## COMMENTS

# A Balanced Approach to Mandamus Review of Attorney Disqualification Orders

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You are general counsel for a company that has been sued for patent infringement. Given the high-stakes nature of the litigation, you hire a large and reputable law firm to defend you. On the eve of trial, the plaintiff files a motion to have your outside counsel disqualified due to an alleged conflict of interest. The district court grants the motion because your counsel also represents, in an unrelated matter, a company that is in the process of acquiring the plaintiff. You have two possible responses: you can hire new counsel and bring them up to speed at great expense, or you can seek interlocutory appellate review of the disqualification order. Seeking a writ of mandamus in the court of appeals is one of the two methods available to you for obtaining review at this stage,[1] and whether you prevail will depend in large part on which standard of review the court of appeals applies in exercising its mandamus jurisdiction. The above scenario is not far-fetched.[2] Indeed, in recent years, courts have seen an enormous increase in motions for attorney disqualification.[3]

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1 The other potential method of review is certification pursuant to 28 USC § 1292(b) (2000) (allowing for interlocutory review when the district court is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation").

2 For example, a substantially similar case arose in *In the Matter of Sandahl*, 980 F2d 1118 (7th Cir 1992) involving the law firm then called Mayer, Brown & Platt.

3 According to one survey, in the period from 1986 to 1990, six times more disqualification motions were reported in federal court opinions than in the period from 1970 to 1975. See Kenneth L. Penegar, *The Loss of Innocence: A Brief History of Law Firm Disqualification in the Courts*, 8 Georgetown J Legal Ethics 831, 889 (1995). This increase cannot be attributed to an increase in the total number of civil cases filed, which increased only gradually during the relevant period. See id at 890. Penegar also estimates that there are disqualification orders in two-thirds of all lawsuits. Id at 832. See also Barry Tarlow, *RICO Report: Who Did Your Partners Represent Before They Met You?*, Champion 56, 63 (Nov 2003) (noting the increasing frequency of motions by prosecutors to disqualify defense counsel, and attributing it partially to the fact that such motions are no longer reviewable until a verdict is rendered); Douglas R. Richmond,

America's largest law firms are growing even larger, in part through mergers and lateral hiring of attorneys from other firms.[4] Their clients are likewise expanding and adopting complex organizational structures.[5] Potential conflicts of interest arise more frequently than ever as a result of these changes. Federal courts may disqualify attorneys from litigation due to violations of state and American Bar Association (ABA) rules governing professional responsibility[6] or violations of standards developed through common law. Such disqualification motions, if successful, not only deny litigants their counsel of choice, but also result in delays and additional litigation expenses associated with bringing new counsel up to speed. Given the high stakes, parties frequently appeal the grant or denial of disqualification motions.

In a trilogy of cases heard in the first half of the 1980s (the "*Firestone* trilogy"), the Supreme Court held that neither orders denying nor orders granting attorney disqualification motions are final judgments[7] and that neither falls within the collateral order exception to the final judgment rule.[8] Therefore, disqualification orders are subject

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*The Rude Question of Standing in Attorney Disqualification Disputes*, 25 Am J Trial Advoc 17, 17 (2001) (noting the increasing frequency of attorney disqualification motions).

4 See Amon Burton, *Migratory Lawyers and Imputed Conflicts of Interest*, 16 Rev Litig 666, 666 (1997) (citing a survey finding that approximately 40 percent of partners at major law firms are lateral hires, and noting that mergers are occurring at an "increasing rate"). For an argument that ethics rules should be adjusted to reflect changes in the legal industry, see David Hricik, *Uncertainty, Confusion, and Despair: Ethics and Large-Firm Practice in Texas*, 16 Rev Litig 705, 745 (1997) (advocating changes in ethics laws to provide more "clear answers" when resolving ethical issues, and arguing that bar associations should be "more proactive").

5 See Ronald D. Rotunda, *Conflicts Problems When Representing Members of Corporate Families*, 72 Notre Dame L Rev 655, 681 (1997) (noting that among the benefits of multiple incorporation is the ability for large companies to "conduct[] business through a series of corporate entities, perhaps with a complex, ever-changing and bewildering organizational chart, using an impenetrable fog of subsidiaries and affiliates").

6 See ABA Model Rules of Professional Conduct (2002). The rules as adopted vary from state to state.

7 The final judgment rule derives from 28 USC § 1291 (2000), which provides the courts of appeals with jurisdiction over appeals from all final decisions of the district courts. See also *Lauro Lines SRL v Chasser*, 490 US 495, 497 (1989) (noting that parties may generally appeal only from a final judgment); *Catlin v United States*, 324 US 229, 233 (1945) (defining a final judgment as "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment").

8 The *Firestone* trilogy consists of *Firestone Tire & Rubber Co v Risjord*, 449 US 368, 370 (1981) (holding that "orders denying motions to disqualify counsel are not appealable final decisions under § 1291"); *Flanagan v United States*, 465 US 259, 260 (1984) (holding that "a District Court's pretrial disqualification of defense counsel in a criminal prosecution is not immediately appealable" under § 1291); and *Richardson-Merrell Inc v Koller*, 472 US 424, 426 (1985) (concluding that "orders disqualifying counsel in a civil case are not collateral orders subject to immediate appeal").

The collateral order doctrine is a judicially created exception to the final judgment rule. In creating the collateral order doctrine, the Supreme Court recognized that there is a small class of

to interlocutory review only if they are certified pursuant to 28 USC § 1292(b) or via mandamus.[9] However, while the Supreme Court left open the possibility that parties subject to disqualification orders can petition for writs of mandamus in "exceptional circumstances,"[10] the Court failed to provide any guidance to help lower courts determine what qualifies as exceptional. As a result, the circuit courts have taken divergent approaches to reviewing petitions for mandamus in this area.

Some circuits apply a strict standard of review to petitions for mandamus in the attorney disqualification context so that mandamus review does not become a method for circumventing the prohibition on interlocutory appeals.[11] Other circuits, however, apply a more relaxed standard that approaches the de novo review applied on direct

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orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v Beneficial Industrial Loan Corp*, 337 US 541, 546 (1949). To fall within the collateral order exception, an order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v Livesay*, 437 US 463, 468 (1978). The First Circuit put these requirements more succinctly: "separability, finality, urgency, and importance." *United States v Alcon Laboratories*, 636 F2d 876, 884 (1st Cir 1981).

In one extraordinary case the Tenth Circuit did allow an appeal under the collateral order doctrine. See *United States v Bolden*, 353 F3d 870, 876–78 (10th Cir 2003) (allowing an appeal under the collateral order doctrine of a district court's disqualification of an entire U.S. Attorney's office because "appellate vindication cannot undo such an invasion of Executive authority").

9 See *Firestone*, 449 US at 378–79 n 13 (leaving open three options for those faced with disqualification orders: ask the trial court for reconsideration, seek 28 USC § 1292(b) certification, or seek a writ of mandamus "in the exceptional circumstances for which it was designed"). See also *Koller*, 472 US at 435 (reiterating that § 1292(b) certification and mandamus are still available for parties seeking review of disqualification orders). Note that petitions for writs of mandamus are not technically appeals but rather are original actions brought in the appellate court. See, for example, *Cotler v Inter-County Orthopaedic Association*, 530 F2d 536, 538 (3d Cir 1976) (holding that because the appellate court exercises mandamus jurisdiction as an original act of law, litigation costs for a mandamus proceeding may accordingly be "assessed in favor of the prevailing party in such an action at law as in any other"). The *Koller* Court also suggests, somewhat implausibly, that disqualified attorneys whose reputations have been injured may seek "relief from the Circuit Judicial Council pursuant to 28 U.S.C. § 332(d)(1)." 472 US at 435. However, rather than reviewing district court judgments for error, the Council is charged with providing "an administrative remedy for misconduct of a judge for which no judicial remedy is available." *In re Charge of Judicial Misconduct*, 595 F2d 517, 517 (9th Cir 1979). As such, even a gross error will not be remedied by the Council so long as the error does not derive from actual misconduct.

10 *Koller*, 472 US at 435, citing *Firestone*, 449 US at 378–79.

11 See, for example, *Sandahl*, 980 F2d at 1121 ("To avoid the collapse of mandamus into an appeal . . . a litigant who seeks mandamus to set aside an order of disqualification must show that the order is patently erroneous."); *In re Mechem*, 880 F2d 872, 874 (6th Cir 1989) (determining that findings of fact in a disqualification order are subject to a "clearly erroneous" standard of review); *In re Bushkin Associates, Inc*, 864 F2d 241, 245 (1st Cir 1989) (suggesting that "mandamus does not lie to control run-of-mine misuses of judicial discretion").

appeal so that they might shape the substantive law of attorney disqualification.[12]

This Comment argues that neither the very strict standard nor the de novo standard comports with Supreme Court precedent. A standard for mandamus that is virtually impossible to meet renders meaningless the Supreme Court's preservation of this avenue for relief. A de novo standard, on the other hand, ignores the Court's directive that mandamus be reserved for the "exceptional circumstances for which it was designed."[13] In contrast, a balanced approach to mandamus review of disqualification orders—one that combines a high threshold showing of a clear right to mandamus relief with a more flexible understanding of irreparable harm—has advantages over both of the above approaches in terms of efficiency and justice, especially when combined with mechanisms that assure greater uniformity and predictability in the law of attorney disqualification. This balanced approach dovetails nicely with that taken by the Seventh Circuit and comports with the pragmatic underpinnings of the *Firestone* trilogy. However, the balanced approach constitutes an improvement over existing approaches in that it distinguishes between orders granting and orders denying disqualification motions when assessing whether a party faces irreparable harm.

Part I of this Comment provides a broad overview of the substantive law of attorney disqualification and an introduction to the writ of mandamus. This Part also discusses the Supreme Court's pronouncements in this area and describes the trends leading up to the *Firestone* trilogy. Part II compares the divergent approaches taken by the courts of appeals in the wake of the *Firestone* trilogy.[14] Finally, Part III ad-

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12 See, for example, *In re American Airlines, Inc*, 972 F2d 605, 609 (5th Cir 1992) (holding that a district court's application of ethical standards in a disqualification order is subject to de novo review); *In re Dresser Industries, Inc*, 972 F2d 540, 543 (5th Cir 1992) (holding that where "disqualification is based on a state's disciplinary rules, a court of appeals should consider the district court's interpretation of the state disciplinary rules as an interpretation of law, subject essentially to *de novo* consideration"); *Christensen v United States District Court for the Central District of California*, 844 F2d 694 (9th Cir 1988) (vacating a district court judgment without granting it any deference and thus reviewing the applicable law on disqualification orders under an effectively de novo standard).

13 *Firestone*, 449 US at 379 n 13.

14 This Comment focuses on attorney disqualification orders in the civil context. Disqualification orders in criminal cases present very different issues from those in civil cases. For example, unlike those appealing a disqualification order after final judgment in a civil suit, a petitioner who was wrongly denied his counsel of choice in a criminal case need not show that he was prejudiced by this denial. See *Flanagan*, 465 US at 267–68 (noting that "prejudice to the defense is presumed" in such circumstances). Moreover, the Court has indicated that the justifications for the finality requirement are particularly strong in criminal cases due to the various interests in seeing a speedy resolution to the trial. See id at 264–65, citing *United States v Hollywood Motor Car Co*, 458 US 263, 265 (1982) (noting that policy considerations against piecemeal litigation are

vances a balanced approach to mandamus review of attorney disqualification orders and attempts to reconcile it with Supreme Court precedent. Part III also proposes methods by which greater uniformity can be achieved in the substantive law of attorney disqualification while maintaining a relatively demanding standard for the issuance of mandamus.

## I. BACKGROUND

### A. Substantive Law of Attorney Disqualification

Every court has the inherent power to supervise the conduct of attorneys appearing before it.[15] Indeed, many courts see this supervision as their duty to the public.[16] While federal law ultimately governs the conduct of attorneys in federal court,[17] courts are guided by a number of ethical standards, including "case law, applicable court rules, and 'the lore of the profession,' as embodied in codes of professional conduct."[18] Chief among these codes is the ABA Model Rules of Professional Conduct (the "Model Rules") and its predecessor, the ABA Model Code of Professional Responsibility.[19] The Model Rules, as adopted by state supreme courts, are the primary source of ethical standards in federal courts. However, even these rules are not binding on the federal courts.[20]

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"strongest in the field of criminal law") and *Cobbledick v United States*, 309 US 323, 325 (1940) (stating that such judicial efficiency considerations are "especially compelling in the administration of criminal justice").

15 See *Ex parte Burr*, 22 US (9 Wheat) 529, 531 (1824) (stating that the power to suspend an attorney is "incidental to all Courts, and is necessary for the preservation of decorum, and for the respectability of the profession"). See also *Chambers v NASCO, Inc*, 501 US 32, 46 (1991) (discussing the implied powers of courts to control the conduct of attorneys appearing before them); *Ramsay v Boeing Welfare Benefit Plans Committee*, 662 F Supp 968, 969 (D Kan 1987) (noting that the court's broad power to disqualify attorneys is inherent in its "general supervisory authority").

16 See, for example, *In re Cendant Corp*, 260 F3d 183, 199 (3d Cir 2001) (explaining that courts are empowered to regulate the attorneys that appear before them in order to "preserve the integrity of the judicial process").

17 See *In re Snyder*, 472 US 634, 645 n 6 (1985).

18 Id at 645.

19 See ABA Model Rules (cited in note 6). The ABA Model Code of Professional Responsibility was promulgated in 1969 and subsequently adopted by the majority of federal jurisdictions. See *Tannahill v United States*, 25 Cl Ct 149, 161 n 23 (1992) (noting that, prior to the adoption of the Model Rules, the majority of states and federal jurisdictions had adopted the Model Code). The Model Rules replaced the Model Code in 1983 and have since been adopted in every state but California, which has its own code of professional conduct. See Richard E. Flamm, *Lawyer Disqualification: Conflicts of Interest and Other Bases* § 1.1 at 5–6 (Banks & Jordan 2003).

20 See Judith A. McMorrow and Daniel R. Coquillette, *Moore's Federal Practice: The Federal Law of Attorney Conduct* § 807.02 at 807-13 (Matthew Bender 3d ed 2001) (describing the common law nature of attorney disqualification and the "scant attention" given by courts to local rules).

The Model Rules were designed to be a guide to ethical behavior for use in disciplinary proceedings, not for attorney disqualification.[21] Even where courts do identify violations of ethical rules, these do not command disqualification, which is considered an extreme remedy.[22]

Cases raising issues of attorney conduct most frequently involve conflicts of interest.[23] These conflicts of interest can be between an attorney and his current client (frequently arising in cases of multiple representations)[24] or between an attorney and his former client (to whom the attorney continues to owe a duty of loyalty).[25] Of course, other types of ethics violations, such as contacting jurors or offering monetary inducements to expert witnesses prior to their testimony, may also yield disqualification orders.[26]

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21 See ABA Model Rules, Scope ¶ 20 (cited in note 6). See also David Hricik and Jae Ellis, *Disparities in Legal Ethical Standards Between State and Federal Judicial Systems: An Analysis and a Critique*, 13 Georgetown J Legal Ethics 577, 577 (2000) (noting the "curious fact that courts rely on standards that expressly apply only in disciplinary proceedings in deciding non-disciplinary issues, such as disqualification motions").

22 See, for example, *Duncan v Merrill Lynch, Pierce, Fenner & Smith*, 646 F2d 1020, 1025 n 6 (5th Cir 1981) (noting, in the context of class actions, that disqualification is "an extreme remedy that will not be imposed lightly"), revd on other grounds, *Gibbs v Paluk*, 742 F2d 181, 185 (5th Cir 1984). See also *Herr v Union Local 306*, 943 F Supp 292, 294 (SD NY 1996) (holding that ethical standards should not be "mechanically applied when disqualification is raised in litigation"); *Armstrong v McAlpin*, 625 F2d 433, 444 (2d Cir 1980) ("Weighing the needs of efficient judicial administration against the potential advantage of immediate preventive measures, we believe that unless an attorney's conduct tends to 'taint the underlying trial' . . . courts should be quite hesitant to disqualify an attorney."), vacd on other grounds, *McAlpin v Armstrong*, 449 US 1106 (1981).

23 See Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 Fordham L Rev 71, 71 n 4 (1996) (citing a study by Daniel Coquillette finding that "out of 443 reported federal decisions involving attorney conduct over a five-year period, 46% involved conflict-of-interest rules and an additional 10% involved the attorney-witness disqualification rules, which many regard as conflict-of-interest rules").

24 See, for example, *Smiley v Director, Office of Workers Compensation Programs*, 984 F2d 278, 282 (9th Cir 1993) (analyzing conflicts created by multiple representations and finding an attorney's "dual representation" of adverse interests to be sufficient grounds for disqualification where "consent was lacking"); *In re Freedom Solar Center, Inc*, 776 F2d 14, 15 (1st Cir 1985) (holding that a "debtor's counsel may not also represent the debtor's sole shareholder when that sole shareholder is attempting to purchase some of the debtor's assets and may be liable for preferential transfers"); *International Electronics Corp v Flanzer*, 527 F2d 1288, 1296 (2d Cir 1975) (finding conflict of interest considerations present in civil litigation "where one of the defendants was formerly a member of the law firm which represented all the defendants in a transaction that is the subject of [the] suit" and directing the trial judge to explore "adequately" whether a conflict of interest was present).

25 See, for example, *Mannhalt v Reed*, 847 F2d 576, 580 (9th Cir 1988) (noting that conflicts arise where a lawyer is forced to divide his loyalty between a present and past client).

26 For example, attorneys have been disqualified for contacting a represented party without the permission of his lawyer, see *Faison v Thornton*, 863 F Supp 1204, 1207 (D Nev 1993); contacting jurors, *Bushkin Associates, Inc v Raytheon Co*, 121 FRD 5, 8 (D Mass 1988); and offering opposing counsel's expert witness a monetary inducement prior to his testifying, *Erickson v Newmar Corp*, 87 F3d 298, 303–04 (9th Cir 1996).

The multiplicity of sources forming the substantive law of attorney disqualification contributes significantly to the inconsistency among federal courts in the application of this body of law. In addition, some of the divergence can surely be attributed to the diversity of views in the legal community regarding the broader purposes of attorney disqualification. While some commentators criticize disqualification as frequently unnecessary[27] and subject to abuse by litigants jockeying for strategic advantage,[28] others suggest that the practice can control dangerous conflicts of interest and promote public confidence in the judicial system.[29] In any event, these characteristics of attorney disqualification law render all the more acute the effects on the bar of an absence of interlocutory review of these orders. The lack of uniformity in how this law is applied results, in part, from this absence of top-down control.

## B. The Pre-*Firestone* Landscape and the *Firestone* Trilogy

Motions to disqualify counsel were relatively infrequent until the 1970s.[30] The substantial increase in such motions since then reflects significant change in the legal industry's structure. Law firms grew,

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27 See, for example, Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 Hofstra L Rev 971, 973–74 (2001) (arguing that sophisticated parties should be trusted to enter into prospective conflicts waiver agreements with their attorneys). See also David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv L Rev 799, 882 (1992) (discussing the efficacy of various mechanisms, including the market, disciplinary bodies, and civil liability, in regulating attorney conflicts of interest).

28 For example, Susan Shapiro describes a number of ways in which corporations can use the law of attorney disqualification to their advantage:

> They give business—any kind of business—to a law firm known to orchestrate hostile takeovers so that their company will not be a takeover target of that firm. Or perhaps a company is secretly planning to sue another company. But, first, for strategic advantage, it gives some business to the law firm that typically handles that company's litigation, or to the best local litigation firms, thereby increasing its adversary's defense costs and restricting its access to legal talent.

Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 L & Soc Inquiry 87, 110 (2003).

29 See, for example, Orrin G. Judd, *Conflicts of Interest—A Trial Judge's Notes*, 44 Fordham L Rev 1097, 1112 (1976) ("[N]o judge properly can disregard this responsibility [to disqualify attorneys] to enforce respect for the judicial process where the very integrity of that process is threatened by an attorney's conflict of interest."). See also *Brown v Eighth Judicial District Court*, 116 Nev 1200, 14 P3d 1266, 1269 n 4 (2000) ("[D]isqualification may be warranted if an appearance of unfairness or impropriety is great enough to undermine public trust and confidence in the judicial system."); *Lovell v Winchester*, 941 SW2d 466, 469 (Ky 1997) (holding that the appearance of impropriety justifies attorney disqualification because it "promotes the public's confidence in the integrity of the legal profession").

30 See Penegar, 8 Georgetown J Legal Ethics at 832 (cited in note 3).

often through mergers and lateral hiring.[31] At the same time, clients that had previously relied on a single firm for outside counsel began to spread their legal work across multiple firms.[32] In addition, federal dockets expanded in size, and the nature of that growth made disqualification more likely; there was a disproportionate increase in large and complex business litigation, which is likely to involve several parties who are in turn likely to be repeat purchasers of legal services.[33]

These changes in the legal industry increased not only the likelihood of actual conflicts but also opportunities to gain strategic advantage in litigation through the use of disqualification motions. In many cases, parties would file strategic motions to disqualify opposing counsel, and if denied, appeals under the collateral order doctrine. Thus, they would delay the litigation, waste their opponents' resources, and potentially deny them their choice of counsel.[34]

The frequency with which the circuit courts faced appeals from disqualification orders in the period leading up to the *Firestone* trilogy resulted from the fact that many circuits allowed parties to appeal these orders as of right under the collateral order doctrine.[35] In addition, as noted above, permitting appeals as of right allowed litigants to use disqualification orders to gain strategic advantage. In fact, in the period leading up to *Firestone*, the Sixth and Eighth Circuits, both of which had previously allowed appeals under the collateral order doctrine, changed course in response to concerns that the motions and appeals were "disguised harassment."[36] It is against this backdrop that

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31 See Ted Schneyer, *Nostalgia in the Fifth Circuit: Holding the Line on Litigation Conflicts Through Federal Common Law*, 16 Rev Litig 537, 542 (1997).

32 Id at 542–43. Of course, the existence of these conflicts rules is one reason why companies use multiple law firms.

33 Id.

34 See, for example, *Allegaert v Perot*, 565 F2d 246, 251 (2d Cir 1977) (expressing concern over the purely tactical use of disqualification motions); *Woods v Covington County Bank*, 537 F2d 804, 813 (5th Cir 1976) (noting that attorneys "now commonly use disqualification motions for purely strategic purposes").

35 The Third, Fourth, Fifth, Seventh, and Tenth Circuits all allowed interlocutory appeal of denials of disqualification orders under the collateral order doctrine in the pre-*Firestone* period. The First, Second, Sixth, Eighth, Ninth, and D.C. Circuits did not. See *Firestone Tire & Rubber Co v Risjord*, 449 US 368, 373 n 10 (1981) (outlining the circuit split).

Moreover, the pre-*Firestone* circuit split over whether to allow interlocutory appeal as of right under the collateral order doctrine roughly correlates with the current divide over the appropriate standard for mandamus relief in the attorney disqualification context. Accordingly, one might conclude that the real disagreement among the circuits is not over the narrow question of which standard to apply in reviewing petitions for mandamus in this context but rather the broader question of whether interlocutory review of attorney disqualification orders is a good idea at all.

36 *Melamed v ITT Continental Baking Co*, 592 F2d 290, 295 (6th Cir 1979) (observing that disqualification motions "can easily be simply 'disguised harassment'") (internal citation omit-

the Supreme Court's jurisprudence in this area should be interpreted.[37] Although the *Firestone* trilogy primarily employs doctrinal arguments in holding that attorney disqualification orders are not appealable under the collateral order doctrine, the Court appears to have been motivated, at least in part, by very pragmatic policy considerations.[38]

In the first of the *Firestone* trilogy, *Firestone Tire & Rubber Co v Risjord*,[39] the Court held that orders denying disqualification motions were not subject to immediate review under the collateral order doctrine.[40] The *Firestone* Court explicitly left open the question of whether orders *granting* disqualification were immediately appealable. In two subsequent decisions, *Flanagan v United States*[41] and *Richardson-Merrell Inc v Koller*,[42] the Court held that these too did not qualify for appeal under the collateral order doctrine.

While the Court closed off the collateral order route to interlocutory review of attorney disqualification orders, it did allow that in a narrow range of cases parties may seek mandamus relief at an interlocutory stage.[43] The standards for mandamus vary across circuits and legal contexts, but two important requirements can be derived from

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ted), revd, *Firestone*, 449 US at 380 n 15. See also *In re Multi-Piece Rim Products Liability Litigation*, 612 F2d 377, 378 (8th Cir 1980) (agreeing with the Sixth Circuit's rationale on "disguised harassment" and holding, prospectively, that orders denying disqualification were no longer appealable under the collateral order doctrine, though continuing to recognize that orders granting such motions were appealable), vacd and remd, *Firestone*, 449 US at 370.

37 Although the Supreme Court vacated *Koller* on jurisdictional grounds, the Court acknowledged the D.C. Circuit's concerns regarding the tactical use of disqualification motions. See *Koller v Richardson-Merrell Inc*, 737 F2d 1038, 1051 (DC Cir 1984) (noting that the "tactical use of motions to disqualify counsel" had "become so prevalent in large civil cases in recent years as to prompt frequent judicial and academic commentary"), vacd and remd, 472 US 424, 436 (1985) ("[W]e share the Court of Appeals' concern about 'tactical use of disqualification motions' to harass opposing counsel.").

38 See *Koller*, 472 US at 434, citing Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, 15 *Federal Practice and Procedure* § 3907 at 433 (West 1976) (noting that "[m]ost pretrial orders of district judges are ultimately affirmed" and rejecting the suggestion that "the delay resulting from the occasionally erroneous disqualification outweighs the delay that would result from allowing piecemeal appeal of every order disqualifying counsel").

39 449 US 368 (1981).

40 Id at 375.

41 465 US 259 (1984) (holding that orders disqualifying counsel in the criminal context were not appealable under the collateral order doctrine).

42 472 US 424 (1985). A circuit split emerged after *Flanagan* over the appealability of orders granting disqualification in the civil context. The Fifth and Sixth Circuits relied on *Flanagan* in holding that such orders were not so reviewable, while the Second, Eleventh, Federal, and D.C. Circuits distinguished *Flanagan* and allowed such appeals in civil cases. *Koller*, 472 US at 432. The *Koller* Court held that orders disqualifying counsel in the civil context were unreviewable under the collateral order doctrine. Id at 426.

43 *Firestone*, 449 US at 379 n 13 (indicating that "in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available"). See also *Koller*, 472 US at 435 (confirming that mandamus is still available in exceptional circumstances to parties subject to disqualification motions).

Supreme Court precedent: a petitioner must demonstrate irreparable harm and a clear right to relief.[44] In determining under what circumstances the Court intended that mandamus be available to litigants, some insights can be drawn from the Court's collateral order doctrine decisions.

The *Firestone* Court held that while denial of a disqualification motion does satisfy the first prong of the collateral order doctrine,[45] and assumed without deciding that such orders satisfy the second prong,[46] such an order is not "effectively unreviewable" from a final judgment and so fails the last prong of the test.[47] In so holding, the Court rejected as insufficient the petitioner's claim that it might be irreparably harmed by "the possibility that the course of the proceedings may be indelibly stamped or shaped with the fruits of a breach of confidence or by acts or omissions prompted by a divided loyalty."[48] This suggests that such concerns will not satisfy the irreparable harm requirement for obtaining mandamus relief, either. However, the Court's opinion leaves open the possibility that such orders may yet be irreparable under the right circumstances.[49] Unfortunately, the circumstances that may justify interlocutory relief are left to the imaginations of the lower court judges.[50]

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44 See *Mallard v United States District Court for the Southern District of Iowa*, 490 US 296, 309 (1989) (enumerating the mandamus requirements as (1) the lack of "adequate alternative means" and (2) a "clear and indisputable" right to issuance); *Allied Chemical Corp v Daiflon, Inc*, 449 US 33, 35 (1980) (articulating the mandamus requirements in similar language); *Bankers Life & Casualty Co v Holland*, 346 US 379, 384 (1953) (holding that mandamus was inappropriate where "it [was] not clear that adequate remedy [could not] be afforded petitioner in due course" and the petitioner had not "met the burden of showing that its right to issuance of the writ [was] 'clear and indisputable'").

45 *Firestone*, 449 US at 375 (holding that such an order "conclusively determine[s] the disputed question"). Note, however, that Justice Rehnquist would have held that the denial of a motion to disqualify does not satisfy this first prong because a district court judge can reconsider at any time and order the disqualification. Id at 381 (Rehnquist concurring).

46 Id at 376 (majority) (assuming without deciding that the question is "completely separate from the merits of the action").

47 Id at 377:

> The decision whether to disqualify an attorney ordinarily turns on the peculiar factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits.

48 Id at 376, quoting Brief for Petitioner, *Firestone Tire & Rubber Co v Risjord*, No 79-1420, *15 (S Ct filed July 18, 1980) (available at 1980 WL 339807).

49 *Firestone*, 449 US at 378–79 n 13.

50 While the Supreme Court failed to explicitly specify the circumstances in which mandamus relief should be available to redress erroneous disqualification orders, Judge Michael McConnell's student comment is somewhat illuminating in this regard. See Michael McConnell, Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U Chi L Rev 450, 472–80 (1978) (noting that a review of Supreme Court jurisprudence "yields certain doctrinal principles with which to evaluate the appropriateness of

Similarly, the *Koller* Court indicates that although a petitioner might suffer substantial delay in getting the relief he seeks if he is forced to change counsel, this does not render a disqualification order appropriate for interlocutory review under the collateral order doctrine.[51] The Court also rejected the argument that the delays caused by "injudicious use of disqualification motions" justify allowing interlocutory appeals from disqualification orders.[52] Likewise, the Court was not persuaded by the argument that attorneys suffer a harm from disqualification that would go without redress in the absence of interlocutory review:[53] the Court held that "[a]s a matter of professional ethics," only the client's needs should govern the decision of whether and when to appeal.[54] In addition, the Court held that increased litigation expenses are "not sufficient to set aside the finality requirement imposed by Congress."[55] Finally, the Court was unconvinced by the broader policy concern over the tactical use of disqualification orders by litigants, concluding that the trial courts can more effectively police the parties.[56] The Court's holdings that the above effects do not render a disqualification order effectively unreviewable may also suggest that these effects do not satisfy the irreparable harm requirement for

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using the writ to review disqualification denials"). Both the Sixth and Eighth Circuits relied upon McConnell's analysis in their discussions of the avenues for interlocutory review left open after the collateral order path was closed. See *Multi-Piece Rim Products*, 612 F2d at 378; *Melamed*, 592 F2d at 295. The *Firestone* Court did the same. See 449 US at 378 n 13. McConnell recognized that "[s]ome mechanism must be available . . . to review a blatantly incorrect order where special circumstances make the consequences to the party unusually harsh." McConnell, Comment, 45 U Chi L Rev at 464. The fact that the Supreme Court cited ten pages of McConnell's comment when it discussed mandamus may suggest that the Court had similar reasons for retaining a narrow mandamus remedy while eliminating interlocutory appeals as of right. The nature and degree of burdens that satisfy the irreparable harm requirement for mandamus relief should be analyzed accordingly.

51 *Koller*, 472 US at 434.

52 Id.

53 If the client prevails with new counsel or settles the suit, an erroneous disqualification order is rendered moot, and if the client loses, he may nevertheless be unable to demonstrate prejudice.

54 *Koller*, 472 US at 434–35, citing ABA Model Rules of Professional Conduct 1.7(b), 2.1 (1985).

55 *Koller*, 472 US at 436.

56 Id (responding to the D.C. Circuit's analysis that failing to review disqualification orders at the interlocutory stage raises the stakes in a world where parties use these orders to gain strategic advantage). Indeed, district courts have occasionally imposed sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure to discourage the abusive use of disqualification motions. See Penegar, 8 Georgetown J Legal Ethics at 858 (cited in note 3) ("Rule 11 sanctions have begun to be imposed on lawyers who file (or resist) . . . [disqualification] motions without sufficient factual basis or for improper purposes."). See also *Optyl Eyewear Fashion International Corp v Style Cos*, 760 F2d 1045, 1051 (9th Cir 1985) (affirming a district court's imposition of sanctions on an attorney who brought a meritless disqualification motion solely for tactical reasons and in bad faith). Nevertheless, policing by district courts works only when those courts do not themselves err. Adding another layer of review could potentially reduce error costs.

mandamus relief.[57] However, the fact that the Court once again explicitly left open mandamus as a path for interlocutory review suggests that it acknowledged that in some circumstances the burdens placed on parties due to the disqualification of their counsel will be so great as to qualify as irreparable harm. Therefore, even if disqualification of one's counsel of choice is not de facto irreparable harm on its own, when combined with a very great burden in terms of litigation costs and delay it may be.

### C. Mandamus Generally

In circumstances in which other forms of interlocutory review, including review under the collateral order doctrine, are unavailable, parties may petition for writs of mandamus.[58] Although litigants have used the writ for many purposes in its long history,[59] it is now best understood as akin to an interlocutory appeal, a means to procure interlocutory review of a district court order.[60] The writ offers relief in those "instances where rigid enforcement of the final judgment rule would result in injustice."[61]

The writ is regarded as a "drastic" remedy, "to be invoked only in extraordinary situations."[62] Mandamus is reserved for those instances

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57 Another way to reconcile the Court's holding that these effects do not render an order effectively unreviewable with its reservation of mandamus is to suggest that the "effectively unreviewable" standard in the collateral order context is not identical to the "irreparable harm" standard in the mandamus context. At least some courts suggest that the irreparable harm requirement for mandamus relief tracks the "effectively unreviewable" prong of the collateral order doctrine. See *In re Papandreou*, 139 F3d 247, 250 (DC Cir 1998) (reasoning that "mandamus's 'no other adequate means' requirement tracks *Cohen*'s bar on issues effectively reviewable on ordinary appeal"). See note 8. This need not be the case, however, and it is entirely plausible, given the paucity of cases in which the collateral order doctrine has been found to apply, that the requirement of irreparable harm for mandamus is less demanding. Of course, the dearth of collateral order doctrine cases can be explained on other grounds (that is, the separability requirement might be as effective a roadblock to jurisdiction under the collateral order exception). Analyzing the differences between the "effectively unreviewable" requirement and the "irreparable harm" requirement would necessitate looking well beyond the attorney disqualification context. As such, this suggestion is beyond the scope of this Comment.

58 The federal courts derive jurisdiction to consider petitions for mandamus from the All Writs Act, 62 Stat 944 (1948), codified at 28 USC § 1651(a) (2000) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

59 See, for example, *Marbury v Madison*, 5 US (1 Cranch) 137, 139 (1803) (holding that the appropriate remedy would be a writ of mandamus compelling delivery of the commission).

60 See, for example, *Ex parte Republic of Peru*, 318 US 578, 583 (1943) (indicating that the writs have traditionally been used "to exert the revisory appellate power over the inferior court").

61 *In re American Medical Systems, Inc*, 75 F3d 1069, 1077 (6th Cir 1996).

62 *Allied Chemical Corp v Daiflon, Inc*, 449 US 33, 34 (1980). See also *Ex parte Fahey*, 332 US 258, 260 (1947) ("As extraordinary remedies, [writs of mandamus, prohibition, and injunction against judges] are reserved for really extraordinary causes."). Some courts suggest that this is so

of "clear abuse of discretion or 'usurpation of judicial power'"[63] and where the petitioner has satisfied the "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'"[64] Furthermore, mandamus is available only where no adequate alternatives exist.[65] Whereas under the collateral order doctrine the challenge for parties seeking interlocutory relief is jurisdictional, the challenge with mandamus is actually qualifying for relief: the Court has made it exceedingly difficult to satisfy the requirements for issuance of the writ.[66]

The courts of appeals have operationalized the Supreme Court's directives in different ways. While the Sixth and Ninth Circuits have adopted multifactor balancing tests,[67] the Seventh Circuit considers only whether a petitioner has a clear and indisputable right to relief and whether the petitioner faces irreparable harm.[68] The various approaches utilized by the circuit courts and the conflicting standards employed by some of the circuits point to the highly discretionary nature of mandamus relief.[69] Moreover, courts operationalize the mandamus standard differently depending on the legal context.[70] This ex-

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because a petition for a writ of mandamus has "the unfortunate consequence of making the judge a litigant." Id at 260. However, all appeals effectively make the district court an interested party in some sense, so it is not clear that this explains why mandamus is special.

63 *Holland*, 346 US at 383.

64 Id at 384.

65 See, for example, *Kerr v United States District Court*, 426 US 394, 403 (1976).

66 See, for example, *Allied Chemical*, 449 US at 36 (illustrating with a Gilbert & Sullivan line that writs of mandamus are to be issued only in rare, exceptional circumstances: "What never? Well, *hardly* ever!").

67 The Sixth Circuit, for example, considers whether (1) the petitioner "has no other adequate means . . . to attain the relief desired"; (2) "[t]he petitioner will be damaged or prejudiced in a way not correctable on appeal"; (3) "[t]he district court's order is clearly erroneous as a matter of law"; (4) "[t]he district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules"; and (5) "[t]he district court's order raises new and important problems, or issues of law of first impression." *In re Bendectin Products Liability Litigation*, 749 F2d 300, 304 (6th Cir 1984) (noting that these are guidelines that are to be balanced against each other, not requirements that must each be met). This mirrors the Ninth Circuit's guidelines. See *Bauman v United States District Court*, 557 F2d 650, 654–55 (9th Cir 1977). Note that factors (1) and (2) are closely related, if not identical. Also note that while factor (3) appears to conflict with factor (4) and factor (4) appears to conflict with factor (5), these conflicts are not fatal given that these factors are guidelines that need not all be met.

68 See, for example, *In re Barnett*, 97 F3d 181, 183–84 (7th Cir 1996) (stating that a disqualification order could be challenged with mandamus where the petitioner shows both "irreparable harm" and a "*clear* right to relief").

69 See Steven Wisotsky, *Extraordinary Writs: "Appeal" by Other Means*, 26 Am J Trial Advoc 577, 582–83 (2003) (suggesting that "writ usage is governed by soft situational discretion" resulting in a jurisprudence that is a "legal realist's paradise").

70 For example, cases involving mandamus review of decisions to allow or disallow jury trials are considered special and therefore not analogous. See Nathan A. Forrester, Comment, *Mandamus as a Remedy for the Denial of Jury Trial*, 58 U Chi L Rev 769, 778 (1991) (explaining that the irreparable harm requirement is softened for this category of cases). For a discussion of mandamus review in the judge recusal context, see Wisotsky, 26 Am J Trial Advoc at 584–85 (cited in note 69).

plains why the courts struggle to arrive at an appropriate standard for mandamus relief in the somewhat unique attorney disqualification context.

Interestingly, the Sixth Circuit formulates the requirement that the petitioner have a clear and indisputable right to relief as a requirement that the order be clearly erroneous as a matter of law. While clearly erroneous is a standard ordinarily associated with findings of fact, it effectively conveys the more demanding nature of mandamus review for errors of law; this is not the de novo standard applied on review in other circumstances. Likewise, ordinary abuse of discretion will not justify mandamus relief when that is the applicable standard.

## II. DIVERGENT APPROACHES AMONG THE CIRCUITS

### A. Circuits That Relax the Standard

Although the Supreme Court indicates that the mandamus exception to the prohibition of interlocutory appeal of disqualification orders is quite narrow,[71] some circuits have seized upon this avenue and expanded its availability. For example, while many courts interpret the traditional mandamus requirement that a petitioner demonstrate his "clear" or even "clear and indisputable" right to relief to require a finding of something akin to "clear error" but with respect to questions of law,[72] the Fifth Circuit has interpreted this requirement such that they may review a "district court's interpretation of . . . disciplinary rules as an interpretation of law, subject essentially to *de novo* consideration."[73]

This approach allows the Fifth Circuit to require that district courts apply its preferred substantive law of attorney disqualification. For example, the *Dresser* court utilized a de novo standard of review to hold that national conflict of interest standards apply in the Fifth

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71 *Firestone*, 449 US at 378–79 n 13.

72 See, for example, *In re Bushkin Associates, Inc*, 864 F2d 241, 245 (1st Cir 1989) (explaining that the legal question at issue was "at least fairly debatable" and that generally, "a showing of legal error sufficient to win reversal on direct appeal, without more, does not warrant resort to mandamus"). The First Circuit added that the decision to disqualify an attorney once a violation is found is essentially a discretionary one and that "mandamus is generally thought an inappropriate prism through which to inspect exercises of judicial discretion." Id.

73 *In re Dresser Industries, Inc*, 972 F2d 540, 543 (5th Cir 1992) (indicating that a court will interpret ethics rules as it would any other source of law because "district courts enjoy no particular advantage over appellate courts in formulating ethical rules to govern motions to disqualify"), citing *Woods v Covington County Bank*, 537 F2d 804, 810 (5th Cir 1976), and *Unified Sewerage Agency v Jelco Inc*, 646 F2d 1339, 1342 n 1 (9th Cir 1981). Likewise, precedent in the Fifth Circuit suggests that "a district court's ruling upon a disqualification motion is not a matter of discretion." *In re American Airlines, Inc*, 972 F2d 605, 609 (5th Cir 1992).

Circuit.[74] Likewise, in *In re American Airlines, Inc*,[75] the Fifth Circuit held that "little or no deference is proper in reviewing [the district court's] interpretation of ethical rules."[76]

As to the second requirement for mandamus, that the ruling will cause the petitioner some irreparable harm in the absence of interlocutory relief, the Fifth Circuit has concluded that the Court has not foreclosed the possibility that a very substantial delay or increase in litigation costs might justify mandamus relief.[77] It has also considered the broader precedential import of a case as impacting the decision to grant mandamus relief.[78] Similarly, the Ninth Circuit held in *Christensen v United States District Court for the Central District of California*[79] that the petitioner's inability to be represented *at trial* by the counsel of his choice was irreparable in that this harm could not be redressed on appeal from final judgment.[80]

More troubling from the perspective of one interested in maintaining a rigorous standard for mandamus relief is the *Christensen* court's discussion of the requisite finding of error justifying mandamus. The Ninth Circuit purported to grant mandamus only where the court was "firmly convinced that [the] district court erred in deciding" to disqualify the petitioner.[81] However, it is not clear that "firmly convinced" implied anything more stringent than a finding of mere error. The court never once mentions the district court's lack of reasonabil-

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74 The district court in *Dresser* interpreted Texas Disciplinary Rule 1.06(b) such that disqualification was in order only when a law firm was representing opposing parties in "substantially related" litigations or when the firm's ability to represent its client will be in some other manner "adversely limited" by representing the opposing party in an unrelated litigation. Texas Disciplinary Rules of Professional Conduct (1989), reprinted in Tex Gov Code Ann, title 2, subtitle G, appendix (Vernon Supp 1995). See also *Dresser*, 972 F2d at 542 (reviewing the district court's determination). The Fifth Circuit, in reviewing Dresser's mandamus petition, instead applied the national ethics standards (the ABA Model Rules, the Code of Professional Responsibility, and the Restatement of the Law Governing Lawyers) that prohibit any representations against current clients without their consent. See id at 543–45 (stating that a disqualification motion in a "generic civil case" is "governed by the ethical rules announced by the national profession in light of the public interest and the litigants' rights"). Note that the Fifth Circuit, despite applying a de novo standard, inexplicably stated that the district court "clearly erred" in solely applying local ethics rules. Id.

75 972 F2d 605 (5th Cir 1992).

76 Id at 609.

77 Id (holding that the "nature and size" of the litigation may preclude the petitioner from getting adequate relief on direct appeal).

78 Id (holding as relevant the fact that the legal issues addressed in the underlying suit have broader relevance), citing *In re Burlington Northern, Inc*, 822 F2d 518, 523 (5th Cir 1987). There is some basis for this consideration in Supreme Court cases regarding advisory mandamus generally and in Judge McConnell's comment. See McConnell, Comment, 45 U Chi L Rev at 474–76 (cited in note 50) (collecting cases).

79 844 F2d 694 (9th Cir 1988).

80 Id at 697 ("Once a new attorney is brought in, the effect of the order is irreversible.").

81 Id, quoting *In re Cement Antitrust Litigation*, 688 F2d 1297, 1306–07 (9th Cir 1982).

ity during its long and involved discussion of the appropriate legal standard and how it should be applied.[82]

## B. Circuits That Tighten the Standard

Taking the approach opposite to the Fifth and Ninth Circuits, the First Circuit interprets the holdings of the *Firestone* trilogy such that mandamus is inappropriate in the vast majority of cases and, in fact, may never be justified in the attorney disqualification context.[83] Indeed, the First Circuit appears to go beyond the Supreme Court, holding that "disqualification orders plainly do not meet the first of these [mandamus] requirements," that the denial of interlocutory relief will subject the petitioner to some kind of special, irreparable harm.[84] Thus, the First Circuit seems to foreclose the possibility of mandamus relief, even in exceptional circumstances. Like the First Circuit, the Sixth Circuit does not consider additional costs or delays imposed on a litigant as satisfying the requirements for mandamus relief.[85]

Though finding the lack of irreparable harm dispositive, the First Circuit goes on to consider the second prong of the test, requiring that the petitioner's right to relief be clearly established. In *In re Bushkin Associates, Inc*,[86] the court held that legal error sufficient to warrant reversal on direct appeal may not rise to the level necessary to qualify for mandamus relief.[87] Even more menacing for those who seek mandamus relief from the First Circuit is the court's limited view of the circumstances in which mandamus should issue generally. The court requires that a lower court acted "clearly without jurisdiction"[88] or that it "abused its discretion to such an extreme and injurious degree that

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82 *Christensen*, 844 F2d at 697–99 (determining that the "substantial relationship test," which "prohibits an attorney from undertaking representation of an adverse party that is 'substantially related' to the former representation," is inapplicable to the underlying situation in which the district court disqualified counsel).

83 See *Bushkin*, 864 F2d at 243 (While the *Firestone* trilogy does not "bar mandamus challenges to disqualification orders in so many words, their import is clear. The common strands which weave their way through the *Koller/Flanagan/Risjord* trilogy strongly suggest that, in the great majority of instances, mandamus would be utterly inappropriate.").

84 Id at 243–44 (suggesting that the "incremental delay-cum-expense resulting from disqualification is insufficient to justify intermediate review").

85 See *In re Mechem*, 880 F2d 872, 874 (6th Cir 1989), quoting *Firestone*, 449 US at 377, for the proposition that a disqualification order "will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits."

86 864 F2d 241 (1st Cir 1989).

87 Id at 245 (holding that even if the district court judge "miscalculated in extending [a precedent] to the circumstances at bar . . . a showing of legal error sufficient to win reversal on direct appeal, without more, does not warrant resort to mandamus").

88 Id, quoting *United States v Sorren*, 605 F2d 1211, 1215 (1st Cir 1979).

its actions comprise 'a judicial usurpation of power.'"[89] It thus appears that the First Circuit's reluctance to employ mandamus in its advisory function is responsible, at least in part, for its reticence in issuing the writ in the attorney disqualification context.[90]

Although the Tenth Circuit is sometimes listed with the First and Sixth Circuits as maintaining a high threshold for the issuance of mandamus in this context,[91] that characterization of the Tenth Circuit's approach may not be accurate. For example, the Tenth Circuit granted mandamus relief in *In re American Cable Publications, Inc*,[92] concluding that the trial court had made an error of law in holding that a lawyer may not represent his law partner.[93] Although the *American Cable Publications* court admitted that a literal reading of the applicable professional responsibility rules "plausibly support[ed] the trial court's interpretation," the importance of the novel legal question at issue and the lack of an alternative legal remedy provided the exceptional circumstances required for the issuance of mandamus.[94] While there is a legal basis for considering the existence of a novel and important issue of law in the decision to grant mandamus relief,[95] the court clearly employed mandamus in an advisory rather than a supervisory manner.

### C. The Seventh Circuit's Middle Way

The Seventh Circuit, in its approach to mandamus review of attorney disqualification orders, has managed to sail between the Scylla of de novo review that would effectively undermine the Supreme Court's prohibition of interlocutory appeals in the *Firestone* trilogy

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89 *Bushkin*, 864 F2d at 245–46 (holding that the choice of sanction is highly discretionary and that "because the impost selected, though severe, was not so grossly disproportionate as to vault the towering barrier blocking intermediate review of discretionary rulings, mandamus will not lie"), citing *Allied Chemical Corp v Daiflon, Inc*, 449 US 33, 35 (1980).

90 See *Bushkin*, 864 F2d at 247 (holding that "to entertain advisory mandamus in this instance would flout the well-reasoned jurisdictional curbs erected by the *Koller/Flanagan/Risjord* trilogy"). For more on the debate over the use of mandamus, see generally Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 Geo Wash L Rev 1165, 1165 (1990) (arguing that "interlocutory appeals can and should play a greater role in the adjudicative process in the federal courts").

91 See, for example, *In the Matter of Sandahl*, 980 F2d 1118, 1121 (7th Cir 1992) (identifying the circuit split on this issue and listing the Tenth Circuit with the hard-liners).

92 768 F2d 1194 (10th Cir 1985).

93 Id at 1195 ("We treat this appeal as an application for a writ of mandamus because we are convinced the trial court erroneously decided an important principle of law that affects not just [the defendant] but all lawyer-litigants who choose to be represented by their law partners.").

94 Id at 1195–96 (referring to Colorado professional responsibility rules that address conflicts of interest).

95 See McConnell, Comment, 45 U Chi L Rev at 475–76 (cited in note 50) (collecting cases that consider the novelty of a legal question in the decision to grant mandamus).

and the Charybdis of standards so stringent that the result is great injustice in more exceptional cases. The Seventh Circuit first laid out its approach in *In the Matter of Sandahl*[96] and then developed it in subsequent cases. Ultimately, the court achieved this balance, first, by requiring that a district court's ruling be "patently erroneous"[97] in order to warrant mandamus relief and, second, by recognizing irreparable harm in a broader range of cases than would the First Circuit.

For example, the Seventh Circuit in *In re Barnett*[98] considered the complexity of a case and the late stage of the litigation as suggesting irreparable harm.[99] The *Barnett* court's willingness to consider the above as constituting irreparable harm results from the court's pragmatic acknowledgment that it would be "unrealistic" to imagine the Seventh Circuit vacating a final judgment in such a case merely because some of the litigants had been improperly denied their counsel of choice.[100] In order to justify what the First Circuit might criticize as a downward departure from the Supreme Court's irreparable harm requirement in such instances, the *Sandahl* court points to examples from the right to jury trials to the recusal of judges to demonstrate that the irreparable harm requirement is not what it seems; courts frequently water down this requirement.[101] The *Sandahl* court also justifies this standard by pointing to two differences between the collateral order doctrine and mandamus: (1) whereas appeals under the collateral order doctrine are as of right, jurisdiction under mandamus is discretionary; and (2) while the standard of review under the collateral order doctrine is identical to the standard applied on direct appeal from a final judgment, the standard applied on mandamus is more narrow.[102] Because of these two differences, the court explains, litigants have less of an incentive to petition for mandamus than they had to appeal under the collateral order doctrine in the pre-*Firestone* era.[103] In essence, the difficulty of qualifying for mandamus and the inherent risk in making the attempt (a party who fails ends up back in front of the same district court judge) render mandamus self-policing.

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96 980 F2d 1118 (7th Cir 1992).

97 Id at 1121.

98 97 F3d 181 (7th Cir 1996).

99 See id at 184 (holding the irreparable harm requirement satisfied where complex litigation has advanced to the remedies stage).

100 Id.

101 *Sandahl*, 980 F2d at 1120 (describing the use of mandamus in situations "where irreparable harm could easily have been found wanting").

102 Id.

103 Id ("There is little danger to the courts of appeals of being flooded by petitions for mandamus, and in fact such petitions are relatively infrequent.").

More importantly, the *Sandahl* court identified the real dam that keeps the flood of mandamus appeals at bay as not the irreparable harm requirement, but rather the requirement that petitioners demonstrate a clear right to relief.[104] As a result, the *Sandahl* court decried the tendency of some circuit courts to apply the same standard of review in the attorney disqualification context to petitions for mandamus that is traditionally reserved for direct appeals from final judgments.[105] Instead, the Seventh Circuit sides with those courts that interpret the "clear right to relief" requirement to mean that the trial court's disqualification order must be clearly erroneous.[106] The Seventh Circuit specifically criticizes the Fifth Circuit's practice of reviewing de novo a trial court's decision of which ethical standard to apply.[107] Despite this criticism, however, the *Sandahl* court forthrightly declared that mandamus should more readily issue where an order is clearly wrong: "If the order is plainly wrong—if this is apparent without elaborate consideration of contested facts and legal principles—considerations of administrative efficiency argue for resort to mandamus as a swift and economical remedy against injustice."[108]

Employing this reasoning in a subsequent case, the *Barnett* court granted mandamus to reinstate attorneys who had been disqualified for, among other things, criticizing a district court judge in public.[109] The basic framework that emerges from these cases sets a high threshold for "clear right to relief" and then allows a degree of flexibility with respect to the irreparable harm requirement.

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104 Id at 1121 (internal citation omitted):

> If *clear* right to relief—the existence of a demonstrable injustice—is allowed to slide into *mere* right to relief, on the theory that disqualification cases usually turn on the interpretation of ethical standards rather than disputed facts and hence raise "legal" issues on which appellate courts do not defer to trial courts, mandamus will provide a route of appellate review functionally identical to the direct appeal of disqualification orders.

105 Id at 1119 (criticizing the standard of review employed by some circuits as being "functionally identical to [the standard used on] the direct appeal of disqualification orders").

106 Id at 1121 (agreeing with the First, Sixth, and Tenth Circuits that a litigant appealing a disqualification order must cross a higher threshold, showing that the order was "patently erroneous").

107 Id (disagreeing with, among other decisions, the Fifth Circuit's decision in *American Airlines*, which, according to the Seventh Circuit, subscribes to the theory that "disqualification cases usually turn on the interpretation of ethical standards . . . and hence raise 'legal' issues").

108 Id at 1120.

109 See *Barnett*, 97 F3d at 184 (finding "no basis in law" for any of the district court judge's justifications for the disqualifications). As this case involved a redistricting question, the court recognized the public importance of the final disposition as factoring into the mandamus analysis. Id (noting that the "larger public interest at stake . . . would be disserved by the consequent delay"). In this respect, the Seventh Circuit approach looks a bit more like the Sixth and Ninth Circuits' multifactored analysis.

A few years later, in *In re Lewis*,[110] the court dismissed the petitioners' arguments about increased litigation costs, damage to their attorneys' reputations, and the risk that prevailing with new counsel will render an erroneous disqualification order harmless as constituting irreparable harm.[111] The *Lewis* court allowed, however, that irreparable harm may exist if the petitioners lose on the merits with new counsel and yet are unable to establish that they would have prevailed had their original attorneys not been disqualified.[112]

The *Lewis* court acknowledged that to carry this argument too far would undermine *Koller*, echoing the *Sandahl* court's conclusion that the only way to keep mandamus from effectively overturning *Koller* is to allow mandamus relief only in cases of clear error.[113] The *Lewis* court noted that the two prior attorney disqualification cases where the Seventh Circuit issued mandamus involved "obvious blunders by the district courts, blunders that imposed pointless costs on litigants."[114] Analogizing to the calculus employed by district courts in deciding whether to grant preliminary injunctions, the *Lewis* court suggested that courts utilize a similar balancing test in determining whether to grant mandamus relief in the attorney disqualification context.[115] In effect, courts balance the costs of wrongly issuing mandamus against the costs to the petitioner of denying mandamus.[116] This would be a significant departure from the *Sandahl-Barnett* framework were it not that the *Lewis* court retained the high threshold requirement of a clear right to relief established in the earlier decisions and only accepted lesser showings of irreparable harm where they were balanced by a showing of clear right to relief that exceeded the threshold.[117]

The Seventh Circuit approach therefore requires that a certain threshold be met with respect to the clarity of the error while the degree of irreparable harm required varies with the degree to which the

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110 212 F3d 980 (7th Cir 2000).

111 Id at 983–84.

112 Id at 984 (explaining that "this injury will be impossible to establish because it is so hard to evaluate the benefits of legal expertise and know, even in retrospect, the destinations of paths untaken").

113 Id (noting that *Sandahl* "accordingly concluded that only 'patently erroneous' disqualification orders may be undone by mandamus").

114 Id at 984–85.

115 Id at 984 ("Just as a judge asked to issue a preliminary injunction must balance the costs of error . . . so a court of appeals must balance error costs.").

116 Id. The analogy to preliminary injunction balancing is inapt to some extent, but the balancing of error costs involved in the decision to grant mandamus is at least comparable.

117 Id ("A shortfall in the predicted size of irreparable injury may be overcome by a substantial likelihood of error—for if the district judge has committed an obvious blunder, then immediate correction benefits both sides, without undermining application of the final-decision rule for closer cases.").

clarity of the error surpasses this threshold. That is, an elevated showing of a right to relief can make up for a lesser showing of irreparable harm (though the converse is not true). Of course, while this approach is superior to those taken by the other courts of appeals, it could be improved in important ways.

## III. A BALANCED APPROACH

This Part recommends a new approach, termed the "balanced" approach, which is essentially a modified version of the Seventh Circuit approach. Like the Seventh Circuit approach, the balanced approach would retain a high threshold for right to relief and deemphasize irreparable harm.[118] However, the balanced approach is superior to the Seventh Circuit approach in that it accounts for the differences between orders granting disqualification motions and those denying such motions.

Courts can more easily address a refusal to disqualify an attorney where disqualification is warranted on appeal from a final judgment than an order disqualifying an attorney when disqualification is not warranted. For example, a refusal to disqualify that results in the passage of sensitive information from the offending attorney to his client will more likely reveal demonstrable injury. On the other hand, if the client of a disqualified attorney loses on the merits with new counsel, it is virtually impossible to establish that the party would have prevailed with his original counsel. As the *Lewis* court explained, this "[r]eal but hard-to-quantify loss is a standard form of irreparable injury."[119]

In addition, insofar as one disapproves of the theoretical underpinnings of much of the substantive law of attorney disqualification, it is easier to see injury flowing from the disqualification of attorneys than from the failure to disqualify attorneys. As such, irreparable harm should be *presumed* when a party seeks mandamus relief from an order granting disqualification, while irreparable harm should rarely be found from an order refusing to disqualify. This flexible approach will allow interlocutory appeals in those cases in which the district court orders are most likely wrong while preserving the effi-

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118 Although completely eliminating the irreparable harm requirement in this context does not appear permissible under current Supreme Court doctrine, a broad array of cases in the circuit courts and the Supreme Court seem to contemplate a high degree of flexibility with respect to the requirement of irreparable harm in several categories of cases. See note 50 and accompanying text. See also *Sandahl*, 980 F2d at 1120 (noting that "the history and usages of mandamus" demonstrate that it "has been deployed flexibly in cases where irreparable harm could easily have been found wanting—notably cases in which the writ is used to enforce the right to a jury trial"). It therefore seems acceptable to deemphasize the irreparable harm requirement in the attorney disqualification context.

119 212 F3d at 984.

ciencies secured through application of the final judgment rule in those cases in which some doubt exists as to the proper legal outcome. As such, application of the probabilistic approach to mandamus review of attorney disqualification orders should increase net social welfare.

### A. Efficiency and Justice Justifications

The balanced approach is an improvement over the First and Sixth Circuit approaches from an efficiency perspective. If the threshold for clear error is high enough, then mandamus will issue only in those cases where appellate courts almost certainly would have vacated any final judgment.[120] The greater the amount of resources involved (as where litigation is very complex or where a case is at a very advanced stage), the greater the cost to society of failing to issue a writ of mandamus where a disqualification order was erroneously issued. Moreover, even where the petitioner has a very strong case on the merits, an erroneous disqualification order will increase the settlement value for the other party by an amount up to the cost of bringing new counsel up to speed; this creates yet another ex ante incentive for parties to bring disqualification motions. The balanced approach responds to these concerns.

Even if the de novo review practiced by those circuits that relax the standard for mandamus relief reduces net error costs and yields efficiency gains, this would not justify broad circumvention of the final judgment rule. However, because the threshold standard for mandamus relief is very high under the balanced approach, few cases will qualify, resulting in little evasion of the rule. This is important because while greater interlocutory review of trial court decisions would allow for more prompt error correction, "Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by 'piecemeal appellate review of trial court decisions which do not terminate the litigation.'"[121]

Even more compelling than any efficiency gains resulting from the balanced approach is the fact that this approach alleviates the burden on parties who are subject to the greatest injustice from patently erroneous disqualification orders. Parties that suffer a significant delay or added expense become victims of injustice to the extent that

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[120] One problem here, however, is that in those cases in which the petitioner would have prevailed anyway, the erroneous disqualification order is harmless error. Likewise, mandamus will result in efficiency gains only in those cases in which the petitioner does not prevail if the appellate courts do not require a showing of prejudice on appeals from final judgments.

[121] *Koller*, 472 US at 430, citing *United States v Hollywood Motor Car Co*, 458 US 263, 265 (1982).

such delay or expense forces (1) plaintiffs to abandon their suits entirely, or (2) defendants to settle for higher amounts than would have been otherwise required. The Supreme Court left open the mandamus route to interlocutory review of attorney disqualification orders, and we must assume that it did so for a reason: to provide a pressure release valve for situations in which its holdings in the *Firestone* trilogy would result in great injustice.

Indeed, while the final judgment rule can perhaps be justified on efficiency grounds,[122] both Congress[123] and the judiciary[124] have recognized the need for exceptions in certain circumstances. Mandamus, though not created in response to similar concerns, has been flexibly applied in circumstances that warrant interlocutory relief but where statutory and judicially-created exceptions leave a gap. Such is the case where a heavy burden falls on a litigant, a burden that is not justified by any uncertainty as to the proper legal outcome.

### B. The Balanced Approach and Supreme Court Precedent

The efficiency gains and even the justice rationale for the balanced approach cannot justify erosion of Supreme Court precedent by the circuit courts. Therefore, it is necessary to confirm that this approach comports with the holdings of the *Firestone* trilogy. The Supreme Court does not recognize increased litigation expenses or delay as a basis for finding that an order is effectively unreviewable upon final judgment.[125] However, as discussed above, this does not necessar-

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122 The Court has defended the final judgment rule, claiming that it "promotes efficient judicial administration while at the same time emphasizing the deference appellate courts owe to the district judge's decisions on the many questions of law and fact that arise before judgment." *Koller*, 472 US at 430, citing *Firestone*, 449 US at 374, and *Flanagan*, 465 US at 263–64. Although "[t]here is general agreement that, on balance, the policies underlying the final judgment rule justify the costs it may impose in most cases," Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 Notre Dame L Rev 175, 185 (2001), some commentators nevertheless argue for a variety of exceptions to the rule where the costs presumably outweigh the benefits. See, for example, Jordon L. Kruse, Comment, *Appealability of Class Certification Orders: The "Mandamus Appeal" and a Proposal to Amend Rule 23*, 91 Nw U L Rev 704, 705 (1997) (proposing "an amendment to Rule 23 which would provide limited interlocutory review of class certification orders"); Michael J. Davidson, *A Modest Proposal: Permit Interlocutory Appeals of Summary Judgment Denials*, 147 Milit L Rev 145, 152 (1995) (arguing that "interlocutory appeal [should] be permitted in those limited situations when an appellate court's potential reversal of a district court's order denying summary judgment, pursuant to FRCP 56, would effectively terminate the litigation").

123 See 28 USC § 1292 (setting out circumstances in which appellate courts have jurisdiction over interlocutory appeals).

124 See note 8.

125 See *Koller*, 472 US at 434 ("We do not think that the delay resulting from the occasionally erroneous disqualification outweighs the delay that would result from allowing piecemeal appeal of every order disqualifying counsel."). See also id at 436 ("If the expense of litigation

ily imply that such considerations cannot, in extreme circumstances, warrant a finding of irreparable harm in the mandamus context. Indeed, mandamus has repeatedly been used as a means of last resort to avoid unjust ends.[126]

The approach of those circuits that harden the standard for mandamus implies that no set of circumstances in the attorney disqualification context will satisfy the Supreme Court's irreparable harm requirement for mandamus relief.[127] However, the Court clearly indicated that in a certain narrow set of circumstances such relief may be available.[128] This apparent conflict suggests either that the Supreme Court has effectively contradicted itself or that those circuits that tighten the standard for mandamus relief have interpreted the mandamus standard too strictly.

Finally, one court that tightens the standard for mandamus relief, the First Circuit, suggests that mandamus is generally inappropriate when applied to exercises of judicial discretion.[129] However, the appellate courts arguably have jurisdiction to issue the writ in such circumstances both in their supervisory and advisory capacities.[130] Thus, the Court can be understood to have held in *La Buy v Howes Leather Co*[131] that the use of mandamus is appropriate to correct "gross abuses of judicial discretion."[132] More importantly, the Supreme Court decisions regarding the appropriate use of mandamus "are better viewed not as doctrinal pronouncements but as examples of a pragmatic approach in action."[133] Indeed, Justice Kennedy alludes to this pragmatic approach in his concurrence in *Cunningham v Hamilton County*.[134]

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were a sufficient reason for granting an exception to the final judgment rule, the exception might well swallow the rule."), quoting *Lusardi v Xerox Corp*, 747 F2d 174, 178 (3d Cir 1984).

126 See Justice Kennedy's concurring opinion in *Cunningham v Hamilton County*, where he stated that mandamus may be justified to avoid "an exceptional hardship itself likely to cause an injustice." 527 US 198, 211 (1999).

127 See *Bushkin*, 864 F2d at 243 (interpreting the "Supreme Court's formulation of the appealability equation" to mean that disqualification orders "plainly do not meet" the irreparable harm requirement).

128 See *Firestone*, 449 US at 378–79 n 13 (noting that in "exceptional circumstances" a litigant who is "absolutely determined that it will be harmed irreparably" might possibly resort to a writ of mandamus).

129 See *Bushkin*, 864 F2d at 245 (calling mandamus "an inappropriate prism through which to inspect exercises of judicial discretion").

130 See *La Buy v Howes Leather Co*, 352 US 249, 256 (1957) (endorsing the exercise of supervisory mandamus jurisdiction where a district court has made an arguably discretionary decision to refer a case to a special master).

131 352 US 249 (1957).

132 McConnell, Comment, 45 U Chi L Rev at 477 (cited in note 50).

133 Id at 478.

134 527 US 198, 211 (1999) (Kennedy concurring) (explaining that an attorney sanctioned by the district court "is not without remedy" but can petition for a writ of mandamus where the result is "an exceptional hardship itself likely to cause an injustice").

### C. Lack of Uniform Standards

The *Firestone* trilogy has ushered in a period in which district courts have been almost entirely without guidance from appellate courts with regard to what substantive standards they should apply in assessing motions to disqualify attorneys. The lack of uniformity even across courts within the same circuit has created notice problems and increased uncertainty costs for potential litigants. While mandamus review may help at the margins (the courts can at least point out particularly egregious departures from the appropriate standards), this does not create uniformity.

In spite of the problems associated with the Fifth and Ninth Circuits' approach, requiring mere error with respect to questions of law and allowing that substantial costs (in the case of the Fifth Circuit) or the inability to be represented by one's counsel of choice (in the case of the Ninth) may satisfy the irreparable harm requirement, this approach certainly has its advantages. In a world where the absence of interlocutory review of disqualification orders as of right usually results in no review at all, looser standards for mandamus relief may help the appellate courts ensure somewhat uniform standards in the administration of attorney disqualification law. Indeed, the Fifth Circuit may be doing exactly this.[135] Relaxing the requirements for the issuance of mandamus, however, seems a questionable means of effecting the goal of uniformity. Instead, the following mechanisms, coupled with the balanced approach to mandamus review, may alleviate some of the consistency problems that exist under the current regime.

#### 1. Giving disqualified attorneys standing.

The Tenth and Eleventh Circuits, in certain circumstances, provide disqualified attorneys standing to sue based on reputational harm.[136] The Tenth Circuit recognizes standing in such suits after final judgment even if the client has settled the case or is otherwise uninterested in appeal.[137] The Eleventh Circuit requires that the attorney

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135 See generally Schneyer, 16 Rev Litig 537 (cited in note 31) (criticizing the Fifth Circuit's imposition through mandamus of national ethical standards rather than allowing district courts in Texas to apply state conflicts standards). Also note that in both *Dresser* and *American Airlines*, the Fifth Circuit issued writs of mandamus reversing the lower courts' *denial* of disqualification. *Dresser*, 972 F2d at 541; *American Airlines*, 972 F2d at 607. These actions are consistent with the Fifth Circuit's preference that the district courts in that circuit employ stricter conflicts requirements.

136 See, for example, *Weeks v Independent School District*, 230 F3d 1201, 1207 (10th Cir 2000) (holding that a disqualified attorney had standing to appeal the disqualification order because "a favorable court decision would . . . help ameliorate the damage to [the attorney's] professional reputation from the sanction order").

137 See, for example, *Johnson v Board of County Commissioners*, 85 F3d 489, 492 (10th Cir 1996) ("[S]ettlement of an underlying case does not preclude appellate review of an order dis-

have been disqualified based on allegations of misconduct in order to have standing.[138] Otherwise, these courts hold, there is no reputational harm to redress. This requirement severely limits the utility of this approach because a large proportion of disqualification orders stem from conflicts of interest rather than actual misconduct.[139] If courts adopt a broader conception of reputational harm, however, this mechanism may provide for enough appellate review to achieve uniform standards. For example, a law firm that has been disqualified because of an undetected conflict of interest, or because its precautions to avoid the intermingling of confidential client information and thus the harm from such conflicts were considered inadequate, suffers reputational harm because potential clients may see the firm as incompetent in this respect. If courts recognize an attorney's standing on the basis of this harm, the courts will likely have many cases in which to craft the substantive law of attorney disqualification.

2. National standards for attorney disqualification.

The adoption by the judicial conference of a body of federal rules governing attorney conduct and disqualification in federal courts has also been proposed as a means of creating uniformity in the substantive law of attorney disqualification. Although this proposal was not taken up at the most recent judicial conference, a report prepared for that conference describes how the proposed standards would work.[140] Of course, this does not solve the problem of lack of review; it is possible that the various district courts will adopt conflicting interpretations of such rules. Nevertheless, such a uniform, coherent set of rules would undoubtedly be an improvement over a system in which it is not even clear which ethical rules apply.[141] This would have the addi-

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qualifying an attorney from further representation insofar as that order rests on grounds that could harm his or her professional reputation.").

138 See, for example, *Kirkland v National Mortgage Network, Inc*, 884 F2d 1367, 1370 (11th Cir 1989) (finding relevant the potential negative and lasting consequences that a disqualification order, invoked on grounds of misconduct, could have on the attorney's career).

139 See Green, 65 Fordham L Rev at 71 n 4 (cited in note 23) (discussing a study finding that "out of 443 reported federal decisions involving attorney conduct over a five-year period, 46% involved conflict-of-interest rules").

140 Federal Rules of Attorney Conduct, Draft Rule 1, reprinted in 16 ABA/BNA Lawyers' Manual on Professional Conduct: Current Reports No 6 158 (2000) (setting forth several alternative models of a proposed Federal Rule of Attorney Conduct 1). See also McMorrow and Coquillette, *Moore's Federal Practice* § 802.23 at 802-79 to 802-80 (cited in note 20) (discussing the proposed Federal Rules of Attorney Conduct).

141 See Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 Geo Wash L Rev 460 (1996) (proposing and defending detailed rulemaking by the federal judiciary). But see Note, *Uniform Federal Rules of Attorney Conduct: A Flawed Proposal*, 111 Harv L Rev 2063, 2064 (1998) (arguing that "federal courts should . . . defer to state definitions of ethical attorney conduct" since "[f]or many

tional benefit of making decisions to disqualify attorneys less discretionary because judges would no longer have multiple sources from which to choose the law they will apply, and issuing mandamus in such cases would appear less objectionable.

## CONCLUSION

One might worry that a lower standard for mandamus to issue in the attorney disqualification context will cause the appellate courts to be inundated with a barrage of mandamus petitions.[142] However, this has not been the experience in the Seventh Circuit, where only three such petitions were heard during the 1990s. The nature of mandamus itself helps to control this threat. District court judges often see mandamus petitions as a slap in the face, and a party will be concerned that he may end up back in front of the same judge at some future date. Likewise, the disqualified attorney may be concerned that she will have to appear before that judge in future cases. Therefore, petitioners will seek mandamus relief only in the most egregious of circumstances. The balanced approach is the best way for the courts to achieve the finality goals outlined by the Supreme Court in the *Firestone* trilogy without sacrificing judicial economy or justice for the parties.

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lawyers, the attorney-client relationship exists prior to and independent of litigation in the federal courts").

142 See *Koller*, 472 US at 434 (voicing such a concern).