2012 ETHICS IN CIVIL LITIGATION, PART 1 AND PART 2
First Run Broadcast: June 5 & 6, 2012
1:00 p.m. E.T./12:00 p.m. C.T./11:00 a.m. M.T./10:00 a.m. P.T. (60 minutes each day)

This wide ranging ethics update will cover major ethics developments important to your civil litigation practice. The program will cover developments in conflicts of interest at each stage of litigation and developments in confidentiality and the attorney-client privilege. Use of “the cloud” by attorneys to store litigation files online and related data security issues, with a focus on inadvertent disclosure and improper access, will also be covered. The program will also cover ethics in e-discovery, the use of metadata in litigation, and ethics issues in judicial recusal. Throughout the program, the speakers will focus on developing best practices to avoid ethics complaints and how to reduce the risk of violations.

Day 1: June 5, 2012:
- Developments in the attorney-client privilege and confidentiality
- Attorneys and “the cloud,” litigation files and data, data security and client confidences
- Developments in conflicts of interest in civil litigation, part 1

Day 2: June 6, 2012:
- Loss prevention and managing difficult clients and cases in a challenging economy
- Developments in conflicts of interest in civil litigation, part 2
- Ethics in e-discovery and using metadata

Speakers:

Lucian T. Pera is a partner in the Memphis office of Adams & Reese, LLP. His practice includes professional malpractice litigation as well as counseling lawyers and law firms in the area of ethics and professional responsibility. He was a member of the ABA’s Ethics 2000 Commission and is co-author of "Ethics and Lawyering Today," a national e-mail newsletter on lawyer ethics, which is accessible at: www.ethicsandlawyering.com. Before entering private practice, he served as a judicial clerk to Judge Harry W. Wellford of the U.S. Court of Appeals for the Sixth Circuit. Mr. Pera received his A.B. with honors from Princeton University and his J.D. from Vanderbilt University School of Law.

William Freivogel is the principal of Freivogel Ethics Consulting and is an independent consultant to law firms on ethics and risk management. He was a trial lawyer for 22 years and has practiced in the areas of legal ethics and lawyer malpractice for 20 years. He is chair of the Editorial Board of the ABA/BNA Lawyers’ Manual on Professional Conduct and recent past chair of the ABA Business Law Section Committee on Professional Responsibility. He maintains the Web site “Freivogel on Conflicts” at www.freivogelonconflicts.com. Mr. Freivogel is a graduate of the University of Illinois (Champaign), where he received his B.S. and LL.B.
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2012 Ethics in Civil Litigation, Part 1
Teleseminar
June 5, 2012

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I will be attending:

**2012 Ethics in Civil Litigation, Part 2**
**Teleseminar**
**June 6, 2012**

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2012 Ethics in Civil Litigation Update,
Part 1 & Part 2
Conflicts of Interest Material

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A Guide to Conflicts of Interest for Lawyers

This guide is built around the categories listed in the Table of Contents below. The What’s New page contains very recent decisions and opinions on those categories. It is updated several times a week.

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Current Client Current - Part I

Note: due to the length of this page we have divided it into two parts, Part I (this page) and Part II (next page; click here). Part I discusses the basics of the current client rule with subcategories. Part II consists of cases that do not particularly illuminate the categories at Part I.

A law firm based in Chicago represents a corporate client (Client A) in one matter, a property tax appeal in San Diego, being handled by a partner in the firm's San Diego office. While that matter is pending, another client (Client B) asks a partner in the firm's Chicago office to bring a billion-dollar breach of contract suit against Client A. The alleged breach of contract has nothing whatsoever to do with the property tax matter in San Diego, and the corporate personnel involved are in different divisions and different cities. Can the law firm take on the breach of contract matter?


The Texas exception. Texas is the only state having a version of Model Rule 1.7 that permits a lawyer to be directly adverse to a current client on a matter unrelated to the representation. See Texas Rule 1.06(b)(1). The Fifth Circuit has specifically rejected the Texas rule, In Re Dresser Industries, Inc., 972 F.2d 540 (5th Cir. 1992). In In re Southwestern Bell Yellow Pages, Inc., 141 S.W.3d 229 (Tex. App. 2004), the court applied the Texas rule and said no disqualification; however, the court also found that the lawyer in question had not gained information in the other matter to assist the lawyer in this matter.

Ohio. Carnegie Cos., Inc. v. Summit Props., Inc., 2009 Ohio App. LEXIS 3973 (Ohio App. Sept. 9, 2009). This is a comprehensive discussion of current clients under the new Ohio Rules of Professional Conduct. It takes issue with several federal court decisions decided under Ohio’s former unique version of Model Code DR5-105, which were somewhat more lenient than the ruling in this case. In Carnegie Cos., Inc. v. Summit Props., Inc., 2012 Ohio App. LEXIS 1151 (Ohio App. March 28, 2012), the court upheld an award of $80,000 to the moving party for the opponent's bad faith refusal to withdraw in the face of the conflict.

Daniel J. Bussel, No Conflict, 25 Geo. J. Legal Ethics (2012) (at SSRN, to be published). Professor Bussel contends that the American current client rule should be changed in favor of a "substantial relationship" test as applied in the former client rule. Whatever one thinks of that conclusion, the article is a thorough and entertaining history of the current rule.

"No Harm, No Foul." On occasion a court will allow a law firm to remain in a case where it was
technically being adverse to a current client. Such a case is Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc., 142 F. Supp. 2d 579 (D. Del. 2001) (although, also showing of a consent). More usually, this is where one representation had ended, was nearly "dead," was severely winding down, or was recently dead. See, for example, Bayshore Ford Truck Sales, Inc. v. Ford Motor Co., 380 F.3d 1331 (11th Cir. 2004) (had conflict for brief time, then dropped one of the clients); Boston Scientific Corp. v. Johnson & Johnson Inc., 2009 U.S. Dist. LEXIS 75527 (D. Del. Aug. 25, 2009) (firm had continuing current client conflict involving European matter but screen, etc.; same result, same parties, Wyeth v. Abbot Labs., 2010 U.S. Dist. LEXIS 11032 (D.N.J. Feb. 8, 2010)); Cliff Sales Co. v. Amer. Steamship Co., 2007 U.S. Dist. LEXIS 74342 (N.D. Ohio Oct. 4, 2007) (overlapping conflict lasted only two months with no harm to client); LifeNet, Inc. v. Musculoskeletal Transplant Foundation, 2007 U.S. Dist. LEXIS 29058 (E.D. Va. April 19, 2007) (one of the lawyers left the firm); Pfizer, Inc. v. Stryker Corp., 256 F. Supp. 2d 224 (S.D.N.Y. 2003) (firm briefly represented the other side in two product liability cases, but then withdrew); End of Road Trust v. Terex Corp., 2002 U.S. Dist. LEXIS 2586 (D. Del. 2002); Research Corp. Tech., Inc. v. Hewlett-Packard Co., 936 F. Supp. 697 (D. Ariz. 1996); SWS Financial Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392 (N.D. Ill. 1992); Kaminski Bros., Inc. v. Detroit Diesel Allison, Div. of Gen. Motors Corp., 638 F. Supp. 414 (M.D. Pa. 1985) (also a "hot potato" situation); Air Products & Chemicals, Inc. v. Airgas, Inc., 2010 Del. Ch. LEXIS 35 ( Ct. Ch. Del. March 5, 2010) (lawyers screened; matters not related; Cravath was the firm); Airgas, Inc. v. Cravath, Swaine & Moore LLP, 2010 U.S. Dist. LEXIS 78162 (E.D. Pa. Aug. 3, 2010) (motion to dismiss damages case against Cravath denied); Goodman v. Goodman, 2008 Mo. App. LEXIS 1375 (Mo. App. Oct. 7, 2008) (no showing the “fair or efficient administration of justice” was threatened); Develop Don't Destroy Brooklyn v. Empire State Development Corp., 816 N.Y.S.2d 424 (N.Y. App. 2006); In Prudential Ins. Co. of America v. Anodyne, Inc., 365 F. Supp. 2d 1232 (S.D. Fla. 2005), the court denied a motion to withdraw even though the moving law firm discovered that it was representing the other side on unrelated matters. The court relied heavily on SWS, above as well as what is now § 11.21 of Hazard, Hodes & Jarvis. In Gen-Cor, LLC v. Buckeye Corrugated, Inc., 111 F. Supp. 2d 1049 (S.D. Ind. 2000), the court found a current client conflict by virtue of a parent-subsidiary relationship, but rejected disqualification because the client would not be prejudiced by the conflict. In Atofina Chemicals, Inc. v. Jci Jones Chemicals, Inc., 2002 U.S. Dist. LEXIS 13970 (E.D. Pa. July 10, 2002), the court held that because one of the representations was surely going to end, in any event, and to avoid prejudice to the client of the firm with the conflict, the court denied the motion. A variation on "no harm, no foul" is Stanton v. Northside Marina at Sesuit Harbor, Inc., 2005 U.S. Dist. LEXIS 17942 (D. Mass. Aug. 18, 2005). It was not a disqualification case. An aggrieved litigant attempted to have a summary judgment hearing stayed because of a conflict. The court denied the stay because the litigant was not prejudiced by the conflict. In Hempstead Video, Inc. v. Village of Valley Stream, 409 F.3d 127 (2d Cir. 2005), the court held that a law firm could be adverse to the current client of an of counsel where the firm could show that the of counsel has been screened from the firm's matter. In Board of Regents of the Univ. of Neb. v. BASF Corp., 2006 U.S. Dist. LEXIS 58255 (D. Neb. Aug. 17, 2006), the court allowed a law firm to oppose a party, even though the law firm was representing that party in another case, not related to this case. There is too much to the case to repeat here, but if you want to be adverse to a current client, you should read it. In Doctor John’s, Inc. v. City of Sioux City, 2007 U.S. Dist. LEXIS 90 (N.D. Ia. Jan. 2, 2007), the court gave a law firm a pass even though for a short period of time it had a current-client conflict. In Abubakar v. County of Solano, 2008 U.S. Dist. LEXIS 12173


Odd Sequence. In Friskit, Inc. v. RealNetworks, Inc., 2007 U.S. Dist. LEXIS 51774 (N.D. Cal. July 5, 2007), the court denied a motion to disqualify where the movant was the second of the two clients to have retained law firm.

In Starwood Hotels & Resorts Worldwide, Inc. v. Aoki Corp., 768 N.Y.S.2d 9 (N.Y. App. 2003), a law firm, because of a merger, wound up on both sides of a case for several months. A lawyer for one side left the firm, and the court allowed her and her new firm to keep the client. While she was with the former firm, the lawyers for each side were in different cities and had little contact. In a similar scenario the court in Laucella v. Ireland San Filippo, LLP, 2006 Cal. App. Unpub. LEXIS 359 (Cal. App. Jan. 13, 2006) disqualified the law firm.

Combustion Engineering Caribe, Inc. v. George P. Reintjes Co., Inc., 298 F. Supp. 2d 215 (D.P.R. 2003). This is a suit involving a troubled construction project. The relevant entities in question are three subcontractors, Sub1, Sub2, and Sub3. Sub1 hired Sub2, and Sub2 hired Sub3. When things went badly, Sub1 sued Sub2 (this case). Sub3 is not a party in this case. When it came time for Sub1 to depose two employees of Sub3 (the non-party), one of Sub2’s lawyers, Duane Fox, announced that he would be representing not only Sub2 at the depositions, he would also be representing Sub3 and the two deponents, for purposes of the depositions. After the depositions Sub1 moved to disqualify Fox from representing Sub2, because it was a conflict to represent both Sub2 and Sub3. Sub2 first raised Sub1’s standing to make the motion. The court admitted that standing was an issue and noted authorities going both ways. Then, without expressly ruling on standing, the court went on to rule on the merits and denied the motion. The court acknowledged that there were disputes between Sub2 and Sub3, although, again, Sub3 had not been brought into the case. But, the court felt that as to the issues in this case, and as to discovery in this case, Sub2 and Sub3 had common interests. It was also important that Fox’s limited role in temporarily representing Sub3 in certain discovery activities diminished any chance that Sub3 would be prejudiced with respect to its dispute with Sub2.
In Sperr v. Gordon L. Seaman, Inc., 727 N.Y.S.2d 456 (N.Y. App. June 18, 2001), a law firm defended Hicksville Cinemas in two personal injury actions, which have been settled. While those cases were pending, the law firm, in a third personal injury case involving the same property, filed a third-party action against Hicksville Cinemas on behalf of the defendant. The court affirmed the trial court's order disqualifying the law firm in the pending, third case. The court said in part:

This case involves a law firm which, even if for a relatively brief time, represented a client in one personal injury case while simultaneously opposing relief sought by that same client in a separate personal injury case involving the same premises. Thus, there is a more serious risk of an appearance of impropriety than in the case of a lawyer who later adopts a position which is adverse to that of a former client in a substantially related matter (see, Code of Professional Responsibility DR 5-108 [22 NYCRR 1200.27] . . . .

A firm in this position should consider setting up a screen around the confidential information and the lawyers and staff who were privy to it. A helpful authority suggesting that entire law firms need not be disqualified is Restatement §132 cmt. g(ii). It says that where there is not an attorney-client relationship, the law of agency applies, and that law does not impute the knowledge of agents to others. Other helpful authorities are Restatement § 15 and Model Rule 1.18. Those provisions relate to information gathered from “prospective clients.” They provide that the lawyer is to keep the information confidential and not use it to the prospective client’s disadvantage. It is important to note that both provisions provide that a screen will prevent other lawyers in the firm from being disqualified. Thus, one could argue that a law firm obtaining non-client information while doing due diligence could also use a screen. There appears to be no logical difference between the two situations. To see other “prospective client” cases, go to “Initial Interview/Hearing too Much,” in this site.


N.Y. Op. 901 (December 2011) discusses the extent to which a lawyer may represent a corporation after having represented an officer of the corporation, and the extent to which a lawyer may represent both the corporation and the officer at the same time.

What Is a "Current" Client?

When is a client a "current" client, as opposed to a "former" client? That is discussed at the section entitled "Former Client - the Substantial Relationship Test."

What Is Direct Adversity?

Suing a current client is direct adversity. What about negotiating a major contract for one client when the opposite party to the contract is a current client of the firm on unrelated matters? That is probably direct adversity, but there are few cases or opinions on the subject. See the section of this publication entitled, "Commercial Negotiations."

What about suing a non-client where the outcome will have an adverse economic impact on another client who is not a party to the law suit. For example, can a law firm sue a person who is a guarantor on a note held by a current client where the maker of the note is in financial difficulty? There are few cases that address that issue. ABA Op. 95-390 (1995) contains an excellent discussion of direct adversity in the corporate family context. Also, see the section of this publication, entitled, "Corporate Families." ABA Op. 95-390 cites a case that is very similar to the guarantor situation, North Star Hotels Corp. v. Mid-City Hotel Associates, 118 F.R.D. 109.

The Standing Committee on Ethics and Professional Responsibility of the American Bar Association has provided valuable insight into what is “direct adversity” in two opinions. Formal Opinion 05-434, dated December 8, 2004, deals with a testator who asks a lawyer to draft a new will, the effect of which is to disinherit the testator’s son. The problem is the son is a client of the lawyer on matters unrelated to the testator’s estate. The court held that drafting the will is not direct adversity to the son, and the lawyer does not need the son’s consent to do the will. The Committee does point out scenarios under which the lawyer may not be able to do the will, which we will not elaborate on here. Anyone who has this situation should read Opinion 05-434. Formal Opinion 05-435, also dated December 8, 2004, deals with a lawyer who represents an insurance company as a named party in litigation. Now, in an unrelated matter, another client (“Client A”) asks the lawyer to file a lawsuit against Defendant B. The problem is that Defendant B is insured by a policy issued by the lawyer’s insurance company client. The Committee opined that without more, pursuing the lawsuit against Defendant B is not direct adversity to the insurance company. As was the case in Opinion 05-434, the Committee discusses scenarios under which filing the suit may not be permissible.

GATX/Airlog Co. v. Evergreen Int’l. Airlines, Inc., 8 F. Supp. 2d 1182 (N.D. Cal. 1998) furnishes another twist on direct adversity. The owner of several 747 passenger airplanes sued a company that allegedly did faulty work in converting them to freight airplanes. The defendant’s law firm also represented a major bank on a variety of matters. Well into the 747 litigation, the parties realized that the bank was an owner of one of the airplanes that had been converted, although the bank had not yet filed its own suit. The bank moved to intervene in the original suit to have the law firm disqualified. The court granted the motion, saying it should have been clear early on that the law firm’s actions were adverse to its bank client - even though the bank had not yet filed an action. The law firm’s status later became moot, and the Ninth Circuit ordered the disqualification order vacated, at 192 F.3d 1304 (9th Cir. 1999).

In Harvey E. Morse, P.A. v. Clark, 890 So. 2d 496 (Fla. App. 2004), the court held that the law firm representing a trust, which was trying to deplete a decedent’s estate in favor of the trust, was directly adverse to the heirs of the estate. Because one of the heirs (actually, an assignee of several heirs) was a current client of the firm on unrelated matters, the court held the firm had a direct adversity conflict.

What About Referring other Party to Lawyer. D.C. Op. 326 (Dec. 2004). The D.C. Bar Ethics Committee opined that a lawyer with a conflict may refer the non-client to another lawyer. The Committee relied principally upon D.C.’s version of Model Rule 4.3. Compare Flatt v. Superior Court, 885 P.2d 950 (Cal. 1994), in which the court held that a lawyer did not have a duty to advise a declined client about the statute of limitations if doing so would disadvantage an existing client.

"Potential" vs. "Actual" Conflicts. In most contexts and in most jurisdictions lawyers are disqualified for having "actual" rather than "potential" conflicts. See, for example Shaffer v.
Farm Fresh, Inc., 966 F.2d 142 (4th Cir. 1992); Guillen v. City of Chicago, 956 F. Supp. 1416 (N.D. Ill. 1997); Chapman Engineers, Inc. v. Natural Gas Sales Co., 766 F. Supp. 949 (D. Kan. 1991); In re Possession & Control of Commissioner of Banks, 764 N.E.2d 66 (Ill. App. 2001); and Bottoms v. Stapleton, 706 N.W.2d 411 (Ia. 2005). However, California Rule 3-310(C)(1) says a lawyer may not represent interests that "potentially" conflict, without consents. In Glahn & Hirschfield v. Taylor, 2004 Cal. App. Unpub. LEXIS 3249 (Cal. App. April 7, 2004), the court described how California courts define "potential" (a situation that is "reasonably likely" to lead to an actual conflict). Another case discussing these distinctions is Maali v. Abtahi, 2008 Cal. App. Unpub. LEXIS 454 (Cal. App. Jan. 16, 2008). "Potential conflict" is also used in bankruptcy cases. To read about those go to "Bankruptcy" at this site. The distinction is also made in the criminal cases. To read about them, go to "Criminal Practice."


Patent Opinions. Va. Op. No. 1774 (Feb. 13, 2003). This may be a first. A law firm is asked by client A to render a validity opinion on a patent owned by B. B is a patent client of the firm, but on other types of products. The Virginia committee opined that to render the opinion is direct adversity under Va. Rule 1.7(a), and that the firm can only do so with the consent of A and B. More recently, a court made a similar holding regarding a non-infringement opinion, Andrew Corp. v. Beverly Mfg. Co., 415 F. Supp. 2d 919 (N.D. Ill. 2006). That is the first court opinion so holding, of which we are aware. Also, see Samuel C. Miller, Ethical Considerations in Rendering Patent Opinions and the Impact of Knorr, Echostar and Andrew, 88 J. Pat. & Trademark Off. Soc’y 1091 (Dec. 2006).

Bond Lawyer Conflicts. Iowa Op. 06-03 (November 6, 2006). This opinion softens Iowa’s position on conflicts for municipal bond lawyers. It provides that a law firm may represent an issuer when it is already representing the underwriter in other, unrelated, transactions, provided waivers are obtained, and the parties signing the waivers are sophisticated. Earlier Iowa Op. 95-20 (February 22, 1996), would have prevented such a waiver and would have barred a law firm from representing an issuer where the firm represents the underwriter currently, or had represented the underwriter in the past.

Banks/Trust Departments. May a lawyer doing lending work for a bank oppose the bank it its capacity as a fiduciary? There is little judicial guidance. For a full discussion of this, go to "Banks/Trust Departments" by clicking here.

Zero Sum Games. May a law firm assist one client in seeking a broadcast license in competition with another client? May a law firm assist one client in collecting a debt, where another client is also a creditor of the same debtor, and the amount of money available is not enough to satisfy both. We discuss these issues and provides cases and opinions on them at a section entitled "Zero Sum Games." To go there, click here.

"Nominal" Clients. In the following cases the court held that the lawyer's representation of one of
the clients was only nominal, so the lawyer could be adverse to that "client:" Commercial Union Ins. Co v. Marco Int'l. Corp., 75 F. Supp. 2d 108 (S.D.N.Y. 1999); Guzewicz v. Eberle, 953 F. Supp. 108 (E.D.Pa. 1997); and In re Dooley, 599 N.W.2d 619 (N.D. 1999). In American Special Risk Ins. Co. v. Delta America Re Ins. Co., 634 F. Supp. 112 (S.D.N.Y. 1986), the court allowed a law firm to stay in a matter using the “nominal client” rubric; however, the law firm was doing real work for the client, and the client was “nominal” in the matter where the law firm was adverse to it.

"Vicarious Clients." Atrotos Shipping Co., S.A. v. The Swedish Club, 2002 U.S. Dist. LEXIS 9018 (S.D.N.Y. May 20, 2002). A ship owner is suing its "Freight, Demurrage, and Defense" insurance carrier, The Swedish Club (“TSC”). TSC usually appoints law firms to represent ship owners, all correspondence is between the law firm and TSC, and TSC pays the law firm's fees. The law firm for the plaintiff is also representing TSC in other shipping losses. TSC moved to disqualify the law firm in this case, because of these other matters. The law firm responded that it was really representing the insured in the other cases and that TSC was merely a "vicarious" client. The court disagreed and disqualified the law firm.

Third-Party Actions. Richmond American Homes of Northern California, Inc. v. Air Design, Inc., 2002 Cal. App. Unpub. LEXIS 6948 (Cal. App. July 25, 2002). A sued B. B filed a third-party action against C. C moved to disqualify A’s lawyer because that lawyer had previously represented C on substantially related matters. A claimed that A was not suing C, so there was no adversity. The Appellate Court disagreed noting that third-party defendants can defend against a third-party complaint by attempting to prove the defendant had no liability to the plaintiff. The court held that is being directly adverse to the former client. (While this is not a current client conflict, the same analysis regarding third-party complaints should apply to current clients.) Another third-party action in which the court held that a lawyer could not represent both the plaintiff and the third-party defendants is Pressman-Gutman Co., Inc. v. First Union National Bank, 459 F.3d 383 (E.D. Pa. 2004). The court disqualified the law firm from representing the third-party defendants. And, upon reconsideration, the court ordered the law firm out of the case entirely, Pressman-Gutman Co., Inc. v. First Union National Bank, 2004 U.S. Dist. LEXIS 23991 (E.D. Pa. Nov. 30, 2004). The Third Circuit denied mandamus at Pressman-Gutman Co., Inc. v. First Nat. Bank, 459 F.3d 383 (3d Cir. 2006). In In re Methyl Tertiary Butyl Ether Products Liab. Litig., 438 F. Supp. 2d 305 (S.D.N.Y. 2006), a law firm started out representing plaintiffs and a third-party defendant. When challenged, it withdrew from representing the latter. In Liberty Mut. Fire Ins. Co. v. Ravannack, 2006 U.S. Dist. LEXIS 50252 (E.D. La. July 21, 2006), the court allowed a lawyer to represent both a plaintiff and a third-party defendant (with a waiver) without discussing the conflict and the ability of the parties to understand it. Same, in Hall Dickler Kent Goldstein & Wood, LLP v. McCormick, 930 N.Y.S.2d 195 (N.Y. App. 2007). In Decker v. Nagel Rice LLC, 2010 U.S. Dist. LEXIS 26530 (S.D.N.Y. March 22, 2010), the court ruled that a lawyer could not represent the plaintiff and be a third-party defendant.

Attempt to Apply "Substantial Relationship" Test to Current Client Situation. And, Much More. Reed v. Hoosier Health Systems, Inc., 825 N.E.2d 408 (Ind. App. 2005). The lawyers representing the plaintiff in this corporate dispute are in a law firm that represents the defendants in medical malpractice suits. The trial court granted the defendants’ motion to disqualify plaintiff’s lawyers, and in this opinion the appellate court affirmed. The plaintiff bravely
attempted to get the court to apply the “substantially related” test even though the conflict is a current one under Indiana’s version of Model Rule 1.7(a)(1). The court did not buy that one. The law firm also offered to withdraw from the malpractice cases. The court did not buy that one either, citing the “hot potato” cases. Last, the plaintiff tried to argue that defendants weren’t really clients of the firm in the malpractice cases because of the nature of their relationship to their malpractice carrier. This argument was based upon the fact that the insurance company appointed defendants’ law firm and had complete control of the defense, and only the insurance company had exposure. That argument also failed.


Strother v. 3464920 Canada Inc., 2007 SCC 24 (Can). Lawyer did tax shelter work for Client No. 1 for several years and through 1997. The law changed in 1997, and Lawyer advised Client No. 1 that it could do no further tax shelter deals of the sort it had been doing. Lawyer’s law firm (“Law Firm”) continued to do other work for Client No. 1 through 1998 and into 1999. In early 1998 Lawyer began representing Client No. 2, and, through a loophole in Canadian tax law, Lawyer did a number of tax shelter deals for Client No. 2, similar to those Lawyer had done for Client No. 1. Further, Lawyer had an agreement that Client No. 2 would share its profits with Lawyer. When Client No. 1 learned of Lawyer’s work for Client No. 2, it sued Lawyer and Law Firm for breach of fiduciary duty for failure to advise Client No. 1 of the loophole opportunities. The key issue was whether Lawyer had an obligation in 1998 to advise Client No. 1 of the loophole. As of 1998 Law Firm had no written engagement letter with Client No. 1. The B.C. trial court held that Lawyer and Law Firm had no duty to advise Client No. 1 of the loophole. The B.C. Court of Appeal disagreed and reversed. In this opinion the Supreme Court of Canada, in a 5-4 opinion affirmed the Court of Appeal on the issue of liability of Lawyer. The Supreme Court ruled that Law Firm had no liability for breach of fiduciary liability but might be vicariously liable under the Canadian Partnership Act. According to press accounts the Supreme Court’s ruling on damages reduced Lawyer’s exposure from upwards of $40 million to about $1 million.

S.C. Op. 05-14 (2005). Lawyer may not represent mortgagor in foreclosure proceeding when the mortgagee is a client in other foreclosure proceedings without a waiver from the mortgagee.


Patent Matter. Enzo Biochem, Inc. v. Applera Corp., 468 F. Supp. 2d 359 (D. Conn. 2007) . In this case Enzo has sued Applera for patent infringement. In another case Enzo has sued Amersham for infringement of the same patents. Amersham is a subsidiary of GE. Law Firm represents Enzo in this case (the Applera case). Another firm represents Enzo in the Amersham
case. Law Firm represents GE in other intellectual property matters. For that reason GE intervened in this case to move to disqualify Law Firm. In this opinion the court denied the motion. There was some evidence that Law Firm communicated with the law firm representing Enzo in the Amersham case in order to present consistent claims construction positions. However, Law Firm has committed not to participate in any appeals of the claims construction rulings. The court added:

[While the construction of Enzo's patents applicable to the infringement claims brought against two separate accused infringers, Amersham and Applera, implicates pretrial Markman overlap, the trials of how those constructions apply to the respective accused products or conduct are wholly separate. GE has not claimed that any of its witnesses in Amersham will be cross-examined by [Law Firm] in Applera, as contemplated as demonstrating direct adversity under Rule 1.7(a)(1).]


Secondment. N.Y. City Op. 2007-2 (undated). Here is the Committee's digest:

A law firm may second a lawyer to a host organization without subjecting the law firm to the imputation of conflicts under DR 5-105(D) if, during the secondment, the lawyer does not remain “associated” with the firm. The seconded lawyer will not remain associated with the firm if any ongoing relationship between them is narrowly limited, and if the lawyer is securely and effectively screened from the confidences and secrets of the firm’s clients. Both during the secondment and afterward, the seconded lawyer and his or her employer should be mindful of the lawyer’s former-client conflicts under DR 5-108.

Representing Client and Having Simultaneous Fee Dispute. L.A. County Op. 521 (2007). This opinion discusses the extent to which a lawyer may continue to represent a client in the face of a disagreement over fees.

Threats by Client to Sue for Malpractice Grounds for Withdrawal. Moore v. United States, 2008 U.S. Dist. LEXIS 34741 (E.D. Cal. April 28, 2008). Plaintiffs in this case threatened to sue their law firm for malpractice. In this opinion the court ruled that the threat created a conflict of interest and ruled that the law firm’s motion to withdraw should be granted.

Commercial Development Co. v. Abitibi-Consolidated Inc., 2007 U.S. Dist. LEXIS 86147 (W.D. Wash. Nov. 15, 2007). This is a suit for specific performance of a real estate sales contract, among other things. A realtor (“Realtor”), affiliated with the real estate agency (“Agency”) representing the seller, successfully moved to intervene to defend her conduct, which appeared to be put in issue by the plaintiffs. Realtor then moved to disqualify the plaintiffs’ law firm (“Law Firm”) because Law Firm represents Realtor and has represented Realtor on matters substantially related to this matter. In this opinion the court granted the motion. The court plowed no new ground, here, and the analysis was very fact-intensive. Law Firm’s relationship with Realtor came about through Law Firm’s representation of Agency, for which Realtor was an independent
contractor. Realtor paid a portion of Law Firm’s fees pursuant to her contract with Agency. A partner at Law Firm (“Lawyer”) had counseled with Realtor on issues similar to those in this case.

Ore. Op. 2009-182 (Oct. 2009). In this opinion the Committee held that the filing of a Bar complaint by a client does not necessarily require the lawyer to withdraw from an ongoing representation that is the subject of the Bar complaint.

If You "Have to Ask," Rule 1.7(a)(2) Is Almost Certainly Involved - A Comparison with Rule 1.7(a)(1)

Rule 1.7(a)(2) may be involved where there is no direct adversity against a current client. It applies if the representation of a client “may be materially limited” by the lawyer's responsibility to someone else or by the lawyer's own interests. If the answer is "maybe," then the lawyer must be satisfied that "the representation will not be adversely affected," (1.7[b][1]) and the client consents (1.7[b][4]).

Take the guarantor situation mentioned above. Notwithstanding the North Star case, which the drafters of ABA Op. 95-390 believe stretches the meaning of direct adversity under Rule 1.7(a)(1), an analysis of Rule 1.7(a)(2) would still be required. That is, would the lawyer's loyalty to the payee of the note cause the lawyer to do less than a perfect job in going after, and possibly bankrupting, the guarantor. Stated another way, if you are concerned about whether 1.7(a)(1) applies, and you decide that it does not, you are almost certainly going to have to go through the 1.7(a)(2) analysis.


Sands v. Menard, Inc., 787 N.W.2d 384 (Wis. 2010). According to an arbitration panel, on the evening of March 14, 2006, Dawn Sands, the general counsel of Menard's, the building materials chain, was sitting at her desk preparing for a meeting. John Menard, the company founder, entered her office and said; "Pick your shit up; I want your ass out of here. You've got five minutes." (Thus, setting a new standard for civility in terminating a general counsel.) Sands brought an arbitration, and the panel awarded her almost $1.8 million in damages and ordered her reinstated. The trial court ordered that the award be enforced. The appellate court affirmed. In a 4-3 decision (this opinion) the Wisconsin Supreme Court reversed the reinstatement and remanded to the trial court to consider "front pay" damages in lieu of reinstatement. The existing $1.8 million award was not disturbed. The majority ruled that, given the degree of animosity between the parties, Sands could not possibly comply with her ethical obligations if she were to return to the company. The majority cited only Wisconsin Rule 1.7(a)(2), the material limitation
provision. The vigorous dissent, arguing for reinstatement, centered primarily upon the need for preserving the integrity of arbitration awards. However, it contains one of the lengthier discussions of the material limitation provision of Rule 1.7 that we have seen.

Suing Current Client for Fees. In re Simon, 2011 N.J. LEXIS 641 (June 9, 2011). In this opinion the New Jersey Supreme Court upheld a reprimand of a lawyer who had sued a current client for fees. It was a murder case, from which the lawyer was trying to withdraw. The trial court had denied the lawyer leave to withdraw. After the suit for fees was filed, the court granted the lawyer leave to withdraw. The court held that the suit for fees under these circumstances was a violation of New Jersey Rule 1.7(a)(2), the material limitation rule.

In re Bruzga, 2011 N.H. LEXIS 64 (N.H. May 12, 2011). Lawyer advised Client on whether Client could remove funds from a "special needs trust" set up under Medicaid laws. After Client paid the funds to himself and his sister, Medicaid investigators began an investigation of Client, the sister, and Lawyer as to whether the funds should have been paid to the government. Lawyer continued to advise Client as to the investigation. Ultimately, the government ordered Client and his sister to disgorge the funds. A bar prosecution began against Lawyer. In this opinion the court considered whether Lawyer violated New Hampshire's version of MR 1.7(a)(2) (the material limitation provision - designated "1.7(b)" in New Hampshire), because Lawyer represented Client while they were both being investigated. The court ruled that Lawyer did violate that rule (among others). The court suspended Lawyer for six months. Lawyer had been disciplined on three prior occasions, two of them resulting in suspensions of one year and six months, respectively.

Lawyer argues that his client and not lawyer liable for sanctions, making lawyer subject to further sanctions. Wade v. Soo Line R.R. Corp., 500 F.3d 559 (7th Cir. 2007).

Coe v. Northern Pipe Products, Inc., 589 F. Supp. 2d 1055 (N.D. Ia. 2008). This is an employment discrimination case. Disqualification was not an issue. Nevertheless, when discussing the difference between a "mixed motives" claim and a "but for" claim, the court made the following interesting observation:

Indeed, this court has often wondered if plaintiffs' lawyers explain these realities to plaintiffs and let them decide whether to pursue a "but for" or "mixed motive" claim or both. If an attorney does not make such a full disclosure that allows the plaintiff personally to decide which claim or claims to pursue, this court suggests that there may be a conflict of interest between the lawyer and the client. After all, there are some cases in which it is to the plaintiff's lawyer's advantage to pursue a "mixed motives" claim, which would provide compensation to the lawyer, but it would not be to the plaintiff's advantage to do so, because the plaintiff might recover nothing, and vice versa.

Shanley v. Cadle Co., 2010 U.S. Dist. LEXIS 131560 (D. Mass. Dec. 3, 2010). Lawyer appeared for several plaintiffs in this litigation. The defendant is Cadle Co. Lawyer, in other venues, is engaged in a bitter personal battle with Cadle Co. Among other things, Cadle Co. obtained a defamation judgment of $250,000 against Lawyer. In this brief opinion the court expressed serious concern about Lawyer's ability to adequately represent the plaintiffs in these cases, citing the material limitation provision in Massachusetts' version of MR 1.7. The court ordered Lawyer
and Lawyer's co-counsel to file affidavits explaining how Lawyer's personal battles with Cadle Co. will not jeopardize Lawyer's performance in these cases. Stay tuned.

Negotiating Lawyer's Fee with Settlement Amount (posted February 18, 2011) Martin v. Huddle House, Inc., 2011 U.S. Dist. LEXIS 13670 (N.D. Ga. Feb. 11, 2011). In this opinion the court refused to approve the settlement of FLSA claims because the plaintiffs' lawyer negotiated the settlement amounts and his fees "simultaneously." The court scheduled a hearing to deal with "this potential ethical violation."

Valley/50th Ave. LLC v. Morse and Bratt, P.S.C., 2011 Wash. App. LEXIS 1286 (Wash. App. June 1, 2011). Without more, the taking of a security interest from a client does not constitute a “material limitation” under Washington’s version of MR 1.7(a)(2).

O'Malley v. Novoselsky, 2011 U.S. Dist. LEXIS 66406 (N.D. Ill. June 14, 2011). Lawyer is a defendant in two consolidated lawsuits. One suit is by a former client ("FC"), who is claiming return of $160,000 in fees. The other suit is by a lawyer formerly employed by Lawyer ("FE"). FE is claiming that he is entitled to 1/3 of FC's $160,000, pursuant to an employment agreement between FE and Lawyer, because FE had referred FC to Lawyer. FC and FE are represented by the same lawyer ("Gentleman"). FC is also represented by Johnson. The court held, among other things, that pursuant to the Northern District's version of Model Rule 1.7(a)(2), any belief by Gentleman and Johnson that they could adequately represent both FC and FE would be unreasonable.

In re Rubio, 2011 Colo. App. LEXIS 1400 (Col. App. Aug. 18, 2011). Post dissolution proceeding. W gave her law firm a retainer. H sought to garnish the unearned portion of the retainer from W's law firm and moved to disqualify the law firm. The trial court disqualified the law firm. In this opinion the appellate court reversed. The court said that, as things stood, both W and the law firm sought the same relief and had no conflict. W had also waived any conflict.

N.Y. Op. 865 (May 10, 2011). Here is the committee's conclusion:

In light of Estate of Schneider v. Finmann, [15 N.Y.3d 306 (2010)], a lawyer who prepared an estate plan for a client may agree to act as counsel to the executor after the client’s death as long as the lawyer does not perceive a colorable claim for legal malpractice before or during the representation of the executor. However, if the lawyer does perceive a colorable claim for legal malpractice before or during the representation, then the conflict is nonconsentable and the lawyer (and all other lawyers associated with his firm) must decline or withdraw from the representation and the lawyer must inform the executor of the facts giving rise to the claim.

Cross-Examining Employee of Client. Lewis v. State, 2011 Ga. App. LEXIS 939 (Ga. App. Oct. 28, 2011). In this criminal case Defendant is charged with defrauding School District, of which Defendant was Superintendent. Law Firm is defending Defendant. The prosecution listed a number of witnesses, one of whom is an employee ("Employee") of Company, a construction firm that did work for School District. Law Firm represents Company on matters unrelated to this case, or to School District. Law Firm had no prior relationship with Employee. The
prosecution moved to disqualify Law Firm in this case, because Law Firm would have to cross examine an employee of Law Firm's client, Company. The trial court granted the motion. In this opinion the appellate court reversed. First, the court held that Company and Employee were not one for conflicts purposes. Second, the appellate court did not buy the trial court's theory that Law Firm would be limited in its cross examination of Employee by its fealty to Company. The court held that the prosecution had not shown the court enough information about Employee or her importance to Company to establish that Law Firm would, in fact, be so limited. Both Company and Defendant had waived the conflict.

CSX Transp., Inc. v. Gilkison, 2011 U.S. Dist. LEXIS 130118 (N.D. W. Va. Nov. 9, 2011). Law Firm represented a number of plaintiffs against Railroad in asbestos cases. In this case Railroad is suing Law Firm for fraud arising out of the asbestos cases. In this opinion the court ruled that West Virginia's version of MR Rule 4.2 does not prohibit Railroad's lawyers from contacting Law Firm's former clients, but does prohibit Railroad from contacting Law Firm's current clients. The court also ruled that Law Firm could not represent former clients when they are deposed in this case because of the material-limitation provision of West Virginia's version of MR 1.7(a)(2).

Gatlage v. Winters & Yonkers, P.S.C., 2012 U.S. Dist. LEXIS 149655 (W.D. Ken. Dec. 29, 2011). Lawyer was an associate at Law Firm, which was a plaintiffs' personal injury firm. Lawyer was encouraged to send all clients to Doctor Co. When he refused to do so, he was terminated. Lawyer brought this action for wrongful termination. In this opinion the court granted a motion to dismiss. The court did not specify a rule by number but, evidently, Lawyer is claiming that the referral arrangement, allegedly a two-way one, violated Kentucky's version of M.R. 1.7(a)(2). The court said that what Lawyer described was "not a pretty business," but that the law afforded Lawyer no relief.

Gerber v. Riordan, 2012 U.S. Dist. LEXIS 11411 (N.D. Ohio Jan. 31, 2012). A difficult plaintiff made a number of negative comments about his lawyers ("Lawyers") in certain pleadings. Lawyers moved to withdraw. In this opinion the magistrate judge granted the motion, saying that withdrawal was justified under Ohio Rule 1.7(a)(2), the material limitation rule.

Restatement. See §§ 121, 125, and 128.

Treatise. Hazard, Hodes, & Jarvis §§ 11.2-11.5.

Current Client - Part II
(“Other” Cases)


Post-Estate Planning Ministerial Work not Current Representation. Yang Enterprises, Inc. v. Yang, 2008 Fla. App. LEXIS 11865 (Fla. App. Aug. 7, 2008). This is an unremarkable opinion affirming the trial court’s denial of a motion to disqualify. The movant had waited years to make the motion. While the decision was based largely on a waiver by passage of time, the court made this interesting statement as to whether the client was current or former:

Petitioners argued below that they are current clients of Broad and Cassel and relied primarily on two cover letters sent from a paralegal in Broad and Cassel's Orlando office in 2004 and a paralegal's bill for minor changes to their estate file in 2007. None of these acts indicated a continuing legal representation, but rather they were ministerial tasks performed to update the completed estate planning documents.

Hill v. Hunt, 2008 U.S. Dist. LEXIS 68925 (N.D. Tex. Sept. 4, 2008). In this opinion the court granted a motion to disqualify the plaintiff’s law firm, Bickel & Brewer (“B&B”). This suit involves allegations of mismanagement of two Hunt family trusts. Two issues were whether B&B currently represented one of the defendants or whether B&B had formerly represented that defendant. This decision is very fact intensive and, as far as we can tell, has no precedential value. But, it is interesting. Some of the factors discussed include who paid what fees, what bills were sent to whom, the significance of E-mails, the significance of who appeared at what meetings and what was discussed at the meetings, who sought legal advice, who directed the activities of B&B, and so forth. The court frequently used the term “appearance of impropriety,” even though both the ABA Model Rules and the Texas rules dropped that expression when they were adopted. The court did not discuss the fact that Texas is the only state whose version of Model Rule 1.7 allows a lawyer to represent a client on one matter and be adverse to that client on an unrelated matter, but the court did acknowledge that the Fifth Circuit in both American Airlines and Dresser Industries held that the ABA rules, and not the Texas rules, would apply in this context in the Fifth Circuit. That distinction would not have changed the result in this case because the court held that the matters in question were related.

met with Lawyer to discuss a divorce. Lawyer was married to Husband's mother. As a result of the meeting Lawyer prepared a petition for dissolution, in which Wife was petitioner and Lawyer was Wife's lawyer. Wife never signed the petition, and it was never filed. Husband then hired another lawyer who filed a petition for Husband (this case). Before trial of this case Lawyer appeared for Husband. Wife moved to disqualify Lawyer, which the trial court denied. In this opinion the appellate court affirmed. The court said that the result would be the same whether Rule 1.7 or Rule 1.9 applied because, in either case, Wife was not able to show that the conflict did "clearly call in question the fair or efficient administration of justice." Among other things the court noted that Wife never met separately with Lawyer, except for a phone call to schedule a meeting during which she indicated she might go see another lawyer.

*Styles v. Mumbert*, 79 Cal. Rptr. 3d 880 (Cal. App. 2008). Creditor sued Debtor. Lawyer represented Debtor. After default judgment, and during pendency of an appeal of the default, Debtor sued Lawyer for malpractice, and Lawyer counterclaimed for fees. Lawyer then purchased Creditor's judgment (judgment assigned) and sought leave to substitute for Creditor in the appeal of the default. In this opinion the appellate court held that Lawyer had a serious conflict and should not be allowed to substitute. The court stressed Lawyer's duty of confidentiality to Debtor.

*Avin v. SMG*, 2009 Mich. App. LEXIS 97 (Mich. App. Jan. 20, 2009). A door panel fell on Plaintiff's decedent, killing him. Plaintiff sued the general manager ("Manager") of the property and several companies associated with manufacturing and selling the door. The defendants included Overhead Door, which had installed the door. Manager filed a cross-claim against Overhead Door. Manager moved to disqualify Overhead Door's law firm ("Law Firm") because Law Firm was currently representing Manager in a different injury case. The trial court denied the motion. In this opinion, the appellate court reversed. The court spent some time on what is direct adversity. It also said that the fact that different lawyers at Law Firm worked on the two matters would not affect the outcome, noting that screens only work in the context of former clients.

*Waiver as to Unrelated Matter; Standing (posted February 21, 2009)* Camel v. Nijjar, 2009 N.Y. Misc. LEXIS 269 (N.Y. Misc. Feb. 11, 2009). Auto accident case. The plaintiff sued two individuals and two companies. The plaintiff's lawyer ("Lawyer") is also representing one of the individual defendants ("Agins") in an unrelated workers' compensation matter. Two other defendants moved to disqualify Lawyer. In this opinion the court denied the motion because Agins and the plaintiff had waived the conflict, and because the moving defendants did not have standing to make the motion.

established a competing Company B. Lawyer represented Company B and ultimately became sole owner of Company B. Lawyer never disclosed his interest in Company B to the owner of Company A. In this opinion the court found that Lawyer violated Florida's versions of Model Rules 1.7(a)(1), 1.8(a), and 8.4(c). As to 1.7, the court said that it does not just apply in litigation. What Lawyer did was directly adverse to his client, Company A. As to 1.8(a), the court applied the second prong of the rule about acquiring an interest adverse to a client. As to 8.4(c), the court said that Lawyer's failure to request Company A's consent to his competing business was deceitful. The bottom line: Lawyer was suspended for 18 months.

*Palgut v. City of Colorado Springs*, 2009 U.S. Dist. LEXIS 21698 (D. Col. Mr. 3, 2009). This opinion involves a motion to withdraw by the plaintiff's law firm because the plaintiff had stopped paying fees. During a hearing on the motion an expert witness for the plaintiff testified that the law firm should not be permitted to withdraw because there was a "genuine dispute" between the plaintiff and her law firm over the propriety of the fees it was charging. After that testimony the law firm amended its motion to withdraw claiming that the negative testimony by the expert created a conflict between the plaintiff and her law firm. In this opinion the court denied the motion to withdraw, saying, in part, that a fee dispute does not automatically constitute a conflict of interest.

*Hillis v. Heineman*, 2009 U.S. Dist. LEXIS 29914 (D. Ariz. Mr. 25, 2009). Plaintiff sued the defendants and their lawyer ("Lawyer") for fraud and related causes of action. Lawyer appeared for all defendants, including himself. Plaintiff moved to disqualify Lawyer because he should be a witness. The court denied the motion without prejudice because it was not yet clear whether Lawyer should be a witness. What the court did not mention, and what the parties apparently did not raise, was the propriety of Lawyer defending himself as well as the other defendants, especially in light of Lawyer's having earlier represented the company involved in the case.

*Employers Mut. Cas. Co. v. Al-Mashhadi*, 2009 U.S. Dist. LEXIS 75442 (E.D. Mich. Aug. 24, 2009). An employee at a filling station ("Employee"), at about the time he was getting off work, was horsing around with a rifle owned by the filling station. The rifle accidentally discharged injuring a friend of Employee ("Friend"). Friend sued the filling station and several individuals, including Employee, in state court. The plaintiff in this case ("EMC") issued an insurance policy covering the filling station for liability. EMC is seeking in this case a declaration that its policy does not cover the shooting accident. The law firm representing EMC in this case ("Law Firm") also represents the filling station and individual defendants in the state court case. However, EMC retained a different law firm to represent Employee in the state court case. Employee moved to disqualify Law Firm in this case. In this opinion the court denied the motion, finding no conflict of interest.

infringement action. For a time Law Firm was representing Merck as co-counsel in a patent prosecution while representing Pro Thera in this case. The prosecution matter involved some of the same chemicals that are involved in this case. Those relationships caused Merck to file a disqualification motion against Law Firm in this case. The motion was filed after Merck had changed counsel in the prosecution matter. In this opinion the magistrate judge granted the motion. The judge treated the conflict as a current-client conflict, following those decisions that said that the situation had to be judged as of the time of the conflict, rather than at the time the motion was filed.

*Encompass Holdings Inc. v. Daly, 2009 U.S. Dist. LEXIS 93197 (N.D. Cal. Sept. 23, 2009).* Court enforces current client rule under California Rule 3-310(C).

*National Envelope Corp. v. American Pad & Paper LLC*, No. 06 Civ. 12988 (S.D.N.Y. Nov. 5, 2009). Law Firm represents the plaintiff in this matter. Intervenor, not a party to this case, has moved to disqualify Law Firm because Law Firm represents Intervenor in another matter not related to this case. Intervenor evidently claims that Law Firm's position in this case may affect Intervenor adversely in yet another case in which Law Firm is not involved. In this opinion the district judge has affirmed the order of the magistrate judge denying the motion.

*Lincoln Associates & Construction, Inc. v. Wentworth Construction Co., Inc.*, 2010 Fla. App. LEXIS 121 (Fla. App. Jan. 12, 2010). In a current client situation the trial court denied a motion to disqualify because the conflict was not "material." In this opinion the appellate court reversed, holding that materiality has nothing to do with it.

*Feld v. Feld*, 2010 U.S. Dist. LEXIS 4743 (D.D.C. Jan. 21, 2010). This is an action by a beneficiary of a trust to remove the trustee. In this opinion the court held that the lawyer for the trustee could stay in this case even though that lawyer also represented the trustee in his personal capacity in another suit by the beneficiary, and even though the lawyer also represented some of the trustee's children.

*Bals v. Metedeconk Nat'l Golf Club, Inc.*, 2010 U.S. Dist. LEXIS 32557 (D.N.J. March 31, 2010). In this case Plaintiff sued Golf Club, Plaintiff's former employer, for age discrimination. Law Firm represented Plaintiff. A senior partner at Law Firm was on the board of Golf Club when Plaintiff was hired. The senior partner and Plaintiff became friends, but, evidently, the senior partner while on the board of the Golf Club was not privy to any of the facts relevant to this case. The senior partner turned this case over to another partner to handle. Golf Club moved to disqualify Law Firm. In this opinion the magistrate judge denied the motion. First, she found no current-client or former-client conflict because neither the senior partner nor Law Firm had ever represented Golf Club. Second, she found that under Rule 1.10 whatever personal interest the senior partner had in Plaintiff or Golf Club was not imputed to the partner handling the case.
Last, the judge found that Law Firm was not in violation of the lawyer-as-witness rule.

*Marks Constr. Co., Inc. v. The Huntington Nat'l Bank*, 2010 U.S. Dist. LEXIS 32998 (N.D. W. Va. April 2, 2010). This is an action by ERISA plan fiduciaries and participants against plan administrators. The defendants moved to disqualify the law firm representing all the plaintiffs because there was a conflict between the plaintiff/fiduciaries on the one hand and the plaintiff/participants on the other. The court found there was no conflict based upon somewhat arcane ERISA law principles. (If you do ERISA litigation, you might want to read the opinion.) The court also found that a four-year delay in bringing the motion was grounds, alone, to deny the motion. Last, the court held that the conflict, if any, was waivable, and that the plaintiffs had proven to the court's satisfaction that there was a waiver.

*In re Savin*, 2010 Minn. LEXIS 185 (Minn. April 7, 2010). In this one-page opinion, containing no background, the court publicly reprimanded Lawyer for having a "1.7" "directly adverse" conflict of interest. We got hold of the disciplinary authority's petition. This is a crude attempt to summarize the allegations. Lawyer represented a business person in setting up a joint venture to develop real estate. This would be the same real estate the county planned to use for a baseball stadium. Lawyer's partners, the county's bond counsel, represented the county in obtaining legislation authorizing the purchase of the land.

*California Earthquake Auth. v. Metropolitan West Securities, LLC*, 2010 U.S. Dist. LEXIS 44016 (E.D. Cal. May 5, 2010). In 2002 Law Firm and a state agency ("Agency") entered into a written retainer agreement. Among other things, the agreement provided that Law Firm would have to give Agency thirty days written notice if it intended to terminate the relationship. Law Firm did three hours work for the Agency during 2002 and did no work for Agency after that. Law Firm never gave Agency written notice of termination. In 2009 Law Firm appeared for the defendant in this case adverse to Agency. Agency moved to disqualify Law Firm, and in this opinion the court granted the motion. Basically, the court said that the absence of written notice of termination meant that Agency was a current client of Law Firm. The court further said that written contracts between lawyers and clients should be "read expansively and not parsed to favor the lawyer."

*Filippi v. Elmont Union Free School Dist. Bd. of Educ.*, 2010 U.S. Dist. 66352 (E.D.N.Y. July 2, 2010). This is an employment-related action against a school board and several of its administrators. An associate at the plaintiff's law firm ("Law Firm") is a member of the school board. For this reason the defendants moved to disqualify Law Firm. In this opinion the court granted the motion. First, the court held that there was a conflict under N.Y. Rule 1.7(a)(1). Second, although Law Firm screened the board member from this case, the court held that Law Firm was too small for the screen to be trusted. Although the board had initially approved of the board member joining Law Firm, the court held that there should have been a written waiver.
The court also expressed doubts about whether the conflict was waivable. The court also discussed N.Y. Rule 1.11, saying that the rule offered no help to Law Firm. Last, the court found an "appearance of impropriety."

Robinson v. State of New York, 2010 U.S. Dist. LEXIS 70715 (W.D.N.Y. July 14, 2010). This is an employment discrimination case against the state. The plaintiff moved to disqualify the N.Y. Attorney General ("AG") from representing the defendants in this case because the AG is also, in another case, defending an action in which one of the defendants in this case is the plaintiff. In this opinion the magistrate judge denied the motion, relying primarily on the fact that different personnel in the AG's office are handling the two matters and the AG's office promised to set up a screen between the teams of lawyers.

North Carolina State Bar v. Sossomon, 2010 N.C. App. LEXIS 1768 (N.C. App. Sept. 7, 2010). Discipline. Fact-specific. Complex. Lawyer was suspended for one year for being insensitive to conflict and confidentiality rules. If you want to know how not to handle the sale and resale of undeveloped real estate, read the opinion.

Dimenco v. Service Employees Int'l Union, 2011 U.S. Dist. LEXIS 4068 (N.D. Cal. Jan. 10, 2011). The court held that where a law firm is adverse to a labor union in an NLRB certification proceeding, that law firm is disqualified from bringing an action for several union members on behalf of that union.

“Framework” Retainer Agreements. Banning Ranch Conservancy v. Superior Court, No. G044223 (Cal. App. March 22, 2011). Banning Ranch sued City to prevent City from building a highway on the ranch. City moved to disqualify the ranch's law firm ("Law Firm") because City was a current client of Law Firm on other matters. In fact, Law Firm had done no work for City for about five years. The City pointed to its written retainer agreement (actually, there were two) with Law Firm, which contemplated that the terms of the agreement (fees, etc.) would remain in force for each new matter that Law Firm handled for City. The appellate court termed the agreement a "framework" agreement. The trial court granted the motion to disqualify. In this opinion the appellate court reversed (granted writ of mandate). The court, in construing the "framework" agreement as a matter of contract law, held that the agreement did not extend out the lawyer-client relationship beyond the rendering of the services Law Firm performed for City.

Alayoff v. Alayoff, 2011 N.Y. Misc. LEXIS 1957 (N.Y. Sup. Ct. April 27, 2011). Daughter sued Father over a property dispute. Daughter moved to disqualify Father's lawyer, alleging that she is a former client of the lawyer. In this opinion the court denied the motion. Daughter offered no specific evidence that she was a client, stating merely that the lawyer was a "family attorney" for many years. That, the court said, was not enough.
Law Firm represents the plaintiff in this patent infringement case. Direct TV, a non-party, sought leave to intervene and disqualify Law Firm, because Law Firm represented Direct TV in other matters. Direct TV claimed that this case was antagonistic to its interests in other patent cases, in which Law Firm was not involved. In this opinion the court denied the motion to disqualify. The court noted two similar cases with different results: *Rembrandt Techs. LP v. Comcast Corp.*, 2007 U.S. Dist. LEXIS (E.D. Tex. Feb. 8, 2007) (finding disqualification); and *Enzo Biochem. v. Applera Corp.*, 468 F. Supp. 2d 359 (D. Conn. 2007) (finding no disqualification). The court found the latter more compelling in this circumstance.

Process Controls Int'l, Inc. v. Emerson Process Mgmt., 2011 U.S. Dist. LEXIS 49876 (E.D. Mo. May 10, 2011). For part of the time this case was pending, a lawyer ("Lawyer") in Defendant's law firm ("Law Firm") did work for Plaintiff unrelated to this case. Because of this work, Plaintiff moved to disqualify Law Firm. In this opinion the court granted the motion. The court said that disqualification was appropriate even if Lawyer's work for Plaintiff consisted of short, "self-contained" assignments that had ended by the time of the motion. The fact that this work occurred during the pendency of this case was determinative.

Ramos v. Quien, 2011 U.S. Dist. LEXIS 64871 (E.D. Pa. June 20, 2011). This is a medical malpractice case against several medical providers. Pursuant to a local ADR rule the case went to arbitration. The arbitration award found for the plaintiff against one doctor but against the plaintiff as to the other providers. Pursuant to the local rule the first doctor moved for a trial de novo. That meant that all the defendants had to stand trial. Lawyer, who moved for the trial de novo, appeared for all defendants. The plaintiff moved to disqualify Lawyer. In this opinion the court denied the motion.

Wink, Inc. v. Wink Threading Studio, Inc., 2011 U.S. LEXIS 82379 (E.D. Va. July 26, 2011). Trademark infringement action and issue of willfulness. The defendant claims its actions were not willful because it relied on an opinion of a lawyer ("Payne"). Payne was deposed and testified that he advised the defendant that its trademark was "problematic." Owners of the defendant testified that Payne told them the trademark was not a problem. The same two lawyers ("Lawyers") represented both the defendant and Payne. The plaintiff moved to disqualify Lawyers. In this opinion the magistrate judge granted the motion.

In re Stephenson, 2011 Ill. App. LEXIS 880 (Ill. App. Aug. 12, 2011). Pay close attention. This is complicated. Divorce case. W hired Elizabeth Wakeman to represent her and file a petition for dissolution. H hired Paulette Gray to defend and counterclaim. Paulette was married to Robert Gray. Robert Gray was a member of the Gummerson Rausch law firm. Later Mark Gummerson, of Gummerson Rausch, sought leave to become additional counsel for W. H objected and moved to disqualify Gummerson. Two troublesome conversations had taken place, leading to the motion.
to disqualify. First, Paulette, H's lawyer, had discussed the case with her husband Robert, who was the partner of Mark Gummerson (who was seeking to become W's lawyer). Second, Paulette had a discussion with Mark Gummerson, himself, at the court house about the foibles of practicing in that county. The trial court disqualified Gummerson. In this opinion the appellate court reversed. First, the court held that H had never become a client of the Gummerson Rausch firm because of those conversations. Thus, this could not be a current client conflict, or, for that matter, a former client conflict. The court relied on agency law and implied authority concepts to an extent not usually seen in conflict-of-interest cases. Second, the court felt that no sensitive information had gotten through to Mark Gummerson. Third, the court noted approvingly that the Gummerson Rausch firm had erected a screen between its partner, Robert, and the rest of the firm.

_Stewart v. VCU Health System Auth._, 2011 U.S. Dist. LEXIS 95407 (E.D. Va. Aug. 25, 2011). The plaintiff wrote a letter to the court complaining that the plaintiff's lawyer ("Lawyer") had committed various frauds and other types of professional misconduct. The court granted Lawyer's motion to withdraw. The plaintiff then moved the court to reconsider the order allowing withdrawal. In this opinion the court denied the motion to reconsider. The court said that withdrawal was compelled by the material limitation provision in Virginia Rule 1.7(a)(2).

_Conflict before IRS._ Harbin v. Commissioner, 2011 U.S. Tax Ct. LEXIS 39 (U.S. Tax Ct. Sept. 26, 2011). H and W were going through a divorce. Lawyer represented both. After the IRS declared a deficiencies against both H and W, H filed for relief from joint and several liability. Lawyer had represented both H and W before the IRS. Because of Lawyer's conflict of interest, the Tax Court, in this opinion, ruled that H should obtain relief from joint and several liability.

_Discipline._ In re Ferraro, 2011 N.Y. App. Div. LEXIS 8594 (N.Y. App. Div. Nov. 29, 2011). Lawyer represented a decedent's estate in the sale of Parcel No. 1. Lawyer did not inform the executor that the broker in the transaction, who had recommended Lawyer, was the principal of Buyer. Lawyer also failed to inform the executor that Lawyer was representing Buyer in the transaction. Lawyer also represented Buyer in the purchase of Parcel No. 2, which was contiguous to Parcel No. 1. Lawyer represented Buyer in selling Parcel No. 1 to another company for more money than Buyer was paying the estate. This resale of Parcel No. 1 was contingent upon the conclusion of the sale of Parcel No. 2. None of this was disclosed to the executor. In this opinion the court held that Lawyer should be suspended for two years.

_Little Italy Dev. LLC v. Chicago Title Ins. Co._, 2011 U.S. Dist. LEXIS 138335 (N.D. Ohio Dec. 1, 2011). Law Firm did work for Title Co. While still doing work for Title Co., Law Firm got into a coverage argument with Title Co. on behalf of another client. After Law Firm's work for Title Co. ceased, Law Firm filed this action over the aforesaid coverage issue. In this opinion, in a fact-intensive analysis, the court granted a motion to disqualify Law Firm. [Note: the court
relied substantially upon Carnegie Cos., Inc. v. Summit Props., Inc., 918 N.E.2d 1052 (Ohio App. 2009), a case we have always felt exemplified the kind of analysis a court should make under modern conflict rules.]

Withdrawal Denied. Alzheimer’s Inst. of Am., Inc. v. Avid Radiopharmaceuticals, 2011 U.S. Dist. LEXIS 140345 (E.D. Pa. Dec. 7, 2011). Law Firm represents the plaintiff in this patent infringement case. When Intervenor sought to intervene adversely to the plaintiff, Law Firm, in a conflicts check, discovered it represented Intervenor in unrelated matters. Because of this conflict, Law Firm then sought to withdraw from this case. In this opinion the court denied the motion. The court held that Pennsylvania's Rule 1.16(c) trumps the current client provisions contained in Rule 1.7. The court applied a balancing test, holding, in effect that the prejudice to the plaintiff if Law Firm withdrew would outweigh any harm to Intervenor if withdrawal was denied. The court also mentioned the disruption to the court's docket if Law Firm were to withdraw. The Federal Circuit affirmed at In re University of So. Fla. Bd. of Trustees, 2012 U.S. App. LEXIS 821 (Fed. Cir. Jan. 12, 2012). In a somewhat related case a magistrate judge in Alzheimer's Inst. of Am. v. Elan Corp PLC, 2011 U.S. Dist. LEXIS 147471 (N.D. Cal. Dec. 22, 2011) refused to allow Law Firm to withdraw for much the same reason as the court gave in the Pennsylvania case.

Feingold v. Liberty Mut. Group, 2011 U.S. Dist. 140336 (E.D. Pa. Dec. 6, 2011). This is a bad faith claim against InsCo. In the underlying state court case Lawyer, an employee of InsCo, appeared for InsCo, adversely to the plaintiff. Lawyer is now in the law firm representing InsCo ("Law Firm"), but is not one of the lawyers of record. The plaintiff moved to disqualify Law Firm. In this opinion the court denied the motion. The court said that Lawyer's relationship to the plaintiff in state court was plainly arms-length and adversarial. Thus, no conflict in this case.

In re McElroy, 2011 N.Y. Misc. LEXIS 5913 (N.Y. Sup. Ct. Dec. 19, 2011). Law Firm represented Incompetent. Law Firm also represented Executor of the estate of Incompetent's mother and is moving for probate of the will. Under the will Incompetent would receive less than she would have intestate. Claiming that Law Firm had a conflict, GAL, on behalf of Incompetent, moved to disqualify Law Firm. In this opinion the court granted the motion.

Discipline. People v. Johnson, 2011 Colo. Discipl. LEXIS 83 (Col. Dec. 13, 2011). In this one-paragraph order Lawyer was suspended for thirty days solely (apparently) for representing a corporation and suing it at the same time.

Gill v. Bischoff, 2011 Guam LEXIS 23 (Guam Dec. 20, 2011). X entered into a contract with Lawyer, which provided in part for legal services. X filed for bankruptcy. Y claims he succeeded to the rights of X under the contract. Lawyer refused to work for Y, and Y filed this case against Lawyer. The trial court dismissed the complaint. In this opinion the supreme court affirmed,
holding that a contractual right to legal services is not assignable; both the client and the lawyer must agree for the relationship to continue. Moreover, in this case, proceeding on behalf of Y would have put Lawyer in conflict with other clients.

Discipline. In re Kalla, 2012 Minn. LEXIS 4 (Minn. Jan. 25, 2012). This is one of those rare disciplinary decisions based solely on a conflict of interest. The lawyer was given a public reprimand and put on two years supervised probation.

Cameron v. Rohn, 2012 U.S. Dist. 12381 (D.V.I. Jan. 30, 2012). Lawyers A and B were partners in Firm AB. A left Firm AB and is now suing Firm AB and B. The only count against Firm AB alleges that it discriminated against A. There other counts against B related to control of law firm property and the like. B's new law firm, BC, has appeared in this case for Firm AB. A moved to disqualify Firm BC and B, and the magistrate judge granted the motion. In this opinion the district judge reversed holding that B and Firm BC would have no motive to favor themselves over Firm AB in the discrimination count.

Krutzenfeldt Ranch, LLC v. Pinnacle Bank, 2012 Mont. LEXIS 15 (Mont. Jan. 31, 2012). In this case Borrowers sued Bank for breach of a loan agreement. Borrowers' lawyer retained Tax Lawyer to advise Borrowers on how to structure a possible settlement. Without warning to Borrowers, Tax Lawyer joined the law firm representing Bank ("Bank Firm"). When Borrowers received an announcement of this change, they immediately moved to disqualify Bank Firm. The trial court denied the motion, holding that Borrowers were former clients of Tax Lawyer and that Bank Firm's screen of Tax Lawyer prevented Bank Firm's disqualification. In this opinion the supreme court reversed. After analyzing what transpired when Tax Lawyer joined Bank Firm, the court concluded that the Borrowers remained clients when the move occurred. Thus, Bank Firm's disqualification became automatic. The court also added that even under a former client analysis, the screen erected by Bank Firm was not timely.

Hartford Life & Accident Ins. Co. v. King, 2012 U.S. Dist. LEXIS 60308 (W.D. Va. April 30, 2012). H is a suspect in the death of W. H is also executor of W's estate. InsCo insured W's life. InsCo filed this interpleader action against H and W's mother, the only other heir. Lawyer appeared for H individually and as executor of the estate. Among other findings, the court held that Lawyer had a conflict and could not appear for both, given the pending issue of whether H killed W.

In re Neely, 2012 U.S. Dist. 67743 (N.D. Ind. May 14, 2012). H died. The guardian of W, an incompetent, has sued two nephews of H and W, because H had defrauded W when he was alive by diverting assets from a joint account between H and W to the nephews. The guardians of the nephews moved to disqualify the law firm for W's guardian ("Law Firm") because Law Firm also represents H's estate. In this opinion the magistrate judge denied the motion, finding no
conflict. The court noted that Law Firm had never represented H and that H's estate is an entity separate from H.
"Underlying Work" Problem

A partner in a law firm (Partner A) represents a client in the purchase of heavy equipment. Partner A drafted the key sales documents. A year later, the client and the seller have a disagreement over the seller's obligations if the equipment fails to perform certain tasks. In the meantime, Partner A has retired. The client comes to another partner in the law firm (Partner B) to seek assistance in resolving the dispute. If the parties cannot agree, they must, pursuant to one of the documents, submit to binding arbitration. Partner B retrieves Partner A's files on the purchase and reviews the documents. A key provision in one of the documents that might greatly affect the result seems ambiguous. Partner B gets several "second opinions" from other lawyers in the firm. Partner B concludes that the provision is indeed ambiguous and that other lawyers in the firm have routinely been using another version of that provision that is much more clear.

Should the firm take the case? The glib answer is that it depends. On a more serious note, the issue of whether a law firm can handle a dispute when it might involve its earlier work has become seriously troubling. Law firms used to do this all the time. The problem is that conflicts of interest have become so prominent and dangerous in malpractice cases. If the law firm were to take the case, and the result is a bad one, the client will go to another law firm for an evaluation. That law firm may very well come up with a three-part analysis that will be very difficult to counter.

1. "They made the wrong arguments." First, the new law firm may conclude that one of the reasons the original law firm lost the case is that it made the wrong arguments – that it avoided arguments that were apt to focus on its conduct in handling the underlying transaction.

2. "Did they discuss the credibility issue with you?" Second, the new law firm will point out that the original firm surely knew that it would have to call at least one of the transactional lawyers in the firm as a witness. Although most states’ versions of Model Rule 3.7 allow a lawyer to try a case even though his partner will be a witness, doing so could create credibility issues with the trier of fact. The new law firm may not be kind in its analysis of the credibility point.

3. "You mean they did not discuss settlement with you at all?" Last, is the question of settlement. The new law firm may conclude that the original firm did not press settlement as it should have. Part of the reasoning may very well be that the original law firm knew that because of its handling of the underlying transaction, it would have to be a third party at the settlement table. Because it did not want to focus on its own involvement and potential liability, it avoided settlement. In effect, it deprived its client of an opportunity to settle the case on terms much more favorable than the resulting verdict.

We are aware of several situations where the plaintiff’s lawyer in the resulting malpractice case made precisely these arguments, and the original law firm and its carrier(s) settled the case, rather than risk an adverse verdict or award.

A case confronting these very principles is Eurocom, S.A. v. Mahoney, Cohen & Co., 522 F.
Supp. 1179 (S.D.N.Y. 1981). Large Firm attempted to represent a plaintiff in a case arising out of a transaction it had handled. The defendant moved to add Large Firm as a third-party defendant or, in the alternative, to disqualify Large Firm as counsel for plaintiff in the case. The court granted the motion to disqualify for the reasons discussed above. The court briefly discussed the lawyer-as-witness rule, but minimized its effect, because the lawyers who would have been witnesses were either dead or gone. Taking a broader view, however, the court said:

A potential conflict arises between Cleary, Gottlieb and its own client. Under\textit{Hercules Chemical Co., Inc. v. North Star Reinsurance Corp.}, 72 A.D.2d 538, 421 N.Y.S.2d 67 (1st Dept. 1979), plaintiff's recovery is subject to possible diminution by Cleary, Gottlieb fault (assumed arguendo for the sake of this discussion only). If the jury reached such a conclusion, Cleary, Gottlieb would presumably face a malpractice action, brought by its own client. In these circumstances, Cleary, Gottlieb has its own interest in minimizing its role during the underlying commercial transaction, and maximizing that of the plaintiff's own representatives, so that any factors tending to reduce plaintiff's recovery would not be laid at the door of Cleary, Gottlieb. Secondly, the theory defendant asserts against Cleary, Gottlieb constitutes an inevitable complicating factor in settlement discussions. The possibility of settlement is always encouraged by the Court; but the parties are entitled to advice on that subject from counsel who are entirely uninhibited by any personal involvement of their own in the merits.

\textit{Eurocom} was a disqualification case. Yet, it would not take much effort for a plaintiff's lawyer, in the appropriate case, to transform the same reasoning into a breach of fiduciary duty claim for damages.

\textit{Another Disqualification Case. Jamieson v. Slater}, 2006 U.S. Dist. LEXIS 86712 (D. Ariz. Nov. 27, 2006). Lawyer represented Husband No. 2 in dissolution action against Wife. During the dissolution proceeding Lawyer filed lis pendens against Wife's real estate. The dissolution court, finding that Husband No. 2 had no claim to Wife's real estate, ordered the lis pendens released. Lawyer also filed a quiet title action against Wife's real estate on behalf of Husband No. 1. As a result of this meddling with Wife's title, Wife filed this action against Husbands 1 and 2 and against Lawyer. Lawyer appeared for himself and Husbands 1 and 2. Wife, claiming Lawyer had a conflict, moved to disqualify Lawyer. In this opinion the court granted the motion. As to Wife's standing, the court held that given the seriousness of the conflict, Wife did not need standing (analysis of standing not that clear). As to the conflict, the court identified various ways Lawyer's conflicts could adversely impact not only Wife but also Husbands 1 and 2. In discussing Lawyer's underlying work problem, the court said:

In the present case, the interests of [Husband No. 1] and [Husband No. 2] conflict with the interests of [Lawyer] because the actions of [Lawyer] while he represented [Husband No. 2] and [Husband No. 1] in lawsuits against [Wife] is the primary wrongdoing for which [Wife] seeks to recover damages. Because [Lawyer] is a named co-defendant in the present case, there is a significant risk that his ability to consider, recommend, and carry out an appropriate course of action on behalf of [Husband No. 2] and [Husband No. 1] will be materially limited as a result of his exposure to personal liability (bold and italics, the court's).

\textit{Crews v. County of Nassau}, 2007 U.S. Dist. LEXIS 6572 (E.D.N.Y. Jan. 30, 2007). This is a civil rights case arising out of the criminal prosecution of one of the plaintiffs ("Plaintiff").
Lawyer, who is representing Plaintiff in this case, also defended Plaintiff in the criminal case. The defendants moved to disqualify Lawyer because he would be a witness in this case, but also because he would have a conflict of interest arising out of his work on the criminal case. In this opinion the court granted the motion on both grounds. As to the latter ground, the court said in part:

If, as defendants argue, [Lawyer] erred in his representation of [Plaintiff] in state court, [Lawyer] would have a significant incentive to tailor his representation of plaintiffs in this case so as to avoid revealing or belaboring his alleged errors.?

Liability Cases. In Veras Investment Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP, 851 N.Y.S.2d 61 (N.Y. Misc. 2007), the law firm had advised a client on securities trading strategies. It later represented the client in investigations by the SEC and others into those very trading strategies. In this opinion the court denied a motion to dismiss parts of a complaint dealing with this alleged conflict. A follow-up opinion regarding privilege and the plaintiffs’ communications with subsequent counsel is at Veras Investment Partners, LLC v. Akin Gump Strauss Hauer & Feld LLP, 860 N.Y.S.2d 78 (N.Y. App. 2008). Brodie v. U.S. Dep’t of Justice, 2007 U.S. Dist. LEXIS 75191 (E.D. Pa. Oct. 4, 2007), appears to be another case where a law firm got sued after attempting to represent in a criminal proceeding, which involved advice the firm had given to the client before the criminal proceeding. Given the nature of the proceeding, the malpractice claim was not clearly described.

What should a firm being asked to handle the "underlying matter" do? Where no reasonable person could argue that the firm's underlying transactional work had anything at all to do with the dispute or how it is resolved, perhaps the firm simply proceeds. Where there is some doubt, perhaps the firm explains the situation to the client and asks for the client's consent to proceed. The next level of protection is to require the client to seek other counsel on the issue of whether the firm should stay in the matter. Some situations could be so serious that the firm should not proceed under any circumstances.

Ia. Op. 09-03 (Aug. 25, 2009). This is a discussion of the situation where a law firm handled a transaction and is subsequently asked to handle litigation arising out of the transaction. The opinion contains a lengthy discussion of the issues raised by the lawyer-as-witness rule, Rule 3.7, and well as the material limitation issues raised by Rule 1.7.

Special Note on Bond Practice

The Internal Revenue Service has been aggressively auditing tax-exempt transactions. Typically the IRS goes to the issuer for information. If the IRS believes the bond issue in question should be taxable, it will first negotiate with the issuer to see if the issuer will pay the resulting tax, rather than the bondholders. Such a resolution is called a "closing agreement." This process usually results in the issuer bringing pressure on other participants in the transaction to contribute to the settlement. Frequently, the issuer or other participant will seek help from the law firm that represented it in the original transaction. As often as not, this will be "bond counsel;" that is the law firm that issued the opinion on state law and federal income tax issues.

Should that law firm get involved in the audit? Again, it depends. Certainly, if the IRS is going
after the structure of the transaction, and the law firm in question was largely responsible for that structure, the law firm may simply decline. At the other end of the spectrum, the IRS concerns may involve the conduct of one or more participants long after the law firm concluded its work. There, the law firm's prior work may simply not be an issue. In between those two situations, the law firm will have to do a careful analysis.

The law firm may recommend that the client get independent advice on the conflict issues. Or, the law firm may recommend that the client hire another law firm to be co-counsel and protect the client on conflict issues. A very important part of any analysis is the issue of whether the law firm should contribute to the settlement. One could argue that the law firm is in no position to provide the required objectivity on that issue.

The good news is that bond lawyers are becoming increasingly sensitive to these issues. The bad news is that IRS officials continue to observe law firms that are up to their necks in exposure continue to represent their clients in audits with no apparent independent supervision. It is now at the point that the IRS requires law firms in this position to obtain conflict waivers from their clients before the IRS will deal with the firm.

**Tax Court Gets It**

Whether a lawyer is taking a tax-exempt matter or some other federal tax matter to Tax Court, the Rules of Practice & Procedure of the United States Tax Court have a fairly specific provision to address the underlying work situation. Rule 24 provides as follows:

(g) Conflict of Interest: If any counsel of record (1) was involved in planning or promoting a transaction or operating an entity that is connected to any issue in a case, . . . then such counsel must either secure the informed consent of the client . . . withdraw from the case; or take whatever steps are necessary to obviate a conflict or other violation of the ABA Rules of Professional Conduct . . . . The Court may inquire into the circumstances of counsel's employment in order to deter such violations. See Rule 201.

**Other Cases**

We are not aware of any other opinions that address this issue directly as those above. However, *Streber v. Hunter*, 221 F.3d 701 (5th Cir. 2000) is very close to being such a case and also involves tax advice and an IRS proceeding. The lawyer had given tax advice to two sisters. The IRS assessed the sisters back taxes and penalties. The sisters challenged the assessment in court, and the same lawyer represented them in that proceeding. It turned out badly for the sisters. They sued the lawyer, his firm, and others in the firm, for malpractice. The claim included the allegedly bad advice the firm gave the sisters initially and the allegedly bad advice the firm gave the sisters about the litigation. The court did not state specifically that handling both matters created a conflict of interest; however the court could not have been impressed favorably by that conduct, either. One of the sisters settled before the appeal. The Fifth Circuit affirmed the verdict for the other sister and against the lawyer, the firm, and others, for $839,000.

A case that contains an element of the underlying work problem is *Chang v. Chang*, 597 N.Y.S.2d 692 (N.Y. App. 1993). The court was concerned about the fact that the lawyer was
handling a case in which he would have to testify about his underlying work. The case was also complicated by the fact that the lawyer was a defendant in the case along with his clients. Nevertheless, the court’s concern about the lawyer’s underlying work is apparent from the following:

As a defendant himself, Mr. Cartelli (the lawyer) was in a hopelessly compromised position. He had represented the corporation in all the complained-of transactions. He was exposed to the possibility of a finding of professional malpractice or being part of a scheme to defraud. A finding against his own clients, the Changs, even as to the fifth cause of action, might well exonerate him of all liability.

**Sammis v. Brobeck, Phleger & Harrison, 2002 Cal. App. Unpub. LEXIS 1896 (Cal. App. June 4, 2002).** This appeal is from a summary judgment for Brobeck in a malpractice suit brought by its former client, Sammis. The case is in its early stages, so not much significance can be assigned to the opinion, which, among other things, was ordered not to be published. However, the following language did appear:

Additionally, Sammis alleged that Brobeck urged him to settle with Lorenz to hide Brobeck’s own conflict of interest, arising from its malpractice in the Saiga transaction.

**Main Events Productions, LLC v. Lacy, 220 F. Supp. 2d 353 (D.N.J. 2002).** Patrick English represented Main Events in negotiating and drafting a promotion agreement with Jeff Lacy, a boxer. This case concerns the agreement drafted by English. For that reason, Lacy has moved to disqualify English as Main Events’ lawyer. One of the bases for the motion was that English might be a witness. The court brushed that aside, noting that another lawyer would try the case. Lacy also contended that English’s role in drafting the agreement in question creates a “personal interest” and would cause him to justify his conduct in ways not necessarily in the interests of his client. The court simply disagreed saying, in effect, that the concern was speculative. The court did not say as much, but it could not have hurt that English had brought in another lawyer to try the case. Further, while the court did not discuss Lacy’s standing the make the motion, one wonders whether Lacy's not being the "victim" of the alleged conflict might have influenced the court.

**Dahlin v. Jenner & Block, L.L.C., 2002 U.S. Dist. LEXIS 23973 (N.D. Ill. December 12, 2002).** Malpractice case against Jenner & Block. Because it is only the denial of Jenner’s motion for summary judgment, it would not be useful to present the facts in detail. Essentially, Jenner is accused of botching a commercial lease for a landlord/client. After allegedly misdrafting the lease, Jenner continued to advise the landlord. One of the allegations is that this subsequent advice was not in the landlord’s best interests because Jenner was driven by it concern over the lease allegation.

**Hetos Investments, Ltd. v. Kurtin, 1 Cal. Rptr. 3d 472 (Cal. App. 2003).** Gray Cary prepared a promissory note on behalf of the borrower. Later, the firm filed an action for the borrower
against the lender, alleging, among other things, that the note was usurious. The lender moved to
disqualify Gray Cary because the firm was attacking the validity of the note that it prepared. The
trial court denied the motion, and the appellate court affirmed. The court considered the
applicability of California Rule 3-210 (not applicable because only clients are protected by it),
ABA Model Rule 1.16(a) (ABA Model Rules have no force in California), and the “appearance
of impropriety” test under old ABA Canon 9 (recognized by some California courts, but not
applicable here). The court noted that if anyone were to be harmed by the alleged conflict it
would be Gray Carey’s client, the borrower, not the movant, the lender. At bottom, the court felt
that no harm would come to anyone by Gray Carey’s remaining in the case.

Firm Avoided Problem Where “Sophisticated Client” Made the Questionable Decision in the
(N.Y. App. 2006). Winston & Strawn (“W&S”) represented North Hempstead in entering into a
waste disposal agreement. When the waste disposal project did not go well, one of the parties
sued North Hempstead. W&S handled the defense, but the plaintiff recovered a jury verdict of
some $32 million. North Hempstead then sued W&S for malpractice in its handling of the
litigation. One of the grounds was that W&S did not assert an available affirmative defense.
North Hempstead claimed that W&S did not assert the defense because it had a conflict arising
out of the way it handled the underlying transaction. The trial court denied W&S’ motion for
summary judgment. In this opinion the Appellate Division reversed. As to W&S’ failure to assert
the affirmative defense, the court emphasized that it was the decision of the Town Attorney (“a
sophisticated client”) not to assert the affirmative defense. Moreover, the court said, the defense
was not a sure thing, and W&S could not be held liable for exercising “professional judgment on
a question that was not elementary or conclusively settled by authority.” [Note: several of the
facts recited above were not in the opinion, but surfaced in press reports regarding the
unpublished trial court’s opinion.]

U.S. Dist. LEXIS 6897 (S.D. Tex. Jan. 31, 2007). In both cases law firms litigating over patents
they had prosecuted. The courts did not treat them as “underlying work” problems, but rather as
lawyer-as-witness problems.

Hillis v. Heineman, 2009 U.S. Dist. LEXIS 29914 (D. Ariz. Mr. 25, 2009). Plaintiff sued the
defendants and their lawyer ("Lawyer") for fraud and related causes of action. Lawyer appeared
for all defendants, including himself. Plaintiff moved to disqualify Lawyer because he should be
a witness. The court denied the motion without prejudice because it was not yet clear whether
Lawyer should be a witness. What the court did not mention, and what the parties apparently did
not raise, was the propriety of Lawyer defending himself as well as the other defendants,
especially in light of Lawyer's having earlier represented the company involved in the case.

Plaintiffs are trustees of employee welfare plans. They are suing several corporations and individuals for defrauding the plans. The defendants moved to disqualify the law firm for the plaintiffs ("Law Firm") under the lawyer-as-witness rule and because it had a conflict of interest. The court disposed of the lawyer-as-witness argument by holding that the defendants had not shown that the lawyers' testimony would be needed. The conflict of interest argument was that Law Firm would be put in the position of defending their earlier work in representing the trusts while the alleged frauds were occurring -- essentially an "underlying work" argument. The court rejected that argument holding that the focus of this case was the conduct of the defendants, not the operation of the trusts by the plaintiffs or the conduct of Law Firm in representing the plaintiffs.

**Martin v. Turner**, 2011 U.S. Dist. LEXIS 17021 (E.D. Pa. Feb. 18, 2011). Client hired Lawyer No. 1 to assist Client in collecting on a note From Company No. 1. Lawyer No. 1 negotiated a settlement between Client and Company No. 1. One term of the settlement was that Client would have a security interest in a claim by Company No. 1 against Company No. 2. Lawyer No. 1 filed a UCC-1 in connection with this security interest. Five years later, no one filed a UCC-3 continuation statement. When Client learned this could be a problem, Client fired Lawyer No. 1 and hired Lawyer No. 2. Lawyer No. 2 filed a malpractice action (this case) on behalf of Client against Lawyer No. 1, citing the failure to file the UCC-3. Lawyer No. 1 moved to disqualify Lawyer No. 2, claiming Lawyer No. 2 had a conflict of interest. The alleged conflict was that Lawyer No. 2 should have taken the position that the UCC-3 was unnecessary and should have prevented Company No. 2 from paying a creditor other than Company No. 1 or Client. By claiming in this case that Lawyer No. 1's failure to file the UCC-3 was the sole cause of Client's loss, Lawyer 2 was deflecting attention from Lawyer No. 2's failure to prevent Company No. 2 from paying the disputed funds to another creditor, a classic "underlying work" problem. In this opinion the court denied the motion to disqualify. Oddly, the court did not take a position on whether the UCC-3 was necessary to preserve Client's priority.

**Jacques H. Geisenberger, Jr., P.C. v. DeAngelis**, 2011 U.S. Dist. LEXIS 108916 (M.D. Pa. Sept. 23, 2011). In this opinion the district judge affirmed the bankruptcy judge's order disqualifying Debtor's counsel ("Lawyer"). The disqualification was largely due to Lawyer's failure to disclose his pre-petition relationships and compensation. However, there was another feature. Before the bankruptcy, Lawyer had handled for Debtor the sale of stock but had failed to comply with federal and state securities laws. That resulted in litigation between the buyer and Debtor. That litigation was pending when the bankruptcy was filed and Lawyer's appointment as Debtor's counsel was approved. The court found that to be a conflict because Lawyer could not have given Debtor objective advice about the buyer's claim given Lawyer's intimate involvement in the sale.
Waiver/Consent Forms

DISCLAIMER: Lawyers using these forms should do so very carefully to ensure that the language finally used fits the particular situation for which they are designed. It is not the intent of these forms to suggest or establish practice standards.

Forms that Follow:

- Litigation - Beauty Contest
- Litigation - Joint/Multiple Representation
- Advance Waiver

- Representing Purchaser and Seller

- Estate Planning - Simultaneous Representation of Husband and Wife

- Estate Planning - Dealing with other Family Members

- Creation of New Business - “I Am not your Lawyer”

- Creation of New Business - Relationship with Minority Shareholders, Limited Partners, LLC Members, etc.

- Doing Business with Client - Taking Second Mortgage on House to Secure Fee - Compliance with Rule 1.8(a)

- Termination of Representation Letter
- Waivers of Direct Adversity Conflict
- Lawyer Serving on Board of Client

Litigation - Beauty Contest

John Smith, Esq.
ABC Corp.
1 LaSalle Street
Chicago, Illinois 60603

Re: Proposed Action against XYZ Corp.

Dear John:

This is to confirm that you will visit this firm August 1. You wish to hire a law firm in this city to bring an action against XYZ Corp., and the purpose of your visit will be to evaluate the ability of this firm to handle the action for you. We understand that you will be interviewing other firms
here, as well.

On the telephone, we discussed the possibility that if you do not hire us, XYZ or some other party in the action may seek to hire us in your case. We have agreed that at our meeting on August 1 you will not reveal any confidential information to us. We further agreed that nothing that occurs at the meeting will form the basis for an objection on your part to our representing one of the other parties in the action.

Thank you very much, and we look forward to our meeting.

Very truly yours,

Sarah Barnes

(See the "Initial Interview - Hearing too Much" page at this site.)

Litigation – Joint/Multiple Representation

John Smith, Esq.
ABC Corp.
1 LaSalle Street
Chicago, Illinois 60603

Mr. Morton Jones
1 LaSalle Street
Chicago, Illinois 60603

Re: Newton v. ABC Corp. and Morton Jones – Joint Representation

Gentlemen:

This is to confirm that this law firm will represent both ABC Corp. and Morton Jones in the captioned action. We have discussed the potential for a conflict of interest to arise between you. Neither you nor we have as yet detected a basis for a conflict. You both wish this firm to represent ABC Corp. and Mr. Jones in order to present a united front and to keep expenses down. ABC Corp. will pay all legal fees and expenses. We do not believe that will in any way compromise our ability to represent Mr. Jones fairly and effectively.

During this joint representation we will share with both of you all information that we gather from either of you and from Mr. Newton and from third parties. If we learn something from one of you that we think the other needs to know, we will disclose the information to the other. If we learn something in confidence from one of you that we do not believe is relevant to the other and that the other does not need to know, we will not share the information with the other.

Conflicts under these circumstances sometimes arise. One example would be where we discover
evidence that one of you may have behaved as alleged by the plaintiff. Others could be where you disagree on trial strategy or the appropriateness of a settlement.

In the event a conflict does develop between ABC Corp. and Mr. Jones, this law firm will have the right to terminate its representation of Mr. Jones and continue on behalf of ABC Corp. We will have the right to take positions adverse to Mr. Jones and use information that we obtained from Mr. Jones during our representation of him. There may be circumstances where this would not be appropriate, and a court might not permit it.

This is further to confirm that we have urged Mr. Jones to retain other counsel to review this letter and the arrangement proposed above.

Very truly yours,

Sarah Barnes

Agreed:

Morton Jones:

ABC Corp.

By:

(Caution: this is a highly aggressive letter, particularly the part about being able to stay in the case. It is based upon the discussion of In re Rite Aid Corp. Securities Litigation v. Grass, 139 F. Supp. 2d 649 (E.D. Pa. April 17, 2001), and Zador Corp. v. Kwan, 37 Cal. Rptr. 2d 754 (Cal. App. 1995). Obtaining the agreement is one thing. Defeating a motion to disqualify is quite another. The tribunal will be most concerned about the sophistication of the individual party and his or her ability to understand the implications of the agreement.)

Advance Waiver

John Smith, Esq.
ABC Corp.
1 LaSalle Street
Chicago, Illinois 60603

Re: Advance Waiver for Other Matters

Dear John:

ABC Corp. is retaining us to handle a single property tax appeal because property tax appeals constitute a major part of this firm's practice. In the past we have been adverse to ABC Corp. in both litigation and transactional matters. We expect to be asked by other clients to be adverse to
ABC Corp. in the future.

ABC Corp. agrees to waive in advance any conflict that might result from our representing another client adverse to ABC Corp. in a matter unrelated to the property tax appeal matter. This includes matters that might come up during the course of our representation of ABC Corp. and includes litigation adverse to ABC Corp. We will not take on a matter adverse to ABC Corp. that would involve confidential information obtained from ABC Corp. in the property tax appeal matter.

Thank you very much.

Very truly yours,

Sarah Barnes

Agreed:

ABC Corp.
By:

While it is clearly not unethical to seek such a waiver, making it stick when the conflict arises is not foregone. See the discussion of advance waivers at the Waivers/Consents page of this site. New Comment [22] to Model Rule 1.7, quoted there, emphasizes the need to be specific as to what the future adverse matters might be. The above letter is not. If you know what the future matters might be, it would behoove you to state them in the letter. Note the specific reference to litigation in the form. Several of the cases disapproving an advance waiver turned upon the failure of the waiver to include a specific reference to litigation.

Representing Purchaser and Seller

(Caution! This is rarely appropriate. Go to "Commercial Negotiations" at this site for opinions and decisions on this practice.)

Mr. Clyde Owen
100 Main Street
Jonesville, Illinois 60521

Ms. Molly Bright
222 Grant Street
Jonesville, Illinois 60521

Re: Waiver for Joint Representation in Sale of Molly’s Hardware, Inc.

Dear Clyde and Molly:
This firm has for some years represented each of you and your respective businesses. Now, Clyde wishes to purchase Molly’s business. You have both asked this firm to represent both of you in the transaction. I explained it would be best if you each sought another lawyer or law firm. This is particularly true because we have obtained much confidential information from each of you over the years. Some of the information from one of you may be important to other in evaluating the terms of the sale.

You both have persisted in getting us to act for both of you, because that will avoid the cost of educating new lawyers and the cost of involving two law firms. We have agreed to do so. We expect you to agree on the principal terms of the sale without our involvement. This is particularly true as to price. We have explained to you that we must be forthcoming to each of you about what we know about, or learn from, the other, to enable you to make informed judgments about the transaction. There cannot be any secrets among us relating to this transaction.

If, during the transaction, we believe we cannot represent both of you fairly and effectively, we will have to withdraw from representing both of you.

I urged you both to seek the advice of other lawyers about the wisdom of proceeding on this basis. If you agree to the above, please sign at the space below.

Very truly yours,

Sarah Barnes

Agreed:

Clyde Owen:

Molly Bright:

(Note: most states adopted ABA Model Rule 2.2. It appears to apply to most multiple representations in transactions. It also appears to require that whenever multiple clients have a falling out, the lawyer must withdraw completely. It does not allow for a consent for the lawyer to continue on behalf of anyone in the transaction. That is why the letter says the lawyer will withdraw from representing both parties. The ABA House of Delegates removed Model Rule 2.2 in February 2002, and substituted more specific comments to new Rule 1.7.)

Estate Planning – Simultaneous Representation of Husband and Wife

Mr. and Mrs. James Smith
1 Maple Street
Jonesville, Illinois 60521
Dear Mr. and Mrs. Smith:

We will be representing both of you in the preparation of your estate plans. We encouraged you to obtain separate counsel, but for reasons of expense, you asked us to represent both of you.

It is the policy of this firm to seek an agreement in such cases regarding the sharing of confidential information. If we learn anything from one of you that we believe the other needs to know in connection with our representation, we will tell the other. If we learn something in confidence from one of you that we do not believe is germane to the representation of the other or that the other does not need to know, we will not tell the other.

Very truly yours,

Sarah Barnes

Agreed:
James Smith:
Emily Smith:

(This provision would be less jarring if tucked into an engagement letter containing the scope of the engagement and provisions relating to fees.)

Estate Planning – Dealing with other Family Members

Mr. James Smith, Jr.
11 Elm Street
Jonesville, Illinois 60521

Re: Representation of Your Parents

Dear Jim:

As you know we have been representing your parents on estate planning and other matters for many years. You have now, for the first time, retained us to revise your will and trust. You and I have discussed the difficulties of representing multiple family members and have agreed upon an approach to handling family information.

First, while we have no current information that would suggest this would happen, one or both of your parents could ask us to make changes in their estate plans to your disadvantage. You agree that we may follow your parents' instructions in this regard.

Moreover, any information regarding your parents' affairs will remain confidential with us. That means, for example, if either of them takes some action with respect to his or her estate or
property that is detrimental to you, we will not disclose that action to you. We would hope and expect that various members of your family will exchange information where appropriate. This will not be our role, however.

Very truly yours,

Sara Barnes

Agreed:

James Smith, Jr.

(Note: the above assumes the son already knows that Barnes represents his parents. What if the son does not know? In that case, Barnes could not get the son’s consent without disclosing that she represents the parents, something the parents may not want the son to know. And, Barnes cannot go to the parents for consent to tell the son without disclosing to them that she intends to represent the son, something the son may not want the parents to know. Solution? There may not be one.)

Creation of New Business – “I Am not your Lawyer”

(Note: this is a very important letter, and you should always write it, particularly where you have met with people during planning meetings that you have no intention of representing.)

Mr. Owen Smith
999 N. Barksdale St.
Jonesville, Illinois 60521

Re: Who Will Be Clients, and Who Will not Be

Dear Owen:

It was good to meet you yesterday. You and Ned Green are going to start a new business, tentatively called Green’s Cards. It will probably be a corporation; we are looking into that. The purpose of this letter is to confirm our conversation yesterday, during which I informed you that this firm will be representing Ned and the new company. We do not represent you personally. You will need to consult with your own lawyer on issues relating to you.

We understand that you will be the COO of the new company. We expect to have much contact with you in that role. Please understand, however, that in that role you, personally, will not be our client.

Thank you very much, and we look forward to working with you.
Very truly yours,

Sarah Barnes

Agreed:
Owen Smith:

(Go to "Joint/Multiple Representation" - "Unintentional" Joint/Multiple Representation at this site.)

Creation of New Business – Relationship with Minority Shareholders or Limited Partners

Mr. Ralph Newland
444 N. Vine St.
Jonestville, IL 60521

Re: Formation of Green’s Cards, Inc.

Dear Mr. Newland:

We understand that you will be one of several minority shareholders of Ned Green’s new company. As Green’s Cards’ counsel we will have to communicate with you from time-to-time. While we have have never met you, we did want to make sure that there were no misunderstandings about whom we are representing. Our clients are, and will continue to be, Ned individually and Green Cards, Inc. We do not represent, and will not be representing, any of the minority shareholders, directors, or employees of the company.

Very truly yours,

Sarah Barnes

(It is our view that personal contact with “non-clients” creates the most potential for misunderstandings about who represents whom. In the case of closely held entities, misunderstandings may arise even absent personal contact. Thus, a letter like this would seem advisable, where there are minority shareholders, limited partners, minority members of L.L.C.s, and so forth. Go to "Joint/Multiple Representation" - "Unintentional Joint/Multiple Representation” at this site.)

Doing Business with Client – Taking Second Mortgage on House to Secure Fee –
Compliance with Rule 1.8(a)

Mr. Miles Prescott
666 N. Ross St.
Jonesville, Illinois 60521

Re: North v. Prescott – Change in Fee Arrangement

Dear Miles:

In light of the slow-down at your business and your inability to pay our fees when due, we have agreed that you will convey to us a second mortgage on your home as security for the payment of our fees. We have estimated that our remaining fees will be approximately $50,000, so the mortgage will be in that amount. We will charge interest at the rate of X% per year on fees for which payment is late. We asked you to ask your accountant what a fair rate would be, and that is the rate he gave you.

What this means is that if you are unable to pay our fees on the schedule we have agreed upon, we could foreclose on the second mortgage. If we did that, it would be financially disruptive for you and could even cause you to lose your home.

We want you to consult with another lawyer before proceeding with the mortgage transaction. Please do this within the next two weeks, so that we can proceed. If you need more time, let us know. You have a right not to see another lawyer, but we believe you should.

When you are ready to do so, please sign the copy of the letter at the place indicated on the bottom. Thank you very much.

Very truly yours,

Sarah Barnes

I have read the above and I agree to it. I believe that I understand it. I (did) (did not) review this with another lawyer. I had sufficient time to do so. Miles Prescott

(We believe this letter complies with Model Rule 1.8(a). Do not attempt such a waiver without reviewing the relevant state’s version of that rule. It is our belief that all “mid-stream” fee changes should comply with that rule.)

Termination of Representation Letter

Mr. Miles Prescott
666 N. Ross St.
Jonesville, Illinois 60521

Re: North v. Prescott – Conclusion

Dear Miles:

Finally! All the appeals are over, and you have paid our fees. You have treated this firm very well, particularly in agreeing to give the second mortgage. We are grateful your cash position improved, and we were able to cancel the mortgage.

There is nothing left to be done, and our representation of you has ended. We would very much like to serve you in the future, if that becomes necessary. If you need our services in the future, give us a call, and we will prepare a new engagement letter.

Very truly yours,

Sarah Barnes

(The purpose of the letter is to avoid the inference that the firm is going to be looking out for the former client. It is also to make clear that the former client is not a current client for conflict of interest purposes. The above form is not “perfect.” A more effective letter would have said:

The case is over, you have paid our fees, and you are no longer a client. That means we have no further duty to look after your interests on any matters. That also means we are free to sue you for other clients on matters not related to the completed lawsuit?

Thus, the better the letter, the worse the marketing. For a discussion of when a "current client" becomes a "former client," click here.)

Waivers of Direct Adversity Conflict

(Situation: Bradley Clark is one of several passengers on an Ajax Transportation bus. It has an accident. Clark is a real estate client of law firm A. Ajax is a litigation client of A. Clark and others want to sue Ajax, using law firm B. Ajax wants A to defend the case. The following two letters are consents from Clark and Ajax allowing this to happen.)

Mr. Bradley Clark
1001 Clark Place
Jonesburg, IL 60521

Re: Smith, et al. v. Ajax
Dear Brad:

This is to confirm our telephone conversation about the captioned lawsuit. You and 26 other passengers have hired another law firm to sue Ajax Transportation, Inc. because of an accident that occurred while you were riding on an Ajax bus.

Ajax has asked my partner, Sarah Barnes, to defend Ajax in that case. As I explained to you, she cannot do so without the consent of both you and Ajax. Ajax has indicated that it will consent. So have you. I suggested you talk to another lawyer about this before signing a waiver.

There is nothing about the lawsuit that will cause me not to be completely loyal to you on your real estate matters. Moreover, while I do not believe this law firm has any information about you that would be relevant to the Ajax law suit, I will ensure that no lawyer working on the law suit will have access to any information that we may have about you.

If you still agree to waive this conflict, please sign the enclosed copy of this letter and return it to me.

Thank you very much.

Very truly yours,

Clyde Slick

Agreed:
Bradley Clark

Tom Jones, Esq.
General Counsel
Ajax Transportation, Inc.
111 S. LaSalle St.
Chicago, IL 60603

Re: Smith, et al. v. Ajax

Dear Tom:

This is to confirm our telephone conversation, in which I informed you that one of the 27 passengers on your bus and plaintiff, Bradley Clark, is a current real estate client of my partner,
Clyde Slick. We cannot proceed on your behalf in the lawsuit without a waiver from both of you. Mr. Clark has agreed to sign such a waiver.

Neither I nor any member of my litigation team know Mr. Clark, and we believe we can represent you with complete loyalty to Ajax. Accordingly, if you still agree that we can represent you, notwithstanding our unrelated representation of Mr. Clark, please sign the enclosed copy of this letter and return it to us.

Thank you very much.

Very truly yours,

Sarah Barnes

Agreed:
Ajax Transportation, Inc.
By:

**Lawyer Serving on Board of Client**

(To Chairman of Board)

Re: Service on Board

Dear [Chair]:

You have asked that I stand for election for Director of ABC Corp. I have obtained the permission of my law firm and agree to do so. You and I have discussed several issues that my service may raise, and I wish to summarize those issues here.

My law firm has represented ABC Corp. for many years on a variety of matters. For the past ____ years I have been the partner at the firm in charge of the firm’s relationship with ABC Corp. We expect that my firm will continue to represent ABC Corp. as in the past and that I will continue to be the partner in charge.

Perhaps the single most critical issue of my service as Director is the preservation of the attorney-client privilege. Communications, oral or written, between ABC personnel and me in connection with my law firm’s providing legal services to ABC should remain privileged. That is, absent extraordinary circumstances, adversaries to ABC in litigation should not be able to
obtain those communications. However, communications between ABC personnel and me in connection with my service as a Director enjoy no such privilege. The difficulty is identifying which type of communication is which. It will be necessary for me, from time-to-time, to remind you and other ABC personnel of what capacity I am operating in, so that you know what is, and is not, privileged. Caution: there is no guarantee that a court or other tribunal will agree with our characterization of a particular communication as privileged. We will just have to do the best we can.

[We have agreed that from the time I am elected as a Director I personally will not participate in any legal representation that my law firm provides to ABC Corp. That means all my communications with ABC personnel will be as a Director, and none of those communications will be protected by the attorney-client privilege.]

Another issue relates to the fact that I will not be able to participate in discussing or voting upon some issues that come before the Board because I will have a conflict. For example, if the issue of what law firm to hire for a major project comes up, I will probably have to absent myself from the meeting and not participate in the decision at all. Thus, for purposes of some issues, while you may have a quorum, you will be operating without a full board.

[My service as a Director for ABA Corp. means that my law firm will not have malpractice insurance coverage for any work my firm does for ABC Corp.]

[Rule 1.8(a) compliance. I have urged you to discuss my possible service as Director with a lawyer not in my firm, and you have indicated that you have sought the advice of ABC Corp’s. General Counsel.]

[Other issues may arise that we simply cannot predict. For example, if my law firm is representing ABC Corp. in litigation and the opponent objects to my partners and associates seeing certain of the opponent’s confidential documents, because I am a Director, we may be limited in how we handle the litigation.]

Very truly yours,

Sarah Barnes

End of Forms
FORMAL OPINION NO. 2011-185

Withdrawal from Litigation:
Client Confidences

Facts:
During litigation, Lawyer and Client have a dispute concerning the representation. Lawyer and Client cannot resolve the dispute and Lawyer files a motion to withdraw in which Lawyer wishes to state one of the following:

1. My client won’t listen to my advice;
2. My client won’t cooperate with me;
3. My client hasn’t paid my bills in a timely fashion; or
4. My client has been untimely and uncooperative in making discovery responses during the course of this matter.

Question:
May Lawyer chose unilaterally to provide the court any of the client information noted above in the motion to withdraw?

Conclusion:
No, qualified.

Discussion:
Oregon RPC 1.0(f) provides:
Information relating to the representation of a client denotes both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Oregon RPC 1.6(a) provides:
A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
Oregon RPC 1.6(b) provides, in part:
A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

* * *

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(5) to comply with other law, court order, or as permitted by these Rules.

Lawyer’s obligation not to reveal information relating to the representation of a client continues even when moving to withdraw from representing Client. See Oregon RPC 1.6(a). To the extent the withdrawal is based on “information relating to the representation of a client,” the Lawyer may not reveal the basis for the withdrawal to the court unless disclosure is permitted by one of the narrow exceptions in Oregon RPC 1.6(b). ¹

Depending upon the specific factual circumstances involved, the four statements noted above seem likely to constitute information relating to the representation of a client because if the information “would be embarrassing or would be likely to be detrimental to the client.” See also THE ETHICAL OREGON LAWYER §4.3 (Oregon CLE 2006) (providing that an event “such as the nonpayment of fees, may have confidential aspects to it, and therefore may constitute information protected by Oregon RPC 1.6”). ²

¹ This opinion does not address the situation that would occur when a client terminates a lawyer’s services. Pursuant to Oregon RPC 1.16(a)(3), a lawyer is required to withdraw from the representation of a client if “the lawyer is discharged.” Under those circumstances, it would be appropriate to inform the court that the lawyer’s motion is being brought pursuant to Oregon RPC 1.16(a)(3).

² This opinion assumes that the dispute between Lawyer and Client does not concern whether Lawyer should take action in violation of the RPCs. For an analysis of such a situation, see OSB Formal Ethics Op No 2005-34, which notes that if a client will not rectify perjury, “the lawyer’s only option is to withdraw, or seek leave to withdraw, from the matter without disclosing the client’s wrongdoing.” See also In re A., 276 Or 225, 554 P2d 479 (1976).
For example, a client’s inability or refusal to pay may prejudice the client’s ability to resolve the dispute with an opposing party. Likewise, a party’s unwillingness to cooperate with discovery may lead the plaintiff to file additional pleadings or seek sanctions. Consequently, Lawyer cannot unilaterally and voluntarily decide to make this information public unless an exception to Oregon RPC 1.6 can be found.

Neither a disagreement between Lawyer and Client about how the client’s matter should be handled nor the client’s failure to pay fees when due constitute a “controversy between the lawyer and the client” within the meaning of Oregon RPC 1.6(b)(4). While there may be others, the two most obvious examples of such a controversy are fee disputes and legal malpractice claims. A client’s dissatisfaction with the lawyer’s performance may ultimately ripen into a controversy, but at the point of withdrawal, such a controversy is inchoate at best. In a fee dispute or malpractice claim, fairness dictates that the lawyer be on equal footing with the client regarding the facts. Such is not the case under the facts presented here.

Suppose, however, that the court inquires regarding the basis for the withdrawal or orders disclosure of such information. 3 Comment 3 to ABA Model Rule 1.16 offers guidance and provides, in part:

The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer’s statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. 4

3 See, for example, Oregon RPC 1.16(c), which provides that a lawyer wishing to withdraw must “comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.” See also Uniform Trial Court Rule 3.140 (discussing resignation of attorneys); USDC LR 83-11 (discussing withdrawal from a case).

4 Similarly, THE ETHICAL OREGON LAWYER provides that “[i]n most instances, it should be sufficient to state on the record or in public pleadings that the situation is one in which withdrawal is appropriate and to offer to submit additional information under seal if the court so desires.” THE ETHICAL OREGON LAWYER §4.3 (Oregon CLE 2006).
If the court orders disclosure, Lawyer may reveal information relating to the representation of Client under Oregon RPC 1.6(b)(5) but may only do so to the extent “reasonably necessary” to comply with the court order. Lawyer should therefore take steps to limit unnecessary disclosure of confidential information by, for example, offering to submit such information under seal (or outside the presence of the opposing party) so as to avoid prejudice or injury to the client.

Approved by Board of Governors, August 2011
IN THE SUPREME COURT OF THE STATE OF NEVADA

MERITS INCENTIVES, LLC, A NEVADA LIMITED LIABILITY COMPANY; RAMON DESAGE, INDIVIDUALLY; AND CADEAU EXPRESS, INC.,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE
MARK R. DENTON, DISTRICT JUDGE,
Respondents,

and

BUMBLE AND BUMBLE PRODUCTS, LLC, A NEW YORK LIMITED LIABILITY COMPANY; FENNEMORE CRAIG, P.C.; AND JOHN H.
MOWBRAY,
Real Parties in Interest.

Original petition for a writ of mandamus challenging a district court order denying a motion to dismiss or, alternatively, to disqualify counsel and to prohibit the use of certain information.

Petition denied.

Pisanelli Bice, PLLC, and Todd L. Bice, Las Vegas; Glaser, Weil, Fink, Jacobs, Howard & Shapiro, LLC, and Lance Coburn, Las Vegas, for Petitioners.

Lionel Sawyer & Collins and Paul R. Hejmanowski and Samuel S. Lionel, Las Vegas, for Real Parties in Interest Fennemore Craig, P.C., and John H. Mowbray.
Fennemore Craig, P.C., and John H. Mowbray, Las Vegas, for Real Party in Interest Bumble and Bumble Products, LLC.

BEFORE SAITTA, C.J., HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, HARDESTY, J.:

In this original writ proceeding we review a district court’s decision to deny a motion to disqualify opposing counsel, when opposing counsel reviewed confidential documents he received, unsolicited, from an anonymous source.¹ We initially conclude that although there is no Nevada Rule of Professional Conduct that specifically governs an attorney’s actions under these facts, the attorney in this case fulfilled any ethical duties by giving prompt notification to opposing counsel, soon after his receipt of the disk from an unidentified source, through an NRCP 16.1 disclosure.

We must also determine whether the district court abused its discretion when it refused to disqualify counsel, even though one of the documents sent to counsel was privileged. We adopt factors to aid a district court in determining whether disqualification is warranted under such circumstances, and conclude in this case that the factors weigh in

¹While the challenged order also denied a motion to dismiss, this writ petition seeks only counsel’s disqualification, not dismissal of the underlying action, and thus only disqualification is discussed herein.
favor of the district court’s decision. Therefore, although we consider the writ petition, we ultimately deny the relief requested.

FACTS AND PROCEDURAL HISTORY

Real party in interest Bumble & Bumble, LLC, manufactures and sells high-end salon products. Petitioners Merits Incentives, LLC, Ramon DeSage, and Cadeau Express, Inc. (collectively, petitioners), contracted with Bumble to distribute Bumble’s products to the Wynn Hotel in Las Vegas, Nevada. After entering into the contract with petitioners, Bumble discovered that some of its products were being sold at unauthorized retailers such as CVS, Rite Aid, and Walgreens. Bumble sued petitioners for breach of contract, fraud, and injunctive relief because of the alleged distribution of Bumble products by petitioners to entities other than those authorized by the parties’ contract.

Prior to Bumble’s suit against petitioners, Cadeau Express fired one of its logistics engineers, Mohamed Issam Abi Haidar. In a separate action from this one, petitioners sued Haidar, alleging that he stole “confidential and proprietary information and trade secrets.” The district court in that case permanently enjoined Haidar from distributing any of the stolen information to petitioners’ “customers, manufacturers, suppliers, or business partners.”

Receipt of disk from an anonymous third party

After filing suit against petitioners, Bumble received an anonymous package from Lebanon at its New York headquarters on September 24, 2009. The package contained a disk and a note stating that the package should be forwarded to Bumble’s counsel, John Mowbray, an attorney with Fennemore Craig, P.C., a law firm in Las Vegas. On October 15, less than one month later, Mowbray served on petitioners a supplemental NRCP 16.1 mandatory pretrial discovery disclosure (16.1
disclosure). The third of three disclosures identified a "[d]isk received by Bumble and Bumble on September 24, 2009 from an unidentified source." The 16.1 disclosure also included a copy of the disk and a copy of the envelope it arrived in, which bore Lebanese stamps and the phrase "[h]ighly [c]onfidential." On October 19, Bumble served an amended supplemental 16.1 disclosure on petitioners and provided another identical copy of the disk. At the time, petitioners did not inform Bumble that they objected to Bumble having the disk, and they did not file any motions with the court to preclude Bumble’s use of the disk or its contents.

On November 6, 2009, Bumble served petitioners with a second request for production (second RFP), listing individually over 500 documents that were contained on the disk and requesting authentication and hard copies of some of the documents. Petitioners did not file their response to the second RFP until January 11, 2010, and generally objected to the request as follows:

[Petitioners] object to this Request on the grounds that it seeks information and documents already in Bumble’s possession, on the grounds that it is overbroad and unduly burdensome, on the grounds that it seeks information protected by the attorney/client and/or attorney work product privilege, on the grounds that many of the documents on the Disk are corrupted and will not open, and on the grounds that it is vague and ambiguous in that Bumble has not identified the source of the Disk. Subject to the foregoing, [petitioners] state that they have produced all documents they have an obligation to produce in response to this Request. The documents previously produced...are generally responsive to this Request.

On January 27, 2010, Bumble used some of the documents from the disk to depose one of petitioners’ employees, and petitioners still did not object
or argue that the documents were privileged. On May 14, 2010, nearly eight months after Bumble first disclosed its receipt of the disk, petitioners first objected to Bumble’s use and possession of the documents on the disk through a motion to the district court.

Petitioners’ motions regarding the disk

Petitioners filed a motion with the district court for the dismissal of Bumble’s case with prejudice or, in the alternative, a motion to prohibit Bumble’s use of misappropriated confidential and privileged documents and for disqualification of Bumble’s counsel. In the motion, petitioners alleged that Mowbray received the disk from Haidar in violation of the injunction petitioners had obtained against him. Petitioners also alleged that Bumble failed to notify them for over eight months that it had petitioners’ confidential and privileged documents, and that Bumble used that information “to gain a tactical advantage in [the] litigation.” Bumble opposed the motion, arguing that it had produced the disk through the normal course of discovery. Bumble included with its response an expert report supporting its claim that Mowbray did not violate any of Nevada’s ethical rules and that disqualification was not warranted. Petitioners replied and included a rebuttal expert report.

After a hearing on the motion, the district court declined to dismiss the case or disqualify Mowbray and his firm, Fennemore Craig. In its findings of fact, which neither side challenges, the district court stated

2Although petitioners raised the above-quoted general objection to Bumble’s request for production, that type of objection is insufficient to assert a privilege. See Nevada Power Co. v. Monsanto Co., 151 F.R.D. 118, 121 & n.5 (D. Nev. 1993).
that, "[o]n or about September 24, 2009, [Bumble] received... an unsolicited package from an anonymous source." The district court also found that Bumble and its counsel "conspicuously set forth" their receipt of the disk in the NRCP 16.1 disclosure, and that "[n]either [Bumble] nor its counsel had actual knowledge of the injunction [petitioners had against Haidar]."

The court concluded that petitioners failed to show that any of the documents, except a draft affidavit, contained on the disk were privileged. The court excluded the use of the draft affidavit, but otherwise allowed the use of the documents contained on the disk. Despite the one privileged document on the disk, the district court concluded that Bumble’s counsel "acted reasonably and in accordance with the Nevada Rules of Professional Conduct with respect to the documents and the Disk." The court also concluded that Mowbray "went out of [his] way to advise [petitioners] that [he] had received the documents and Disk, to let [petitioners] ascertain their provenance and to give them every opportunity to register an objection and demand return and non-use." Petitioners now seek extraordinary writ relief to instruct the district court to disqualify Mowbray and his firm or, alternatively, to compel the district court to reconsider the disqualification motion.

DISCUSSION

Petitioners maintain that the district court abused its discretion when it failed to disqualify Mowbray and his firm as counsel for Bumble. "A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." Williams v. Dist. Ct., 127 Nev. __, __, __ P.3d __, __ (Adv. Op. No. 45, July 28, 2011) (quoting International Game Tech. v. Dist. Ct., 124 Nev.
193, 197, 179 P.3d 556, 558 (2008)); see also NRS 34.160. This court will not issue a writ of mandamus if the "petitioner has a plain, speedy, and adequate remedy in the ordinary course of law," Williams, 127 Nev. at __, ___ P.3d at ___ (quoting Mineral County v. State, Dep’t of Conserv., 117 Nev. 235, 243, 20 P.3d 800, 805 (2001)), and "[m]andamus will not lie to control [the district court’s] discretionary action, unless discretion is manifestly abused or is exercised arbitrarily or capriciously," Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981) (internal citation omitted). A writ may issue, however, "where an important issue of law needs clarification and public policy is served by this court’s invocation of its original jurisdiction." Mineral County, 117 Nev. at 243, 20 P.2d at 805 (quoting Business Computer Rentals v. State Treas., 114 Nev. 63, 67, 953 P.2d 13, 15 (1998)).

Although we conclude that the district court did not abuse its discretion by denying petitioners’ motion to disqualify Mowbray and his law firm, we take this opportunity to adopt a notification requirement to apply to situations where an attorney receives documents or evidence from an anonymous source or from a third party unrelated to the litigation. Additionally, we also set forth factors for district courts to consider in determining whether an attorney who reviews privileged information under such circumstances should be disqualified. Thus, while we consider the writ petition because it raises important issues of law that need clarification, we deny the relief requested.

**Mowbray did not violate any ethical duties**

Petitioners argue that Mowbray and his law firm did not meet their ethical duties when Mowbray reviewed the disk he received from an anonymous source. Bumble and Mowbray argue that Mowbray exceeded any ethical obligations by immediately disclosing the disk received from
an anonymous source in a supplemental 16.1 disclosure, by propounding discovery on opposing counsel seeking authentication regarding the documents contained on the disk, and by listing each document individually in a discovery request.

At the outset, we note that both parties agree that RPC 4.4(b), which provides that “[a] lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender,” is not applicable here. We also agree that RPC 4.4(b) is not applicable, as written, because the disk was not inadvertently sent to Bumble and Mowbray.\(^3\)

\(^3\)In fact, the American Bar Association (ABA) has stated as much. The comment to the ABA Model Rule identical to RPC 4.4(b) states that “this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.” Model Rules of Prof’l Conduct R. 4.4 cmt. 2 (2007). Additionally, the ABA has stated that:

if the providing of the materials is not the result of the sender’s inadvertence, Rule 4.4(b) does not apply to the factual situation.... A lawyer receiving materials under such circumstances is therefore not required to notify another party or that party’s lawyer of receipt as a matter of compliance with the Model Rules. Whether a lawyer may be required to take any action in such an event is a matter of law beyond the scope of Rule 4.4(b).

Petitioners’ caselaw is not persuasive

Petitioners cite to various cases and ethics opinions from other jurisdictions in an attempt to persuade this court that Mowbray violated his ethical duties because, once he realized the privileged nature of the documents on the disk, he should have ceased reviewing the disk, notified petitioners, and returned the disk (also referred to as the “cease, notify and return” rule). The caselaw they cite, however, is based on facts that are easily distinguishable from the current case.

In Burt Hill, Inc. v. Hassan, an attorney claimed to have received documents anonymously but did not sign an affidavit to that effect, and the court found the claimed lack of knowledge regarding the delivery of the documents appeared “highly suspicious.” No. Civ. A. 09-1285, 2010 WL 419433, at *1-2 (W.D. Pa. Jan. 29, 2010). In the instant case, Mowbray signed an affidavit in which he declared that he did not know the source of the disk, he produced the envelope he received the disk in, and the district court found that the disk was sent anonymously.

Three other cases petitioners cite involve the attorney’s client providing the confidential documents to the attorney, rather than the attorney receiving the documents from an anonymous third party, and the attorney failing to immediately notify opposing counsel of the client’s misconduct. See Maldonado v. New Jersey, 225 F.R.D. 120, 125-26 (D.N.J. 2004) (attorney’s client obtained confidential letter from opposing party to its counsel, gave the letter to his attorney, and attorney did not disclose or return the document); In re Marketing Investors Corp., 80 S.W.3d 44, 46-

\(^4\)Nevada has no such rule.
47 (Tex. App. 1998) (attorney’s client took documents from opposing party in violation of employment agreement and gave to his attorney who kept copies and refused to agree not to use documents despite a protective order); Castellano v. Winthrop, 27 So. 3d 134, 135 (Fla. Dist. Ct. App. 2010) (attorney’s client illegally obtained opposing party’s flash drive and attorney used information contained on it to file a motion to vacate a final order before notifying opposing counsel of receipt).  

Although petitioners do not specifically cite to either rule in their writ petition, some of the above cases discuss, and petitioners’ ethical expert in the district court opined, that Mowbray’s actions violated RPC 4.4(a) and 8.4(d). RPC 4.4(a) states, in pertinent part, that “[i]n representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [a third] person.” (Emphasis added.) RPC 8.4(d) states that “[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct that is prejudicial to the administration of justice.” (Emphasis added.)  

In all of petitioners’ cited cases discussing RPC 4.4(a) or 8.4(d), the courts found that the attorneys either played some part in obtaining an opposing party’s documents or were complicit in actions used to

5Petitioners also cite to jurisdictions that already have a cease, notify, and return rule regarding inadvertent receipt of the opposing party’s documents to show that Mowbray violated his ethical duties. See Maldonado v. New Jersey, 225 F.R.D. 120, 138 (D.N.J. 2004) (discussing the rule in conjunction with the New Jersey Rules of Professional Conduct); D.C. Bar Comm. on Legal Ethics, Op. 318 (2002) (construing the rule with District of Columbia Rule of Professional Conduct 4.4(b)). Because Nevada has no rule or caselaw to this effect, we determine that this authority is unpersuasive.
wrongfully obtain those documents. Similarly, the emphasized language in RPC 4.4(a) and 8.4(d) demonstrate that the attorney must take some type of affirmative action, either by employing a method of obtaining evidence or engaging in certain conduct, to violate either of those rules. Mowbray did not do that here, as the district court’s unchallenged findings of fact stated that the disk was sent anonymously and unsolicited, and that Mowbray had no knowledge of the injunction against Haidar.\(^6\)

An attorney’s responsibility upon receiving documents or evidence from an anonymous source or from a third party unrelated to the litigation

As discussed above, Nevada does not have any ethical rules that govern the specific issue presented in this petition. It appears, however, that the district court applied RPC 4.4(b) by analogy, which requires an attorney to notify the sender if he or she receives documents inadvertently, and concluded that Mowbray met his ethical duties because he promptly notified petitioners of his receipt of the disk through an NRCP 16.1 disclosure.

We agree with the district court’s reasoning; therefore, we now adopt a notification requirement to apply in situations where an attorney receives documents anonymously or from a third party unrelated to the litigation. Thus, an attorney who receives documents regarding a case from an anonymous source must promptly notify opposing counsel, or risk

\(^6\)While petitioners attempt to prove to this court that Mowbray knew of the injunction against Haidar, they do not ask this court to overturn the district court’s findings of fact that Mowbray had no knowledge of the injunction. Therefore, we conclude that the district court’s findings of fact are undisputed.
being in violation of his or her ethical duties and/or being disqualified as counsel. Notification must adequately put opposing counsel on notice that the documents were not received in the normal course of discovery and describe, with particularity, the facts and circumstances that explain how the documents or evidence came into counsel’s or his or her client’s possession.\(^7\) In this case, Mowbray did just that through an NRCP 16.1 disclosure. Therefore, the district court correctly concluded that Mowbray fulfilled his ethical duties.

The district court did not abuse its discretion in refusing to disqualify Mowbray and his firm as counsel for Bumble

The determination that Mowbray fulfilled his ethical duties does not end our inquiry concerning disqualification. The district court found that one document on the disk, a draft affidavit, was protected by the attorney-client privilege. Despite this finding, the district court did not disqualify Mowbray and his firm as counsel for Bumble. Petitioners claim this was an abuse of discretion. “The district court has broad discretion in attorney disqualification matters, and this court will not

\(^7\)Although we do not adopt a cease, notify, and return rule, that does not prevent a party whose privileged information has been obtained by the opposing party from seeking the return of that information. If petitioners believed that Mowbray was acting unethically or possessed their privileged information, they should have immediately informed Mowbray of their concerns and sought return of the disk and any documents Mowbray retrieved from the disk. If Mowbray did not comply with their request, they could have sought relief from the district court in a timely manner. Despite petitioners’ claim that they were in the midst of changing counsel, petitioners’ counsel may have had an independent responsibility to promptly object to the use of documents provided by an anonymous source. See RPC 1.3.
overturn its decision absent an abuse of that discretion.” Waid v. Dist. Ct., 121 Nev. 605, 609, 119 P.3d 1219, 1222 (2005). This court has not previously determined what factors a district court should consider when presented with a motion to disqualify an attorney who has received an opposing party’s privileged information, yet played no part in obtaining the information.

The Supreme Court of Texas resolved a similar issue in In re Meador, 968 S.W.2d 346 (Tex. 1998). In that case, the defendant filed suit against a company and some of its employees for various claims, including allegations of sexual harassment. Id. at 348. Another company employee took and copied certain documents from the company that were potentially relevant to the litigation. Id. That employee later contacted the defendant because she was considering filing her own lawsuit against the company, and the defendant referred the employee to her attorney. Id. at 349. When the employee met with the attorney, she gave him the documents she had copied. Id. Later in the litigation, the company claimed the documents were privileged, and the trial court instructed defendant’s counsel that the documents could not be used in the litigation and all copies had to be returned to the company. Id. The district court declined, however, to disqualify the defendant’s counsel, and the company appealed that decision. Id.

In determining whether the district court abused its discretion by failing to disqualify the defendant’s counsel, the Meador court stated that “[w]ithout doubt, there are situations where a lawyer who has been privy to privileged information improperly obtained from the other side must be disqualified, even though the lawyer was not involved in obtaining the information.” Id. at 351. The court also realized, however,
that "it is impossible to articulate a bright-line standard for disqualification where a lawyer, through no wrongdoing of his or her own, receives an opponent's privileged materials." Id. We agree.

The court went on to identify a nonexhaustive list of factors to aid trial courts in determining whether disqualification is appropriate:

1) Whether the attorney knew or should have known that the material was privileged;

2) the promptness with which the attorney notifies the opposing side that he or she has received its privileged information;

3) the extent to which the attorney reviews and digests the privileged information;

4) the significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;

5) the extent to which movant may be at fault for the unauthorized disclosure; [and]

6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.\(^8\)

Id. at 351-52. We now adopt these factors, and we further agree with the Meador court that, in exercising its judicial discretion, the district courts "must consider all the facts and circumstances to determine whether the interests of justice require disqualification." Id. at 351.

Having adopted factors that inform a district court's disqualification decision, we must now determine whether the district

\(^8\)As this list is nonexhaustive, the district court may consider other factors that are pertinent to the facts of each individual case.
court abused its discretion when it refused to disqualify Mowbray and his law firm as counsel for Bumble for allegedly reviewing the privileged draft affidavit. *Waid*, 121 Nev. at 609, 119 P.3d at 1222.

In concluding that Mowbray met his ethical duties, the district court stated:

In fact, it appears to the Court that, instead of lying in wait with the documents, [Mowbray] went out of [his] way to point out that [he] had received them and to let Defendants ascertain their provenance, giving every opportunity for Defendants to register an objection and demand return and non-use.

Additionally, the second RFP did not list the draft affidavit as one of the documents, and Mowbray filed an affidavit with the court stating that he did not review any such document. The district court did not make any findings that contradicted Mowbray’s assertion that he never reviewed the document.

Applying the above factors, we agree with the district court’s order denying disqualification because the factors weigh in favor of the district court’s determination that Mowbray and his firm were not subject to disqualification. The district court found that most of the documents on the disk were not privileged, and Mowbray stated he did not review the document the court determined was privileged. Mowbray sent petitioners’ counsel a supplemental NRCP 16.1 disclosure one month after Bumble received the disk at its headquarters. Although the privileged document, a draft affidavit, may have had some significance, the district court prohibited its use, and petitioners failed to show any prejudice resulting from the affidavit’s disclosure. Finally, Bumble would suffer prejudice if it had to retain new counsel because the litigation involves complex contracts and numerous entities.
Although we conclude that Mowbray's initial supplemental NRCP 16.1 disclosure of the disk was an adequate method of notification, he did not end there with his attempts to promptly notify petitioners of his receipt of the disk. Four days later, Mowbray filed an amended supplemental 16.1 disclosure with another copy of the envelope the disk arrived in. Additionally, approximately one month later, Mowbray propounded a second RFP that included a request spanning 22 pages and individually listing 503 of the documents contained on the disk. Thus, these additional steps taken by Mowbray further indicate that he was not trying to deceive petitioners or conceal his receipt of the disk from them. Therefore, we conclude that the district court did not abuse its discretion by denying petitioners' motion to disqualify Mowbray and his law firm.

Based on the foregoing, we deny the petition for extraordinary writ relief.  

\[\text{Hardesty}\]

We concur:

\[\text{C.J.}\]

\[\text{J.}\]

\[\text{J.}\]

\[\text{J.}\]

\[\text{Petitioners also requested this court address whether their seven-month delay in seeking disqualification of Mowbray constituted waiver. Because we denied writ relief based on our conclusion that the district court did not abuse its discretion in denying petitioners' motion to disqualify, we need not reach this issue.}\]
Ethics in Digital Communications

Michael E. Lackey, Jr.
Mayer Brown LLP
Ethical Issues in the Wireless World: Hot Topics

- Safeguarding attorney-client privilege in wireless communications
- Issues in “the cloud”
Ethical Issues Implicated

- Duties of competency, confidentiality, and supervision
- Responsibility to safeguard privileged communications
Privilege and Ethical Issues When Using Wireless Communications

• Caution with client communications
  - Includes WiFi, PDAs, cellphones, etc.
• An attorney may violate his duty of confidentiality under Model Rule 1.6
• An attorney may accidentally (or cause his client to) waive attorney-client privilege
ABA Op. 99-413

• Addresses email, fax machines, and cordless, wireless phone communications

• Approves use of unencrypted e-mail communications – use does not violate Model Rule 1.6
  ▪ What about anti-spyware software? Password protection locks on PDAs?
ABA Op. 99-413

- Preserving confidentiality ethically includes choosing a means of communication in which the lawyer has a "reasonable expectation of privacy".

- Not reasonable to avoid a mode of communication because interception is "technologically possible," especially when unauthorized interception of the information is a violation of the law.
Statutory Support for Reasonableness

- Electronic Communications Privacy Act, which prohibits the unauthorized interception or disclosure of an E-communication

- Computer Fraud and Abuse Act, which prohibits the unauthorized access of a computer
ABA Op. 99-413

• Client consent if “highly sensitive”

• “When the lawyer reasonably believes that confidential client information being transmitted is so highly sensitive that extraordinary measures to protect the transmission are warranted, the lawyer should consult the client as to whether another mode of transmission, such as special messenger delivery, is warranted.”
“Cloud Computing”

• What is it?
• What are the key issues?
• How can these issues be addressed?
“Cloud Computing”

- What is it?
- What are the key issues?
  - Security
  - Ownership
  - Handling Litigation holds and collections
    - Auditing and compliance
  - Privilege issues
  - Cross-border issues
  - Data remediation issues
“Cloud Computing”

- Approval to do so
- Obligation is to exercise “reasonable care” in handling client confidences
- “Reasonable care” may require the attorney to conduct due diligence to understand fully the risks to client data before having it stored in the cloud
- Consistent with thrust of NY Op. No. 782 requiring attorneys to stay abreast of technological advances
“Cloud Computing”

• Keys to addressing these key issues
  ▪ Private versus public clouds
  ▪ Key contract provisions
ABA Commission on Ethics 20/20

• Revised draft proposal released May 7, 2012, for review at August meeting
• Issued report on the use of technology and confidentiality
  ▪ “Competent” means knowing “the benefits and risks associated with relevant technology”
  ▪ Must use “reasonable efforts” to prevent disclosure
    • Lists factors to be considered
Ethics and Loss Prevention in Tough Times

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Loss Prevention in Tough Times

• The Great Recession of 2007-20??
• Effect on our clients
• Effect on lawyers and law firms
• **MORAL:** In a downturn, the basics of loss prevention – the things we should already be doing – matter more.
Loss Prevention in Tough Times

• Do malpractice claims against lawyers increase in a recession?
  – Some say frequency and severity go up.
  – Others don’t see the evidence.
• And the answer is….?

• MORAL: In a downturn, loss prevention matters more.
Loss Prevention in Tough Times

• New Client Intake and New Matter Intake
  – Always matters to health, profitability, safety – matters more in a downturn.

• In a new client or matter, . . .
  – What are you looking for?
  – What are you looking to avoid?
• New Client/Matter Intake: What are you looking for?
  – Client for whom you can handle a matter well, successfully, efficiently, effectively, and to their satisfaction.
  – Client who will pay in a timely fashion, without complaint.
  – Client with realistic expectations about the matter and their lawyer.
• New Client/Matter Intake: *What are you looking to avoid?*
  – Client changing lawyers.
  – Client very critical of other lawyers.
  – Client who has sued other lawyers.
  – Client who has frequently changed other professionals (e.g., auditors, CPAs).
  – Client whose management, owners, or principal players have changed recently.
New Client/Matter Intake: *What are you looking to avoid?*

- Client with recent or planned dramatic change in business plan or strategy.
- Client with unrealistic business plan or strategy.
- Client with unrealistic expectations.
- Client with an implausible story.
• New Client/Matter Intake: *What are you looking to avoid?*
  – Client with a criminal or litigation record.
  – Start-up business.
  – Matter involving handling *Other People’s Money*.
  – Matters involving unusual use of firm’s trust account to receive or hold assets.
  – *Others*…?
• New Client/Matter Intake: “Unworthy Clients”
  – Due diligence on new clients and matters.
  – See lengthy list above…
Loss Prevention in Tough Times

• New Client/Matter Intake: When a good client goes bad…
  – Can a good client become an “unworthy client”?  
  – Potential warning signs?
    • Financial difficulties
    • Slower payment of bills
    • Ownership/management changes
    • Changes in client behavior
    • Client complaints
Loss Prevention in Tough Times

• New Client/Matter Intake: *Think about*…
  – Independent partner-level review of intake of new matters

• **MORAL:** In a downturn, new client intake and new matter intake matter more.
• Dabbling
  – dab·ble – v.: to undertake something superficially or without serious intent. – *American Heritage Dictionary*
  – Resist the temptation.
  – “A man's got to know his limitations.”

• **MORAL:** In a downturn, knowing your limitations matters more.
Loss Prevention in Tough Times

• Greater Time and Fee Pressure
  – Demands by clients for quicker response.
  – Demands by clients for lower fees.
  – What about Rule 1.2(c) scope limitations?
  – Insist on maintaining the quality of your work product.

• **MORAL**: In a downturn, recognizing and pushing back on unreasonable client demands matters more.
Loss Prevention in Tough Times

- *Conflicts! Conflicts! Conflicts!*
  - But conflicts *always* matter, right?
    - Yes, but/and…
  - Conflicts as tactical weapons
    - By opposing counsel
    - By clients and former clients
Loss Prevention in Tough Times

• Conflicts! Conflicts! Conflicts!
  – The unfortunate intersection of malpractice claims and conflicts

• **MORAL:** In a downturn, conflicts of interest may matter more.
Loss Prevention in Tough Times

• Employment and Other Business Decisions
  – Lawyers are people, too; law firms are business, too.
  – Employment decisions – hiring, layoffs, promotions.
  – Same for partners.

• **MORAL:** In a downturn, making responsible business employment and other decisions matters more.
Loss Prevention in Tough Times

• Lateral Hires and Mergers
  – Downturns present business opportunities.
  – Be careful out there.

• MORAL: In a downturn, due diligence matters more.
“Internal Controls”
- Definition?
- Examples?
  - Two-signature requirement for checks
  - Separation of duties between check-writing and account reconciliation
  - Limits on cash transactions

Rules 5.1, 5.3

**MORAL:** In a downturn, protecting clients, your practice, and yourself matters more.
Loss Prevention in Tough Times

• Fees
  – What’s different?
    • Slower payment of bills
    • Increased scrutiny of all billings
    • Pressure for alternative billing
  – What to do?
    • Use security retainers
    • Carefully review alternative fees
    • Communicate very clearly, in writing and in a timely fashion
Loss Prevention in Tough Times

• Fees – *What to do?*
  • Monitor WIP and A/R closely
  • Bill or report to clients frequently
  • Address A/R directly and quickly
  • Quit while you are behind
    – Rule 1.16(b)(1)

• **MORAL:** In a downturn, clear thinking, clear communication, and clear understanding about fees matters more.
Loss Prevention in Tough Times

• Suing for Fees
  – *Quiz*: What’s the likeliest result of suing a former client for fees?
  – Remember Coleman Reese?
    • “Let me get this straight: You think that your client, one of the wealthiest, most powerful men in the world, is secretly a vigilante who spends his nights beating criminals to a pulp with his bare hands. And your plan is to blackmail this person? Good luck.” - Lucius Fox, *The Dark Knight* (2008)
• Suing for Fees
  – Still, a collection suit is sometimes a reasonable tool against deadbeat clients.
    • Evaluate *all* statutes of limitations.
    • Independent review of fee claim.

• **MORAL:** In a downturn, understanding and evaluating the risks of suing for fees matters more.
Loss Prevention in Tough Times

More Questions?
Ethics in E-discovery and Using Metadata

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June 6, 2012
What is “Metadata”

- Metadata is a generic term, “data about data”
- Data a computer creates unbeknownst to the user
- Data that the user inputs into a document
  - It can be hidden information reflecting editorial comments, strategy considerations, legal issues, or legal advice
  - Embedded data
- Metadata can be altered if not handled carefully
- Today we’ll use the term in its broadest sense
Ethical Issues Involving Metadata

- Recent ethical guidance regarding how to handle metadata in electronic documents

- Opinions address several aspects of how lawyers handle metadata
  - Documents being sent to another
  - Documents received from another
  - Differences between correspondence and discovery documents
Ethical Issue Involving Metadata

• Implicates several ethical concepts
  ▪ Duty to represent your client zealously
  ▪ Duty of competency
  ▪ Obligation to maintain client confidences
  ▪ Obligation to safeguard privileged information

• Context is important
  ▪ Is it a communication between opposing parties?
  ▪ Is it a document produced during discovery in litigation?
Ethical Issue Involving Metadata

- In documents one attorney is sending to another

- NY Op. 782, issued in December 2004
  - Addresses ethical standard for emailing a document that has metadata containing “client confidences”

- ABA Op. 11-459, issued August 2011
  - Addresses duty to protect confidentiality of e-mail communications
  - Issues with employees use of a company computer
Ethical Issue Involving Metadata

• Must exercise “reasonable care” to prevent the disclosure of client confidences in metadata

• “Reasonable care” may require the attorney to “stay abreast of technological advances and the potential risks in transmission”

• Currently prevailing standard
Ethical Issues Involving Metadata

- What about documents received from another?

- To look or not to look . . . . Conflict among legal ethics authorities

- Implicates zealous representation duty and the duty of competency
DC Ethics Opinion 341

- Published Sept. 2007
- When “receiving lawyer has actual knowledge that an adversary has inadvertently provided metadata in an electronic document, the lawyer should not review the metadata without first consulting with the sender and abiding by the sender's instructions.”
- “In all other circumstances, a receiving lawyer is free to review the metadata contained within the electronic files provided by an adversary.”
- Similar to bar opinions in Colorado and West Virginia
ABA and Maryland approach

- ABA Op. 06-442 (Aug. 5, 2006) (“No specific prohibition against” searching for and using metadata, does not violate concept of lawyer’s “honesty”)

- MD Op. 2007-092 (“this Committee believes that there is no ethical violation if the recipient attorney (or those working under the attorney’s direction) reviews or makes use of the metadata without first ascertaining whether the sender intended to include such metadata”)

- Similar to bar opinions in Minnesota and Vermont
New York Approach

- Addresses use of computer software to examine electronic documents
- Use of computer technology to access client confidences revealed in metadata constitutes “an impermissible intrusion on the attorney-client relationship”
- This “prohibited approach” is similar to bar opinions in Alabama, Arizona, Florida, Maine, N.H., and North Carolina
Conflicting Authority

• Three lines of somewhat conflicting authority from the state ethics bars, which may conflict further with judicial opinions in those states (see, e.g., West Virginia)

• Numerous states have not yet weighed in on the issue

• Area of significant risk, in which prudence likely dictates a conservative approach
Context is Critical

- Distinction between correspondence and discovery materials is important

- Discussion has focused on correspondence and inadvertent production of hidden metadata

- In discovery context, metadata can also be at issue
Negotiating Metadata Issues in the Meet-and-Confer Process

- Under the FRCP, parties required to meet-and-confer regarding these issues
- Issue is which fields will be produced
  - Certain “standard fields” have evolved over time
  - Recently, attorneys have sought additional fields (could be driven by new technologies)
- Technological limitations still largely preclude “native” productions
Preparing to “Meet and Confer”

• Must work closely with client and vendor to understand (1) what fields are available for the various file types, (2) vendor limitations on collecting and producing those fields, and (3) any additional costs or impact on work flow caused by an agreement to produce those additional field

• Be particularly mindful if client has changed from one system to another
Inadvertent Production Issues

- The parties should try to obtain a provision that addresses the inadvertent production of materials (i.e., a “clawback” provision)
  - FRE 502(b) also provides some protection
- Inadvertent metadata production should be addressed through ESI protocol and FRE 502(b)
Correspondence versus Discovery

- Ethical issues are still implicated, because counsel has ethical obligation to protect confidences and privileges, even in the discovery context.
- Improper “scrubbing” of evidence can raise serious issues.
Best Practices

- Awareness of the issues, act reasonably, and be careful
- Understand the technology and risks
- Take a conservative approach where the law is unsettled
- Remember context matters
- Be prepared for the meet-and-confer process
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