 warns against the possibility of an attorney's own economic interest materially limiting the efficacy of a current representation.[181] Yet, the accompanying ABA Formal Op. 96-400 actually *encourages* withdrawal from the representation absent client consent.[182] Thus, instead of Comment 6 being the strongest support for the hot potato rule in the Model Rules, the ABA's interpretation is explicit disapproval of it.

Hazard & Hodes second argument against the hot potato rule is that it is contrary to the permissive withdrawal scheme under Rule 1.16 of the Model Rules if Professional Conduct because "those provisions permit a lawyer to cease representation – assuming no harm to the client – for no reason or because the lawyer is bored or overworked or because more lucrative work presents itself."[183] To Hazard and Hodes, there is no breach of loyalty to the former client because he has not suffered a cognizable harm under Rule 1.16(b).[184]

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[179] HAZARD & HODES, *supra* note 8, at §20.10.

[180] *See supra* note 70 and accompanying text.

[181] MODEL RULES OF PROF'L CONDUCT R. 1.7, cmt. 6 (2002).

[182] ABA Comm. on Ethics and Prof'l Responsibility, Fromal Op. 96-400 (1996).

[183]HAZARD & HODES, *supra* note 8, at § 20.10.

[184] *Id.*

Viewed through this framework, the hot potato rule exemplifies a tension in the rules themselves: the fact that loyalty to a client "subjugates personal autonomy" of the attorney.[185] The Model Rules recognizes this tension and therefore aims to limit an attorney's discretion to withdraw when the client will suffer harm. The hot potato rule's addition of a mental element to the permissive withdrawal rule while dispensing of the showing of harm requirement is an aberration in the entire withdrawal scheme.[186] The result, Hazard & Hodes concludes, is to impermissibly "convert the lawyer-client relationship into one of continuing servitude."[187] On a deeper level, this damages the personal nature of the attorney client freedom because it limits the ability of the attorney to choose which causes are worthy of their loyalty;[188] the hot potato rule imposes that choice upon him.

In many ways, Hazard & Hodes criticisms of the hot potato rule in this context fail to take into account the most oft cited reason for the rule: the public's negative view of an attorney who fickly drops a client for monetary purposes.[189] Upon inspection, this reason cannot be justified given the current approach of the Model Rules for two reasons.

First, the harm, if any caused by such an act is not morally equivalent to the other areas of the Model Rules that take into account an attorney's motivation. There are two other sections of the Model Rules where misconduct is dependent on the lawyer's motivation. The first is contained in Model Rule of Professional Conduct Rule. 4.4 – Respect for Third Parties.

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[185]McChrystal, *supra* note 3, at 376.

[186]HAZARD & HODES, *supra* note 8, at § 20.10

[187] *Id.*

[188]*Id.*

[189]*Ransburg*, 648 F. Supp. at 1044-45.

Under Rule 4.4, it is misconduct for "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person."[190] The second area is under Rule 8.4 comment 3, which states, "A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status."[191] Actions contrary to rule 8.4 are unethical under the general principle that any attempt to use the courts to cause harm undermines elementary notions of justice. Even absent harm, an attorney's motivation to perpetuate a wrong via the courts calls into question his role as an officer of the court. As for the comment to Rule 8.4, there is no comparison to an attorney who is driven partially by greed, a principle that is acceptable under the Model Rules, and one who uses their position as an attorney to witness their prejudices. Moreover, under Rule 8.4 there is only a violation if "such actions are prejudicial to the administration of justice,"[192] contrary to the hot potato rule where no harm is required.

The hot potato rule, Rule 8.4, and Rule 4.4 have "intrinsic," as opposed to "instrumental" justifications for their existence.[193] In the student project titled *Developments in the Law – Conflicts of Interests in the Legal Profession*, *II. Models of Ethical Regulation*, the authors extensively explore the philosophical underpinnings of the ethical precepts that govern attorney conduct.[194] In the article, an intrinsically justified form is misconduct is one

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[190] MODEL RULES PROF'L CONDUCT, R. 4.4(a) (2002).

[191] *Id.* at R. 8.4, cmt. 3.

[192] *Id.*

[193] Harvard Law Review, *supra* note 178, at 1253.

[194] *Id.* at 1251.

that is "prohibited, not because of [its] consequences, but because of structured features of the act itself that make it wrong to bring about the consequence in this way."[195] In this respect, the hot potato rule based on intrinsic justifications, not because of the harm that occurs, but because dropping a client disrespects the "integrity of the client as an individual" and is "inherently wrong."[196] If this is true, the permissive withdrawal rule embodied in Rule 1.16(b)(1) could not exist at all because this intrinsic view implies that an attorney is unethical whenever an attorney chooses to end his fiduciary relationship before its natural conclusion because the attorney has, by definition, placed some other interest above the desire to further represent the client.

Ethics that are justified intrinsically naturally have their genesis under Canon 5's "appearance of impropriety" standard – the vestige that an attorney is acting ethical as long as he appears to be acting ethical.[197] In any event, Rule 1.9 governing conflicts of interests still provides the better paradigm. When the attorney-client relationship is severed, an attorney's actions only appear disloyal if they are relevant to the prior representation.[198] At the same time, regardless of the framework to evaluate the conduct, speculative harms that seek to protect the public, or, at the very least, hypothetical client expectations are only justified if the harms are great.[199] In terms of the hot potato rule, the harms to the public or to the

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[195] *Id.*

[196] *Id.* at 1258, 1260.

[197] Kozinski, *supra* note 59, at 1005.

[198] HAZARD & HODES, *supra* note 10, at § 13.2.

[199] Harvard Law Review, *supra* note 178, at 1268 n. 74.

expectations of the individual client are neither probable nor substantial enough to justify its limiting effect on individual attorney decision-making.

IV. PRACTICAL EFFECT S OF THE HOT POTATO RULE

In addition to the lack of support for hot potato rule under the current Model Rules and the philosophical underpinnings of the attorney-client relationship, three problems emerge when the hot potato rule is applied to garden variety premature withdrawal scenarios. First, the hot potato rule is not likely to apply to small law firms or concern the most vulnerable clients.[200] Second, the efficacy of the rule is limited under the fact that the prohibition is "contracted around" via advance waiver agreements offered by large law firms. Third, in the absence of an advance waiver agreement, the rule is circumvented the ability of law firms to juggle potentially adverse clients until the proverbial plate can be cleared of all conflicts.[201]

Whenever an attorney withdraws before the natural completion of the representation, transactional costs necessarily are borne by the client.[202] Early withdrawal forces the client to find new counsel and expend resources getting the new counsel "up to speed" in the litigation. This is true regardless of whether the client suffers actual prejudice from the withdrawal. Individuals suffer the most from attorney withdrawal because of the "informational assymetr[y]" that exists between unsophisticated clients and their attorneys and the fact that individuals are less adept at navigating through the legal marketplace.[203] Thus, it follows

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[200] SHAPIRO, *supra* note 5, at 137.

[201] *Id.* at 189.

[202] Pilcher, *supra* note 13, at 846.

[203] SHAPIRO, *supra* note 5, at 137.

logically that individuals, particular those less affluent, as "one shot participants in the [legal] marketplace,"[204] will suffer the greatest economic harm from the severance of the agency relationship between attorney and client in hot potato scenarios.[205] Paradoxically, individuals are the least likely victims of being dropped like a hot potato because they pose little threat of barring a law firm from future representation from a conflict of interest. In contrast, a corporation may have multiple subsidiaries and be engaged in numerous lawsuits in any given moment, thus creating multiple avenues upon which the client may veto future representation.[206]

Second, smaller law firms tend to represent less affluent, individual clients tend.[207] Small law firms are less likely to be tempted to drop a client because they, as a whole, encounter less unforeseeable conflicts of interest less often than larger law firms do.[208] As

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[204] Label used to described "[individuals who] will hire a lawyer only once in their lifetime." David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 829 (1992).

[205] *Id*.

[206] SHAPIRO, *supra* note 5, at 100-01.

[207] *Id.* at 36.

[208] *Id.* at 20. Perhaps with one exception: conflicts arising from an attorney concurrently representing either co-defendants or co-plaintiffs in a lawsuit or criminal matter tend to be common in smaller law firms. However, as a practical matter, these situations do not need to invoke the hot potato rule because upon withdrawal a conflict would still exist under the more liberal "substantial relationship" standard of MODEL RULE OF PROF'L CONDUCT R. 1.9. *See also* Model RULE OF PROF'L CONDUCT R. 1.7, cmt 29 (stating

Susan Shapiro, sociologist and senior research fellow for the American Bar Association, presents in *Tangled Loyalties: Conflict of Interest in Legal Practice*, "[c]onflicts of interest multiply rapidly as firms expand."[209] In her book, Shapiro illustrates this when she quotes a downstate Illinois lawyer who claims that concurrently representing two clients whose interests are adverse is "as freak as running into the same guy twice on the highway."[210]

Because larger law firms are more likely to have a greater number of clients, and, of those clients, a greater percentage of them will be complex organizations (i.e. corporations), it is therefore certain that the hot potato rule will overwhelmingly be invoked against larger law firms representing corporations or their subsidiaries.[211] However, while the makeup of a law firm's clientele may make it susceptible to conflicting interests, it is often the bureaucratic nature of the law firm that enables it to "skirt" the hot potato rule.[212]

"Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails.")

[209] SHAPIRO, *supra* note 5, at 186 – 91.

[210] *Id.* at 70.

[211] The cases in Section II of this Note reinforce this fact: all of the cases involved medium to large size law firms and all but one involved corporations. The lone case regarding representation of an individual, *Santacroce*, 134 F.Supp.2d at 367-69, was merely by virtue of the one of client's status as CEO of the client corporation and the second client's status as the CEO's girlfriend.

[212] SHAPIRO, *supra* note 5, at 189.

The first and most obvious way for a law firm to become nearly immune is for the client to sign a prospective waiver to consenting to the conflict.[213] Prospective waivers to consent to future conflicts are permissible according to the ABA.[214] A client may consent to a conflict arising under the hot potato rule despite the adverse party is not identifiable; the client only needs to be "given enough information to make an intelligent decision."[215] However, the ability of a client to consent to this type of conflict of interest is problematic because the conflict is inherently a moral one.[216] The supposed conflict in the hot potato rule cannot be cured by screening, so it is difficult to justify how a client can consent to a "patently base and disloyal" action.[217] As a practical matter, Shapiro notes, clients tend to disfavor these "lawyer-client prenuptial agreements . . . for the same reason lovers decry prenuptial agreements: they represent a rather distrustful, pessimistic beginning to a relationship, at best, and may scare off prospective partners at worst."[218] It is common for corporations to have rules to never consent to a conflict.[219]

Even absent a waiver from a client, large law firms have devised way to circumvent the hot potato rule. In *Tangled Loyalties,* Shapiro gives several examples of how law firms are able to use their large bureaucracies to juggle smaller clients while anticipating larger

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[213] *Id.* at 187.

[214] John W. Allen, *Conflicts of Interest – The Basics,* Feb. 1999 at 183.

[215] *Id.*

[216] Wolfram, *supra* note 93, at 708.

[217] *Id* at 708-09.

[218] SHAPIRO, *supra* note 5, at 187.

[219] Rossheim, *supra* note 28, at 7.

ones.[220] The most common method is the "screw up excuse," which may be possible when a firm receives a smaller case on referral and a more lucrative client presents itself a short time later.[221] Here, the firm will merely call back the referring attorney or law firm and as one attorney put it, "claim a mistake had been made, that our docket department screwed up and we already had the case in for somebody else."[222] Another tactic is keeping the new client in limbo, or "juggling the hot potato."[223] In this case, the attorney tells the new client that they must check in with their "executive committee," or the equivalent, until the firm is able to "clear the underbrush" and remove whatever conflicts may be present.[224] In essence, "firms [are able to] use their bureaucratic intake procedures as a delaying tactic, [or] use their contacts with insurers are a buffer between clients, and so on."[225]

To be sure, corporations deserve loyal representation just as much as individuals, however, the justifications supporting the hot potato rule break down when applied in the corporate context. First, supporters of the hot potato rule expose a "friendship" view of the

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[220] SHAPIRO, *supra* note 5, at 189.

[221] *Id.*

[222] *Id.*

[223] *Id.* at 190.

[224] *Id.*

[225] SHAPIRO, *supra* note 5, at 187. Another method that Shapiro encountered in the course of her book was the use of threatening withdrawal as a tool to get the client to settle an ongoing case quickly. *Id.* at 187. Thus, instead of dropping the client like a hot potato, the law firm "drop[s] the client slowly and ambivalently like a bad habit. *Id.* at 189. This strategy is patently unethical. *Stanley v. Richmond*, 41 Cal. Rptr. 2d 768, 782-83 (1993).

attorney-client relationship; that is, loyalty is breached when the attorney takes any action not authorized by his client.[226] However, this view weakens as corporations begin to treat outside legal services as a commodity.[227] Today, more corporations utilize in-house counsel for routine legal work and utilize firms on a "project by project, case by case basis."[228] They also tend to allocate their legal needs to several law firms at the same time.[229] Therefore, the risk that the corporation has actually felt "betrayed" is relatively slight when the corporation already has other counsel waiting in the wings.[230] The same is true when the corporation has the luxury of in-house counsel, as was the case in *Ransburg Corp*.[231] As the court in *Atromick International, Inc v. Drustar*[232] noted, "The concepts of having a 'personal attorney' or a 'general corporate counsel' are much less meaningful today, especially among sophisticated users of legal services, than in the past."[233] The progression is natural: "[a]s corporate clients

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[226] Harvard Law Review, *supra*, note 178, at 1269 .

[227] Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. Mem. L. Rev. 631, 676 (2005).

[228] *Id.*

[229] Wilkins, *supra* note 204, at 827.

[230] Harvard Law Review, *supra* note 178, at 1269. For a good example, see the abovementioned *Unified Sewerage Agency*, 642 F.2d at 1343. In that case, recall, the client corporation already had alternative counsel when it withdrew consent to the law firm's concurrent representation.

[231] 648 F. Supp. at 1042.

[232] 134 F.R.D. 226 (S.D. Ohio 1991).

[233] *Id.* at 232.

. . . become less loyal to the firms they hire, lawyers . . . become less loyal to the firms that employ them."[234]

Because there is no actual "harm" done to the client from the actual withdrawal, i.e. the case was not prejudiced, it is unlikely that true hot potato scenarios are brought to the attention of disciplinary officials. In addition, the ex post review system inherent in disciplinary processes are of little use to corporations.[235] Instead, corporations depend on disqualification motions to enforce the ethical rules.[236] Thus, because there has been no actual *harm* to the client and because it is unrealistic to say that the corporation is "betrayed" by the so-called disloyal act of the attorney, the use of disqualification as a mode of enforcement of the ethical rules is inappropriate – the proceedings have not been "tainted" by the acts of the attorney.[237]

When used as a vehicle for exacting attorney disqualification, the hot potato rule is reduced to a mere "pretext to cause their adversaries expense and delay."[238] This, in turn, encourages "taint-shoppers," which are defined as "institutional clients [that] sprinkle insignificant litigation among many firms, solely so they may bring motions to disqualify

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[234] Kirkland, *supra* note 227, at 676 (citing MARC GALANTER & THOMAS M. PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM, 46-50 (1991).

[235] Wilkins, *supra* note 204, at 826.

[236] *Id.* As is evident from the case law tracking the evolution of the hot potato rule: the majority of opinions stem from disqualification proceedings.

[237] O'Mary, *supra* note 20, at 1231.

[238] Rossheim, *supra* note 28, at 5.

their opponent's counsel in future litigation."[239] Many courts, including the one in *Reed v. Hoosier Health*, have already acknowledged this danger.[240] In the end, the use of the hot potato rule as a "sword"[241] to disqualify opposing counsel may have the effect of "undermining public confidence in the legal profession."[242]

Finally, all conflict of interest rules inevitably "pit partners or practice groups against each other" because "decisions about which client to take and which client to turn away" inevitably leads to prioritization of one group above another.[243] As Shapiro notes at the end of her discussion, the extension of the client's veto to future representation vis-à-vis the hot potato rule leaves the law firm with no choice but to decline representation from the

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[239]*Id.* For example, corporations continually attempted to keep on retainer the two leading Mergers & Acquisitions firms on Wall Street during the 1980s in order to prevent those firms from leading hostile takeover against their companies. *Id.*

[240]For another example, see *SWS Financial Fund A. v. Solomon Brothers*, 790 F. Supp. 1392 (N.D. Ill. 1992), where the judge acknowledged:

> Clients of enormous size and wealth, and with a large demand for legal services should not be encouraged to parcel their business among dozens of the best law firms as a means of purposefully creating the potential for conflict. With simply a minor "investment" of some token business, such clients would in effect be buying an insurance policy against that law firm's adverse representation.

Id. at 1402.

[241]Rossheim, *supra* note 28, at 5 (quoting from an interview with William Hodes).

[242] O'Mary, *supra* note 16, at 1232.

[243]Kirkland, *supra* note 227, at 671.

perspective client, thus exposing further the "fault lines within the law firm" when "a lawyer bringing in a huge piece of business is paralyzed by the paltry case of a colleagues."[244]

IV. CONCLUSION

The rationales supporting the application of the hot potato rule are unavailing in today's legal marketplace.[245] On the one hand, the intentions of those who support rule are admirably idealistic; but the rule as applied fails to produce its desired effect.[246] As a matter of logic, the hot potato rule does not to sit squarely within the current Model Rules of Professional Conduct, specifically within the liberal rules governing permissive withdrawal.[247] As a matter or principle, conceptions of loyalty in the hot potato doctrine do not comport with the type of interests traditionally protected under the conflict of interests rules.[248] Finally, as applied, the rule fails to protect the type of clients that are least able to bear the costs of an attorney's premature withdrawal.[249] As infrequent and unsophisticated

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[244] SHAPIRO, *supra* note 5, at 191.

[245] *See* Love, *supra* note 68, at 442, 443 (noting the Model Rule's mindfulness of the rapidly changing professional environment).

[246]Pilcher, *supra* note 13, at 842.

[247]HAZARD & HODES, *supra* note 8, at § 20.10.

[248] *See generally* Eleanor W, Meyers, *Examining Independence and Loyalty*, 72 TEMP. L. REV. 857 (1999) (explaining the interests involved in lawyer mobility and client loyalty).

[249] *See* McChrystal, *supra* note 3, at 417 (stating that "client abandonment always imposes some cost on the client, if only in terms of the client's hurt feelings, annoyance, or inconvenience").

users of legal services, individuals are more likely to view their attorney as a counselor, and less of an advocate.[250] Individuals innately feel the sense of betrayal when an attorney suddenly abandons them in order to "switch sides" or pursue representation of another client.[251] Nonetheless, overzealous use of the hot potato rule by corporate clients not even harmed increases the danger of producing unnecessary and damaging satellite litigation, the sole purpose of which is to increase overall costs of litigation and cause delay.[252] In this respect, the hot potato rule has been adopted in an era where it has no import.

The hot potato rule is a rule by fiat. As such, courts have attempted to justify its existence based on broad aphorisms of loyalty with little inquiry into their underlying worth. The effect is that courts, from the very beginning, have had to revisit the rule in order to carve out numerous exceptions to find a "fit" for the rule in today's professional thought and practice.[253] As more exceptions are created, the shaky framework upon which the hot potato rule was built withers under its own weight. Therefore, the American Bar Association and the courts in the respective states need to resuscitate the permissive rules of withdrawal that focus

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[250] Kirkland, *supra* note 227, at 676 (citing MARC GALANTER & THOMAS M. PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM, 46-50 (1991).

[251] *See* ROTUNDA & DZIENKOWSKI, *supra* 31, at § 1.7-5 (describing the transience of corporate loyalties).

[252] *See* Rossheim, *supra* note 28, at 5 (outlining the dangers of the offensive use of disqualification procedures).

[253] *See* Tuft, *supra* note 2, at 26-27 (arguing that a balance must be struck between conflict of interests and lawyer mobility).

on the actual harm caused to the client and not the attorney's subjective motivation for doing so.