Closing Program – Conflicts, Waivers, and Client Protection: A Mock Meeting of In-house and Outside Counsel

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Anthony E. Davis is a partner at Moye, Giles, O'Keefe, Vermeire & Gorrell, LLP. He practices law in New York and Colorado and advises lawyers and law firms on legal profession and legal ethics issues, and law firm risk management and loss control.

He is the author of *Risk Management: Survival Tools For Law Firms*, and *The Essential Formbook: Comprehensive Practice Management Tools for Lawyers*, published by the ABA. As an adjunct professor of law, he taught "Legal Profession" at Brooklyn Law School for many years. In addition to his books, he has written and lectured widely on a variety of legal profession and ethics issues, including a regular bimonthly column on Professional Responsibility in the *New York Law Journal*.

He is a director and the secretary of the Association of Professional Responsibility Lawyers, a member of the Professional Responsibility Committee of the Association of the Bar of the City of New York, a member of the American Law Institute, and a fellow of the College of Law Practice Management.

He received his law degree from Cambridge University, and an LLM from New York University School of Law.

William Freivogel

William Freivogel is a consultant to law firms and other lawyer groups on legal ethics and professional liability. He publishes an online guide to conflicts of interest, "Freivogel on Conflicts," located at www.freivogelonconflicts.com.

Mr. Freivogel was previously served for 12 years as loss prevention counsel at Attorneys' Liability Assurance Society. He was a trial lawyer for over 20 years, most of which he spent with Ross & Hardies in Chicago.

He is a member of the American Law Institute, where he served on the Members' Consultative Group of the Restatement Third, The Law Governing Lawyers project. He is a member of the ABA, and serves on the advisory council to the Commission on the Evaluation of the Rules of Professional Conduct–"Ethics 2000." He is a member of the American Bar Foundation and the Lawyers' Club of Chicago.

Mr. Freivogel received his BS and LLB from the University of Illinois.

Peter R. Jarvis

Peter R. Jarvis is partner and chair of the Professional Responsibility Practice Group of Stoel Rives LLP located in Portland, Oregon. His practice includes advising attorneys with legal ethics questions and defending attorneys accused of legal ethics violations.

Mr. Jarvis is a member of the Oregon and Washington State Bars. He is a frequent writer and speaker on legal ethics issues. He is also this year's chair of the ABA Center for Professional Responsibility Conference Planning Committee. Mr. Jarvis is a former member of the Washington State Bar Rules of Professional Conduct Committee and the Oregon State Bar Legal Ethics Committee. He is a coauthor of the *Oregon Rules of Professional Responsibility Annotated* and an ethics columnist for *The Oregon Law Journal*, an online publication that can be found at orlj.com.

In 1991, Mr. Jarvis received the "President's Membership Services" award from the Oregon State Bar for his ethics work. In 1993, he received the Harrison Tweed Special Merit Award from ALI-ABA for his continuing legal education work in ethics. In 1995, Mr. Jarvis was elected to membership in The American Law Institute.

Mr. Jarvis received a BA from Harvard University, and an MA in economics and JD from Yale University.

William B. Lytton

William B. Lytton is senior vice president and general counsel of International Paper Company in Stamford, Connecticut.

Mr. Lytton came to International Paper from Lockheed Martin Corp., where he was vice president and associate general counsel for the electronics sector. Before the combination of Lockheed and Martin Marietta, he served as vice president and associate general counsel for business operations and international at Martin Marietta. Before Martin Marietta acquired General Electric Aerospace, Mr. Lytton had served as vice president and general counsel of GE Aerospace.

Mr. Lytton served on the staff of U.S. Senator Charles H. Percy. He was an assistant U.S. attorney in the Northern District of Illinois and was an Assistant U.S. Attorney in the Eastern District of Pennsylvania, serving as chief of the criminal division and later as first assistant U.S. attorney. He then joined the Philadelphia law firm of Kohn, Savett, Klein and Graf where he was a trial lawyer handling a variety of criminal and civil matters. While at the law firm, he served as staff director and chief counsel for the Philadelphia Special Investigation (MOVE) Commission.

In 1987, he left his law firm for a six-month assignment as deputy special counselor to President Ronald Reagan. In that position, he coordinated the White House response to the congressional inquiries and independent counsel's investigation of the Iran-Contra matter. Upon his return to his law firm, he continued as a consultant to the President throughout the Reagan Administration. He also served as special counsel to President George Bush on issues relating to the Iran-Contra matter.

Mr. Lytton is vice chair of ACCA's board of directors. In 1998, he received ACCA's "Excellence in Corporate Practice" award. Mr. Lytton is a graduate of Georgetown University and the American University School of Law.

John H. McGuckin, Jr.

John H. McGuckin, Jr. is executive vice president, general counsel, and secretary of The Bank of California and the bank's chief trust counsel.

Prior to joining The Bank of California, Mr. McGuckin worked in the Bank of America Legal Division and in private practice. During this time, he specialized in the areas of probate administration and litigation, estate planning, taxation, community property, and family law. Mr. McGuckin is a frequent author and speaker on Y2K, compliance, corporate law department management, corporate governance, and legal ethical topics.

Mr. McGuckin was the first in-house counsel elected to the board of governors of the State Bar of California, where he served a three-year term. He has chaired the State Bar's Committee on Continuing Legal Education and served on the State Bar's Legal Trust Fund (IOLTA) Commission. He was also vice president and treasurer of the State Bar of California, chairing the Administration and Finance Committee. As a member of ACCA's board of directors, Mr. McGuckin currently chairs the board's Advocacy Committee.

Mr. McGuckin is a *magna cum laude* and Phi Beta Kappa graduate of Harvard College and received his JD from Harvard Law School.

Roderick A. Palmore

Roderick A. Palmore is senior vice president, general counsel, and secretary of Sara Lee Corporation in Chicago.

Mr. Palmore previously was a partner with Sonnenschein, Nath & Rosenthal in Chicago. He was a partner with Wildman, Harrold, Allen & Dixon prior to that, and was also an assistant United States attorney in the Northern District of Illinois.

Mr. Palmore is a member of the board of directors of the Chicago Board Options Exchange, ACCA, the Boys and Girls Clubs of Chicago, Centers for New Horizons, and the Village Foundation. He also is a member of the Visiting Committee of the University of Chicago Law School. He has served on the board of directors of the Chicago Bar Foundation, the Legal Assistance Foundation of Chicago, and the Public Interest Law Initiative. He also served on the Chicago Bar Association's board of managers and nominating committee. He has been chair of the Plan Commission of the Village of Oak Park.

Mr. Palmore received a BA from Yale University, where he was a National Achievement Scholar, Kenneth MacLeish Scholar, and Yale Alumni Association of Pittsburgh Scholar. He received a JD from the University of Chicago Law School.

Gloria Santona

Gloria Santona is general counsel of McDonald's Corporation in Oak Brook, Illinois.

Ms. Santona previously served as vice president and U.S. general counsel, as well as secretary, of McDonald's. As U.S. general counsel, Ms. Santona oversaw the delivery of legal services to McDonald's U.S. division. She also served as corporate secretary and was responsible for oversight of corporate, securities, regulatory, and transactional matters. Ms. Santona joined McDonald's as an attorney immediately following law school. Since then, she has held successive positions in the corporate legal department. Ms. Santona is a member of the ABA , Chicago Bar Association, and ACCA. She is also a member of the board of directors of the American Society of Corporate Secretaries and serves as a member of its Corporate Practices Committee. Ms. Santona was formerly chair of the Corporate Board of Advisors of the National Hispana Leadership Institute.

Ms. Santona received a BS from Michigan State University and is a *cum laude* graduate of the University of Michigan Law School.

John K. Villa

John K. Villa is a partner at Williams & Connolly LLP in Washington, DC. He specializes in corporate and financial services-related litigation, both civil and criminal.

Mr. Villa is an adjunct professor at Georgetown University Law School teaching a course entitled "Counseling the Corporation in Crisis. " He was a trial attorney (Honors Program) in the U.S. Department of Justice and a special assistant U.S. Attorney in the U.S. Attorney's Office in the District of Columbia. He was a recipient of the Attorney General's Special Commendation Award for Outstanding Service (1975).

He was named to *National Law Journal*'s list of "100 Most Influential Lawyers in America" as "the first lawyer that other attorneys and law firms turn to when caught up in the S&L and banking scandals." He has recently been retained as claims counsel to the Attorneys' Liability Assurance Society, Inc. (ALAS)–the nation's largest insurer of lawyers and law firms. He is a member of the advisory board of Georgetown Law School Corporate Counsel Institute.

Mr. Villa is a graduate of Duke University and the University of Michigan Law School, where he was an editor of the *Michigan Law Review*.

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Conflicts and Waivers 101: A Primer for In-House Counsel

by Peter R. Jarvis and Mark J. Fucile

I. Introduction.

Sooner or later, and sometimes quite often, in-house counsel are asked for conflicts waivers by their outside law firms. As ethics counsel for a law firm, we have helped to make many such requests. As outside advisors to corporate counsel with respect to requests for waivers submitted by other firms, we have also had ample opportunity to be on the other side of the fence.

This article summarizes our experience on both sides. Part II provides a brief overview of the rules relating to the three principal kinds of conflict of interest that may result in conflicts waiver requests—current client conflicts, former client conflicts and personal or business conflicts on the part of the lawyer or law firm. This part of the article is annotated with references to both the Washington State Bar Rules of Professional Conduct (the "RPCs") and the Oregon State Bar Disciplinary Rules (the "DRs"). Part III then discusses the issues that in-house counsel typically do or should consider when reviewing a request for a conflicts waiver. Because this part of the article is based on our experience, it is unannotated.

II. The Basic Conflicts Rules.

As a matter of fact and law, the relationship between client and attorney is one of principal and agent. It should therefore come as no surprise that the duty of loyalty that attorneys owe to their clients is at the heart of the attorney-client relationship just as it is central to other agency relationships. The principal purpose of the conflict of interest rules is to codify or enforce those aspects of the duty of loyalty whose violation can lead to attorney discipline. Although the conflicts rules are not identical in all American jurisdictions, they are largely similar in most respects.

A. The Current Client Conflicts Rules.

The core of the current client conflicts rules can be simply stated: American lawyers and law firms may not represent one current client adversely to another current client on any matter unless, at a minimum, both clients consent to the conflict after full disclosure.[1] In other words, current clients have veto power that allows them to prevent any of their current counsel from opposing them on any matter, whether it is related or unrelated to the work that is being done for that client. And due to the so-called "hot potato" rule, a law firm generally cannot avoid the effects of the current client conflicts rules simply by dropping a less desirable client in midmatter.

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1 *See, e.g.*, RPC 1.7; DR 5-105.

There also are some conflicts between current clients that the law regards as so severe that even a knowing conflicts waiver by informed and intelligent clients on all sides of a matter will not shield the lawyer from discipline. In some jurisdictions, for example, a lawyer or law firm cannot ethically represent both a buyer and a seller to a real estate transaction even if both clients consent after full disclosure.[2] In others, a lawyer can do so if the transaction is not too complex.[3] In still others, such representations would appear to be completely permissible if competent clients knowingly agree to them. There is, at present, no general and universal agreement among American lawyers about how such lines should be drawn.

There also is no general and universal agreement with respect to another critical aspect of current client conflicts relations. All of the examples posited above involve what amounts to a fixed-sum game in which "more" for one client necessarily means "less" for the other. Suppose, however, that several current or would-be clients simultaneously ask a single lawyer or law firm to represent all of them in putting together a corporation or other business entity in which they hope to do business together. In this type of situation, the adversity that is present in, say, a straight buy-sell situation may as a practical matter be reduced, if not overcome, by the joint interests that the would-be incorporators or partners will have in putting together a profitable business. It should come as no surprise, therefore, that the answer to the question whether a single lawyer or law firm may represent multiple would-be incorporators or partners with or without consent is "it depends." If the interests of the proposed multiple clients are too adverse, a single lawyer or firm cannot represent them all even if all consent. If the interests are or reasonably appear to be entirely or almost entirely consistent, simultaneous representation may be permissible even without a formal conflicts waiver. And in all situations in between, a lawyer or firm may proceed only on the basis of informed consent from all of the clients.[4]

These are not the only current client conflicts questions. At times, for example, one can legitimately question whether a particular entity or individual is or is not a client of the lawyer and whether a particular attorney-client relationship has ended or is still a current attorney-client relationship.[5] One can also question whether, or under what circumstances, a representation of or adverse to one among a number of related brother-sister or parent-subsidiary corporations constitutes the representation or action adverse to other entities for conflicts purposes.[6] And although the disqualification of one lawyer in a firm typically requires the disqualification of all other lawyers at that firm, there are times when the screening of a laterally hired lawyer or the fact that the only lawyer who received client confidences about a matter may have left the firm may avoid the need for disqualification and prevent a current client from exercising any veto power.[7] As is noted in the first paragraph of this subsection, however, the general rule of current client conflicts is simply that current clients typically have veto power: If they do not allow "their" lawyers to oppose them, their lawyers may not do so.

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2 *See, e.g., In re Johnson*, 300 Or 52, 707 P2d 573 (1985).

3 *See, e.g., Baldasarre v. Butler*, 625 A2d 458 (NJ 1993).

4 *See, e.g., The Ethical Oregon Lawyer* § 12.14 (OSB CLE 1991 & Supp 1998).

5 *See, e.g., id.* § 6.3, *et seq.* (1991 & Supp 1998).

6 *See, e.g., id.* § 6.5 (1991 & Supp 1998).

7 *See, e.g.*, RPC 1.10(c); DR 5-105(J).

B. The Former Client Conflicts Rules.

Former clients also have veto power, but it is limited to two situations. In addition, former clients can always waive conflicts.[8]

The two types of situations in which former client conflicts waivers are required have sometimes been referred to as "matter-specific" and "information-specific."[9] A matter-specific conflict exists, and a conflicts waiver is required, if the transaction or litigation that a lawyer or law firm proposes to handle adversely to a former client is the same as or sufficiently identical to the transaction or litigation that the lawyer previously handled for that client. For example, a lawyer who represents the seller in a real property transaction cannot subsequently represent the buyer in litigation against the seller relating to that contract even if it can be shown that the lawyer learned no pertinent confidences or secrets from the seller at the time of the former representation.[10] Not surprisingly, there is some dispute in the case law concerning how closely two matters must be related before a conflicts waiver is required.

By contrast, an information-specific former-client conflict exists if, during the course of work on a prior matter, a lawyer or firm learned confidential client information that could be used adversely to the former client in the present matter.[11] Not surprisingly, there is also disagreement within the case law concerning how clear the proof must be.

In many cases, matter-specific and information-specific conflicts will both be present. In many others, neither one will be. The point for present purposes is only that the presence of either one requires a conflicts waiver. And in a former-client conflicts case, the waiver must come from both the current client who is to be represented and the former client who is to be opposed.

C. Personal or Business Conflicts.

The duty of loyalty can be violated not only by conflicting obligations owed to multiple current or former clients but also by conflicts between a single client's interests and the lawyer's own personal or business interests. In some jurisdictions, all or nearly all such conflicts would appear to be waivable. In others, some conflicts of this type cannot be waived.[12]

The personal or business conflicts that are more likely to come to the attention of in-house counsel will generally be waivable. Suppose, for example, that a corporate client wishes to compensate a lawyer through the issuance of stock to the lawyer. Subject to the applicable limitations on excessive or unreasonable fees, such an alternative payment relationship is permissible as long as the lawyer provides a sufficient explanation of the pros and cons.

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8 *See, e.g.,* RPC 1.9; DR 5-105(C), (D).

9 *See, e.g.,* RPC 1.9; DR 5-105(C).

10 *See, e.g.,* OSB Legal Ethics Op Nos 1991-11, 1991-17.

11 *See, e.g., id.*

12 *See, e.g.,* RPC 1.7(b), 1.8; DR 5-101, 5-104.

Personal or business conflicts can also arise when a lawyer or member of a lawyer's firm also occupies a position on a client's board of directors. In this type of situation, the conflict arises because the lawyer's or firm's duties as lawyers may conflict with the individual lawyer-director's duties as director. Once again, such conflicts are likely to be waivable after full disclosure.

D. A Conflicts Rules Postscript.

Three further points are worth noting. First, the conflicts rules do not necessarily provide the full measure or extent of a lawyer's duties to a client. A lawyer or firm may be held civilly liable for breach of fiduciary duty even though a violation of the formal ethical rules may not be present. Conversely, there are also times when a lawyer will be subject to discipline even though the client would have no private cause of action.[13] It follows that in-house counsel need to keep an eye on more than what the formal conflicts rules provide.

Second, in-house counsel who agree to a conflicts waiver are not necessarily without disciplinary risk if, for example, the conflict turns out to be one that cannot be waived. This is true because lawyers are generally prohibited from assisting other lawyers in violating the rules.

Finally, and because the nature or degree of a conflict of interest may change over time as circumstances or client interests may change, conflicts waivers will sometimes need to be repeated or renewed. It is also possible that what was a waivable situation will become one in which the conflict cannot be waived.[14] Both in-house counsel and outside counsel must therefore remain alert as events unfold.

III. Conflicts Waiver Considerations.

When outside counsel decide whether to request a conflicts waiver, they typically consider three things: Whether it is ethical to do so, whether they are likely to get the consent that they seek and whether the benefits of making the request outweigh the potential burdens. The questions that in-house counsel should ask when faced with a conflicts waiver request are essentially the same. For present purposes, however, we have broken down these questions into six overlapping but distinguishable parts.

A. What Kind of Work Is To Be Done?

1. Business Matters.

Experience tells us that conflicts waivers are much easier to obtain in business matters than in litigation. Presumably, this is because both sides to a potential deal begin by wanting to see the deal completed, and neither side is likely to wish to impose extra burdens by, for example, making the other side change counsel unless there is some real reason to do so. This kind of analysis makes sense.

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13 *See, e.g.,* RPC 5.1; DR 1-102(A)(1), 1-102(B).

14 *See, e.g., The Ethical Oregon Lawyer* § 12.2 (1991 & Supp 1998).

Some parties to business deals also seem to act on the theory that the devil they know may be better than the devil they don't know and that a lawyer on the opposite side of a matter who is beholden to them in some way will be more likely to be fair to them than a total stranger. We are not sure that this kind of analysis makes sense. Whether this is a realistic belief in light of the opposing lawyer's obligation to represent the opposing party zealously seems to us to be subject to serious question in many cases.

2. Litigation.

Unlike parties who hope to do business together, parties to litigation sometimes think that they can gain by placing as many obstacles in an opponent's path as possible. Whether this strategy works very often—whether the litigation opponent that is forced to get new counsel will really fight less hard, for example—seems to us to be open to question in many cases.

Although it would seem that there is in any event little to lose by making life potentially more difficult for an opponent in litigation, there are also reasons why a client may wish to consent to being sued by its own lawyer. If, for example, a client wishes to make use of Lawyer X at Firm X, it may be the case that Firm X would be unwilling to let Lawyer X work for the client unless the client is willing to let Firm X represent opposing parties in certain kinds of litigation unrelated to the work of Lawyer X. On the other hand, and at least when a client can be sure that its confidences and secrets will not be used against it, there is often very little reason not to allow a party to a business transaction to use its "regular" corporate counsel—particularly if the client was not going to use that firm in any event.

It may also be the case that the type of matter is as important as whether the matter does or does not involve litigation per se. For example, a client can reasonably conclude that it will allow a firm to represent opposing parties in small- or medium-sized breach of contract actions but not in bigger dollar actions or in actions in which fraud may be alleged.

A client should also bear in mind that it can determine how much consent to give and can, for example, agree to allow a law firm to oppose it in attempting to negotiate a particular transaction or the resolution of an existing conflict but not allow the law firm to litigate against it if the transaction or negotiated resolution subsequently falls apart. Because consent need not be given, it can be given conditionally. In fact, in-house counsel may wish to look with greater favor upon conflicts waiver requests that are made with additional protections "built in" before a request is made for them.

B. Who Will Do the Work?

Although a client's right to insist upon the disqualification of one lawyer at a firm typically allows the client to insist upon the disqualification of an entire firm, many clients are reasonably and understandably less concerned about conflicts waivers when the lawyers who will work for them and the lawyers who will work against them are not the same individuals. Moreover, a bright-line distinction of this type can save everyone from potential embarrassment or difficulties at a later time.

Once again, clients should understand that they have a right to condition their consent on outside counsel's agreement to use different lawyers for and against a client or to take one or more particular steps to, for example, protect against the adverse use of the clients' confidential information.

C. Are Client Confidences or Secrets at Risk?

This question has two parts. One is simply whether the work that a lawyer or firm has done or is presently doing for a client has given the lawyer confidential client information that the lawyer would be in a position to use adversely to that client in the matter for which the waiver is sought. The other is whether, if such a risk does theoretically exist, the client is nonetheless satisfied that protective measures can be taken, such as using different personnel or bringing in another firm to handle particular issues, to assure that this risk will not become a reality. There are few situations in which a conflicts waiver should be given if in-house counsel is not satisfied on both points.

D. How Related or Unrelated Is the Work?

This question is implicit in several of the prior questions. Clients are understandably and quite properly more willing to grant conflicts waivers for work that is altogether unrelated to the work that a lawyer or firm is doing for them than for work that may be related in some way—whether because the same kinds of issues are involved, because the same lawyers or company personnel are involved or because there is overlapping confidential client information.

E. How Broad Is the Consent?

Future or blanket conflicts waivers are permitted in some, if not necessarily all, jurisdictions. The two critical questions are whether the subsequent conflict is not subject to waiver (in which case an advance waiver is no better than a present one) and whether the disclosure provided an adequate basis for the future consent.[15] Although there are many circumstances in which a blanket conflicts waiver is both necessary and appropriate, there are others in which in-house counsel may at least wish to consider whether a more limited waiver would be more in keeping with client interests. At a minimum, raising this question with outside counsel may help flesh out what is and is not at stake in a particular conflicts waiver request.

F. How Good Is Outside Counsel's Disclosure?

Some states require written conflicts waivers.[16] Others do not. Even in those states in which no writing is required, however, we believe the better practice from both outside counsel's and the client's point of view is for outside counsel to submit some form of written request for a waiver. We also believe that in-house counsel who are asked to consider a waiver request ought to ask themselves whether the combined oral and written disclosures by outside counsel

15 *See, e.g.,* OSB Legal Ethics Op No 1991-122.

16 *See, e.g.,* RPC 1.7; DR 10-101(B).

adequately explain the kind or kinds of conflict and the nature of the problem or problems that could result from them. We are concerned that an outside lawyer who does not explain a conflict in a manner that effectively brings home the essential points to in-house counsel may not fully understand the conflict at issue and why someone should care about it. We are also concerned that a lawyer who does not understand a conflict may be less likely to take the steps that are necessary to protect the client's interests.

IV. Concluding Remarks.

Both in-house and outside counsel are human beings, and in many cases conflicts waivers therefore come down to a matter of personal relationships. Lawyers who are more comfortable with each other and their respective roles are more likely to understand what may be waivable and what should be waived. As we hope we have shown, however, more is at stake than merely the personalities of the particular individuals involved. Both the substantive rules of conflicts law and the interests of the client should be considered before a decision is reached.

Freivogel on Conflicts

A practical online guide to conflicts of interest for lawyers with sophisticated business and litigation practices.

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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 daily, using a variety of sources, including online and hard copy. The articles represented in the Table of Contents contain in total the largest collection of citations to cases, ethics opinions, and articles on conflicts of interest available. Before using these materials, please read the "Ground Rules for Using this Site."

Special Page for Corporate Law Departments. The author has prepared a conflict-of-interest guide for corporate law departments. To go there, click here.

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CONFLICT OF INTEREST ISSUES FOR CORPORATE LAW DEPARTMENTS

Following are situations confronting corporate law departments that the author has observed in his 13 years working with large law firms on ethics and professional liability matters. There are other issues relevant to law departments not covered at this page, but which are covered in the main body of this site. To see the Table of Contents for the entire site, click here. Also note that the latest cases, ethics opinions, and articles, on conflicts, are collected at a page entitled, "*What's New*." To go there, click here.

For a tragic story of how a general counsel was screwed by one of his company's principal law firms in a conflict of interest situation, go to "THEY *WHAT*?" by clicking here.

Advance Waivers

The Situation. You want to hire a boutique law firm to handle one highly specialized matter. The firm has sued your company in the past and is certain that it will have multiple opportunities to sue you after this matter terminates. In order to eliminate any doubts about being able to do this, the firm asks for you to waive in advance any conflicts that might occur after the current matter terminates.

Analysis. Advance waivers are discussed in some detail at another page at this site. To go there, click here. As you will see at that page, these agreements will work, but in the more recent cases, the courts found ways not to enforce them.

Practice Tip. You do not have to sign such a waiver. You might have to in order to get the firm to handle the matter. If you do sign such a waiver, you can negotiate the terms. You can say what sorts of matters you will not consent to, such as litigation.

Corporate Families

The Situation. You discover that one of your current law firms has sued a subsidiary of your company.

Analysis. Corporate family conflicts are discussed in detail at another page of this site. To go there, click here. If you have provided in an engagement letter that the firm cannot sue corporate affiliates, that will end the matter fast. The firm must withdraw or be disqualified. What if you have no such agreement? In a few jurisdictions, the courts are of the view that this is always a conflict - the "bright line" rule. In more jurisdictions, the court will consider all the

facts and circumstances - the "weighing" test. In a few, the courts apply the *alter ego* test that courts use in corporate veil cases. In one court (Southern District of New York) the court applied the bright line rule where the corporate relationship was parent-subsidiary, but applied a weighing test when the relationship was sister-sister subsidiaries. *Stratagem Dev. Corp. v. Heron Int'l. N.V.*, 756 F. Supp. 789 (S.D.N.Y. 1991)(bright line); *Travelers Indem. Co. v. Gerling Global Reinsurance Corp.*, 2000 U.S. Dist. LEXIS 11639 (S.D.N.Y. 2000)(weighing).

Practice Tip. Periodically send your firms an updated list of corporate affiliates, and request that they enter the names as clients into their conflicts databases. Most law firms do not routinely do corporate family searches in their conflicts checking, because it is too labor-intensive and not 100% effective. Giving them a list will enable them to avoid problems with your company.

For a small fiction piece involving a corporate family, see "THEY *WHAT*?" To go there, click here.

Lawyers Changing Firms

The Situation. You discover that an associate at one of your firms, who was working on one of your matters has gone to another firm, and the new firm is on the other side of that matter.

Analysis. Without your consent, the associate may not work on the matter at the new firm. And, depending on the jurisdiction and the new firm's handling of the matter, the new associate may cause the entire firm to be disqualified. In a few states the new firm may cure this problem by creating a "Chinese Wall" or screen around the new lawyer. Then, it stays in the matter even without your consent. In all other states, the new firm may have to get out, unless it gets your consent. For a state-by-state analysis of whether screening without consent will work, click here.

"Hot Potato" Doctrine

The Situation. Your company's law firm is handling one small matter currently. It notifies you that it wants to withdraw from that matter. You reluctantly agree and find new counsel. The original law firm now winds up as lead counsel in a $1 billion suit against your company.

Analysis. Courts frown on law firms that drop one client like a "hot potato" in order to take on a more lucrative matter for another client against the first firm. If that is what happened, your motion to disqualify your former firm will most likely be granted. Then, they will have neither matter. If the firm's conduct was completely innocent, such as where a company merger caused the conflict, the court may likely allow the firm to drop one client and keep the other. For a more detailed analysis of the "hot potato" rule, click here.

"Underlying Work" Syndrome

The Situation. Your company's law firm handles a deal. The other side now raises an issue about the meaning of a contract and threatens suit. Do you use the same law firm to handle the dispute?

Analysis. You must consider two things.

The first concern is whether the law firm has "gotten you into this." Was the contract unnecessarily ambiguous? How will the law firm argue the case? Will they be upfront about the ambiguity? Or will they structure the case to deflect attention from that point? Moreover, if the firm's handling of the deal was lacking, should not the firm and its malpractice carrier be part of a three-way negotiation to settle the dispute? If so, who will hold their feet to the fire?

The second issue is whether a lawyer from the firm will have to testify. Most jurisdictions have adopted a version of ABA Model Rule 3.7, which permits one lawyer to try a case even though another lawyer in the firm must be a witness. That is all well and good, but someone must make an objective evaluation about whether that combination will hurt the lawyer/witness' credibility. Can that law firm make that evaluation?

Practice Tip. Do not necessarily be quick to drop the firm. They know a lot about the matter, and bringing another firm up to speed might be expensive. Do be quick to get a second opinion about whether the firm can represent you effectively and will analyze the case objectively in light of the two points made above.

Lawyers Representing Lawyers

The Situation. Your company is a defendant in a bitterly contested contract action. You are using the Smith firm. You learn that the lawyer representing the plaintiff may be the target of a federal grand jury proceeding. You also learn that he has retained a preeminent white collar criminal lawyer from the Smith firm, your firm. Any problem?

Analysis. Check it out. One concern is whether the Smith firm will "pull its punches" to your detriment in order not to offend the plaintiff's lawyer. Another, more real, concern is that there are some things the Smith firm simply will not be able to do on you behalf. For example, suppose the plaintiff has been guilty of egregious litigation misconduct such as destroying documents or computer files, and the plaintiff's lawyer is involved in that conduct up to his ears. A motion for sanctions against both the plaintiff and the plaintiff's lawyer would be in order. Under every state's version of Model Rule 1.7(a)(except possibly Texas), the Smith firm would then be directly adverse to its current client, the plaintiff's lawyer - something it cannot do without the plaintiff's lawyer's consent. Suppose the Smith firm advises that a motion for sanctions would be appropriate only against the plaintiff but not the lawyer. Are they being objective? You may want a second opinion on these questions.

For a more complete discussion of lawyers representing lawyers at this site, click here. For a discussion of "direct adversity" and current clients, click here.

Beauty Contests

The Situation. Your company needs counsel in a certain city to handle a major law suit there. You plan to conduct interviews at

three firms. One of the firms has never represented your company. During a telephone conversation setting up the meeting with that firm, the partner requests that you sign a letter saying that you will not convey any company confidences during the interview. He also asks you to agree that if you do not hire that firm, it will be free to represent another party in the suit in question.

Analysis. Those are usually reasonable requests. They are the product of a high profile case in which a major law firm was conflicted out of a case, because it had allegedly "heard too much" during the beauty contest. *Bridge Products Inc. v. Quantum Chem. Corp.*, 1990 U.S. Dist. LEXIS 5019 (N.D. Ill. 1990). For a more complete discussion of this, go to "Initial Interview - Hearing too Much," by clicking here.

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WAIVERS/CONSENTS

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This article has several significant sections. They are listed immediately below, and to go to any one of them, just click on the title.

"Consent" vs. "waiver." The core rule on conflicts of interest, Model Rule 1.7. uses "consent." So does the *Restatement*, when discussing conflicts. Many cases and writers use the terms interchangeably. "Waiver" seems slightly broader. For example, when one considers passage of time as precluding a conflict objection, one thinks of "waiver," rather than "consent." The author will use "waiver" throughout this article.

Non-Waivable Conflicts

The focus of this section will be to identify conflicts that simply may not be waived. Comment [7] to Model Rule 1.7 says:

> [7] Paragraph (a) [of the rule] prohibits representation of opposing parties in litigation.

Another Comment to Rule 1.7 that comes close to an outright prohibition is Comment [12], which says:

> . . . [A] lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

What Comment [12] *probably* means is that a lawyer may not represent both the buyer and the seller or the lender and borrower. It pretty clearly means that representing more than one buyer or lender in the same transaction is possible, presumably with a waiver. As to the buyer-seller, lender-borrower situations, there are very few opinions articulating an out-right prohibition. The few of which the author is aware are in a separate article at this site, "Commercial Negotiations." To go there, click here.

Ethics 2000. As to litigation, the Commission proposes to make the black letter of Rule 1.7 more specific by prohibiting a lawyer from asserting a claim for one client against another client in the same litigation. Neither the proposed rule nor the Comments do much to clarify the buyer-seller, lender-

borrower situation. To go to the Ethics 2000 treatment of Rule 1.7 and the Comments, click here.

Restatement. The black letter of § 122(2) makes the same clarification as to litigation as would the Ethics 2000 Commission. As to non-litigation, the *Restatement,* likewise, does little to clarify things.

Cases. A handful of cases discuss the litigation prohibition. Those of which the author is aware are: *Sapienza v. New York News*, 481 F. Supp. 676 (S.D.N.Y. 1979)(dicta); *Klemm v. Superior Court*, 142 Cal. Rptr. 509 (Cal. App. 1977)(uncontested divorce); *Florida Bar v. Feige*, 596 So.2d 433 (Fla. 1992)(attorney could not defend client and himself in lawsuit, despite client's consent); *Zarco Supply Co. v. Bonnell*, 658 So.2d 151 (Fla. App. 1995)(law firm's representation of wife and children against husband and husband's insurer in personal injury lawsuit was improper where law firm also represented husband in medical malpractice action, despite husband's consent; client consent is insufficient where "the fair administration of justice" is called into question); *Kelly v. Greason*, 244 N.E.2d 456 (N.Y. 1968); and *Jedwabny v. Philadelphia Transportation Co.*, 135 A.2d 252 (Pa. 1957), *cert. denied*, 355 U.S. 966 (1958). As to non-litigation, go to "Commercial Negotiations," by clicking here.

N.Y. City Op. 2001-2 (2001) deals primarily with transactions, but touches on litigation as follows:

> In litigation, the answer is clear-cut.˚ As Professor Simon states, "Obviously, a lawyer cannot represent both sides in the same litigation.˚ That is one of the few per se rules in the field of conflicts."˚ Simon's New York Code of Prof'l Resp. Ann., DR 5-105, at 337 (West 2000); accord˚Wolfram,⁄3.7.2 ("Almost without exception, a lawyer may not represent adverse parties in the same litigation.").

Robertson v. Wittenmyer, 736 N.E.2d 804 (Ind. App. 2000) Wittenmyer was driving, and Robertson was a passenger. They rear-ended a truck, and a station wagon rear-ended them. McGlone represented Wittenmyer and Robertson against the station wagon. They settled. Robertson's share was less than his medical bills. McGlone then sued Wittenmyer on behalf of Robertson. During all this time McGlone was representing Wittenmyer in a workmen's compensation matter. The court held that McGlone should be disqualified and that the conflict was non-waivable

Additional Note on Litigation. In footnote 12 to Rotunda § 8-2, Professor Rotunda makes the common sense observation that a lawyer may be able to handle a simple, uncontested divorce for both parties. Many lawyers would agree with him. That was the ruling in *Klemm*, above. But, see Hazard & Hodes § 11.4, Illus. 11-1. In *In re Egedi*, 2001 Cal. App. LEXIS 239 (Cal. App. 2001), the court held that a marital support agreement drafted by one lawyer for both parties was enforceable. The lawyer had obtained a written conflicts waiver and agreed to act only as a scrivener.

Treatise. Hazard & Hodes § 11.6.

Law Review. Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 Yale L.J. 407, 416-429 (1998).

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Need for Writing

Before getting into what the rules require, it should be noted that written waivers are always a good idea. A case in which the court rejected a claim of waiver, the court noted that there was nothing in writing, *In Re Corn Derivatives Antitrust Litigation*, 748 F.2d 157 (3d Cir. 1984).

Model Rule 1.7, which governs most conflict situations, does not contain a requirement that waivers be in writing. Model Rule 1.8(a), on doing business with clients, does require that both the disclosures to the client and the waiver from the client be in writing.

Ethics 2000. *Big* change. In its report posted November 27, 2000, the Commission has proposed that all waivers under Model Rule 1.7 be in writing. The rule is as follows:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client gives informed consent, *confirmed in writing*, and: . . .

(emphasis added) Proposed Comment [20] explains the highlighted phrase:

> . . . Such a writing may consist of a document executed by the client or oral consent that the lawyer promptly records and transmits to the client. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
>
> * * * *
>
> The writing need not take any particular form . . . .

The Ethics 2000 Commissioners retain the writing requirements of Rule 1.8(a) and *add to them* the requirement that the advice about getting a second opinion also be in writing. To see the Ethics 2000 version of Rule 1.8, click here. These changes will be voted upon by the ABA House of Delegates at the August 2001 Annual Meeting.

Anyone wishing to know more about the work of the Commission and its other changes, should click on the following: http://www.abanet.org/cpr/ethics2k.html.

Restatement. *See* § 122, which is the rule that deals with waivers. It does not require writings where the current Model Rules do not. Doing business with clients is dealt with at § 126. Oddly, the black letter does not mention a writing. However Comment *g* refers to the fact that state codes require it. Thus, the *Restatement* seems to be saying in a back-handed way that the Model Rule 1.8(a) requirements for writings do apply, after all.

The States. Almost all states have requirements for writings that track

the current Model Rules. That is, in Rule 1.7 situations (most situations), there is no requirement for a writing, and in 1.8(a) situations (doing business with clients) a writing of some sort is required. *Caution, a few states may have additional writing requirements.* You must check a state's version of Model Rule 1.7 to be sure. California's core conflicts rule, Rule 3-310, requires writings under almost all conflict circumstances, as does Rule 3-300, California's version of Model Rule 1.8(a). Washington's version of Rule 1.7 requires that waivers be in writing. To see it click here. Washington's version of Rule 1.8 has the Model Rule requirement that disclosures to the client be in writing, but drops the Model Rule requirement that the client's waiver also be in writing. To see Washington's Rule 1.8, click here. Wisconsin's version of Rule 1.7 requires waivers to be in writing. To see it, click here.

Former Government Lawyers. Model Rule 1.11 applies to lawyers leaving governments for private employment. Subsection (a)(2) requires written notice to the government where a lawyer is going to be screened from a matter. The Ethics 2000 version of Rule 1.11 contains the same requirement. To see it, click here.

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Components of Effective Waiver

Model Rule 1.7(a)(2) provides simply for consent "after consultation." Rule 1.7(b)(2) contains more of a standard:

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

Ethics 2000. In Comment [10] to the Commission's draft of Rule 1.7, is a considerably more specific description of what makes an effective waiver:

> [10] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.4(c) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty and confidentiality, and the advantages and risks involved. See Comments [29] and [30] (effect of joint representation on confidentiality). Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

The Restatement. The black letter of § 122 (the waiver section) contains the following:

> Informed consent requires that the client or former client have reasonably adequate information about the material risks of such

representation to that client or former client.

Comment *c(i)* to § 122 is a detailed treatment of what constitutes adequate information, and Comment *c(ii)* discusses the capacity of the consenting person to give the consent. The Reporter's Note to those comments reviews cases and other authorities on what constitutes an effective waiver. The cases are so numerous and so fact-specific, the author will not undertake listing or discussing them here. When a notable case on consent does come down, the author will post it both at the *What's New* page and in this article.

In *Welch v. Paicos*, 26 F. Supp. 2d 244 (D. Mass. 1998), there was an issue about how much "consultation" had occurred. The court refused to disqualify counsel because the former client had been represented by other counsel at the time of the waiver.

Treatise. Hazard & Hodes § 10.9; Wolfram, Modern Legal Ethics § 7.2.4 (1986); Rotunda § 8-4.1.

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Advance Waivers

The situation is as follows: A lawyer takes on a single piece of business for a very large company that will result in fees totaling $20,000. The lawyer has little reason to believe that the company will give the lawyer any other business. May the lawyer ask the company to waive an objection to future matters in which the lawyer is asked to represent some other client against the company on some completely unrelated matter – even before the original matter is completed?

Almost all authorities agree that such an arrangement is not *per se* unethical, at least as to private entities (as to public entities see the paragraph entitled "*Governments,*" below). The problem is that, depending upon the facts and the tribunal, any number of things can result in such a waiver not being enforceable. The key issues will be (1) whether the future "unrelated" matter is adequately identified, (2) whether the party giving the waiver is adequately sophisticated, (3) whether the waiver is recent enough, and (4), in some cases, whether the waiving party had an opportunity to seek independent counsel's advice on giving the waiver. So far, no two courts have treated these issues the same.

The Painter article. Richard W. Painter, *Advance Waiver of Conflicts*, 13 Geo. J. of Legal Ethics 289 (2000) is an excellent and timely review of the entire subject of advance waivers. It discusses the leading cases on the subject that preceded the article. These include *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, (S.D.N.Y.) (MacMahon, J) (Memorandum and Order, April 10, 1978); *Unified Sewerage Agency of Washington County v. Jelco Corp.*, 646 F.2d 1339 (9th Cir. 1981); *Elliott v. McFarland Unified School Dist.*, 165 Cal. App. 3d 562 (Cal. App. 1985); *Interstate Properties v. Pyramid Co.*, 547 F. Supp. 178 (S.D.N.Y. 1982); *Fisons Corp. v. Atochem N.A., Inc.*, 1990 U.S. Dist. LEXIS 15284 (S.D. Cal. 1990); and *Worldspan L.P. v. The Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356 (N.D. Ga. 1998).

In each of the cited cases, except one, the court enforced some sort of advance waiver. In *Worldspan*, the court found that the waiver was not effective because it was too remote in time and because it did not specify that the

adverse matter could be litigation. The court also expressed hostility to any such waiver, 5 F. Supp. 2d at 1358; the court might not have approved the waiver under any circumstances.

ABA Op. 93-372 (1993). The ABA opinion recognizes the validity of such arrangements, although it is firm on the need to identify the type of matters being waived with specificity. It states, in part, as follows:

> [I]f the waiver is to be effective with respect to a future conflict, it must contemplate that particular conflict with sufficient clarity so the client's consent can reasonably be viewed as having been fully informed when it was given.

N.Y. County Op. 724 (1998). This opinion follows the approach of ABA Op. 93-372 (1993). See, too, Cal. Op. 1989-115 (1989).

Restatement. See § 122, Comment *d*. It says that normally to be effective the client must be sophisticated and have an opportunity to get the advice of another lawyer.

"*Ethics 2000*." See the draft of Comment 13 to proposed Rule 1.7 by clicking here.

Treatises. Hazard & Hodes § 10.9; Rotunda § 8-4.2.

Governments. The author is aware of a few jurisdictions where a waiver from a state or local government simply would not be enforced. New Jersey Rules of Professional Conduct 1.7(a)(2) & 1.7(b)(2); *State of West Virginia v. MacQueen*, 416 S.E.2d 55 (W. Va. 1992); and *City of Little Rock v. Cash*, 644 S.W.2d 229 (Ark. 1982). This may be true in other states, as well.

Items post-dating the Painter article:

In re Rite Aid Corp. Securities Litigation v. Grass, 2001 U.S. Dist. LEXIS 4669 (E.D. Pa. April 17, 2001). This is a securities class action against Rite Aid and several of its executives. Early in the case the General Counsel of Rite Aid retained Ballard Spahr to represent Rite Aid and one of the executives, Alex Grass. Ballard Spahr sent Grass an engagement letter saying that if a conflict developed between the Rite Aid and Grass, Ballard Spahr would withdraw from representing Grass and would continue on behalf of Rite Aid. A conflict did develop, Ballard Spahr dropped Grass, and it continued on behalf of Rite Aid. Grass moved to disqualify Ballard Spahr, and the court, relying in part upon the engagement letter, denied the motion.

Goss Graphics Systems, Inc. v. Man Roland Druckmaschinen Aktiengesellschaft , No. C00-0035 MJM (N.D. Iowa, May 25, 2000). A law firm had two advance waiver agreements with a client, one signed in 1997, relating to one matter, and the other signed in 1999, relating to a later matter. Arguably, the earlier letter was broad enough to allow the law firm to oppose the client in an unrelated litigation matter. However, the later letter was not that broad. The parties could not agree on whether the later letter superseded the earlier. The court resolved matters by disqualifying the law firm.

"Sidebar," National Law Journal, May 22, 2000. According to this publication, a prominent Philadelphia law firm recently tried to rely on an

advance waiver that was signed in 1990. Evidently, it did not work, and a state administrative tribunal removed the firm from the matter in question. The brief article does not say whether the age of the waiver was a factor.

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Implied Waivers

Passage of Time. Many cases deal with the concept of waiving a conflict by waiting too long to raise it. They are the subject of a section of this article, "Passage of Time as Waiver." To go there, click here.

Time not a Factor. In the following cases the courts discussed implied waivers in contexts other than a claim that the aggrieved party waited too long to bring a motion to disqualify. In some cases the court made a distinction between conflicting representations that were current as opposed to those that were successor. In the current representation situations, those courts said there could be no implied waiver.

FDIC v. Frazier, 637 F. Supp. 77 (D. Kan. 1986)(court found implied waiver where conflicting representations were current); and *Conoco, Inc. v. Hon. Pat M. Baskin, Judge*, 803 S.W.2d 416 (Tex. App. 1991)(said trial court *could* have justified denial of motion to disqualify by finding the movant had impliedly waived the conflict, even where conflicting representations were current).

In the Matter of the Estate of Richard, 602 P.2d 122 (Kan. App. 1979), involved a claim for specific performance of an oral contract. The plaintiff lost and claimed on appeal that one of the lawyers should have been disqualified. The appellate court agreed and remanded for a new trial. However, the court approved the concept of implied waiver as follows:

> A client may also expressly or *impliedly* consent to an attorney's representing adverse interests, but there is no evidence in the record in this case that the client did so.

(emphasis added)

In *McCann v. ABC Ins. Co.*, 640 So. 2d 865 (La. App. 1994), a party had moved to disqualify counsel on the other side on the eve of trial. The appellate court noted the last-minute aspect of the motion, but the court also looked at factors other than the passage of time, such as the fact that confidences were not shared and no prejudice to the complaining party had been shown. The court said:

> Moreover the evidence strongly supports a finding that Methodist implicitly waived the condition of disqualification per Rule 1.10 (d).

Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400 (Tenn. 1991), involved successive representations and was a malpractice case. But it contains language friendly to the concept of implied waiver:

> There is no evidence of demonstrated conflicts or potential conflicts not expressly or implicitly waived that would prohibit the

> simultaneous representation of the corporation and the parties involved in its organization.
>
> * * * *
>
> Had there been a conflict of interests, Mehler's failure to raise the issue would have created a reasonable belief on the part of Stone & Hinds that its continued representation of the corporation was acceptable to Mehler.

While not a disqualification case, the court in *Glidden Co. v. Jandernoa*, 173 F.R.D. 459 (W.D. Mich. 1997) expressed hostility to the concept of an implied waiver of a conflict:

> Where dual representation creates a conflict of interest, the burden is on the attorney involved to approach both clients with an affirmative disclosure and a request for express consent. Independent consultation with another lawyer by the opposing party is insufficient to satisfy the obligation of full disclosure.

Likewise, in *In re American Continental Corp./Lincoln Savings and Loan Securities Litigation*, 794 F. Supp. 1424 (D. Ariz. 1992), a securities class action against lawyers, among others, the court said:

> A client's implied consent is insufficient to waive a potential conflict of interest.

California. Several cases from California are clear that implied waivers will not be recognized in cases of simultaneous representation, but might be recognized in cases of successor representations. *Blecher & Collins, P.C. v. Northwest Airlines, Inc.*, 858 F. Supp. 1442 (C.D. Cal. 1994); *State Farm Mut. Auto. Ins. Co. v. Federal Ins. Co.*, 86 Cal. Rptr. 2d 20 (Cal. App. 1999); *In re Lee G.*, 1 Cal. Rptr. 2d 375 (Cal. App. 1991); *Health Maintenance Network v. Blue Cross of So. California*, 249 Cal. Rptr. 220 (Cal. App. 1988). Recall that in California conflict waivers must be in writing. *See* "Need for Writing," above. The judge in *Blecher*, referring to the *Lee* and *Health Maintenance* decisions, said as follows:

> Both of these cases held that an attorney's former client can impliedly consent to his former attorney's decision to represent his current adversary. Neither case holds or suggests that current clients can impliedly consent to conflicted representation. Rule 5-102(B) [predecessor to California Rule 3-310] clearly requires attorneys to obtain an informed *written* waiver of conflicts before embarking on joint representation. Because obtaining a *written* waiver requires little effort, informs and protects clients, and avoids costly evidentiary and credibility disputes, the rule is inflexible.

(emphasis added)

Treatise. Rotunda § 8-1.4.

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Passage of Time as Waiver

Put simply, when a motion to disqualify is filed, courts look at how long the movant waited before filing it. Opinions where the court considered whether the movant waited too long are too numerous to collect all of them here. The author will list many of them. Anyone with an issue concerning waiver through passage of time should start with *Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988 (8th Cir. 1978). (In *Central Food*, the court said that motions to disqualify must be made with "reasonable promptness," and denied a motion to disqualify because the movant waited too long.) *Central Foods* is frequently cited, and Shepardizing it is a good way to find more recent cases in the relevant jurisdiction.

In many cases, the court simply holds that the movant waited too long. In other cases, the court will weigh the amount of time the movant waited with the seriousness of the alleged conflict. For example, in *State of Arkansas v. Dean Foods Products Co., Inc.*, 605 F.2d 380 (8th Cir. 1979), the delay was "more than two years" but the court refused to find a waiver because of the seriousness of the alleged conflict. In all cases, the courts recognize that delay in bringing a motion to disqualify can operate as a waiver. They vary as to how much delay is necessary and how to weigh the countervailing factors, such as the nature of the conflict.

Below are three lists: one for cases in which the court found that the movant waived the conflict by waiting too long; another for cases in which the court found no waiver; and a short list of cases where an appellate court remanded for more fact-finding on the reasons for delay. The author had to build these lists from the ground up, and he undoubtedly has missed some. He intends to note every such case he can find from this point (October 1, 2000) forward. He will occasionally miss a future case, so, as stated in the "Ground Rules," this site is no substitute for doing your own research.

Where the length of the movant's delay is clear, the author will note it. Some courts will use the term "waiver." Other courts use "estoppel." The author is not aware of the significance of the difference in this context.

Cases Denying Disqualification Because of Delay. In re Valley-Vulcan Mold Co, 2001 U.S. App. LEXIS 3212 (6th Cir. 2001)("less than one week before trial" - length of delay unclear); *Kafka v. Truck Ins. Exchange*, 19 F.3d 383 (7th Cir. 1994)(after trial); *Cox v. American Cast Iron Pipe Co.*, 847 F.2d 725 (11th Cir. 1988)(eighteen months; one month before trial); *Trust Corp. of Montana v. Piper Aircraft Co.*, 701 F.2d 85 (9th Cir. 1983)("more than two and a half years"); *Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988 (8th Cir. 1978)("more than two years"); *Redd v. Shell Oil Co.*, 518 F.2d 311 (10th Cir. 1975)(three days before trial); *In re Rite Aid Corp. Secs. Litig. v. Grass*, 2001 U.S. Dist. LEXIS 4669 (E.D. Pa. 2001)("at least nine months (and more like thirteen)"); *Geissal v. Moore Medical Corp.*, 92 F. Supp. 2d 945 (E.D. Mo. 2000); *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449 (S.D.N.Y. 2000)(less than two months before trial); *Digital Design Group, Inc. v. Information Builders, Inc.*, 2000 Okla. Civ. App. LEXIS 1 (Okla. App. 2000)(one year); *In re: A&T Paramus Co., Inc.*, 1999 Bankr. LEXIS 1841 (D.N.J. 1999)("nearly a year and a half"); *Resolution Trust Corp. v. Fidelity and Deposit Co. of Maryland*, 1997 U.S. Dist. LEXIS 22180 (D.N.J. 1997)(five years); *Szoke v. Carter*, 974 F. Supp. 360 (S.D.N.Y. 1997)(22 months); *Abney v. Wal-Mart*, 984 F. Supp. 526 (E.D. Tex. 1997)(one year); *Concerned Parents of Jordan Park v. Housing*

Authority of the City of St. Petersburg, 934 F. Supp. 406 (M.D. Fla. 1996)(five months); *Weeks v. Samsung Heavy Ind. Co., LTD*, 909 F. Supp. 582 (N.D. Ill. 1996)(two years); *Chemical Waste Mgm't., Inc. v. Sims*, 875 F. Supp. 501 (N.D. Ill. 1995)(21 months); *Alexander v. Primerica Holdings, Inc.*, 822 F. Supp. 1099 (D.N.J. 1993)(three years and four months before trial); *Commonwealth Ins. Co. v. Graphix Hot Line, Inc.*, 808 F. Supp. 1200 (E.D. Pa. 1992)(two years, and three weeks before trial); *Medicine Shoppe Int'l., Inc. v. Rebs Co.*, 737 F. Supp. 70 (E.D. Mo. 1990)(one year); *Employers Ins. of Wausau v. Albert D. Seeno Constr. Co.*, 692 F. Supp. 1150 (N.D. Cal. 1988)("well over a year"); *Zimmerman v. Duggan*, 81 Bankr. 296 (E.D. Pa. 1987)("nearly three years"); *Warpar Mfg. Corp. v. Ashland Oil, Inc.*, 606 F. Supp. 852 (N.D. Ohio 1984)(21 months and six weeks prior to trial); *Glover v. Libman*, 578 F. Supp. 748 (N.D. Ga. 1983)(thirteen months); *Jackson v. J.C. Penney Co., Inc.*, 521 F. Supp. 1032 (N.D. Ga. 1981)(fifteen months); *Western Continental Co. v. Natural Gas Corp.*, 261 Cal. Rptr. 100 (Cal. App. 1989); *River West, Inc. v. Nickel*, 234 Cal. Rptr. 33 (Cal. App. 1987)(three years); *Case v. City of Miami*, 756 So. 2d 259 (Fla. App. 2000)(seven years); *Lau v. Valu-Bilt Homes Ltd.*, 582 P.2d 195 (Haw. 1978)("more than one year"); *In re Estate of Kirk*, 686 N.E.2d 1246 (Ill. App. 1997)(three and a half years); *Corbello v. Iowa Production Co.*, 2001 La. App. LEXIS 1445 (La. App. 2001)(eight months and eve of trial); *Colson v. Johnson*, 764 So. 2d 438 (Miss. 2000)(three years; four months prior to trial); *Terre Du Lac Prop. Owners' Assoc., Inc. v. Shrum*, 661 S.W.2d 45 (Mo. App. 1983)(after trial); *United Nuclear Corp. v. General Atomic Co.*, 629 P.2d 231 (N.M. 1980); *Eisenstadt v. Eisenstadt*, 2001 N.Y. App. Div. LEXIS 3835 (N.Y. App. 2001); *McDade v. McDade*, 659 N.Y.S.2d 530 (N.Y. App. 1997)(two and a half years); *Lewis v. Unigard Mut. Ins. Co.*, 442 N.Y.S.2d 522 (N.Y. App. 1981)(six years); *Young v. Oak Crest Park, Inc.*, 428 N.Y.S.2d 69 (N.Y. App. 1980)(four years); *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.*, 813 S.W.2d 400 (Tenn. 1991); *Seibers v. Pepsi-Cola Bottling Co.*, 2000 Tenn. App. LEXIS 818 (Tenn. App. December 21, 2000); *Massey v. Columbus State Bank*, 2000 Tex. App. LEXIS 7624 (Tex. App. 2000)(raised first time on appeal); *Jones v. Lurie*, 2000 Tex. App. LEXIS 8033 (Tex. App. 2000)(raised first time on appeal); *FSBIC v. Intercapital Corp. of Oregon*, 738 P.2d 263 (Wash. 1987); *Batchelor v. Batchelor*, 570 N.W.2d 568 (Wis. App. 1997)(*three months*).

Cases Upholding Disqualification in Face of Delay. *State of Arkansas v. Dean Foods Products Co., Inc.*, 605 F.2d 380 (8th Cir. 1979)("more than two years"); *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973)(three years); *Colorpix Systems of America v. Broan Mfg. Co.*, 2001 U.S. Dist. LEXIS 1499 (D. Conn. 2001)(18 months); *Loomis v. Consolidated Stores Corp.*, 2000 U.S. Dist. LEXIS 12391 (S.D.N.Y. 2000)(client knew for year and a half, but did not appreciate significance of conflict; lawyer did not learn about conflict until much later); *Montgomery Academy v. Kohn*, 82 F. Supp. 2d 312 (D.N.J. 1999)("less than three months"); *Islander East Rental Program v. Ferguson*, 917 F. Supp. 504 (S.D. Tex. 1996)(four months); *Healy v. Axelrod Construction Co. Defined Benefit Pension Plan and Trust*, 155 F.R.D. 615 (N.D. Ill. 1994)("no trial date"); *British Airways, PLC v. Port Authority of New York and New Jersey*, 862 F. Supp. 889 (E.D.N.Y. 1994)("only two years"); *Image Tech. Services v. Eastman Kodak Co.*, 820 F. Supp. 1212 (N.D. Cal 1993)(one year); *Baird v. Hilton Hotel Corp.*, 771 F. Supp. 24 (E.D.N.Y. 1991)(thirteen months); *Little Rock School Dist. v. Borden, Inc.*, 1979 U.S. Dist. LEXIS 13217 (E.D. Ark. 1979)("short"); *Key Largo Rest., Inc. v. T.H. Old Town Assoc., Ltd.*, 759 So. 2d 690 (Fla. App. 2000)(five years, but action stayed by bankruptcy - vigorous dissent); *Casco Northern Bank v. JBI Associates, Ltd.*, 667 A.2d 856 (Me. 1995)(about a month, but court said that

delay alone should not be a reason to deny a motion to disqualify).

Remanded for More Information. *Lackow v. Walter E. Heller & Co. Southeast, Inc.*, 466 So. 2d 1120 (Fla. App. 1985)("months;" remanded for findings on reason for delay); *Douglas v. Jepson*, 945 P.2d 244 (Wash. App. 1997)(delay "more than six months" but remanded for further findings on reason for delay).

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Revocation of Waiver

A lawyer has agreed to represent A and B in a business transaction and obtains a written conflicts waiver from them. After several months A becomes unhappy with the lawyer, objects to the "conflict of interest," and tries to fire the lawyer. Can she do that? A client can almost always discharge her lawyer, Model Rule 1.16(a)(3) and Model Code DR 2-110(B)(4). (Examples of situations causing the author to say "almost" are the civil rights laws, "whistle-blower" situations, and the right of a tribunal to keep a lawyer in a case.) So, as to her *own representation*, a client can always "revoke" a conflicts waiver.

Can A also revoke the waiver as to the lawyer's representation of B, the other party? The author has never seen a case that answers the question directly. That is, can a client who has waived a conflict of interest as to a lawyer's representation of someone else revoke that waiver?

Restatement. The ALI made a brave stab at describing situations in which a client may, or may not, prevent a lawyer from continuing to represent another party by revoking a waiver previously given, at Comment *f* to § 122 (the section dealing with waivers). The cases cited in the Reporter's Note on Comment *f*, while tangentially relevant, simply do not purport to address the issue specifically. In none of them did the party resisting the disqualification rely on the fact that a waiver had been given. Comment *f* provides in pertinent part:

> . . . Whether the lawyer may continue the other representation depends on whether the client was justified in revoking the consent (such as because of a material change in the factual basis on which the client originally gave informed consent) and whether material detriment to the other client or lawyer would result. . . .
>
> * * * *
>
> In the absence of valid reasons for a client' revocation of consent, the ability of the lawyer to continue representing other clients depends on whether material detriment to the other client or lawyer would result and, accordingly, whether the reasonable expectations of those persons would be defeated. Once the client or former client has given informed consent to a lawyer's representing another client, that other client as well as the lawyer might have acted in reliance on the consent. For example, the other client and the lawyer might already have invested time, money, and effort in the representation.

In the following cases cited in the Reporter's Note the representation

started out as joint (with implied or express waivers), then something changed - the facts, the attitude of a party, the conduct of the lawyer, and so forth. Again, in none of them did the court discuss the concept of a party's revoking a consent to a lawyer's representing another party. *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168 (5th Cir. 1979); *Allegaert v. Perot*, 565 F.2d 246 (2d Cir. 1977); *Interstate Properties v. Pyramid Co.*, 547 F. Supp. 178 (S.D.N.Y. 1982); *In re Lanza*, 322 A.2d 445 (N.J. 1974); *In re Braun*, 227 A.2d 506 (N.J. 1967); *In re Banks*, 584 P.2d 284 (Ore. 1978); *In re Eltzroth*, 679 P.2d 1369 (Ore. App. 1984).

Treatise. Hazard & Hodes § 10.8.

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CORPORATE FAMILIES

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A lawyer represents corporation A in a small matter. Corporation A is a wholly-owned subsidiary of Corporation AA. While that matter is pending, Corporation B comes to the lawyer and asks the lawyer to bring a multi-million dollar suit against Corporation AA. May the lawyer take the case? Are Corporations A and AA one for conflict of interest purposes? That will depend upon the tribunal or the facts or both. As shown below, some courts and writers have said that this is always a conflict of interest (the "bright line" rule). Others have said that the answer depends upon the facts (for lack of a better phrase, the "weighing" rule).

ABA Op. 95-390 (1995). Any careful study of this issue should begin with a reading of this opinion. The majority concluded that a parent-subsidiary relationship should not automatically disqualify a lawyer from a representation such as that described in the opening paragraph. Two members of the Committee wrote eloquent dissents. They took the bright line position that this would always be a conflict for which a consent would be required. A third member joined in those dissents. Thus, the Committee was deeply split. Nevertheless, the opinion is highly instructive.

The Cases. (Caution: those cases that adopted the weighing approach do not necessarily consider the same factors in the same way. One factor that is important to some courts is whether the same in-house lawyer may be involved in both matters. Another is whether the lawyer may have obtained information about the client in one matter that would give the lawyer an advantage in the other. Some courts that reject the bright line test hold that the test should be an *alter ego* test. Other courts appear to be applying an *alter ego* analysis but do not say so. In short, there is no substitute for reading these cases before relying upon them.) *Colorpix Systems of America v. Broan Mfg. Co.*, 2001 U.S. Dist. LEXIS 1499 (D. Conn. 2001)(weighing - court disqualified firm - impressed that same in-house lawyer involved for parent and subsidiary); *Gen-Cor, LLC v. Buckeye Corrugated, Inc.*, 111 F. Supp. 2d 1049 (S.D. Ind. 2000)(bright line); *Travelers Indem. Co. v. Gerling Global Reinsurance Corp.*, 2000 U.S. Dist. LEXIS 11639 (S.D.N.Y. 2000)(weighing - sister-sister corporations - note *Stratagem* below); *Reuben H. Donnelley Corp. v. Sprint Publishing and Advertising, Inc.*, 1996 U.S. Dist. LEXIS 2363 (N.D. Ill. 1996) (weighing; court noted same in-house lawyer not involved in both matters); *Apex Oil Co. v. Wickland Oil Co.*, 1995 U.S. Dist. LEXIS 6398 (E.D. Cal. 1995) (weighing; *alter ego*); *Vanderveer Group, Inc. v. Petruny*, 1993 U.S. Dist. LEXIS 13614 (E.D. Pa. 1993) (weighing); *Baxter Diagnostics, Inc. v. AVL Scientific Corp.*, ***798*** F. Supp. 612 (C.D. Cal. 1992)(seemed to apply a weighing test); *Teradyne, Inc. v. Hewlett-Packard Co.*, 1991 U.S Dist. LEXIS 8363 (N.D. Cal. 1991) (weighing); *Stratagem Dev. Corp. v. Heron Int'l. N.V.*, 756 F. Supp. 789 (S.D.N.Y. 1991) (bright line - parent-subsidiary); *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 738 F.

Supp. 1121 (N.D. Ohio 1990) (weighing); *Hartford Accident & Indem. Co*. v. RJR Nabisco, Inc., 721 F. Supp. 534 (S.D.N.Y. 1989) (weighing); *Pennwalt Corp. v. Plough, Inc.*, 85 F.R.D. 264 (D. Del. 1980) (bright line); *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft*, 81 Cal. Rptr. 2d 425 (Cal. App. 1999) (weighing; court noted possible prejudice because of confidential information obtained in one matter that might be used in the other); *Brooklyn Navy Yard Cogeneration Partners L.P. v. Superior Court*, 70 Cal Rptr. 2d 419 (Cal. App. 1997) (weighing; *alter ego*); and *McCourt Co. v. FPC Properties, Inc*, 434 N.E.2d 1234 (Mass. 1982) (bright line).

State and Local Ethics Opinions. (See the parenthetical note at *The Cases*, above. Much the same can be said for the following opinions.) Cal. State Bar Op. 1989-113 (1990) (weighing; *alter ego* test); Md. State Bar Op. 87-19 (weighing); Mass. Bar Op. 3 (1992) (weighing, but leaning toward bright line [see *McCourt*, above]); N.Y. County Bar Op. 684 (1991) (weighing; stresses possibility of misuse of confidences).

Rule 4-1.13 of the Florida Rules of Professional Conduct. The Florida Supreme Court amended the Comment to its version of Model Rule 1.13 to adopt the *alter ego* test. To read it, click here, then scroll to Comment [12].

Ethics 2000. The Commission has proposed a new Comment [19] to Model Rule 1.7, which essentially adopts a weighing test. To read it, click here, and scroll to Comment [19].

Treatises. Hazard & Hodes § 17.9; Rotunda § 14-7.

Law Reviews. Wolfram, *Corporate Family Conflicts*, 2 J. Inst. Study Legal Ethics 296 (1999); Rotunda, *Sister Act: Conflicts of Interest with Sister Corporations, in, Legal Ethics: The Core Issues*, 1 Journal of the Institute for the Study of Legal Ethics 215 (1996).

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CHANGING FIRMS

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Lawyers

Scenario: Lawyer changes law firms while those firms have a matter pending between them. While at the old firm, Lawyer may or may not have had some contact with that matter. Lawyer's presence at the new firm may disqualify the entire new firm in that matter. Usually, the consent of the client of the old firm will avoid that result. What if the client will not consent? Will a "Chinese Wall" or screen at the new firm avoid disqualification absent consent? What if the person changing firms is a non-lawyer, such as a paralegal or secretary? Those are the issues addressed on a state-by-state basis below.

Several general comments are in order. In most states it is stated that, as to lawyers, the screen, without consent, will "probably not" work. That is because those states adopted Model Rule 1.9(b). That rule does not approve of a screen if the moving lawyer has information that is "material to the matter." In those several states with such a rule where a court has addressed the issue, the court has almost always ruled that the rule means what it says. That rule does not require a screen if the information is not "material."

Enter *Restatement* § 124. It does not allow a screen where the information is significant, but does not, like Model Rule 1.9(b), stop there. If the lawyer has information that is *not* "significant," the *Restatement requires* a screen. Note, the Model Rule does *not* require a screen if the moving lawyer's knowledge is not "material to the matter." (The author is not aware of anything in the literature that makes a distinction between "significant" and "material.") Several states have started down the *Restatement* path. As you will see below, Massachusetts has adopted a rule similar to the *Restatement's*. The New York Court of Appeals has adopted a similar rule in a decision.

The future? The ABA Ethics 2000 Commission, according to its report posted November 27, 2000, has adopted a screening rule for new lawyers. New Model Rule 1.10(c), if approved by the ABA House of Delegates in August 2001, would provide as follows:

> (c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
>
> > (1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> >
> > (2) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

Anyone wishing to review the work of the Ethics 2000 Commission, should click on the following: http://www.abanet.org/cpr/ethics2k.html.

In doing research for this section, the author had the good fortune to come across *Ohio's New Ethical Screening Procedure*, by Burkhart R. Lindahl, 3 U. Toledo L. Rev. 145 (Fall 1999). The article was precipitated by the *Kala* decision of the Ohio Supreme Court (see Ohio below). Nevertheless, it is one of the clearest and most comprehensive discussions of screening in the United States that the author has encountered in the years he has considered this subject.

Other Articles. Burton, *Migratory Lawyers and Imputed Conflicts of Interest*, 16 Rev. Lit. 665 (1997); Hamilton and Coan, *Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 Hofstra L. Rev. 27 (1998); M. Peter Moser, *Chinese Walls: A Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm*, 3 Geo. J. Legal Ethics 399 (Winter 1990).

Treatise. Hazard & Hodes §§ 14.8-14.11; Rotunda §§ 11-2 & 11-3.

Non-Lawyers

As shown below, most state courts and ethics committees that have considered this issue as to non-lawyers have given non-lawyers more slack and have approved screening. So did ABA Informal Op. 1526 (1988). Restatement § 123, Comment *f* says that non-lawyers are not subject to the imputation rule governing lawyers and recommends screening. Caution is advised because several recent decisions have not been so liberal. *See, for example, Zimmerman v. Mahaska Bottling Co.*, 2001 Kan. LEXIS 163 (Kan. 2001)(no screening absent consent). *Also, see First Miami Securities, Inc. v. Sylvia*, 2001 Fla. App. LEXIS 1774 (Fla. App. 2001) and *Koulisis v. Rivers*, 730 So. 2d 289 (Fla. App. 1999), where Florida appellate courts refused to recognize screening for non-lawyers. (Florida appellate courts are split on non-lawyers. To see them all, click here.) Where the author is not aware of an opinion on non-lawyers in a given jurisdiction, the author will not state a view as to whether approval of a screen is "probable."

Treatise. Rotunda § 11-4.

Summary

Again, the issue posed below is whether a screen or "Chinese Wall" will prevent a disqualification where the second firm does not have a consent from the client of the first firm.

Alabama

Lawyers - Probably not. Rule1.10(b). *See also Roberts v. Hutchins*, 572 So. 2d 1231 (Ala. 1990).

Non-Lawyers - Probably. Ala. Op. RO-91-01 (1991).

Arizona

Lawyers - Probably not. Rule 1.10(b). *Towne Development of Chandler, Inc. v.*

Superior Court, 842 P.2d 1377 (Ariz. App. 1992).

Non-Lawyers - Probably. *Smart Industries Corp. v. Superior Court*, 876 P.2d 1176 (Ariz. App. 1994).

Arkansas

Lawyers - Probably not. Rules 1.9(b) and 1.10(a).

Non-Lawyers - Probably. *Herron v. Jones*, 637 S.W.2d 569 (Ark. 1982).

California

Lawyers - Probably not. *Klein v. Superior Court*, 244 Cal. Rptr. 226 (1988), and *Henriksen v. Great American Savings & Loan*, 14 Cal. Rptr. 2d 184 (Cal. App. 1992), have been cited as discouraging screening as a way to avoid disqualification. However, the Ninth Circuit is of the view that California courts will move in the direction of allowing screening, *In Re: County of Los Angeles*, 223 F.3d 990 (9th Cir. 2000). While this case involved a judicial officer moving to a law firm, the opinion comes very close to holding that screening will work for lawyers moving from firm-to-firm. Earlier federal court cases more hostile to screening are: *Employers Ins. of Wausau v. Albert D. Seeno Constr. Co.*, 692 F. Supp. 1150 (N.D. Cal. 1988); *In re Mortgage v. Realty Trust*, 195 Bankr. 740 (C.D. Cal. 1996); *Andric v. State of California*, 55 F. Supp. 2d 1056 (C.D. Cal. 1999). L.A. County Op. 501 (1999) contains a lengthy discussion of imputation in California, but it does not discuss screening. *See* Gibbon-White, *Migratory Lawyers in Private Practice: Should California Approve the Use of Ethical Walls?*, Loy. L.A. L. Rev. 161 (1999).

Not a screening case, but important nonetheless. Adams v. Aerojet-General Corp., 2001 Cal. App. LEXIS 89 (Cal. App. 2001). Firm A represented Corporation in environmental matters. Lawyer X was a partner in Firm A but did no work on Corporation's matters. Lawyer X moved to Firm B and attempted to sue Corporation on environmental matters. Corporation moved to disqualify Lawyer X, and the trial court granted the motion. The appellate court reversed and remanded. The appellate court purported to answer this issue for the first time: Were Corporation's confidences in Firm A automatically imputed to Lawyer X, so that Lawyer X cannot sue Corporation on environmental matters? The appellate court said no, citing ABA Model Rule 1.9 and *Restatement* § 124. In remanding the case, the appellate court said:

> On remand, the court should focus not only on the relationship between [Lawyer X] and [Firm A's] representation of [Corporation], but whether [Lawyer X's] responsibilities as partner and principal, as well as his relationship with other members of [Firm A], placed him in a position where he was reasonably likely to have obtained confidential information relating to the current case.

That was also the holding in *Dieter v. Regents of the Univ. of Cal*., 963 F. Supp. 908 (E.D. Cal. 1997).

Non-Lawyers - Probably. *Atmel Corp. v. Information Storage Devices, Inc.*, 1998 U.S. Dist. LEXIS 4241 (N.D. Cal. 1998); *In Re Complex Asbestos Litigation*, 283 Cal. Rptr. 732 (Cal. App.1991). Cal. Op. 1992-126 (1992) seems to suggest that screening will work for temporary lawyers who move

from firm-to-firm.

Colorado

Lawyers - Probably not. Rules 1.9(b) and 1.10(a). *See* Colorado Formal Op. 88 (1991).

Non-Lawyers - Hard to say. Col. Op. 105 (1999) looks favorably on screening in the context of temporary lawyers.

Connecticut

Lawyers - Probably not. Rule 1.10(b). The author is not aware of a Connecticut Supreme or Appellate Court opinion holding that the rule does not mean what it says. *But see Horch v. United of Omaha Life Ins. Co.*, 1999 Conn. Super. LEXIS 1792 (Conn. Super. 1999), which approved a screen, but citing no Connecticut authority for doing so. *Also see State of Connecticut v. White*, 2000 Conn. Super. LEXIS 85 (Conn. Super. 2000), and *State of Connecticut v. Marion*, 2000 Conn. Super. LEXIS 77 (Conn. Super. 2000). Neither was about lawyers changing firms; they were both criminal prosecutions. Neither discussed Rule 1.10(b). In each case, the court implied that if an effective "Chinese Wall" had been erected, there might not have been a disqualification. *Also see Wellner v. Carroll*, 1995 Conn. Super. LEXIS 359 (Conn. Super. 1995), not involving a lawyer changing firms. It does imply that a "Chinese Wall" in that case might have prevented disqualification. It does not discuss Rule 1.10(b).

Non-Lawyers - Maybe. Rivera v. Chicago Pneumatic Tool Co., 1991 Conn. Super. LEXIS 1832 (Conn. Super. 1991).

Delaware

Lawyers - Probably not. Rule 1.10(b). *See* Delaware Op. 1986-1; *Nemours Foundation v. Gilbane, Aetna, Federal Ins. Co.*, 632 F. Supp. 418 (D. Del. 1986).

Non-Lawyers - Probably. Del. Op. 1986-1 (undated).

District of Columbia

Lawyers - Probably not. Rule 1.10(b). *See* D.C. Bar Ops. 273 (1997) and 227 (1992).

Non-Lawyers - Probably. D.C. Op. 227 (1992) & 279 (1998).

Florida

Lawyers - Probably not. Rule 4-1.10(b). *See Gaton v. Health Coalition, Inc.*, 745 So. 2d 510 (Fla. App. 1999); *Birdsall v. Crowngap, Ltd.*, 575 So. 2d 231 (Fla. App. 1991); *Edward J. DeBartolo Corp. v. Petrin*, 516 So. 2d 6 (Fla. App. 1987); *Nissan Motor Corp. v. Orozco*, 595 So. 2d 240 (Fla. App. 1992).

Non-Lawyers – Split of authority. In *Lansing v. Lansing*, 2001 Fla. App. LEXIS 7396 (Fla. App. May 25, 2001)(5th District); *Stewart v. Bee-Dee Neon & Signs, Inc.*, 751 So. 2d 196 (Fla. App. 2000)(1st District), *City of Apopka v.*

All Corners, Inc., 701 So. 2d 641 (Fla. App. 1997)(5th District), and *Esquire Care, Inc. v Maguire*, 532 So. 2d (Fla. App. 1988)(2d District), the courts approved screening of non-lawyers. Fla. Op. 5 (1986) does likewise. *In First Miami Securities, Inc. v. Sylvia*, 2001 Fla. App. LEXIS 1774 (Fla. App. 2001)(3rd District) and in *Koulisis v. Rivers*, 730 So. 2d 289 (Fla. App. 1999)(4th District), the courts did not approve screening for non-lawyers.

Georgia

Lawyers - Probably not. Rule 1.9(b).

Hawaii

Lawyers - Probably not. Rule1.9(b) and 1.10(a). *See Otaka, Inc. v. Klein*, 791 P.2d 713 (Hawaii 1990).

Idaho

Lawyers - Probably not. Rule 1.10(b)

Illinois

Lawyers - Yes. Rules 1.10(b)(2) and 1.10(e). *See Cromley v. Lockport Bd. Of Educ.*, 17 F.3d 1059 (7th Cir. 1994); *Miller v. Chicago & N.W. Trans. Co.*, 938 F. Supp. 503 (N.D. Ill. 1996). *But see Van Jackson v. Check 'n Go of Illinois, Inc.*, 114 F. Supp. 2d 731 (N.D. Ill. 2000). The court disqualified the new firm, primarily because it was too small (four lawyers) to ensure that a screen would work. Two cases on Illinois' position on screening that predated adoption of screening in the Illinois Rules of Professional Conduct are: *SK Handtool Corp. v. Dresser Indust., Inc.*, 619 N.E.2d 1282, 1290 (Ill. App. 1993); and *Marriage of Thornton*, 486 N.E.2d 1288, 1294-97 (Ill. App. 1985).

Jackson Nat. Ins. Co. v. Duane Morris & Heckscher, Circuit Court of Cook County, Illinois. (The following summary is taken from an article in the November 11, 2000 online *Law.com*. To go to the article, click here.) Jackson National Insurance Company ("JNIC") had hired Holleb & Coff of Chicago to sue the Philadelphia law firm, Duane Morris & Heckscher. Duane Morris brought into its Chicago office ten lawyers from Holleb & Coff, at least one of whom had billed time on the JNIC matter. JNIC sued Duane Morris for an injunction prohibiting their bringing in the Holleb & Coff lawyers. According to the article, a judge of the Circuit Court of Cook County, Illinois, has denied the injunction because Duane Morris had successfully screened the new lawyers under Illinois' pro-screening rule. The case is one of the few conflict of interest cases decided not in the context of a motion to disqualify, but rather in a suit for injunction. For other examples go to "Enjoining Conflicts" by clicking here.

Non-Lawyers - Probably. *Kapco Mfg. Co. v. C&O, Inc.*, 637 F. Supp. 1231 (N.D. Ill. 1985); Chicago Bar Op. 5 (1994).

Indiana

Lawyers - Probably not. Rule 1.10(b). *But see Chapman v. Chrysler Corp.* 54 F. Supp. 2d 864 (S.D. Ind. 1999) and *Speedy v. Rexnord Corp.* 54 F. Supp. 2d

867 (S.D. Ind. 1999). In both cases the court said it would follow Seventh Circuit precedent allowing screening.

Iowa

Lawyers - Probably not. DR5-105(E).

Kansas

Lawyers - Probably not. Rule 1.10(b). *See Lansing-Delaware Water Dist. v. Oak Lane Park, Inc.*, 808 P.2d 1369 (Kan. 1991); *Parker v. Volkswagenwerk Aktiengesellschaft*, 781 P.2d 1099 (Kan. 1989); *Graham v. Wyeth Laboratories*, 906 F.2d 1419 (10th Cir. 1990); *Pacific Employers Ins. Co. v. P.B. Hoidale Co.*, 796 F. Supp. 1428 (D. Kan. 1992); Kan. Op. 90-005 (1991).

Non-Lawyers - No. *Zimmerman v. Mahaska Bottling Co.*, 2001 Kan. LEXIS 163 (Kan. 2001); Kansas Op. 90-5 (1991).

Kentucky

Lawyers - Probably. Rules 1.9(b) and 1.10(d).

Non-Lawyers - Probably. Ky. Op. E-308 (1985).

Louisiana

Lawyers - Probably not. Rule 1.10(b). *But see Petrovich v. Petrovich*, 556 So. 2d (La. App.), *cert. denied*, 559 So. 2d 1377 (1990). The court did not recognize a screen in *Green v. Administrators of Tulane Educational Fund*, 1998 U.S. Dist. LEXIS 769 (E.D. La. 1998).

Maine

Lawyers - Probably not. Rule 3.4(k). *See Casco Northern Bank v. JBI Ltd.*, 667 A.2d 856 (Me. 1995).

Maryland

Lawyers - Probably. Rule 1.10(b).

Massachusetts

Very demanding rule. Rule 1.10(d)(2). The rule tracks the holding of the New York Court of Appeals in *Kassis* (See New York below and the discussion at the top of this page). A federal district judge, in refusing to approve a screening arrangement, applied the rule according to its terms, *United States Filter Corp. v Ionics, Inc.*, 189 F.R.D. 26 (D. Mass. 1999).

Michigan

Lawyers - Yes. Rule 1.10(d)(2). *See* Michigan Op. R-4 (1989).

Non-Lawyers - Probably. Mich. Ops. RI-284 (1996) & RI-115(1992).

Minnesota

Lawyers - Very restrictive rule. Minnesota amended its rule in 1999 and adopted the *Restatement* approach. Rule 1.10(b). *See Jenson v. Touche Ross & Co*., 335 N.W.2d 720 (Minn. 1983).

Mississippi

Lawyers - Probably not. Rule 1.10(b).

Missouri

Lawyers - Probably not. Rule 1.10(b). *But see School Dist. of Kansas City v. AcandS, Inc*., 1989 U.S. Dist. LEXIS 10009 (W.D. Mo. 1989).

Non-Lawyers - Probably not. Williams v. Trans World Airlines, Inc., 588 F. Supp. 1037 (W.D. Mo. 1984).

Montana

Lawyers - Probably not. Rule 1.10(b).

Nebraska

Lawyers - Probably not. DR 5-105(D). *See State of Nebraska ex rel. FirsTier Bank, N.A. v. Buckley*, 503 N.W.2d 838 (Neb. 1993).

Non-Lawyers - Probably not. Creighton Univ. v. Hickman, 512 N.W.2d 374 (Neb. 1994).

Nevada

Lawyers - Probably not. Rule 160(2). *See Edwards v. 360 [degrees],* 189 F.R.D 433 (D. Nev. 1999); *Coles v. Arizona Charlie's*, 1997 WL 465416 (D. Nev. 1997); *Ciaffone v. Eighth Judicial Dist. Ct.,* 945 P.2d 950 (Nev. 1997).

Non-Lawyers - No. Ciaffone v. Eighth Judicial Dist. Ct., 945 P.2d 950 (Nev. 1997).

New Hampshire

Lawyers - Probably not. Rule 1.10(b).

New Jersey

Lawyers - Probably not. Rule 1.10(b). *See* New Jersey Op. 667 (1992); *Cardona v. General Motors Corp.*, 945 F. Supp. 968 (D.N.J. 1996); *Dewey v. R.J. Reynolds Tobacco Co.*, 536 A.2d 243 (N.J. 1988).

Non-Lawyers - Probably. N.J. Ops. 633 (1989) & 665 (1992).

New Mexico

Lawyers - Probably not. Rule 16-110(B).

New York

Very demanding rule. DR 5-105(D) and 5-108. The New York Court of Appeals has a rule similar to the *Restatement* (see discussion at the top of this page). *Kassis v. Teacher's Ins. & Annuity Ass'n*, 695 N.Y.S.2d 515 (1999). It does not permit screening if the moving lawyer had significant information. It *mandates* screening if the moving lawyer has information that is not significant, something Model Rule 1.9(b) does not require. *See also Alicea v. Bencivenga*, 704 N.Y.S.2d 578 (N.Y. App. Div. 2000), *Cummin v. Cummin*, 695 N.Y.S.2d 346 (N.Y. App. 1999); *Schwed v. General Electric Co.*, 990 F. Supp. 113 (N.D.N.Y. 1998); *G.D. Searle & Co. v. Nutrapharm, Inc.*, 1999 U.S. Dist. LEXIS 5963 (S.D.N.Y. 1999); *Decora Inc. v. DW Wallcovering*, 899 F. Supp. 132 (S.D.N.Y. 1995)(new firm too small, moving lawyer worked closely with lawyer on the case in the new firm, and screen set up too late); and *Feingold v. Keller*, QDS: 72703455, New York Supreme Court (To read the opinion, click here.). While somewhat dated, N.Y. State Op. 720 (1999) provides helpful guidance on how a law firm ought to go about clearing conflicts when bringing in a lawyer from another firm.

In *Abatement & Decontamination Services, Inc. v. Consolidated Edison Co. of N.Y., Inc., QDS:22703171* (reported in the September 25, 2000, New York Law Journal), a judge in the New York Supreme Court refused to disqualify a law firm because the lawyer in question ultimately never joined the law firm. The court was, however, highly critical of the firm because it negotiated with the lawyer while the lawyer was actively handling a law suit against the firm.

For a discussion of screening in New York, see James M. Altman, *Conflict-of-Interest Issues Can Derail Job Offers*, New York Law Journal, February 16, 2001.

Non-Lawyers - Probably not. Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc., 514 N.Y.S.2d 440 (N.Y. App. 1987).

North Carolina

Lawyers - Probably not. Rule 5.11(B)

North Dakota

Lawyers - Probably not. Rule 1.10(b).

Ohio

Lawyers - Probably. DR 5-105(D). *Kala v. Aluminum Smelting & Refining Co*., 688 N.E.2d 258 (Ohio 1998). *Also see Hamrick v. Union Township*, 79 F. Supp. 2d 871 (S.D. Ohio 1999). There, the court said that a law firm had to be disqualified because it produced no proof that it had erected a screen.

Non-Lawyers - Probably. *Green v. Toledo Hospital*, 2000 Ohio App. LEXIS 3590 (Ohio App. 2000).

Oklahoma

Lawyers - Probably not. Rule 1.10(b).

Oregon

Lawyers - Yes. DR 5-105(I). *See Portland Gen. Elec. Co. v. Duncan, Weinberg, Miller, & Pembroke*, 986 P.2d 35 (Or. App. 1999),

Pennsylvania

Lawyers - Yes. Rules 1.10(b)(1) and (2). *See* Philadelphia Bar Op. 91-18 (1991); *Dworkin v. General Motors Corp.*, 906 F. Supp. 273 (E.D. Pa. 1995). *Also see James v. Teleflex, Inc*., 1999 U.S. Dist. LEXIS 1961 (E.D. Pa. 1999), in which the court disqualified a firm because it had not complied with all the requirements of Pennsylvania's screening rule.

Non-Lawyers - Probably. Philadelphia Bar Ops. 80-77 & 80-119 (1980).

Rhode Island

Lawyers - Probably not. Rule 1.10(b). R.I. Op. 91-60 (1991). *See also Falvey v. A.P.C. Corp.* 185 F.R.D. 120 (D.R.I. 1999).

Non-Lawyers - Probably not. R.I. Op. 11 (1993).

South Carolina

Lawyers - Probably not. Rules 1.9(b) and 1.10(a). S.C. Op. 92-23 (1992).

Non-Lawyers - Probably. S.C. Ops. 29 (1993) & 12 (1991).

South Dakota

Lawyers - Probably not. Rules 1.9(b) and 1.10(a).

Tennessee

Hopelessly confused. Both the Tennessee Bar in Op. 89-F-118 (1989) and the Sixth Circuit in *Manning v. Waring, Cox, James, Sklar & Allen*, 849 F.2d 222 (6th Cir. 1988) had approved a liberal screening rule. However, *Clinard v. Blackwood*, 1999 Tenn. App. LEXIS 729 (Tenn. App. 1999) muddied things. The appellate court applied a much harsher, anti-screening rule similar to that contained in § 124 of the *Restatement* and adopted by the New York of Appeals in *Kassis v. Teacher's Ins. & Annuity Ass'n, 695 N.Y.S.2d 515 (1999)* and Massachusetts Rule 1.10(d)(2). In *Clinard v. Blackwood*, 2001 Tenn. LEXIS 443 (Tenn. May 18, 2001) the Tennessee Supreme Court seemingly reversed field and approved the more liberal screening rule, citing Tenn. Op. 89-F-118 (1989). But, then the court executed a double reverse by ruling that the appearance-of-impropriety test still present in Tennessee's version of the old ABA Model Code should also have been applied by the lower courts. The court held that their failing to do so was an abuse of discretion and required the Supreme Court to find that there was an appearance of impropriety requiring the firm's disqualification.

A committee of the Tennessee Bar had submitted a set of rules based upon the ABA Model Rules to the Supreme Court in October 2000. The court has given the public until June 30, 2001, to comment. The new rules do not contain an appearance-of-impropriety standard but do contain a screening provision. Stay

tuned.

A note of interest: another branch of the Tennessee Court of Appeals in *Allied Sound, Inc. v. Neely*, 2001 Tenn. App. LEXIS 204 (Tenn. App. 2001), had, while *Clinard* was pending in the Tennessee Supreme Court, gone back to the more liberal approach, citing Tenn. Op. 89-F-118 (1989) and *Manning*, and, interestingly, not mentioning *Clinard*.

Non-Lawyers - Do Not Count on It. See the discussion for lawyers just above.

Texas

Lawyers - Probably not. Rule 1.09(b). *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994); *Henderson v. Floyd*, 891 S.W.2d 252 (Tex. 1995). As to use of work product by successor to the disqualified firm, see *In Re Kenneth George - In Re Epic Holdings, Inc.*, 28 S.W.3d 511 (Tex. 2000).

Non-Lawyers - Probably. In Re American Home Products Corp., 985 S.W.2d 68 (Tex. 1998); *Arzate v. Hayes,* 915 S.W.2d 616 (Tex. 1996); *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466 (Tex. 1994); *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831 (Tex. 1994); Tex. Op. 472 (1991).

Law review. Burton, *Migratory Lawyers and Imputed Conflicts of Interest*, 16 Rev. Lit. 665 (1997).

Utah

Lawyers - Probably not. Rule 1.10(b). *See SLC Limited v. Bradford Group West, Inc*., 999 F.2d 464 (10th Cir. 1993).

Vermont

Lawyers - Probably not. DR 5-105(D). *See* Vt. Op. 87-7 (undated).

Non-Lawyers - Probably not. Vt. Op. 85-8. *But see* Vt. Op. 92-12.

Virginia

Lawyers - Probably not. Rule 1.9(b). *See* Va. Op. 1428 (1992).

Non-Lawyers - Probably. Va. Op. 745 (1985).

Washington

Lawyers - Yes. Rule 1.10(b).

West Virginia

Lawyers - Probably not. Rule 1.10(b). *See Roberts & Schaefer Co. v. San-Con, Inc.*, 898 F. Supp. 356 (S.D. W. Va. 1995).

Wisconsin

Lawyers - Probably not. Rule 20:1.10(b). *But see Nelson v. Green Builders,*

Inc., 823 F. Supp. 1439 (E.D. Wis. 1993).

Wyoming

Lawyers - Probably not. Rule 1.10(b).

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ISSUE OR POSITIONAL CONFLICTS

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Mercantile Bank is attempting to repossess an automobile owned by Lawyer A's maid. Lawyer A is representing the maid on a *pro bono* basis in the local county court. A young associate of Lawyer A suggests that Lawyer A might successfully argue that the attorney's fees provided for in the Mercantile Bank standard retail installment contract cause the contract to violate the state's usury law. Violation of the usury law would negate the contract, and the maid would get to keep the car. Lawyer A's partner, Lawyer B, represents Republic Bank on a variety of matters. Republic Bank's standard retail installment contract has an attorney's fee provision virtually identical to that in the Mercantile contract. If Lawyer A wins the argument, client, Republic Bank may be greatly disadvantaged. Under what circumstances may Lawyer A make the argument.

Clearly, Lawyer A must do an analysis under Model Rule 1.7(b). If she concludes that her firm's allegiance to Republic Bank will not adversely affect the representation of the Maid, she can proceed after explaining everything to the Maid and getting her consent. Does the law firm need Republic Bank's consent? Only if making the usury argument against a different bank is deemed direct adversity to Republic Bank. Then, the analysis is done under Rule 1.7(a), and Republic Bank's consent may be necessary. This is probably not direct adversity, however - see the article at this site, entitled "Current Client and Direct Adversity."

Add some facts. While Lawyer A's case is pending, Republic Bank asks Lawyer B to represent it in the same court and oppose another litigant who is making the same usury argument that Lawyer A is making against Mercantile Bank. Can the law firm argue both sides of the usury issue at the same time in the local county court.

The Comment to Model Rule 1.7 contains a brief reference to issue conflicts. It provides in part:

> [I]t is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

As we will see below, almost no authority agrees with the Comment's focus on appellate courts. Indeed, the Ethics 2000 Commission proposes to abandon the distinction between trial and appellate courts, in new Comment [23]. To see it, click here, then scroll down to [23].

ABA Op. 93-377 (1993) deals with issue conflicts. The Committee said it did not agree with the distinction between trial courts and appellate courts. In either case, the Committee said, the lawyer may conclude that he must withdraw from one of the representations or get consents from both clients after making full disclosure of the potential effect one ruling would have on the other.

Restatement. See § 128. Illustration 5 says that a lawyer can take

opposite positions in two different federal district courts. In Illustration 6 both matters are before the United States Supreme Court at the same time. It says that the conflict is so great, not even consent will cure it.

State and Local Ethics Opinions. A number of ethics committees have opined on these issues, and no two opinions are just alike. Ariz. Op. 87-15 (1987)(with consent, same firm can be on both sides of an employment law issue in same appellate court); Cal. Op. 1989-108 (1989)(firm may take opposite positions before same federal judge); D.C. Op. 265 (1996)(drops the trial/appellate court distinction); Mich. Op. RI-108 (1991)(lawyer may rely on regulation in one proceeding and attack its validity in a later proceeding); Mich. Op. CI-1194 (where two cases are consolidated in state supreme court requiring diametrically opposite positions, lawyer must withdraw from both; consent will not cure); Maine Op. 155 (1997)(cautions lawyer about taking opposite positions before same judge); N.M. Op. 1990-3 (1990)(in child neglect cases, firm may not take diametrically opposite positions in same trial or appellate court); N.Y. City Op. 1990-4 (1990)(firm may take pro bono cases before city human rights commission and defend private clients before commission at the same time); and Philadelphia Op. 89-27 (1990)(with consent firm may take opposite positions on behalf of environmental clients and insurers of environmental risks before the same trial or appellate courts).

The Cases. The author is not aware of any reported court decisions that deal directly with issue or positional conflicts. The following cases have been cited by some writers in connection with these issues. Upon closer examination, they involve situations where a law firm's taking a position for one client will (or could) harm another client *in a specific matter*. *Fiandaca v. Cunningham*, 827 F.2d 825 (1st Cir. 1987); *GATX/Airlog Co. v. Evergreen Int'l. Airlines, Inc.*, 8 F. Supp. 2d 1182 (N.D. Cal. 1998)(discussed at "Current Client and Direct Adversity"); *Estates Theatres, Inc. v. Columbia Pictures Industries, Inc.*, 345 F. Supp. 93 (S.D.N.Y. 1972)(really a "hot potato" case); and *Maritrans GP Inc. v. Pepper, Hamilton & Scheetz*, 602 A.2d 1277 (Pa. 1992). *See Sumitomo Corp. v. J.P. Morgan & Co., Inc.*, 2000 U.S. Dist. LEXIS 1252 (S.D.N.Y. 2000).

Treatise. Hazard & Hodes § 10.10; Rotunda § 8-6.14.

Articles. Douglas R. Richmond, *Choosing Sides: Issue or Positional Conflicts of Interest*, 51 Fla. L. Rev. 383 (1999); John S. Dzienkowski, *Positional Conflicts of Interest*, 71 Tex. L. Rev. 457 (1993); Nancy Ribaudo, *Issue Conflicts*, 2 Geo. J. Legal Ethics 115 (1988).

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The Perils of Joint Representation of Corporations and Corporate Employees in Litigation

A new lawsuit names as defendants the company and the CEO. The suit, on its face, appears utterly without merit, but you have not fully investigated the matter. As general counsel, you must weigh the risks and benefits of hiring a single law firm to represent both the company and the CEO. One of the greatest risks of hiring only one law firm, you have heard, is the possibility that the firm will be required to withdraw from the representation of *both* the company and the CEO if the two clients' interests are later seen to be in conflict. What are the rules in this treacherous area? One court has now adopted the *Restatement* rule allowing a lawyer to drop the CEO, or other corporate employee, as an "accommodation" client while keeping the company. *In re Rite Aid Corp. Securities Litigation*.[1]

One of the most vexing problems facing inside counsel is the decision whether to hire one law firm to represent both the company *and* its employees (typically executives) when individuals are named as defendants along with the company. There are obvious financial benefits from hiring only one firm as defense counsel. More importantly, corporate employees and executives often prefer to be represented by the company's lawyers because they believe that this conveys to the plaintiff a "united front" and implies that the company fully endorses the employees' conduct in the underlying matter. On the other hand, inside lawyers are sensitive to the risks that conflicts can develop between the interests of the corporation and the interests of corporate employees. If that conflict ethically requires that the law firm withdraw from the representation of both the company and the employee, then the result will be deeply disruptive to the corporation's defense. Withdrawal from the representation of both joint clients when a conflict develops is, in fact, the general rule required by Model Rules 1.7,

[1] __ F. Supp. 2d__, 2001 WL 389341 (E.D.Pa. 2001).

1.9 and 1.16, but the *Restatement (Third) of the Law Governing Lawyers* has given impetus to the notion of "accommodation" clients. Under the "accommodation" client concept, now endorsed in the *Rite-Aid* case, a lawyer can – under some circumstances – withdraw from the representation of the corporate employee or executive as an "accommodation" client and continue representing the company.

Before considering the "accommodation" client rule, let us review some of the rules of ethics and privilege governing joint representation. A lawyer may not represent two or more clients who are "directly adverse" to each other unless "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and each client consents after consultation." Model Rule 1.7(a). Because direct adversity suggests situations such as opposing parties in litigation or in transactions, this rule generally will not be applicable to situations where the inside counsel is realistically considering having one law firm jointly represent both the company and its executives or employees. The applicable standard is more likely to be Model Rule 1.7(b), which applies in situations where the representation of one client "may be materially limited by the lawyer's responsibilities to another client…." Illustratively, will the lawyer's obligation to secure the best outcome for the company be "materially limited" by the lawyer's obligation to secure the best outcome for the jointly represented executive? In those situations, as in the 1.7(a) direct adversity conflict, the lawyer cannot undertake the representation unless he or she "reasonably believes that the representation will not be adversely affected" and "the client consents after consultation." Before taking on a dual representation in corporate civil litigation, then, a lawyer must

first "reasonably believe"[2] that the corporation and the executive or employee will not be "adversely affected" by the dual representation, and the lawyer must obtain the clients' consent "after consultation" -- which requires explaining the risks to each client.[3] Assuming that the lawyer concludes that the clients will not be "adversely affected" and that the two clients "consent after consultation," the lawyer may ethically agree to represent both clients. The two clients are generally considered co-equal joint clients of the lawyer.

Now that we have worked out the ethical rules, it is important to review the rules of attorney-client privilege. The traditional rule is that there are no confidences between jointly-represented clients, and thus the lawyer in our illustration is free to provide to the company any information the lawyer receives from the executive and vice-versa.[4] Even this area has become murky, however, as at least three significant jurisdictions now have reached a contrary conclusion: a lawyer is *not* free to share information between joint clients without the disclosing client's consent.[5] Illustratively, D.C Ethics Opinion 296 holds that if, in jointly representing a corporation and an employee, the corporate employee discloses to the lawyer information about the employee's illegal conduct, then the lawyer cannot provide the information to the corporation absent the employee's consent. If the employee does not consent, then the lawyer must resign from the representation of both the company and the employee. The solution to this problem, the

[2] The term "reasonably believes" as defined in the "Terminology" section of the Model Rules means "the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable."
[3] The term "consultation" as defined in the "Terminology" section of the Model Rules means "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."
[4] *Brennan's, Inc. v. Brennan's Restaurants, Inc.,* 590 F.2d 168 (5th Cir. 1979).

D.C Ethics Opinion advises, is to secure the prior agreement that the lawyer is permitted to share confidences between the two clients.

Returning to our case-in-chief, what happens when the lawyer, who agreed to jointly represent both the corporation and the corporate employee, discovers that the two clients' interests are conflicting. This can occur, for example, when subsequent investigation or discovery reveals that the executive was dishonest, breached a duty to the corporation, violated the corporate code of conduct, or broke a federal or state law in a mistaken attempt to benefit the corporation. Can counsel drop the corporate executive and proceed with the company as the sole client? Where the lawyer undertakes the representation of two clients, the general ethics rule precludes the lawyer from terminating his or her representation of one of the clients in favor of the other client, even when a conflict subsequently develops between the two clients.[6] This has become known as the "hot potato" rule, in recognition of a well-known ruling that "[a] firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client."[7] The unhappy result of the "hot potato" rule is that the lawyer must

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[5] D.C. Ethics Op. No. 296; New York State Bar Op. No. 555; *see also* Ill. Adv. Op. 98-07.

[6] Under the *Model Rules of Professional Conduct*, the obligation of a lawyer to withdraw when presented with a conflict during the representation of a single client is governed by Rule 1.7(a). Where a lawyer represents more than one client on a matter and withdraws from representing one of the clients after a conflict between the clients develops during the representation, the question whether the lawyer may continue to represent the remaining client(s) is determined by Model Rule 1.9, governing representations adverse to a former client. Model Rule 1.7, cmt. 2; *see also Restatement (Third) of the Law Governing Lawyers*, *supra*, § 132, cmt. c (noting that the existence of grounds for mandatory or permissive withdrawal may be sufficient to render the representation of one client "former" under the former-client conflict rules of Section 132, but only if the lawyer's primary motivation is not the desire to represent the other client).

[7] *Picker Int'l, Inc. v. Varian Assocs., Inc.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987), *aff'd*, 869 F.2d 578 (6th Cir. 1989). *See also Harte Biltmore Ltd. v. First Pennsylvania Bank*, 655 F. Supp. 419 (S.D. Fla. 1987).

withdraw from the representation of *both* clients when a conflict between the two clients develops.

While the "hot potato" rule remains the prevailing standard, there is some developing support for the rule that withdrawal from the representation of only one of two joint clients is permissible if the "dropped" client is an "accommodation" client. Following a rule that developed in the Second Circuit, the *Restatement* opines that a lawyer may, *with the informed consent of each client*, undertake the representation of one client "as an accommodation to the lawyer's regular client."[8] In the event adverse interests subsequently develop between the clients, even if relating to the matter involved in the common representation, which preclude the lawyer from continuing to represent both clients, then the accommodation client may be deemed to have consented to the lawyer's continued representation of the regular client in the matter.[9] This was the approach adopted by the United States District Court for the Eastern District of Pennsylvania in *Rite Aid.*

Rite Aid was a federal securities class action resulting from the corporation's disclosure of severe financial problems. The defendants included the corporation and its CEO.[10] Based on inside counsel's belief that both defendants shared an identity of interest because the allegations were, in his view,[11] without merit, one law firm was

[8] *Restatement (Third) of the Law Governing Lawyers, supra,* § 32, cmt. i.
[9] *Id.* (further providing that the lawyer bears the burden of showing that circumstances exist warranting the inference that the accommodation client understood the relationship and impliedly consented to the arrangement).
[10] The chief financial officer and the president subsequently became clients of outside counsel in this matter under the same terms as the original representation of the corporation and the CEO. *In re Rite Aid Corp. Sec. Litig., supra*, 2001 WL 389341, at *2.
[11] In house counsel's view was based on the CEO's representation that the claims were meritless. *Id.* at *6.

retained to represent both the corporation and the CEO in the litigation. With respect to the representation of the CEO, however, inside counsel instructed the law firm *not* to speak directly with the CEO, but to work through inside counsel. The law firm included in its engagement letter that, in the event a conflict arose between the corporation and the CEO, the CEO would be required to retain separate counsel and outside counsel would continue to represent the corporation. Two other facts are important. First, the CEO never provided any confidential information to the law firm.[12] Second, at the same time inside counsel had engaged one law firm to represent both the corporation and the CEO as counsel of record, a separate law firm was hired to represent only the CEO.[13] A law firm who is hired to look out for the interests of an individual client in these circumstances but not enter an appearance in litigation or surface publicly until absolutely necessary is sometimes referred to as "shadow counsel." An investigative audit subsequently disclosed apparently serious breaches of fiduciary duty on the part of the CEO, which had been concealed by the CEO. The firm that had jointly represented both Rite-Aid and the CEO then advised Rite-Aid that it could no longer represent the CEO, who had recently resigned, and that the CEO must retain his own counsel in the litigation.[14]

Following a partial settlement of the litigation, which resolved securities claims against Rite-Aid but did not release the former CEO, the former CEO moved for disqualification of Rite-Aid's law firm on the basis that its continuing representation of Rite-Aid with respect to the partial settlement violated Model Rule 1.9(a). Model Rule

[12] *Id.* at *3.
[13] *Id.* at *2.
[14] *Id.* at *3.

1.9(a) prohibits a lawyer from representing a client (here, Rite Aid) in the same or a substantially related matter in which that person's interests are materially adverse to those of a former client (here, the former CEO). In denying the motion, the court found that the CEO was an "accommodation" client under the terms of the *Restatement.*[15] Its conclusion was based on his engagement of, and his dealings with, the law firm *through* inside counsel and the corporation, which was the basis for a finding that the CEO had consented to outside counsel's continued representation of the corporation.[16] The court also relied on the Second Circuit jurisprudence that antedated the "accommodation" client theory of the *Restatement*, in which the courts held that simultaneous representation did not require disqualification where it was clear that the non-moving party (the corporation) was the primary client and the moving party (the former CEO) was a secondary client who had no reason to believe that any information would be withheld from the non-moving party.[17] Finally, the court held that the former CEO had waived his rights.[18]

The American Law Institute's *Restatement (Third) of the Law Governing Lawyers* is a relatively newly-minted authority, and *Rite Aid* appears to be the first reported decision that has addressed the application of the *Restatement's* "accommodation" client theory to situations involving the simultaneous representation of a corporate entity and

[15] *Restatement (Third) of the Law Governing Lawyers, supra,* § 132, cmt. i.
[16] *In re Rite Aid Corp. Sec. Litig., supra*, 2001 WL 389341, at *8. The court also found that, aside from the "accommodation" client reasoning of the *Restatement*, the CEO had effectively consented to the continued representation of the corporation because the engagement letter "could not have been clearer with respect to the relationship between [outside counsel's] representation of Rite Aid and its representation of [the CEO]." *Id.*
[17] *Id.* at *5-*6 (discussing *Allegaert v. Perot*, 565 F.2d 246 (2d Cir. 1977), and *Kempner v. Oppenheimer & Co*., 662 F. Supp. 1271 (S.D.N.Y. 1987)).
[18] *Id.* at *9-*10.

its individual members.[19] While the theory may, in the future, provide a solution for conflicts that subsequently unfold during the course of this type of representation, it may require an engagement letter that clearly identifies outside counsel's responsibilities in the event a conflict develops between the interests of the corporation and those of the individuals.[20] Other factors that may warrant the inference that the accommodated client understood and consented to such representation include the individual client's contact with the law firm solely through the corporation,[21] the fact that the law firm had represented Rite-Aid as the regular or "primary" client for a long period of time prior to its representation of the corporate employee or officer, the limited duration and scope of the representation of the corporate officer, and the understanding that the law firm "was not expected to keep confidential from [the corporation] any information provided to the lawyer by [the corporate officer]"[22] Finally, two factors weighing against disqualification in *Rite-Aid* were that the CEO had his own lawyer throughout the case to protect his rights and that he had not provided confidential information to the corporation's lawyers.

Even if the "accommodation" client theory gains increasing acceptance, it has unknown risks. After the law firm withdraws from the representation of the

[19] In *Universal City Studios Inc. v. Reimerdes*, 98 F. Supp. 2d 449 (S.D.N.Y. 2000), the court rejected the law firm's assertion that the plaintiff, a former client, was an accommodation client whom the firm could unilaterally drop in favor of another client whom the firm represented in an unrelated action against the plaintiff. The court found that the firm's decision to undertake the representation of the other client was improper at the outset because of the adverse interests. The court also found that the firm's conclusion that the plaintiff was an accommodation client was based on factual assumptions that "are demonstrably wrong . . . unproved, or are unwarranted inferences drawn from assertions" made by the firm. *Id.* at 454.

[20] In *Rite Aid*, the court stated that counsel's letter "made it pellucid" that the firm would, in the case of a conflict between the corporation and its CEO, cease its representation of the CEO but continue its representation of the corporation. Although the CEO contended that he did not see the letter nor agree to this provision, the court held that the CEO was constructively on notice of the letter's contents since it was "his decision to engage counsel through Rite Aid." 2001 WL 389341, at *8.

[21] *Id.*

[22] *Restatement (Third) of the Law Governing Lawyers, supra,* § 132, cmt. i.

"accommodation" client, what use can the law firm make of any information provided to it by the accommodation client during the course of the representation? While the application of the "accommodation" client theory denotes that the accommodation client consented to the disclosure, or sharing, of information with the regular client,[23] does this also entitle counsel to use the information against the client after withdrawal? Of course, one can argue that no lawyer can "forget" what he has already learned. So will the lawyer be prohibited from being adverse in any way to the former client because of the lawyer's duty "to take no unfair advantage of the client by abusing knowledge or trust acquired by means of the representation?"[24]

Rite-Aid and the "accommodation" client rule from the *Restatement* are at the cutting edge of the ethics/privilege jurisprudence involving jointly-represented clients. There is no assurance that other courts will follow this lead, and the consequences of the traditional "hot potato" rule can be calamitous if it results in the withdrawal of the law firm from the representation of both clients. Thus, while corporate counsel should keep an eye on these and other similar developments, it would be a grave mistake to rely upon the "accommodation" client rule without full recognition of the risks it entails.

If the risks are too high, there is a worthy alternative. The primary law firm could represent only the corporation, and the corporate employee-defendants could be represented by a separate lawyer(s) paid for by the corporation under its indemnity

[23] *See In re Rite Aid Corp. Sec. Litig., supra*, 2001 WL 389341, at *5-*6 (discussing pre-Restatement cases applying primary client theory, wherein courts rejected contention that counsel had breached the duty of confidentiality under Canon 4 since the secondary client had no reason to believe at the outset of the representation that any information would be withheld from the primary client).
[24] *Restatement (Third) of the Law Governing Lawyers, supra,* § 33(d).

obligations. If the individuals' lawyers are urged to avoid duplication of work, and agree to operate under a joint defense agreement, then the ethical and privilege risks are much diminished, probably without a huge increase in cost to the corporation. Of course, this alternative is only financially realistic in large cases where you would otherwise hire "shadow counsel." And it has a cost: the corporate employees are not represented jointly by the corporation's outside law firm. Most employees and some executives readily accept this result. Many CEOs find it unacceptable for appearance purposes.

The foregoing discussion of the "accommodation" client rule has been exclusively in the context of civil litigation, and so it should be. While there may be no principled distinction between civil and criminal litigation for application of this rule, the fact is that the likelihood of a conflict developing between a corporation and a corporate employee or officer is, in the author's experience, far greater in criminal cases than in civil cases. And the conflicts can become much sharper if the government offers the corporation a good deal if it abandons the corporate employee (or vice versa). Thus, the dynamics of criminal litigation make it far less attractive to use the "accommodation" client theory there than in civil litigation.

What are the practical lessons to be learned from this analysis?

-- Until your jurisdiction has endorsed the "accommodation" client rule, caution dictates hiring separate counsel for individuals and minimizing duplication of work.

-- Don't rely upon the "accommodation" client rule where there appears a significant likelihood of a conflict developing.

-- Draft initial engagement letters with extreme care. Recite therein that the corporation is the primary client, that the law firm is entitled to advise the corporation of anything that the individual client tells counsel, and that in the event of a conflict, the law firm will withdraw from the representation of the individual and continue representing the corporation and is free to use all information it has previously gained from the individual for any purpose whatsoever. Devote whatever time and resources are necessary to explain to the individual employee the implications of these terms, including having the individual employee consult with separate counsel, in order to satisfy the burden of "consent after consultation."

-- If financially feasible, provide the individual with "shadow counsel" who monitors the litigation, although he or she does not enter an appearance or "surface" until absolutely necessary.

The following material is excerpted from:

Gary E. Munneke and Anthony E. Davis,
THE ESSENTIAL FORMBOOK: Comprehensive Management Tools for Lawyers,

Copies of THE ESSENTIAL FORMBOOK are available by calling 312.988.5522.

CHECKLIST - ENGAGEMENT LETTERS

Every firm, and every practice group within each firm, will have its own preferred style and text for its form engagement letters. Our purpose is to present the basic checklist of items that should be covered in all such forms. If a firm decides to structure its intake process as described in this work, it should review each version of the engagement letter form so that the review process, can proceed without separate consideration of every form letter by the oversight partner or committee. Because clients have differing needs and levels of sophistication, this checklist includes both required and optional items. Required items, listed in **bold face and large type,** should at least be considered for inclusion in every engagement letter; in ***bold face italic type*** are additional ***optional*** items which may also be included.

The Checklist is presented in two forms, first as a simple list, and, second, with detailed commentary.

THE CHECKLIST

1. Parties

2. Scope of Engagement

3. Nature of Services – Course of Representation (optional)

4. Lawyers and Others Providing Services

5. Communicating with the Responsible Lawyer

6. Methods of Communication - Preserving Confidences (optional)

7. Client's Obligations

8. (i) Fee Arrangement

(ii) Disbursement Arrangement

9. Billing Arrangement

10. Dispute Resolution

11. Right of Withdrawal

12. Additional Requirements of State Law or Court Rules (optional)

13. Agreement (Countersignature) of Client

ANNOTATED CHECKLIST – ENGAGEMENT LETTERS

1. Parties

- The letter should specifically identify all parties or entities represented in the matter — and all parties specifically ***not*** represented — by proper legal name.

- If the client is a corporation or organization, make clear that you will represent the interests of the entity, **not** the president, the board of directors, or the trustees. If the engagement involves services provided to individuals, state whether you will represent, for example, the husband, as opposed to the husband and wife. ***If appropriate, include advice to those not being represented to seek and obtain separate counsel***.

Comment: Careful specification of the client can clarify the interests involved in the case and reveal any potential conflict of interest. Because multiple clients may have very different interests, this element is especially important in joint representations. If more than one individual or entity is named as client, the letter should automatically be reviewed to determine whether appropriate steps have been taken to deal with actual or potential conflicts that may arise from multiple client representation, as discussed in Chapter 2, ***Making Judgments: Managing The Client Selection Process***.

If a decision is reached to accept the engagement despite a conflict of interest, either the engagement letter or a separate letter should deal specifically with the issue, including the necessary full disclosure. It may also be appropriate to describe the action you will take if a conflict ***subsequently*** arises that requires separate representation. If appropriate, specify which client you will represent under these circumstances. Warn that if you are required to withdraw because of a conflict of interest, all parties may be denied your services, and each party will then have to pay a new attorney to assume the matter. If warranted, recommend that the client seek independent counsel regarding the conflict of interest and its impact.

***Notes*:**
(1) In multiple client situations, additional language at Item 6 (Methods of Communication - Preserving Confidences) will be appropriate to inform all clients that they do not have ***separate*** (only collective) expectations of confidentiality.
(2) Additional language will also be necessary at Item 13 (Agreement of the Client) in every matter where there is a conflict to be waived or consented to, in order for the client(s) to give express waiver or consent to the engagement notwithstanding the conflict.

2. Scope of Engagement

- Clearly, fully, and specifically describe and define the services you have agreed to perform for each individual representation. This definition is essential in ensuring that you meet the client's goals, and can provide a valuable reference point for discussion of goals and expectations over the course of the engagement.

- Specifically state any limitations on services and exclude services that you have ***not*** agreed to perform. Exclusion warns the client that he or she should protect himself or herself through other means if potential issues arise that you do not want to address. Be as specific as possible so that you cannot subsequently be blamed for failing to address a related issue. When you are representing one party to a divorce proceeding, for example, the engagement letter should state that your representation will not include the sale of a house or other property.

- Disclaim responsibility for providing any services not specifically listed; for example, you may choose to expressly limit your scope of engagement to avoid responsibility for giving technical advice on the implications for the engagement of "Year 2000" or "Y2K" concerns and risk.

- Specify any special areas of authority that the client has agreed to grant you, such as hiring of co-counsel or experts or incurring of significant expenses. Note, however, that this advance grant of authority is not all-inclusive; you may need to seek renewed authorization for authority issues that may arise later in the representation.

Comment: A clear, full, and explicit description of what the firm is - and is not - being retained to do is an essential element in establishing the basis of any fee arrangement (especially any non-time based fee), and in avoiding claims that the firm failed to perform assigned tasks. Ambiguity in the definition of the scope of the engagement can be extremely dangerous from a risk management perspective. In

one case, for example, a firm was retained "to recover damages for injuries sustained in an auto accident" of a certain date. The firm understood its role to be the filing and prosecution of a civil suit, and did not pursue workers' compensation remedies. When the limitations period expired on the workers' compensation claim, the client sued for malpractice. Because the engagement letter stated broadly that the firm's responsibility was to handle matters related to the accident, the firm and its carrier paid a large settlement on a matter that the firm had never consciously accepted.

Limitation of the scope of engagements is expressly permitted by the Model Rules of Professional Conduct, and has been accepted by many courts. It may also be helpful and advisable, to state that a closing letter will be sent at the end of the engagement, after which the firm's representation of the client will cease unless a new engagement letter is exchanged.

3. Nature of Services – Course of Representation (optional)

- Outline the work to be performed, define a general time line for its performance, and note major tasks, deadlines and milestones. Establishment of a clear framework for conduct of the representation can help you define tasks, meet deadlines and avoid excessive expenditures. It can also alert you to unclear or unrealistic client expectations.

- Indicate both attorney and client responsibilities on the task schedule. If appropriate, note scheduled ongoing meetings or other channels of communication.

- If you want to address the likelihood of success in a litigation, be careful to avoid wording — especially a percentage-based estimate — that could be interpreted as a guarantee of success. If you do discuss the likelihood of a positive outcome, be sure to include appropriate caveats.

Comment: This is distinct from the statement of the scope of the engagement, and is intended for the benefit of individual or unsophisticated (especially first-time)

clients. This element describes and explains how lawyers will perform the assigned project, and the kinds of activities involved, so that there are no expressions of surprise by the client at the time or efforts spent on activities outside the client's vision or expectation. In litigation matters, such as contested matrimonial cases, it can be very helpful to provide clients with a detailed description - perhaps in a separate document - that explains the steps and timetable for a "typical" case.

4. Lawyers and Others Providing Services

- Identify the primary attorney responsible for the engagement, other attorneys within the firm, paralegals and all other professional staff who will work on the engagement. Also identify any outside consultants, experts or co-counsel at other firms who will be involved in the matter.

- If the client is retaining other attorneys besides you, delineate exactly what responsibility and authority you will assume and what responsibility and authority others will have. Make sure the client is clear about this delineation.

Comment: Identify with specificity the lawyers who will be working on the client's matter, or at least those who will be responsible, and with whom the client may communicate.

5. Communicating with the Responsible Lawyer

- Describe the frequency and form of your anticipated communications with the client. Establishment of clear lines of communication is essential to ensure that changes during the course of the representation — in the matter itself, the firm's or the client's circumstances, or the attorney-client relationship — are recognized and adequately addressed.

- Specify the firm's policy regarding the time within which calls or faxes are customarily answered, and what to do if no response is received on a timely basis.

Comment: The most frequent complaint voiced about lawyers – to disciplinary authorities, as well as in malpractice cases - is "My lawyer ***never*** **returned my telephone calls.**" Accordingly, this element of the engagement letter presents an ideal

opportunity to make a positive commitment that can only have a beneficial effect on the relationship – that **your firm**, and **your lawyers**, understand the importance of being accessible – and ***agree*** to live up to the firm's policy.

6. Methods of Communication - Preserving Confidences (optional)

- Early discussion of attorney-client privilege — including protections, limitations, and waiver — is critical, especially in matters involving joint representation, and with respect to the use of technological devices (cellular phones, E-Mail, etc.).

- You may want to specify that client records will be returned at the conclusion of the matter or state your document retention policy, including periodic disposal, for other materials whose return the client does not request.

Comment: Much time and energy has been spent in recent years discussing the need for protection of computer systems and data by encryption and the dangers of mis-addressed faxes, and cellular telephones and other threats to attorney-client confidentiality. Many of these potential problems can be eliminated if the issue is directly addressed in the engagement letter and the client consents to whatever security (or lack thereof) is to be adopted in communications between the firm and the client, and within the firm generally. Expression of such concerns in the engagement letter is essential if the client or a particular matter demands special treatment.

7. Client's Obligations

- Identify any important matters that must be decided by the client, and specify any deadlines involved.

- Emphasize that the client is responsible for regular communication and provision of complete and accurate information throughout the engagement. State that you will rely on the completeness and accuracy of that information when performing your services.

- Specify any tasks your client must perform, such as obtaining tax returns or other relevant documents, and state deadlines for their completion.

- Changes in the client's structure, ownership or other circumstances can give rise to new conflicts. If appropriate, specify that the client must inform you of any such changes during the engagement. On a more practical level, some firms state that the client must notify the attorney of any change of address or telephone number and any extended travel plans.

- Further specification of client responsibilities may be appropriate in some personal representations. For example, you may want to stipulate that the client agrees to comply with court orders or medical requirements relevant to the engagement.

Comment: Until serious problems arise, lawyers tend to forget that their clients have basic obligations, especially truthfulness toward counsel. When lawyers discover that clients have lied or committed fraud, during the course of representation, the problems which ensue under every version of ethics codes are nothing less than horrendous. The problems can be significantly mitigated by a clear expression within the engagement letter of the client's obligations and the consequences which will follow under the applicable ethics code in the event that these problems arisre. If it is clearly and simply expressed, this language can prevent serious trouble later.

8. (i) Fee Arrangement

- Clearly state the basis on which fees will be charged, and note the client's agreement that the fees are reasonable. **Many states require that the firm's fee schedule be communicated to the client in writing, regardless of whether a contingent fee is involved**. In some states, the attorney must specifically inform the client of the basis of charges at the outset of the engagement. **The courts will always resolve ambiguities in the client's favor.**

- In all hourly fee engagements, specify the respective billing rates of all professional staff who will be working on the matter, and note any likely change in rates during the course of the engagement.

- Specify any charge you intend to bill on a basis other than straight hourly charges, and describe how such charges will be computed. Specify any additional charge you intend to impose, such as a premium for achieving a favorable outcome. It may be useful to explore potential alternative fee arrangements with the client before formalizing the basis of charges. Specify whether a lesser rate will be

charged for travel time; if not, state that necessary travel will be billed at the rates previously set forth.

- Most states require exact written explanation of how contingent fees will be determined — including, as specified by ABA Model Rule 1.5, "the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated." Some states may impose additional requirements.

- If there is any arrangement for the sharing of legal fees with other lawyers (including referral fees), review local ethics rules, and state the sharing arrangement in the necessary detail as set forth in those rules.

Retainer and Management of Client Funds

- State the amount of your retainer, the types of fees and expenses covered, when the retainer must be replenished and what actions you will take if it is not replenished. Careful scheduling of retainer payments can ease the payment process and eliminate surprises as the engagement proceeds. Some clients may prefer to make direct payments to third-party consultants or vendors instead of paying a large retainer.

- Specify whether or not the retainer is refundable if the engagement ends before it is exhausted. Non-refundable or advance-pay retainers may be void or voidable in some states; check local ethics rules and case law first.

- Specify how client funds will be handled and whether or not interest will accrue. Many states require that refundable retainer monies be placed in a trust account; depending on the amounts and times involved, your fiduciary role may dictate that the account be interest-bearing. Trust arrangements are especially vulnerable to outside scrutiny; review all arrangements carefully to ensure that there is no appearance of advantage to you or the firm.

Comment: Clearly state the nature of the fee arrangement and the firm's policies with respect to all disbursements. Segment 3 of this work, ***Fees, Billing and Collections***, will deal at length with the reasons why hourly billing is problematic; what the alternatives are - including contingent, task-based, value-based, capped, flat, discounted or blended fees - and why lawyers will make more money if they adopt them; and how to make the transition.

(ii) Disbursement Arrangement

- Clearly indicate whether out-of-pocket charges (such as long-distance telephone calls, copying and transcription charges, travel, court costs, postage and couriers, and charges for computerized research) will be passed on to the client, and specify your procedures for doing so. Warn the client if these charges are likely to be significant. If appropriate, explain that internal staff time for word processing and similar tasks is not included in the hourly fee and will be billed. Scrutinize your estimates to ensure that the client receives the best rates possible for such tasks, whether performed in-house or contracted to a vendor.

Comment: There are both ABA Formal Ethics opinions, as well as local opinions, regarding permissible charges for disbursements.[4] Beyond the negative appearance of substantially marked-up disbursement charges, in many states it is unethical to make a profit on the provision of non-legal services, such as photocopying. While one approach is to provide a schedule of standard disbursement expense charges, many lawyers and firms have concluded that clients prefer a single inclusive bill without separate charges for disbursements – and have raised their rates to accomplish that end.

9. Billing Arrangement

- Explain your billing and payment requirements and set out a clear payment schedule. Specify the frequency and format of your standard bills.

- You may want to state that you will submit interim reports specifying what legal services have been performed and what funds have been disbursed during the stated period, even if no payment is due. Interim reports both inform the client and protect the attorney by providing a detailed record of time and expenses. In the event of termination or a future claim against the firm, this record can help establish the reasonable value of services provided.

10. Dispute Resolution

- Describe the procedures you will take to resolve any disputes that may arise during the course of the representation.

- Inclusion of a mediation clause is recommended to demonstrate your commitment to lower costs and rapid resolution of possible problems. This method has proven both successful and efficient in resolving disputes; it can help you build good client relations.

- Consider including an arbitration clause for fee disputes. Some states require ADR to resolve disputes regarding legal fees, while others limit these clauses. Accordingly, before using alternative dispute resolution (ADR) clauses, check with your insurer to make sure they do not violate the terms of your policy or state or local rules. Limitation of this clause to address fee disputes only, as opposed to all disputes, is essential to limit your risk exposure by separating any claims arising from fee disputes from any broader malpractice claims.

Comment: This element is optional - and in a few states, some elements, such as mandatory arbitration, may be prohibited or restricted[5]. In our view, however, it is always preferable for disputes with clients to be resolved ***in private***, rather than in open court where they are likely to be exposed to the glare of the media. We recommend that arbitration always be offered as an option, even where it may not be mandated under local ethics rules.

11. Right of Withdrawal

- To eliminate any uncertainty, state that the client can terminate your engagement at any time, without cause.

- Explain that you also have the right — and sometimes the obligation — to terminate the engagement, on written notification and subject to the ethical standards in the Rules of Professional Conduct.

- You may want to state that you reserve the right to suspend or terminate the representation if the client ***either*** breaches its obligations with respect to the engagement (see item 7 above) ***or*** does not pay the firm's invoices within a specified period. This provision can lessen the likelihood that you will have to file suit to collect your fees, which often results in counterclaims by the client. Statements that the client agrees not to contest the firm's withdrawal if its fees have not been paid, however, may violate state ethical standards.

Comment: If, as recommended above, the engagement letter clearly expresses all of the client's obligations to the firm, the courts are likely to honor a firm's request to withdraw in cases where consent is required, provided that this right is also clearly expressed in the engagement letter. This provision, combined with ongoing oversight of billing and collections to prevent accumulation of significant accounts receivable, should enable firms to extract themselves from engagements in which the clients fail to pay their bills on a timely basis. Of course, firms should also not wait until the eve of trial in cases where a court's permission to withdraw is required. Even when such permission is not required, termination just before a transaction is due to close may constitute a violation of applicable rules of professional conduct.

12. Additional Requirements of State Law or Court Rules

- Include any additional disclosure or discussion of any other items specifically required by the state. See, in particular, New York's rules relating to matrimonial lawyers,[6] and many states' rules regarding the content and, in some cases, the registration of contingency fee agreements.

13. Agreement (Countersignature) of Client

- Suggest that the client call you to discuss any terms of the engagement letter that are not clearly understood. Your offer to explain the terms can both improve client relations and protect you from possible future assertions that the client didn't know what he or she was signing.

- Specify that the engagement letter is a binding legal agreement.

- Provide two copies of the engagement letter and include a clearly labeled space for the client's signature. Request that the client sign and return one copy of the letter and keep the other copy for his or her records. A signed engagement letter is essential to resolve any future questions regarding client consent, client responsibilities, or any other terms of the representation.

- If the client fails to return a signed copy of the engagement letter, send a reminder noting that you need an executed copy of the agreement to proceed. Ask the client to call you to discuss any questions or problems.

Comment: **Unless the client countersigns the letter before the engagement commences or very promptly after initial engagement, the letter may be held to be unenforceable against the client on the grounds that a letter signed after significant work has been performed gives the client no choice but to accept the terms. Worse, an unsigned letter may be enforced against the firm as draftsmen, but not against the client. To avoid these problems, the client intake process should not be concluded, and significant work should not be commenced until the countersigned letter is on file.**

COMPREHENSIVE HOURLY FEE ENGAGEMENT LETTER

[Letterhead]

[Date]

[Client's Name]
[Client's Address]

Dear [Client's Name]:

It was a pleasure meeting with you yesterday to discuss [Client's Name] engagement of [Law Firm Name] to provide professional services. I would like to thank you for selecting [Law Firm Name] to handle your matter.

The purpose of this letter is to set forth the terms upon which [Law Firm Name] agrees to represent [Client's Name], in order to establish and maintain a mutual understanding of the goals and respective responsibilities of [Law Firm Name] and [Client's Name].

SCOPE OF SERVICES

[Client's Name] has engaged [Law Firm Name] to represent it in connection with [*express in as much detail as possible the exact description of the matter and the nature of the services to be provided*].

(As we have discussed, this engagement letter does not encompass, nor does it engage [Law Firm Name] to represent [Client's Name] in any matter not described above. In particular, this letter does not include [*express in as much detail as possible any possible matters, such as appeals, representation in other transactions, representations of subsidiaries, etc., which would be the subject of a separate engagement for any reason*.])

It is understood that [Law Firm Name] will not settle, negotiate, or compromise this matter without [Client's Name]'s written consent.

POSSIBLE CONFLICTS OF INTEREST

Example 1: As we discussed, [Law Firm Name] will not be representing [Client's Subsidiary's Name] in this matter because of potential attorney_client privilege and conflict-of-interest concerns. I have advised [Client's Subsidiary's Name], by letter dated [date], that [Law Firm Name] cannot represent it and that [Client's Subsidiary's Name], is responsible for retaining separate counsel to represent it. [*Include conflict-of-interest acknowledgment at end of letter, above countersignature line*.]

Example 2: As we discussed, [Law Firm Name] will represent only [Client's Name] [the entity (Client)] and not any of its [shareholders_partners] individually, because of the differing individual interests of each of the [shareholders_partners] in the matter. By separate letter to each of the [shareholders_partners], I have advised them of this limitation upon our engagement, and that each of them should consult or engage their own separate counsel to advise them regarding any aspect of the matter where they perceive that their individual interests may diverge

from either [Client's Name]'s interests or of the other [shareholders_partners]. [*Include conflict-of-interest acknowledgment at end of letter, above countersignature line*.]

Optional, but highly recommended:
GENERAL MATTER_TRANSACTION_LITIGATION INFORMATION

In order to take away the mystery from the process of representing [Client's Name] in this [matter], it may assist if I explain in some detail, how [matter] is [handled_likely to progress] and what you can expect during this engagement.

E.g., a lawsuit is commenced by the service and filing of a Summons and Complaint. The Complaint recites facts upon which the Plaintiff asserts liability against the Defendant. In this case, [Plaintiffs] are alleging that [Client's Name] terminated their employment exclusively on the basis of age. [Client's Name] as the Defendant then ha(ve)(s) a limited number of days in which to serve and file an answer that typically denies the claims asserted in the Complaint.

Both the Plaintiff(s) and Defendant(s) are afforded a limited period of time called "discovery," during which they investigate the strengths and weaknesses of each other's claims. Written questions called "interrogatories" are frequently exchanged that require written responses about the facts and claims asserted by both parties. Oral depositions are also commonly used as discovery tools, where parties to the action, as well as witnesses, orally answer questions posed by opposing counsel that are simultaneously recorded by a stenographer. Depositions are very important, because the testimony can later be used at trial to perhaps point out inconsistencies between deposition and trial testimony. Also, depositions are helpful in ascertaining the strength and credibility of the deponent. If interrogatories are sent to us, we will explain the procedure and assist you and any other relevant employee of [Client's Name] with answering the questions. If depositions are scheduled, we will meet with you or the relevant [Client's Name] employee_deponent prior to the deposition and discuss the process. We will also be present at every deposition.

If your case does not settle after discovery is terminated, then a trial will take place, usually before a judge and six-person jury. Prior to trial, we will spend considerable time with you and other witnesses_parties explaining how a trial is conducted and reviewing everyone's testimony. It is entirely possible that several trial dates will be set, only to be continued because of crowded court calendars. It is very important that you understand the delays that often attend lawsuits; they can stretch on for years, which is why [Client's Name]'s commitment to and patience with this process is imperative. As with everything else relating to this engagement, if [Client's Name]'s ha(ve)(s) any questions regarding the status or progress of this matter, please call me at any time.

<u>ASSIGNMENT OF FIRM PERSONNEL</u>

I will be primarily responsible for the supervision of [Client's Name]'s matter, but [Client's Name] is_are engaging [Law Firm Name], not me individually. As and when necessary, I will draw upon the talent and expertise of other partners and associates within the firm and

utilize paralegal staff to handle administerial tasks. [Wherever possible, identify others involved and give name of additional contact person in the firm if writer is unavailable.]

LEGAL FEES, EXPENSES, AND BILLINGS

Fees: We have discussed the fee arrangements for this engagement, and [Client's Name] ha(ve)(s) agreed to pay fees for the services of [Law Firm Name] on an hourly, time-charge basis, based upon the following rates:

Partners: [*Specify rates_ranges*.]
Associates: [*Specify rates_ranges*.]
Paralegals: [*Specify rates_ranges*.]

Optional: These rates are subject to adjustment in [month] of every calendar year upon prior notice to [Client's Name]. Our rates will, in any event, not change in this engagement before [date]. Hourly billing will be to the tenth (1_10th) of an hour for time spent on [Client's Name]'s matter. It is important to understand that time spent will include telephone and personal conferences with both [Client's Name] and assigned firm personnel, legal research, [e.g., conferences, meetings, preparation and review of necessary documents and correspondence].

[*Optional*: We have determined that these time-charge rates are applicable to this matter after consideration of the following factors: (a) the nature of the legal issue, including its novelty, complexity, and importance; (b) preclusion of other employment; (c) the amount or consequence at stake and the result obtained; (d) time limitations imposed by [Client's Name] or by the situation; (e) the experience, reputation, and ability of the attorneys; and (f) the skill necessary to handle the legal matter correctly.]

It is difficult to estimate, in advance, the amount of fees that [Client's Name] will incur in connection with this matter. [Optional: We anticipate the fees will be in the range of $[amount], exclusive of expenses. This figure is not, however, a maximum fee, but is simply an estimate to allow [Client's Name] to budget appropriately. If we see that the fees will be exceeding this estimate by a significant amount, we will notify [Client's Name].

Costs and disbursements: [Client's Name] is_are responsible for payment of any expenses properly and reasonably incurred on [Client's Name]'s behalf, including reimbursement of all disbursements advanced by [Law Firm Name]. Such expenses and disbursements are likely to include, but are not limited to, photocopying and facsimile charges, long distance telephone calls, travel expenses (economy class unless otherwise approved in advance by [Client's Name]), and computer research charges. Costs exceeding $[], such as expert witness fees and deposition costs, may be billed directly to [Client's Name], for which [Client's Name] will make prompt, direct payments to the vendor. [Law Firm Name] will attempt to notify [Client's Name] prior to advancing any individual item of which the cost is likely to exceed $[].

[*Optional: Retainer*: As is our policy (with new clients), we are requesting an initial deposit of $[ ]. This retainer is a partial advance against anticipated legal fees and disbursements and must be paid before [Law Firm Name] will commence work upon the file. The retainer will be deposited in the firm's client trust account, subject to IOLTA (Interest on Lawyer Trust

Accounts) requirements, and applied against [Client's Name]'s bills for legal services and disbursements. If the retainer is exhausted prior to the conclusion of this matter, [Law Firm Name] reserves the right to request replenishment of the retainer before additional work is performed. In the event of such a request, [Client's Name] agrees to make such replenishment within fourteen (14) days of such request. The retainer, or any unused portion thereof, will be refunded to [Client's Name] in the event it has not been utilized in this matter, immediately upon the conclusion of the matter or upon the termination or withdrawal of [Law Firm Name] from this engagement.]

Billing arrangements: Itemized statements of services and disbursements will be sent to [Client's Name] monthly, with payment to be made within thirty (30) days of the invoice date. [Optional: [Law Firm Name] reserves the right to charge [Client's Name] interest, not to exceed []% per annum, on any bill outstanding for more than thirty (30) days.] If [Client's Name] has any questions regarding the billing format or any information contained in any invoice or statement, please contact [Law Firm Name] so that we can try to resolve any concerns promptly and amicably.

CLIENT COOPERATION AND MUTUAL COMMUNICATION

In order to advocate effectively [Client's Name]'s interests, it is important for [Client's Name] to understand, that [Client's Name] ha(ve)(s) an affirmative obligation to assist and to cooperate with [Law Firm Name] during this engagement. For example [*specify likely assistance to be needed from client, e.g.*]: [Client's Name] will be required to furnish certain information and documents, and [Client's Name] [designated Client representatives] may be expected to provide requested documentation promptly to the appropriate firm representative, whether an attorney, paralegal, or secretary. [Client's Name] [designated Client representatives] must be available to work with [Law Firm Name] attorneys in preparation for [meetings] and to discuss issues as they arise throughout this matter. [Client's Name]'s noncooperation will be grounds for [Law Firm Name]'s withdrawal, and thus, it is essential that we maintain open communication.

In return, [Law Firm Name] will keep [Client's Name] informed of the status of this matter and to consult with [Client's Name] when appropriate. Copies of significant correspondence and documents will be sent to the person designated by [Client's Name] from time to time for that purpose. Initially, [Client's Name] has designated [name] for this purpose. [*Optional, but highly recommended:* In the event that [Client's Name] needs to reach [Law Firm Name] and the person sought is unavailable, please leave a message for the person concerned disclosing the nature and urgency of the call. It is our policy that all calls will be returned promptly, and in any event no later than within one (1) business day of receipt of the call; if you have not received a return call within that time, please call again.]

Optional—Sophisticated Clients_Transactions Only—
PROTECTION OF CLIENT CONFIDENCES—HIGH TECH COMMUNICATION DEVICES

As lawyers, we are always mindful of our central obligation to preserve the precious trust which our clients repose in us—their secrets and confidences. To that end it is important that we

agree from the outset what kinds of communications technology we will employ in the course of this engagement. For instance, depending on the degree of security that you wish to maintain, it may not be appropriate to speak using cellular telephones (or at least not to do so where substantive information is being discussed). Similarly, the exchange of documents using the Internet, or even direct computer-to-computer data transfer, may involve some risk that information will be retrieved by third parties with no right to see it. Even the use of fax machines can cause problems if documents are sent to numbers where the documents sit in open view. Accordingly, we request that you indicate below whether you intend or anticipate that any of the listed forms of communication are likely to be used in the course of this engagement. As to each item you check as likely to be used, we will contact you after receiving this letter from you to make the security and transmission arrangements appropriate to each item. In each case, we will send you a separate memorandum for your signature detailing the agreed-upon communication methodology and the nature and level of security to be employed. Please understand that by agreeing to the use of any means of communication other than in-person private meeting or two-way (as opposed to multiparty) land line telephone conversations, you will be giving your consent to, and accepting any risks of disclosure of, confidential information to third parties that may be attendant upon the use of those means of communication.

Cellular telephone ([Client's Name]'s): [ ]

Facsimile machine ([Client's Name]'s): [ ] If checked, give number:

Is the machine at that number in open view of anyone other than you or your designated representative [ ]?

E-mail [ ] If checked, give address:

Do you check your e-mail every day?: Yes [ ] No [ ]

Computer-to-computer data transfer [ ] If checked, identify software:
Do you use a password (do NOT write it here)? Yes [ ] No[ ]

Describe other security measures in use (e.g., encryption, fire walls, etc.):

Are there other communications and confidentiality issues which we should be aware of in connection with this engagement? [ ] If checked, please explain:

WITHDRAWAL

[Client's Name] has the right to terminate this engagement at any time, subject to payment of any final billings. Conversely, [Law Firm Name] reserves the right to withdraw from the engagement, and from representing [Client's name] subject to the ethical restrictions imposed upon us by the applicable Rules of Professional Responsibility, if [Client's Name] fail(s) to

cooperate, fail(s) to make timely payments as required pursuant to this letter, or if [Client's Name] request(s) [Law Firm Name] to take any position or action that in our good-faith opinion requires or permits our withdrawal because of professional duties imposed upon us by the applicable Rules of Professional Responsibility. If [Law Firm Name] seeks to terminate this engagement for any reason, reasonable notice will be given to [Client's Name].

RESOLUTION OF DISPUTES—ARBITRATION

Any controversy or claim arising out of or relating to this engagement letter shall be settled by arbitration in the County of [County], State of [State], as follows: (a) if and to the extent that [State] shall have adopted rules for fee arbitrations based in whole or in part upon the American Bar Association Model Rules for Fee Arbitrations at any time prior to the issue of a demand for arbitration hereunder, then such rules as adopted in [State] shall govern the arbitration; or (b) if State of (State] shall not have adopted such rules, then such arbitration shall be conducted in all respects in accordance with the Rules of the American Arbitration Association, and any award issued in any such arbitration shall be enforceable in any court with jurisdiction. In any arbitration hereunder, to the extent permitted by the rules governing such arbitration, the arbitrators shall have the power but not the obligation to award reasonable attorneys' fees to the prevailing party.

BINDING AGREEMENT

This letter represents the entire agreement between [Client's Name] and [Law Firm Name]. By signing below, [Client's Name], (by its [Title and Name]), acknowledge(s) that this letter has been carefully reviewed and its content understood and that [Client's Name] agrees to be bound by all of its terms and conditions. Furthermore, [Client's Name] acknowledge(s) that [Law Firm Name] has made no representations to [Client's Name] regarding the outcome of the matter for which [Law Firm Name] has been engaged hereunder. No change or waiver of any of the provisions of this letter shall be binding on either [Client's Name] or on [Law Firm Name] unless the change is in writing and signed by both [Client's Name] and [Law Firm Name].

If this letter reflects [Client's Name]'s understanding of our relationship, please sign and return the enclosed duplicate copy. In conformance with firm policy, we cannot commence work upon this engagement until we have received a copy of this letter countersigned by [Client's Name].

Thank you again for this opportunity to be of service to [Client's Name]; my colleagues and I look forward to working with you.

Sincerely,

[Law Firm Name]
By:

[Partner's Name]

[Client's Name], (by its [Client's Name:]), has reviewed and agreed to the above terms of engagement of [Law Firm Name]. [*In the event of a conflict disclosure in the letter, insert the appropriate waiver here. E.g.*,: [Client's Name], has been fully informed with respect to the matters potentially constituting a conflict of interest as described in this letter, has had an opportunity to consult other counsel both with respect to the conflict issue or generally in the matter described above in "Scope of Engagement." [Client's Name], desires and consents to the engagement of [Law Firm Name] as attorneys for the purposes and to the extent described in this letter.]

[Client's Name],

By:[Name and Title]

Date:

LARGE LAW FIRM—MODULAR STANDARD FORM RETAINER LETTER

NOTE: *The following is a sophisticated form, with multiple modules, in a branching structure, including a variety of alternative clauses in several of the modules, so that lawyers within this firm can use standard language and still have a form that is adaptable to almost all normal purposes. Please also see the Special Note that precedes Module V ("General Advance Conflict Waiver").*

MODULE I—OPENING PARAGRAPHS

A. General (MANDATORY)

We have been asked to represent [insert company name] (the Company") in connection with [describe nature of representation] and any other matter that you and we may specifically agree [in writing] to be subject to such representation (collectively referred to herein as the "Project"). We are writing to confirm our agreement regarding such representation.

B. Monetary Retainer (MANDATORY IF MONETARY RETAINER IS USED)

In accordance with our discussions, I am enclosing a statement for our retainer for services to be rendered to the Company [continue with either "1" or "2"]

[1] in connection with the Project.

[2] during the period from [date] through [date] (the "Retainer Period"). Our retainer arrangement with the Company in connection with the Project will terminate at the end of the Retainer Period, or the completion of our work on the Project (whichever is earlier), unless sooner terminated by the Company at any time, or by mutual agreement or understanding between us and the Company, [or by us in accordance with this letter agreement].

[*Follow with Alternative 1, 2, 3, or 4, as appropriate, or provide other description of retainer understanding*.]

Alternative 1 (Retainer as Advance Payment)

As discussed, our retainer is intended to be only a prepayment for services actually rendered by us and any amount remaining upon completion of the Project [after conclusion of the Retainer Period] would be returned to the Company. We will credit our fees for services in connection with the Project [during the Retainer Period] against the retainer and, if and to the extent such fees exceed the retainer, we will bill them in accordance with our normal practice after fully applying the retainer.

Alternative 2 (Evergreen Advance Payment Retainer)

As discussed below, it is our understanding that we will bill the Company monthly for fees, charges, and disbursements. Future payments by the Company will be applied against the

monthly bills leaving the retainer in the amount of $[Amount]. Of course, our retainer is intended to be only a prepayment for services actually rendered by us and any amount remaining upon completion of the Project [after conclusion of the Retainer Period] would be returned to the Company.

Alternative 3 (Retainer as Fixed Fee for Specific Services)

Our retainer will cover the provision of [*specify services to be covered by retainer*], including, for example [*provide examples if desired*]. It is difficult to anticipate all of the situations that may arise for which the Company may require our services. Accordingly, matters that require the expenditure of time outside of the scope of our basic retainer described above would not be covered by the foregoing retainer amount. For example, *[provide examples if desired]. Should you require such services they will be billed separately at our customary hourly rates (in the absence, of course, of other arrangements.)*

Alternative 4 (Availability Retainer)

As discussed, you are paying us a retainer solely in exchange for our undertaking to be available to provide legal services to the Company during the Retainer Period. Accordingly, the retainer is earned in full at the time of payment. Subject to this letter and to applicable professional obligations, we are prepared to provide whatever legal services the Company may request in connection with the Project [during the Retainer Period]. Those services will be billed separately at our customary hourly rates (in the absence, of course, of other arrangements).

MODULE II—FEES (MANDATORY)
(Select One Alternative)

Alternative 1 (Basic Rates)

Our fees will be determined in accordance with our normal billing practices, taking into account the various factors we normally consider in determining our fees, and will be billed on a monthly basis. [Optional Hourly Rate Insert]

Alternative 2 (Premium Rates)

Our fees will be determined in accordance with our normal billing practices, taking into account the various factors we normally consider in determining our fees, and will be billed on a monthly basis. [Optional Hourly Rate Insert] As you know, in certain extraordinary matters our fees reflect our consideration of a variety of factors including (but not limited to) our internal time charges for the type of work involved, the significance of our role, the importance of our expertise, the complexity of the matter, the outcome of the matter, our contribution to the results obtained, the size and significance of the matter, the intensity and duration of our efforts, the degree to which we played a major part in assisting in the decision-making process, and the amount of fees we have received in other comparable matters.

Optional Hourly Rate Insert

Our normal billing practice is to determine fees by multiplying the number of hours spent working on a matter by our regular and customary billing rates for similar services performed by the firm. The minimum billing increment is ordinarily 1_4 hour. As we discussed, my current billing rate is $(Amount)_hour. Although I will be the attorney primarily responsible for the Project, it is my intention to enlist the services of other attorneys and personnel employed or associated with the firm. [*Continue with either "1" or "2"*]

[1] Hourly rates currently range from $[Amount] to $[Amount] for partners and from $(Amount) to $(Amount) for associates. Hourly rates for paralegals range from $[Amount] to $[Amount].
[2] [Insert hourly rates for attorneys_paralegals who will actually be working on matter.]

These rates, however, may be changed by the firm in the future, in which case new rates will apply to all work performed thereafter.

[**OPTIONAL PARAGRAPH** (for use if estimates or budgets are to be provided): We may from time to time, either at the Company's request or at our own initiative, provide the Company with an estimate of fees or costs that we reasonably anticipate will be incurred in connection with the Project. It is understood that such estimates, which are predicated on a variety of assumptions, are subject to unforeseen circumstances and are by their nature inexact.]

Alternative 3 (Contingent Fees—Requires Approval of New Business Committee)

Our fee will be computed based on a percentage of [insert description of result upon which contingent fee will be based, e.g., _the gross amount recovered in the litigation" or _the difference between $[amount], which we have agreed constitutes a reasonable assessment of the Company's exposure as a defendant in the litigation, and the actual amount of any settlement or any judgment entered against the Company"]. The applicable percentage shall be [insert, e.g., (33 1_3%) or (25%) of the first $[Amount] recovered and (40%) of any excess recovered].

MODULE III—CHARGES AND DISBURSEMENTS (MANDATORY)

Charges and disbursements [are not covered by the retainer and] will also be billed to you on a monthly basis after they are incurred and recorded by our accounting department. Attached is a list of the basis on which we will bill you for certain disbursements we made on your behalf and charges for certain services.

From time to time in the course of this engagement, it may become necessary to incur large expenses in your behalf, for example, for consultants, local or associated counsel, experts, filing fees (including for corporate or real estate transactions), printing and outside reproduction, deposition or trial transcripts, and graphics and trial exhibits. In order to ensure that these services are obtained expeditiously and to avoid the necessity of advancing large amounts on your account, we will arrange for payment of vendors for such expenses by one of the following methods, after consulting with you: (1) direct billing to you by the vendor for the services rendered by the vendor; (2) payment by us of invoices for services rendered on your behalf, with

a request for immediate reimbursement upon presentation to you of a paid invoice; or (3) the establishment of a deposit with us, in advance, to provide funds to pay anticipated expenses of those types.

MODULE IV—BILLING PRACTICES (OPTIONAL)

We will send you periodic statements setting forth the amount of the fees, disbursements, and charges to which we are entitled and the basis for their calculation. Although, as noted above, we will ordinarily bill you monthly for the fees, disbursements, and charges of the preceding month, we may occasionally defer billing for a given month (or months) if the accrued fees and costs do not warrant current billing or if other circumstances would make it more convenient to defer billing.

Our fee structure is based on the premise that all statements are due and payable upon receipt, but in any event no later than thirty (30) days after the date of the statement. [We will charge interest, at the rate of [number]% per month on any balance outstanding for longer than thirty (30) days. Any such interest charges will be added to subsequent statements, and we will apply any receipts first against outstanding interest charges.]

SPECIAL NOTE:
We ask readers to note that Module V below contains a blanket waiver, which we have included, despite the concerns about this kind of waiver expressed in Chapter 2, in recognition that this approach is still favored in some firms. Its inclusion should not be taken as an endorsement of this kind of waiver generally, or that this formulation will be effective.

MODULE V—GENERAL ADVANCE CONFLICT WAIVER (OPTIONAL)

Alternative 1

We have advised you that, from time to time, our firm may be asked to represent current or prospective clients in other matters that could involve our counseling and advising them, and our representing them in litigation and other proceedings (including proceedings brought by our clients or others against the Company) in a manner and on a basis adverse to the Company (_adverse representation"). [*Insert description of any currently foreseeable adverse representations, to the extent consistent with obligations of confidentiality to other clients.*] We have indicated to you our concern that representing the Company in connection with the Project and, in the process, rendering advice for the benefit of, and receiving information from, the Company or its employees, agents or representatives may disable our firm from representing our other current or prospective clients in an adverse representation, and that to proceed we would need an effective waiver of such potential disability. The Company, in turn, has indicated to us that our representation of the Company in connection with the Project would be valuable to the Company and that the Company has no concern with our retaining our ability to represent our other clients from time to time in any other matter on the basis set forth herein. [*Continue with either "1" or "2"*]

[1] In light of the foregoing, and in order that there be no misunderstanding as to the nature of our representation of the Company, this will confirm to you the following:

a. Our role as counsel to the Company relates solely to the Project. Accordingly, the information that we may receive from the Company or its employees, agents, or representatives will relate only to the Project and will not relate to any activities by the Company that might involve our other clients.

b. Except for any matter directly arising out of the Project, the Company specifically agrees and consents to our representation of our other clients (present or future) in connection with any and all controversies and disputes, including an adverse representation. Such adverse representation by our firm may specifically include the bringing of litigation and other adversarial proceedings against the Company. The Company specifically agrees that our representation of it in connection with the Project will not be asserted as, and will not constitute, a basis to disqualify us from any adverse representation.

[2] In the event we become involved in an adverse representation, as permitted by this letter or otherwise with the consent of the Company, the Company hereby specifically and knowingly waives any claim that in connection with the Project we will have gained access to information of a kind or nature that would preclude such representation. Accordingly, the information that the Company or its employees, agents, or representatives provide to us in the course of our representation of the Company in connection with the Project will not be claimed by the Company to be of such a character that would make it inappropriate or improper for us to engage in any such adverse representation. In no event will the Company or anyone asserting a right on behalf of the Company seek to disqualify us from representing any of our clients (present or future) in any such adverse representation based on the receipt of information from or concerning the Company or its employees, agents, or representatives.

[OPTIONAL:] In the event we represent another client (present or future) in any such adverse representation, we would establish an internal mechanism intended (i) to prevent any of our attorneys (or any other professional employee of our firm) who had worked on any matters involving the Company that had a substantial relationship to the matter that gives rise to our adverse representation (the _other matter") from performing any work for such other client in connection with the other matter or communicating any information concerning any such matters involving the Company to anyone working for such other client in connection with the other matter, and (ii) to segregate all documents relating to any such matters involving the Company so that our attorneys (and other professional employees of our firm) working for such other client in connection with the other matter would not have access to them.

[OPTIONAL:] Your acceptance of the foregoing conditions of our agreement to represent the Company in connection with the Project has been made with full and complete awareness of the fact that we and the present and future clients of our firm are and will be relying upon our ability to act for them in accordance with this letter. [You hereby acknowledge that in reviewing and executing this letter, the Company has not relied on any advice provided by this firm but instead has acted solely upon the advice of other counsel.]

Alternative 2

We have advised you that, from time to time, our firm may be asked to represent current or prospective clients in other matters that could involve our counseling and advising them, and our representing them in litigation and other proceedings (including proceedings brought by our clients or others against the Company) in a manner and on a basis adverse to the Company ("adverse representation"). *[Insert description of any currently foreseeable adverse representations, to the extent consistent with obligations of confidentiality to other clients.*] Except for any matter directly arising out of the Project, the Company specifically agrees and consents to our representation of our other clients (present or future) in connection with any and all controversies and disputes, including an adverse representation. Such adverse representation by our firm may specifically include the bringing of litigation and other adversarial proceedings against the Company. The Company specifically agrees that our representation of it in connection with the Project will not be asserted as, and will not constitute, a basis to disqualify us from any adverse representation.

Your acceptance of the foregoing conditions of our agreement to represent the Company in connection with the Project has been made with full and complete awareness of the fact that we and the present and future clients of our firm are and will be relying upon our ability to act for them in accordance with this letter. [You hereby acknowledge that in reviewing and executing this letter, the Company has not relied on any advice provided by this firm but instead has acted solely upon the advice of other counsel.]

MODULE VI—SPECIFIC CONFLICT WAIVER (IF NECESSARY)

Alternative 1 (Another Client Represented in Unrelated Matters)

As you know, we currently represent [XYZ] in connection with [describe matter_matters] in which the interests of the Company are adverse to the interests of [XYZ]. The Company agrees that we are free to continue to fully represent [XYZ] in connection with such [matter_matters] and related matters and waives any conflict arising out of, and agrees not to object to, such representation.

[OPTIONAL—THE FOLLOWING TWO PARAGRAPHS MAY BE ADDED:] It is understood that, in connection with our representation of the Company and [XYZ], we will establish an internal screening mechanism intended (i) to prevent any of the attorneys or other professional employees of our firm who are working on any matters involving the Company from performing any work for [XYZ] or communicating any information concerning any matters involving the Company to anyone working for [XYZ], and (ii) to segregate all documents relating to any matters involving the Company to prevent the attorneys and other professional employees of our firm who are working for [XYZ] from having access to them.

Nothing contained herein shall be deemed to authorize or permit us to disclose to any of our other clients or to any other person, or to use in a manner or on a basis adverse to the interest of the Company, any confidential information concerning the Company obtained by us from the Company or its employees, agents, or representatives in the course of our representation of the

Company in connection with the Project. As used herein, the term "confidential information" does not include information that is or becomes available to us from a source other than the Company or its employees, agents, or representatives.

Alternative 2 (Joint Representation of Multiple Clients)

You have asked us to represent [Client 1] and [Client 2] jointly in connection with the Project. We would be pleased to do so, subject to the following understandings.

Although the interests of [Client 1] and [Client 2] in the Project are generally consistent, it is recognized and understood that differences may exist or become evident during the course of our representation. Notwithstanding these possibilities, [Client 1] and [Client 2], [separately advised by independent counsel], have determined that it is in their individual and mutual interests to have a single law firm represent them jointly in connection with the Project. Accordingly, this letter is to confirm the agreement of [Client 1] and [Client 2] that we may jointly represent them in the Project and related matters. This will also confirm that [Client 1] and [Client 2] have each agreed to waive any conflict of interest arising out of, and that they will not object to, our representation of each other in the Project. It is further understood and agreed that we may freely convey information provided to us by one client to the other, and that there will be no secrets as between [Client 1] and [Client 2] unless both [Client 1] and [Client 21 expressly agree to the contrary.

MODULE VII—FIRM'S OPTION TO WITHDRAW (OPTIONAL)

Alternative 1 (Expands Attorney's Ethical Rights to Withdraw; Firm Can Withdraw to Undertake a New Adverse Matter)

We have advised you and you agree that we have the right, if in our sole judgment we believe such action to be necessary or appropriate [and if we repay any unused portion of the retainer], to resign as counsel to the Company in connection with the Project (including terminating any involvement with the Company and resigning any representation of the Company that may exist at any time) (i) in the event the Company takes any action, directly or indirectly, that we deem to be in any manner adverse to the interests of our other clients (present or future), or (ii) in the event we consider any continued representation of the Company in connection with the Project to be prejudicial to our representation of our other clients (present or future). Such resignation shall not affect our right to be paid all our previously incurred but unpaid fees [after crediting the retainer], and all our previously incurred but unpaid charges and disbursements, in accordance with this letter agreement. Subject to the provisions of this letter, the Company agrees not to raise any objection to any such resignation or termination or our continued representation of our other clients. In the event of our resignation as counsel to the Company in connection with the Project pursuant to the first sentence of this paragraph, upon the Company's written request we will promptly return to the Company or destroy each document (including copies) containing confidential information concerning the Company supplied by or on behalf of the Company or its employees, agents, or representatives in connection with our representation of the Company in connection with the Project, unless and only to the extent that retention by us is deemed by us to be required or material in connection with any then pending or

contemplated proceeding or claim. If we elect to resign as counsel, you agree to cooperate and facilitate such resignation by retaining substitute counsel or otherwise.

Alternative 2 (Expands Attorney's Ethical Rights to Withdraw; Firm Can Withdraw to Undertake a New Adverse Matter)

We have the right, if in our sole judgment we believe such action to be necessary or appropriate [and if we repay any unused portion of the retainer], to resign as counsel to, cease all existing work for, and decline to undertake any new work for the Company with respect to the Project. If we elect to resign as counsel, you agree to cooperate and facilitate such resignation by retaining substitute counsel or otherwise. Such resignation shall not affect our right to be paid all our previously incurred but unpaid fees [after crediting the retainer], and all our previously incurred but unpaid charges and disbursements, in accordance with this letter agreement.

Alternative 3 (Does Not Expand Existing Rights; Firm Cannot Withdraw Without Good Cause)

We may elect to terminate our services and decline to represent you further with your consent or for good cause. Good cause exists if, among other things, (a) you fail to meet your obligations under this agreement, (b) you refuse to cooperate with us or follow our advice in a material matter, or (c) under any other circumstances in which our professional or legal responsibilities and obligations mandate or permit termination. If we elect to terminate this agreement, you agree to cooperate and facilitate such termination by retaining substitute counsel or otherwise. Such resignation shall not affect our right to be paid all our previously incurred but unpaid fees [after crediting the retainer], and all our previously incurred but unpaid charges and disbursements, in accordance with this letter agreement.

MODULE VIIA—FIRM'S RIGHT TO WITHDRAW FOR NONPAYMENT OF FEES (MANDATORY)

Without limiting in any way our general legal and ethical rights to withdraw from this representation for nonpayment of fees, it is agreed that sufficient cause for withdrawal shall be deemed to exist if any of our invoices to you for legal fees, disbursements, and_or charges remain outstanding for a period of ninety (90) days. In such event, we may elect to terminate our services and decline to represent you further. [*INCLUDE FOR LITIGATION MATTERS ONLY*: If we so elect to terminate this agreement, you agree that you (a) will cooperate and facilitate such termination by retaining substitute counsel or otherwise and (b) will not oppose any application that may be required for judicial approval of our withdrawal.] Such termination shall not affect our right to be paid all our previously incurred but unpaid fees [after crediting the retainer], and all our previously incurred but unpaid charges and disbursements, in accordance with this letter agreement.

MODULE VIII—RIGHTS UPON DISCHARGE (MANDATORY)

The Company has the right to discharge us as its counsel in connection with the Project at any time, but such discharge shall not affect our right to be paid all our previously incurred but

unpaid fees [after crediting the retainer], and all our previously incurred but unpaid charges and disbursements, in accordance with this letter agreement.

[OPTIONAL:] The Company and this firm agree that any disputes that may arise regarding the provision of legal services by the firm to the Company, including, without limitation, claims of malpractice or for nonpayment of fees, charges, or disbursements, shall be submitted to binding arbitration in [insert location] before [a neutral arbitrator selected pursuant to the rules and procedures of the American Arbitration Association.] The prevailing party will be entitled to all reasonable attorneys' fees and costs incurred in such arbitration.

MODULE IX—ERRORS AND OMISSIONS INSURANCE (CALIFORNIA ONLY)

We maintain errors and omissions insurance applicable to the services that we will be rendering to you.

MODULE X—CONCLUDING PARAGRAPHS (MANDATORY)

If you agree that the foregoing accurately reflects our understanding, please [continue with either "1" or "2"]

[1] [if addressed to general counsel:] sign and return the enclosed copy of this letter.
[2] [if addressed to any person other than general counsel:] review this letter with your general counsel and have the enclosed copy of this letter signed and returned to us by such counsel or another of your duly authorized representatives (who by signing this letter will be confirming to us that this letter has been reviewed with your general counsel).

We look forward to working with you.
Yours very truly,

Agreed to and Accepted on this
day of

This form is used with the permission of a major New York City_based law firm.

SCHEDULE OF CHARGES AND DISBURSEMENTS

January 1, _____

Attached is a list of disbursements regularly made by our firm's lawyers on behalf of clients and charges for services that our firm may provide in the course of a legal matter. Included is an explanation of the basis on which clients are billed for a disbursement or charge.

This schedule is subject to change from time to time and we will do our best to furnish you with an updated schedule when changes occur.

If you have any questions, please feel free to direct them to [name and title], or to discuss them with the lawyer at our firm with whom you deal concerning billing issues.

DISBURSEMENTS

The actual amount to be paid by the firm to a third-party vendor is billed to the client:

Client hand-deliveries by outside vendors

Copying and document retrieval fees charged by government agencies or service companies

Expert witness fees

Fees of registered agents and corporate service companies

Filing fees of courts and administrative agencies

Food service during conferences and other meetings on behalf of a client

Messenger service

Outside consultants, including accountants, other law firms, investigators, and translators

Postage

Printing or outside reproduction charges including document binding

Transcripts, court reporters

Travel on client business, including transportation, lodging and meals provided by third parties

Velo binding

CHARGES

Type	How Client Is Billed
Automobile travel on client business	$.315_mile
Computer-aided research (Lexis, Westlaw, etc.)	Provider standard rate tariff
Fax—incoming only	no charge
Fax—outgoing only	$1.00 per page
Overnight deliveries (UPS, etc.)	Provider standard rate tariff
Proofreading services	$25_hour
Reproduction—in-house	$.20 per page
Secretarial overtime	$35_hour
Telephone—local	no charge
Telephone—long distance	AT&T Standard Rate Tariff
Word processing services	$35_hour

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FORM ENGAGEMENT LETTER FROM GENERAL COUNSEL TO OUTSIDE LAW FIRM

Prepared by: Anthony E. Davis

ABC Corporation Letterhead

[Date]

[Partner/Law Firm/Address]

Re: PROPOSED TERMS OF ENGAGEMENT

Dear [Partner]:

As we have discussed, we are pleased to offer to your law firm the opportunity to be engaged as outside counsel to ABC Corporation ("ABC") to handle our ongoing [describe general nature of engagement] work, all as more specifically defined below, on a [fixed fee]/[state nature of agreed Alternative fee arrangement] basis. Our goal is to work with outside counsel in a cooperative effort to provide us with the appropriate expertise, advice and other services while rigorously controlling fees and costs. The purpose of this letter is to set forth the proposed terms upon which [Firm Name] agrees to represent ABC, in order to establish and maintain a mutual understanding of the goals and respective responsibilities of ABC and [Firm].

Because [Firm] [has previously represented] [currently represents] ABC in other matters, we are assuming that [Firm] has performed a formal conflict of interest check to determine whether accepting representation of ABC in these matters creates either an ethical or a business conflict. Presently, you have informed us and we understand that no conflict of interest appears to exist but if [Firm] subsequently learns that an adversarial situation, or a business or economic conflict exists between ABC and [Firm's] other clients or any other conflict has arisen which might if disclosed to us in our opinion impair your ability adequately to represent ABC's interests, [Firm] shall promptly upon discovery of any such conflict inform ABC, which reserves the right to withdraw from the engagement.

1. SCOPE OF SERVICES

ABC proposes to engage [Firm] to advise generally and to represent it in connection with the following services (the "Services"):

[Describe in detail scope and specific nature of work required and intended to be included in the engagement - and, if appropriate, describe work intended to be excluded, e.g., [excluding all advice regarding the tax laws and tax implications of all matters otherwise herein defined as or included in the definition of Services in paragraphs - through - above.]

As we have discussed, this engagement letter does not encompass, nor does it engage Firm to represent ABC in any matter not described above. In particular, this letter does not include representation in any matter which is not within the normal course of its business, such

as, for instance, in any acquisition, merger or takeover (whether ABC was the acquiring or the target entity). Any representation by [Firm] in any such matter falling outside the ordinary course of ABC's business shall be the subject of a separate engagement letter.

2. STAFFING OF ABC REPRESENTATION BY [FIRM]

[Firm] has identified the following as the partner(s) who will be responsible for the quality and timeliness of the Services, and for all communications with ABC: [Names]. With ABC's prior approval, which may be given or withheld at ABC's discretion, [Firm] may assign tasks among other partners, associates and support staff in a manner commensurate with the level of expertise required. [Firm] shall promptly notify ABC of any changes in the partners working on providing the Services.

3. COMMUNICATIONS AND TECHNOLOGY

[Firm] currently has installed, or will install immediately following your counter-signature on this letter, technology compatible with that in use within ABC so as to enhance communications, in order that our working relationship will be as smooth and efficient as possible. Attached as Exhibit 1 is a list of the word-processing [, time and billing]/[, other relevant] and communications software which we use, and which you have installed or will install. By countersigning this letter you agree to utilize these technologies when working with us, and to use the security protocols there defined and described in connection with computer communication with us.

ABC expects to be kept closely involved with the progress of [Firm]'s performance of the Services. [Firm] will keep ABC apprized of all material developments in connection with the provision of the Services, and, in the case of administrative or regulatory proceedings, provide sufficient notice to ABC to enable a responsible ABC attorney to attend meetings, conferences, hearings, and other proceedings. A copy of all correspondence in the performance of the Services should be forwarded to the ABC attorney designated as having responsibility either using the agreed communications technology or in hard copy, except that hard copies shall be forwarded of all papers filed in any court or governmental regulatory agency.

During the course of this engagement ABC's General Counsel will have primary responsibility for working with [Firm]. ABC's General Counsel will also have authority to communicate to you whatever approvals may be required for decisions affecting ABC 's interests.

There may be times when [Firm] will need to obtain information from ABC, i.e., documents or information from past and/or current employees. All requests for access to documents, employees, or other information shall be made to the attorney having designated responsibility. At the conclusion of the Services, all documents obtained from ABC's files shall be returned to ABC.

[Name of Addressee]
[Date]
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4. PROPOSED FEE ARRANGEMENTS

A. LEGAL FEES

ABC wishes to make it clear that it expects outside counsel to make a reasonable return on the efficient handling of our work. However, ABC is also committed to the process of requiring outside counsel to face up to the commercial realities involved in determining the true cost of delivery of specific legal services, and pricing by reference to the value to us as the client of those services. ABC proposes to pay [Firm] for the Services on the following basis:

[Describe "alternative fee arrangement" - e.g., fixed monthly retainer; premium for success; reverse contingency - agreed with the firm.]

Optional: [At the end of any three month period when [Firm's] records show that, but for the terms of this Engagement Letter relating to the monthly, or quarterly caps, [Firm] would have billed more than twenty (20%) percent greater than the amount permitted by the terms of this Engagement Letter, ABC agrees in good faith to consider whether the value of the Services provided by Firm during any such period indeed exceeded the capped payment amount, and if so shall pay a reasonable amount in excess of the capped amount, but in no event shall ABC be obligated to pay more than [---] ([--]%) percent of the total additional charge which would have been payable to [Firm] but for the terms of this Engagement Letter.

At the end of any two consecutive calendar quarters when [Firm] has requested additional payments in accordance with the immediately preceding paragraph, and in any event on each anniversary of this Engagement Letter so long as it shall continue to be in effect, [Firm] and ABC agree to hold good faith negotiations to determine if any adjustment should be made to the fee and billing arrangements described hereinabove for the next succeeding year. In the event that the parties fail to reach agreement within one month of such anniversary, [Firm] may at its election withdraw from this engagement provided that it does so in a manner and over a period of time which is reasonably calculated to enable ABC to engage substitute counsel without undue disruption to its affairs or unnecessary expense. [Firm] shall be entitled to be paid for all work performed following such withdrawal and pending the appointment of substitute counsel at [----] ([--]%) percent of the highest rates (including caps) in effect during the immediately preceding quarter.]

ABC will not pay for any of the following services: secretarial or clerical services, whether or not rendered during or outside normal office hours or on an overtime basis; overhead charges; commissions, administrative fees or mark-ups on lawyer or para-professional services; file room or database management charges; temporary employment agency fees or commissions; charges for HVAC; or any other expenses expressly or impliedly excluded from lawyers' fees by the terms of Formal Opinion 93-379 of the American Bar Association Standing Committee on Ethics and Professional Responsibility.

Any additional or supplemental agreements regarding fees, or for any services in addition to the Services, must be set forth in writing and signed on behalf of ABC by its General Counsel in advance of the provision of any such additional services. [Firm] shall be under no obligation to ABC to provide any additional legal services without such a signed writing (a "Supplementary Engagement Letter"). It shall be the responsibility of [Firm] to seek, and to obtain a Supplementary Engagement Letter in advance of providing any such additional services. In connection with such additional services, and any extensions of this engagement, [Firm] shall define such additional services in each Supplementary Engagement Letter in the manner and in comparable detail to the Scope of Services section of this Engagement Letter. Each and every such Supplementary Engagement Letter shall include budgets with respect to the additional services to be performed. In the absence of a Supplementary Engagement Letter signed on behalf of ABC, ABC shall be under no obligation to pay, and [Firm] expressly waives any claim to reasonable or to any fees for any such additional services, even though additional services shall be provided and even though the failure of ABC to pay would cause a hardship to [Firm].

B. COSTS, EXPENSES AND DISBURSEMENTS

It is understood that in the course of and in connection with providing the Services, it may be necessary for [Firm] to incur certain out-of-pocket costs or expenses. ABC will reimburse [Firm] for those costs or expenses actually incurred and reasonably necessary for completing the Services. More particularly, ABC will reimburse [Firm] in accordance with the following guidelines, but in all cases without any mark-up or additions on the actual costs of [Firm] whatsoever:

(i) For all couriers, messengers, photocopying and facsimile charges, [Firm] shall provide ABC with a schedule of its rates, or those of the suppliers or service providers used by [Firm], and, subject to receiving ABC's approval of such rates, shall charge ABC at the rates shown on such schedule.

(ii) Computer-Related Expenses - On-line computerized research and research services involving any charges over $1,000 per month will require the prior approval of ABC. Subject to the requirement of pre-approval of expenses exceeding $1,000 per month, ABC encourages [Firm] to use computer services, such as coding or computerized scanning and storage of documents, which will enable [Firm] to more efficiently manage the Services.

(iii) Travel - ABC will reimburse [Firm] for reasonably necessary expenses in connection with out-of-town travel. Unless otherwise expressly approved by ABC in advance, ABC will only reimburse for coach class travel. All related travel expenses, i.e., lodging and means, must be reasonable under the circumstances. [Firm] will advance all such travel expenses and submit bills for reimbursement.

(iv) Filing Fees - ABC will reimburse properly incurred filing fees and other similar costs.

(v) Telephone - ABC will reimburse for long-distance telephone service at the actual expense to [Firm].

(vi) Messenger/Courier - ABC will reimburse for postage, messenger and courier services at [Firm]'s actual costs.

(vii) Staff expenses - ABC shall not be charged for and will not pay for local travel or meals of [Firm]'s staff, regardless of the hours during which such expenses were incurred.

(viii) Miscellaneous Expenses - ABC will not reimburse [Firm] for the cost of office equipment, books, periodicals, or for any other office expenditures without its express prior approval.

C. BILLING ARRANGEMENTS

Bills will be submitted to ABC's General Counsel. Bills will be submitted monthly. Unless prior approval has been given by ABC for any other format, all bills shall: (1) include a clear statement describing the services rendered for which the bill is submitted; (2) explain, by specific reference to this Engagement Letter, the work performed by [Firm] in connection with the Services including the progress of Firm towards ABC's objectives; (3) be accompanied by a detailed statement in computerized or equivalent form describing the services performed by each person working on ABC's matters within [Firm] during the period of or in connection with the services described in such bill, regardless of whether or not the Services are being performed on a time-charge basis; and (4) hourly rates, in accordance with the terms of Section 3 A. above, and hours actually spent, by all partners, lawyers and, subject to Section 3 B. (vii) above, staff whose time is customarily billed to clients.

Reimbursable expenses included on each bill should also be broken down by the categories used in section B. above. [Firm] will maintain back-up documentation for all expenses at all times during this engagement and for a period of six years thereafter for ABC's review as ABC may require. In the event that [Firm] forwards invoices for certain expenses to be paid directly by ABC, such invoices shall be accompanied by any additional back-up documentation and a letter explaining the purpose of such expense.

ABC reserves the right to audit [Firm]'s bills or to employ an auditing or other firm to do so. [Firm] will promptly upon ABC's request make available in connection with any such audit any documents which may be reasonably necessary to enable a meaningful audit to be performed.

4. INSURANCE

Prior to commencing the provision of the Services, and if this engagement shall be extended or renewed, annually on the anniversary of the commencement of the performance of the Services, [Firm] shall provide, in confidence, to the General Counsel of ABC a Certificate or other original evidence of professional liability insurance showing the amount of coverage, and

the deductible or self insured retention amount thereof, and the dates of the policy period. Further and in addition, [Firm] represents and warrants that it is not a limited liability entity as of the date hereof.

5. TERMINATION

ABC has the right to terminate [Firm]'s engagement by written notice at any time. [Firm] will provide reasonable assistance in effecting a transfer of responsibilities to the new firm. In the event of a termination of this engagement for any reason or at any time, [Firm] shall be entitled to exert any remedies provided by law in connection with any claims it may wish to assert against ABC save and except that [Firm] shall in no event assert, and hereby expressly and irrevocably waives any and all claim or right to assert a lien, whether statutory, charging or of any other description, against the files, papers, documents, written or stored in computer readable media, relating to ABC or to the Services. Further and in addition [Firm] shall deliver any and all of ABC's files, papers, documents, written or stored in computer readable media, relating to ABC or to the Services to ABC or to counsel designated by ABC immediately whenever so requested by the General Counsel of ABC.

[Firm] shall be free to withdraw from this engagement at any time subject to its compliance with all of the requirements of the rules governing professional responsibility in [New York].

Optional: [6. ARBITRATION

Any controversy or claim arising out of or relating to this engagement letter shall be settled by arbitration in the City and County of New York, as follows: (a) if and to the extent that New York shall have adopted rules for fee arbitrations based in whole or in part upon the American Bar Association Model Rules for Fee Arbitrations at any time prior to the issue of a demand for arbitration hereunder, then such rules as adopted in New York shall govern the arbitration; or (b) if New York shall not have adopted such rules, the such arbitration shall be conducted in all respects in accordance with the Rules of the American Arbitration Association, and any award issued in any such arbitration shall be enforceable in any court with jurisdiction. In any arbitration hereunder, to, the extent permitted by the rules governing such arbitration, the arbitrators shall have the power but not the obligation to award reasonable attorneys fees to the prevailing party.]

7. BINDING AGREEMENT

This letter, when countersigned on behalf of [Firm] represents the entire agreement between ABC and [Firm]. By signing below, [Firm] by its [Title and Name], acknowledges that this letter has been carefully reviewed and its content understood and that [Firm] agrees to be bound by all of Its terms and conditions. No change or waiver of any of the provisions of this letter shall be binding on either ABC or on [Firm] unless the change is in writing and signed by both ABC and [Firm].

We look forward to working with your law firm.

Very truly yours,

[General Counsel]

THE ABOVE AGREEMENT IS ACCEPTED AND AGREED TO
[Name of Law Firm]

By: _____
[Name]
Date: _____

