Disqualification Motions and the RPCs

Recent Decisions Using Ethics Rules as the Basis for Disqualification

by Mark J. Fucile*

Introduction

The ABA Model Rules of Professional Conduct ("Model Rules") profess to be limited to guiding lawyer conduct through the bar disciplinary process:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty. Scope, Model Rules, *reprinted in Annotated Model Rules of Professional Conduct* at xvii-xviii (3d ed. 1996).

Reality is quite different. The Model Rules now provide the key component in the substantive law of disqualification: whether there has been an ethical violation that may warrant disqualification.

This paper surveys the extent to which the ethics rules,[1] their accompanying commentary and associated ethics opinions are currently being used as the functional equivalent of a

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[1]Although the focus of this paper is on the Model Rules and their state counterparts ("RPCs"), the analysis presented extends to those jurisdictions that still use the ABA Model Code of Professional Responsibility ("DRs") and states like California that employ their own hybrids.

substantive body of law governing disqualification motions. It also examines the role of the courts in relation to these rules in the context of disqualification.

The Model Rules as the Substantive Law of Disqualification

The use of the Model Rules as the central element of disqualification case law has become pervasive. For almost each Model Rule that deals with the conduct of litigation, there is a recent decision using that rule as the principal analytical tool for assessing whether an ethical violation took place that may call for disqualification.[2] The reason appears simple. The Model Rules afford a known and comparatively uniform yardstick for measuring lawyer conduct–both for the courts ruling on disqualification motions *and* for the lawyers whose conduct is being examined. As one judge observed succinctly in rejecting the "appearance of impropriety" standard in favor of a rule-based approach to disqualification issues:

> Ethics standards should be clear and precise so that an attorney can know beforehand what conduct is unacceptable. Applying analogy rules to impose an ethical boundary should not be the standard. It does not fairly advise counsel what is proper. *Proctor & Gamble v. Haugen Co.,* 183 F.R.D. 571, 573 (D. Utah 1998).[3]

That is not to say that the Model Rules are the *only* element in the substantive law of disqualification. As will be discussed in more detail in the second section of this paper, although the Model Rules provide, in essence, the substantive law for deciding whether an ethics violation has occurred, the courts retain the ultimate determination on whether any misconduct found merits the sanction of disqualification.[4] Moreover, even on the "liability question," many associated issues relevant to disqualification remain outside the purview of the Model Rules. *See, e.g., Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Tech., Inc.,* 82 Cal. Rptr. 2d 326, 329 (Cal. App. 1999) (examining the preliminary issue of whether there was ever an attorney-client

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[2]The author's research methodology was admittedly simple. Each rule was run through the Westlaw database in association with the word "disqualification" (and its variants) for cases decided, except where otherwise noted, after January 1, 1998. The results presented are intended to be illustrative, not encyclopedic.

[3]Ironically, the issue of *ex parte* contact with an opposing party's expert that was at issue in *Proctor & Gamble* is not specifically addressed in the Model Rules.

[4]It should also be noted at the outset that many of the concepts that found their way into the Model Rules had their roots in judicial decisions. *See, e.g., Annotated Model Rules of Professional Conduct* at 150-51 (3d ed. 1996) (discussing the origins of the "substantial relationship test" later incorporated into Model Rule 1.9); *see generally Kala v. Aluminum Smelting & Ref.*, 688 N.E.2d 258 (Ohio 1998) (discussing the history of disqualification motions for conflicts of interest and their changing role in modern practice).

relationship between the party seeking disqualification based on an asserted conflict and the law firm it was attempting to disqualify); *Associated Wholesale Grocers, Inc. v. Americold Corporation,* __ P.2d __, 1999 WL 112005, at *5 (Kan. Mar. 5, 1999) ("[A]n attorney-client relationship must be established before an MRPC 1.9 or 1.10 violation exists."). In still other situations, the courts have melded the Model Rules with considerations specific to the litigation involved. *See, e.g., Lazy Oil Corp. v. Witco Corp.*, 166 F.3d 581, 588-91 (3rd Cir. 1999) (discussing conflicts and disqualification in the context of class action litigation); *In re American Home Products Corporation,* __ S.W.2d __, 1999 WL 2531, *4-*7 (Tex. Dec. 31, 1998) (applying its own rule for imputed conflicts involving a legal assistant hired from a rival firm in the course of disqualifying a plaintiffs' firm in 3,000 related tort claims).[5]

Disqualification for conflicts of interest still forms the core of most of the cases noted here. But, increasingly, the courts' resort to the Model Rules in the disqualification context extends well beyond conflict-based issues to those addressing discovery and other pretrial activities as well.

Disqualification for Conflicts:
Model Rules Dealing with the "Client-Lawyer Relationship"

Given that many motions to disqualify arise from asserted present or former multiple client conflicts of interest, it is not surprising that the courts regularly turn to the Model Rules' conflict provisions in analyzing and deciding these motions.[6]

❒ **Model Rule 1.6: *Confidentiality of Information***

- *Capacchoine v. Charlotte-Mecklenburg Board of Education*, 9 F. Supp. 2d 572 (W.D.N.C. 1998)

  An educational law specialist from a law firm was invited to address the defendant on general developments in the law of school desegregation. Later, other lawyers

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[5]The Restatement of the Law Governing Lawyers is also being cited with increasing frequency in the context of disqualification issues. *See, e.g.*, *In re Polypropylene Carpet Antitrust Litigation*, 181 F.R.D. 680, 698 (N.D. Ga. 1998) (citing the Restatement in discussing a lawyer's duty upon receiving an adversary's inadvertently produced documents).

[6]With much less frequency, other provisions defining the client-lawyer relationship also come into play in motions to disqualify. *See, e.g., Cannon v. Cherry Hill Toyota, Inc.,* 1999 WL 157684 (D. N.J. Feb. 25, 1999) (involving a motion to disqualify based on New Jersey RPC 1.2(a) for the alleged failure of the plaintiff's lawyer to present the defendant's settlement offer to the plaintiff); *Musick v. Musick*, 453 S.E.2d 361 (W. Va. 1994) (examining West Virginia RPCs 1.8(b) and 1.14 in determining that a personal relationship between a lawyer and a client in the context of a dissolution proceeding may warrant disqualification).

from the firm acted as local counsel to the plaintiff in a desegregation case involving the same school district. The school district asserted that its superintendent had provided confidential information to the lawyer who presented the briefing to the school board, and, therefore, argued that North Carolina RPC 1.6(a) (which generally parallels the Model Rule) precluded the lawyer's firm from representing the plaintiff. The district court denied the motion, and, in doing so, relied on RPC 1.6(a) to conclude that no confidential information had been disclosed in either the contacts with the superintendent or the board.

- *Hasco, Inc. v. Roche*,
  700 N.E.2d 768 (Ill. App. 1998)

  A law firm's former clients in a commercial dispute sought an injunction disqualifying the law firm from representing the opposing parties in an arbitration. The Illinois Court of Appeals used Illinois RPCs 1.6(a) (which mirrors the Model Rule) and 1.9 (which is also based on the Model Rule), in concluding that the law firm should be disqualified.

- *Kala v. Aluminum Smelting & Ref.*,
  688 N.E.2d 258 (Ohio 1998)

  While this wrongful termination case was on appeal, the plaintiff's lawyer joined the defendant's law firm. The Ohio Supreme Court examined the lawyer's switch in light of DR 4-101 and DR 5-105 (both of which follow the analogous Model Code provisions) in concluding that he–and his new law firm–should be disqualified.

❒ **Model Rule 1.7: *Conflict of Interest: General Rule***

- *Ferguson Electric Co., Inc. v. Suffolk Construction Company, Inc.*,
  1998 WL 140101 (Mass. Super. Mar. 20, 1998) (slip op.)

  A lawyer who was representing an electrical subcontractor in a construction dispute in Connecticut sought to represent a defendant contractor in a Massachusetts case brought by the same subcontractor. The subcontractor moved to disqualify the lawyer. The lawyer argued that the subcontractor was no longer a current client. But, the superior court found otherwise and disqualified the lawyer. In doing so, it relied on both Connecticut RPC 1.7(a) (which is based on the Model Rule) and the analogous Massachusetts rules.

- *GATX/Airlog Co. v. Evergreen Int'l Airlines, Inc.*,
  8 F. Supp. 2d 1182 (N.D. Cal. 1998)

The district court found a current client conflict under California RPC 3-310[7] where a law firm was representing the plaintiff in a declaratory judgment proceeding attesting to the airworthiness of a cargo plane design and, at the same time, was representing a beneficial owner of one of the planes affected by the alleged design flaws in unrelated matters. The court held that the law firm's effort to "cure" the conflict by "firing" the plane owner violated the so-called "hot potato rule" (prohibiting a law firm from remedying a conflict by dropping one client "like a hot potato" to preserve a relationship with another, and presumably more remunerative, client) and disqualified the law firm.

- *Image Technical Serv., Inc. v. Eastman Kodak Co.*,
136 F.3d 1354 (9th Cir. 1998)

After a law firm had incurred $400,000 in handling an initial (and successful) appeal to the U.S. Supreme Court for the plaintiff in an antitrust case, the law firm discovered that it had also been representing one of the defendant's major operating divisions in unrelated matters for some time. The defendant declined to grant a waiver and the trial court disqualified the law firm under the California current client conflict rule cited in the preceding case. After the plaintiff eventually won a large jury verdict, it included the $400,000 in its petition for statutory attorney fees. The Ninth Circuit denied this portion of request under accompanying California case law holding that an attorney cannot recover fees for a representation that violates the conflict rule.

- *Worldspan, L.P. v. The Sabre Group Holdings, Inc.*,
5 F. Supp. 2d 1356 (N.D. Ga. 1998)

The plaintiffs in this tort claim moved to disqualify the defendants' local law firm, which was also representing the plaintiffs on unrelated state and local tax matters. The law firm attempted to defend the motion based a "standard engagement letter" executed at the outset of its representation of the plaintiffs in the unrelated tax matters in 1992 that purportedly granted "standing consent" to adverse future representations. The district court found that the letter was insufficient to waive the current client conflict under Georgia DR 5-105 (which mirrors the Model Code provision) and disqualified the law firm.

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[7]California RPC 3-310 reads, in pertinent part:

> [A] member shall not, without the informed written consent of each client * * * [r]epresent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

❒ **Model Rule 1.9: *Conflict of Interest: Former Client***

- *Hawkes v. Lewis*,
  586 N.W.2d 430 (Neb. 1998)

  The Nebraska Supreme Court examined the duties of confidentiality and loyalty that the Nebraska former client conflict rule, DR 5-108(A) (which is based on the Model Code provision), was designed to protect in holding that a party who was not a former client of the law firm lacked standing to seek disqualification based on an alleged former client conflict.

- *In re EPIC Holdings, Inc.*,
  __ S.W.2d __, 1999 WL 2518 (Tex. Dec. 31, 1998)
  (not yet released for publication)

  In this shareholder suit challenging the terms of a merger, the Texas Supreme Court ordered the disqualification of the plaintiff's lawyers under Texas Disciplinary RPC 1.09 (which is similar to the Model Rule) where the lawyers had formerly represented the defendants in a substantially related matter concerning the structure of the corporation involved.

- *Norman v. Norman*,
  970 S.W.2d 270 (Ark. 1998)

  This was a post-dissolution proceeding to enforce an alimony provision in a divorce decree. A partner of the wife's attorney had apparently worked on the original divorce proceeding for the husband. The Arkansas Supreme Court found a former client conflict under Model Rule 1.9(b) (which Arkansas had adopted from the Model Rule verbatim), imputed the conflict to his partner under Arkansas RPC 1.10(a) (again, which was taken substantially from the Model Rule) and disqualified the wife's law firm.

- *Welch v. Paicos*,
  26 F. Supp. 2d 244 (D. Mass. 1998)

  The district court reviewed Massachusetts RPC 1.9 (which is identical to the Model Rule) and the Model Rule's accompanying comments in determining whether consent to a former client conflict was effective. The court held that where, as here, a client had sought the advice of an independent counsel concerning the waiver, sufficient "consultation" and "disclosure" as those terms are used in, respectively, the "Terminology" preface to the Model Rules and in Comment 12 to Model Rule 1.9 had taken place to validate the waiver.

❒ **Model Rule 1.10: *Imputed Disqualification: General Rule***

- *Essex Chem. Corp. v. Hartford Accident and Indem. Co.*,
  993 F. Supp. 241 (D. N.J. 1998),
  rev'g, 975 F. Supp. 650 (D. N.J. 1997)

  The district court used New Jersey RPC 1.10(a) (which follows the Model Rule) and ABA Formal Ethics Op. 95-395 (1995) in reviewing whether all of the law firm participants in a joint defense agreement should be disqualified by a conflict one of the law firms had with the plaintiff. In reversing a magistrate's earlier order disqualifying all of the defense firms, the court found that the magistrate's use of a "double imputation" of shared confidences–*i.e.,* from the plaintiff to its former law firm and then from the firm to its fellow members of the joint defense group–was improper.

- *Ex Parte Terminix International Company, L.P.,*
  1998 WL 890286 (Ala. Dec. 23, 1998) (slip op.)

  The Alabama Supreme Court used Alabama RPC 1.10(a) (which is identical to the Model Rule) and the accompanying comment (which is also based on the Model Rule comment) defining the term "firm" in concluding that a law firm should not be disqualified by virtue of a conflict one of its co-counsel had in a series of cases they were prosecuting against several termite control companies.

- *Koulisis v. Rivers*,
  1999 WL 2689 (Fla. App. Jan. 6, 1999)
  (not yet released for publication)

  The Florida Court of Appeal found that Rule 4-1.10(b) of the Rules Regulating the Florida Bar (which is similar to the Model Rule) applied to legal secretaries as well. Therefore, when the secretary for plaintiff's lead counsel in this medical malpractice case took a job with the defendants' law firm, the court disqualified the defendants' law firm despite the fact that it had "screened" the secretary.

- *State ex. rel Peters v. District Court*,
  951 P.2d 926 (Colo. 1998)

  The Colorado Supreme Court affirmed the disqualification of two defense counsel in a first-degree murder case under Colorado RPC 1.10(a) (which is the same as Model Rule 1.10(a)) where another lawyer in their firm had current and former client conflicts through his representation of an alternate suspect and a prosecution witness that the court imputed to the two defense counsel whom it disqualified.

❒ **Model Rule 1.11: *Successive Government and Private Employment***

- *Osborne v. Osborne*,
  589 N.W.2d 763 (Mich. 1999)

  Although the Michigan Supreme Court ultimately held that disqualification had not been timely raised, both the Supreme Court and the Court of Appeals analyzed the substantive issue under Michigan RPC 1.11(c) (which is identical to Model Rule 1.11(c)) where a government attorney in a termination of parental rights case had earlier represented one of the parents in a related proceeding.

- *State v. Barnett*,
  965 P.2d 323 (N.M. 1998)

  The New Mexico Supreme Court examined New Mexico RPC 16-111(c) (which is based on Model Rule 1.11(c)) in analyzing whether a criminal defendant was entitled to withdraw his guilty plea for ineffective assistance of counsel where his defense attorney failed to advise him that he could move to disqualify a prosecutor who had formerly represented him in a related proceeding.

❒ **Model Rule 1.12: *Former Judge or Arbitrator***

- *Fields-D'Arpino v. Restaurant Associates, Inc.*,
  1999 U.S. Dist. LEXIS 3393 (S.D.N.Y. Mar. 24, 1999)

  The parties in this employment discrimination case participated by agreement in an informal prelitigation mediation conducted by an attorney at the defendant's regular outside law firm. When the mediation was unsuccessful and the plaintiff later filed suit, the law firm appeared on behalf of the defendant. The district court granted the plaintiff's motion to disqualify. In doing so, it relied on New York EC 5-20 (which provides, in pertinent part: "A lawyer who has undertaken to act as an impartial arbitrator or mediator should not thereafter represent in the dispute any of the parties involved.") and a Utah federal district court case (*Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487 (D. Utah 1995)) that had reached the same conclusion under Utah RPC 1.12.

- *State v. Tolias*,
  954 P.2d 907 (Wash. 1998),
  rev'g 929 P.2d 1178 (Wash. App. 1997)

  The Washington Court of Appeals had directed a new trial following a criminal conviction and held that on remand an entire local prosecutor's office should be disqualified under Washington RPC 1.12 (which follows the Model Rule) because

the chief prosecutor had earlier acted as a mediator in the same case. Although the Washington Supreme Court reversed the Court of Appeals, it did so on the procedural ground that the record was not developed sufficiently to, in its view, support the Court of Appeals' factual conclusions.

❒ **Model Rule 1.13: *Organization as Client***

- *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft, LLP*,
  81 Cal. Rptr. 2d 425 (Cal. App. 1999)

  The California Court of Appeals examined ABA Formal Ethics Op. 95-390 (1995), which, in turn, focuses on Model Rule 1.13, in disqualifying a law firm that represented one corporate affiliate and sought to represent interests adverse to another corporate affiliate.

- *Tremont v. Yuditski,*
  1997 WL 12326 (Conn. Super. Jan. 3, 1997) (slip op.)

  The Connecticut Superior Court used Connecticut RPC 1.13(a) (which is identical to Model Rule 1.13(a)) in determining that a law firm did not have an attorney-client relationship with the beneficiaries of a pension trust and, therefore, did not have a conflict under RPC 1.7 warranting disqualification.

Disqualification for Discovery Abuses and Other Pretrial Conduct: Model Rules Dealing with the "Advocate," "Transactions with Persons Other than Clients" and "Maintaining the Integrity of the Profession"

Although conflict issues form the most frequent backdrop for disqualification, the courts have also turned to the Model Rules and associated ABA formal ethics opinions dealing with the duties of an advocate in deciding motions to disqualify based on asserted discovery abuses and other alleged pretrial misconduct.

❒ **Model Rule 3.4: *Fairness to Opposing Party and Counsel***

- *In re Firestorm 1991*,
  916 P.2d 411 (Wash. 1996)

  The Washington Supreme Court found that *ex parte* contact with an opposing party's expert violated the Washington equivalent of FRCP 26(b). Although the court ultimately held that disqualification was not warranted where no privilege had been breached, the court noted Washington RPC 3.4(c) (which is identical to the Model Rule) and ABA Formal Ethics Op. 93-378 (1993) in analyzing the issues presented.

- *Olson v. Snap Products, Inc.*,
  183 F.R.D. 539 (D. Minn. 1998)

  The district court used Minnesota RPC 3.4(c) (which mirrors the Model Rule) and ABA Formal Ethics Op. 93-378, *supra,* in determining that an attorney should not be disqualified for contacting an opposing party's expert witnesses outside the confines of FRCP 26(b) where there was no showing, using the language of RPC 3.4(c), that the attorney knew that the experts involved were retained by the opposing party in that case at the time of the contacts.

❒ **Model Rule 3.6: *Trial Publicity***

- *Brown v. Daniel*,
  180 F.R.D. 298 (D. S.C. 1998)

  The district court noted South Carolina RPC 3.6(a) (which parallels the Model Rule) in finding that the evidence was not sufficiently developed to disqualify a firm based on one of its partners' newspaper statements about the facts underlying the case. At the same time, the court warned the attorneys involved that further pretrial statements to the media might cause it to reconsider disqualification.

❒ **Model Rule 3.7: *Lawyer as Witness***

- *Galerie v. M & T Bank Corp.*,
  30 F. Supp. 2d 322 (N.D.N.Y. 1998)

  The plaintiff was pursuing a tortious interference with contract claim involving a contract that the plaintiff's counsel had drafted. The district court found that the testimony of the plaintiff's attorney was central to the plaintiff's claim, and, therefore, disqualified him under New York DR 5-102 (which follows the Model Code provision).

- *SAS Overseas Consultants v. Offshore Consultants USA, Ltd.,*
  1998 WL 676992 (E.D. La. Sept. 30, 1998) (slip op.)

  The district court analyzed Louisiana RPC 3.7 (which mirrors the Model Rule) in concluding that a lawyer–but not the lawyer's law firm–should be disqualified from handling a breach of contract claim where the lawyer had drafted the contract at issue and was likely to be a witness on interpretation and breach.

❒ **Model Rule 4.1: *Truthfulness in Statements to Others***

- *Essex County Jail Annex Inmates v. Treffinger*,
  18 F. Supp. 2d 418 (D. N.J. 1998)

  The defendants sought disqualification of the plaintiff's lead counsel in this prisoners' rights case based, in part, on an allegedly false statement of material fact to a third person. Although the district court found that the lawyer's statement did not technically violate New Jersey RPC 4.1(a) (which is identical in this respect to the Model Rule), the court disqualified the attorney for violation of one of the court's own orders.

❒ **Model Rule 4.2: *Communications with Represented Parties***

- *In re News Am. Publ'g, Inc.*,
  974 S.W.2d 97 (Tex. App. 1998)

  The Texas Court of Appeals disqualified a law firm representing the plaintiff when its lawyers met *ex parte* with one of the individual defendants without confirming with his attorney the individual defendant's assertion that he had terminated his defense counsel. In doing so, the court relied on Texas Disciplinary RPC 4.02 (which is similar to the Model Rule) and ABA Formal Ethics Op. 95-396 (1995).

- *Palmer v. Pioneer Hotel & Casino*,
  19 F. Supp. 2d 1157 (D. Nev. 1998)

  The plaintiff's counsel in an employment discrimination suit contacted several current and former employees of the defendant hotel. The hotel moved to disqualify the plaintiff's lawyer. The district court used Nevada Supreme Court Rule 182 (which largely mirrors Model Rule 4.2), the comments to Model Rule 4.2 and ABA Formal Ethics Op. 91-359 (1991) in analyzing the issues presented. Although the court concluded that Nevada Supreme Court Rule 182 had been violated with one of the four employees involved, it declined to disqualify the attorney and instead excluded the affidavit of the witness involved. The court also forwarded a copy of its ruling to the Nevada State Bar.

❒ **Model Rule 4.3: *Dealing with Unrepresented Persons***

- *Arons v. Lalime*,
  1998 WL 912034 (W.D.N.Y. Oct. 8, 1998) (slip op.)

  The district court disqualified the plaintiff's lawyer for giving advice on raising a third-party insurance coverage claim and then "ghost writing" a motion for the

third-party coverage complaint for one of the defendants who was then unrepresented. The court relied on New York DR 7-104(A)(2) (which is identical to the Model Code provision) in reaching its conclusion.

- *Pinebrook Towne House Ass'n v. C.E. O'Dell & Associates, Inc.*, 725 So.2d 431 (Fla. App. 1999)

  The Florida Court of Appeal reversed the trial court's order disqualifying the plaintiff town house association's law firm based on a meeting its lawyers had with the principal of a reconstruction project's then unrepresented engineering firm concerning cost overruns in the repairs at issue. The Court of Appeal found that no violation of Florida RPC 4-4.3 (which is similar to Model Rule 4.3) had occurred because the defendant engineering firm's principal knew who the attorneys represented and was aware of the prospect of the town house association making claims against his company.

❒ **Model Rule 8.4: *Misconduct***

- *Biocore Med. Technologies, Inc. v. Khosrowshahi*, 1998 WL 919126 (D. Kan. Nov. 6, 1998); *see also* 181 F.R.D. 660 (D. Kan. 1998) (other violations in the same case)

  With no little measure of judicial pique, the district court disqualified one of the defendants' lawyers under Kansas RPC 8.4(g) (which is drawn from Model Rule 8.4(b)) for multiple and repeated violations of the court's protective order in a trade secrets case. ("This case has become a textbook example of how major litigation should not be conducted, and [the disqualified lawyer's] inability or unwillingness to comply with simple rules has made the entire process more time-consuming, expensive, contentious and protracted than it has needed to be." 1998 WL 919126, at *4.)

- *Essex County Jail Annex Inmates v. Treffinger*, 18 F. Supp. 2d 418 (D. N.J. 1998)

  This case is discussed under Model Rule 4.1 as well. The district court also noted New Jersey RPC 8.4(c) (which mirrors the Model Rule) in discussing the misrepresentation alleged. As noted earlier, the court found no violation of RPC 4.1 (and, therefore, did not reach a conclusion under RPC 8.4(c)), but disqualified the lawyer involved for violating one of the court's own orders.

❒ **ABA Formal Ethics Ops. 92-368 & 94-382: *Issues Relating to the Receipt of an Opposing Party's Privileged or Confidential Materials Through Inadvertent Production or Unsolicited Delivery***[8]

- *Abamar Hous. & Dev., Inc. v. Lisa Daly Lady Decor, Inc.*,
  1998 WL 422789 (Fla. App. July 29, 1998) (slip op.);
  see also 698 So.2d 276 (Fla. App. 1997) (discussing the underlying facts)

  A general contractor, Abamar, produced 70 boxes containing over 100,000 documents in a construction dispute with one of its subcontractors, Lisa Daly. Despite an effort to review the documents for privilege before producing them, Abamar's lawyers discovered that they had inadvertently produced 23 documents that fell within the attorney-client privilege. Lisa Daly's lawyers refused to return the documents, and, instead, used them during depositions. Abamar initially sought a protective order for the return of the documents involved. The Florida Court of Appeal, relying on a Florida Bar opinion that, in turn, was based on ABA Formal Ethics Op. 92-368, *supra,* directed the return of the documents. *See* 698 So.2d at 277-79. On remand, Abamar then moved to disqualify Lisa Daly's lawyers. The case traveled back to the Florida Court of Appeal on that issue. This time, the Court of Appeal disqualified Lisa Daly's lawyers as well.

- *In re Meador*,
  968 S.W.2d 346 (Tex. 1998)

  In related harassment cases, one of the plaintiffs photocopied internal company documents without authorization and provided them to her attorney. When this later came to light during a deposition, the defendant company demanded the return of the documents and moved to disqualify the lawyer. The trial court ordered the return of the documents, but denied the motion to disqualify. The Texas Supreme Court, too, refused to direct the lawyer's disqualification. In reaching its conclusion, the Supreme Court relied heavily on ABA Formal Op. 94-382, *supra*, in fashioning a statement of Texas' lawyers responsibilities in this context: "While we do not exercise our rulemaking authority via judicial opinion

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[8]In Formal Ethics Opinions 92-368 (1992) and 94-382 (1994), the ABA has wrestled with the professional obligations of a lawyer who receives an opposing party's privileged or confidential materials through, respectively, inadvertent production or unsolicited delivery. Neither opinion relies on a specific Model Rule in articulating the receiving attorney's duties to notify the opposing counsel of the receipt and to either abide by the attorney's instructions or refrain from using the materials while promptly seeking judicial resolution. The courts that have dealt with these issues in the context of disqualification motions have not pointed to specific rules either. Rather, what they have at least examined and often relied on are the two ABA formal ethics opinions themselves.

* * *, we nonetheless agree * * * that ABA Formal Opinion 94-382 represents the standard to which attorneys should aspire in dealing with an opponent's privileged information." 968 S.W.2d at 351.

- *State Compensation Ins. Fund v. WPS, Inc.*,
  82 Cal. Rptr. 2d 799 (Cal. App. 1999)

  In this case, the defendant's attorney was sanctioned by the trial court for his failure to return inadvertently produced documents. The California Court of Appeal reversed the award of sanctions because there was not, at the time, controlling California precedent. But, the Court of Appeal then, in effect, adopted ABA Formal Op. 92-368, *supra*, as the standard for future cases. The Court of Appeal went on to note that a lawyer who did not comport with the standard being announced might be subject to disqualification.

The Role of the Courts in Relation to the Model Rules in the Disqualification Context

Although the Model Rules supply a key component in disqualification analysis, courts ruling on these motions typically reserve for themselves the ultimate question of whether the sanction of disqualification should be imposed. *See, e.g., Palmer v. Pioneer Hotel & Casino, supra,* 19 F. Supp. 2d at 1168 ("[W]hile * * * [the offending lawyer's] * * * unethical conduct has impugned the integrity of the judicial process, the Court cannot say that the damage is so great as to justify the draconian sanction of disqualification."); *Biocore Med. Technologies, Inc. v. Khosrowshahi, supra,* 181 F.R.D. at 674 ("The Court finds * * * [the offending lawyer] * * * has failed to follow required procedural and ethical rules to a degree which raises serious questions about his ability and willingness to accept and perform the obligations of his representation in this case. * * * The Court must nonetheless determine whether disqualification is the appropriate remedy.").

Several recent decisions echo the same theme in explaining why the courts do, and should, remain the ultimate arbiter of disqualification:

- "While it is the court's responsibility to ensure the propriety of the bar, the act of disqualifying a firm 'is ordinarily not taken without a strong showing.' * * * Our Court of Appeals has stated, 'The drastic nature of disqualification requires that courts avoid overly mechanical adherence to disciplinary canons at the expense of litigants' rights freely to choose their counsel; and that they always remain mindful of the opposing possibility of misuse of disqualification for strategic reasons.'" *Brown v. Daniel, supra,* 180 F.R.D. at 300 (citation omitted).

- "The Court must determine a motion to disqualify counsel measuring the facts of the particular case. * * * The essential issue is whether the alleged misconduct taints the lawsuit. * * * The Court should not disqualify unless 'the offending

attorney's conduct threatens to 'taint the underlying trial' with a serious ethical violation. * * * Because the interests to be protected are critical to the judicial system, the Court should resolve doubts in favor of disqualification. * * * The Court must balance several factors, however, in including society's interest in ethical conduct, defendants' right to choose their counsel, and the hardship which disqualification would impose on the parties and the entire judicial process.'" *Biocore Med. Technologies, Inc. v. Khosrowshahi, supra,* 181 F.R.D. at 664 (citations omitted).

- "The Third Circuit has stated that a district court, in exercising its discretionary power, should disqualify an attorney only when it determines, on the facts of the particular case, that disqualification is the appropriate means of enforcing the applicable disciplinary rule. The Court should consider the ends that the disciplinary rule is designed to serve and any countervailing policies, such as permitting a litigant to retain counsel of his choice and enabling attorneys to practice without excessive restrictions." *Foley v. International Brotherhood of Electrical Workers Local Union,* 1998 WL 720153, *3 (E.D. Pa. Sept. 10, 1998) (slip op.).

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Although the Model Rules may not have been intended originally to serve as a key component of the substantive law of disqualification, they have taken on that role. As noted at the outset, this should not be particularly surprising. By providing a known and relatively uniform yardstick to assess lawyer conduct, the Model Rules are as close to a "bright line" as the courts and the practicing bar have in navigating what are oftentimes fairly murky waters.