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Conflicts of Interest and Law-Firm Structure

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ARTICLE

Cassandra Burke Robertson

Conflicts of Interest and Law-Firm Structure

Abstract. Business and law are increasingly practiced on a transnational scale, and law firms are adopting new business structures in order to compete on this global playing field. Over the last decade, global law firms have merged into so-called “mega-brands” or “mega-firms”—that is, associations of national or regional law firms that join together under a single brand worldwide. For law firms, the most common mega-firm structure has been the Swiss *verein*, though the English “Company Limited by Guarantee” structure is growing in popularity as well, as is the similar “European Economic Interest Grouping.” All of these structures allow related entities to affiliate under a single brand, yet retain a separate legal identity. Law firms such as Baker & Mackenzie, Norton Rose Fulbright, and Dentons have all adopted the *verein* structure for their global practice. Each has separate legal entities practicing at a regional or national level (such as Dentons US LLP, or Norton Rose Fulbright Canada LLP), with the entities coming together under a single brand globally.

As the mega-brand structure becomes more common, courts have struggled with how to treat imputed conflicts of interest. Is the *verein* (or similar entity) a single law firm, such that a client representation by one of the *verein* members will automatically prohibit other *verein* members from representing a client with conflicting interests? Or does the separate legal status of each of the *verein* members mean that Norton Rose Fulbright Australia could represent a client adverse to Norton Rose Fulbright US LLP—potentially even in the same proceeding?

This article examines mega-firm conflicts from a client-protection perspective. It analyzes the policy goals underlying traditional rules on conflict

imputation, including the need to protect client confidences and loyalty. It considers how conflicts of interest have been resolved in the mirror situation—that is, when law-firm clients are themselves global entities composed of related corporate entities—and analyzes how the conflict rules developed for related client entities could be adapted to fit global law firm vereins. The article ultimately argues that an overly broad imputation of conflicts carries real risk to clients and potential clients by limiting their ability to secure counsel of their choice. An approach focused more tightly on protecting the underlying values of confidentiality and loyalty can ensure client protection while still allowing clients to reap the benefit of innovation in law-firm business practices.

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I. INTRODUCTION

The world has gotten smaller. The communications revolution of the early twenty-first century has made it much easier for people to buy, sell, and communicate across the globe.¹ Business guides talk about the “death of distance.”² Communication across vast distances can occur nearly

1. See generally Rae Goldsmith, *Communication Revolution*, CASE (July–Aug. 2013), https://www.case.org/Publications_and_Products/2013/July/August_2013/Communication_Revolution.html [<https://perma.cc/X7LR-Y84J>] (describing the communications revolution and noting many “communications professionals are grappling with increased demands—social media, mobile websites, digital publications—while managing traditional print media”).

2. Frances Cairncross, *The Death of Distance: How the Communications Revolution Is Changing Our Lives—Distance Isn’t What It Used to Be*, HARV. BUS. SCH. (May 14, 2001), <https://hbswk.hbs.edu/archive/the-death-of-distance-how-the-communications-revolution-is-changing-our-lives-distance-isn-t-what-it-used-to-be> [<https://perma.cc/6LPB-YEK2>].

instantaneously, with goods following shortly thereafter. Schoolteachers in Iowa can order supplies off of Amazon to be delivered from China; aspiring pop stars can perform on YouTube from their apartments in South Korea and find fans worldwide.

The expansion of worldwide communication and commerce created a need for law to follow. The same tools that facilitate international commerce also facilitate the worldwide provision of legal services. Lawyers in New York can easily collaborate with their peers in San Francisco, London, and Hong Kong, sharing discussions and co-authoring documents in real time. The growth of transnational business and the ease of worldwide communication paved the way for law firms to combine on a huge scale. At the same time, the rapid growth and new organizational structures of global law firms have created challenges for legal regulation—especially when it comes to handling the potential conflicts of interest that can arise as law firms grow ever-larger. Finding a way to analyze and address such issues is important, however, if clients and law firms are to reap the benefits of innovation in business and law.

II. THE RISE OF THE MEGA-BRAND STRUCTURE

In the last ten years, so-called “mega-firms” have dominated the global legal landscape.³ Five of the world’s largest law firms are now structured as *vereins*—a Swiss organizational structure that allows individual entities to join together in a larger organization without losing their underlying structure or independence.⁴ Now, the *verein* has been joined by other organizational structures that share key elements including common branding, shared administrative support, and a single board of directors, while still offering structural independence for member entities.⁵ The Company Limited by Guarantee (CLG) is a similar structure arising out of the United Kingdom,

3. See generally DYKEMA, <https://www.dykema.com> [<https://perma.cc/9BPM-E7NF>] (“We serve clients around the world from our [thirteen] strategically situated offices in Michigan, Illinois, Washington, D.C., Texas, California, and Minnesota.”); HAYNESBOONE, <http://www.haynesboone.com/experience/practices/international> [<https://perma.cc/6X8H-67PK>] (“Because your business spans borders, your lawyers should, too.”); NORTON ROSE FULBRIGHT, <http://www.nortonrosefulbright.com/us> [<https://perma.cc/5TS9-BXQS>] (“As a global law firm we provide the world’s preeminent corporations and financial institutions with a full business law service.”).

4. See Chris Johnson, *Large Firms Pulling Back on Use of Vereins in Mergers*, N.Y. L.J. (Mar. 24, 2017), <https://advance.lexis.com/usresearchhome/> [<https://perma.cc/28S2-7MRR>] (search full article title; filter result category to legal news) (explaining the complex structure of *vereins* and their use by the world’s largest firms).

5. *Id.*

and European Economic Interest Groupings (EEIGs) also offer a similar combination of shared administrative backing and structural independence.⁶

A. *Why Global Law Firms Choose the Mega-Brand Structure*

Global accounting firms adopted the *verein* structure much earlier than law firms did.⁷ Adopting the *verein* structure made it easier for firms to combine with other entities in order to grow worldwide.⁸ Although the *verein* has a single board of directors, each member of the *verein* still retains its structural independence.⁹ The key factor of independence is that profits are not shared between *verein* members.¹⁰ Keeping profits with the individuals members offers financial flexibility.¹¹ The U.S. member of a *verein*, for example, can pay its employees a scale that is locally competitive, and the Australian member can pay its employees at the prevailing Australian wage.¹² The entities that make up the *verein* do share a financial connection; however, even though they do not share profits, they may share costs and administrative expenses.¹³

6. *Id.*; see also Matt Byrne, *One-Track Mind*, LAW. (July 30, 2012), <https://www.thelawyer.com/issues/30-july-2012/one-track-mind/> [<https://perma.cc/24GY-EFY4>] (“An EEIG is a network arrangement vehicle that is to all intents and purposes very similar to a Swiss *Verein* . . .”).

7. See Mark Brandon, *You Can't Have Your Swiss Roll and Eat It*, LAW. (Nov. 23, 2015), <https://www.thelawyer.com/issues/23-november-2015/you-cant-have-your-swiss-roll-and-eat-it/> [<https://perma.cc/5WS6-J9XR>] (discussing the difficulties law firms often encounter upon adoption of the Swiss *verein* structure).

8. See Anthony Lin, *The Rise of the Megafirm*, A.B.A. J. (Sept. 2015), http://www.abajournal.com/magazine/article/the_rise_of_the_megafirm [<https://perma.cc/Q267-95D8>] (highlighting how “[a]t least some of the difficulties of [global mega-firm] expansion have been ameliorated by . . . the Swiss ‘verein’”).

9. See *id.* (“*Vereins* . . . include multiple partnerships that, though they adopt a common brand and some management functions, remain legally and financially distinct.”).

10. See *id.* (detailing how merging firms often face challenges when there are significant financial disparities between partners at the various merging firms, and how *vereins* are able to avoid such problems).

11. See, e.g., *id.* (Dentons, a multinational law firm, emphasized “[a]t Dentons, we recognize the fundamental question is how to incentivize lawyers to pick the right lawyer for the right job,” which is contrary to traditional standards of “not only have a single profit pool but lockstep compensation, in which partners are paid strictly according to seniority instead of business origination”).

12. See *id.* (“The lower billing rates and profitability of Australian firms relative to their U.S. and U.K. counterparts played a role in some firms’ decisions to expand in that market via *verein* . . .”).

13. See Chris Johnson, *Inside the Machine: A New Breed of Law Firm Mergers Is Sweeping the Market. But Are These Firms Truly Integrated, or Just Glorified Alliances?*, AM. LAW. (Mar. 27, 2013, 12:00 AM),

After a wave of law-firm mergers in the early part of the twenty-first century, law firms found that having a bigger size offered significant advantages. Following the accounting firms' lead in adopting the *verein* structure lets law firms grow not just big, but massive in size and scope with truly global reach.¹⁴ One article referred to the *vereins* as “[t]he Queen Marys of The Am Law 100,” noting that the five largest *vereins* combined “have more than 12,000 attorneys” or “14 percent of the total lawyers in The Am Law 100.”¹⁵

This rapid growth was made possible in part because the *verein* structure makes regulatory compliance easier for the law firms.¹⁶ *Verein* members are often aligned with national or regional boundaries—for example, a *verein* may have a U.S. member, a Canadian member, and an Australian member, all organized under the national laws of those countries. Each *verein* member then complies with the legal ethics and tax regulations of its own country, minimizing the risk of facing conflicting regulatory orders.¹⁷ Thus, for example, a *verein* branch in the United Kingdom could include non-lawyer partners who share in the branch's profits; such an arrangement would be largely prohibited in the United States, where the overwhelming majority of states' ethics rules preclude fee splitting with non-lawyers.¹⁸

Other than the limitation on profit sharing, the mega-firm's organizational structure typically imposes few restrictions. Instead, the organizations offer a great deal of management flexibility. As a result, the mega-firms have developed varying internal practices, providing “a

<https://www.law.com/americanlawyer/almID/1202589227405/> [<https://perma.cc/D7W3-C7BN>] (explaining “[v]erein firms . . . typically choose to share costs” which directly influences overall profits).

14. *See, e.g., id.* (finding Dentons, an international law firm which employs a whopping 2,500 lawyers, holds the title of world's largest law firm).

15. Robin Sparkman, *The Haves and the Haves Less: Verein Combinations and Mergers Pay Off*, AM. LAW. (Apr. 26, 2012, 12:00 AM), <https://www.law.com/americanlawyer/almID/1202549688766/> [<https://perma.cc/H2EU-MDFF>].

16. *See* Lynnley Browning, *Legal Swiss Cheese*, NEWSWEEK (Dec. 15, 2014, 11:45 AM), <https://www.newsweek.com/legal-swiss-cheese-291745> [<https://perma.cc/7YJM-SPVD>] (stating in comparison to a law firm that has adopted the *verein* structure, “a non-*verein* international law firm . . . must deal with . . . [issues] in each foreign country where it has an in-house office”).

17. *See id.* (“*Verein* members each handle the individual tax and legal ethics regulations in their own country.”).

18. Nate Raymond, *'Verein' Model Allows Cross-Border Unions to Limit Liability and Keep Partnerships, Profits Separate*, N.Y. L.J. (May 28, 2010, 12:00 AM), <https://www.law.com/almID/1202458890456/> [<https://perma.cc/9BJE-GVPP>]. At the present time, only Washington D.C. allows non-lawyers to serve as law firm partners. *See id.* (“Because of the passage in the United Kingdom of the Legal Services Act of 2007, law firms are now able to allow non-lawyers as partners, something that in the United States is only allowed in Washington, D.C.”).

spectrum of arrangements ranging from a loose affiliation to one that involves common branding, a common name and similar standards, systems and procedures.”¹⁹ For most purposes, there is no significant difference between the *verein*, CLG, or EEIG; they are more similar than different, and their practices depend more on the individual agreement than the structure.²⁰ According to one expert, for example, “Anything you can do with a *verein* you can do with an EEIG.”²¹ The variety of practices within the mega-firm arises more from management choice than from organizational structure.

The combination of member independence and common culture, however, has led to the emergence of some norms within mega-firm legal practice. Thus, for example, shared administrative development is common, with the ability to create teams that cross international boundaries to focus on certain business sectors both broadly and deeply.²² At the same time, however, *vereins* typically do not share confidential client information outside of each member unit.²³

B. *How Clients Benefit from a Mega-Brand Structure*

If a shared worldwide brand makes it easier for the law firm to attract clients, then potential clients must see some benefit to hiring a mega-firm. So far, surveys of in-house counsel suggest that clients do not consciously consider law-firm structure in choosing their outside counsel and may not even be aware of the organizational structure of their outside law firms.²⁴ But the qualities that do matter to the client, and that do influence counsel selection, may be easier to achieve with a mega-brand structure.²⁵ Such

19. Byrne, *supra* note 6.

20. *See id.* (“There is no hard and fast rule, no clear answer” to a mega-firm practice, as these firms are “a matter of judgment by those who assess them”).

21. *Id.*

22. *See generally id.* (highlighting the various ways mega-firms have implemented cross-border collaboration in the way they conduct business).

23. *See id.* (“Clearly as the firms are independent there is not one [profit and loss statement] for any of the groups . . .”).

24. *See* Chris Johnson, *What's All the Fuss About?: Our Survey Finds that Clients Are Unfazed by Firms' Varying Structural Models*, AM. LAW. (Mar. 27, 2013, 12:00 AM), <https://www.law.com/americanlawyer/almID/1202589233616/> [<https://perma.cc/W7YQ-MFWZ>] (illustrating through survey data that the vast majority of clients are indifferent to a law firm's internal structure).

25. *See* Meredith Hobbs, *Conflicts, Culture and Control: The View From the U.S. on the Eversheds Sutherland Talks*, LEGALWEEK (Dec. 2, 2016, 4:27 AM), <https://www.legalweek.com/sites/legalweek/2016/12/02/conflicts-culture-and-control-the-view-from-the-us-on-the-everheds->

qualities include, for example, a consistent level of quality; a reputation that is comfortable and familiar to corporate executives; and a deep expertise in the client's area of business. Thus, even if clients do not seek out firms based on their structure, they may well seek out firms for qualities that the firms can better develop through multinational associations.

Clients in general find it difficult to evaluate the quality of legal services, especially *ex ante*, before developing an attorney-client relationship.²⁶ This difficulty is compounded when doing transnational work. The client may not be familiar with the local laws, regulations, and norms of a foreign jurisdiction, making it even more difficult to judge the quality of a foreign firm.²⁷ Working with an established mega-brand gives the client a higher level of quality assurance. The client—often itself a multinational corporation—knows that its counsel is also comfortable with transnational work, with subject-level expertise that transcends national boundaries.

Brand awareness may be more important to the client than many lawyers likely realize.²⁸ When in-house counsel decides who to hire for client needs, relying on a well-known brand can help smooth the process with corporate executives who may have little time or patience for the details of legal matters. In previous decades, it was a cliché to say that “nobody ever got

sutherland-talks [https://perma.cc/6W3E-Y9JS] (“Law firm consultants and local legal recruiters have called [this combination] a smart move for both Sutherland and Eversheds, as Sutherland would gain global reach to better serve multinational clients, while Eversheds would gain access to the largest legal market in the world—the US.”); M.P. McQueen, *Building Your Brand; Verins Improve Their Position in the Latest Iteration of A Client-Awareness Survey*, AM. LAW. (Oct. 1, 2015), <https://advance.lexis.com/usresearchhome/> [https://perma.cc/A2FF-XJ8D] (search full article title; filter result category to legal news) (noting Norton Rose Fulbright, for example, “has organized itself around industry sectors, such as energy and life sciences/health care, with teams of lawyers drawn from different practice areas so that they understand issues arising in that sector[.]” and that this structure “gives their people a competitive edge when it comes to having business discussions with clients, understanding the legal risks and potential gains,” so that they can give “more practical business-savvy advice”).

26. See Cassandra Burke Robertson, *Online Reputation Management in Attorney Regulation*, 29 GEO. J. LEGAL ETHICS 97, 152 (2016) (noting prospective clients often have difficulty evaluating potential lawyers).

27. See McQueen, *supra* note 25 (“[C]orporate clients generally prefer to use the same firms they employ domestically for overseas work, if the firms have that capacity. ‘Unless clients are very familiar with working with a particular jurisdiction, they gain comfort from using a firm they trust at home to then look after their interests in a foreign jurisdiction’”).

28. See *id.* (“Building global brand awareness is difficult but important in an increasingly fragmented market”).

fired for buying IBM.”²⁹ Hiring a recognized symbol of quality can protect in-house managers—including in-house counsel—against later criticism, especially in delicate legal matters with no guarantee of a successful outcome.

For some matters, the client may hire more than one member of the mega-firm. Even if the verein or related entity normally maintains separation and confidentiality between the different members, those members are likely to work well together and communicate easily when the situation calls for it and the client has given permission. This type of inter-firm and intra-firm cooperation can give the client an added level of familiarity—internal processes, methods of communication, and ways of doing business, are likely to be consistent among the different members of the mega-firm. As a result, the client experience may indeed feel relatively seamless, even in matters that span the globe from Shanghai to Singapore to San Antonio—and even when multiple entity members around the globe are working on different aspects of the client’s matter. As a result, even though a client might not have explicitly considered the law firm’s organizational structure when hiring the firm, that client may still benefit from the firm’s structure if it allows the firm to provide smooth and consistent services across international boundaries.

III. MEGA-FIRM CONFLICTS

Over the last decades, mega-firms have grown exceedingly quickly in the legal profession.³⁰ As vereins have taken over lists of the world’s largest law firms, some observers have questioned their place on those lists, arguing that vereins are merely an association of smaller firms and should not be considered firms at all.³¹ Given the vereins’ rapid growth combined with a business structure formerly unfamiliar to the legal profession, it is understandable that there are questions about how to apply the conflict of interest rules to these new entities in the legal profession.

This is not the first time, however, that legal practice has had to adapt to organizational change. A century ago, most lawyers worked as solo

29. H.O. Maycotte, *Your Startup Dilemma: Nobody Ever Got Fired for Buying IBM*, FORBES (Dec. 9, 2014, 1:09 PM), <https://www.forbes.com/sites/homaycotte/2014/12/09/your-startup-dilemma-nobody-ever-got-fired-for-buying-ibm/> [https://perma.cc/YEJ2-SLRT].

30. See Neil W. Hamilton & Kevin R. Coan, *Are we a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 HOFSTRA L. REV. 57, 97–98 (1998) (discussing the development of mega-firms in the US).

31. See *id.* at 98 (noting this rapid growth sees law as a professional gain and not a legal gain).

practitioners.³² The law firms that did exist were structured as general partnerships.³³ Because each partner in the firm was potentially liable for any acts undertaken by the firm, it was important for the partners to know each other well. Operating within a law firm required a great deal of trust. Just as the lawyers in the firm tended to know each other well, the lawyers likely knew the client-representatives of the businesses they represented. After all, both solo lawyers and law firms tended to serve a local market; the lawyers may have grown up and gone to school with people who went on to become business leaders, and lawyers and their business clients likely socialized together as adults. In this era, conflicts of interest did not play a big role in legal practice. Lawyers were accustomed to practicing independently or in very small firms, and local lawyers worked with local clients they knew well, smoothing the way to handle informally the conflicts that did arise.³⁴

By 1931, law firms were starting to grow larger.³⁵ In an ethics opinion from that year, the ABA first recognized a policy of conflict imputation.³⁶ The opinion stated that because “[t]he relations of partners in a law firm are so close[,]” a conflict held by “any one member of the firm” would also bar any other member of the firm from accepting the case.³⁷ The policy of imputation was later included in the ABA’s Model Rules of Professional

32. See Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1710 n.88 (2008) (“There are no systematic data on firm size in the early parts of the twentieth century but it is clear that the vast majority of lawyers worked in solo practice or at most two-person partnerships.”).

33. See *id.* at 1710 (“The model of legal practice that animates professional regulation is still rooted in the solo and (very) small firm practice . . .”).

34. See *id.* at 1710 n.88 (“In 1900, a firm with twenty lawyers was a giant.” (quoting LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* 539 (3d ed. 2005))).

35. See *id.* at 1702 (noting the exploding of large firms occurred after the nineteenth century).

36. See ABA Comm’n on Prof’l Ethics & Grievances, Formal Op. 33 (1931) (“An attorney may not accept litigation against a past client if such requires that the attorney contest the same issue for which he previously was an advocate in the prior litigation. Nor may a partner of such attorney accept such litigation even though he was not a partner at the time of the prior litigation.”); see also Kenneth L. Penegar, *The Loss of Innocence: A Brief History of Law Firm Disqualification in the Courts*, 8 GEO. J. LEGAL ETHICS 831, 832 (1995) (listing the flux of law firms becoming disqualified for their failure to abide by particular professional obligations, specifically obligations involving conflicts of interest).

37. See ABA Comm’n on Prof’l Ethics & Grievances, Formal Op. 33 (1931) (discussing attorneys’ ability to advocate for a client); see also Hamilton & Coan, *supra* note 30, at 73 (noting the close proximity of relations between partners in a law firm bars other members from taking in a conflicting case).

Conduct, and, with minor variations, adopted in every state.³⁸ Again, the imputation rule³⁹ served the profession well in the middle of the twentieth century, when such close relations could be presumed. Even into the 1960s, American law firms had an average of only forty attorneys.⁴⁰

It is important to note, however, that the conflicts rule was a regulatory rule meant to create an environment conducive to ethical practice—it was not itself an ethical imperative.⁴¹ Imputing conflicts at the firm level meant that the entire firm could reasonably be viewed as the client's representative—and attorneys within the firm could freely share confidential information among themselves.⁴² But this was not the only rule that could have worked.

England, which saw similar growth in legal complexity, adopted a different view. There, representation was viewed as more personal—a client was represented by an individual lawyer and not necessarily by the firm.⁴³ Observers noted: “[I]n England, there are little cells of offices in the Inns of Court where barristers who are directly confronting each other in court live cheek by jowl in their chambers. The barristers are all solo practitioners, and the same clerk may handle the work for three or four barristers.”⁴⁴

Conflicts in England are not imputed at the firm level, and neither are confidences freely shared within the firm; “[T]he English bar has no rule providing for imputation and secondary disqualification among members of a firm. Members of the same chamber may represent different parties in the same case.”⁴⁵ Thus, although the imputation rule worked relatively well

38. See generally MODEL RULES OF PROF'L CONDUCT R. 1.10 (AM. BAR ASS'N 2018) (codifying the imputation rule); see also Hamilton & Coan, *supra* note 30, at 73 (discussing the adoption of the imputation rule).

39. MODEL RULES OF PROF'L CONDUCT R. 1.10.

40. Hadfield, *supra* note 32, at 1710 n.88.

41. See Penegar, *supra* note 36, at 832 (explaining the conflicts rule “seek[s] to enforce an asserted professional obligation of the adversary’s counsel, even when a[n] [ethical] violation may not have occurred”).

42. See Hamilton & Coan, *supra* note 30, at 74 (noting “[t]he hypothesis that lawyers in a firm share client confidences does not require that associated lawyers share every client confidence on every matter[,]” but rather “[i]t is based on common sense that associated lawyers talk to one another and share experience about new or difficult issues”); see also MODEL RULES OF PROF'L CONDUCT R. 1.10 (“While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . .”).

43. See Geoffrey C. Hazard, Jr., *Foreword: The Future of the Profession*, 84 MINN. L. REV. 1083, 1089 (2000) (“The barristers are all solo practitioners, and the same clerk may handle the work for three or four barristers.”).

44. *Id.*

45. Hamilton & Coan, *supra* note 30, at 97.

in mid-twentieth-century American practice, it was by no means the only mechanism that could protect the underlying values of confidentiality and loyalty. As others have argued, the English example shows that “there are clearly feasible alternatives to Rule 1.10.”⁴⁶ The American imputation rule allows confidences to be freely shared within a firm and assumes that they will be; the English rule necessarily restricts such sharing of information but allows greater freedom in client representation.⁴⁷

A. *Imputed Conflicts of Interest*

Imputation of conflicts has remained a key feature of U.S. legal practice. The general rule in modern United States legal practice is that “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9,” the conflict of interest rules addressing current and former clients.⁴⁸ The Model Rules also give guidance about what it means for lawyers to be “associated in a firm,” with a comment stating that “[w]hether two or more lawyers constitute a firm . . . can depend on the specific facts[,]” including “[t]he terms of any formal agreement between associated lawyers[,]” whether “they have mutual access to information concerning the clients they serve[,]” as well as, importantly, whether “they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm[.]”⁴⁹ In “doubtful cases[,]” the ABA urges lawyers and judges “to consider the underlying purpose of the Rule that is involved.”⁵⁰

The ABA’s comment reflects what most courts currently do; that is, “[C]ourts tend to impute conflicts of interest to lawyers with mutual access

46. Hazard, *supra* note 43, at 1090.

47. Commentators have long recommended that the imputation rules adopted in the United States be relaxed for multinational practice. See Janine Griffiths-Baker & Nancy J. Moore, *Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time?*, 80 *FORDHAM L. REV.* 2541, 2560–61 (2012) (“For the United States, the most important effort at harmonization would be to relax the rule requiring the imputation of the conflicts of one lawyer to all lawyers in the law firm . . . when the different representations involve lawyers in physically separate offices in separate states or separate countries, so long as the law firms have implemented effective screening devices.”).

48. MODEL RULES OF PROF’L CONDUCT R. 1.10 (AM. BAR ASS’N 2018); see also Daniel Haley, Comment, *Conflicts of Interest for Former Law Firm Clerks Turned Lawyers*, 7 *ST. MARY’S J. LEGAL MAL. & ETHICS* 376, 385–86 (2017) (“The rules of imputation vary from state-to-state depending upon how recently the state updated their professional conduct rules and whether the state strictly follows the Model Rules.”).

49. MODEL RULES OF PROF’L CONDUCT R. 1.0 cmt 2.

50. *Id.*

to clients' files and confidential information, or who hold themselves out to the public in a way to suggest they are a part of a single firm."⁵¹ These principles can point in opposite directions when the purported conflict involves mega-firms and worldwide vereins.⁵² These global entities may well hold themselves out as a single firm. But in most vereins, no confidential client information is shared across the constituent entities unless the client explicitly consents to shared representation by more than one verein member.⁵³ As a result, courts have struggled to fit these new law-firm structures within the larger imputation framework. In particular, courts must determine whether a conflict of interest should be imputed to the verein as a whole or whether it should be imputed only to the lawyers working within the verein member undertaking the representation.

B. *Courts Struggle to Analyze Verein Conflicts*

In spite of the huge growth of vereins, and in spite of the open questions about how conflicts of interest should be handled within such entities, there have actually been very few judicial opinions dealing with such conflicts. To some degree, the dearth of opinions likely reflects the sophistication of mega-firm clients. Corporations with the financial wherewithal to hire such a firm likely have in-house counsel able to anticipate and negotiate for the resolution of potential conflicts before they arise; certainly, it is common for such clients to plan ahead in this manner.⁵⁴

Even with good planning and foresight, however, unanticipated conflicts can arise. In some cases, clients may give advance consent for the law firm to accept the representation of an adverse party. Even clients who may have given advance consent to that representation are likely to feel unhappy when

51. Douglas R. Richmond & Matthew K. Corbin, *Professional Responsibility and Liability Aspects of Vereins, the Swiss Army Knife of Global Law Firm Combinations*, 88 ST. JOHN'S L. REV. 917, 933 (2014) (footnote omitted).

52. *See id.* ("In *re Project Orange Associates, LLC* discusses the latter scenario in the context of a law firm verein." (footnote omitted)).

53. *See id.* at 980 ("The firms that responded to the survey all said that they had twelve of these thirteen structures in place [regarding a single conflict-checking system].").

54. *See Galderma Labs., L.P. v. Actavis Mid Atl., LLC*, 927 F. Supp. 2d 390, 397 (N.D. Tex. 2013) ("[A] general, open-ended waiver is more likely to be effective when dealing with a narrow set of circumstances. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, that consent is more likely to be effective. The consent is particularly likely to be effective when the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation." (citing MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22 (AM. BAR. ASS'N 2010))).

it comes to pass, however, and may have second thoughts at that time.⁵⁵ Furthermore, a system of disclosure and consent, by itself, does not always protect against significant conflicts of interest.⁵⁶

In the earliest reported case dealing with a *verein* conflict, a bankruptcy court was asked to grant approval for DLA Piper USA (a *verein* member) to represent a debtor in bankruptcy proceedings when the debtor's largest creditor was represented by DLA Piper International LLP (another *verein* member).⁵⁷ The bankruptcy court refused to grant approval for the representation, in part because DLA Piper USA had been the one to formally request the waiver from the entity with whom it later claimed to have no attorney-client relationship.⁵⁸ Thus, the representation was prohibited, but not merely as a result of the *verein* structure; instead, the direct participation of the *verein* affiliate disqualified it from the later proposed representation.⁵⁹ Nevertheless, the court suggested in dicta that the *verein* structure might be enough to cause disqualification on its own, finding it difficult to reconcile the *verein* structure with traditional conflicts rules:

DLA Piper holds itself out to the world as one firm, although it now tries to separate itself into separate firms for conflicts purposes. Followed to its logical conclusion, this would lead to the anomalous result that DLA Piper,

55. See Hamilton & Coan, *supra* note 30, at 96 (“For in-house counsel . . . there is nothing quite like learning that outside counsel who has been representing you is now suing you. ‘It is one of the greatest personal and professional embarrassments a general counsel or in-house lawyer can suffer To management, it is the ultimate betrayal of loyalty.’” (quoting Peter D. Zeughauer, *Conflict Over Conflicts*, AM. LAW., July–Aug. 1997, at 80)).

56. See Milan Markovic, *The Sophisticates: Conflicted Representation and the Lehman Bankruptcy*, 2012 UTAH L. REV. 903, 915 (“[E]ven if most clients waive conflicts of interest . . . social psychology research suggests that attorneys’ act of disclosing their conflicts of interest—as they are required to do by Rule 1.7(b)(4)—may have the unfortunate effect of amplifying the conflicts’ adverse effect on the representation.”).

57. See *In re Project Orange Assocs., LLC*, 431 B.R. 363, 365 (Bankr. S.D.N.Y. 2010) (noting DLA Piper US was requested “as general bankruptcy counsel” by Project Orange Associates, LLC); see also Richmond & Corbin, *supra* note 51, at 933 (“Project Orange Associates, LLC (‘Project Orange’) sought bankruptcy court approval to employ *verein* member firm DLA Piper LLP (‘DLA Piper USA’) as its general bankruptcy counsel pursuant to section 327(a) of the Bankruptcy Code.”).

58. See *In re Project Orange Assocs., LLC*, 431 B.R. at 379 (“Here, given DLA Piper’s admitted conflict of interest with GE and GE’s central role in this case, the Court does not believe that the use of conflicts counsel warrants DLA Piper’s retention in this matter.”).

59. See *id.* at 371, 379 n.3 (explaining DLA Piper USA “dealt with itself and its affiliates as one entity in negotiating a conflict waiver” and so the court need not “consider whether different conflicts rules might apply in some circumstances where international law firms share a relationship through a Swiss *verein*.”).

on behalf of one client, could be adverse to DLA Piper International, on behalf of one of its clients, without violating ethical standards.⁶⁰

Another case, this time involving Norton Rose Fulbright (the U.S. member of which was then known as Fulbright & Jaworski)⁶¹ also gave rise to a conflict claim.⁶² The case arose out of a trademark dispute involving John-Wayne branded whiskey.⁶³ Fulbright & Jaworski represented Duke University, who objected to the whiskey maker's attempt to trademark "Duke" in reference to the beverage's brand.⁶⁴ But when Fulbright joined the Norton Rose Verein, verein members ended up on both sides of the case—the American arm representing Duke, and the Canadian arm representing a part-owner of the distillery.⁶⁵ The plaintiff's attorney sought Fulbright's disqualification.⁶⁶ Before the disqualification motion was decided, however, the court dismissed the case on jurisdictional grounds.⁶⁷

The most in-depth discussion of verein structure occurred in a case involving FMC Denton Group (Dentons), a global verein that describes itself as "the world's largest law firm," with more than 173 offices in seventy-seven countries.⁶⁸ The U.S. verein member, Dentons US LLP (Dentons US) had represented a client in a patent enforcement action involving laser-

60. *Id.*

61. Fulbright & Jaworski subsequently changed its firm name to Norton Rose Fulbright US LLP, and became part of a larger legal entity organized as a Swiss verein. NORTON ROSE FULBRIGHT, *supra* note 3.

62. See Andrew Strickler, *Fulbright DQ Bid Tests Waters for Verein Conflict Claims*, LAW360 (Oct. 1, 2014, 9:02 PM), <https://www.law360.com/articles/581856/fulbright-dq-bid-tests-waters-for-verein-conflict-claims> [<https://perma.cc/X6A4-LTVL>] ("In a sharply worded motion filed in August, lawyers from Rutan & Tucker LLP representing John Wayne Enterprises focused on that 2013 verein deal [of Fulbright & Jaworski] and rebuked the firm for not leaving the case.").

63. See *id.* ("A novel attempt to disqualify Fulbright & Jaworski from a trademark case over John Wayne-branded whiskey for alleged conflicts arising from its combination with Norton Rose may be the first in a new wave of challenges mining the inner workings of Swiss verein megafirms like Norton Rose Fulbright . . .").

64. *Id.*

65. See *id.* ("The plaintiff's attorneys argued that the merger brought Jayson Woodbridge, a part owner of the Monument Valley Distillers LLC, and his Norton Rose Fulbright lawyer in Calgary, Robert Rakochev, into a conflict with Fulbright & Jaworski lawyers representing Duke University.").

66. *Id.*

67. See *id.* ("The disqualification motion accused the firm of claiming that it has 'an extensive system of impenetrable seams around it which completely insulates each firm from potential conflicts that might exist with clients of the member firms.'").

68. DENTONS, <https://www.dentons.com/en/> [<https://perma.cc/MM5Y-4CFY>].

abraded denim.⁶⁹ Another *verein* member, Dentons Canada LLP, represented The Gap Inc. (Gap), an adverse party.⁷⁰ Gap moved to disqualify Dentons US from representing its client.⁷¹ Gap argued that because Dentons held itself out to be a single firm, all of the *verein* members owed it a duty of loyalty and were therefore barred from accepting conflicting representation.⁷² An administrative law judge for the International Trade Commission (ITC) agreed, and ordered disqualification.⁷³ He pointed to the ABA's broad definition of law firm, stating that "in the event of a direct conflict such as the one presented here, the ABA would rather regard a group of lawyers as a firm—even if the case is 'doubtful.'" ⁷⁴ He therefore concluded that disqualification was warranted.⁷⁵

The judge's decision was ultimately vacated by the ITC on appeal after Gap settled the underlying claim.⁷⁶ Because the appellate opinion was not based on merits of the disqualification motion, it did not fully grapple with the administrative law judge's interpretation of the ABA's position. As discussed in the next section, however, the mere fact that an organization holds itself out as a single firm is not necessarily sufficient in and of itself to support disqualification. The ABA comment does not say that "doubtful cases" should be resolved in favor of disqualification—rather, it says that those doubtful cases should be resolved by examining the "underlying

69. *In re Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, USITC Pub. 43 (May 7, 2015) (Preliminary); see also Scott Flaherty, *Verein Structure Doesn't Shield Firm From Disqualification*, N.Y. L.J. (Sept. 1, 2015), [https://advance.lexis.com/usresearchhome/\[https://perma.cc/K5VH-5PDR\]](https://advance.lexis.com/usresearchhome/[https://perma.cc/K5VH-5PDR]) (search full article title; filter result category to legal news) ("After convincing an International Trade Commission judge to disqualify Dentons from representing its opponent in a patent infringement case, Gap Inc. has agreed to a settlement.").

70. See *In re Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, USITC Pub. 43 (May 7, 2015) (Preliminary) (detailing Gap's challenge of the breach of the duty of loyalty by Dentons after Dentons began representation of a client adverse to Gap).

71. See *id.* ("On March 11, 2015, Respondent The Gap, Inc. ('Gap') filed a motion seeking to disqualify Dentons US LLP ('Dentons US') as counsel for Complainants.").

72. See *id.* (describing counsel's argument that the duty of loyalty should extend to Denton's worldwide legal practice).

73. See *id.* (holding Denton was "banned under the Model Rules from helping Complainants bring claims against Gap in th[e] Investigation").

74. *Id.*

75. See *id.* (granting Gap's motion to disqualify).

76. See *In re Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, USITC Pub. 43 (April 12, 2016) (Preliminary) ("On November 18, 2015, the Commission terminated the last remaining respondents from the investigation on the basis of settlement and withdrawal of the complaint.").

purpose[s] of the Rule that is involved.”⁷⁷ Relying on firm structure alone is an insufficient substitute for analyzing the interests of the client affected by the potential disqualification.

IV. TOWARD A CLIENT-CENTERED MODEL OF CONFLICT ANALYSIS

A truly client-centered model of conflict imputation must begin by analyzing how the clients' interests are affected by law firm structure and practice. Models drawn from earlier eras may still work in modern practice, but they may also need some adjustment to conform to modern realities. The rote recital of vague standards is insufficient—under the Model Rules, conflict analysis requires consideration of both the potential risks and advantages of the representation.⁷⁸

As other scholars have pointed out, “[E]mploying the unfortunately vague ‘appearance of impropriety’ language” is not helpful in the disqualification context.⁷⁹ After all, the English and American models of conflict imputation could hardly be more different; to an adherent of one system, the other likely looks unreliable. But context matters; the conflicts rules are only one part of a larger system designed to protect client interests. As a result, disqualification rules must take into consideration the larger context—and more importantly, must take into consideration how the profession's underlying values are protected within that larger context.⁸⁰

A. *Protecting Choice of Counsel*

The ABA and other regulatory authorities have long recognized that the conflicts rules must walk a middle path: too loose a standard puts the quality of legal representation at risk by threatening loyalty and confidentiality, but too broad a standard risks disqualifying too many potential lawyers, thus “interfer[ing] needlessly with the right of litigants to obtain competent

77. MODEL RULES OF PROF'L CONDUCT R. 1.0 cmt. 2 (AM. BAR ASS'N 2018).

78. The information to obtain client consent for a conflict is instructive. Under the Model Rules, a client can give informed consent to a conflict of interest only after having been apprised of “the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client.” *Id.* R. 1.7 cmt. 18.

79. Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 155–56 (2014).

80. *See id.* at 155 (highlighting the power of the court to use balancing tests to reach a “just resolution of disqualification motions”).

counsel of their own choosing, particularly in specialized areas requiring special, technical training and experience.”⁸¹

Imputation within “a firm” is itself a shorthand, a way of protecting confidentiality and loyalty without having to analyze each case on its own specific facts. The Model Rules of Professional Conduct apply a presumption that client confidences are shared across the firm, assuming that every attorney in the firm shares the confidences known by every other attorney in the firm—even when the firm has more than a thousand attorneys spread across offices all over the globe.⁸² This bright-line rule works reasonably well for firms that do, in fact, routinely assign attorneys from different groups and different offices to work for the same client. It allows the firm to be flexible in its staffing, safe in the assumptions that client information can flow freely even within the large firm.

Because imputation works relatively well in this context, some have suggested that the same rule should apply to vereins and other mega-firms. The existing court opinions, for example, have focused on whether the verein held itself out as a single firm, noting that the Rules of Professional Conduct treat such “holding out” as a single firm under the rules.⁸³ But the “holds itself out as a firm” standard is inapplicable in this context. The “holds itself out” standard was never developed to regulate conflicts of interest; it was instead intended to ensure that attorneys are not misleading potential clients—especially in cases where lawyers’ shared offices may encourage clients to believe that the lawyers’ financial resources are greater than they are, or that any potential liability owed from the lawyer to the client could be satisfied by looking at a larger resource pool.⁸⁴ These factors are unlikely to concern the corporate clients who are more likely to engage a member of a global mega-firm, and they are simply irrelevant to the underlying policy issues that gave rise to the imputation rule in the first

81. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 342 (1975).

82. See Richmond & Corbin, *supra* note 51, at 982 (discussing the repercussions of using one name for all firms in a network).

83. See *id.* at 979 (“If a verein holds itself out to the world as one firm with lawyers in offices worldwide, and in reality is a fully-integrated firm, a court might recognize a collective liability theory and thereby jeopardize the concept of a verein and its member firms as distinct legal entities.”).

84. See ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 94-388 (1994) (“Lawyers have an obligation not to mislead prospective clients as to what the lawyer is able to bring to bear on the client’s matter in terms of the size of the firm, the resources available to the firm or the relationship between the firm and other law firms with which it is associated.”).

place—that is, the “close, informal relationship” of partners and “incentives, financial and otherwise” to share client information among themselves.⁸⁵

Nonetheless, some scholars have advocated for a broad standard even for mega-firms: “Treating the various law firms within a verein as a single firm for conflict of interest purposes protects these crucial client interests [of confidentiality and loyalty].”⁸⁶ But does imputation in mega-firms truly protect those goals? It is true that imputation does no harm to the interests of confidentiality and loyalty. But imputation still comes with real costs, primarily in terms of limiting clients’ ability to engage their choice of counsel—especially in cases where highly technical expertise may be needed, where there are few attorneys with the requisite experience to begin with.⁸⁷ The more attorneys that are conflicted out of a case, the fewer choices a prospective client will have for representation.

It has long been recognized that erroneous disqualification takes away a client’s choice of counsel. In the criminal context, such error requires automatic reversal even without a showing of prejudice.⁸⁸ The criminal defendant wrongfully deprived of choice of counsel must be given a new trial.⁸⁹ Of course, civil litigation generally comes with lower stakes. No matter how much money is on the line, life and liberty are not at stake. Nonetheless, the judicial system has an interest in protecting civil clients’ choice of counsel as well. The Delaware Supreme Court, for example, has held that courts should be “cautious” in deciding to disqualify a lawyer or law firm even in a civil case, “[B]ecause a litigant should, as much as possible, be able to use the counsel of his choice.”⁹⁰

85. See ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 342 (1975) (“The rule is based upon the close, informal relationship among law partners and associates and upon the incentives, financial and otherwise, for partners to exchange information freely among themselves when the information relates to existing employment.”).

86. Richmond & Corbin, *supra* note 51, at 936.

87. See Swisher, *supra* note 79, at 125 (“Current counsel might be the most knowledgeable about the facts and law of the client’s case, the most technically skilled lawyer in the applicable area of law (or worse but rare, the only competent lawyer in the area), or a long-time or otherwise trusted advisor to the client.”).

88. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (“A choice-of-counsel violation occurs *whenever* the defendant’s choice is wrongfully denied.”).

89. See *id.* (acknowledging “the deprivation of choice of counsel pervades the entire trial” and that ineffective counsel can produce the same result).

90. *Kanaga v. Gannett Co.*, No. 92C-12-182, 1993 WL 485926, at *3 (Del. Super. Ct. Oct. 21, 1993) (quoting *Satellite Fin. Planning Corp. v. First Nat’l Bank of Wilmington*, 652 F. Supp. 1281, 1283 (D. Del. 1987)); see also Matthew F. Boyer, *In the Wake of Infotechnology: Stricter Scrutiny of Attorney*

In the mega-firm context, imputing a single lawyer's conflict to the entire global entity has the effect of conflicting out a very large number of attorneys. And, it is not at all clear that there are truly gains in the protection of loyalty or confidentiality to make such a limitation worth it. Adopting a client-centered rule on imputed conflicts means considering not just the interests of those clients directly affected by the imputed rule, but also considering the broader systemic interests.

In this way, policies on conflict management in the legal profession can be usefully analogized to policies for antibiotic stewardship in the medical profession. Health providers know that antibiotic medications—although lifesaving for bacterial infections—are utterly ineffective against viral illnesses. In recent years, there has been a growing awareness that over prescription of antibiotic drugs causes bacterial resistance, allowing stronger and more deadly strains of bacteria to emerge, ultimately causing more deaths from untreatable bacterial illnesses.⁹¹ Epidemiologists have found that too-broad prescribing policies create health risks in nursing homes.⁹² Individual patients are given antibiotics even when clinical guidelines suggest that such treatment is inappropriate—perhaps on the thought that it is better to be safe than sorry.⁹³ After all, the individual being treated is unlikely to suffer harm from the unneeded antibiotic, and there is always a chance, albeit small, that the patient has a hidden underlying bacterial infection. So, on an individual level, the antibiotic likely does no harm and may even, in some cases, protect against hidden illness. But even if the individual suffers no harm from a single case of overtreatment, the aggregate effect of such unneeded treatment leads to systemic health risks causing much more harm overall.⁹⁴ Thus, the doctor who thinks only of the individual patient being treated might find it worthwhile to over treat—but

Disqualification Motions, 22 DEL. LAW. 16, 17 (2004) (“Delaware courts have adopted a de facto standard that approximates the clear and convincing evidence requirement.”).

91. See Brigid M. Wilson et al., *An Online Course Improves Nurses' Awareness of Their Role As Antimicrobial Stewards in Nursing Homes*, 5 AM. J. INFECT. CONTROL 466, 466 (2017) (“Antimicrobial-resistant and healthcare-associated pathogens cause over 2.5 million infections in the United States each year. Nearly 2% of these infections end in death.”).

92. *Id.*

93. See *id.* (noting each day, approximately 10% of nursing-home residents receive anti-microbial drugs).

94. See *id.* (explaining 40-75% of nursing-home antibiotic prescriptions are given unnecessarily, leading to higher rates of antibiotic resistance).

that decision, multiplied over time, will predictably harm other residents living in the same nursing home.⁹⁵

The same tension between individual and systemic interest exists in law. Under the Rules of Professional Conduct, lawyers are directed to put their own clients first.⁹⁶ But courts and regulatory authorities must determine how to apply the rules in manner that protects systemic interests as well as individual ones. It is not enough to say that disqualification for an imputed conflict causes only minimal harm to the affected client; unneeded disqualification creates significantly larger systemic effects by overly limiting the potential counsel available to clients.

A court that applies an overly broad imputation rule to disqualify counsel harms both the individual client and the larger system of justice. The underlying mechanism is the same: the court may decide to disqualify counsel even when the rules of professional conduct do not require it, and even in the absence of any documented risk to client confidentiality or loyalty, in a misguided attempt to avoid even the appearance of a conflict of interest.⁹⁷ When an improperly-imputed conflict leads to an unnecessary disqualification, individual harm accrues to the opposing client that has now lost its choice of counsel. The client whose lawyer has been disqualified must spend time, money, and effort to seek new counsel, and the case will likely face delay.⁹⁸

The systemic harm, however, is even greater than the individual harm accruing to the opposing client. An improper disqualification rewards parties who try to lock up the marketplace for legal services, allowing them to pre-emptively take away the choice of counsel from parties that might later stand in opposition.⁹⁹ A client with particularly deep pockets can afford to hire multiple excellent firms, giving each a small slice of its legal

95. *See id.* (reporting antibiotic resistance leads to 2.5 million infections a year in the United States, of which two percent are fatal—that is, more than fifty thousand Americans will die each year due to antibiotic resistance).

96. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (AM. BAR ASS'N 2018) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.”).

97. John F. Sutton, Jr., *Introduction to Conflicts of Interest Symposium: Ethics, Law, and Remedies*, 16 REV. LITIG. 491, 494 (1997) (“Often, the disciplinary standard is applied mechanically, word for word, without regard to its appropriateness as a procedural remedy.”).

98. *See id.* at 502 (stating disqualification can easily be used to run up opponent’s expenses).

99. *See Casco N. Bank v. JBI Assocs., Ltd.*, 667 A.2d 856, 861 (Me. 1995) (“[A] large, powerful corporation could hire every attorney in a community, each to perform some minute piece of work, and thus forever bar those attorneys from working on behalf of that corporation’s adversaries.”).

business—and thereby prevent later opposing parties from hiring those firms. Nothing in the Rules of Professional Conduct prevents this strategy.¹⁰⁰ A comment to the Model Rules does clarify that “a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a ‘prospective client[.]’” and therefore should not disqualify a later client from obtaining representation.¹⁰¹ But that provision means only that a potential client cannot use an initial consultation (without engagement) to disqualify a lawyer. If the client actually engages the lawyer—even for a small matter, and even with the disqualification of later parties in mind—the rules still impute that conflict to the larger firm.¹⁰² This limits the client’s choice of counsel even in ordinary firms, though in those cases such harm may be a reasonable cost in relation to the benefit of allowing information to be freely shared among the firm’s lawyers.¹⁰³

But in verein-style mega-firms, the cost of imputation is greater and the potential benefit smaller. The rise of mega-firms means that a client with the ability to spread small amounts of work around the five largest vereins could potentially disqualify more than 12,000 attorneys from being able to represent adverse parties.¹⁰⁴ This would present a tremendous reduction in the availability of specialized counsel. And that cost may not be offset by a concomitant benefit in information-sharing. After all, most vereins choose not to share client information across their member entities without a co-counsel relationship. If information-sharing across entities is unneeded, then imputation may unnecessarily restrict client choice.

100. See Lawrence J. Fox, *Conflicts in the Corporate Family: Professor Wolfram has It Almost Right*, 2 J. INST. STUDY OF LEGAL ETHICS 367, 368 (1999) (noting there are “client corporations who go around the legal world conflicting out as many firms as they can by spreading small assignments here, there, and everywhere[.]” but that “[n]o matter how badly our clients behave . . . We, as lawyers, are guided by different rules”).

101. MODEL RULES OF PROF’L CONDUCT R. 1.18 cmt 2 (commenting on the scope of prospective clients).

102. Sutton, *supra* note 97, at 503 (“A party could discuss a matter with a lawyer, ostensibly seeking a lawyer but actually seeking to make the lawyer unemployable by the opposition.”).

103. Even in non-verein firms, however, some commentators have found the harm arising from conflict imputation greater than the purported benefits. See Griffiths-Baker & Moore, *supra* note 47, at 2551–52 (“This is clearly a major problem for global practice in that what is known by one lawyer in the firm is deemed to be known by the whole firm, irrespective of whether what the lawyer knows is truly confidential . . . [I]n a law firm with offices worldwide and over 2,000 lawyers, how likely is it that an associate in the New York office will have any contact with a lawyer in a different practice area on the other side of the world?”).

104. See Sparkman, *supra* note 15 (noting how five vereins employ “more than 12,000 attorneys” combined and that they routinely lose “lawyers in various markets over conflict issues and to more profitable firms”).

B. *Lessons from Multinational Corporate Clients*

Considering law-firm structure as part of the conflicts analysis will require adjustment from courts, regulatory authorities, and clients. At the current time, all parties are used to thinking that “a law firm is a law firm” regardless of structure or size.¹⁰⁵ But adapting the conflicts rules to account for modern corporate structure is not just possible—it’s something that the legal profession has done before, when it adapted to the complex corporate structures adopted by law firm clients.

Businesses, after all, used complex corporate structures long before law firms even began to consider it.¹⁰⁶ That is part of what motivates the law firms to expand now: the firms are following their clients and providing global counsel to clients that have already been working around the world. A firm that increases its global reach is better able to serve multinational clients.

The legal profession’s prior adaptation to multinational clients with complex corporate structures can provide a guide for today’sverein conflicts. Decades ago, courts and regulatory authorities had to determine how to analyze conflicts of interest in cases involving complex corporate entities—that is, if a law firm represented one corporate entity, would it be precluded from accepting a new client who wanted to bring a case against a corporate affiliate of the client?¹⁰⁷ Did a law firm that represented a subsidiary corporation necessarily owe a duty to the parent corporation? Early on, some courts firmly said yes.¹⁰⁸ They applied what William Freivogel, a leading expert on the law of conflicts of interest, termed the “bright-line” rule, holding that representing a related corporate entity adverse to a current client “is always a conflict of interest.”¹⁰⁹ The district

105. See Richard Acello, *Taking on Big Financial Cases that the Big Firms Won't*, NAT'L L.J. (May 23, 2011, 12:00 AM), [https://www.law.com/nationallawjournal/almID/1202494735752/\[https://perma.cc/W9SX-V9SH\]](https://www.law.com/nationallawjournal/almID/1202494735752/[https://perma.cc/W9SX-V9SH]) (identifying no differences between large or small law firms).

106. See Charles W. Wolfram, *Corporate-Family Conflicts*, 2 J. INST. STUDY LEGAL ETHICS 295, 300 (1999) (“[E]xamine the issues . . . of law firms in dealing with conflicts problems created by corporate affiliations.”).

107. See ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 95-390 (1995) (“The Committee has been asked whether a lawyer who represents a corporate client may undertake a representation that is adverse to a corporate affiliate of the client in an unrelated matter, without obtaining the client’s consent.”).

108. See generally Wolfram, *supra* note 106, at 328 (explaining early court interpretations of the all-affiliates position).

109. William Freivogel, *Corporate Families*, FREIVOGEL ON CONFLICTS, <http://www.freivogelonconflicts.com/corporatefamilies.html> [<https://perma.cc/AA9L-Z6P7>].

court for the Southern District of New York, for example, stated that the lawyer's duty of loyalty "applies with equal force where the client is a subsidiary of the entity to be sued."¹¹⁰

Just over two decades ago, however, the ABA wrestled with that question in an ethics opinion and provided a more nuanced answer. The ABA concluded, "A lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter."¹¹¹ Instead, the ABA said the lawyers must look deeper and determine whether there are other circumstances that could impair representation, for example, other facts that might suggest that the corporate affiliate should also be considered a client; an explicit agreement with the client to avoid representation adverse to the client's affiliates; or other circumstances that would "materially limit" the lawyer's ability to provide competent and diligent representation.¹¹² In the absence of these factors, the lawyer and firm could accept a new client adverse to the client's corporate affiliate.¹¹³

The ABA opinion was not without controversy; two committee members penned separate dissents, with a third member joining both dissenting opinions.¹¹⁴ Committee member Lawrence Fox alleged that the majority opinion put economic gain ahead of client loyalty.¹¹⁵ He asserted that large corporate clients would likely never feel the effect of the opinion, as those clients had enough clout that they could demand their law firms sign agreements promising to voluntarily avoid taking action adverse to entities in the client's corporate families.¹¹⁶ It would be "only the unsophisticated,

110. *Stratagem Dev. Corp. v. Heron Int'l N.V.*, 756 F. Supp. 789, 792 (S.D.N.Y. 1991) (citing *Glueck v. Jonathan Logan, Inc.*, 512 F. Supp. 223, 227 (S.D.N.Y. 1981), *aff'd*, 653 F.2d 746 (2d Cir. 1981); *Rosman v. Shapiro*, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987)).

111. ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995).

112. *Id.*; see also *Stratagem Dev. Corp.*, 756 F. Supp. at 792 ("When . . . the case involves former clients of the firm, the Court will inquire into whether there is a 'substantial relationship' between the two matters." (citing *Fund of Funds Ltd. v. Arthur Andersen & Co.*, 435 F. Supp. 84, 85 (S.D.N.Y. 1977), *aff'd in part, rev'd in part*, 567 F.2d 225 (2d Cir. 1977))).

113. See *Stratagem Dev. Corp.*, 756 F. Supp. at 792 (examining the disqualification factors between former clients of a law firm).

114. See generally ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995) (Fox, dissenting) (detailing the dissenting opinions of the Committee).

115. See *id.* (Fox dissenting) ("The last thing our profession needs is another black eye caused by jettisoned client loyalty in the name of economic expediency.").

116. See *id.* (Fox, dissenting) ("One of the biggest problems with the majority approach is that those clients that are the most sophisticated and the least in need of protection, the very independent

those corporate families which do not have legions of in-house lawyers, who will be caught in the trap this opinion creates[.]” Fox wrote.¹¹⁷ “It is they who will naively hire a lawyer, assume total loyalty and find out much to their surprise that the lawyer feels completely free to sue another member of the corporate family simply because the economic impact on the ‘client’ was indirect.”¹¹⁸

In the wake of the ABA opinion, commentators offered helpful suggestions for performing a more rigorous analysis of corporate family conflicts. John Steele, a highly regarded professional responsibility expert, suggested that “the general rule for corporate affiliate conflicts should be whether the proposed representation violates ‘reasonable expectations’ of confidentiality or loyalty.”¹¹⁹ Professor Charles Wolfram likewise proposed a “functional analysis” examining “the corporate client’s reasonable expectation in the confidentiality of its information” as well as the “operational proximity between the lawyer’s work”—for example, when both the client and its affiliate share the same in-house counsel.¹²⁰

Ultimately, the balancing test prevailed. In 2002, the ABA added comment 34 to Model Rule of Professional Conduct 1.7.¹²¹ The comment states that “[a] lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary.”¹²² As a result, unless an exception applies, “[T]he lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter[.]”¹²³ Exceptions that would prohibit such conflicting representation mirror the exceptions originally set out in the earlier ethics opinion: (1) if “the circumstances are such that the affiliate should also be considered a client of the lawyer,” (2) if “there is an understanding between the lawyer and the organizational client that the lawyer will avoid

Fortune 500 companies that the majority thinks are indifferent to lawsuits against corporate family affiliates . . .”).

117. *Id.* (Fox, dissenting).

118. *Id.* (Fox, dissenting).

119. See John Steele, *Corporate Affiliate Conflicts: A Reasonable Expectations Test*, 29 W. ST. U. L. REV. 283, 283–84 (2002) (directing attention to a change in the rule).

120. See Wolfram, *supra* note 106, at 302 (proposing a functional analysis to attorney-corporation conflict of interest issues).

121. See Freivogel, *supra* note 109 (explaining the adoption of the balancing test in comment 34 to ABA Model Rule 1.7).

122. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 34 (AM. BAR ASS'N 2018).

123. *Id.*

representation adverse to the client's affiliates," or (3) if "the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client."¹²⁴ As a result, there is no bright-line rule against a firm accepting a representation adverse to the interests of a client's affiliate; instead, the firm must examine the larger context of the representation and determine whether there are individual circumstances precluding it.¹²⁵ If not, then the representation will not be barred.

C. *Prioritizing Confidentiality and Loyalty*

A similar balancing test centered on the profession's underlying values should be applied to *verein*-style mega-firm conflicts. When examining conflict imputation within a firm, the underlying values of confidentiality and loyalty are what matters—those values are why the legal profession developed rules to manage conflicts of interest in the first place. When law firms adopt new forms of organizational structure, there is no substitute for directly analyzing how those values will be affected by different regulatory choices. A regulatory choice that imputes a minor conflict to the entire worldwide structure of mega-firm carries serious consequences for prospective clients, who may find it more difficult either to obtain appropriate counsel in the first instance, or to change counsel later when it might benefit the client to do so.

The values of confidentiality and loyalty should retain their primacy.¹²⁶ If failing to impute a conflict threatens these values, then imputation is necessary—just as, when a patient suffers from a bacterial infection, antibiotics are both necessary and life-saving. But as discussed above, applying imputation rules mechanically can lead to overly broad disqualification decisions that reduce the counsel choices available to potential clients. Worse yet, such overly broad disqualification may not actually do anything more to protect either confidentiality or loyalty in a case where the mega-firm's structure already amply protects those interests.

As a result, courts and regulatory authorities should avoid a mechanical application of the imputation rule. Instead, they should apply the strategies developed for analyzing conflicts arising from clients' complex corporate

124. *Id.*

125. *Id.*

126. *Id.* at cmt. 1 (detailing when "[c]oncurrent conflicts of interest can arise from the lawyer's responsibilities to another client").

families: that is, they should look at the underlying structure and policies of the mega-firm itself, weighing actual practices and client disclosure to determine whether in fact a conflict should be imputed to the mega-firm itself. Some vereins and similar mega-firms may in fact regularly share client information among members. In such a case, imputation may be warranted.¹²⁷ Similarly, there are some representations significant enough to the mega-firm to put loyalty at risk even within other constituents of the verein. So, for example, if a single client accounts for a large enough percentage of a verein member's revenue—and if losing that client could give rise to financial costs large enough that the costs would be felt by all other verein members—then the duty of loyalty and the risk of a “material limitation” in judgment likely require other verein members to forgo accepting adverse representation.¹²⁸

These are questions, however, that require analysis of the particular facts and circumstances at hand. It is not enough to say that that verein “holds itself out as a firm”—the rule imputing conflicts firm wide was intended as a shorthand to predict when confidentiality and loyalty might be at risk. Blindly applying that shorthand to new law firm-structures without doing more to analyze the actual risks and benefits of such a policy risks unnecessarily limiting client autonomy. Instead, the interests of confidentiality and loyalty must be directly considered in light of the firm's organizational structure and practice.

V. CONCLUSION

Business and law are increasingly practiced on a transnational scale.¹²⁹ Although corporations have grown steadily more complex throughout the last half-century, the legal profession is only now beginning to experiment with new global practice structures. In the last decade, the so-called “mega-firms”—vereins, CLGs, and EEIGs—have taken over listings of the

127. *See id.* at cmt. 31 (“As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation.”).

128. *See id.* at cmt. 8 (“Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.”).

129. *See* John Leubsdorf, *Legal Ethics Falls Apart*, 57 *BUFF. L. REV.* 959, 1047 (2009) (“Ultimately, the growth of multistate and multinational practice should tend to make professional standards more uniform.”).

world's largest law firms.¹³⁰ As the mega-brand structure becomes more common, courts have struggled with how to treat imputed conflicts of interest. Is the *verein* (or similar entity) a single law firm, such that a client representation by one of the *verein* members will automatically prohibit other *verein* members from representing a client with conflicting interests? While these particular questions are new, the legal profession has already adapted to change over time—including, most notably, dealing with its clients' increasingly complex corporate structures. As long as the courts and regulatory authorities focus on the substance over form, prioritizing the protection of the legal profession's underlying values—client service, loyalty, and protection of confidentiality—the profession will adapt to these new structures as well, allowing both clients and lawyers to reap the rewards of creativity and innovation.

130. See Lin, *supra* note 8 (“The bigger a firm is, the more likely it will confront conflicts More lawyers means more clients and more clients means greater potential for conflicts between clients.”).