U.S. securities regulation, sensitivity to competing national interests, sovereignty, predictability, uniformity and fairness.[87]

Yvonne G. Grassie

ETHICAL CONFLICTS IN THE RECOMMENDATION OF POISON PILLS

The proliferation of corporate mergers and acquisitions has spawned law firms specializing in corporate takeovers.[1] These law firms generally counsel both targets and acquirors. This may confront firms with ethical conflicts of interests.[2] For example, in a recent newspaper account, New York's Skadden, Arps, Meagher & Flom was challenged for drafting over two dozen poison pill plans to repel hostile takeovers and, within a year, arguing in federal court against the constitutionality of similar plans on behalf of a hostile aggressor.[3]

This recent development considers the ethical repercussions of a single law firm recommending antitakeover poison pill plans to some clients and shortly thereafter contesting the constitutionality of similar plans on behalf of other clients. Part I reviews the American Bar Association standards governing concurrent and subsequent representation.[4] Part II applies these standards to specialty firms who recommend then challenge similar antitakeover poison pill plans.[5] This development concludes that

87. *See supra* notes 76-78 and accompanying text.

1. *See* Berner, *Conflict of Interest Case, Developments and Vicarious Disqualification*, in *Thirteenth Institute on Securities Regulation* 621, 623-37 (1981) (Berner chronicles the development of law firms from solo or small firms in 1910 when the largest New York law firm had 17 lawyers to large, multi-office firms of the 1980s).

2. *See generally* Miller and Warren, *Conflicts of Interest and Ethical Issues for the Inside and Outside Counsel*, 40 BUS. LAW. 631, 631-33, (1985); *see supra*, Berner note 1 at 623-27.

3. *See*, Waldman, *Skadden Arp's Poison-Pill Stance Raises Conflict of Interest Concern*, Wall St. J., July 23, 1986, 2, at 1, col. 3. Skadden, Arps is cocounsel with two other law firms. The defendant's answer to the suit challenged the poison pill provisions as against state law, as overreaching the powers of the directors, and if the plan was authorized by state law, the plan impermissibly burdened interstate commerce and violated the United States Constitution. Skadden, Arps denied the representation conflicted with its drafting of poison pill plans for other clients.

4. *See infra* notes 6-25 and accompanying text.

5. *See infra* notes 26-43 and accompanying text.

attorneys should abstain from challenging in federal court the constitutionality of antitakeover plans substantially similar to those they have previously recommended.

I. ABA STANDARDS GOVERNING CURRENT AND SUBSEQUENT REPRESENTATION

The American Bar Association Model Code of Professional Responsibility (Model Code)[6] and Model Rules of Professional Conduct (Model Rules)[7] address conduct involving conflicting interests of clients. These professional standards distinguish between concurrent representation of clients with adverse interests and representation of a client with interests adverse to a former client's interests.

Model Rule 1.9 prohibits an attorney from representing a subsequent client with a "material" adverse interest to a former client in a related subject without the consent of the former client.[8] Model Rule 1.7 proscribes representing a client when representation is "directly adverse"[9] to another client without the informed consent of each client and a reasonable attorney belief that representation will not compromise either attorney/client relationship.[9]

While the Model Code does not specifically address successive representation, applicable canons—prescribing expected standards of conduct—address attorney representation of clients with conflicting

6. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (Model Code) (1969).

7. MODEL RULES OF PROFESSIONAL CONDUCT (Model Rules) (published at 52 U.S.L.W. 1) (1983).

8. MODEL RULE 1.9 provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

9. MODEL RULE 1.7(a) provides:

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents after consultation.

If an attorney's representation is "materially limited" because of duties to another client, Rule 1.7(b) requires the attorney to obtain the clients' consent and reasonably believe that the relationship will suffer no adverse effects before proceeding.

interests.[10] Disciplinary rule 5-105, however, prohibits an attorney from representing a client if it would compromise the attorney's independent judgment or require the attorney to represent opposing interests.[11]

Three distinct dangers arise when an attorney represents clients (concurrently or subsequently) with adverse interests: (1) possible use or disclosure of client confidences; (2) the danger of loyalty dilution; and (3) the threat of decreased vigor on behalf of the clients during the representation.[12]

Attorneys must possess undivided loyalty and use independent judgment in representing clients.[13] Concurrent representation of clients with conflicting interests may interfere with an attorney's professional judgment and thus may reduce the vigor of representing the interests of one or both clients.[14] The Model Code's ethical standards require informed consent from clients with conflicting interests.[15] Furthermore, it must be

10. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (concerning the duty to exercise independent judgment); Canon 4 (requiring the preservation of client confidences); and Canon 9 (cautioning against "even the appearance of impropriety") (1969).

11. Disciplinary rules (DR) are required behavior. They give the minimum level of conduct for attorneys, and apply to all attorneys, without regard to the nature of the attorney's activities. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(A) (Preamble and Preliminary Statement) (1969) states:

> A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing different interests, except to the extent permitted under DR5-105(C).

12. *See Developments: Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1247, 1987-1303 (1981) (The authors distinguish between risks to clients where the attorney concurrently represents clients with conflicting interests in an adversity situation from risks where the attorney represents clients with conflicting interests in a subject matter that is nonadverse. In both situations, ethical codes may proscribe the dual representations).

13. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983). Comments to Rule 1.7 state that impaired loyalty may interfere with an attorney's decisions on the proper courses of action. In assessing the likelihood of a conflict situation which will impair the attorney's independent judgment an attorney should consider: (1) the length of the attorney/client relationship; (2) the legal services provided; (3) the likelihood of an actual conflict; and (4) the effect of a conflict on each client's interests. *Id.*

14. MODEL CODE OF PROFESSIONAL CONDUCT Canon 5 (1983) requires the uncompromised exercise of an attorney's professional judgment and fulfillment of client expectations of undivided loyalty. The ethical considerations of Canon 5 list interests that may affect the judgment of an attorney. *See* MODEL CODE OF PROFESSIONAL CONDUCT EC 5-3, 5-15, 5-18 (1983).

15. *Model Code of Professional Conduct* DR5-105(C) (1983) states:

> In the situations covered by DR-5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

"obvious" the attorney can competently represent both clients.[16] Under the Model Rules, the attorney need only "reasonably believe" the dual representation will not impair either attorney/client relationship.[17]

The judiciary regulates the legal profession. Courts, however, disagree over the appropriate scope of proscribed conduct during simultaneous representation. For example, the Third Circuit requires firm disqualification when representing one corporate client against another corporate client whose unrelated service is complete at the time suit is filed.[18] Finding a continuous relationship, the Third Circuit believes the possibility of adverse effects likely without proof of actual detriment. Furthermore, the Third Circuit believes that disqualification after "the appearance of impropriety" enhances the public's belief in the integrity of the legal system.[19] While concurrent representation is not *per se* unethical, the Third Circuit's approach favors a broad proscription against concurrent representation. In at least one informal opinion, the ABA ethical committee has sanctioned the Third Circuit's approach.[20]

In contrast, the Ninth Circuit permits multiple representation of clients with adverse interests stemming from related disputes if informed client consent is obtained and the attorney reasonably believes loyalty will not be compromised.[21] Evaluating all facets of the dual representa-

16. *Id.* The Model Code requires both the informed consent of each client and an attorney ability to represent both clients without compromise. Informed consent alone is insufficient. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op., No. 84-1508 (1984) ("Lawyer employed by state agency as nonlawyer may not, under most circumstances, represent his fellow employees before other agencies in matters against agency for which lawyer works." The Committee noted that even with client consent, the attorney's personal interests would influence the representation so the representation was prohibited. The lawyer's belief that he would not compromise the representation was measured on an objective standard by the Committee.)

17. *See supra* note 9.

18. *See* International Business Machines v. Levin, 579 F.2d 271 (3d Cir. 1978) (hereinafter IBM). Plaintiff Levin sued IBM in 1972 charging IBM with violations of the Sherman Act and state law. In 1977 IBM moved to disqualify plaintiffs' lawyers because they had performed legal work for IBM in 1970, 1972, 1974 and 1976. *Id.* at 274-81.

19. *Id.* at 283. *See also* Kramer v. Scientific Control Corp., 534 F.2d 1085 (3d Cir. 1976).

20. ABA Comm. on Ethics and Professional Responsibility Informal Op. No. 1495 (1982) (The Model Code prohibits dual representation despite the corporation's use of most of the area's law firms results in a hardship to retain counsel for the corporation).

21. *See* Unified Sewerage Agency of Washington County, Oregon v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981). Defendant Jelco sought legal advice concerning an interpretative contract dispute between Jelco, a general contractor, and subcontractor Ace. The law firm informed Jelco that they represented another subcontractor, Teeples, in a dispute against Jelco involving schedules for concrete work in the same project. The Teeples/Jelco dispute eventually resulted in a law suit. In its Jelco/Ace dispute, Jelco hired the firm after full disclosure and the court affirmed a finding of Jelco's informed consent. After Jelco discharged the firm in the Ace controversy, Jelco sought disqualifica-

tion, the nature of the conflict and the likelihood of actual conflict, the Ninth Circuit requires a definite nexus between the concurrent representatives before firm disqualification.[22] To the Ninth Circuit, informed consent overcomes potential conflicts of interests even when arising from a related matter. The Ninth Circuit's approach is unwilling to presume an irrebuttable ethical violation, preferring instead to consider the circumstances.[23]

When a firm retains a client with interests "substantially related" but adverse to a former client, most courts irrebuttably presume shared confidences.[24] This substantial relationship standard seeks to balance the rights of clients to choose their own attorneys with the interest of minimizing the chance of disclosure of confidences. Absent a relationship between the subject matter of the former client's representation and that of the subsequent client, the attorney may generally represent a subsequent client with adverse interests to a former client.[25]

The ethical conflicts of simultaneous representation of clients with adverse interests and representation of clients with interests adverse to a former client are distinguished by differing burdens placed on the attorney regarding the propriety of the conduct. Concurrent representation generally requires an attorney to overcome the presumption that the dual representation constitutes an ethical violation—a fairly steep burden. Subsequent representation and the substantial relation test eases the evidentiary burden for the attorney. The attorney may defeat the substantial relation test by proving a minimal chance of using the former clients' confidence.

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tion of them in the Jelco/Teeples suit. The court found no facts which indicated the attorneys failed to vigorously represent both clients. *Id.* at 1342-52.

22. *Id.* at 1350-52.

23. *Id.*

24. *See, e.g.*, Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1981); Westinghouse Elec. Corp. v. Kerr-McGee, 580 F.2d 1311 (7th Cir. 1978); T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 216 F.2d 920 (2d. Cir. 1954). *See generally* Miller and Warren, *supra* note 2, at 635-36.

25. *See* Miller and Warren, *supra* note 2, at 635-36. Miller and Warren note that courts differ as to the meaning of substantial relationships. The majority of courts look for factual or subject matter similarities. Thus, if the opposing party in a suit is a former client and that party challenges the current representation, the law firm should prove the former representation is unrelated to the current representation and the likelihood of receiving relevant confidences is minimal.

II. THE ETHICAL PROBLEMS OF RECOMMENDING THEN CHALLENGING POISON PILL PLANS

Law firms specializing in corporate takeovers may function as both prospective counselors, recommending particular business actions, and current advisors on legal proceedings.[26] Conflict of interest issues arise when on behalf of an acquiror client a law firm challenges the constitutionality of poison pill plans substantially similar to those drafted by the firm for different clients.[27] Although these clients are not adversaries in the litigation challenging poison pills, their interests conflict because a successful constitutional challenge to poison pill plans casts into doubt the continued validity of the other client's poison pill plan. Furthermore, a constitutional challenge may shake the original client's expectations of loyalty from the firm. The ethical implications of this conduct may be examined under two standards: the concurrent client standard and the former client standard.

There is no test for labeling a client "former" or "current." A client on retainer or a client which utilizes a firm over a period of years may generally be deemed current.[28] A difficulty arises, however, when a client seeks to retain a merger specialty firm solely for advice on antitakeover poison pill plans. When the firm drafts a poison pill which the corporation adopts, the firm's single rendition of services has a continuing effect on the corporation. This situation has elements of both former and current client status.

If a continuing attorney/client relationship is evident, the original corporate client may be deemed current.[29] Under the Model Code, concur-

26. The same law firm may represent both targets and acquirors in separate takeovers without violating ethical provisions. In such representations, the attorneys should employ all legal arguments to advocate their clients' cause although it may mean arguing differently on the same issue according to the clients' position. Model Rule 1.1 demands that an attorney competently represent a client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1969). Competence is also required in the MODEL CODE BY CANON 6 ("a lawyer should represent a client competently") and DR 6-101(2) (forbidding an attorney from handling a case without adequate preparation) MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(2); Canon 6 (1983).

27. Conflict of issue challenges typically arise in a litigation setting as one party moves to disqualify an opposing attorney on the grounds of conflicting interest. However, disqualification is not the only type of challenge for conflicts of interest. Bar associations may investigate ethical violations in a disciplinary fashion. Committees providing opinions on ethical conduct also illuminate positions on conflicts of interest.

28. *IBM*, 579 F.2d at 281. In *IBM*, the court found that IBM was a current client of the law firm although the firm used a fee for services billing system and there were no current matters being handled at the time suit against IBM was filed.

29. *Id.*

rent representation of clients with adverse interests is suspect. The original clients that adopted anti-takeover poison pills arguably have interests that conflict with an acquiror's challenge to such measures.[30] No one would deny that if the original corporate client was the target in the takeover suit representation of the aggressor by the same firm, the firm's conduct would violate the Model Code.[31] Model Code DR 5-105(c) requires that each client consent after attorney explanation of the nature of the conflict and the possible ethical violations involved.[32] Even with informed client consent, however, the attorney must find it obvious that the representation will be uncompromised.[33] In the dual representation at issue, it is not obvious that an attorney can adequately represent both clients at the same time.

Defending the ethical challenge, the law firm may deny the existence of a conflict by distinguishing the poison pill under attack from the plans drafted by the firm.[34] If, however, the two plans are substantially similar, the conduct seems to violate the Model Code because the adversity

30. The original clients' interest is the preservation of poison pill plans to guard against hostile takeovers.

31. If the original clients were parties to a litigation challenging the poison pill provisions, the clients would move to disqualify the opposing attorneys. Under those circumstances, it is reasonable to assume the attorneys garnered information from the original clients that is useful to the attorneys' preparation for the subsequent case. The subject matter, *i.e.*, the poison pill provisions, would be identical to the current matter. Even if informed consent were obtained from the original clients (a very doubtful proposition), the courts would probably disqualify the attorneys because the attorneys could not adequately represent the subsequent clients.

32. *See supra* note 15. Elective client consent necessitates informing the clients of the dual representation and how the two representations may interact. Procuring client consent after full disclosure influences a court in a disqualification hearing. *See* Malamed v. ITT Continental Baking Co., 592 F.2d 290 (6th Cir. 1979) ("crucial additional fact" that the plaintiff, the only party potentially harmed by the conflict of interest, retained the attorneys after disclosure. Because of plaintiff's informed consent, the court refused to disqualify in the absence of real and substantial harm to plaintiff's interests). *See e.g.*, Waldman, *supra* note 3. In a recent Wall Street Journal article, unidentified clients of the law firm Skadden, Arps found "disturbing" the fact that Skadden, Arps was co-counsel to a lawsuit challenging shareholder rights plans. This suggests the clients did not consent to Skadden, Arp's representation of Dart and probably were unaware of the representation until publicized. In such circumstances, the attorney/client relationship may suffer.

33. *See supra* note 15. The question of obvious adequate representation was explored in Unified Sewerage Agency of Washington County, Oregon v. Jelco, Inc., 646 F.2d 1339 (9th Cir. 1981).

34. Without a relationship between the two shareholder plans, the Model Code does not forbid the dual representations under canons 4 or 5. As canon 9 and the appearance of impropriety may be insufficient to disqualify an attorney for conflict of interests, courts would generally allow both representations. *See supra* note 10. *See also* Waldman, *supra* note 3. In the Skadden, Arps article, attorney Shapiro stated the shareholder plans under attack differ from the plan developed and recommended by Skadden, Arps for more than twenty-five clients.

between the clients is direct and may compromise the attorney's professional judgment.

The Model Rules prohibit representation of a client that is "directly adverse" to another client.[35] The Model Rules, however, do not proscribe dual representations of generally adverse interests "such as competing economic enterprises."[36] Challenging poison pill plans like those recommended to other clients extends beyond competing enterprises. If the poison pill plans are successfully challenged, the continued validity of the original clients' plan is doubtful. Dual representation is possible under the Model Rules only if the clients give informed consent and the attorney reasonably believes he can represent both clients without compromise.[37] Thus, a subsequent constitutional challenge to similar poison pill plans violates the Model Rules when there is no informed consent of the potential conflict and the interests seem directly adverse.

If the clients that sought advice on poison pills are deemed former clients, the law firms must assess the effects of dual representation.[38] Although confidences gathered from the original clients will not be used directly against the clients (as the clients are not parties to the law suit), there exists a danger that such confidences may be used inadvertently in bolstering the later client's arguments.[39] Applying the most generous interpretation of the substantial relationship test, the attorneys must dispel the presumption that the attorney's judgment may be clouded and that confidences are shared.[40] In short, labeling the corporate clients which adopted the poison pill plans "former" clients eases the challenged attorney's burden of showing the absence of conflict.

Defining a substantial relationship between the subject matter of the

35. *See supra* note 9.

36. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 comment (1983). The comments to Rule 1.7 state that an attorney need not obtain consent for representation of generally competing interests.

37. *See supra* note 9. In certain circumstances, an attorney may be unable to secure consent. *See e.g.*, ABA BNA Lawyers' Manual on Professional Conduct 124, No. A-58 (1986) (The New Jersey Supreme Court permitted dual representation of co-defendants in a civil rights action after recognizing a public entity cannot render consent. Other considerations of adequate representation became crucial).

38. Model Rule 1.9 explicitly prohibits subsequent representation in "the same or a substantially related matter." The lawyer must evaluate the two representations and determine if the subject matter comes in the category. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983).

39. An attorney must not reveal the confidences of a former client. Additionally, an attorney may not utilize information from a former representation to prepare a subsequent defense.

40. *See supra* notes 24-25 and accompanying text.

two clients only initiates the inquiry. The conflict in the dual representation transcends appearances and potential misuse of confidences—the essence of the conflict inheres in the precedential value of a successful constitutional challenge advanced against the poison pill plans. Conflicting interests remain debatable if an attorney challenges a provision under existing state law because unfavorable state decisions have minimal precedential value in other states.[41] If the decision inheres in a court's interpretation of the state's individual corporate law, other states may disregard the decision as inapplicable to their corporate statutes. However, a challenge to substantially similar poison pill plans based on a constitutionally impermissible burden on interstate commerce is another story.[42]

A decision in a federal district court which declares an antitakeover plan unconstitutional has greater impact than a state court decision. The decision will stand as precedent in the district which rendered the decision. While a decision from one district court is not binding on other district courts, other districts may follow the decision because the rationale turns on constitutional analysis rather than an interpretation of state statutes. Furthermore, a district court decision which declares poison pill plans unconstitutional would probably be appealed. If the circuit court of appeals affirms the plan's unconstitutionality under the commerce clause, similar business plans throughout the circuit are at risk of invalidation. Furthermore, a well-reasoned opinion in one circuit may influence other circuit courts addressing the same issue to adopt the constitutional rationales. This increases the risk that similar poison pill plans in other jurisdictions may be invalidated. Herein lies the ethical conflict because by vigorously advocating one client's interests, the attorneys endanger the interests of the other clients. The potential precedential reach of constitutional attack elevates this conflict from one where

41. MODEL RULES OF PROFESSIONAL CONDUCT comments (1983). The Comments to the MODEL RULES provide that representing parties with "antagonistic positions" in different cases is acceptable *provided* the dual representation would not adversely affect either client. The Comments find it acceptable for an attorney to assert different positions in separate trial courts, but possibly unacceptable if the cases are before the appellate court at the time. The Comments, however, seem to focus on attorney representation in the litigation matters. There is a difference between advancing the best possible argument for a litigation and developing a prospective corporate plan which the clients adopt. For a law firm to later challenge the constitutionality of substantially identical plans is tantamount to arguing both sides of the validity of the plans before the Supreme Court.

42. *See* Edgar v. Mite, 457 U.S. 624, 643 (1982) (holding an Illinois antitakeover statute unconstitutional on grounds of an impermissible burden on interstate commerce).

attorneys represent different sides of a legal issue to one where an attorney openly represents adverse interests.

III. CONCLUSION

When a law firm recommends poison pill plans for one client then challenges the constitutionality of like poison pills for another client, the attorneys effectively question the constitutionality of their own advice. Consequently, to avoid any ethical dilemma, attorneys who provide planning or drafting services should abstain from challenging the constitutionality of antitakeover plans substantially similar to those they have previously recommended.

Catherine R. Phillips

THE IMPACT OF THE SEC'S CASES AGAINST LEVINE AND BOESKY ON THE ACTIVITIES OF INVESTMENT BANKERS AND ARBITRAGEURS

The Securities and Exchange Commission's recent, highly publicized allegations of insider trading against Dennis Levine, Ivan Boesky, and others announced to Wall Street intensified SEC enforcement of insider trading sanctions against many professionals in the heart of the Wall Street community. Reactions to these cases form a wide spectrum of views. Some commentators applaud the crackdown on insider trading.[1] Others believe the SEC has gone too far.[2] Many investment bankers and

1. Glaberson, *The SEC's Message to the Market on Insider Trading*, BUS. WK., June 9, 1986, at 83 (commentary praising the SEC for finally attacking the heart of information abuse); Laderman, *The Epidemic of Insider Trading*, BUS. WK., April 29, 1985, at 79-92 (although an overzealous SEC could impair routine information gathering, vigorous enforcement effort against insider trading is needed).

2. *See, e.g.*, Macey, *SEC Vigilant on Insider Trading—But Is It Within Law?*, Wall St. J., May 28, 1986, at p. 34, col. 3; Seligman, *Is Dennis a Menace?*, FORTUNE, June 23, 1986, at 127 (criticizing the SEC for failing to show how the investing public was hurt); Steward, *SEC Insider Trading Case Could Clog Pipeline Between Bankers, Arbitragers*, WALL ST. J., May 19, 1986, at p.3, col. 2; *The SEC v. Wall Street*, Wall St. J., May 28, 1986, at p. 32, col. 1 (criticizing the SEC's view that the purpose of regulating the security markets is to ensure an honest crap game and charging that Wall