Serving Multiple Masters: Confronting the Conflicting Interests that Arise in Superfund Disputes

Patrick E. Donovan
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I. INTRODUCTION

The belief that "[n]o man can serve two masters"1 is as old as the Bible. Today's legal community, however, does not entirely submit to this belief as multiple representations2 have become the double-edged sword of modern legal practice. On one edge lies the possibility of multiple successes, including the praise of the legal community, enhanced reputations for the firm and the attorneys involved, and an expanded client list. The other edge, however, can twist what could have been a promising representation into a complex web of conflicting interests if one or more of the clients' interests becomes adverse. Continued representation of parties despite the existence of a conflict of interest can seriously injure a firm's reputation, and can potentially result in monetary damages and disciplinary action against the firm and the individual attorneys involved.3

For these reasons, large firms fear involvement in a serious conflict of interest more than any other ethical problem except, perhaps, encountering personal dishonesty within the firm membership.4 It is

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* Production Editor, 1989–90, Boston College Environmental Affairs Law Review.
1 Matthew 6:24.
2 Unless otherwise noted, the term "multiple representation" is used in this Comment in its most basic definition: the service of two or more clients in the same matter at the same time.
3 See G. Hazard, Jr. & W. Hodes, The Law of Lawyer: A Handbook on the Model Rules of Professional Conduct 126–27 (1986 Supp.) [hereinafter Handbook On The Model Rules]. The authors of this Handbook suggest that, as the law of conflicts of interest becomes more clearly established, it will be enforced through the disciplinary process and malpractice actions. Id.
4 G. Hazard, Jr., Ethics in the Practice of Law 83 (1978).
a fear that is not easily reconciled with the modern practice of law, leading one commentator to observe that "the lawyer with conflicting interests has provided bench and bar with one of the toughest problems in legal ethics." The continuing growth and diversification of today's law firms aggravate this problem and have made conflicts checks a necessity, rather than a superfluous precaution. A clear example of the problems that conflicts of interest pose to large complex practices can be found in environmental law. In an environmental lawsuit, large firms are more likely to undertake multiple representations, due to the size of a typical environmental proceeding and the relatively small number of firms capable of handling this type of complex practice.

In particular, settlement proceedings and litigation spawned by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) have forced firms practicing environmental law to consider the ethical problems associated with multiple representations. The very nature of Superfund proceedings has increased the likelihood that an attorney defending several potentially responsible parties (PRPs) in the same proceeding will encounter conflicting or adverse interests among clients. Under CERCLA, any person who has contributed to the disposal of hazardous substances can be held responsible, even if such contributions occurred decades before the initiation of a clean-up action. Further-

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8 See infra notes 64–148 and accompanying text for a discussion of the effect Superfund has on attorney-client relationships.
9 42 U.S.C. § 9607(a) (1982 & Supp. IV 1986) defines the parties that can be held liable under CERCLA. Although section 9607(a) does not explicitly state that CERCLA applies retroactively, several courts have canvassed the legislative history of the statute and have determined that it does apply retroactively to pre-CERCLA violators. See, e.g., United States v. Northeastern Pharmaceutical and Chem. Co., 810 F.2d 726 (8th Cir. 1986); Ohio ex rel. Brown v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983). There are, however, three very narrow defenses available to targeted parties. These three defenses to liability under CERCLA are: an act of God, an act of war, or an act or omission of a third party other than an employee or agent of the defendant, or a contractor of the defendant. 42 U.S.C. § 9607(b).
more, the number of PRPs can reach well into the hundreds whenever the Environmental Protection Agency (EPA or Agency)\textsuperscript{10} targets parties that may be liable for the clean-up costs of a large dump site.\textsuperscript{11} When multiple PRPs are involved, a firm often finds itself representing several parties, all of whom are hoping to avoid liability.

This Comment addresses the difficulties encountered in applying present conflict standards, found in the Model Rules of Professional Conduct (Model Rules),\textsuperscript{12} and the Model Code of Professional Responsibility (Model Code),\textsuperscript{13} to CERCLA's complex litigation and negotiation situations. This Comment then discusses the particular conflicts that arise in Superfund proceedings and illustrates how the ethical codes provide little, if any, substantive guidance toward resolving these complex issues. This situation has left the legal profession in a quandary over a basic question: whom can we represent? As this Comment illustrates, there are certain natural groupings of parties in Superfund proceedings that are benefited by multiple representation and can survive potential conflicts by virtue of the continuing relationships between them.\textsuperscript{14} Where these relationships do not exist, however, counsel will face a conflict of interest in virtually every case. Finally, this Comment proposes methods by which attorneys can avoid potential conflicts before they occur, and argues that a different analysis of conflict issues should be applied to the multiple representation of parties involved in Superfund proceedings.

\textsuperscript{10} 42 U.S.C. § 9601(2) defines the "Administrator" of CERCLA as the Administrator of EPA.

\textsuperscript{11} See supra note 3.

\textsuperscript{12} MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.9 (1983) [hereinafter MODEL RULES].

\textsuperscript{13} MODEL CODE OF PROFESSIONAL RESPONSIBILITY Disciplinary Rule (DR) 5-105 (1980) [hereinafter MODEL CODE].

\textsuperscript{14} CERCLA defines liable persons as:

1) the owner and operator of a vessel or a facility,

2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

3) any person who by contract, agreement or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment

...,

4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release ... .

42 U.S.C. § 9607(a). See infra note 63 and accompanying text for a more detailed discussion of liability under CERCLA.
II. THE MODEL RULES AND THE MODEL CODE

When confronting the ethical issues that arise out of simultaneous multiple representations, the natural starting point of the analysis is the Model Rules and the Model Code. Any such analysis must accommodate the existence of both the Model Code and the Model Rules, the latter having been adopted by the American Bar Association (ABA or the Bar) in 1983. Because not all states have adopted the Model Rules, however, many courts continue to use the Model Code when confronting ethical issues. Nevertheless, the differences between the Model Rules and the Model Code with respect to ethical issues arising out of multiple representations are relatively minor. Consequently, this Comment will analyze the conflict standards enunciated in Model Rules 1.7 and 1.9, and will note briefly the changes the Model Rules have made to the Model Code.

A. Model Rule 1.7

Rule 1.7 provides the general rule governing all conflict-of-interest situations. Subsection (a) of the Rule provides that a lawyer shall

15 Many states apply their own ethical codes that govern the activities of attorneys practicing within their borders, but the language of these state statutes generally follows the two-pronged test of the Model Rules and the Model Code. The subjective prong of the test requires a reasonable belief that representation of either client will not be materially limited and the objective prong requires informed consent. See MODEL RULES, supra note 12, Rule 1.7; MODEL CODE, supra note 13, DR 5–105.

16 Both ethical provisions permit multiple representations under certain circumstances. In the Model Code, the objective test is that “it is obvious that [the lawyer] can adequately represent the interest of [both prospective clients]”. MODEL CODE, supra note 13, DR 5–105. In the Model Rules, the standard is that “the lawyer reasonably believes the representation will not adversely affect the relationship with the other client.” MODEL RULES, supra note 12, Rule 1.7. Although a lawyer may “reasonably believe” that a conflict of interest has no damaging result upon representation of multiple parties without that representation meeting the “obviousness” standard of the Model Code, the difference is slight and has very little, if any, practical effect. See Commentary, Wheat v. United States, NAT'L RPTR. ON LEGAL ETHICS 97, 100 (1988).

17 MODEL RULES, supra note 12, Rule 1.7 provides:
(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
(2) each client consents after consultation.
(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
(1) The lawyer reasonably believes the representation will not be adversely affected; and
(2) the client consents after consultation. When representation of multiple clients
not engage in multiple representations of clients whose interests directly conflict, unless he or she reasonably believes that the representation will not be adversely affected, and each client consents to the representation. This subsection establishes a strict rule against the representation of a second client when a conflict is known in advance, and requires withdrawal if the conflict is discovered after the concurrent representation has been undertaken. Rule 1.7(a), however, applies only when the conflict "will" be direct and is not intended to bar the representation of clients with interests that "may" conflict. Rule 1.7(b) applies when conflicts are only potential.

Subsection (b) of Rule 1.7 is more flexible than Rule 1.7(a). Its wording suggests that marginal limitations on the simultaneous representation of multiple clients will not bar a lawyer's participation so long as the other parts of the Rule are satisfied. Rule 1.7(b) bars the representation of a client if the representation will be "materially limited" by the lawyer's outside interests or responsibilities. Because the Rule requires lawyers to consider the totality of their outside obligations, it has potential application at almost every juncture of a multiple representation. Nevertheless, subsection (b), like subsection (a), permits representation in conflict situations when the lawyer reasonably believes that the conflict is not insurmountable and each client provides informed consent.

Rule 1.7 clarifies the requirements needed to conduct multiple representations under Canon 5 of the Model Code and Disciplinary Rule 5-105(A) and (C). This clarification dictates that the client's informed consent must be independent of the lawyer's reasonable belief that the representation will not be adversely affected. In fact, Rule 1.7 expresses the same obligations developed in Canon 5 and many of the Disciplinary Rules in terms of the effect outside responsibilities have on the quality of a lawyer's representation.

in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id., Rule 1.7(a).

19 HANDBOOK ON THE MODEL RULES, supra note 3, at 129.

20 Id.

21 Id. at 131.

22 MODEL RULES, supra note 12, Rule 1.7(b).

23 HANDBOOK ON THE MODEL RULES, supra note 3, at 141.

24 SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 138–39 (West 1987) [hereinafter SELECTED STATUTES].

25 Id.

26 HANDBOOK ON THE MODEL RULES, supra note 3, at 140.2.
When an attorney is considering the viability of a simultaneous multiple representation, the language of Rule 1.7 raises a number of questions of interpretation. For instance, the Model Rules do not make it clear when it is "reasonable" for an attorney to believe that a multiple representation is permissible. Similarly, the Rules provide little guidance in determining when a multiple representation becomes "adversely affected," or how an attorney can achieve a "fully informed consent."

1. Reasonable Belief

Lawyers undertaking multiple representations are responsible for resolving conflicts of interest whether these conflicts are actual or potential. When it is determined that the interests of two or more clients actually conflict, a lawyer can engage in multiple representation only upon his or her reasonable belief that the representation of any one client will not be materially affected.

When conflicts are only potential, the determination of a real conflict depends upon the specific facts and circumstances of each case. Unfortunately, the Model Rules do not articulate a test for determining an "adverse effect." The comments to Rule 1.7 clarify the test by defining an adverse effect as an impairment of loyalty that occurs "when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests." Thus, courts may disqualify counsel if it is not obvious that multiple representation will be adequate or proper. Similarly, the comments articulate a restriction upon an attorney's representation of multiple parties in a negotiation in which the interests of the parties are "fundamentally antagonistic to each other." When a common defense can be asserted or the parties' interests are generally aligned, however, common representation is permissible.

27 See Figueroa-Olmo v. Westinghouse Elec. Corp., 616 F. Supp. 1445 (D.P.R. 1985). [Where the possible conflict arises within the context of an ongoing proceeding in which the parties' rights are yet to be established, the shaping of the conflict's profile will necessarily turn on the legal and strategical feasibility of the claims or defenses that, if raised, will create the actual adverse position . . . .

Id. at 1452.

28 MODEL RULES, supra note 12, Rule 1.7(b) comment. This comment provides additional guidance in defining a conflict of interest, a definition noticeably lacking in the Model Code.


30 MODEL RULES, supra note 12, Rule 1.7 comment.

31 Id.
Regardless of whether a conflict is potential or actual, if an attorney reasonably believes that the conflicting interests will not adversely affect representation, the clients are free to consent to the representation, notwithstanding the conflict. By permitting such consent, Rule 1.7 shifts some of the inquiry into the propriety of a multiple representation away from the attorney’s judgment and gives the client the ultimate decision. Requiring both the lawyer’s reasonable belief and the client’s voluntary consent (based upon full disclosure) helps avoid the potential pitfalls of multiple representations and retains its benefits (such as shared legal expenses and a united defense). Courts, however, are not always convinced that an actual or potential conflict is resolved simply by a client’s consent to multiple representation. As a result, courts often interpret the disclosure requirement strictly.

2. Disclosure and Consent

Although parties are free to waive the right to disqualify counsel for conflicts of interest, a waiver does not absolve a lawyer completely from his or her ethical responsibilities. An attorney’s request for a conflict waiver from a client must be accompanied by a full disclosure of all facts and circumstances relevant to the conflict, including the possibility and desirability of seeking independent legal advice. Therefore, in order to obtain a valid waiver, an attorney cannot merely inform the client that the attorney intends to represent multiple parties. Rather, the attorney must inform each client of all relevant facts and circumstances. One method of ensuring a party’s informed consent is to advise clients to consult separate counsel before consenting.

When informed consent is obtained, courts generally are reluctant to second-guess both the client and the attorney by disqualifying

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32 Cf. id. ("[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for [consent] or provide representation on the basis of the client's consent.").
33 See infra notes 184–85 and accompanying text.
34 See, e.g., Schenck v. Hill, Lent & Troescher, 530 N.Y.S.2d 486, 140 Misc. 2d 288 (N.Y. Sup. Ct. 1988) (a law firm's conflict of interest with clients in a legal malpractice action required disqualification because the consent did not reflect a full understanding of the legal rights being waived).
35 MODEL RULES, supra note 12, Rule 1.7(a)(2), (b)(2) and comment.
37 Developments, supra note 5, at 1313.
counsel due to a potential or actual conflict.\textsuperscript{38} This reluctance, however, will not prevent a court from disqualifying counsel when pertinent information relating to a conflict has not been disclosed.\textsuperscript{39} Moreover, if, in the eyes of a court, an attorney cannot reasonably believe that he or she can represent both parties adequately, the attorney is subject to disqualification under Rule 1.7, notwithstanding the client's consent.\textsuperscript{40}

### B. Model Rule 1.9

While Rule 1.7 addresses the conflicts that arise during the simultaneous representation of current clients, Rule 1.9 addresses conflicts that can harm former clients. Despite the differences between Rule 1.9 and Rule 1.7, the basic analytical approach of both Rules is the same and the client interests at stake are similar. For example, the design and effect of Rule 1.9, like that of Rule 1.7, ensure that both present and former clients have a limited form of veto power over their lawyer's choice of clients.\textsuperscript{41}

Rule 1.9 prohibits the representation of a client who has materially adverse interests with a former client in the same or substantially related matter unless the former client consents.\textsuperscript{42} Furthermore, Rule 1.9(b) prevents an attorney from using information about a former client to that client's detriment.\textsuperscript{43} Rule 1.9 also incorporates the duty to avoid "the appearance of impropriety" as expressed by Canon 9 of the Model Code, and forbids multiple representations when the possibility exists that a former client's confidences will be

\textsuperscript{38} Id. at 1308; see also Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339 (9th Cir. 1981) (client who was fully advised that some detriment could result from his hiring a particular attorney was allowed to choose to take a calculated risk).

\textsuperscript{39} Developments, supra note 5, at 1310–11.


\textsuperscript{41} Handbook on the Model Rules, supra note 3, at 175.

\textsuperscript{42} Model Rules, supra note 12, Rule 1.9. Rule 1.9 provides:

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

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

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

Id. The Rule directs the reader to consult Rule 1.6, regarding the use of confidential information, and Rule 3.3, regarding candor toward the tribunal. The issues involved in these two exceptions are generally outside the scope of this Comment.

\textsuperscript{43} Id.
used to the current client’s advantage. Despite Rule 1.9's prohibitions, its comments allow the representation of a new client with adverse interests in a similar matter so long as the representation involves a wholly distinct problem. Consequently, a firm may be permitted to represent a party without obtaining the former client’s consent if the current proceeding does not implicate the same issues or problems involved in the former representation. Nevertheless, by virtue of Rule 1.9's incorporation of Canon 9, a firm may be obligated to refuse representation of a new client in order to preserve the appearance of professional propriety.

Under Canon 9 of the Model Code, an attorney must avoid the appearance of professional impropriety. This canon restricts conduct that, while not in violation of other canons, may lead laypersons to believe that their interests are adversely affected. Consequently, multiple representations may not be permitted when the circumstances of a particular case involve delicate conflicting relationships and inescapably divided loyalties. Thus, the mere likelihood of improper conduct or motivation, even without a showing of harm and regardless of disclosure or consent, may give the appearance of professional misconduct and warrant withdrawal.

Regardless of a client’s informed consent, and notwithstanding judicial reluctance to overturn such consent, courts will inquire whether a conflict waiver can “cure the damage to the integrity of the judicial process that, such joint representation [would] cause.” Thus, even if an attorney obtains a client’s informed consent, and the attorney reasonably believes that his or her representation will not be materially impaired, a court may find that the representation

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44 Selected Statutes, supra note 24, at 144; see also Haagen-Dazs Inc. v. Perche No! Gelato, Inc., 639 F. Supp. 282 (N.D. Cal. 1986) (plaintiff's counsel disqualified in an antitrust matter because one of its attorneys formerly worked as in-house counsel for the defendant, despite the fact that the attorney was not involved in the current dispute).

45 Model Rules, supra note 12, Rule 1.9 comment. “[A] lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.” Id.

46 But see infra note 166 and accompanying text (discussing Canon 9’s treatment at the Circuit level).

47 Canon 9 provides that “[a] lawyer should avoid even the appearance of professional impropriety.” Model Code, supra note 13, Canon 9.

48 See In re Eastern Sugar Antitrust Litig., 697 F.2d 524, 530 (3d Cir. 1982) (attorneys must meet their general obligation to maintain public confidence in the integrity of the Bar).


gives such a strong appearance of professional impropriety that disqualification is in order.\textsuperscript{51}

In any large and complex proceeding, a law firm's legal relationship with a client may be such that dual or joint representation of other parties in the same matter would give an appearance of impropriety. Under these circumstances, courts may view a client's conflict waiver as insufficient.\textsuperscript{52} Due to the complexity and size of a typical Superfund proceeding, attorneys agreeing to undertake the multiple representation of PRPs must consider carefully all of the past and present interests that may be involved, even those interests that appear to be outside the scope of the instant litigation.\textsuperscript{53}

Despite this multiplicity of legal standards, and hypothetical representations that are the basis of both ethical codes, three objectives survive the sometimes vague and abstract language of the rules.\textsuperscript{54} These objectives include: the need to protect a client's legitimate interests; the need for capable and professional counsel; and finally, the Bar's need to be regarded by the public as trustworthy and just.\textsuperscript{55} When attempting to apply these objectives to CERCLA liability and allocations, it becomes clear that the practitioner lacks the proper guidance to feel completely comfortable representing multiple parties in such cases. In fact, conflicts in Superfund proceedings may be the most difficult to resolve due to the magnitude of the proceeding\textsuperscript{56} and the latency of a party's potential liability.\textsuperscript{57} Multiple representations in Superfund proceedings can be appropriate in certain situations, but counsel must be aware of the potential conflicts that may arise in virtually every case.

III. THE SUPERFUND PROCESS

The process established by CERCLA and employed by EPA to assess clean-up liability, settle or litigate clean-up costs creates a variety of potential conflicts of interest for law firms defending mul-

\textsuperscript{51} See W.L. Gore & Assocs. v. International Medical Prosthetics Research Assocs., 745 F.2d 1463 (Fed. Cir. 1984) (law firm disqualified because two of its members had previously represented the plaintiff against the defendants).

\textsuperscript{52} Schenck, 530 N.Y.S.2d at 487, 140 Misc. 2d at 290.

\textsuperscript{53} For instance, a firm that engages in a diverse environmental practice may currently represent a PRP that eventually seeks contribution from another client that has not yet been targeted as a responsible party by the Environmental Protection Agency (EPA or Agency).


\textsuperscript{55} Id.

\textsuperscript{56} See supra note 6 and accompanying text.

\textsuperscript{57} See supra note 9 and accompanying text.
tiple parties. The standards of liability established in section 107 of CERCLA\textsuperscript{58} and the application of joint and several liability\textsuperscript{59} can discourage defendants from presenting a common defense and invite cross-claims between these parties in an effort to limit liability.\textsuperscript{60} Furthermore, an analysis of EPA's settlement policy illustrates how the prospect of bearing a disproportionate share of clean-up costs through failure to settle intensifies co-defendants' adversity.\textsuperscript{61} Finally, an examination of these settlement pressures reveals how firms are often placed on a collision course with very serious conflicts of interest when individual PRPs pursue contribution claims.\textsuperscript{62}

A. Determining Liability and the Notification Process Under CERCLA

Section 107 of CERCLA establishes the classes of parties that are potentially liable for the costs of cleaning up hazardous waste sites.\textsuperscript{63}

\begin{itemize}
  \item Section 107 of CERCLA provides:
  \begin{itemize}
    \item (1) The owner and operator of a vessel or a facility,
    \item (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
    \item (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, or for disposal or treatment of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
    \item (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the occurrence of response costs, of a hazardous substance, shall be liable for—
      \begin{itemize}
        \item (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
        \item (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
        \item (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such release;
        \item (D) The costs of any health assessment or health effects study carried out under section 9604(i) of this title.
      \end{itemize}
  \end{itemize}
\end{itemize}


\textsuperscript{59} Originally, CERCLA did not prescribe joint and several liability. Since the enactment of the Superfund Amendments and Reauthorization Act (SARA), however, federal courts have construed the statute as imposing joint and several liability. See infra notes 75–79 and accompanying text for a more detailed discussion of joint and several liability under CERCLA.

\textsuperscript{60} See infra notes 93–103 and accompanying text.

\textsuperscript{61} See infra notes 104–48 and accompanying text.

\textsuperscript{62} See infra notes 124–28 and accompanying text.

\textsuperscript{63} Section 107 of CERCLA provides:
This liability provision creates four basic categories of PRPs. The first category includes persons presently owning or operating a polluting facility. The second includes persons owning or operating a polluting facility at the time of disposal. The third targets persons arranging for the disposal, treatment, or transport of waste. The fourth imposes liability on persons accepting waste for transport to disposal or treatment facilities. These parties are held strictly liable for clean-up costs. Once there is sufficient evidence available to make a preliminary determination of potential liability under section 107, EPA begins its notification process.

This notification process starts with a “general notice letter” to each PRP. The letter contains notification of potential liability for response costs, a discussion about future notices, a general discussion about site activities, a request for information about the site, the release of certain site-specific information, and a deadline for the PRP's response to the letter. The general notice informs each PRP of the names and addresses of other PRPs who have received the letter, and, to the extent that such information is available, the volume and nature of substances found at the site, and a ranking by

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64 Id.
65 Id. § 9601(21). “Person” is defined broadly as: “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality . . . or any interstate body.” Id.
66 Id. § 9607(a). 
67 Id.
68 Id.
69 Id.
70 42 U.S.C. § 9601(32) (1982 & Supp. IV 1986) defines liability under CERCLA as strict by reference to section 311 of the Federal Water Pollution Control Act (FWPCA) (codified at 33 U.S.C. § 1321(c) (1982)). Courts have determined that section 311 provides for strict liability. See Note, A Right of Contribution Under CERCLA: The Case for Federal Common Law, 71 CORNELL L. REV. 668, 669–70 n.8 (1986), for a brief discussion of judicial application of FWPCA section 311 and CERCLA's legislative history, which reveals an intent to impose a strict liability standard in Superfund proceedings. See also United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987) (liability under CERCLA held to be strict, without regard to liable parties' fault or state of mind); United States v. Northeastern Pharmaceutical and Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984) (defendants being sought by EPA for response costs were subject to strict liability); United States v. Conservation Chem. Co., 589 F. Supp. 59 (W.D. Mo. 1984) (strict liability is more consistent with the legislative aims of CERCLA, which include goals such as the spreading of costs and the assurance that responsible parties bear the cost of cleanup).
71 EPA Interim Guidance on Notice Letters, Negotiations and Information Exchange, 53 Fed. Reg. 5298, 5301 (1988). The Guidance provides that PRPs should inform EPA of substances sent to or present at the site and the name of other PRPs, pursuant to section 104(e) of CERCLA. Id. at 5302.
72 Id. at 5301.
volume of the substances contributed by each PRP.\textsuperscript{73} Receipt of a general notice triggers a period of informal negotiations between PRPs and EPA.\textsuperscript{74} Generally, PRPs have thirty days to respond to the Agency’s information request.\textsuperscript{75}

The next step in the notification process is the issuance of a “special notice letter” to each PRP.\textsuperscript{76} Issuance of this letter is discretionary and depends upon whether EPA believes that a period of formal negotiations will facilitate a settlement agreement and expedite remedial actions.\textsuperscript{77} Thus, the Agency may begin expending Superfund monies immediately toward remedial action if it believes that the PRPs have not been negotiating in good faith, or if it believes that settlement is unlikely.\textsuperscript{78}

Issuance of a special notice letter is important to PRPs because this letter triggers a moratorium during which EPA will not conduct a remedial investigation/feasibility study (RI/FS) of its own, but will allow PRPs to conduct their own remedial actions.\textsuperscript{79} The period of formal negotiations triggered by the special notice letter lasts sixty days from the day the PRP receives the letter.\textsuperscript{80} If EPA receives a good faith offer within that period, it will not commence actions against any person for liability for an additional sixty days.\textsuperscript{81} If information relating to the volume of substances found at the cleanup site was not available when the general notice was issued, such

\textsuperscript{73} Id. at 5302.
\textsuperscript{74} Id. at 5300.
\textsuperscript{75} Id. at 5302.
\textsuperscript{76} Section 122(e) of CERCLA contains provisions relating to the special notice procedures and the release of information to PRPs. The third and final step in the notification process involves the issuance of a remedial design/remedial action (RD/RA) special notice letter as provided in section 122(e) of CERCLA. The content of the remedial investigation/feasibility study (RI/FS) is very similar to the RD/RA special notice letter. Therefore, this Comment analyzes both letters in the context of the special notice procedure. 42 U.S.C. § 9622(e) (1982 & Supp. IV 1986).
\textsuperscript{77} EPA Interim Guidance on Notice Letters, Negotiations and Information Exchange, 53 Fed. Reg. 5298, 5302 (1988). The Guidance provides that EPA may determine that it is inappropriate to issue a special notice and begin remedial actions itself where, \textit{inter alia}, past dealings with the PRPs indicate that they are unlikely to negotiate settlement, or where the Agency believes that the PRPs lack the resources to conduct response activities. \textit{Id}. Section 122(a) grants EPA the authority to decide not to use the special notice procedures established under section 122(e). EPA is required to notify PRPs of this decision and explain why it is inappropriate to use such procedures. This decision is not subject to judicial review. 42 U.S.C. § 9622(a).
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} The Agency will not pursue section 104 or 106 actions and will not commence an RI/FS during this time period. \textit{Id}. 

information and a ranking, by volume, of each substance is provided in the special notice, or as soon as this information becomes available.\textsuperscript{82}

Therefore, under CERCLA, EPA targets and notifies a diverse group of PRPs, each informed of its own potential liability relative to the potential liability of other PRPs. The fundamental goal of this notification process, and CERCLA's enforcement program in general, is to facilitate settlements.\textsuperscript{83} The practical effect, however, pressures PRPs to negotiate "in good faith" toward settlement, or face the disquieting prospect of litigating response costs against the EPA or other PRPs.\textsuperscript{84}

On paper, EPA's notification process appears completely fair and equitable. In practice, however, the Agency may not always be so accommodating to the particular problems facing PRPs. For instance, EPA often refuses to release vital volumetric data until after PRPs have answered informational requests, a point in time that necessarily arrives after the general notice letter has been issued.\textsuperscript{85} Moreover, PRPs are given a relatively short time frame in which to inform the government of their willingness to negotiate.\textsuperscript{86} It is within this time constraint that each PRP must decide if it wishes to retain joint counsel and assert a common defense.\textsuperscript{86} If joint counsel is retained, PRPs must also decide how the group intends to address potential conflict-of-interest issues. This pressure is intensified by the fact that a PRP that refuses to settle may be liable for the total clean-up costs if a court finds it jointly and severally liable.\textsuperscript{87}

\section*{B. Judicial Application of Joint and Several Liability and Contribution}

Originally, CERCLA did not prescribe a method for allocating liability when multiple parties were deemed responsible for a release

\textsuperscript{82} Id. at 5305.
\textsuperscript{83} Id. at 5298.
\textsuperscript{84} See infra notes 93--148 and accompanying text.
\textsuperscript{85} This information about the realities of the notification process was obtained through conversations with practitioners dealing in Superfund negotiations and litigations. At the interviewees' request, their names are not cited.
\textsuperscript{86} Section 107(b) provides that a PRP will not be liable if it can establish that the release and resulting damage were caused solely by: "(1) an act of God; (2) an act of war; or (3) an act or omission of a third party other than an employee or agent of the defendant . . . ." 42 U.S.C. § 9607(b) (1982 & Supp. IV 1986).
\textsuperscript{87} See infra notes 88--98 and accompanying text.
of hazardous substances. The judiciary, however, consistently applied joint and several liability to CERCLA cases despite the chemical industry's plea for apportioned liability and Congress's exclusion of a joint and several liability provision in the statute. Courts reasoned that Congress intended flexible common law principles of liability allocation to apply in Superfund proceedings. Additional support for the imposition of joint and several liability in Superfund cases stems from the fact that hazardous waste problems have a national significance and implicate federal interests, thereby calling for the application of federal common law. Therefore, the federal common law of joint and several liability applies, and the burden of proving that damages are divisible and capable of apportionment falls upon the defendant. In an effort to ameliorate the harsh result of joint and several liability, PRPs raise the right of contribution existing under common law and provided for in several provisions of CERCLA. When multiple parties are deemed liable for clean-up costs, CERCLA is not intended to make one party bear the full costs of removing hazardous substances. A responsible party bearing a disproportionate share of clean-up costs commonly seeks recovery from other PRPs in two situations. The first situation occurs when a party voluntarily cleans up a site prior to governmental action and seeks

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88 See generally Note, supra note 70 (discussing the imposition of joint and several liability in CERCLA cases).
94 See SARA, section 113(f): Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) . . . . [I]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.
recovery under CERCLA section 107(a)(4)(B). This second situation occurs when a party is targeted as a PRP and attempts to limit its potential liability by impleading and cross-claiming other parties under CERCLA section 113(f). This latter section provides that allocation should be determined by the use of equitable factors that the court determines are appropriate. Courts have held, however, that, when a party seeks to limit liability on the ground that the entire harm is capable of apportionment, that party must demonstrate the feasibility of apportionment.

Apportioning damages among PRPs can be extremely difficult when liability is imposed upon a large group of defendants. In United States v. A & F Materials Co., the United States District Court for the Southern District of Illinois identified several factors relevant to apportionment of damages among four generator defendants who released hazardous substances at an Illinois disposal site. The factors included: (1) a party's ability to demonstrate that its contribution to a discharge, release, or disposal of a hazardous waste can be distinguished from the contributions of other defendants; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the waste involved; (4) the degree of involvement by the party in the generation, transportation, treatment, storage, or disposal of the hazardous waste; (5) the degree of care a party exercised with respect to the hazardous waste involved; and (6) the degree of cooperation by a party with federal, state, or local officials.

A defendant who demonstrates, pursuant to the A & F Materials test, that the greater share of liability belongs to other parties, can reduce its share of clean-up costs and shift those costs to its co-defendants.

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95 Section 107(a)(4)(B) provides that defendants are also liable for response costs and damages "incurred by any other person consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). Section 9607(j) also preserves pre-existing common law rights. Id. § 9607(j).


98 United States v. Conservation Chem. Co., 589 F. Supp. 59, 63 (W.D. Mo. 1984) (past off-site generators of hazardous wastes held not to have met their burden of proving apportionment); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808–09 (S.D. Ohio 1983) (court relied on the principle espoused in the Restatement (Second) of Torts that divisibility properly becomes the responsibility of the party seeking to avoid or limit its liability on the ground that the entire harm is capable of apportionment); see also RESTATEMENT (SECOND) OF TORTS § 443B (1976).


100 Id. at 1256. Several of the court's criteria are rooted in negligence standards, even though CERCLA mandates strict liability. See supra note 63 and accompanying text.

101 CERCLA section 113(f)(2) provides that "settlement . . . reduces the potential liability
Given the enormous potential burden of joint and several liability, parties litigating clean-up liability under CERCLA invariably argue for apportionment. Claiming that damages should be apportioned, however, can create a conflict of interest when parties retaining joint counsel attempt to separate themselves from their co-defendants. For instance, transporters and de minimis generators often distance themselves from the liability that faces large-volume generators and generators of different hazardous substances. Once a court allows a party to prove apportionment, it seems clear that the interests among individual defendants become adverse.

Because apportionment involves issues that are not always resolved by a neutral, empirical inquiry, the defendants involved in multiple representations may find themselves disputing each other's relative culpability. If a multiple representation involves clients from different classes of defendants, such as transporters and treaters, this type of conflict seems more likely to occur. These problems surrounding the process of apportioning remedial costs among multiple parties can also disrupt settlement negotiations between PRPs and EPA.

C. How EPA's Settlement Policies Engender Conflicts

Like the potential imposition of joint and several liability on CERCLA co-defendants, EPA's settlement policies, as set forth in the Superfund Amendments and Reauthorization Act (SARA), increase the likelihood that parties will become polarized during negotiations. Cleanup of hazardous waste sites can be accomplished by PRPs before or during settlement negotiations. These private party cleanups generally are more widespread than government-funded cleanups. CERCLA's recognition of private cost-recovery actions can engender conflicts of interest when the PRP that has

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of others by the amount of the settlement." 42 U.S.C. § 9613(f)(2) (1982 & Supp. IV 1986). Thus, the costs allocated to one defendant will affect the costs allocated to co-defendants.

102 Section 122(g) of CERCLA expressly authorizes de minimis settlements. 42 U.S.C. § 9622(g); see Borland, Issues Faced in Organizing the Defense in Hazardous Waste Litigation After the RCRA and CERCLA Amendments 1987 149, 152 (1987) (author recognizes contribution claims between a group of PRPs retaining joint counsel as a potential conflict-of-interest problem that should be addressed before joint counsel is retained).

103 See infra notes 185-86 and accompanying text.


106 See J. Homsy & M. Sargis, supra note 96, at 35.
undertaken response measures is represented by the same counsel retained by other PRPs.107

Additionally, the Agency's use of new settlement negotiation tools can complicate relations between multiple PRPs, and can make it more likely that the various interests of these parties will become adverse. For example, the use of contribution protection,108 non-binding allocations of responsibility (NBARs),109 de minimis contribution settlements,110 and mixed funding111 can polarize PRPs, particularly if a relatively small group of PRPs refuses to agree to a settlement proposal.112 A closer examination of how these tools affect the interests of individual PRPs illustrates how easily conflicts of interest arise during multiple representation of parties negotiating a settlement of response costs under CERCLA.

1. Private Cost-Recovery Actions

Settlement does not always involve EPA beyond an initial identification of PRPs.113 In order to expedite the response process, CERCLA permits a PRP to begin clean-up measures and then seek contribution from other PRPs.114 Private party response actions promote expeditious cleanup of hazardous waste sites by allowing the party that provided response measures to recover the share of costs that is not its own.115 Section 113 of CERCLA permits any party

107 See infra notes 114–19 and accompanying text.
108 See infra notes 120–26 and accompanying text.
109 See infra notes 127–39 and accompanying text.
110 See infra notes 140–42 and accompanying text.
111 See infra notes 143–48 and accompanying text.
112 Mays, Settlements with SARA: A Comprehensive Review of Settlement Procedures Under the Superfund Amendments and Reauthorization Act, in HAZARDOUS WASTE LITIGATION AFTER THE RCRA AND CERCLA AMENDMENTS 1987 229 (1987). Mays discusses these tools in detail. Mixed funding is described as a method of funding site cleanup by using a combination of Superfund and PRP funds as authorized by SARA. 42 U.S.C. § 122(b)(1) (1982 & Supp. IV 1986). Nonbinding allocations of responsibility (NBARs) are an optional method of allocating responsibility among PRPs according to the RI/FS conducted by the Agency. As the name suggests, these initial allocation findings are not binding and essentially provide preliminary guidelines for allocating response costs. NBARs have considerable influence, however, on a large group of PRPs. De minimis settlements allow PRPs who have contributed minor amounts of waste to a site to settle early in the process. Id.
113 J. Homsy & M. Sargis, supra note 96, at 33 (PRPs can resolve clean-up costs among themselves when voluntary cleanup has been completed).
115 See J. Homsy & M. Sargis, supra note 96, at 36.
that has paid or agreed to pay response costs to seek contribution from any person who may be liable under the statute.\textsuperscript{116} In general, contribution claims can seriously endanger the viability of multiple representations of PRPs. Prior governmental approval of private party clean-up actions is not a prerequisite to cost recovery.\textsuperscript{117} Similarly, prior notification to other PRPs that response measures are being undertaken is not required.\textsuperscript{118} Thus, PRPs may be forced to pay for clean-up costs before a formal negotiation period has begun or before assessing appropriate allocation proposals.

This lack of notification can create a conflict of interest when joint counsel is retained by both the party undertaking response measures and other PRPs. Generators are most likely to initiate voluntary cleanup, because these parties generally have the resources needed to conduct response measures and can pursue other PRPs for reimbursement of those costs that are not their own.\textsuperscript{119} Therefore, the multiple representation of a varied class of PRPs is more likely to fall prey to a conflict problem when response costs are sought. The use of contribution protection does not resolve the ethical problems these claims pose to the attorney undertaking such a representation.

2. Contribution Protection

The possibility that a PRP may be granted contribution protection once it has settled its liability with EPA can strain the relationships between PRPs during settlement negotiations, and may create conflicts of interest if contribution actions are pursued after settlement. Under CERCLA sections 113(f), 122(g)(5), and 122(h)(4), a PRP that “has resolved its liability” with the government in an administrative or judicial settlement is not liable for contribution claims involving matters addressed in that particular settlement.\textsuperscript{120} Non-

\textsuperscript{116} See id. at 40.
\textsuperscript{117} 42 U.S.C. § 9613(f)(1).
\textsuperscript{118} Id. § 9613(g)(2). Private actions for cost recovery can be commenced at any time after response costs have been incurred, subject to the temporal limitations set forth in subparagraph (g). Id.
\textsuperscript{119} See Walls v. Waste Resource Corp., 823 F.2d 977, 981 (6th Cir. 1987) (in light of CERCLA's purpose, language and structure, in addition to its legislative history, notification is not required in private actions for the recovery of response costs).
\textsuperscript{120} See 42 U.S.C. §§ 9613(f)(2), 9622(g)(5), 9622(h)(4). The concept of providing contribution protection to a party who has entered into an administrative settlement agreement raises constitutional questions. Whether or not barring a party's right to contribution violates due process was addressed by Senator Stafford in a speech delivered on the Senate floor. See 132 CONG. REC. S14,904–05 (1986). The issues surrounding this question are beyond the scope of this Comment.
settling parties are not released by the settlement, but their potential liability is reduced by the settlement amount.\textsuperscript{121} This policy implies that a nonsettling PRP must make its views known during settlement negotiations if it believes the settling parties are getting a “sweetheart deal” by paying less than their equitable share of the clean-up costs.\textsuperscript{122} If such a settlement occurs, either the nonsettling parties or the Fund has to cover the full amount left by a party that settles for less than its equitable share.\textsuperscript{123}

The likelihood that parties will cross-claim for contribution is present even after a settlement agreement has been reached. By simultaneously providing contribution protection to settling PRPs, and authorizing PRPs, in general, to seek contribution from any liable party, CERCLA opens an avenue to settled PRPs to pursue claims against nonsettling parties.\textsuperscript{124} Furthermore, it is possible that a PRP who has settled with EPA can pursue another settling party if the latter settlement does not address those issues that are the basis of the contribution action.\textsuperscript{125} Because all contribution actions under CERCLA are governed by federal law,\textsuperscript{126} there is also some question as to whether a settled party is subject to contribution claims arising under state statutes or state common law.

There is thus no clear answer as to how CERCLA's contribution protection clause is to be construed in light of the provision granting parties the right to contribution. Although attentive and creative draftsmanship of settlement agreements can remove a client's susceptibility to contribution claims, a serious conflict of interest may still exist if a settled PRP seeks contribution from a nonsettled PRP who retained the same counsel during negotiations. Furthermore, settlement negotiating tools utilized by EPA during its formal negotiation process can create this situation before a settlement is ever reached.

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{121} 42 U.S.C. § 9613(f)(2).
  \item \textsuperscript{122} See Light, \textit{SARA's Consequences: The Emerging Legal Debate Over Liability, Contribution and Administrative Law}, in \textit{HAZARDOUS WASTE LITIGATION AFTER THE RCRA AND CERCLA AMENDMENTS 1987} 68–69 (1987). Light suggests that the government, not the nonsettling PRPs, should bear the portion of the clean-up costs not covered by a “sweetheart” settlement. In this situation, the potential liability of the nonsettling parties would be reduced by the settled PRP's equitable share, rather than the underestimated share. \textit{Id.}
  \item \textsuperscript{123} \textit{Id.}
  \item \textsuperscript{124} Mays, \textit{supra} note 112, at 258; \textit{see also} 42 U.S.C. § 9622(g)(5) (1982 & Supp. IV 1986).
  \item \textsuperscript{125} \textit{See} 42 U.S.C. § 9613(f)(2) (1982 & Supp. IV 1986). Settled parties are protected from contribution “regarding those matters addressed in the settlement.” \textit{Id.}
  \item \textsuperscript{126} \textit{Id.} § 9613(f)(3)(C).
\end{itemize}
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Confllicting Interests

3. EPA’s Use of NBARs, De Minimis Settlements and Mixed Funding

A nonbinding allocation of responsibility (NBAR) is an optional tool that EPA utilizes to establish preliminary guidelines for allocation. In essence, it provides a comprehensive analysis for the settlement of liability for hazardous wastes found at a clean-up site. NBARs can help a PRP class by providing an objective analysis of each party’s potential liability, including the allocation of clean-up responsibility as set out in the remedial investigation/feasibility study (RI/FS). Conversely, NBARs can present a tremendous obstacle to an attorney who represents several PRPs when one party within the multiple representation disagrees with EPA’s allocation.

In May of 1987, EPA issued its “Interim Guidelines for Preparing Nonbinding Allocations of Responsibility.” The factors established in the Guidelines closely resemble the A & F Materials court’s list of factors relevant to apportionment of damages. The Guidelines’ factors include: the volume, toxicity, and mobility of wastes; the strength of evidence against a PRP; the ability of a PRP to pay; the litigation risks and public interest considerations; the precedential value of a case if it were litigated; and other potentially aggravating factors in a case if it were to proceed to trial. If, for example, the factual circumstances in a case overwhelmingly favor the government, EPA might seek to enforce the NBAR in order to develop a favorable precedent for future CERCLA actions.

An NBAR is solely advisory. Consequently, it is not admissible in any proceeding, nor can it be reviewed by a court. Regardless of how fair an NBAR may appear, the effect it has on a PRP’s negotiation strategy is potentially adverse because the information used to arrive at the preliminary allocation determination can be sensitive to a PRP’s status among its co-defendants. Because each

127 Id. § 9622(e)(3).
128 Id. § 9622(e)(3)(A).
129 Id.
131 See supra notes 99–100 and accompanying text.
132 See NBAR Guidelines, supra note 130, at 19,919.
134 Id.
135 See Mays, supra note 112, at 242–43. “[S]ome attorneys representing PRPs are not
defendant faces joint and several liability, EPA or a group of PRPs negotiating a settlement agreement can exert a tremendous amount of settlement pressure upon a recalcitrant PRP, even though it may be forced to bear a disproportionate share of the clean-up costs as allocated by the NBAR. An attorney representing multiple PRPs must balance delicate allegiances if one of his or her clients in the group is a PRP who refuses to agree to a settlement proposal approved by its co-defendants.

When negotiations involve a large number of PRPs it is not always possible to bring all concerned parties into agreement. NBARs are the first impression parties have of the potential allocation of liability and may seem relatively painless. Their psychological influence on a group of PRPs, however, should not be underestimated, as NBARs can pressure parties to settle when it is not in their best interests to do so.

The peer pressure associated with the use of NBARs can also affect the settlement of small or de minimis claims. When a PRP's potential liability is small or de minimis, according to section 122(g)(1) of CERCLA, a conflict of interest can arise if the proposed settlement does not reflect the party's liability accurately. De minimis contributors are generally willing to pay their share of the clean-up costs early in the response process in order to avoid excessive legal fees and publicity. Subsequently targeted PRPs, however, may seek contribution from these de minimis parties before settlement is reached if the original allocation estimates prove to be inaccurate. By settling with these de minimis PRPs before other PRPs can dispute their relative shares of liability, EPA creates a potential conflict for the attorney who represents both de minimis parties and more culpable PRPs or PRPs allegedly contributing larger volumes of waste.

anxious to have NBARs prepared in their cases, fearing that EPA's NBAR will be difficult to overcome should they disagree with the allocation." Id. at 242.

See supra notes 88–103 and accompanying text.

See Hickok & Padleschat, Strategic Consideration in Defending and Settling a Superfund Case, 19 LOY. L.A.L. REV. 1213, 1214 (authors note that EPA's settlement policies are problematic in multiparty contexts and may be doomed by apportionment disagreements).

Id.

Id.


See Mays, supra note 112, at 246.

See supra notes 121–28 and accompanying text for a discussion of the internal debate within section 113(f)(1) and (2) of CERCLA regarding the conflicting policies of contribution protection and the right to contribution.
Similarly, mixed funding, the combining of Superfund and PRP funds for the purpose of site cleanup, can create conflicts of interest for attorneys defending multiple PRPs in the same action. Under section 122(b)(1) of CERCLA, EPA can agree to "reimburse the parties... from the Fund, with interest, for certain costs of which [EPA] has agreed to finance." This provision allows a settlement to proceed even when several major PRPs are holding up negotiations. EPA can use the Fund to pay those clean-up costs that would otherwise be borne by the PRPs refusing to join the proposed settlement. The Agency then pursues the recalcitrant PRPs in order to recover the Fund's share of the costs.

Because either the Fund itself or recalcitrant PRPs are liable for any remedial costs not covered by the original settlement, firms representing settled parties during negotiations may face charges of impropriety if they attempt to defend the nonsettling parties in a subsequent proceeding. This "assignment" of contribution rights by the settled parties may remove a direct conflict of interest, although a Canon 9 charge of giving the appearance of impropriety may still exist.

IV. TYPES OF SUPERFUND CONFLICTS OF INTEREST

No court has yet addressed an attorney's conflict of interest arising out of a multiple representation of Superfund defendants. Consequently, there is no case law that directly resolves the issues and questions raised in this Comment. By placing what has been analyzed in purely theoretical terms into a more concrete setting of attorney-client relationships, the following hypotheticals allow the reader to draw a practical understanding of the ways conflicts of interest arise in Superfund proceedings.

For example, adverse interests arise between multiple PRPs when one party settles with EPA and then pursues contribution claims against other, nonsettling PRPs. This situation is likely to occur when large generators settle and then seek contribution from de minimis contributors who settled at an earlier time. In this scen-

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143 42 U.S.C. § 9622(b)(1).
144 Id.
145 See Mays, supra note 112, at 245.
146 Id.
147 Id. at 246–47.
148 MODEL CODE, supra note 13, Canon 9.
149 See supra notes 141–45 and accompanying text.
ario, a law firm that simultaneously represents both a *de minimis* contributor and a large generator during negotiations with EPA is likely to face disqualification should the dispute result in litigation. At the outset, the attorney might have believed that the interests of the two parties were "generally aligned" and that multiple representation was permissible "even though there [was] some difference of interest among them." Thus, if the attorney's belief was reasonable and both clients provided their informed consent to the representation, Rule 1.7 would permit the representation. Once the contribution action is pursued, however, the parties' interests become adverse and counsel must withdraw, forcing both clients to seek and retain new representation.

Such a conflict of interest can be avoided if a group of PRPs share similar interests and obligations. For instance, two PRPs who operate in the same community may feel mutually obligated to conduct clean-up measures due to the value of their status and relationship with that community. In general, however, PRPs in any one class share a common desire to limit their respective liability, although the amount of clean-up costs allocated to one party will affect another's liability. This type of threshold conflict can arise in virtually every multiple representation of PRPs, but may not be a factor when the group of clients maintain continuing relationships within the industry. When parties maintain business relationships, any possible contribution award may amount to relatively little when compared to the loss of future business that would result.

Many law firms may face more subtle conflict problems, particularly when their practice is diverse. For example, assume that a firm represents an owner/operator of a waste disposal site currently negotiating its responsibility for clean-up costs with EPA. A past landowner of the same site, however, is also a client who has been represented by the same firm on a regular basis, occasionally in environmental matters. If the past landowner is eventually targeted

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150 This situation is particularly likely when the *de minimis* contributor settles early in the negotiating process with EPA and subsequently discovers new facts indicating that the generator was in fact responsible for the clean-up costs covered by the settlement.

151 *Model Rules*, supra note 12, Rule 1.7 comment.

152 Id.

153 Id.

154 See, e.g., Kingson, $24 Million Accord Reached on Toxic Cleanup, N.Y. Times, Feb. 1, 1989, at A13, col. 3. A spokeswoman for a past landowner said, "[w]e certainly feel we have an obligation to do this kind of cleanup," referring to the real estate concern's agreement to pay 50% of the remaining costs, despite not owning the land since 1984. Id.

155 See infra notes 185-86 and accompanying text.
as a PRP on the basis of his or her past activities at the same site, the firm may be involved in a conflict of interest even though the landowner retains another firm as its counsel in this matter. The firm may thus be precluded from representing one or both parties on the basis of its representation of the past landowner. This preclusion is likely if the owner/operator contends that the past landowner is primarily responsible for the presence of hazardous wastes at the dump site.

V. THE INEFFECTIVENESS OF THE MODEL RULES IN RESOLVING CONFLICTS OF INTEREST IN COMPLEX TORT LITIGATION

Because no court has yet addressed a conflict of interest arising out of a Superfund proceeding, it is necessary to understand how courts have treated conflicts of interest in analogous areas of the law. In other complex tort areas, however, case law reveals the difficulty of enforcing ethical code provisions when the interests of all involved parties are not fully realized. For instance, in Duca v. Raymark Industries, the United States District Court for the Eastern District of Pennsylvania addressed conflicts arising from multiple representation of parties in asbestos litigation. Duca involved cross-claims pursued by eight unsettled co-defendants to establish the joint liability of two other co-defendants who had settled. If the court found that the settled parties were jointly liable, then the unsettled defendants could limit their liability by the amount of damages already paid by the settled parties.

Because the law firm that represented the unsettled parties also represented the settled defendants in other asbestos actions, a potential conflict arose. Although the settled defendants no longer had a financial interest in the cross-claims being considered by the court, a judgment rendering them joint tortfeasors could have affected their interests in future actions by virtue of the decision's

156 See generally Marden Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986). In this case the seller of a plant at which hazardous substances were deposited negotiated a release from all actions relating to the plant with the buyer in the purchase agreement. The buyer, however, sought contribution from the owner after being targeted as a PRP by EPA. Id.

157 See supra notes 42–55 and accompanying text.


159 Id. at 186.

160 Id. at 187.

161 Id.

162 All that was at stake in this action was the amount of the judgment against the nonsettled parties. Id.
collateral estoppel effect.\textsuperscript{163} Furthermore, the firm risked compromising its zealous representation of the unsettled defendants due to its obligation of loyalty to the settled defendants as both prior and potential clients.\textsuperscript{164}

Despite these risks, the \textit{Duca} court ruled that, if the parties’ consent was fully informed, the potential conflicts were not severe enough to warrant disqualification because the firm was not representing divergent interests in the same litigation.\textsuperscript{165} Moreover, the \textit{Duca} court rejected the argument that the multiple representation violated Canon 9’s prohibition against the appearance of impropriety. It concluded that conduct falling short of violating Canons 4 and 5 should not invoke disqualification under a Canon that has been characterized by the Third Circuit Court of Appeals as “necessarily vague” and “overly broad and question-begging.”\textsuperscript{166}

More significantly, the \textit{Duca} court addressed the unique situation presented by cross-claims used to obtain contribution or to limit a party’s liability in complex modern tort litigation.\textsuperscript{167} The court found that large complex proceedings have diverged significantly from the traditional adversary model out of which the disciplinary rules emerged and to which they have most often been applied.\textsuperscript{168}

Although the \textit{Duca} decision does not address all the various hypothetical situations that can create adverse interests,\textsuperscript{169} and hence conflicts, in Superfund proceedings, it suggests a rationale that can be applied when addressing both actual and potential conflicts under CERCLA. Superfund has created a type of representation that involves a complicated web of interrelationships among defendants and potential defendants. This representation differs significantly from the adversary model used in developing both the Model Rules

\textsuperscript{163} Id. at 189.

\textsuperscript{164} Id. at 190–91.

\textsuperscript{165} Id. at 191.

\textsuperscript{166} Id. (quoting \textit{In re Eastern Sugar Antitrust Litig.}, 697 F.2d 524, 530 (3d Cir. 1982)). Although the public’s regard for the Bar is a central concern to the Bar, many of the circuit courts, including the Third Circuit, regard Canon 9 as largely a redundancy of Canons 4 and 5. Although there are cases in which a violation of Canon 9 was enough to warrant disqualification, it is an unusual situation where the “appearance of impropriety” is sufficient to warrant such action by the courts. \textit{But see} United States v. Miller, 624 F.2d 1198 (3d Cir. 1980); IBM v. Levin, 579 F.2d 271 (3d Cir. 1979) (disqualification based, in part, upon Canon 9).

\textsuperscript{167} 663 F. Supp. at 184.

\textsuperscript{168} Id. at 186.

\textsuperscript{169} This Comment, however, raises many of these situations. \textit{See supra} notes 89–165 and accompanying text.
and the Model Code. In enacting CERCLA, Congress not only wanted to establish an equitable process, but also wanted a procedure that would require responsible parties to respond promptly in order to avert a serious threat to the environment and the public health. Furthermore, the expertise required to represent a party in a Superfund proceeding, coupled with the costs of retaining such representation, limits PRPs' alternatives in choosing counsel. In a case involving a large number of PRPs, it might be difficult for a party to locate a firm that has both the expertise necessary to represent the party and does not have potential conflicts that may impair its representation.

When considering these policy issues and the legal market constraints that a PRP faces, the reasoning applied by the Duca court appears sound. If a PRP consents to a firm's multiple representation after full disclosure, and if the firm reasonably believes that its representation of that PRP will not be adversely affected, then representation of multiple PRPs should be allowed. If the legal community is to abide by its ethical codes, then an attorney's reasonable belief and a client's fully informed consent, obtained pursuant to Rule 1.7, should be enough to fulfill an attorney's ethical obligations.

Nonetheless, the reasonable belief standard remains an insurmountable obstacle to a firm that understands fully the myriad conflicts that can potentially arise when it represents multiple defendants in a Superfund proceeding. If this ethical standard is going to be considered by courts adjudicating conflict problems in CERCLA proceedings, then there must be a change in the way courts interpret the Model Rules in complex tort litigation.

170 The ethical codes consider representations that facilitate the role of the lawyer as negotiator, mediator, and advisor. The codes, however, do not provide enough substantive guidance on recognizing adverse interests in these settings. Conflict problems can occur during negotiations with EPA, but attorneys are given much more latitude under Rule 1.7(b) where clients' interests are "generally aligned . . . even though there is some difference of interest among them." MODEL RULES, supra note 12, Rule 1.7 comment.

In order to meet the objectives of CERCLA, however, an attorney must juggle all of these roles while balancing the delicate allegiance of several parties. It seems clear that hazardous waste cleanups are not facilitated by the zealous advocate needed in a trial situation, the setting for which ethical codes are tailored.


172 See supra notes 17–42 and accompanying text.

173 See supra notes 88–138 and accompanying text for a discussion of conflict potential in Superfund settlement negotiations.
VI. POSSIBLE REFORMS

The Duca court's holding does not solve the problems that this Comment has analyzed. Rather, it merely recognizes that complex tort and environmental litigation is not reconciled easily with either the Model Rules or the Model Code. Therefore, the Duca decision provides little solace to an attorney faced with actual conflicts of interests among clients involved in the same Superfund proceeding. Reforms must come from both the judiciary and EPA if this problem is to be resolved adequately.

The courts must realize that CERCLA's objectives are best met through a united effort by all the various defendants and by EPA. Therefore, the reasonable belief standard of Model Rules 1.7 and 1.9 should be applied to the group of PRPs a firm represents as a whole, rather than to each individual party within that group. In other words, to determine whether multiple representation is going to serve the interests of all PRPs, a lawyer should be permitted to weigh the likelihood and magnitude of a possible conflict of interest against the benefits a multiple representation provides to the parties and to the conduct of the proceedings. If the benefits outweigh the detriments and the involved clients provide their informed consent, then the multiple representation should be regarded as permissible under the Model Rules.

If a party challenges the propriety of an attorney's representation, then the courts should attempt to isolate the issues that are more likely to create conflicts of interest from the rest of the dispute. Trial judges have broad discretion in the order of their proceedings. Issuing bifurcation orders can separate the conflict-of-interest issues and make Superfund cases more manageable.

In addition to this change by the courts, EPA must address the potential for conflicts of interest that result from its current practice in pursuing and settling CERCLA cases. Information, such as the relative volume of substances found at a site, should be provided to parties as soon as it is available, as a matter of policy and practice. This early disclosure will enable attorneys who are considering the

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175 FED. R. CIV. P. 42(b).
176 See supra notes 67–129 and accompanying text for a discussion of the conflict-engendering policies of EPA.
177 See supra note 85 and accompanying text.
viability of a simultaneous multiple representation to assess all the factors that can create a conflict of interest and potentially compromise his or her clients' positions.

The avoidance of conflicts of interest should not be the responsibility of the courts and EPA alone. Practitioners and PRPs can also prevent the occurrence of this problem by considering potential conflicts of interest before retaining counsel, or subsequently impleading a large number of third-party defendants. A united effort by all parties involved in a Superfund proceeding can avoid the potential conflicts of interest explored in this Comment and can ensure that CERCLA's objectives are met without an unnecessary increase in litigation costs or case complexity.

If a group of defendants in a Superfund case cannot agree on an allocation formula, and the allocation dispute or contribution action goes to litigation, then the court can design a rational organization of the issues and prevent the occurrence of a conflict of interest through bifurcation. A common form of bifurcation is to separate cost-allocation issues from total damage and liability issues. Bifurcating these issues allows a defendant to avoid having to litigate response-cost allocation if that defendant prevails in an earlier proceeding regarding liability. By removing a party from the proceeding at the liability stage of a case, the likelihood that a conflict of interest will arise when allocation is considered is eliminated. Moreover, to the extent that there are conflicting interests, resolution of those interests can usually be postponed through an agreement to reserve claims inter se until after resolution of common defenses.

Similarly, bifurcation can extend the time permitted to a group of PRPs and allow them to present a more effective and united settlement proposal, which will assist both the court and the EPA. For instance, while a court concentrates on the liability of the various defendants, a more acceptable allocation formula can be negotiated. In this way, bifurcation can be used as a device for facilitating settlements by extending the time frame during which parties can

178 Hickok & Padleschat, supra note 137, at 1221-22.
179 Id.
180 Id. at 1221.
181 The prevalent use of inter se agreements among PRPs engaging joint counsel was discovered through conversations and correspondence with several practitioners involved in large Superfund negotiations and settlements. Again, at the interviewees' request, their names are not cited.
182 See Hickok & Padleschat, supra note 137, at 1221-22.
resolve issues that may ultimately create conflicts and prolong the suit. 

*United States v. Conservation Chemical Co.* illustrates a bifurcation order issued under this rationale. In this case, the United States District Court for the Western District of Missouri ordered a bifurcation directing an initial trial on liability and damages, with the subsequent trial reserved for apportionment issues. Such an order has potential influence on eventual settlements. For example, defendants who were unwilling to settle may discover a change of heart when a number of PRPs avoid liability at the initial trial. Because the remedial costs must then be apportioned among fewer defendants, those recalcitrant parties may be more willing to settle, rather than risk being held to a greater share of liability. Although this type of settlement pressure may not be in the best interests of all parties involved, avoiding litigation over the question of apportionment is one way to avoid an actual conflict of interest and subsequent withdrawal by counsel.

Before a multiple representation of PRPs ever reaches litigation, an attorney assessing the reasonableness of such a representation must consider the probability that the various interests of the clients will become adverse. If there is a potential conflict, the attorney must consider whether the representation would be compromised if the conflict actually arises. But a worst-case scenario should be balanced against the relative benefits of the representation, such as a coordinated defense strategy, enhanced negotiations, reduced legal expenses, and a greater likelihood that the defendants will agree on a settlement proposal. Other, more intangible benefits, such as the continued good will among the parties aligned in a united defense, are relevant when one PRP is a client, supplier, or customer of another PRP. In this situation, the continued relationships between the parties may ultimately be more valuable than a successful contribution claim. This consideration will make a multiple representation more reasonable, because the probability that the parties' interests will become adverse is relatively low and the benefits of the representation are great.

A multiple representation limited to one class of PRPs, such as only those parties connected to one type of waste found at a particular site, is a simple example of the type of prior analysis of the relationships between potential clients that can be used to avoid

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184 Id. at 215–16.
conflicts of interest. For example, a transporter who has maintained a continuing relationship with a particular treater of hazardous wastes is less likely to dispute allocation with that treater if such conduct would jeopardize the transporter's future business. If the two parties' interests eventually conflict, they can postpone the resolution of those interests until all common defense issues have been resolved. Even after these latter issues are resolved, the parties may be more likely to reach a friendly settlement between themselves.

By utilizing these relationships, developed through years of interaction within the industry, multiple representations can minimize transactional costs incurred through lengthy litigation. These savings can then be applied to clean-up costs. The number of law firms that have the capability of handling complex environmental tort defenses is typically much smaller than the number of PRPs that may be involved in any one Superfund case. Arguably, developing a successful settlement proposal is easier and more feasible when counsel can act as mediator, and can focus on reducing the overall settlement costs of the group of clients, rather than solely concentrating on any one client's share of liability. Therefore, courts should disqualify counsel only when the probability that the defendants' interests will become adverse is very high, and when the conflict will jeopardize settlement negotiations or compromise the defendants' litigation strategies.

For instance, a firm should not be permitted to represent multiple parties when it has clients on either side of a contribution action. In such a situation, a PRP's financial costs in retaining new counsel may substantially outweigh what it hopes to gain through contribution from other PRPs. Increased delay in litigation and greater case complexity occur as more parties are dragged into the proceedings. Valuable time is spent allowing newly retained counsel to become familiar with the case. When the potential for conflicts of interest is extreme and the degree of harm to the parties is serious, a firm cannot be permitted to represent multiple PRPs.

One possible approach to avoid the possibility of a conflict of interest created through third-party contribution claims is to institute alternative dispute resolutions when developing an allocation formula for the apportionment of remedial costs among defendants.

186 See supra note 6 and accompanying text.
For instance, in *United States v. Laskin*, the twenty companies that allegedly sent more than de minimis volumes of waste to the Polar/Laskin site were nonetheless not named by EPA as potentially responsible parties. These companies agreed to settle potential third-party claims through an alternative dispute resolution in return for a deferral of third-party claims in court.

This unique approach employs mediators and negotiations to settle contribution claims before the parties resort to the courts. The parties are free to devise their own procedure for the alternative dispute resolution that will enable the firms involved to circumvent potential conflicts before the matter ever reaches governmental involvement or litigation. Generally, the process calls for the appointment of a qualified “neutral” or “neutral panel” to serve as both a mediator and a decision maker. The potential phases involved in this type of allocation procedure are: (1) investigation and fact finding; (2) position statements by the PRPs; (3) neutral attempts to achieve agreement through mediation; (4) alternative dispute resolution, such as arbitration or mini-trial; (5) cost-allocation determination by a neutral party; and (6) acceptance of the determination. By using this approach, each PRP can know its share of clean-up costs, and reduce its exposure to joint and several liability. In addition, this process places the PRPs in a position to cooperate with one another and eliminates or reduces the need for cross-claims and the possible conflicts of interest that such claims create. Nevertheless, it would behoove a group of PRPs attempting to allocate response liabilities privately to enlist the aid of local environmental officials. Such assistance would minimize possible public criticism and the susceptibility of a lawsuit should a settlement create dissatisfaction and controversy among interested citizens.

**VII. Conclusion**

The legal community’s ethical codes do not adequately resolve the potential conflicts of interest that arise in Superfund proceedings.

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189 Id.
190 Id.
191 Id. at 645–48.
193 Id. at 7476.
194 Id.
Furthermore, EPA’s policies in pursuing and settling liability under CERCLA engender conflicts of interest among parties retaining joint counsel. Because PRPs cannot always afford or rely on retaining individual representation in these proceedings, a serious problem exists that strains the resources of the limited number of law firms practicing environmental law. Consequently, this Comment advocates a more flexible approach to multiple representations in CERCLA actions.

This approach must recognize the values of multiple representations as well as the potential conflicts of interest. In many ways, multiple representations facilitate the cleanup of hazardous wastes. When a cooperative approach is possible, multiple representations can reduce legal costs, decrease the length of time needed to resolve the allocation of clean-up costs, and increase the likelihood that parties can reach an equitable settlement with EPA. To a degree, what is needed is precisely what the Model Rules provide: a flexible and workable approach to ethical standards that allows an honest practitioner to make decisions consistent with both the principles of the legal profession and the needs of the client.

Although the voluntary consent test fulfills its purpose, it does so only to the point where the legal community adheres to the “informed” requirement of that test. In the context of a Superfund proceeding, that requirement can be strenuous, but the benefits it promotes far outweigh the detriments.