2006 Seminar Series

Ethics for Lawyers

October 25, 2006

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Ethics for Lawyers

October 26, 2006

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PROBLEM ONE: COMPENSATING POTENTIAL WITNESSES; MULTIJURISDICTIONAL PRACTICE; CHOICE OF LAW

Lawyer, a New York Litigator, is admitted *pro hac vice* in Florida to represent Brother in a business dispute with Sister. The dispute involves Bizco, a family-owned business.

Lawyer receives a call from Bookkeeper, a former Bizco employee living in Canada. Bookkeeper says that Sister stole several million dollars in company funds and that Bookkeeper can explain from the business records how this was done and tell Lawyer where the assets are hidden. Bookkeeper says she is willing to meet with Lawyer and assist in the investigation if Brother pays her $100,000 for her time, plus, as a finder's fee, 5% of any money that he recovers as a result of her assistance. Lawyer describes the call to Brother, who is eager to accept Bookkeeper's proposal but would like to bargain her down.

May Lawyer negotiate the deal?

See Florida Bar v. Wohl, 842 So.2d 811 (Mar. 20, 2003); New York State Bar Association Committee on Professional Ethics ("NYSBA") Opinion 668 (1994).

Which jurisdiction's rules govern the question?

See N.Y. Code of Professional Responsibility Disciplinary Rule ("DR") 1-105.

If it is uncertain whether Lawyer may make the arrangements, what risks does Lawyer run? If Lawyer may not negotiate the deal, may he suggest that Brother do so directly?

See DR 1-102(A)(2).

Briefs and Other Related Documents

Supreme Court of Florida.
THE **FLORIDA BAR**, Complainant,
v.
Edward H. **WOHL**, Respondent.
No. SC95770.

March 20, 2003.

Attorney disciplinary proceeding was commenced. The Supreme Court held that: (1) former employee of client's family business was a fact witness, and thus, attorney's participation in developing an agreement by which employee would be paid for her assistance violated rule of professional conduct, and (2) violation warranted 90-day suspension.

Suspension ordered.

West Headnotes

[1] Attorney and Client 45 42

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases
Former employee of client's family business was a "fact witness," and not simply a consultant, in client's dispute with his brother over their mother's estate and thus, attorney's participation in developing an agreement, by which employee could earn up to $1 million depending on usefulness of information she provided to enable client to recover assets, violated rule of professional conduct prohibiting an attorney from offering an inducement to a witness, where employee had personal knowledge of business and brother's actions, agreement specified that she would assist client in identifying and recovering assets and damages, and she was to be compensated for what she had witnessed. West's F.S.A. Bar Rule 4-3.4(b).

[2] Attorney and Client 45 42

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases
Rule of professional conduct prohibiting an attorney from offering an inducement to a witness is not limited to testifying witnesses. West's F.S.A. Bar Rule 4-3.4(b).

[3] Attorney and Client 45 57

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k57 k. Review. Most Cited Cases
In reviewing a referee's recommended attorney discipline, the Supreme Court's scope of review is somewhat broader than that afforded to findings of facts because, ultimately, it is the Court's responsibility to order an appropriate punishment.

[4] Attorney and Client 45 57

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k57 k. Review. Most Cited Cases
The referee's recommendation for attorney discipline will generally be upheld if supported by a reasonable basis in existing caselaw.

[5] Attorney and Client 45 59.13(3)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.13 Suspension
45k59.13(2) Definite Suspension
45k59.13(3) k. In General. Most Cited Cases
(Formerly 45k58)
Attorney's participation in formulating and negotiating an agreement that offered a financial inducement to a witness warranted 90-suspension from practice of law, and not merely an admonishment for minor misconduct and probation.

***812** John F. Harkness, Jr., Executive Director, John Anthony Boggs, Division Director and Edward Iturralde, Bar Counsel, Tallahassee, FL, for Complainant.
John A. Weiss of Weiss & Etkin, Tallahassee, FL, for Respondent.
PER CURIAM.
We have for review a referee's report regarding an alleged ethical breach by Edward H. **Wohl**. We have jurisdiction. *See* art. V, § 15, Fla. Const. The **Florida Bar** filed a complaint alleging that **Wohl** violated rule 4-3.4(b) of the Rules Regulating the **Florida Bar**, "Fairness to Opposing Party and Counsel," by offering an inducement to a witness.

FACTS

After a hearing, the referee made the following findings of fact.

Edward H. **Wohl** is a member of The **Florida Bar**. He has represented Bruce Winston (hereinafter "Bruce") in various matters for over twenty-five years, but always retained co-counsel when litigation was involved. Bruce and his brother, Ronald Winston (hereinafter "Ronald"), were engaged in a bitter dispute concerning the Florida estate of their mother, Edna Winston, which included substantial assets in the New York estate of their father, jeweler Harry Winston. Bruce was allegedly having difficulty obtaining information from Ronald, who was a trustee of their father's estate. Bruce located Katherine Kerr, a former employee of the Winston family diamond business "Harry Winston International" (HWI), to help him understand***813** the business practices of the company.

Subsequently, there was a meeting between Kerr's lawyers and Bob Silver and David Boies (representing Bruce as trial attorneys), to draw up an agreement between Bruce and Kerr. **Wohl** was involved in drafting the agreement as well as some aspects of the negotiations. The final agreement stated that Kerr would provide "assistance" to Bruce and included compensation to Kerr of: (1) $25,000 for her first fifty hours of assistance; (2) a potential "bonus" ranging between $100,000 and over $1,000,000, depending on "the usefulness of the information provided," which would be paid after a "culmination event" by which Bruce would have received some relief against Ronald; and (3) additional hours of assistance would be paid at the rate of $500 per hour over the bonus amount and after the culmination event.

The referee examined whether Kerr was a consultant, an expert witness, or a fact witness. **Wohl** testified, and other attorneys provided affidavits, that no one expected Kerr to testify in the litigation. However, Kerr did testify at depositions in the Florida proceedings involving Edna Winston's estate. Also, she was listed as a witness by the estate's personal representative after **Wohl** disclosed that Kerr had personal knowledge about Ronald's possible diversions of assets, including a missing diamond necklace. After the personal representative listed Kerr as a witness, **Wohl** also listed Kerr as a possible witness. The referee determined that Kerr was a fact witness for **Wohl** because she provided factual information about what she had seen, heard, and experienced while working at the family business.

The referee also examined whether the agreement was an inducement to Kerr. The referee noted that the "bonus" provision of the agreement was especially significant; Kerr could earn up to $1,000,000 depending on the usefulness of the information she provided to enable Bruce to recover assets, damages by settlement, or a judgment. Therefore, Kerr's ability to receive the bonus only arose if Bruce was successful in reaching a culmination event. The referee stated that such "provisions go to the very heart of the evil sought to be avoided by [rule 4-3.4(b)]: the temptation of a witness to color his or her testimony" and concluded that the agreement was "an inducement that went far beyond reasonable expenses incurred by the witness."

Wohl argued that he should not be found guilty of offering the inducement to Kerr, claiming that he had minimal involvement in the agreement. However, the referee found that **Wohl** participated in the formation and negotiation of the agreement. **Wohl** had written to the other attorneys involved and suggested changes to the agreement. He also received drafts from the other attorneys and engaged in phone conversations with them regarding the agreement. The referee stated that even if Kerr's attorneys and Bruce's other attorneys handled most of the negotiation, **Wohl** could not do through others that which he could not do himself. *See* R. Regulating **Fla**. **Bar** 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another).

As to guilt, the referee recommended that by participating in the development of the agreement,

Wohl offered an inducement to a witness in violation of rule 4-3.4(b).

The referee next considered the appropriate disciplinary sanction. Relying on the Florida Standards for Imposing Lawyer Sanctions, the referee found one aggravating factor, 9.22(i), substantial experience in the practice of law. The referee found ***814** four mitigating factors: (1) 9.32(a), absence of a prior disciplinary record; (2) 9.32(b), absence of a dishonest or selfish motive; (3) 9.32(e), full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and, (4) 9.32(g), character or reputation. The referee recommended that **Wohl** be sanctioned by an admonishment for minor misconduct and placed on probation for one year, with the condition that **Wohl** successfully complete a Practice and Professionalism Enhancement Program.

The Bar petitioned for review of the referee's disciplinary recommendation. **Wohl** cross-petitioned, arguing against the referee's findings of fact, recommendation as to guilt, and disciplinary recommendation.

ANALYSIS

[1] We first consider **Wohl's** challenges to the referee's findings of fact. **Wohl** argues that the referee's report needs to be "supplemented." **Wohl** alleges that no one expected Kerr to testify when the agreement was originally made. He claims that Kerr's knowledge about the diamond necklace is the reason she later became a witness, and that her knowledge about the necklace did not come to light until after the agreement.

Our standard of review regarding a referee's factual findings is as follows:
A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. Absent a showing that the referee's findings are clearly erroneous or lacking in evidentiary support, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee.

***Florida Bar** v. Sweeney*, 730 So.2d 1269, 1271 (Fla.1998) (quoting ***Florida Bar** v. Spann*, 682 So.2d 1070, 1073 (Fla.1996)).

Wohl insists that the point when Kerr told him about the diamond necklace is a key factor, arguing that the attorneys considered Kerr to be a consultant, and not a witness, until they knew about the missing necklace. However, despite **Wohl's** claims, knowledge of the diamond necklace is not the determinative factor. The record indicates that Kerr was a fact witness, not a consultant. Kerr had personal knowledge about the workings of HWI and Ronald's actions. Furthermore, the agreement that **Wohl** helped prepare even specified that Kerr would assist Bruce in identifying and recovering assets and damages related to and arising from the diversion of assets and other misconduct. Kerr was to be compensated for what she had witnessed. As the referee stated, paying an individual who has personal knowledge of the facts is to pay a witness, whether or not that person is expected to testify. Therefore, **Wohl** has not met the burden of demonstrating that the referee's findings of fact are clearly erroneous or unsupported by the record. *See Sweeney*, 730 So.2d at 1271. We approve the referee's findings of fact.

Next we consider **Wohl's** challenge to the referee's recommendation as to guilt. **Wohl** alleges that the findings of fact do not support a violation of rule 4-3.4(b). He argues that he should not be found guilty of inducing a witness because his participation in developing the agreement was minimal. Further, **Wohl** continues to claim that he did not intend to have Kerr testify when the agreement was made. Rather, he considered Kerr to be a consultant. **Wohl** argues that this is significant because rule 4-3.4(b) is meant to apply to testifying witnesses, not all witnesses. He notes that the comment to the rule states ***815** that the proscribed conduct is payment to "an occurrence witness ... for testifying."

[2] We find **Wohl's** arguments are without merit. First, we do not view **Wohl's** participation as minimal. He participated in the formation and negotiation of the agreement. Second, although **Wohl** claims that rule 4-3.4(b) applies only to testifying witnesses, the plain language of the rule does not support that view:
A lawyer shall not:
....
(b) fabricate evidence, counsel or assist a witness to testify falsely, or *offer an inducement to a witness*, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or

testifying at proceedings.

R. Regulating **Fla. Bar** 4-3.4(b) (emphasis added). Clearly, the rule is not limited to testifying witnesses. Further, the history of the rule indicates that it was amended to address situations such as the instant case. In 1992, in ***Florida Bar*** *v. Cillo*, 606 So.2d 1161 (Fla.1992), Cillo was accused of paying money to a former client as an inducement for the client to dismiss his Bar complaint against Cillo. The question arose whether it was misconduct to induce a witness to tell the truth by offering money or other valuable considerations. At the time, there was no rule governing such a situation so we did not impose discipline for that conduct. We were concerned, however, that the payment of compensation other than costs to a witness could adversely affect credibility and fact-finding functions. We directed that a rule be developed to clarify that any compensation paid would be improper unless certain conditions were met. *Id.* at 1162. Thereafter, in 1994, in ***Florida Bar*** *re Amendments to Rules Regulating the* ***Florida Bar***, 644 So.2d 282 (Fla.1994), we amended rule 4-3.4(b) to its present form. In so doing, we established that a witness may not be paid, unless the payments fall within the clearly delineated exceptions, such as payments for reasonable expenses or payments to an expert witness. None of the exceptions to the rule are present in **Wohl's** case. Therefore, we conclude that the referee's findings of fact support his recommendation that **Wohl** be found guilty of violating rule 4-3.4(b).

DISCIPLINE

[3][4] Next, we consider the Bar's challenge to the referee's recommended discipline of an admonishment for minor misconduct and probation for one year, with the condition that **Wohl** successfully complete a Practice and Professionalism Enhancement Program. It is well established that in reviewing a referee's recommended discipline, this Court's "scope of review is somewhat broader than that afforded to findings of facts because, ultimately, it is [the Court's] responsibility to order an appropriate punishment." ***Florida Bar*** *v. Anderson*, 538 So.2d 852, 854 (Fla.1989). However, the referee's recommendation will generally be upheld if supported by "a reasonable basis in existing caselaw." ***Florida Bar*** *v. Temmer*, 753 So.2d 555, 558 (Fla.1999).

[5] The Bar argues that the appropriate discipline is a ninety-day suspension. **Wohl** argues that the referee's recommendation of an admonishment is too severe and that diversion to ethics school is more appropriate. We agree with the Bar and find that the referee's recommended discipline of an admonishment for minor misconduct under the circumstances of this ***816** case does not have a reasonable basis in existing case law.

In ***Florida Bar*** *v. Jackson*, 490 So.2d 935 (Fla.1986), a Florida attorney contacted a New York attorney and requested that his clients be paid $50,000 for their testimony in a pending insurance claim case in New York. We quoted with approval the referee's report which stated:

[T]he very heart of the judicial system lies in the integrity of the participants.... Justice must not be bought or sold. Attorneys have a solemn responsibility to assure that not even the taint of impropriety exists as to the procurement of testimony before courts of justice. It is clear that the actions of the respondent ... violates [sic] the very essence of the integrity of the judicial system and ... the oath of his office.

Jackson, 490 So.2d at 936. *Jackson* was decided under the former Code of Professional Responsibility, well before the adoption of rule 4-3.4(b). We found that Jackson's actions violated Disciplinary Rule 1-102(A)(5) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice) and suspended Jackson for three months.

In ***Florida Bar*** *v. Machin*, 635 So.2d 938 (Fla.1994),[FN1] we imposed a ninety-day suspension on an attorney who offered to set up a $30,000 trust fund for the minor child of a victim in a criminal case if the victim agreed not to testify at the client's sentencing hearing. Like **Wohl**, Machin had no prior disciplinary record. Unlike **Wohl**, Machin disclosed his agreement to the state attorney, the sheriff, and the victim assistance representative. The Court suspended Machin for ninety days.

FN1. *Machin* was decided before rule 4-3.4(b) was amended. Machin was found guilty of violating rules 3-4.3 (conduct contrary to honesty and justice) and 4-8.4(d) (conduct prejudicial to the administration of justice).

Offering financial inducements to a fact witness is extremely serious misconduct. As the referee stated,

tempting a witness to color testimony is an evil that should be avoided. We condemn the practice of compensating fact witnesses in violation of rule 4-3.4(b) in no uncertain terms. We find that **Wohl's** misconduct has demonstrated an attitude that is wholly inconsistent with professional standards. Case law requires that **Wohl** be suspended. But for the four mitigating factors, **Wohl** could have earned a more severe sanction. Thus, we disapprove the referee's recommended discipline of an admonishment and conclude that the seriousness of **Wohl's** misconduct and violation of rule 4-3.4(b) warrant a ninety-day suspension.

We approve the referee's other recommendations that require **Wohl** to participate in probation for one year and to successfully complete a Practice and Professionalism Enhancement Program. Such requirements are not unusual in disciplinary cases. ***Florida Bar*** *v. Nunes*, 679 So.2d 744 (Fla.1996) (attorney suspended for ninety days and required to complete specified continuing legal education hours).

CONCLUSION

Accordingly, we approve the referee's recommended findings of fact and recommendation of guilt as to the violation of rule 4-3.4(b). We disapprove the referee's recommended discipline of an admonishment for minor misconduct.

Edward H. **Wohl** is hereby suspended from the practice of law for ninety days. The suspension will be effective thirty days from the filing of this opinion so that **Wohl** can close out his practice and protect the interests of existing clients. If **Wohl *817** notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. **Wohl** shall accept no new business from the date this opinion is filed until the suspension is completed. Judgment is entered for The **Florida Bar**, 650 Apalachee Parkway, Tallahassee, Florida 32399, for recovery of costs from Edward H. **Wohl** in the amount of $1,601.85, for which sum let execution issue.

It is so ordered.

ANSTEAD, C.J., WELLS, PARIENTE, LEWIS, QUINCE and CANTERO, JJ., and SHAW, Senior Justice, concur.
Fla.,2003.
The Florida Bar v. Wohl

842 So.2d 811, 28 Fla. L. Weekly S251

Briefs and Other Related Documents (Back to top)

- 2002 WL 32131234 (Appellate Brief) Cross Answer and Reply Brief (May. 01, 2002)
- 2002 WL 32131429 (Appellate Brief) Respondent's Initial Brief on Cross Appeal and Answer Brief (Apr. 15, 2002)
- 2002 WL 32131435 (Appellate Brief) Respondent's Initial Brief on Cross Appeal and Answer Brief (Apr. 15, 2002)
- 2002 WL 32131235 (Appellate Brief) Initial Brief (Feb. 01, 2002)
- 2002 WL 32131233 (Appellate Brief) Amended Cross Answer and Reply Brief (Jan. 01, 2002)
- 1995 WL 17016527 (Appellate Brief) Amended Cross Answer and Reply Brief (Jan. 01, 1995) Original Image of this Document (PDF)
- 1995 WL 17016528 (Appellate Brief) Cross Answer and Reply Brief (Jan. 01, 1995) Original Image of this Document (PDF)
- 1995 WL 17016529 (Appellate Brief) Respondent's Initial Brief on Cross Appeal and Answer Brief (Jan. 01, 1995) Original Image of this Document (PDF)
- 1995 WL 17016530 (Appellate Brief) Initial Brief (Jan. 01, 1995) Original Image of this Document (PDF)
- 1995 WL 17016531 (Appellate Brief) Respondent's Reply on Cross-Appeal (Jan. 01, 1995) Original Image of this Document (PDF)

END OF DOCUMENT

New York State Bar Association

Committee on Professional Ethics

Opinion 668 (16-94) 6/3/94

Topic: "Reasonable Compensation" of a Witness

Digest: There is no ethical limit on the amount an individual may be paid for assistance in the fact finding process, so long as the client consents after full disclosure. The attorney should keep in mind that such pay may affect the amount the attorney may recover in attorneys' fees. An individual testifying at trial may receive a reasonable rate, deter-mined by the fair market value for the time, regardless of whether the individual suffered actual financial loss.

Code: DR 7-109(C)

QUESTION

May an attorney pay an individual a fee for assistance in the fact-finding process of a litigated matter where the individual may be a witness?

OPINION

An attorney represents a client in a potential lawsuit to recover funds allegedly lost due to conspiracy, fraud, and other violations of law. The attorney believes that proof of the case is dependent upon an individual, who, in exchange for services, seeks $150/hour for work that should take approximately 50-60 hours. Such work involves finding and explaining documents, tape recordings, and photographs purporting to prove the client's case. The individual will attend interviews, examine and explain documents and tape recordings, and otherwise assist in the fact-finding process. The individual also may be required to testify at the trial.

This question is governed to some extent by DR 7-109(C), which states that:

A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of a case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

1. Expenses reasonably incurred by a witness in attending or testifying.

2. Reasonable compensation to a witness for the loss of time in attending or testifying.

3. A reasonable fee for the professional services of an expert witness.

DR 7-109(C), on its face, governs only the compensation of "witnesses," those parties testifying or attending trial. Thus, DR 7-109(C) has no bearing on instances, such as the one at hand, where an individual is to be retained, not necessarily as a testifying witness, but as an assistant in the fact-finding

process. This assumes that such arrangement does not serve as a pretext for avoidance of the proscriptions of DR 7-109(C). An individual testifying at trial is entitled to compensation, as limited by DR 7-109(C).

Pre-Trial Fact-Finding

There is no ethical impropriety, if a client so determines, in paying an individual $150/hour for pre-trial fact-finding as DR 7-109(C) does not apply to situations where the individual is not a witness. See Alabama Op. 83-77 (undated), indexed in ABA/BNA Lawyer's Manual on Professional Conduct 801:1055 (1986) (attorney could pay an "investigator/consultant for documentary evidence and witnesses he has discovered on his own initiative É [if payment] is made with the client's consent after full disclosure"); Maryland Op. 83-38 (1982), indexed in ABA/BNA Lawyer's Manual on Professional Conduct 801:4327 (1986) (client can pay informant for information, but cannot pay the informant for testifying except reimbursement for expenses and financial loss).

In the instant situation, the attorney may pay an individual whatever amount the client consents to for pre-trial fact-finding services that the individual provides. In striking such a bargain, the attorney should keep in mind other ethical duties, such as closely monitoring a nonIawyer's participation in the litigation, and insuring that the attorney's fee is not higher than the applicable statutes permit. Even with the client's consent, an attorney is not entitled to receive amounts from the transaction that would in the aggregate constitute an excessive fee. DR 2-106(A); N.Y. State 576 (1986). To the extent the individual's duties replace the traditional functions of the attorney, the contingency fee charged by the attorney may become unreasonable. For example, if the client is paying $150/hour for the individual to perform the fact-finding duties normally performed by the attorney, a contingency fee percentage might be too high. See e.g., N.Y. State 572 (1985) (when another entity's services displace the attorney's work, the reasonableness of the attorney's contingent fee percentage may be affected.)

Trial Testimony

If, and when, the individual also becomes a witness, the compensation is governed by DR 7-109(C). The issue is whether $150/hour is "reasonable compensation" for the time, if any, the individual spends testifying, preparing to testify, and attending the trial. DR 7-109(C) is designed to prevent compensation that would have a tendency to lead to the "production of fraudulent evidence and to the giving of falsely colored testimony as well as to [the prevention of] outright perjury." N.Y. State 547 (1982), citing 6A Corbin on Contracts, §143O (1951). Further, the rule also is influenced by the notion that "the testimonial duty, like other civic duties, is to be performed without pay, the sacrifice being an inherent burden of citizenship É ." Id., citing 8 Wigmore Evidence, §202 (McNaughton Rev., 1961).

On the other hand, not everyone views testifying at trial as an honor or civic duty, especially when the individual incurs expenses or suffers a financial loss. We must attempt to draw the line between compensation that enhances the truth seeking process by easing the burden of testifying witnesses, and compensation that serves to hinder the truth seeking process because it tends to "influence" witnesses to "remember" things in a way favorable to the side paying them.

For that reason, DR 7-109(C) explicitly prohibits the payment of a witness on a contingency basis because the witness will be tempted to give more favorable testimony in the hopes of insuring or increasing the witness fee. Reasonable compensation, however, expressly is allowed under DR 7-109(C). The term "loss of time in attending or testifying" has been interpreted to mean "loss of time in testifying or in otherwise attending court proceedings and preparing therefor." N.Y. State 547 (1982). The witness' "loss of time" then must be translated into dollars. Id. A witness who loses wages because of his or her role as a witness

may be reimbursed for the money lost. A witness who is unemployed, self-employed, or on salary, also may be compensated since even "recreation time is susceptible to valuation." Id. A witness who is reimbursed for loss of free time, or does not lose money as a result of the role as a witness, is still entitled to compensation, but the amount should be given "closer consideration" than it is when the witness is being reimbursed for lost wages. Id. Thus, "reasonable compensation" is not merely out-of-pocket expenses or lost wages.

Thus, the fact that an individual may perform duties for the attorney on his or her own time or may currently be unemployed does not necessitate a finding that the individual is not entitled to receive compensation. See Wisc. Op. E-89-17 (1989), indexed in ABA/BNA Lawyer's Manual on Professional Conduct 901:9111(1990) (retired person could be compensated for the "reasonable and necessary time spent in preparation, travel, and testifying even though the compensation will not be for lost wages since the witness is retired").

The amount of compensation that is to be considered "reasonable" will be determined by the market value of the testifying witness. For example, if in the ordinary course of individual's profession or business, he or she could expect to be paid the equivalent of $150/hour, he or she may be reimbursed at such rate.

CONCLUSION

Subject to the qualifications stated above, the question is answered in the affirmative.

F. A subordinate lawyer does not violate these Disciplinary Rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

DR 1-105 [§1200.5-a] Disciplinary Authority and Choice of Law.

A. A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.

B. In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

1. For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
2. For any other conduct:
   a. If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
   b. If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

DR 1-106 [1200.5-b] Responsibilities Regarding Non-legal Services

A. With respect to lawyers or law firms providing non-legal services to clients or other persons:

1. A lawyer or law firm that provides non-legal services to a person that are not distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the provision of both legal and non-legal services.
2. A lawyer or law firm that provides non-legal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Disciplinary Rules with respect to the non-legal services if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship.
3. A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing non-legal services to a person is subject to these Disciplinary Rules with respect to the non-legal services if the person receiving the services could reasonably believe that the non-legal services are the subject of an attorney-client relationship.
4. For purposes of DR 1-106 [1200.5-b](A)(2) and DR 1-106 [1200.5-b](A)(3), it will be presumed that the person receiving non-legal services believes the services to be the subject of an attorney-client relationship unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of an

1-107 when so dealing with the non-lawyer. Thus, a lawyer advising a client in connection with a discharge of chemical wastes may engage the services of and consult with an environmental engineer on that matter without the need to comply with DR 1-107. Likewise, the requirements of DR 1-107 need not be met when a lawyer retains an expert witness in a particular litigation.

EC 1-18 Depending upon the extent and nature of the relationship between the lawyer or law firm, on the one hand, and the non-legal professional or non-legal professional service firm, on the other hand, it may be appropriate to treat the parties to a contractual relationship permitted by DR 1-107 as a single law firm for purposes of these Disciplinary Rules, as would be the case if the non-legal professional or non-legal professional service firm were in an "of counsel" relationship with the lawyer or law firm. If the parties to the relationship are treated as a single law firm, the principal effects would be that conflicts of interest are imputed as between them pursuant to DR 5-105(D), and that the law firm would be required to maintain systems for determining whether such conflicts exist pursuant to DR 5-105(E). To the extent that the rules of ethics of the non-legal profession conflict with these Disciplinary Rules, the rules of the legal profession will still govern the conduct of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also be subject to legal obligations arising from a relationship with non-lawyer professionals who are themselves subject to regulation.

DISCIPLINARY RULES

DR 1-101 [§1200.2] Maintaining Integrity and Competence of the Legal Profession.

A. A lawyer is subject to discipline if the lawyer has made a materially false statement in, or has deliberately failed to disclose a material fact requested in connection with, the lawyer's application for admission to the bar.

B. A lawyer shall not further the application for admission to the bar of another person that the lawyer knows to be unqualified in respect to character, education, or other relevant attribute.

DR 1-102 [§1200.3] Misconduct.

A. A lawyer or law firm shall not:

1. Violate a Disciplinary Rule.
2. Circumvent a Disciplinary Rule through actions of another.
3. Engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer.
4. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
5. Engage in conduct that is prejudicial to the administration of justice.
6. Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be

brought before such tribunal in the first instance. A certified copy of a determination by such a tribunal, which has become final and enforceable, and as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice shall constitute prima facie evidence of professional misconduct in a disciplinary proceeding.

7. Engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

DR 1-103 [§1200.4] Disclosure of Information to Authorities.

A. A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of DR 1-102 [1200.3] that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

B. A lawyer possessing knowledge or evidence, not protected as a confidence or secret, concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

DR 1-104 [§1200.5] Responsibilities of a Partner or Supervisory Lawyer and Subordinate Lawyers.

A. A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.

B. A lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the disciplinary rules.

C. A law firm shall adequately supervise, as appropriate, the work of partners, associates and non-lawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

D. A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:

1. The lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it; or
2. The lawyer is a partner in the law firm in which the other lawyer practices or the non-lawyer is employed, or has supervisory authority over the other lawyer or the non-lawyer, and knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated.

E. A lawyer shall comply with these Disciplinary Rules notwithstanding that the lawyer acted at the direction of another person.

PROBLEM TWO: COMMUNICATING WITH A REPRESENTED PARTY

Lawyer represents PlaintCo in a contract dispute with DeftCo, one of its suppliers. Pres, the President of PlaintCo, is exasperated that the dispute cannot be resolved without litigation being filed. He complains that DeftCo's attorney is just trying to run up her fee. Pres says that if he could only negotiate directly with CEO, DeftCo's chief executive, he could work things out. Lawyer says that Pres has every right to do that. Pres says, "Good. Then I'll meet with CEO and try to make her listen to reason. But before I go, tell me what terms I should propose to resolve the dispute and what arguments I should make about why the terms are fair and reasonable."

May Lawyer provide the requested assistance?

See DR 7-104(B); Association of the Bar of the City of New York ("ABCNY") Formal Opinion 2002-3.

make timely disclosure to counsel for the defendant, or to a defendant who has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment.

DR 7-104 [§1200.35] Communicating with Represented and Unrepresented Parties.

A. During the course of the representation of a client a lawyer shall not:
1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.
2. Give advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

B. Notwithstanding the prohibitions of DR 7-104 [1200.35] (A), and unless prohibited by law, a lawyer may cause a client to communicate with a represented party, if that party is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented party's counsel that such communications will be taking place.

DR 7-105 [§1200.36] Threatening Criminal Prosecution.

A. A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

DR 7-106 [§1200.37] Trial Conduct.

A. A lawyer shall not disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling.

B. In presenting a matter to a tribunal, a lawyer shall disclose:
1. Controlling legal authority known to the lawyer to be directly adverse to the position of the client and which is not disclosed by opposing counsel.
2. Unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

C. In appearing as a lawyer before a tribunal, a lawyer shall not:
1. State or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.
2. Ask any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.
3. Assert personal knowledge of the facts in issue, except when testifying as a witness.
4. Assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

FORMAL OPINION 2002-3

TOPIC: The "no-contact rule" and advising a client in connection with communications conceived or initiated by the client with a represented party.

DIGEST: This Committee concludes that where the client conceives the idea to communicate with a represented party, DR 7-104 does not preclude the lawyer from advising the client concerning the substance of the communication. The lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient. N.Y. City 1991-2 is withdrawn.

CODE PROVISIONS: DR 7-104 [22 NYCRR § 1200.35], EC 7-18

QUESTION: Where a client conceives the idea of communicating directly with an adverse party who is known to be represented by counsel, may the attorney advise the client about the substance of the communication?

OPINION

Circumstances abound in both litigation and transactional contexts in which it is advisable -- and even crucial -- for a client to communicate directly with her counterpart. The need for such direct contact often arises to cement a settlement or break a negotiating logjam, to name just two common situations. To that end, the client might well expect to rely especially heavily on her lawyer's advice as she contemplates entering the fray personally. But in N.Y. City 1991-2, this Committee interpreted DR 7-104 in a manner that deprives the client of her lawyer's advice when the client may require that assistance most urgently.

Specifically, this Committee opined in N.Y. City 1991-2 that: (1) a lawyer may not encourage or "cause" a client to communicate with a represented party, without the consent of opposing counsel or legal authorization; and (2) even in situations when the client independently decides to contact a represented party, the lawyer should advise the client that, without opposing counsel's consent, the lawyer cannot assist or advise the client in these communications.

In July 1999, DR 7-104 was amended to provide a safe harbor for a lawyer who suggests that a client communicate with a represented party:

> Notwithstanding the prohibitions of DR7-104[1200.35](A), and unless prohibited by law, a lawyer may cause a client to communicate with a represented party, if that party is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented party's counsel that such communications will be taking place.

DR 7-104(B). EC 7-18 further provides that a lawyer may advise his or her client to communicate directly with a represented person, "including by drafting papers for the client to present to the represented person," so long as the attorney gives "reasonable advance notice" that such communications will be taking place. EC 7-18 defines "reasonable advance notice" as "notice provided sufficiently in advance of the direct client-to-client communications, and of sufficient content, so that the represented person's lawyer has an

opportunity to advise his or her own client with respect to the client-to-client communications before they take place." See Roy Simon, The 1999 Amendments to the Ethical Considerations in New York's Code of Professional Responsibility, 29 Hofstra L. Rev. 265, 274 (Fall 2000) (describing "reasonable advance notice" as a "flexible concept" that requires at least ample time for the "opposing lawyer to get in touch with her client").

In light of these recent amendments to DR 7-104(b) and EC 7-18, we now revisit the remainder of N.Y. City 1991-2 1 .

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DISCUSSION

The "No-Contact" Rule and DR 7-104

DR 7-104(A)(1) of the Code establishes a "no-contact" rule for counsel:

During the course of the representation of a client a lawyer shall not:

> Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The "no-contact" rule is traceable to an 1836 legal treatise that instructs: "I will never enter into any conversation with my opponent's client, relative to his claim or defense, except with the consent, and in the presence of his counsel." John Leubsdorf, Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests, 127 U. Pa. L. Rev. 683, 710 n. 6 (Jan. 1979) (quoting 2 D. Hoffman, A Course of Legal Study Addressed to Students and the Profession Generally 771 (2d ed. Baltimore 1836) (1st ed. Baltimore 1817)).

It gained widespread acceptance in 1908 through the American Bar Association's Canons of Professional Ethics, which prohibited a lawyer from communicating with a represented party:

> A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel.

(quoted in ABA Formal Opinion 95-396, Communications with Represented Persons (July 28, 1995)). The no-contact rule was carried forward into the 1970 Code of Professional Responsibility.

Among the purposes underlying the "no-contact" rule are the protection of clients against overreaching by opposing counsel and the preservation of the attorney-client relationship. "[T]he anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests." ABA Formal Opinion 396 (1995); see also Niesig v. Team I, 76 N.Y.2d 363, 370, 559 N.Y.S.2d 493, 496 (1990) ("By preventing lawyers from deliberately dodging adversary counsel to reach - and exploit - the client alone, DR 7-104(A)(1) safeguards against clients making improvident settlements, ill-advised disclosures and unwarranted concessions."); Charles W. Wolfram, Modern Legal Ethics, § 11.6.2, at 611 (1986) ("The prohibition is founded upon the possibility of treachery that might result if lawyers were free to exploit the presumably vulnerable position of a represented but unadvised party"); EC 7-18 ("The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.").

The linchpin of N.Y. City 1991-2 was the conclusion that the lawyer's client is included within DR7-104's prohibition against a lawyer's causing "another" to communicate with a represented party. From this premise, this Committee concluded that a lawyer cannot "assist, direct or otherwise participate in such communication" by her client with an adverse party who is represented by counsel even when the client conceives the idea of communicating with her adversary. Beyond this, the Committee held that "a lawyer who learns that a client has initiated settlement negotiations with the adverse party may not, thereafter, advise the client how to proceed with those negotiations" See N.Y. City 1991-2 (emphasis added)

To be sure, a lawyer may not use an intermediary to achieve indirectly what the Code prohibits the lawyer from achieving directly. See DR 1-102(A) ("A lawyer or law firm shall not . . . [c]ircumvent a Disciplinary Rule through actions of another."). And the Committee was certainly correct to be concerned with a lawyer using her own client as an instrumentality to circumvent opposing counsel. In reaching this conclusion, the Committee's opinion was supported by all relevant Bar Association opinions at that time, as well as the interpretations of both this Association and the New York State Bar Association of DR 7-104. After all, DR 7-104 explicitly mandates this concern by prohibiting a lawyer from "caus[ing] another to communicate" with a represented party, and there is no exclusion from this prohibition for the lawyer's client. But, by interpreting DR7-104 to create a blanket prohibition against the lawyer providing any assistance to her client, even when the client conceives or initiates the communication - a situation that by no means involves a lawyer in "causing" another to communicate - this Committee misconstrued DR 7-104 and thereby ignored the overarching reason why the lawyer has been engaged -- to render legal advice to the client.

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Lawyers May Advise Clients Concerning the Substance of Communications Conceived or Initiated by Clients with Represented Parties

Not surprisingly, N.Y. City 1991-2 provoked a flood of scholarly criticism. "[This] interpretation [of DR 7-104(A)(1)] stands the no-contact rule on its head. The purpose of the rule is to protect lawyers' agency relationships with their respective clients, and to prevent clients from being overreached by opposing lawyers." 2 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering, § 38.2 (2002); Restatement (Third) of the Law Governing Lawyers § 99C, comment (k) (2000) ("… the anti-contact rule does not prohibit a lawyer from advising the lawyer's own client concerning the client's communication with a represented nonclient . . . Prohibiting such advice would unduly restrict the client's autonomy, the client's interest in obtaining important legal advice, and the client's ability to communicate fully with the lawyer."); James G. Sweeney, Attorneys' Arrogance: Warning Unheeded, N.Y.L.J., June 17, 1991, p.2, col. 3 ("To deny or deter the client from the opportunity of entering into the gauging process of what value is to him in a particular dispute by denying him an opportunity to sit at the bargaining table with his adversary works against the very fundamental idea of the self and of human autonomy.") See also John Leubsdorf, Communicating With Another Lawyer's Client: The Lawyer's Veto and the Client's Interests, 127 U. Pa. L. Rev. 683, 697 (Jan. 1979) ("An extension of the [no-contact] rule to communications between clients is hard to reconcile with its ostensible purposes. Whatever dangers flow from the confrontation of professional guile with lay innocence are absent when two nonlawyers communicate . . . Perhaps we have again come across the desire to keep disputes safely in the control of lawyers.")

We believe that the overly broad construction of DR 7-104 in N.Y. City 1991-2 is at odds with modern authority. Under the Model Rules of Professional Conduct, which replaced the Model Code in the majority of states, a lawyer is permitted to advise a client to speak directly to a represented party. See Model Rule 4.2. Indeed, in 1983 the ABA House of Delegates considered and rejected a proposed amendment by the New York State Bar Association that would have restored the language "or cause another to communicate" to Model Rule 4.2. Opponents of the amendment successfully "objected to a possible interpretation of the amendment that would prevent lawyers from advising principals to speak directly with their counterparts.

The Rule was not intended to prohibit such advice." Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates 148-49 (1987); accord ABA Formal Opinion 362 (1992).

The thrust of N.Y. City 1991-2 also is directly contrary to the Ethics 2000 Commission's Commentary to Model Rule 4.2 that states: "Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." Ethics 2000 - February 2002 Report, Rule 4.2, Comment 2, available at www.abanet.org/cpr/e2k-202_111_85.doc.

In this same vein, Section 99 of the Restatement of the Law Governing Lawyers explicitly permits a lawyer to assist or advise a client concerning communications with a represented party. See Restatement (Third) of the Law Governing Lawyers § 99(2) (2000) ("[the no-contact rule] does not prohibit the lawyer from assisting the client in otherwise proper communication by the lawyer's client with a represented nonclient.").

On its face, we find nothing in DR 7-104(a) that would permit, much less compel, a severe limitation on a client's right to obtain legal advice to assist the client in communicating with her counterpart to achieve a lawful objective. On the contrary, there is a strong public policy in favor of resolving disputes that is undermined by an overly expansive interpretation of DR 7-104(a).

In reaching the conclusion that a lawyer was ethically prohibited under DR 7-104 from "endorsing or encouraging" direct client-to-client communications or advising a client about the substance of communications with a represented party even where the client, not the lawyer, first raised or proposed the contact, New York City 1991-2 adopted an overly broad definition of the term "cause":

> We conclude that "caus[ing] another to communicate with a party" in this context includes not just using the client as an agent for or in place of the lawyer for making the communication (i.e., where the lawyer directs, supervises or plans the substance of the communication), but also the act of suggesting or recommending to the client that he or she engage in such communication, even though the lawyer has no further involvement in or knowledge of the substance of the communication that subsequently takes place, or the endorsement or encouragement of such a course of action, even when it is first raised or proposed by the client.

From this broad definition, the Committee concluded "[a] lawyer who learns that a client has initiated settlement negotiations with the adverse party may not, thereafter, advise the client as to how to proceed with those negotiations. . . "

Given the modern authority referred to above, we conclude that a narrower definition of the term "cause" contained in DR7-104 is more appropriate, one akin to the definition found in the dictionary, which would apply where the lawyer prompts or initiates a client's direct contact with an adversary. It does not extend to the endorsement or encouragement of a communication "first raised by a client" and does not preclude the lawyer from advising the client on the content of communications conceived of or initiated by the client.

In light of the foregoing, we are constrained to withdraw N.Y. City 1991-2. In doing so, the Committee is mindful of the possibility that some lawyers may seek to overreach, even when the client conceives the idea to contact a represented party. Accordingly, the Committee adopts the Restatement's salutary view that in

advising a client in connection with such communications, the lawyer may not "assist the client inappropriately to seek confidential information, to invite the nonclient to take action without the advice of counsel, or otherwise to overreach the nonclient." Restatement § 99 Comment (k). In this connection, we interpret "overreach[ing] the nonclient" to prohibit the lawyer from converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient, an aspect of N.Y.C. 1991-2 with which we agree (prohibiting a lawyer who learns that a client has initiated settlement discussions with adverse party from assisting the client in "in any other manner that would constitute using the client as a vehicle for communicating with the represented party, absent notice to and consent from opposing counsel").

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Conclusion

N.Y. City 1991-2 is withdrawn. This Committee concludes that where the client conceives the idea to communicate with a represented party, DR 7-104 does not preclude the lawyer from advising the client concerning the substance of the communication. The lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient.

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1. Because the safe harbor created by DR 7-104(B) protects a communication by a lawyer's client with a represented party when the communication is initiated by a lawyer, a fortiori, the safe harbor protects a communication with a represented party conceived of by the lawyer's client. As we discuss below, however, where the client initiates the communication, the advance notice provision of DR 7-104 (B) need not be followed.

2. Webster's Ninth New Collegiate Dictionary defines the word "cause" to mean "to bring about an event or result" or "to effect by command, authority or force".

Issued: May, 2002

PROBLEM THREE: ERRORS IN CLOSING DOCUMENTS

A corporation enters into a written contract for the purchase of another company's assets. At the closing, the seller's lawyer realizes that the closing documents prepared by the buyer's lawyer contain a typographical error relating to the allocation of the purchase price, and that the effect would be to give the seller much more than was contemplated under the contract.

What should the seller's lawyer do? What if the seller's lawyer discusses the error with the seller, who insists that the error not be disclosed? What if the seller's lawyer notices the error only after the closing, by which time the buyer has paid the excess amount?

See Colorado Bar Association Ethics Committee, Opinion 80 (Feb. 18, 1989); DR 4-101; DR 7-102(A).

Ethics Opinion 80: Lawyer's Duty to Disclose Mistakes in Commercial Closing, 02/18/89; Addendum Issued 1995

The following Formal Opinion was written by the Ethics Committee of the Colorado Bar Association

[*Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel and do not provide protection against disciplinary actions.*]

80 LAWYER'S DUTY TO DISCLOSE MISTAKES IN COMMERCIAL CLOSING

Adopted February 18, 1989.
Addendum issued 1995.

Syllabus

In representing a client at the closing of a commercial transaction, a lawyer has both a duty of loyalty to the client and a duty of honesty and fair dealing to the other party and to the other party's attorney. If at the closing, one party or its attorney has made an undeniable mistake in the closing settlement statement regarding a basic assumption or element upon which the contract between the parties is based and silence by the other party would be conduct amounting to a knowing misrepresentation under the facts and circumstances, an attorney must advise his client to disclose the mistake rather than remain silent about the mistake and accept the benefits of it. If the client refuses disclosure, the attorney may not continue representing the client in the closing. To do so would violate DR 1-102(A)(4) and, depending on the facts, might also violate DR 7-102(A)(3), (5), (7) or (8). Whether the attorney also either is permitted or required to make disclosure to the other party depends on whether, under the facts and circumstances, the attorney's previous silence and other conduct, despite discontinuing participation in the closing, would be conduct by the attorney (i) involving dishonesty, fraud, deceit or misrepresentation, (ii) resulting in concealing or knowingly failing to disclose that which the attorney is required by law to reveal, or (iii) knowingly making a false statement of fact or law. If the attorney participates in the closing without disclosure being made and later determines disclosure should have been made, the attorney should call upon the client to rectify the

error. If the client refuses, the lawyer may similarly be permitted or required to disclose the mistake to the other party, depending on the facts and circumstances.

Introduction and Summary of Facts

A request has been submitted to the Ethics Committee ("Committee") for its opinion regarding a lawyer's duties in representing a client in the closing of a commercial transaction when the lawyer realizes the other party, in preparing the settlement statement, has made an undeniable mistake regarding a basic assumption or element on which the contract between the parties is based. The mistake, if not discovered, will benefit the client financially. The client requests the attorney to not disclose the mistake. While the Committee does not know all of the facts and in any event cannot make factual determinations regarding individual circumstances, the Committee assumes that the following is a reasonably accurate summary of the situation in question:

> Attorney X ("Seller's Attorney") represents Client Y, a corporation ("Seller"), in the purchase and sale of Seller's assets to A, a corporation ("Buyer"), represented by B, an attorney representing Buyer ("Buyer's Attorney"). Z is the president and sole shareholder of Seller. The parties had entered into a written contract for the purchase and sale of Seller's assets. Among other typical provisions, the contract provided for the purchase price, including the assumption of certain liabilities by Buyer, and the allocation of the purchase price among the assets and assumed liabilities. It appears but it is not certain that the written contract was prepared by Buyer's Attorney. At the closing Buyer and Buyer's Attorney presented the contemplated closing documents and the closing settlement statement, apparently prepared by Buyer's Attorney. When Z and Seller's Attorney reviewed the closing settlement statement, they realized that it clearly and undeniably contained a conceptual and formatting error relating to the allocation of the purchase price. The effect of the error was that Seller would receive a net payment substantially in excess of that undeniably contemplated by and due under the sale and purchase contract. When Z and Seller's Attorney conferred about the closing documents and the error in the closing settlement statement, they speculated that Buyer or Buyer's Attorney may have corrected or adjusted for the error in the disbursement checks to be delivered at the end of the closing. In any event Z requested of Seller's Attorney that, if at all

> possible, he did not wish to point out the mistake. No disclosure of the error was made. The parties proceeded with the closing. The final disbursements mirrored the closing settlement statement and the mistaken, excess payment was delivered to Seller.

All of these events occurred within a short period of time during which Seller's Attorney realized the conflict between his duty of loyalty to his client on the one hand and, on the other hand, his duty to act honestly and fairly in dealing with Buyer and Buyer's Attorney. Seller's Attorney did not know how to resolve the conflict and determine which duty was paramount and still permit the closing to occur. He states he therefore decided to participate in the closing and permit the erroneous disbursements to be made without any comment regarding the mistake, but to do so with the intent to resolve the problem after the closing.

Subsequently, in seeking guidance from various colleagues, Seller's Attorney received conflicting advice on how to assess his duties in the situation and on whether any obligation to disclose the mistake to Buyer and Buyer's Attorney existed at or after the closing. Therefore, Seller's Attorney decided to submit this inquiry to the Committee and so informed Z. In the meantime Seller's Attorney also advised Z that, should the mistake be discovered by Buyer or Buyer's Attorney, Buyer would have a good claim against Seller and Z for return of the excess money and in all likelihood they would be required to return the money. Also, Seller's Attorney advised Z to place the money in a separate account for safekeeping until this matter could be resolved.

For policy reasons the Committee frequently declines to answer requests regarding the completed conduct of a specific attorney. Completed events frequently involve many determinations of facts and applications of substantive law and require individual legal advice. Nevertheless, the Committee determined to address the general questions presented by this inquiry because they are particularly important for guidance to the bar and because this opinion may assist in the resolution of problems underlying the inquiry. The Committee offers no opinion regarding any party's duty and possible liability under applicable substantive law, for example, under principles of contract or agency law. Given the particular circumstances, the Committee also has recommended to the attorney presenting the inquiry to consider obtaining individual legal advice in this matter.

Questions Presented

1. In representing a client in the closing of a commercial transaction, what are a lawyer's duties to the client and to the other party when confronted by the other party's undeniable mistake regarding a basic assumption or element on which the contract between the parties is based, when the lawyer's client benefits financially from non-disclosure and the client requests disclosure not be made?
2. If the parties closed without disclosure having been made and in doing so the attorney had not been able to resolve the attorney's conflicting duties in the situation, what duty, if any, does that lawyer have to rectify the situation if the lawyer determines that disclosure was required at the closing?

Applicable Provisions of the Code of Professional Responsibility ("Code")

This opinion involves application of: DR 1-102(A)(4) (dishonesty, fraud, deceit or misrepresentation is misconduct); DR 4-101(B)(1) and (2) (a lawyer has the duty to maintain the confidences and secrets of his client); DR 4-101(C)(2) (when disclosure of confidences and secrets is permitted); DR 7-102(A)(3) (a lawyer shall not conceal or *knowingly* fail to disclose that which he is required by law to reveal); DR 7-102(A)(5) (a lawyer shall not *knowingly* make a false statement of law or fact); DR 7-102(A)(7) (a lawyer shall not counsel or assist his client in conduct that the lawyer *knows* to be illegal or fraudulent); DR 2-110(B) (mandatory withdrawal); and DR 2-110(C) and DR 7-101(A)(2) (permissive withdrawal).

Canon 1 states: "A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession." DR 1-102 Misconduct, in relevant part provides: "(A) A lawyer shall not . . . (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Canon 4 states: "A Lawyer Should Preserve the Confidences and Secrets of a Client." DR 4-101 Preservation of Confidences and Secrets of a Client, in relevant part provides: "(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly: (1) Reveal a confidence or secret of his client. (2) Use a confidence or secret of his client to the disadvantage of the client." In DR 4-101(A) "confidence" is defined as "information protected by the attorney-client privilege under applicable law" and "secret" means "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." However, DR 4-101(C)(2) provides: "A lawyer may reveal: . . . .

Confidences or secrets when permitted under Disciplinary Rules or required by law or court order."

Canon 7 states: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." DR 7-101 Representing a Client Zealously, provides "(A) A lawyer shall not intentionally: . . . (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B) . . . ." DR 7-101(B)(2) permits a lawyer to refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal. DR 7-102 Representing a Client Within the Bounds of the Law provides:

> (A) In his representation of a client, a lawyer shall not: . . . (3) Conceal or knowingly fail to disclose that which he is required by law to reveal. . . . (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

Regarding a lawyer's withdrawal from representation, DR 7-101(A)(2) provides that: "(A) lawyer shall not intentionally: . . . (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105." DR 2-110 Withdrawal from Employment, provides: "(B) Mandatory Withdrawal. A lawyer representing a client . . . (in matters other than before a tribunal) . . . shall withdraw from employment, if: (2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule."

Legal Background

The inquiry presents the persistent problem of resolving a lawyer's sometimes conflicting duties of loyalty to the lawyer's client and the duties of candor and fairness when dealing with third parties. This opinion first describes the nature and scope of the applicable duties of Seller's Attorney and then presents the analytical bases for resolving any apparent conflicts among those duties and for choosing a proper course of conduct in the situation presented.

A. *Description of Seller's Attorney's Roles as Advisor and Representative and the Responsibilities Inherent in these Functions*

Attorneys perform different functions. Depending upon the circumstances and the functions being performed, an attorney's

generally paramount duty of loyalty to the client may be affected by the client's and the attorney's coexisting duties to third parties or the courts. The following general examples are illustrative of the shifting circumstances. As legal advisors or counselors at law, attorneys listen to, consult with and give advice to their clients. With rare exception those communications are confidential. DR 4-101(B). As negotiators and representatives, outside the context of litigation, attorneys assist clients in solving problems or gaining opportunities. When providing such representation involves dealing with third parties, an attorney's duties may include duties to not only the client but also to third parties. See, for example, DR 1-102(A)(3), (4) and (5), DR 4-101(B), DR 4-101(C)(2) and (3) and DR 7-102(A)(3), (7) and (8). As advocates, attorneys resolve disputes within the context of our adversary system of justice, for the most part dealing with a client's past conduct and taking the facts as they happened. However, as an advocate, an attorney's loyalty in representing the client is subject to rules of conduct which prohibit presenting non-meritorious claims and require the lawyer's candor to the court. See, for example, C.R.C.P. 11 and DR 7-102.

Each of these different functions involves the lawyer-client relationship complicated to a greater or lesser degree by other varying relationships with and resulting duties to third parties or the courts. The proper course of an attorney's conduct may depend on whether the lawyer is functioning as a legal advisor, transactional negotiator or representative, or as an advocate. EC 7-3 and EC 7-5. In this case the Committee begins its analysis with the fact that Seller's Attorney functioned both as a legal advisor and as the client's representative at the closing.

As a legal advisor, Seller's Attorney's responsibility is to assist Seller in evaluating present circumstances and in determining the course of future conduct and relationships. EC 7-3. In this capacity a lawyer furthers the interests of the client by giving his professional opinion regarding the applicable principles or rules of law, the client's legal responsibilities, duties and potential liabilities under the law, by expressing what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing the client of the legal and practical effect of various courses of action. EC 7-5.

Seller's Attorney also was the client's representative at the closing. This expanded role brings the added dimension of a third party relationship with Buyer and Buyer's Attorney. In this role Seller's Attorney is both a fiduciary and an agent, actively participating in the transaction on behalf of his client, the principal. As such Seller's

Attorney's conduct is subject both to the provisions of the Code as an officer of the court and to applicable principles of agency law. Restatement (Second) of Agency 1, comment e (1958). *See* DR 7-102(A)(3) and (7) as examples of ethical duties depending on requirements of substantive law. (For an exposition of the law of agency's significant import, both historically and legally, in analyzing an attorney's duty of confidentiality to a client in relation to the attorney's duty of truthfulness to third parties, *see* American Bar Association, *Annotated Model Rules of Professional Conduct* Comment and Legal Background to Rule 1.6 Confidentiality of Information, 60-72, and Comment and Legal Background to Rule 4.1 Truthfulness in Statements to Others, 264-267 (1984).)

B. *Lawyer's Duty of Loyalty and Confidentiality of Information*

The fiduciary relationship between client and lawyer and the proper functioning of our legal system require the preservation by the lawyer of the "confidences" and "secrets" of the lawyer's client. EC 4-l. A lawyer's duty to protect a client's confidences and secrets is generally considered paramount. For example, ABA Formal Opinion 341 (1978), in balancing the lawyer's duty to preserve confidences against the obligation to reveal frauds, interpreted the phrase "privileged communication" in the 1974 Amendment to DR 7-102(B) as referring to those confidences and secrets that are required to be preserved by DR 4-101, thus substantially limiting in scope the possible disclosure mandated by DR 7-102(B). The principle requiring lawyer-client confidentiality is revered because it is recognized as serving important societal purposes. Attempts to circumvent or undermine the privilege, when properly invoked, are carefully scrutinized and exceptions narrowly construed. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383 (1981) (defining the scope of a corporate attorney's attorney/client privilege in light of important purposes served by the privilege).

The prohibition against disclosure of confidences extends to information which is protected by the attorney/client privilege. The existence of the attorney-client privilege in Colorado is established in C.R.S. 13-90-107(1)(b) (1987 Repl. Vol.). A frequently quoted definition of the privilege is also found in *United States v. United Shoe Machine Corp.*, 89 F.Supp. 357, 358 (D. Mass. 1950):

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the Bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication

> relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

See also 8 Wigmore, *Evidence* 2292 (1961).

While the term "confidence" includes privileged attorney/client communications, DR 4-101(A) broadly defines "secret" to refer to "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would likely be detrimental to the client." Despite the broad scope of confidentiality established by the Code, the law recognizes that the rules of confidentiality may not be used to further a fraudulent or illegal purpose or to engage in conduct that would violate the Code. *See Re Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986); *Caldwell v. District Court of Denver*, 644 P.2d 26 (Colo. 1982); *United States v. Bartlett*, 449 F.2d 700 (8th Cir. 1971), *cert. denied*, 405 U.S. 832 (1972); *United States v. Friedman*, 445 F.2d 1076 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); *United States v. Mackey*, 405 F.Supp. 854, 860 (E.D.N.Y. 1975); *In the Matter of Callan*, 300 A.2d 868, 878 (N.J. Super. Ct. Ch. Div. 1973); *In re Selser*, 105 A.2d 395 (N.J. 1954); DR 7-102(A)(3) and (7); DR 7-102(B)(1); DR 4-101(C)(2). This legal concept is varyingly described as either an exception to the confidentiality rules or a matter outside the scope of the rules. Under either formulation, the result is the same: The confidentiality rules may be superseded by the policy of preventing conduct which is fraudulent, illegal or violates the disciplinary rules.

The facts giving rise to the instant inquiry - the discovery that Buyer or Buyer's Attorney has made an error in the closing settlement statement benefitting Seller - involve information that the Committee considers a "secret" under Rule DR 4-101(A). Seller's Attorney obtained the information about the error while performing work on behalf of a client. Moreover, it appears that the client does not wish the attorney to disclose the information. Accordingly, before disclosure can be required of Seller's Attorney, an exception to the confidentiality rules must be found to be applicable.

Analysis

An attorney's duties in any situation depend to some extent on the facts, circumstances and reasonable expectations of the parties. The

setting here is the closing of the sale and purchase of a business. An important reality in any closing is that the parties already have struck a contract and the closing is to consummate that previous agreement. Under these circumstances, the parties reasonably expect that each is there to act fairly and in good faith to fulfill the ends of the agreement. See, for example, *Restatement (Second) of Contracts* 205 (1979) and C.R.S. 4-1-203. In this context certain actions have generally accepted meanings. For example, transfer documents are to transfer property under the terms and conditions required by the agreement. Similarly, closing settlement statements are intended in part to assist the parties in assuring each other that the agreement has been fulfilled to each party's satisfaction. In such a setting, approval or disapproval, acceptance or rejection and affirmation or negation are the corroborative proof by which the parties measure performance. In such a setting, the attorney is a key participant and his actions, reactions or inactions may have material meaning. And, in such a setting, silence may be meaningful conduct, a form of communication indicating approval or acceptance regarding the accuracy and conformity of documents and deliveries in the transaction.

Under these circumstances rules requiring honesty have a plain meaning. C.R.C.P. 241(B)(4) requires attorneys to act in accord with the highest standards of honesty, justice and morality. DR 1-102(A)(4) prohibits conduct involving dishonesty, fraud, deceit or misrepresentation. A simple hypothetical illustrates the point. Two parties agree that in exchange for a painting, $10 will be given. The Committee concludes it would be dishonest for the artist's lawyer to knowingly accept, without disclosure, a $100 bill if mistakenly delivered by the buyer instead of a $10 bill.

In this case, the Committee assumes, the calculation and allocation of the purchase price are basic and undisputed elements of the contract between the parties. The closing was to fulfill the agreements of the parties in the contract. Given the facts in the instant case, the Committee concludes it would be dishonest for Z and Seller's attorney to continue with the closing, to not point out the error in the closing settlement statement and to accept the overpayment.

In reaching this conclusion, the Committee also recognizes the common law standard of good faith adopted by Colorado courts. In *Ruff v. Yuma County Transp. Co.*, 690 P.2d 1296, 1298 (Colo. App. 1984), the Colorado Court of Appeals adopted *Restatement (Second) of Contracts* 205 (1981) which requires that parties dealing with one another in business transactions act in good faith. *See also* related U.C.C. provisions at C.R.S. 4-1-203, 4-2-103 and 4-1-201, adopting

standards of good faith and fair dealing. Similarly, under tort law, Colorado has adopted the provisions of the *Restatement (Second) of Torts* 551 (1965) which provide in part:

> (2) one party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
>
> . . . .
>
> (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Bair v. Public Service Employees Credit Union, 709 P.2d 961, 962 (Colo. App. 1985). The same ideals are recognized by the Code. The Code requires honesty and truthfulness in dealing with third parties. *See, e.g.*, DR 1-102(A)(4); DR 7-102(a)(3) and (5). *See also, People v. Berge*, 620 P.2d 23 (Colo. 1980).

Depending on the actual facts and circumstances in this or a similar situation, other provisions of the Code may apply as well. For example, DR 7-102(A)(7) prohibits a lawyer from counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent. The Committee is of the view that "illegal conduct" means conduct in violation of the criminal laws. *See*, American Bar Foundation, *Annotated Code of Professional Responsibility* 11 (1979). The Committee assumes that Seller's conduct in not rectifying the Buyer's mistake is not criminal. The question remains whether such conduct is fraudulent. Such a determination involves deciding issues of fact and substantive law. The Code gives no guidance in applying the rule. In any event, the Committee does not make decisions of substantive law. The Committee makes no decision whether the facts involve fraud by Seller or Seller's Attorney. However, the Committee's research indicates almost a total absence of analytical examples of interpreting and applying Code provisions which by their terms depend on determinations of substantive law. Therefore, the Committee believes that a general summary of some of the possibly applicable principles of substantive law would by illustration assist the bar in interpreting and applying such Code provisions.

In Colorado the well-recognized, elementary constituents of fraud in a contractual relationship include concealment of a material existing

fact, that in equity and good conscience should be disclosed. *Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). Colorado recognizes that nondisclosure of a fact may result in fraudulent misrepresentation. For example, *Cahill v. Readon*, 273 P. 653 (Colo. 1929); *Bohe v. Scott*, 265 P. 694 (Colo. 1929); CJI-Civ.2d 19:2, 19:5 (1980); Restatement (Second) of Contracts 159 and 161 (1981). In resolving the question of whether nondisclosure of a material fact is fraudulent, the Colorado Supreme Court has stated:

> . . . fraud may be committed by the suppression of truth as well as the suggestion of falsehood. *The test of liability for failure to disclose facts material to the transaction is some duty, legal or equitable, arising from the relations of the parties, such as that of trust or confidence, or superior knowledge or means of knowledge*. When in the circumstances of the particular case such duty is present, failure to disclose a material fact with intention to mislead or defraud is equivalent to a fraudulent concealment of the fact, and stands no better than the affirmation of material misrepresentation. (Emphasis in original.)

In re Cisneros, 430 P.2d 86, 89 (Colo. 1967) quoting with approval from *Newell Bros. v. Hanson*, 97 Vt. 297, 304, 123 A. 208, 210 (1924).

Similarly, in a tort action for misrepresentation the plaintiff must prove: (1) a false representation by the defendant; (2) the defendant's knowledge that the representation was false; (3) plaintiff's ignorance as to the falsity of the representation; (4) defendant made the representation with the intent that plaintiff should act on it; and (5) damage to the plaintiff. *Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). *See also* W. Prosser, *Torts* 105 (4th Ed. 1971). Also, a false representation may be the failure to disclose a material existing fact which in equity and good conscience should have been disclosed. *Schnell v. Gustafson*, 638 P.2d 850 (Colo. App. 1981) citing *McNeill v. Allen*, 534 P.2d 813, 818 (Colo. App. 1975). *See also Morrison, supra* at 462.

Determining the existence of fraud also may depend on other factors such as Buyer's or Buyer's Attorney's possible negligence in committing the error in the first instance and possibly related issues of justifiable reliance.

Summarizing, the critical choices for Seller's Attorney involve determining how to protect his client's confidences and secrets while

not engaging in prohibited conduct in advancing the client's interests in the third party relationships with Buyer. Generally, prohibited conduct in this context would mean conduct which violates the provisions of DR 1-102(A)(4) or DR 7-102(A).

Conclusion

A. *Resolution During the Closing*

Based on the foregoing, how should Seller's Attorney proceed? Realizing that continued participation in the closing without disclosure would involve dishonesty and assisting his client in possibly fraudulent conduct, Seller's Attorney should explain to Z why disclosure is required and the possible practical and legal effects of failure to disclose. On this basis, Seller's Attorney should advise Z to point out the error in the closing settlement statement. Based on the collective experience of its members, the Committee believes most instances of this sort would be resolved at this juncture based on the attorney's professional stature and ability to influence a client to do at least what the law requires and what people reasonably expect as requirements of good faith and fair dealing.

If Z refuses and instructs Seller's Attorney not to disclose the error, Seller's Attorney must decline to do so. If Z persists, Seller's Attorney must withdraw from representation and decline to participate further in the closing. Withdrawal is mandatory under DR 2-110(B)(2) because continued representation clearly involving dishonest conduct by the lawyer would violate DR 1-102(A)(4). Depending on the facts, withdrawal also could be required if continued representation would result in violation of any of DR 7-102(A)(3), (5), (7) and (8). These provisions prohibit such conduct as knowingly failing to disclose that which is required by law to reveal, knowingly making a false statement of fact and knowingly engaging in other conduct contrary to a Disciplinary Rule.

Whether, in addition to withdrawing from representation, Seller's Attorney also is permitted or even may be required to disclose the error depends on the facts, particularly Seller's Attorney's own statements or other conduct prior to withdrawing. For example, if such conduct by Seller's Attorney was equivalent to a representation that the closing settlement statement was accurate, and Seller's Attorney knows that to be the case, disclosure is permitted under DR 4-101(c)(2) and required by DR 7-102(A)(3), (5) or (8). These rules requiring disclosure where the lawyer's own conduct is the critical question are recognized exceptions to the strict duty of confidentiality

regarding communications and information.

B. *Resolution Following the Closing*

Finally, the Committee turns to the question of Seller's Attorney's duties in the event of a completed closing, without disclosure, and delivery of the overpayment.

In this case Seller's Attorney arguably acted in good faith in proceeding with the closing without disclosure at the request of his client because he was not certain how to balance the apparently conflicting duties. Z and Seller's Attorney had a common law duty of honesty and fair dealing which may have been breached by the failure to disclose the error. Also, Seller's Attorney's conduct appears to have been inconsistent with his obligation not to engage in conduct involving dishonesty or misrepresentation insofar as he knew the truth of the error and refrained from comment, albeit only at the client's request. Under such apparent circumstances, the Committee concludes an attorney may rectify the error.

Since there may now exist differing interests between Seller and Z on the one hand and Seller's Attorney on the other hand, Seller's Attorney should so inform Z and Seller, but do so in calling upon Seller and Z to rectify the overpayment. If Seller declines, Seller's Attorney is permitted to disclose the overpayment to Buyer under DR 4-102(C)(2). The Committee reaches this conclusion for several reasons. Seller's Attorney still owes a duty of loyalty to Seller. However, withdrawal no longer is a viable means of Seller's Attorney's honoring loyalty to his client while not otherwise engaging in unethical conduct himself. The Committee recognizes that the information is a "secret" under Canon 4. However, keeping the secret "confidential" places the attorney in the possible position of a continuing violation of DR 1-102(A)(4) and DR 7-102(A)(8) and possibly DR 7-102(A)(3).

If the actual facts surrounding nondisclosure were determined to be fraudulent conduct by Seller's Attorney, the Committee's view is that disclosure would be permissible under DR 4-101(C)(2) and required by DR 7-102(A)(5). DR 7-102(A)(5) prohibits a lawyer from "knowingly mak[ing] a false statement of law or fact." Since lawyers must not engage in deliberate deception, DR 4-101 does not prevent a lawyer from correcting intentionally false or misleading statements made in violation of Rule 7-102(A)(5).

Afterword

In view of this opinion's introductory remarks emphasizing how a change in the lawyer's role or function may alter the analysis and require results different than disclosure of confidential information, two additional illustrations are offered.

The first example involves a defense lawyer's representation in a criminal case. In *People v. Schultheis,* 638 P.2d 8 (Colo. 1981), the defendant had insisted upon presenting perjured testimony through alibi witnesses. The trial court refused the defense attorney's request to withdraw. Defense counsel proceeded with the defense but refused to call the alibi witnesses. After conviction of murder in the first degree, the defendant appealed. He claimed that he was deprived of his constitutional right to effective assistance of counsel because defense counsel refused to present the testimony of the alibi witnesses.

In affirming the conviction, Justice Erickson, on behalf of a unanimous Court, illuminated the course for an attorney's resolving the difficult conflict between loyalty to the client and candor to the tribunal under these circumstances. As its beginning principle, in the interest of preserving the integrity of the American adversary system of criminal justice, the Court held that a lawyer may not offer testimony of a witness which the lawyer knows is false, fraudulent or perjured. DR 7-102(A)(4), (7) and (8). When serious disagreement occurs between defense counsel and the accused, and counsel is unable to dissuade the client from insisting that fabricated testimony be presented by a witness, counsel should request permission to withdraw from the case. DR 2-110(C)(l)(c). In making the request, the lawyer should not reveal to the trial judge the specific reason for the motion to withdraw. Rather, counsel should only state, in support of the motion to withdraw, that there exists an irreconcilable conflict with his client. If the motion to withdraw is denied, counsel must continue to serve as defense counsel, but must not present the perjured testimony. The attorney's refusal to call particular witnesses, because obedience to ethical standards prohibits presentation of fabricated testimony, does not constitute ineffective assistance of counsel. EC 7-26. This case illustrates how, in an adversarial situation, an attorney should seek to maintain client confidences while not, by his own conduct, presenting false evidence.

The second example involves a tax lawyer who, in reviewing the past tax returns of a new client, discovers that some time in the past on a concluded matter the government had made a $100,000 error, to the client's benefit, in calculating the client's tax liability. The Chicago Bar Association Professional Responsibility Committee considered this situation in its Opinion 864 (updated). That committee opined that a

lawyer whose client benefitted financially from the government's erroneous calculation of the client's tax liability is not ethically required to disclose the error to the government unless the lawyer's failure to disclose the error would perpetrate a fraud *by the lawyer* (and not the client) on the government. The lawyer may, but is not required to, disclose the government's error if the client consents to such disclosure or if disclosure is required by law. The analysis in Opinion 864 of the Chicago Bar Association Professional Responsibility Committee is consistent with the Committee's analysis in the present opinion. While the attorney should not reveal confidential information about the client's past affairs, the attorney may not, by his own conduct, engage in dishonest, fraudulent or misleading behavior.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.2 (regarding scope of representation); Rule 1.2(d) (which prohibits a lawyer from engaging in or assisting a client in conduct that the lawyer knows is fraudulent); Rule 1.2(e) (regarding the requirement that the lawyer shall consult with the client regarding limitations on the lawyer's conduct regarding assistance not permitted by the Rules of Professional Conduct or other law); Rule 1.6 (confidentiality of information); Rule 1.16 (declining or terminating representation); Rule 3.4 (regarding fairness to opposing party and counsel); Rule 4.1 (regarding truthfulness in statements to others); Rule 4.3 (regarding dealing with unrepresented person); Rule 8.4 (regarding misconduct) and 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation).

information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, the lawyer should avoid professional discussions in the presence of person to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of the client after full disclosure, such information for the lawyer's own purposes. Likewise, a lawyer should be diligent in his or her efforts to prevent the misuse of such information by employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC 4-6 The obligation to protect confidences and secrets of a client continues after the termination of employment. For example, a lawyer might provide for the personal papers of the client to be returned to the client and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration. DR 2-111 sets forth the procedures for protecting confidences and secrets of clients in connection with the sale of a law practice.

EC 4-7 The lawyer's exercise of discretion to disclose confidences and secrets requires consideration of a wide range of factors and should not be subject to reexamination. A lawyer is afforded the professional discretion to reveal the intention of a client to commit a crime and the information necessary to prevent the crime and cannot be subjected to discipline either for revealing or not revealing such intention or information. In exercising this discretion, however, the lawyer should consider such factors as the seriousness of the potential injury to others if the prospective crime is committed, the likelihood that it will be committed and its imminence, the apparent absence of any other feasible way in which the potential injury can be prevented, the extent to which the client may have attempted to involve the lawyer in the prospective crime, the circumstances under which the lawyer acquired the information of the client's intent, and any other possibly aggravating or extenuating circumstances. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

DISCIPLINARY RULES

DR 4-101 [§1200.19] Preservation of Confidences and Secrets of a Client.

A. "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

B. Except when permitted under DR 4-101 [1200.19] (C), a lawyer shall not knowingly:

1. Reveal a confidence or secret of a client.
2. Use a confidence or secret of a client to the disadvantage of the client.
3. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

C. A lawyer may reveal:

1. Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
2. Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
3. The intention of a client to commit a crime and the information necessary to prevent the crime.
4. Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.
5. Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

D. A lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 [1200.19] (C) through an employee.

professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
2. Fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under DR 2-110 [1200.15], DR 5-102 [1200.21] and DR 5-105 [1200.24].
3. Prejudice or damage the client during the course of the professional relationship, except as required under DR 7-102 [1200.33](B) or as authorized by DR 2-110 [1200.15].

B. In the representation of a client, a lawyer may:
1. Where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.
2. Refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR 7-102 [§1200.33] Representing a Client Within the Bounds of the Law.

A. In the representation of a client, a lawyer shall not:
1. File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
2. Knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
3. Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.
4. Knowingly use perjured testimony or false evidence.
5. Knowingly make a false statement of law or fact.
6. Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.
7. Counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.
8. Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

B. A lawyer who receives information clearly establishing that:
1. The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.
2. A person other than the client has perpetrated a fraud upon a tribunal shall reveal the fraud to the tribunal.

DR 7-103 [§1200.34] Performing the Duty of Public Prosecutor or Other Government Lawyer.

A. A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause.

B. A public prosecutor or other government lawyer in criminal litigation shall

PROBLEM FOUR: REPRESENTING CORPORATIONS AND THEIR CONSTITUENTS IN THE CONTEXT OF GOVERNMENTAL INVESTIGATIONS

A corporate client of the law firm has been informed by the United States Attorney and the Securities and Exchange Commission that they are conducting an investigation of the company and that they want to interview a number of directors, officers and employees of the company. General Counsel for the company has asked the law firm to represent the company and the directors, officers and employees in connection with these investigations.

Which of the following is correct:

a. The law firm may undertake the representation as requested.

b. The law firm may undertake the representation of the company only.

c. The law firm may not undertake the representation.

See DR 5-105; ABCNY Op. 2004-02.

3. The client consents in writing, after full disclosure, to the terms of the transaction and to the lawyer's inherent conflict of interest in the transaction.

B. Prior to conclusion of all aspects of the matter giving rise to employment, a lawyer shall not negotiate or enter into any arrangement or understanding:

1. With a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the employment or proposed employment.
2. With any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of employment by a client or prospective client.

DR 5-105 [§1200.24] Conflict of Interest; Simultaneous Representation

A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 1200.24](C).

B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24](C).

C. In the situations covered by DR 5-105 [1200.24](A)and (B), a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

D. While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101 [1200.20](A), DR 5-105 [1200.24] (A) or (B), DR 5-108 [1200.27] (A) or (B), or DR 9-101 [1200.45] (B) except as otherwise provided therein.

E. A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105 [1200.24] (D). Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-105 [1200.24] (D) occurs, shall be a violation by the firm. In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105 [1200.24] (D) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5-105 [1200.24] (D).

DR 5-106 [§1200.25] Settling Similar Claims of Clients.

A. A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against the clients, unless each client has consented after full disclosure of the implications of the aggregate settlement and the advantages and risks involved, including the

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2004-02

REPRESENTING CORPORATIONS AND THEIR CONSTITUENTS IN THE CONTEXT OF GOVERNMENTAL INVESTIGATIONS

Topic: Multiple Representations; Corporations and Corporate Constituents

Digest: Multiple representations of a corporation and one or more of its constituents are ethically complex, and are particularly so in the context of governmental investigations. If the interests of the corporation and its constituent actually or potentially differ, counsel for a corporation will be ethically permitted to undertake such a multiple representation, provided the representation satisfies the requirements of DR 5-105(C) of the New York Code of Professional Responsibility: (i) corporate counsel concludes that in the view of a disinterested lawyer, the representation would serve the interests of both the corporation and the constituent; and (ii) both clients give knowledgeable and informed consent, after full disclosure of the potential conflicts that might arise. In determining whether these requirements are satisfied, counsel for the corporation must ensure that he or she has sufficient information to apply DR 5-105(C)'s disinterested lawyer test in light of the particular facts and circumstances at hand, and that in obtaining the information necessary to do so, he or she does not prejudice the interests of the current client, the corporation. Even if the lawyer concludes that the requirements of DR 5-105(C) are met at the outset of a multiple representation, the lawyer must be mindful of any changes in circumstances over the course of the representation to ensure that the disinterested lawyer test continues to be met at all times. Finally, the lawyer should consider structuring his or her relationships with both clients by adopting measures to minimize the adverse effects of an actual conflict, should one develop. These may include prospective waivers that would permit the attorney to continue representing the corporation in the event that the attorney must withdraw from the multiple representation, contractual limitations on the scope of the representation, explicit agreements as to the scope of the attorney-client privilege and the permissible use of any privileged information obtained in the course of the representations, and/or the use of co-counsel or shadow counsel to assist in the representation of the constituent client.

Code: DR 2-110; DR 4-101; DR 5-105; DR 5-107; DR 5-108; DR 5-109; DR 7-104

Question

Under what circumstances may a lawyer simultaneously represent a corporation and one or more of its officers, directors, employees or other constituents in the context of a governmental investigation? What disclosures must the lawyer make to her current and prospective clients and what consents must she obtain prior to undertaking such a representation? How may the lawyer structure her relationship with her clients so as to minimize adverse consequences if conflicts between their interests arise?

Opinion

In an era in which each day's edition of The Wall Street Journal brings fresh reports of companies under investigation, it has become increasingly common for lawyers to be asked to undertake simultaneous representation of a corporation and one or more of its officers, directors, employees or other constituents (sometimes collectively referred to as "constituents") in the context of a governmental investigation. In addition, in an era in which corporations are under increasing pressure to demonstrate that they are "good corporate citizens" by cooperating fully with governmental investigations, it has become increasingly likely that simultaneous representation of a corporation and its constituents may involve the representation of differing interests.

At the same time, there is relatively little guidance available to attorneys on the ethical issues implicated by

a request for simultaneous representation of a corporation and an officer or employee of that corporation in the context of a governmental investigation. We have found no ethics opinions addressing the topic.*1* In addition, reported case law on multiple representation – which tends to be limited to issues such as when conflicts will require the disqualification of counsel or the reversal of a conviction – is of only limited assistance.*2*

As a result, we believe it would be helpful and timely to outline the ethical issues implicated by multiple representation of a corporate client and one or more officers, directors, employees or other constituents in the context of a governmental investigation. In particular, this Opinion focuses on: (1) the circumstances under which a lawyer for the corporation may ethically undertake simultaneous representation of one or more employees of the corporation; (2) the disclosures that must be made and the consents that must be obtained in order to render such multiple representation ethically permissible; and (3) the steps that can or should be considered to minimize potential harm to the corporate and employee clients if conflicts between their interests arise.*3* Although this Opinion deals specifically with multiple representations in the context of governmental investigations, we believe that most, if not all, of the concepts discussed in this opinion would apply to any multiple representation of a corporation and one or more of its constituents.

While there is no per se bar to simultaneous representation of corporate and employee clients in the context of governmental investigations, the Code of Professional Responsibility imposes three important restrictions on the permissibility of such representations. First, the lawyer must be able to conclude that a disinterested lawyer would, given the facts at hand, regard multiple representation as in the interest of both the corporate client and the employee client. Second, the lawyer must obtain the consent of both clients after full disclosure of the advantages and risks involved in multiple representation. Third, the lawyer must be alert to changes in circumstances that would render continuation of multiple representation impermissible.

In addition, the lawyer contemplating multiple representation should consider whether steps might be taken to structure his relationship with each client so as to minimize adverse consequences in the event that a conflict between them arises. For example, it may be appropriate or even necessary for the lawyer to seek a prospective waiver from his clients permitting him to continue his representation of the corporate client in the event that a conflict arises between the corporate client and the employee client. Additionally, or alternatively, the lawyer may conclude that the disinterested lawyer test is more clearly satisfied if he jointly represents one or both clients with co-counsel or shadow counsel.

The Standard Articulated in DR 5-105

DR 5-105 articulates the ethical standard governing the permissibility of representing multiple clients in a matter. Subject only to the exception contained in DR 5-105(C), the provisions of DR 5-105(A) and (B) prohibit undertaking or continuing in multiple representation "if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected" or "if it would be likely to involve the lawyer in representing differing interests."

As defined by the Code, differing interests "include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest." 22 N.Y.C.R.R. § 1200.1(a); see also NYSBA Comm. on Prof'l Ethics Op. 674 (n.d.). Accordingly, a finding of "adverse" or "differing" interests does not require "actual detriment" or any actual conflict; rather, a broad prophylactic rule is appropriate because it "not only preserves the client's expectation of loyalty but also promotes public confidence in the integrity of the bar." Tekni-Plex, Inc. v. Meyner & Landis, 89 N.Y.2d 123, 131, 674 N.E.2d 663, 667 (1996) (discussing, on motion to disqualify, similar standard under DR 5-108 regarding conflicts with former clients).

Under DR 5-105, a lawyer may undertake or continue multiple representation of clients with potentially differing interests only if:

a disinterested lawyer would believe that the lawyer can competently represent the interests of each [client] and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

DR 5-105(C).

The Disinterested Lawyer Test

Thus, under DR 5-105, the first determination that must be made before undertaking simultaneous representation of a corporate client and an employee client is that a disinterested lawyer would believe that a single lawyer could competently represent the interests of each client. In addition, since DR 5-105 also speaks to continuing a multiple representation, it requires the attorney to remain alert to potential conflicts and to reassess, as circumstances change, whether the disinterested lawyer test is still satisfied.

A "disinterested lawyer" is an objective, hypothetical lawyer "whose only aim would be to give the client the best advice possible about whether the client should consent to a conflict" or potential conflict. Simon's New York Code of Prof'l Responsibility Ann. 554-55 (2003). If the lawyer believes that such a disinterested lawyer "would conclude that any of the affected clients should not agree to the representation under the circumstances, the lawyer involved should not ask for" consent to multiple representation. EC 5-16.

In some instances, it will be obvious that the disinterested lawyer test cannot be satisfied with respect to the simultaneous representation of a corporate client and an employee client. For example, if the government is investigating securities law violations relating to the filing of false or misleading financial statements, a disinterested lawyer could not reasonably conclude that a single lawyer could competently represent both the corporation and an employee who has admitted wrongdoing in connection with the financial statements under investigation.

In such a scenario, the corporation would have a strong interest in avoiding or limiting criminal or civil liability by, among other things, cooperating fully with the government and providing any information sought by the government regarding the preparation of the financial statements.*4* The individual employee would, by contrast, have to consider a variety of factors before deciding whether it was in his interest to cooperate with the government, and he would need counsel able and willing to negotiate the best possible resolution of the matter for him.

In other scenarios, it would be clear that the disinterested lawyer test is easily satisfied. For example, in our same hypothetical investigation of securities law violations, an employee in the corporation's maintenance department who merely overheard comments regarding the need to alter the corporation's financial statements would have no reason for concern about personal liability. Such an employee would have no need for counsel to negotiate independently with the government on his behalf, and a disinterested lawyer would easily conclude that a single lawyer could competently represent the interests of both the corporation and the maintenance worker.

Many situations, however, are likely to be far less clear than the two scenarios described above. What if, for example, instead of working in the corporation's maintenance department, the employee was the head of one of the corporation's accounting divisions, albeit not the one involved in the financial statements under investigation? What if the employee worked in the accounting division under investigation, and had some, but not full, discretion to decide how to account for the transactions giving rise to the investigation? What if the employee had no decision-making authority, but nonetheless participated in booking the transactions? What if the employee is the corporation's CEO, who is not an accountant but who certified the accuracy of the corporation's financial statements?

In all such scenarios, the question of whether multiple representation would pass the disinterested lawyer test is much closer and likely would turn on the specific knowledge possessed by the employee, the specific laws or regulations implicated by the conduct, and the perceived scope of the government's investigation. As a result, in all such scenarios, the lawyer must take particular care to ensure that he has a sufficiently detailed grasp of the relevant facts to be able to make the assessment required by DR 5-105(C).

Obtaining the Facts Needed to Apply the Disinterested Lawyer Test

The need for facts sufficient to apply the disinterested lawyer test raises the issue of what, if any, precautions a lawyer must take in his fact-gathering to avoid potential harm to his existing or prospective clients. In the typical case, an attorney's first encounter with a corporate employee will occur in the context of an interview in which the attorney is representing only the corporation and is engaged in fact-gathering

on behalf of the corporation. In such interviews, it is typical for the attorney to advise the employee that: (1) the attorney represents the corporation, not the employee; (2) any information imparted to the attorney is privileged, but the privilege is held by the corporation, not the employee; and (3) it will be up to the corporation to decide whether to waive the privilege and share any information imparted by the employee with third parties.

In all cases where the interests of the constituent and the interests of the corporation may differ, attorneys are affirmatively required to give at least part of the advice described above. The Code requires an attorney to advise a corporation's employees that she is "the lawyer for the organization and not for any of the constituents" in any situation in which "it appears that the organization's interests may differ from those of the constituents." DR 5-109(A). Given the ease with which the "differing interests" test is satisfied, we believe an attorney should usually advise a corporate employee that she represents the corporation rather than the employee. Furthermore, given the increased solicitude that courts and other authorities have shown for the reasonable expectations of a party in determining whether an attorney-client relationship has been formed,*5* an attorney also acts at the peril of his corporate client if the attorney fails to make clear whom she does and does not represent.

If, in an initial interview, a corporate employee asks the corporation's attorney whether he should consult with counsel, it is typical for the attorney to reiterate that he represents the corporation and therefore cannot advise the employee. Here, too, the Committee regards that practice as a prudent precaution. While DR 7-104(a)(2) allows an attorney to advise an unrepresented party to secure counsel,*6* the attorney also must bear in mind that as corporate counsel, "he owes allegiance to the entity and not to a shareholder, director, officer, employee, representative, or other person connected with the entity." EC 5-18. Because affirmatively advising a corporate employee to secure counsel may work against the interests of the corporation, we believe it is appropriate for corporate counsel to be reluctant to render that advice – at least in the absence of the consent of his client to do so.*7*

If a constituent requests, prior to an initial interview by corporate counsel, to be represented by corporate counsel, it is typical for corporate counsel to decline at that point to undertake multiple representation. The Committee regards that practice as a prudent precaution. While it is, in theory, possible that corporate counsel will already have facts sufficient to enable her to apply the disinterested lawyer test prior to an initial interview with the employee, it seems likely that in most instances she will not have sufficient facts. Thus, we regard it as likely to be an exceptional case in which corporate counsel could properly agree to represent one of the corporation's employees prior to an initial interview of that employee.

If an employee who has already been interviewed subsequently requests representation by corporate counsel – a request that typically is triggered by a request from the government to interview or take testimony from the employee – the corporate attorney will then need to determine whether he has sufficient facts to enable him to apply the disinterested lawyer test. If he does not, he must then determine how best to obtain those additional facts.

In this regard, the corporate attorney should take care to avoid proceeding in a manner that could work against the interests of his existing client, the corporation. Thus, for example, if the corporate attorney were simply to agree to meet again with the corporate employee for the purpose of determining whether he could represent the employee, without first discussing whether the attorney may not be free to share with the corporation any additional information that was imparted, then the attorney may not in fact be able to share that information with the corporation, see, e.g., United States v. Dennis, 843 F.2d 652, 656-57 (2d Cir. 1988) (statements made by prospective client are privileged even if attorney ultimately declines the engagement), and might even in some cases be unable to continue to represent the corporation. See Restatement (Third) of the Law Governing Lawyers § 15 (2000) (addressing a lawyer's duty to protect information relating to the representation of a prospective client and how to protect against adverse consequences to an existing client). As a consequence, to protect the interests of the existing client, the corporation, it is important that the lawyer make clear to the employee that information shared in the interview will be disclosed to the corporation and that the corporation will control the decision as to whether to disclose such information further.

Consent After Full Disclosure

If the attorney concludes that the disinterested lawyer test has been satisfied, the lawyer may undertake multiple representation only with the consent of each client after "full disclosure of the implications of the simultaneous representation and the advantages and risks involved." DR 5-105(C).

" Full disclosure" means the provision of "information reasonably sufficient, giving due regard to the sophistication of the client, to permit the client to appreciate the significance of the potential conflict . . . ." EC 5-16; cf. People v. Gomberg, 38 N.Y.2d 307, 314, 342 N.E.2d 550, 554 (1975) ("Attorneys are under an ethical obligation to disclose to their clients, at the earliest possible time, any conflicting interests that might cloud their representation.").

Full disclosure also includes "disclosure of any and all defenses and arguments that a client will forgo because of the joint representation, together with the lawyer's fair and reasoned evaluation of such defenses and arguments, and the possible consequences to the client of failing to raise them." NYCLA Ethics Op. 707 (1995).

This Opinion cannot, and does not attempt to, catalogue all possible advantages and risks attendant to simultaneous representation of a corporation and one or more of its employees. Instead, the Opinion attempts to provide general guidance in this area by noting some of the more common advantages and risks, with the caveat that in each case in which multiple representation is contemplated, the attorney must give careful, fact-specific consideration to the potential risks and advantages of the representation so that there can be full disclosure to the clients within the meaning of DR 5-105(C).

Risks and Advantages from the Corporate Client's Perspective

In the case of a corporate client, the most common (and most readily apparent) advantage to multiple representation is avoiding the expense of separate counsel. Other common advantages include providing employees with the benefit of counsel who has a detailed and broad knowledge of the relevant facts and avoiding the suggestion that there is any division of interest between the corporation and its employees.*8*

With respect to the risks posed to a corporate client from multiple representation, the most serious potential risk will tend to be the possibility that a conflict will arise that will disable corporate counsel from continuing as corporate counsel. If a matter is time sensitive, or if corporate counsel has invested considerable time in the representation, the prejudice to the corporation from such a development could be quite significant.

In this regard, corporate counsel should ensure that the corporation understands that if the interests of the corporation and the employee become materially adverse, corporate counsel will not be able to continue in the matter on behalf of the corporation unless the employee consents to counsel doing so. See DR 5-108(A) (prohibiting, absent consent after full disclosure, representation that is materially adverse to a former client in the same or a substantially related matter). In addition, if there is any reasonable possibility of a divergence of interests, we believe that corporate counsel should seriously consider advising the corporation to obtain a prospective waiver sufficient to satisfy DR 5-108(A) as a condition of consenting to multiple representation. Indeed, in some cases, the absence of such a waiver might well cause the multiple representation to fail the disinterested lawyer test.

Other common disadvantages, from the corporation's perspective, to multiple representation include potential loss of credibility with the investigating agency, complication of corporate counsel's ability to report facts to the corporation, and complication of the corporation's ability to report facts to the government.

With respect to the first of those possible disadvantages, it may well be the case that a government attorney will regard with greater suspicion the testimony of a corporate employee that is favorable to the corporation if the employee is represented by counsel for the corporation. Indeed, a government attorney may even affirmatively object to the multiple representation. In such cases, it is not uncommon for the corporation or its counsel to decide against multiple representation even if it is believed to be permissible.

Multiple representation may also complicate corporate counsel's ability to report to the corporation

because, absent consent, she may not be able to pass on the confidences or secrets of his employee client. See DR 4-101(B)(3); DR 4-101(C)(1) (confidences and secrets of a client cannot be disclosed or used for the advantage of a third party without consent of the client after full disclosure); Greene v. Greene, 47 N.Y.2d 447, 453, 391 N.E.2d 1355, 1358 (1979) (prohibition against disclosure of client confidences covers any confidential communication made by the client in the course of the lawyer's representation and continues even after the dissolution of the attorney-client relationship).9 While such a factor is likely to be less significant in cases in which the prospective employee client has already been extensively debriefed, it nonetheless remains a potential complicating factor that ordinarily should be disclosed prior to seeking consent for multiple representation.

Similarly, corporate counsel should ordinarily consider and discuss with the corporation the possibility that multiple representation could complicate the corporation's ability to cooperate with, and report facts to, the government. As noted above, the current state of the law, and the current state of mind of law enforcement officials, operate to place considerable pressure on corporations to be willing to self-report, to waive the attorney-client privilege and effectively to serve as an investigative arm of the government with respect to the conduct of their employees. Allowing corporate counsel to simultaneously represent a corporate employee may put the corporation or its counsel in the undesirable position of having information that is of interest to the government but that cannot be shared with the government because the employee client has declined to waive his attorney-client privilege.*10*

Risks and Advantages from the Employee's Perspective

From the employee's perspective, many of the common advantages of multiple representation tend to be similar to the advantages that exist from a corporate client's perspective. Those advantages typically include obtaining counsel who has a detailed and broad knowledge of the relevant facts and avoiding the suggestion that there is any division of interest between the corporation and the employee.*11*

The principal risks posed to the employee client from multiple representation typically tend to be that corporate counsel's larger constituency may render it difficult for him (despite his best intentions) to be as vigilant in his protection of the individual client's interests, or that a divergence of interests will require the attorney to withdraw from representation of the employee client. Any such risks should be discussed with the prospective employee client prior to obtaining his consent to multiple representation. In addition, where the need to withdraw would be likely to work a significant disadvantage to the employee client (because, for example, the matter is time sensitive or especially complex), consideration should be given to the advisability of having co-counsel or shadow counsel.*12*

Structuring the Representation to Minimize Potential Adverse Consequences

As the foregoing discussion indicates, an attorney contemplating multiple representation can, and often should, consider whether the attorney-client relationship can be structured to minimize potential drawbacks to multiple representation. Such structuring may include obtaining prospective waivers of conflict, contractually limiting representation to minimize the possibility of conflicts, having a written understanding with regard to confidential information learned during the representations, and providing for co-counsel or shadow counsel.

Prospective Waivers

There is, as a general matter, no ethical bar to seeking a waiver of future conflicts. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 372 (1993); NYCLA Ethics Op. 724 (1998). In order to best ensure the likelihood that such waivers will be effective, however, it is advisable to put them in writing, see ABA Formal Op. 372, and they should otherwise meet all the requirements for contemporaneous waivers. See id.; NYCLA Ethics Op. 724; see also, e.g., Woolley v. Sweeney, No. 3:01-CV-1331-BF, 2003 U.S. Dist. LEXIS 8110, at *22 (N.D. Tex. May 13, 2003) (rejecting client's prospective waiver of conflicts where client "has never had the benefit of full disclosure"). The nature of these requirements depends on the specific conflicts to be waived, which, in turn, depend on the interests of the various clients. NYCLA Ethics Op. 724 (stating that "adequacy of disclosure and consent will depend . . . upon the circumstances of each individual case") (citation omitted).

In seeking to obtain a prospective waiver from clients, it frequently will be difficult for an attorney to make "full disclosure" to the same extent as in connection with a concurrent waiver. This is because it may not

be clear to the attorney at the outset of the representation just what conflicts might later arise. To satisfy his obligation of full disclosure, then, the lawyer seeking a prospective waiver should at least advise the client "of the types of possible future adverse representations that the lawyer envisions, as well as the types of matters that may present such conflicts. The lawyer also should disclose the measures that will be taken to protect the client or prospective client should a conflict arise." NYCLA Ethics Op. 724. "[I]t would be unlikely that a prospective waiver which did not identify either the potential opposing party or at least a class of potentially conflicted clients would survive scrutiny." ABA Formal Op. 372. In other words, the more specific the lawyer can be, the more likely the waiver is to be upheld. *Id*.

In the context of governmental investigations, prospective waivers may be useful in dealing with a number of the potential conflicts discussed above. Most commonly, prospective waivers may be sought in such cases from an employee client regarding the ability of corporate counsel to continue representing the corporate client in the event an actual or potential conflict develops. In addition, if there is any realistic likelihood that the governmental investigation might lead to litigation, consideration should be given to obtaining a waiver of the employee client's right to object to being cross-examined by his former attorney. Such a waiver will satisfy the specificity requirement for advance waivers because the constituent client will understand the nature of the future representation in which the lawyer would cease to represent the individual and continue to represent the entity.*13*

It bears noting that even if the prospective waivers do comport with the requirements for contemporaneous waivers as of the time they are made, the lawyer must still revisit the issues at the time the actual or potential conflicts arise. ABA Formal Op. 372 (stating that securing "'second' waiver" from client at time that actual conflict develops "in many cases . . . will be ethically required"); NYCLA Ethics Op. 724 (stating that "[n]otwithstanding" prospective waiver, "the lawyer must reassess the propriety of the adverse concurrent representation . . . when the conflict actually arises"). If the actual or potential conflicts turn out to be "materially different" from those the clients waived, the lawyer will not be permitted to rely on the prospective waivers, and will have to obtain new, contemporaneous waivers. NYCLA Ethics Op. 724. Likewise, courts will not necessarily accept the validity of prospective waivers, and may have to satisfy themselves that such waivers continue to be appropriate in light of the circumstances that actually develop. Cf. United States v. Alex, 788 F. Supp. 359, 363 (N.D. Ill. 1992) (rejecting waiver of conflicts by former clients as "by no means binding on this court," and recognizing "obligation to independently review the former clients' consents to waive their former counsel's conflict of interest"). Thus, in seeking such prospective waivers, the lawyer should be as specific as possible, in order to ensure that the lawyer has adequately disclosed the risks, and to maximize the likelihood that a reviewing court will conclude that the waiver was knowledgeably made.*14*

Contractual Limits on Representation

A lawyer may likewise ethically limit by contract his representation of a client, provided that the representation still comports with the requirements of the N.Y. Code of Professional Responsibility. NYSBA Comm. on Prof'l Ethics Op. 604 (1989). In effect, this means that the representation may not be so limited as to be inadequate. Ass'n of the Bar of the City on New York Comm. on Prof'l & Judicial Ethics [hereinafter "ABCNY"] Formal Op. 2001-3 (2001). Stated otherwise, the representation "must be sufficient . . . to render practical service to the client," and must not "materially impair the client's rights." NYSBA Ethics Op. 604. Such a limitation on representation is, however, subject to many of the same requirements as valid waivers: there must be full disclosure of the terms of the engagement and the client must consent. ABCNY Formal Op. 2001-3. In addition, such a representation should not be proposed if "a client could not reasonably conclude that the proposed arrangement serves its interests." Id. Finally, any such representation "must cover a discreet matter or a discreet stage of a matter and not terminate before the completion of that stage." NYSBA Ethics Op. 604.

Accordingly, it may be possible for a lawyer to limit his representation of an employee of the corporation to a discreet stage of an investigation in which a conflict with the corporation is unlikely to arise. For example, the lawyer may attempt to limit his representation of the employee to the investigatory stage of the case, thereby eliminating any risk that he would still represent the employee at the time of trial, should he then need to cross-examine the employee. Alternatively, depending on the facts of the particular case, the lawyer may be able to limit the scope of his representation of the employee even more narrowly,

perhaps to just a single interview or a handful of interviews with the government about a narrowly circumscribed topic.

Understandings with Respect to Privileged and Confidential Information

Once it is decided that the lawyer will represent the corporation and the constituent, it is important to have a clear understanding with both clients as to (1) whether and what kind of confidential information will be shared; (2) who will control the privilege with respect to such information; (3) how the attorney-client privilege will operate in the event a dispute arises between the clients concerning the matter; and (4) whether the lawyer will continue to represent the corporation even if a conflict develops between the corporation and the constituent. While the New York Code does not require that such understandings be in writing, we strongly recommend that they be in writing.

Co-Counsel or Shadow Counsel

Another potential middle ground that may be appropriate in some cases is the use of co-counsel or shadow counsel – that is, separate counsel who serves as additional counsel for the corporate employee and thus is available to offer independent advice to the employee and, if necessary, to take over as sole counsel for the employee. While the use of such counsel diminishes one of the advantages of multiple representation – namely, cost-savings – it can also significantly diminish the potential risks of multiple representation. If the co-counsel's existence is disclosed to the government (as it is in some cases), it can allay any concern on the part of the government that the corporate employee is not receiving independent legal advice. In addition, if the matter is a complex or time-sensitive one, having co-counsel who is kept reasonably well apprised of facts and developments could help prevent prejudice to the employee if it is subsequently determined that corporate counsel cannot continue to represent the employee.

Conclusion

Multiple representations are ethically complex, and the high-stakes nature of a typical governmental investigation only adds to the complexities. Before undertaking simultaneous representation of a corporation and one or more of its employees in the context of a governmental investigation, an attorney must carefully consider whether a disinterested lawyer would conclude that he can competently represent the interests of each client. The attorney must also take care to ensure that she has sufficient information to apply the disinterested lawyer test, and must give careful, fact-specific consideration to the risks and advantages to multiple representation and discuss those factors fully with each client before seeking their consent to multiple representation. In addition, throughout the representation, the attorney must remain alert to changing circumstances that may render continuation of multiple representation impermissible or inadvisable, and the attorney must discuss any such circumstances with his clients. Finally, the attorney should give consideration to whether there are ways in which the multiple representation can be structured so as to minimize adverse consequences to her clients should a conflict between them arise.

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1. Although we have found one ethics opinion in New York relating to multiple representation in a corporate context, that opinion is limited to the relatively narrow issue of an attorney's duties when perjury is committed by a corporate officer and the attorney represents both the officer and the corporation. NYSBA Comm. On Prof'l Ethics, Op. 674 (1995).

2. The issues that might arise at trial are distinct from those implicated at the investigative stage of a matter. In addition, whether counsel should be disqualified and whether counsel should have accepted or continued in multiple representation are separate questions. Thus, while decisions rendered in the context

of litigated actions provide some assistance, they do not define the universe of issues relevant to deciding whether it is ethically permissible to undertake multiple representation of a corporate client and one or more employee clients in the context of a government investigation.

3. The guidelines established in this Opinion apply to situations where a lawyer represents or may represent an organization and also one of its constituents, regardless of whether the constituent is an officer, director, or employee, and we use those terms interchangeably throughout the Opinion. However, as with all circumstances in which disclosure and consent is or may be required, the degree of sophistication of the constituent will play a role in how detailed the discussions of those issues need to be.

4. In recent years, both the Department of Justice and the Securities and Exchange Commission, among other law enforcement agencies, have repeatedly cited the willingness of a corporation to cooperate with governmental investigations (which cooperation is sometimes requested to include waiver of the attorney-client privilege) as an important factor in determining whether to hold a corporation civilly or criminally liable for the actions of its officers or employees. See, e.g., United States Attorneys Manual, Criminal Resource Manual 161 (January 20, 2003 memorandum of Deputy Attorney General Larry D. Thompson announcing a revised set of principles governing federal prosecution of business organizations) ("The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation."); SEC Release No. 34-44969, 2001 WL 1301408 (October 23, 2001) (Report on the Relationship of Cooperation to Agency Enforcement Decisions) (describing the nature and extent of a company's cooperation with the SEC as important factors to be taken into account in determining whether an enforcement action will be brought against the company).

5. See, e.g., Restatement (Third) of the Law Governing Lawyers § 14 & cmts. e-f (conditioning attorney-client relationship on client's intent and lawyer's failure to "manifest lack of consent," and stating that failure of corporate counsel to clarify whom he represents "in circumstances calling for such a result might lead a lawyer to have enteredinto client-lawyer representations not intended by the lawyer"); Nancy J. Moore, Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee, 39 S. Tex. L. Rev. 497, 506 (1998) (noting the inability of many corporate employees to understand the distinction between the lawyer's role as corporate counsel and his role as counsel for the employee in his individual capacity); see also Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (implying attorney-client relationship between corporate counsel and corporate officer where attorney represented close corporation and officer "reasonably believed that [attorney] was representing him"). But see Talvy v. Am. Red Cross, 205 A.D.2d 143, 149-50, 618 N.Y.S.2d 25, 29-30 (1st Dep't 1994) ("Unless parties have expressly agreed otherwise in the circumstances of a particular matter, a lawyer for a corporation represents the corporation, not its employees."), aff'd mem., 87 N.Y.2d 826, 661 N.E.2d 159 (1995).

6. DR 7-104(a)(2) states that "[d]uring the course of the representation of a client a lawyer shall not give advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client." However, since the employee will not typically be named in any related action actually being litigated before a tribunal while the governmental investigation is still pending, the employee, properly speaking, may not be a "party" within the meaning of this provision.

7. As noted above, DR 5-109(A) prescribes what corporate counsel must instruct a corporate constituent in cases where the interests of the corporation and the constituent "differ." Where the interests of the entity and the interests of the constituent are actually adverse, however, the New York Code provides no additional guidance and requires nothing more. It nevertheless may be advisable to consider that in situations of actually adverse interests, the ABA Model Rules provide specific guidance not also provided by the New York Code. Comment 10 to ABA M.R. 1.13 states: "There are times when the organization's interest may be or become adverse to those of [the constituent]. In such circumstances the lawyer should advise any constituent . . . that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for the constituent individual, and that discussion between the lawyer for the organization and the individual may not be privileged." Of course, there are many situations in which the entity's and the

constituent's interests will or might "differ" within the meaning of the New York Code yet such warnings and separate representation will not be necessary.

8. Less sophisticated corporate clients might also mistakenly believe that multiple representation carries the benefit of ensuring that their employees are represented by attorneys whose first loyalty is to the corporation. In such cases, it is incumbent upon corporate counsel to make clear to the corporation that he will owe a full and equal duty of loyalty to the employee clients, and that, if she is unable to discharge that duty, she will not be able to continue representing the employee clients.

9 . Although there is an exception to the obligations of DR 4-101 "where an attorney acts for two or more clients jointly," the scope of this exception is not entirely clear. Some authorities suggest that it is limited "only to the evidentiary privilege and applies only in subsequent litigation between the clients." NYSBA Comm. on Prof'l Ethics Op. 555 (1984). These sources stress that before confidences may be shared between jointly represented clients, "the circumstances must clearly demonstrate that it is fair to conclude that the clients have knowingly consented to the limited non-confidentiality." Id. Courts, however, have appeared more willing to infer such consent from the nature of the relationships in a multiple representation. See Tekni-Plex, 89 N.Y.2d at 137, 674 N.E.2d at 670 ("Generally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other . . . ."); accord Talvy, 205 A.D.2d at 149-50, 618 N.Y.S.2d at 29-30. Given these differing approaches, the Committee believes that it will always be advisable, prior to sharing the confidences of one client with another, for the lawyer to obtain the client's consent, after full disclosure. See DR 4-101(C)(1). This can be done in an engagement letter that sets out the understandings and agreements between the corporate client and the employee client with regard to the sharing and control of confidential information.

10. For an example of one such potential complication, see infra note 13.

11. Cost savings will not ordinarily be among the potential advantages to the employee client because the cost of separate counsel would in many, if not most, cases be borne by the corporation. Payment of such costs by the corporation is plainly allowed so long as there is full disclosure and the client consents. See DR 5-107.

12. To determine whether to withdraw from employment in the context of a multiple representation, a lawyer should refer to, inter alia, DR 2-110 and EC 5-15.

13. In seeking the prospective waivers and advance permission to reveal confidential information (see discussion infra at 13), counsel should also bear in mind any specific reporting requirements to which the corporate client may be subject. For example, certain corporations, such as banks and broker-dealer firms, are subject to federal laws that require them to report suspicious financial transactions by filing suspicious activity reports ("SARs"). See, e.g., 12 C.F.R. pt. 21. If counsel for such a corporation undertakes the simultaneous representation of a corporate employee, counsel may obtain, in the course of representing that employee, otherwise privileged information regarding suspicious transactions that, as an agent of the corporation, counsel may be obligated to disclose to the corporation and that the corporation, in turn, may be obligated to report to the government. As such, counsel for corporations with reporting requirements should consider seeking prospective waivers and advance permission to disclose information from any potential employee client that would permit the filings of such reports. While DR 4-101(C)(2) permits an attorney to reveal client "[c]onfidences or secrets when . . . required by law . . . ," the precise scope of this provision is unclear. It is thus uncertain whether the attorney, absent consent from the employee client, could report to the government information acquired in the course of representing that employee. Moreover, given that some of the reporting laws prohibit the filer of a SAR from informing any party that is involved in the underlying transaction, see, e.g., 31 U.S.C. 5318(g)(2)(A)(i), a prospective waiver prior to undertaking the representation may be the only opportunity for counsel to obtain the employee client's consent.

14. In evaluating the validity of prospective waivers, reviewing courts try to ascertain whether the client was reasonably informed about the future matter. See Restatement (Third) of the Law Governing Lawyers § 122 (2000) (defining "informed consent" to a prospective (as well as current) waiver as "requiring that

the client or former client have reasonably adequate information about the material risks of such representation"). ABA Formal Op. 372 ("the particular future conflict of interest as to which the waiver is invoked [must have been] reasonably contemplated at the time the waiver was given"); NYCLA Ethics Op. 724 (an advance waiver is valid if "the subsequent conflicts should have been reasonably anticipated by the original client based on the disclosures made and the scope of the consent sought"). Where the attorney specifically identifies the party or parties with whom the client's interests potentially could differ and explains how that divergence could occur, courts have tended to uphold prospective waivers. See Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339, 1345 (9th Cir. 1981) (quoting In re Boivin, 533 P.2d 171, 174 (Or. 1975); accord Fisons Corp. v. Atochem N.A., Inc., No. 90 Civ. 1080 (JMC), 1990 U.S. Dist. LEXIS 15284, at *15 (S.D.N.Y. Nov. 14, 1990); see also Interstate Props. v. Pyramid Co., 547 F. Supp. 178, 181-82 (S.D.N.Y. 1982). In the scenarios being considered in this opinion, the party with whom the client's interests might differ normally will be reasonably clear. Cf. W.R. Grace & Co. v. Goodyear Tire & Rubber Co., No. 1:99-CV-305, 1999 U.S. Dist. LEXIS 22554, at *12-*16 (W.D. Mich. 1999) (upholding prospective waiver executed by members of defense group that prohibited members from objecting "to the continued representation by Common Counsel of all or any of the other members [of the group] in connection with any legal services arising out of" the subject of the agreement). Moreover, even in litigation, courts have upheld prospective waivers involving representation of a corporation and its constituents. See In re Rite Aid Corp. Sec. Litig., 139 F.Supp.2d 649 (E.D. Pa. 2001) (permitting a lawyer who represented the corporation and several of its executives to withdraw from representing one of the executives and continue to represent the corporation after a conflict developed, based upon a written engagement letter containing an advance waiver); see also Zador Corp. v. Kwan, 37 Cal. Rptr. 2d 754 (Cal. Ct. App. 6th Dist. 1995) (upholding an advance waiver permitting a lawyer who represented a corporation and an individual to continue representing the corporation after a conflict developed between the corporation and individual).

Issued: June, 2004

PROBLEM FIVE: CLIENT FRAUD

A corporate client of the law firm applied to a bank for a $10 million line of credit. At the bank's request, the law firm gave an opinion letter stating that the company's receivables were good security. The loan closed.

A year later, the law firm learned that many of the receivables were nonexistent and that the company's net worth is less than the line of credit. The law firm also learned that the company intends to ask the bank to extend the line of credit. The law firm has withdrawn from representing the company.

1. Which of the following is correct:

a. The law firm cannot say anything to the bank about what it has learned about the former client's financial condition.

b. The law firm cannot say anything to the bank about its opinion letter.

c. The law firm may tell the bank it is withdrawing its opinion letter without saying why.

d. The law firm must tell the bank it is withdrawing its opinion letter without saying why.

2. What other options does the law firm have, if any?

See DR 7-102; DR 4-101.

professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
2. Fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under DR 2-110 [1200.15], DR 5-102 [1200.21] and DR 5-105 [1200.24].
3. Prejudice or damage the client during the course of the professional relationship, except as required under DR 7-102 [1200.33](B) or as authorized by DR 2-110 [1200.15].

B. In the representation of a client, a lawyer may:
1. Where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.
2. Refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR 7-102 [§1200.33] Representing a Client Within the Bounds of the Law.

A. In the representation of a client, a lawyer shall not:
1. File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
2. Knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
3. Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.
4. Knowingly use perjured testimony or false evidence.
5. Knowingly make a false statement of law or fact.
6. Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.
7. Counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.
8. Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

B. A lawyer who receives information clearly establishing that:
1. The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.
2. A person other than the client has perpetrated a fraud upon a tribunal shall reveal the fraud to the tribunal.

DR 7-103 [§1200.34] Performing the Duty of Public Prosecutor or Other Government Lawyer.

A. A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause.

B. A public prosecutor or other government lawyer in criminal litigation shall

information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, the lawyer should avoid professional discussions in the presence of person to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of the client after full disclosure, such information for the lawyer's own purposes. Likewise, a lawyer should be diligent in his or her efforts to prevent the misuse of such information by employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC 4-6 The obligation to protect confidences and secrets of a client continues after the termination of employment. For example, a lawyer might provide for the personal papers of the client to be returned to the client and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration. DR 2-111 sets forth the procedures for protecting confidences and secrets of clients in connection with the sale of a law practice.

EC 4-7 The lawyer's exercise of discretion to disclose confidences and secrets requires consideration of a wide range of factors and should not be subject to reexamination. A lawyer is afforded the professional discretion to reveal the intention of a client to commit a crime and the information necessary to prevent the crime and cannot be subjected to discipline either for revealing or not revealing such intention or information. In exercising this discretion, however, the lawyer should consider such factors as the seriousness of the potential injury to others if the prospective crime is committed, the likelihood that it will be committed and its imminence, the apparent absence of any other feasible way in which the potential injury can be prevented, the extent to which the client may have attempted to involve the lawyer in the prospective crime, the circumstances under which the lawyer acquired the information of the client's intent, and any other possibly aggravating or extenuating circumstances. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

DISCIPLINARY RULES

DR 4-101 [§1200.19] Preservation of Confidences and Secrets of a Client.

A. "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

B. Except when permitted under DR 4-101 [1200.19] (C), a lawyer shall not knowingly:

1. Reveal a confidence or secret of a client.
2. Use a confidence or secret of a client to the disadvantage of the client.
3. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

C. A lawyer may reveal:

1. Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
2. Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
3. The intention of a client to commit a crime and the information necessary to prevent the crime.
4. Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.
5. Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

D. A lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 [1200.19] (C) through an employee.

PROBLEM SIX: CONFLICT OF INTERESTS

In 2003, HealthCare engaged First National Bank to act as lead underwriter in connection with its initial public offering (IPO). First National Bank in turn hired your law firm, as one of its regular outside counsel, to handle part of the due diligence for the transaction, to provide a 10b-5 opinion, and to assist in the drafting of the registration statement. As part of its due diligence, the firm's attention was focused on the description of risk factors that could affect HealthCare's business operations in New York as well as those of its competitors. In performing its work as underwriter's counsel, the firm signed a confidentiality agreement and was given access to confidential HealthCare documents regarding its future business plans and strategies (including its takeover defenses). It met with the senior executives of the company and spoke with the company's auditors and outside counsel. Among the subjects covered in these discussions were the company's litigation strategy and need to recruit and retain senior management and sales associates critical to the success of the business. Following the IPO, your firm had no further contact with HealthCare.

Two years later, FeelGood, Inc., a competitor of HealthCare, seeks to retain your firm to represent it in a lawsuit brought by HealthCare alleging that FeelGood had hired away a senior manager of HealthCare who, in turn, had lured a number of key HealthCare sales associates to join him, allegedly in violation of non-compete and anti-solicitation clauses in their employment contracts. It also informs you that it is contemplating a hostile takeover of HealthCare and will need outside counsel to assist it in that effort. Your law firm has never represented HealthCare.

May the firm represent FeelGood in the pending litigation? If consent is needed, from whom should it be sought and in what manner? If consent is needed, could it have been sought in advance – and, if so, how? If FeelGood proceeds with a hostile takeover, may the firm represent it in connection with such matter? What if HealthCare retains First National to advise it in connection with FeelGood's bid? Could the lawyers who worked on the IPO work on this engagement? What if the partner in charge of that matter had left the firm in the interim?

See DR 4-101, DR 5-108, DR 5-109; ABA Model Rules of Professional Conduct, Rules 1.6, 1.9, 1.10; *HF Management Services LLC v. Pistone*, 818 N.Y.S.2d 40 (N.Y.A.D. 1st Dept., 2006), reversing decision (Ian Gammerman, J.H.O.) entered Feb. 24, 2005 (3/1/2005 N.Y.L.J. 18); *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120 (2d Cir. 2002) and 171 F.3d 779 (2d Cir. 1999); Restatement (Third) of the Law Governing Lawyers § 132 cmt. g(ii); Restatement (Second) of Agency § 381; ABCNY Op. 2005-2.

information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, the lawyer should avoid professional discussions in the presence of person to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of the client after full disclosure, such information for the lawyer's own purposes. Likewise, a lawyer should be diligent in his or her efforts to prevent the misuse of such information by employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC 4-6 The obligation to protect confidences and secrets of a client continues after the termination of employment. For example, a lawyer might provide for the personal papers of the client to be returned to the client and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration. DR 2-111 sets forth the procedures for protecting confidences and secrets of clients in connection with the sale of a law practice.

EC 4-7 The lawyer's exercise of discretion to disclose confidences and secrets requires consideration of a wide range of factors and should not be subject to reexamination. A lawyer is afforded the professional discretion to reveal the intention of a client to commit a crime and the information necessary to prevent the crime and cannot be subjected to discipline either for revealing or not revealing such intention or information. In exercising this discretion, however, the lawyer should consider such factors as the seriousness of the potential injury to others if the prospective crime is committed, the likelihood that it will be committed and its imminence, the apparent absence of any other feasible way in which the potential injury can be prevented, the extent to which the client may have attempted to involve the lawyer in the prospective crime, the circumstances under which the lawyer acquired the information of the client's intent, and any other possibly aggravating or extenuating circumstances. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

DISCIPLINARY RULES

DR 4-101 [§1200.19] Preservation of Confidences and Secrets of a Client.

A. "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

B. Except when permitted under DR 4-101 [1200.19] (C), a lawyer shall not knowingly:

1. Reveal a confidence or secret of a client.
2. Use a confidence or secret of a client to the disadvantage of the client.
3. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

C. A lawyer may reveal:

1. Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
2. Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
3. The intention of a client to commit a crime and the information necessary to prevent the crime.
4. Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.
5. Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

D. A lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 [1200.19] (C) through an employee.

existence and nature of all the claims involved and the participation of each person in the settlement.

DR 5-107 [§1200.26] Avoiding Influence by Others than the Client.

A. Except with the consent of the client after full disclosure a lawyer shall not:
1. Accept compensation for legal services from one other than the client.
2. Accept from one other than the client anything of value related to his or her representation of or employment by the client.

B. Unless authorized by law, a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal service for another to direct or regulate his or her professional judgment in rendering such legal services, or to cause the lawyer to compromise the lawyer's duty to maintain the confidences and secrets of the client under DR 4-101 [1200.19] (B).

C. A lawyer shall not practice with or in the form of a limited liability company, limited liability partnership or professional corporation authorized to practice law for a profit, if:
1. A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
2. A non-lawyer is a member, corporate director or officer thereof; or
3. A non-lawyer has the right to direct or control the professional judgment of a lawyer.

DR 5-108 [§1200.27] Conflict of Interest - Former Client.

A. Except as provided in DR 9-101 [1200.45] (B) with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:
1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.
2. Use any confidences or secrets of the former client except as permitted by DR 4-101 [1200.19](C) or when the confidence or secret has become generally known.

B. Except with the consent of the affected client after full disclosure, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
1. Whose interests are materially adverse to that person; and
2. About whom the lawyer had acquired information protected by section DR 4-101 [1200.19](B) that is material to the matter.

C. Notwithstanding the provisions of DR 5-105 [1200.24](D), when a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm only if the law firm or any lawyer remaining in the firm has information protected by DR 4-101 [1200.19](B) that is material to the matter, unless the affected client consents after full disclosure.

DR 5-109 [§1200.28] Organization as Client.

A. When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents.

B. If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include, among others:

1. Asking reconsideration of the matter;
2. Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
3. Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

C. If, despite the lawyer's efforts in accordance with DR 5-109 [1200.28](B), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in a substantial injury to the organization, the lawyer may resign in accordance with DR 2-110 [1200.15].

DR 5-110 [§1200.29] Membership in Legal Service Organization.

A. A lawyer may serve as a director, officer or member of a not-for-profit legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests that differ from those of a client of the lawyer or the lawyer's firm, provided that the lawyer shall not knowingly participate in a decision or action of the organization:

1. If participating in the decision or action would be incompatible with the lawyer's duty of loyalty to a client under DR 5-101 through DR 5-111 [1200.20 through 1200.29]; or
2. Where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests differ from those of a client of the lawyer or the lawyer's firm.

Model Rules of Professional Conduct

CLIENT-LAWYER RELATIONSHIP

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

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

(6) to comply with other law or a court order.

Comment

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby

encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure,

paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Model Rules of Professional Conduct

CLIENT-LAWYER RELATIONSHIP
RULE 1.9 DUTIES TO FORMER CLIENTS

(**a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.**

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

> **(1) whose interests are materially adverse to that person; and**
>
> **(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;**

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

> **(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or**
>
> **(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.**

Comment

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Model Rules of Professional Conduct

CLIENT-LAWYER RELATIONSHIP
RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

> **(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and**
>
> **(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.**

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations

can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

H

Supreme Court, Appellate Division, First Department, New York.
HF MANAGEMENT SERVICES LLC, Plaintiff-Appellant,
v.
Frank **PISTONE**, et al., Defendants-Respondents.
June 27, 2006.

Background: Employer brought action against former employees and competitor alleging breach of employee non-solicitation agreements and unfair competition. The Supreme Court, New York County, Ira Gammerman, J.H.O., disqualified law firm representing employer, and employer appealed.

Holding: The Supreme Court, Appellate Division, Catterson, J., held that firm was not disqualified from representing employer due to its work for underwriter in connection with competitor's initial public offering (IPO).

Reversed.

Andrias, J.P., dissented and filed opinion in which Nardelli, J., joined.

West Headnotes

[1] Fraud 184 7

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k5 Elements of Constructive Fraud
184k7 k. Fiduciary or Confidential Relations. Most Cited Cases
Fiduciary relationship exists between two persons when one of them is under duty to act for or to give advice for benefit of another upon matters within scope of relation.

[2] Fraud 184 7

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k5 Elements of Constructive Fraud
184k7 k. Fiduciary or Confidential Relations. Most Cited Cases
New York law does not recognize existence of fiduciary obligation that is based solely on relationship between underwriter and issuer.

[3] Attorney and Client 45 21.5(1)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k20 Representing Adverse Interests
45k21.5 Particular Cases and Problems
45k21.5(1) k. In General. Most Cited Cases
Underwriter that conducted company's initial public offering (IPO) of stock was not in fiduciary relationship with company, and thus law firm that conducted due diligence investigation for underwriter in connection with IPO was not disqualified from representing company's competitor in its action alleging that company had engaged in unfair competition as result of its purported practice of hiring away competitor's employees, despite company's contention that firm acquired confidential information in course of IPO due diligence investigation that would prejudice company's defense, where company and underwriter were separately counseled, there was no indication that underwriter and company enjoyed any type of pre-existing relationship, and information provided by company to firm was for purpose of preparing public documents.

***41** Proskauer Rose LLP, New York (Steven C. Krane and David A. Lewis of counsel), for appellant.
Littler Mendelson PC, New York (A. Michael Weber and Michael P. Pappas of counsel), for respondents.

RICHARD T. ANDRIAS, J.P., DAVID B. SAXE, EUGENE NARDELLI, LUIS A. GONZALEZ, JAMES M. CATTERSON, JJ.
CATTERSON, J.
In this action for breach of employee non-solicitation agreements and unfair competition, the plaintiff, a management services company, appeals from an

order that disqualified plaintiff's original litigation counsel based on the motion court's finding that a fiduciary relationship exists between an underwriter and an issuer, and that such relationship is imputed to that underwriter's due diligence counsel.

In August 2004, the plaintiff, **HF Management** Services (hereinafter referred to as "**HF Management**") commenced this action against two of its former employees and WellCare (hereinafter referred to collectively as "WellCare"). **HF Management** alleged that the employees had breached their non-solicitation agreements, and that WellCare, as part of an alleged practice had raided **HF Management's** sales force.

HF Management was represented by Epstein, Becker & Green (hereinafter referred to as "EBG"), a law firm that had conducted a due diligence investigation in connection with WellCare's Initial Public Offering of stock the previous year. EBG was hired as due diligence counsel by Morgan Stanley, the underwriter of the IPO. In that role, EBG spent several hundreds of hours reviewing files and interviewing WellCare personnel. EBG reviewed business plans, strategic and market analyses, employee policies, and recruitment and retention documents. It also discussed WellCare's various litigations and litigation strategies with WellCare's head of litigation and later, with its general counsel.

Subsequently, upon commencement of this lawsuit by **HF Management**, the defendants moved to disqualify EBG on the grounds that it had acquired confidential information in the course of the IPO due diligence investigation that would prejudice the defense. The motion court granted the requested relief. It reasoned that the lack of a formal attorney-client relationship was not dispositive, and that "the crux of disqualification is not the attorney-client relationship itself, but the fiduciary relationship that results from it." The court held that Morgan Stanley as underwriter owed a fiduciary duty to WellCare, and EBG as Morgan Stanley's agent in the IPO shared the underwriter's fiduciary duty to WellCare. For the reasons set forth below, we find that the motion court erred on the law, and therefore we reverse and deny the defendants' motion seeking disqualification of EBG, the plaintiff's original litigation counsel.

First, we acknowledge that in certain instances where no formal attorney-client relationship exists, a fiduciary obligation has been sufficient grounds for attorney disqualification. *Greene v. Greene*, 47 N.Y.2d 447, 418 N.Y.S.2d 379, 391 N.E.2d 1355 (1979). However, in this case we find that no fiduciary relationship existed between Morgan Stanley and WellCare, and so none may be imputed to EBG as Morgan Stanley's agent.

***42** [1] A fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *EBC I Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 175, 832 N.E.2d 26, 31 (2005) *citing* Restatement [Second] of Torts § 874, Comment a. The Court has held that while the determination of a fiduciary relationship is fact-specific, generally no such relationship exists between those involved in arm's length business transactions. *Northeast Gen. Corp. v. Wellington Adv. Inc.*, 82 N.Y.2d 158, 162, 604 N.Y.S.2d 1, 3, 624 N.E.2d 129, 131 (1993); *see also Breakaway Solutions Inc. v. Morgan Stanley & Co. Inc.*, 2004 WL 1949300, *13, 2004 Del. Ch. LEXIS 125 at *52-53 (Ct. Of Chancery, Delaware 2004) (applying New York law and finding that arm's length business relationship does not give rise to a fiduciary obligation).

[2] New York law, therefore, essentially does not recognize the existence of a fiduciary obligation that is based solely on the relationship between an underwriter and issuer. The Court of Appeals recently underscored the non-fiduciary nature of the relationship between underwriter and issuer in *EBC I v. Goldman Sachs & Co., supra*, even while finding that a fiduciary relationship may have existed between the two parties in that case. 5 N.Y.3d at 20, 799 N.Y.S.2d at 175, 832 N.E.2d 26.

In arriving at its conclusion, the Court first examined the typical relationship between an underwriter and issuer based on an underwriting agreement. It found that such a contractual relationship alone does not create any fiduciary obligations. *EBC I v. Goldman Sachs & Co.*, 5 N.Y.3d at 20, 799 N.Y.S.2d at 175, 832 N.E.2d 26. The Court described the relationship in connection with an IPO as essentially one between a buyer and seller where typically "the issuer'-or company seeking to issue the security ... sells an entire allotment of shares to an investment firm who purchases the shares [in order] to sell them to the public." *Id.* at 16, 799 N.Y.S.2d at 173, 832 N.E.2d 26 [internal citations omitted].

The Court nevertheless allowed for a fiduciary obligation exception where there was a pre-existing relationship created independently and apart from the

contractual one. *Id.*, at 20, 799 N.Y.S.2d at 175, 832 N.E.2d 26. In that case, EBC I, an Internet retailer also known as eToys, had hired Goldman Sachs, the lead managing underwriter, for its "knowledge and expertise to advise it as to a fair IPO price ... with eToys' best interest in mind." *Id.*, at 20, 799 N.Y.S.2d at 175, 832 N.E.2d 26. The Court observed that, if proved, the reliance of eToys on the advice and expertise of Goldman Sachs would have created a relationship of "higher trust" resulting in a fiduciary obligation of underwriter to issuer. *Id.*

However, the Court made quite clear that this case was, colloquially speaking, the exception that proves the rule. *EBC I v. Goldman Sachs*, 5 N.Y.3d at 21, 22, 799 N.Y.S.2d at 176, 832 N.E.2d 26. The Court stated: "We stress that the fiduciary duty we recognize is limited to the underwriter's role as advisor. We do not suggest that underwriters are fiduciaries when they are engaged in activities other than rendering expert advice." *Id.*

Indeed, the Court was unequivocal that the fiduciary relationship alleged by the parties in *EBC I v. Goldman Sachs* was "beyond that which arises from the underwriting agreement alone." 5 N.Y.3d at 22, 799 N.Y.S.2d at 176, 832 N.E.2d 26.

[3] In the case at bar, nothing in the record even remotely suggests that the relationship between Morgan Stanley and WellCare rose above the typical contractual***43** relationship of an underwriting agreement between a buyer and a seller. Both parties were separately counseled. In fact, the underwriting agreement specifically identified EBG as the "special regulatory counsel for the underwriters" and acknowledged that another law firm was serving as outside counsel for WellCare. Certainly, there is no indication or suggestion that Morgan and WellCare enjoyed any type of pre-existing relationship, or that Morgan acted as an "expert advisor on market conditions" to WellCare in the same way that Goldman Sachs apparently advised eToys. [FN1]

> FN1. The motion court established Morgan Stanley's fiduciary obligation as arising from the principle that an underwriter "may not profit from corporate information gained in its capacity as underwriter." In so doing, it mistakenly relied on case law like *Frigitemp Corp. v. Fin. Dynamics Fund, Inc.*, 524 F.2d 275, 279 (1975), that allow a characterization of underwriters as fiduciaries of corporations primarily in situations involving confidential, insider information used for profit or benefit prior to an IPO. *See also Dirks v. Sec. Exch. Comm.*, 463 U.S. 646, 655, n. 14, 103 S.Ct. 3255, 3262, 77 L.Ed.2d 911, 922 (1983).

It is true that the motion court's decision of February 16, 2005 pre-dates the Court of Appeals decision in *EBC I v. Goldman Sachs* by almost four months. However, in placing the typical underwriter-issuer relationship beyond the bounds of fiduciary constraints in *EBC I v. Goldman Sachs*, the Court was not creating new law. It was simply reiterating the principles of a "long-established and well-understood" contractual relationship between underwriter and issuer. *EBC I v. Goldman Sachs*, 5 N.Y.3d at 27, 799 N.Y.S.2d at 180, 832 N.E.2d 26 (Read, J., dissenting in part, and citing a 20-page documentation of this "well-understood" relationship in *United States v. Morgan*, 118 F.Supp. 621, 635-655 (S.D.N.Y.1953)).

Indeed, New York courts and jurisdictions applying New York law have long recognized the non-fiduciary nature of the underwriter-issuer relationship. *See Blue Grass Partners v. Bruns, Nordeman, Rea & Co.*, 75 A.D.2d 791, 791, 428 N.Y.S.2d 254, 255 (1st Dept.1980) (affirming lower court's finding that an underwriting contract does not create a fiduciary duty between the underwriter and the issuer); *Breakaway Solutions v. Morgan Stanley & Co., supra* at *13, 2004 Del. Ch. LEXIS 125 at *52 (with certain exceptions, positions of underwriter and issuer are adverse).

In fact, not only is a fiduciary aspect absent from the majority of underwriting relationships, such relationships are better characterized as adversarial since the statutorily-imposed duty of underwriters is to investors. Pursuant to the Securities Act of 1933, it is the underwriter's responsibility to prepare a registration statement providing full and adequate information to investors concerning the issuing company and the distribution of the securities. *See* 15 U.S.C. § 77g (providing, in part, that any registration statement shall contain information and documents "necessary or appropriate in the public interest or for the protection of investors").

In this case, EBG, as underwriter's due diligence counsel was the law firm charged with the task of uncovering such documents and information about WellCare and reporting it to the underwriter. On the basis of the reporting, underwriters like Morgan

Stanley then make the appropriate disclosures in the offering materials, or may decide the offering is not feasible. To the extent that the information and documents may be unfavorable to the issuer, a fiduciary obligation would almost certainly create a conflict with the underwriter's duty to potential investors.

***44** Thus, given that no fiduciary duty was owed by Morgan Stanley to WellCare, none may be imputed to EBG, Morgan's due diligence counsel, whether EBG is described as counsel, "agent" or even underwriter's investigator.

In any event, as the plaintiff asserts, the creation of a fiduciary duty from underwriter's counsel to the issuer of securities makes no sense under the federal securities laws. Citing to Section 11 of the Securities Act, codified as 15 U.S.C. § 77k, the plaintiff asserts that the statute allows an underwriter to assert a defense against liability for material misstatements in a registration statement if it performed due diligence. No such due diligence defense is available to the issuer. Consequently, as the plaintiff contends, there is "no conceivable basis for any conclusion that the due diligence is being performed for the issuer's benefit."

Finally, the plaintiff asserts that no confidentiality obligation appertains to the information gathered by EBG from WellCare since it was provided for the purpose of preparing public documents, the registration statement and the IPO prospectus, and that such communications are not confidential. *See In re John Doe Corp.*, 675 F.2d 482, 489 (2d Cir.1982) (confidentiality privilege lost after selective disclosure to underwriter counsel for beneficial purpose, and not for purpose of legal advice).

The defendants argue that not all of the information gathered was actually published in the documents connected with the IPO. Nevertheless, this Court's decision to deny disqualification in this case is entirely consistent with prior rulings of this Court. *See Cutner & Assocs. P.C. v. Kanbar*, 300 A.D.2d 157, 157, 751 N.Y.S.2d 733, 733 (2002) (confidential information was not received under circumstances that gave a party the right to believe that the attorneys would respect the confidences).

The defendants' alternative argument that, while there was no formal attorney-client relationship between EBG and WellCare, there, nevertheless, existed "sufficient indicia" of an attorney-client relationship to justify disqualification, is also without merit. Such cases are usually limited to circumstances where the non-client, in this case WellCare, shares with the actual client, in this case Morgan Stanley, a joint interest that is being advanced on both the client and non-client's behalf. See *Flores v. Willard J. Price Assocs., LLC*, 20 A.D.3d 343, 799 N.Y.S.2d 43 (1st Dept.2005); *but cf. Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 748-749 (2nd Cir.1981). In this case, such jointly-held interest could only be premised on, or arise out of an existing fiduciary relationship which for all the foregoing reasons did not exist here.

Accordingly, the order of the Supreme Court, New York County (Ira Gammerman, J.H.O.), entered on or about February 24, 2005, granting defendants' motion to disqualify plaintiff's original litigation counsel, Epstein, Becker & Green, should be reversed, on the law, without costs, and the motion denied.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered on or about February 24, 2005, reversed, on the law, without costs, and the motion to disqualify plaintiff's original litigation counsel denied.

All concur except ANDRIAS, J.P. and NARDELLI, J. who dissent in an Opinion by ANDRIAS, J.P.

ANDRIAS, J.P. (dissenting).

Because the confidential information obtained by plaintiff's counsel Epstein Becker & Green, P.C. (EBG) from defendant WellCare Health Plans, Inc. in the course of its prior due diligence work for Morgan ***45** Stanley may be reasonably perceived as placing such confidences in jeopardy of disclosure to plaintiff, I respectfully dissent and would affirm.

It is undisputed that, in connection with its initial public offering in late 2003, WellCare made extensive due diligence disclosure to the offering's underwriter, Morgan Stanley, through Morgan Stanley's then counsel EBG. Only months later, EBG was retained by plaintiff to prosecute this litigation against WellCare and defendant thereafter moved for and obtained the presently appealed order disqualifying EBG from acting as plaintiff's counsel.

It is well settled that the disqualification of an attorney is a matter that rests within the sound discretion of the court (*see Flores v. Willard J. Price Assocs.*, 20 A.D.3d 343, 344, 799 N.Y.S.2d 43 [2005]). EBG's disqualification was proper since it obtained confidential information in the due diligence

process within the context of a fiduciary relationship (*see* *Greene v. Greene*, 47 N.Y.2d 447, 453, 418 N.Y.S.2d 379, 391 N.E.2d 1355 [1979]) and that information is substantially related to the issues presented in the instant litigation. A fiduciary relationship may exist between an underwriter and an offeror of securities (*see* *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 799 N.Y.S.2d 170, 832 N.E.2d 26 [2005]), and the motion court correctly found that such a relationship did exist between Morgan Stanley and WellCare, at least to the extent that Morgan Stanley was bound to preserve from adverse use against WellCare in other contexts confidential information elicited from it to facilitate the underwriter's due diligence. This duty was properly imputed to EBG in its capacity as Morgan Stanley's counsel.

While recognizing that in certain instances, even where no formal attorney-client relationship exists, a fiduciary obligation has been sufficient to warrant attorney disqualification, the majority, relying for the most part on *EBC I, Inc. v. Goldman Sachs & Co.*, *supra*, feels that no fiduciary relationship existed between Morgan Stanley and WellCare and so none may be imputed to Morgan Stanley's attorney. As aptly noted by the motion court, the crux of disqualification is not the attorney-client relationship itself, but the fiduciary relationship that results from it. Whether or not Morgan Stanley, as underwriter, was a fiduciary in the limited sense that Goldman Sachs was found to be in *EBC I, Inc. v. Goldman Sachs & Co.*, *supra* ("the fiduciary duty we recognize is limited to the underwriter's role as advisor. We do not suggest that underwriters are fiduciaries when they are engaged in activities other than rendering expert advice") does not warrant a different result. In *EBC I*, the Court merely held that the parties had created their own relationship of higher trust which required Goldman Sachs to deal honestly with its client and disclose its conflict of interest (*id.* at 22, 799 N.Y.S.2d 170, 832 N.E.2d 26).

Here, Morgan Stanley in its role as underwriter undertook as part of its relationship with WellCare to conduct the due diligence work necessary for the public offering of WellCare stock it was underwriting and retained EBG as its agent for that purpose. In that role, EBG obtained "secret" information from WellCare within the meaning of Code of Professional Responsibility DR 4-101 (22 NYCRR 1200.19), to which it would not otherwise have been privy. Thus, even if it was not a fiduciary as found in the context of *EBC I*, at the very least, EBG owed WellCare a fiduciary or special obligation not to disclose to anyone other than Morgan Stanley the "secret" information obtained by it in the course of rendering professional services to Morgan Stanley, so that Morgan ***46** Stanley could use it for the purposes for which EBG was retained.

It is undisputed that the confidential information turned over by WellCare to EBG in the course of, and to advance the purpose of, the encompassing confidential relationship included employee policies, retention and recruitment documents, litigation strategy, and business and competitive analyses directly relevant to the unfair competition claims now brought by plaintiff against WellCare. While EBG urges that the disqualification of the entire firm is unnecessary to protect WellCare against any conflict that the lawyers who worked on the WellCare offering may have, in view of the circumstance that EBG has made no attempt to screen those lawyers from the lawyers working on the present case, it was proper to impute their conflict to the entire firm (*see e.g.* *Panebianco v. First Unum Life Ins. Co.*, 04 Civ 9331, 2005 WL 975835, *3, 2005 U.S. Dist. LEXIS 7314, *8 [S.D.N.Y. April 27, 2005]).

N.Y.A.D. 1 Dept.,2006.
HF Management Services LLC v. Pistone
818 N.Y.S.2d 40, 2006 N.Y. Slip Op. 05153, 24 IER Cases 1497

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Tuesday, March 1, 2005

DOI

DECISION OF INTEREST

New York County Supreme Court

Firm That Handled Due Diligence for Defendant Is Disqualified in Employment Suit

JHO **Gammerman**

HF Management Services LLC v. **Pistone** - In this action, plaintiff sues defendants WellCare of New York, Inc. and WellCare Healthplans, Inc. (collectively "WellCare') and two of its former employees, now employed by defendant WellCare, charging defendants with soliciting plaintiff's employees in violation of antisolicitation clauses contained in the individual defendants' contracts, as part of an alleged practice by WellCare of employee raiding.

In motion sequence no. 001, defendants move for disqualification of plaintiff's counsel, Epstein, Becker and Green, P.C. ('EBG').

While defendants' moving papers refer to two cases in which EBG served directly as counsel to WellCare, those cases, standing alone, would likely not support disqualification.1 Rather, the focus of the motion is that in 2003-04, WellCare had an IPO, with Morgan Stanley as lead underwriter. As part of that process, Morgan Stanley retained EBG to perform certain due diligence work. WellCare provides detailed affidavits demonstrating that EBG was provided with sensitive, confidential information, including information about WellCare's litigation strategy in an action involving claims similar to those asserted here.

EBG asserts that there is no conflict of interest because there was no attorney-client relationship between EBG and WellCare and therefore none of the communications between EBG and WellCare were privileged. To the contrary, it asserts, it had an affirmative obligation to disclose adverse information about WellCare to its client, Morgan Stanley. In addition, it asserts that the attorneys who performed those services do not recall communications described by WellCare. It contends that the present case is not "substantially related" to the work that it did. Further, it asserts that it will erect a "Chinese wall.'

The motion to disqualify is granted.

Contrary to EBG's contention, the confidential information to which it was exposed is "substantially related" to the issues in the present litigation so as to warrant disqualification, see e.g. Felix v. Balkin, 49 F Supp 2d 260 (SD NY 1999); Mitchell v. Metropolitan Life Ins. Co., 2002 WL 441194 (SD NY 2002). Inter alia, WellCare has demonstrated that it shared confidential information, including litigation strategy, with EBG. This included information about its personnel policies, and about a lawsuit asserting claims similar to the one asserted herein.

Also contrary to EBG's contention, the lack of a formal attorney-client relationship between EBG and WellCare is not dispositive. While there is language in the reported cases to the effect that disqualification requires a showing of an attorney-client relationship, see e.g. Tekni-Plex, Inc. v. Meyner and Landis, 89

NY2d 123, reargument denied 89 NY2d 917 (1996), the crux of disqualification is not the attorney-client relationship itself, but the fiduciary relationship that results from it, a relationship that imposes a duty not merely to protect privileged attorney-client communications, but other confidential matter as well, see Lightman v. Flaum, 97 NY2d 128 (2001), cert denied 535 US 1096 (2002); Greene v. Greene, 47 NY2d 447 (1979); Carimati v. Carimati, 94 AD2d 659 (1st Dept 1983).

In Greene v. Greene, 47 NY2d 447, supra, two partners in plaintiff's law firm had formerly been partners in the law firm that plaintiff was suing. The Court of Appeals held that plaintiff's firm was disqualified because, inter alia:

As former partners in defendant law firm, Grutman and Bjork owe a fiduciary obligation similar to that owed by an attorney to his client (see, e. g., Meinhard v. Salmon, 249 NY 458, 463-464). This is especially so with respect to Grutman, a former managing partner of the firm (Id., at p. 468). Defendant relates, in its affidavits, that Grutman and Bjork gained confidential information in their capacity as members of the firm. Indeed, it is alleged that one or both of them were privy to partnership discussions concerning the firm's potential liability for its management of plaintiff's trust. In view of these allegations, we cannot discount the possibility that information obtained by Grutman and Bjork in their role as fiduciaries will be used in the pending lawsuit [emphasis added].

Thus, the former partners obtained confidential information about the defendant in the course of professional activities that were characterized by a fiduciary obligation, not an attorney-client relationship.2

The same principle applies here. As Morgan Stanley's agent in the IPO, EBG shared Morgan Stanley's fiduciary duty to WellCare. Morgan Stanley, as underwriter, owed a fiduciary duty to WellCare and may not profit from corporate information gained in its capacity as underwriter, see Frigitemp Corp. v. Fin. Dynamics Fund, 524 F2d 275 (2d Cir 1975) (applying New York law); Breakaway Solutions, Inc. v. Morgan Stanley & Co., 2004 WL 1949300, at 13 (Del Ch 2004). EBG obtained confidential (or, more accurately, to use the terminology of the Code of Professional Responsibility, secret) information from WellCare in the course of rendering professional services under circumstances that imposed on it a fiduciary or special obligation to disclose that information solely to Morgan Stanley, so that Morgan Stanley could use it for the purposes for which the firm was retained by its direct client. It obtained that information in the context of a relationship that encouraged WellCare to disclose confidential information to EBG. EBG's own papers acknowledge that "communications with WellCare personnel were understood to be, and were, confidential," and that EBG "was not entitled to share the information it learned about WellCare with the public, particularly prior to the effective date of the IPO." While that information could have been disclosed to Morgan Stanley in connection with Morgan Stanley's services as IPO underwriter, EBG does not, and could not, deny that neither Morgan Stanley nor EBG had the right to utilize confidential information about WellCare obtained during the due diligence process, for any other purpose, let alone for other purposes adverse to WellCare's interests.

WellCare has demonstrated that the matters involved in both matters (the due diligence work and the present lawsuit) are substantially related, and that the interests of plaintiff and WellCare are materially adverse. Under Tekni-Plex, this gives rise to an irrebuttable presumption of disqualification.

Even where the prior representation was by an attorney who was not at the time employed by the subject law firm, and where the presumption of shared communications and disqualification is therefore rebuttable, see Kassis v. Teacher's Ins. and Annuity Assn, 93 NY2d 611 (1999), the prior client meets its burden by showing that the two matters are substantially related, and that there is a risk that the incoming attorney acquired any client confidences in the prior employment, Kassis, supra. That presumption can be overcome by showing that the attorney had no opportunity to acquire confidential information in the former employment, Kassis, supra. Mere denials of actually receipt or recall are inadequate. Thus, even under that lesser standard, WellCare would not be required (though it has done so) to show that confidential or secret information was actually imparted, see e.g. Edwards v.

Gould Paper Corp., __F Supp 2d__, 2005 WL 136434 (ED NY 2005) (granting EBG's motion to disqualify its adversary); Schwed v. General Elec. Co., 990 F Supp 113 (ND NY 1998) (granting EBG's motion to disqualify its adversary); Arifi v. de Transport Du Cocher, Inc., 290 F Supp 2d 344 (ED NY 2003); Felix v. Balkin, 49 F Supp 2d 260 (SD NY 1999).3

EBG's representation that it will establish a "Chinese wall" is insufficient.

As stated in Charles W. Wolfram, Modern Legal Ethics § 7.6.4, at 402 (West 1986):

In the end there is little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer chickens. Whether the screen is breached will be virtually impossible to ascertain from outside the firm. On the inside, lawyers whose interests would all be served by creating leaks in the screen and not revealing the leaks would not regularly be chosen as guardians by anyone truly interested in assuring that leaks do not occur.

Under Kassis, a "Chinese wall" will shield a firm from disqualification only in very narrow circumstances: where an attorney in the firm, while employed elsewhere, had handled a matter for an entity whose interests are adverse to those of the firm's present client,4 and where the presumption of shared confidences - and hence, of disqualification - has been rebutted.

In Kassis, the Court of Appeals held:

Where the presumption does arise, however, the party seeking to avoid disqualification must prove that any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation. In that factual scenario, with the presumption rebutted, a "Chinese Wall" around the disqualified lawyer would be sufficient to avoid firm disqualification [emphasis added; citations omitted].

The need for the Chinese wall remains after the presumption is rebutted because, the Court of Appeals explained:

Demonstrating that no significant client confidences were acquired by the disqualified attorney, however, does not wholly remove the imputation of disqualification from a law firm. Because even the appearance of impropriety must be eliminated, it follows that even where it is demonstrated that the disqualified attorney possesses no material confidential information, a firm must nonetheless erect adequate screening measures to separate the disqualified lawyer and eliminate any involvement by that lawyer in the representation (see, Cheng v. GAF Corp., 631 F2d 1052 [2d Cir 1980]) [emphasis added].5

Thus, the Chinese wall does not itself rebut the presumption. It is effective to withstand disqualification only where the presumption of shared confidences and disqualification has been rebutted on other grounds, and the sole ground for disqualification is the appearance of impropriety.

Here, as in Kassis:

Defendants' conclusory averments that Arnold did not acquire such confidences during the prior representation failed to rebut that presumption as a matter of law. The erection of a "Chinese Wall" in this case, therefore, was inconsequential. Thus, we hold, as a matter of law, that disqualification is required.

Christopher Panczner, one of the attorneys who worked on the IPO due diligence, states

I do not believe I learned anything as part of the IPO due diligence that would be detrimental to WellCare - or even relevant - to the litigation. However, I also am not at all involved in working on the litigation, and I will not participate in this case in the future, thus allowing for the maintenance of a "Chinese wall" between those who handled the WellCare IP due diligence and the attorneys pursuing the

amended complaint.

Jerrold Ehrlich, Paul Squire, and Purvi Badiani Manier make similar statements.

Merely not being "involved" or not "participating" in the case is not adequate to establish a "Chinese wall" sufficient to allow a firm to continue despite a conflict of interest, see, e.g. Cheng, supra. Among the things notably absent from these representations are any undertaking not to discuss WellCare with the attorneys working on the case, not to be present at any discussions of the case, and not to have any physical proximity to the files relating to it.6 Also absent is any representation that these attorneys have not already discussed WellCare with other attorneys in the firm. EBG provides no affidavit from any of the attorneys involved in the present litigation as to what conversations they have already had with the exposed lawyers or the extent of contact with them.

Even where a Chinese wall is adequate, it must be set up at the outset of the representation, not after communications may have already taken place, see e.g. Mitchell v. Metropolitan Life Ins. Co., 2002 WL 441194 (SD NY 2002); Young v. Central Square Cent. School Dist., 213 F Supp 2d 202 (ND NY 2002); Schwed v. General Elec. Co., 990 F Supp 113, supra.7

The very fact that EBG makes these arguments suggests a fundamental lack of appreciation for the obligations imposed by the Code of Professional Responsibility to protect confidences and secrets. In this connection, I note that in at least four reported cases, EBG unsuccessfully resisted motions to disqualify it,8 and that it asserts arguments in opposition to the present motion that are inconsistent with the holdings of courts that have granted disqualification motions made by, or targeting, EBG itself. This does little to instil confidence that the firm fully appreciates the parameters of conflict of interest or its fiduciary duty to avoid such conflicts.

Even were there any doubt, any doubt must be resolved in favor of disqualification, see e.g. Rodolico v. Unisys Corp., 189 FRD 245 (ED NY 1999) (granting EBG's motion to disqualify adversary); Young v. Central Square Cent. School Dist., 213 F Supp 2d 202 (ND NY 2002).

This motion is made at the outset of the litigation, thereby minimizing any prejudice to plaintiff. It is therefore distinguishable from cases such as Prudential Securities, Inc. v. Wyser-Pratte, 187 AD2d 306 (1st Dept 1992) (denying, due to delay, EBG's motion to disqualify adversary, drawing inference "that this motion was made merely to secure a tactical advantage.')

Plaintiff's informal request for costs and attorneys fees pursuant to Part 130 is denied, on the ground that it is procedurally improper. Were it to be reached, it would be denied.

Accordingly, it is hereby

ORDERED that the motion to disqualify plaintiff's counsel is granted.

This constitutes the decision and order of the court.

(1) In its reply papers, WellCare refers to other cases as well. Since these are mentioned for the first time in reply papers, I do not consider them in support of the motion.

(2) Other cases in which firms were disqualified despite the absence of an actual attorney-client relationship, include Stratagem Development Corp. v. Heron Intern. N.V., 756 F Supp 789 (SD NY 1991) (disqualifying EBG) and cases there cited; see also, Nichols v. Village Voice, Inc., 99 Misc 2d 822 (Sup Ct, NY County 1979) ('where an attorney receives confidential information from a person who, under the circumstances, has a right to believe that the attorney, as an attorney, will respect such confidences, the law will enforce the obligation of confidence irrespective of the absence of a formal attorney-client relationship'); Emle

Industries, Inc. v. Patentex, Inc., 478 F2d 562 (2d Cir 1973); Moss v. Moss Tubes, Inc., 1998 WL 641362 (ND NY), reconsideration denied 1998 WL 775059 (ND NY 1998); Marshall v. State of N.Y. Div. of State Police, 952 F Supp 103 (ND NY 1997); Blue Planet Software, Inc. v. Games Intl, 331 F Supp 2d 273 (SD NY 2004); Papyrus Technology Corp. v. New York Stock Exchange, Inc., 325 F Supp 2d 270 (SD NY 2004).

(3) In Edwards, granting EBG's motion to disqualify its adversary, the court held:

It is particularly important that Heck be barred in this case because it was commenced prior to the date upon which he left the DelMauro Firm. While Heck denies that he reviewed any correspondence, confidential or otherwise, with respect to this lawsuit, the issue with respect to the third disqualification element is access to confidential information, rather than the content of information that can be proven to have been actually conveyed.

Similarly, in Schwed, granting EBG's motion to disqualify its adversary, the court held:

Grygiel asserts that he does not possess any confidential information and does not recall any discussions while he was employed at BSK regarding the instant case .... There is no reason to doubt the sincerity and truth of Grygiel's assertions. It need not be shown that Grygiel does, in fact, have confidential information, but only that he had access to such information.

(4) However, in Cummin v. Cummin, 264 AD2d 637 (1st Dept 1999), where there had been a prior consultation with a partner of the firm, the First Department stated that in Kassis,'the Court of Appeals implied that the presumption could be rebutted where confidential information previously acquired by a large firm, but never shared among its associates, could be physically isolated, such as with the erection of a 'Chinese wall."' For the purposes of the present case, the question of whether a Chinese wall can have any role where the prior representation was by the firm itself, is moot, since here, the presumption of shared confidences and disqualification has not been rebutted. Therefore, even if the Kassis standard (rebuttable presumption where attorney was hired by firm), rather than the Tekni-Plex standard (irrebuttable presumption where prior representation was by same law firm) is applied, a Chinese wall cannot vitiate the disqualification.

(5) The firm that was disqualified in Cheng was EBG. The Second Circuit stated "[b]ecause we disagree with Judge Owen's view of the effectiveness of the screening procedures employed by the Epstein firm, we reverse.'

The cited Cheng decision was vacated for lack of appellate jurisdiction, GAF Corp. v. Cheng, 450 US 903 (1981). As discussed below, after further motion and appellate practice, see Cheng v. GAF Corp., 713 F2d 886 (2d Cir 1983), ultimately, the district court disqualified EBG. That disqualification order was affirmed, Cheng v. GAF Corp., 747 F2d 97 (2d Cir 1984). The affirmance was vacated on jurisdictional grounds, 472 US 1023 (1985).

'Although the Supreme Court vacated Cheng on procedural grounds, district courts continue to look to the case for guidance and the Second Circuit appears to consider its reasoning sound," Arifi v. de Transport du Cocher, Inc., 290 F Supp 2d 344, supra. The Second Circuit's decision reported at 713 F2d 886 (2d Cir 1983), reversing the district court's award of costs, reaffirms its views of the disqualification motion, observing: we think this court's prior decision on the merits was itself enough to justify appellant's efforts. The Supreme Court vacated that decision on procedural grounds, but it did not address this court's treatment of the merits. Thus, although the district judge was not bound by our previous decision, we find it puzzling that he chose to ignore the reasoning of that decision and again denied appellant's motion to disqualify. More significantly, we find it extraordinary that he should penalize appellant's lawyer for attempting to have this court review that denial, given that this court had already ruled in appellant's favor in its earlier opinion .... While the petition for mandamus was ultimately denied, it was hardly unreasonable for appellant's lawyer to bring it. Indeed, in light of our earlier decision on the merits in Cheng's favor, his attorney may have

been ethically obliged to pursue his disqualification efforts.

Cheng is cited with approval by the New York Court of Appeals in Kassis, supra, and is cited by at least 117 other cases.

(6) The screening that was rejected by the Court of Appeals in Kassis involved the following:

'1. The entire file which presently consists of 15 redwells will be kept in my office in lieu of our general filing area.

'2. Mr. Arnold's office will be at a substantial distance from my office.

'3. Mr. Arnold upon commencement of his employment with the firm on March 3, 1997 will be instructed not to touch the Kassis file nor to discuss the Kassis matter with any partner, associate or staff member of the firm.

'4. There will be no meetings, conferences or discussions in the presence of Mr. Arnold concerning the Kassis' litigation.

'5. All future associates who may work on the Kassis matter with me in preparation for trial will be instructed not to discuss this file with Mr. Arnold.'

In Cheng, supra,

[o]pposing the disqualification motion, the Epstein firm averred in its affidavits that Gassel had been hired as a health law attorney and had functioned only in that capacity, aside from handling some commercial litigation and miscellaneous matters. The Epstein firm emphasized that Gassel had not worked on the Cheng case, had not divulged any confidential information and would not be required to do so in the future. Gassel submitted an affidavit disclaiming any present involvement in the Cheng case and urging acceptance of the technique of insulation practiced by the Epstein firm.

The Second Circuit held this to be inadequate.

(7) In Schwed, the court granted EBG's motion to disqualify an adversary, holding:

Now is not the time to beseech the court to permit the representation to continue despite a conflict of interest, while attempting to blame another firm for its own inaction ... Furthermore, it would be ineffective to now order some sort of insulating screening procedure, since there has been no such procedure in place for well over one year.

(8) See American Psych Systems, Inc. v. Options Independent Practice Assn, Inc., 168 Misc 2d 582 (Sup Ct, Westchester County 1996); Stratagem Development Corp. v. Heron Intern. N.V., 756 F Supp 789 (SD NY 1991); Cheng v. GAF Corp., 631 F2d 1052, supra ('[b]ecause we disagree with Judge Owen's view of the effectiveness of the screening procedures employed by the Epstein firm, we reverse'); Yaretsky v. Blum, 525 F Supp 24 (SD NY 1981) (noting close similarity of disqualification issues between Yaretsky and Cheng).

EBG cites no case in which a motion to disqualify it was denied. As noted above, subsequent to the vacation, on jurisdictional grounds, of the Second Circuit's reversal of the decision denying disqualification of EBG, and notwithstanding the Second Circuit's clear expression of its views that EBG's representation was improper, EBG continued to resist efforts to disqualify it. There was additional motion and appellate practice, see Cheng v. GAF Corp., 713 F2d 886, supra. Ultimately, the district court disqualified EBG. That disqualification order was affirmed, Cheng v. GAF Corp., 747 F2d 97 (2d Cir 1984), supra. The affirmance was vacated on jurisdictional grounds, 472 US 1023 (1985), supra. The net result was that the firm was disqualified.

It appears that EBG was recently contacted by Morgan Stanley in connection with

further work relating to WellCare, and that EBG, commendably, declined, on the ground that due to the present action and an additional undisclosed matter, it had a conflict of interest.

3/1/2005 NYLJ 18, (col. 1)

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Briefs and Other Related Documents

United States Court of Appeals,
Second Circuit.

BANK BRUSSELS LAMBERT, Plaintiff-Appellant,
v.
FIDDLER GONZALEZ & RODRIGUEZ,
Defendant-Appellee.

Docket No. 01-9026.

Argued: April 25, 2002.
Decided: Sept. 20, 2002.

Client, a Belgian bank with a New York branch, sued its Puerto Rican law firm for legal malpractice and other torts, in connection with law firm's failure to disclose information about borrower to bank. The United States District Court for the Southern District of New York, Lawrence M. McKenna, J., 1998 WL 182434, dismissed suit for lack of personal jurisdiction. Client appealed. The Court of Appeals, Sotomayor, Circuit Judge, affirmed in part, vacated in part, and remanded. On remand, the United States District Court for the Southern District of New York, 2001 WL 893362, McKenna, J., again dismissed for lack of personal jurisdiction. Client again appealed. The Court of Appeals, Sotomayor, Circuit Judge, held that: (1) law firm's allegedly tortious conduct caused injury to bank in New York, as would support exercise of personal jurisdiction under New York long-arm statute; (2) allegations stated claim for legal malpractice, under Puerto Rican law; (3) law firm had minimum contacts with New York forum and purposely availed itself of the privilege of doing business in New York; and (4) New York District Court's exercise of personal jurisdiction was reasonable.

Vacated and remanded.

West Headnotes

[1] Constitutional Law 305(5)
92k305(5)

[1] Federal Courts 76.1
170Bk76.1
(Formerly 170Bk76)

If there is a statutory basis for jurisdiction under the state's long-arm statute, the district court must then determine whether the extension of personal jurisdiction in such a case would be permissible under the Due Process Clause of the Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

[2] Federal Courts 776
170Bk776
The Court of Appeals reviews a district court's dismissal for want of personal jurisdiction de novo.

[3] Federal Courts 76.25
170Bk76.25
Puerto Rican law firm's allegedly tortious failure to disclose information to client bank regarding borrower, which occurred in Puerto Rico, and caused injury to bank in New York, supported exercise of personal jurisdiction over law firm under New York long-arm statute, in bank's legal malpractice action against law firm, since New York was place where bank first disbursed its funds to borrower, which was first step in process that generated its ultimate economic loss, where law firm maintained apartment in New York, so that it had persistent relevant contacts with New York. N.Y.McKinney's CPLR 302(a), par. 3.

[4] Attorney and Client 129(2)
45k129(2)
Allegations that law firm represented both bank and borrower, that law firm discovered that borrower's finances were not as he represented to bank, that law firm failed to disclose information to bank regarding borrower, that law firm failed to withdraw as legal counsel for bank, and that borrower defaulted on loan stated claim for legal malpractice against law firm, under Puerto Rican law.

[5] Attorney and Client 20.1
45k20.1
Upon discovering a conflict arising from successive or simultaneous representations of clients, for which adequate representation of subsequent or simultaneous client requires disclosure of other client's confidences, the attorney must withdraw from the representation without divulging any confidential communications, under Puerto Rican law.

[6] Constitutional Law 46(1)
92k46(1)
It is only once the state's long-arm statute is deemed satisfied that the district court need examine whether due process is likewise comported with, in determining personal jurisdiction. U.S.C.A. Const.Amend. 14.

[7] Constitutional Law 305(5)
92k305(5)
The "minimum contacts test," for purpose of determining whether extension of personal jurisdiction comports with due process, asks whether the defendant has certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. U.S.C.A. Const.Amend. 14.

[8] Constitutional Law 305(5)
92k305(5)
Where the claim arises out of, or relates to, the defendant's contacts with the forum, that is, specific jurisdiction, minimum contacts exist, for purposes of determining whether personal jurisdiction over defendant comports with due process, where the defendant purposely availed itself of the privilege of doing business in the forum and could foresee being haled into court there. U.S.C.A. Const.Amend. 14.

[9] Federal Courts 76.5
170Bk76.5
A forum state may assert general jurisdiction, that is, jurisdiction irrespective of whether the claim arises from or relates to the defendant's forum contacts, only where the contacts are continuous and systematic. U.S.C.A. Const.Amend. 14.

[10] Constitutional Law 305(5)
92k305(5)

[10] Federal Courts 76.25
170Bk76.25
Puerto Rican law firm had minimum contacts with New York forum and purposely availed itself of the privilege of doing business in New York, for purposes of determining if exercise of personal jurisdiction by New York District Court comported with due process, in client bank's legal malpractice action against law firm; although law firm did not solicit bank as client in New York, law firm maintained apartment in New York partially for purpose of better servicing New York clients, law firm faxed newsletters regarding Puerto Rican legal developments to persons in New York, law firm had numerous New York clients, and its marketing materials touted law firm's close relationship with the Federal Reserve Bank of New York. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law 305(5)
92k305(5)
Courts are to consider five factors in evaluating reasonableness of exercise of personal jurisdiction, for purpose of the due process analysis: (1) burden that the exercise of jurisdiction will impose on defendant, (2) the interests of the forum state in adjudicating case, (3) plaintiff's interest in obtaining convenient and effective relief, (4) interstate judicial system's interest in obtaining the most efficient resolution of the controversy, and (5) shared interest of the states in furthering substantive social policies. U.S.C.A. Const.Amend. 14.

[12] Constitutional Law 305(5)
92k305(5)
Where a plaintiff makes the threshold showing of the minimum contacts required for the first test in the due process analysis, for purpose of determining personal jurisdiction, a defendant must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. U.S.C.A. Const.Amend. 14.

[13] Constitutional Law 305(5)
92k305(5)
In determining whether exercise of personal jurisdiction comports with due process, the import of the reasonableness inquiry varies inversely with the strength of the minimum contacts showing; a strong showing by the plaintiff on the minimum contacts test reduces the weight given to the reasonableness test. U.S.C.A. Const.Amend. 14.

[14] Constitutional Law 305(5)
92k305(5)

[14] Federal Courts 76.25
170Bk76.25

[14] Federal Courts 76.30
170Bk76.30
New York District Court's exercise of personal jurisdiction over Puerto Rican law firm, in bank client's action against law firm for fraud, breach of fiduciary duty, and breach of implied contractual duties, was reasonable, under Due Process Clause; exercise of jurisdiction would not impose undue burden on law firm, New York had unquestionable interest in litigation as forum where the injury to client resulted, New York forum was convenient, as many witnesses and much evidence were located in New York, and holding law firm subject to jurisdiction would not likely erode shared social policies of the states. U.S.C.A. Const.Amend. 14.

***122** Lance Gotthoffer, Oppenheimer Wolff & Donnelly LLP, New York, New York (Christopher W. Jones, on the brief), for the appellant.

Robert E. Kushner, D'Amato & Lynch, New York, New York (Peter A. Stroili, on the brief), for the appellee.

Before: F.I. PARKER, STRAUB and SOTOMAYOR, Circuit Judges.

SOTOMAYOR, Circuit Judge.

This case returns to us a second time following proceedings on remand from this Court in the United States District Court for the Southern District of New York (McKenna, J.). In our prior opinion, we vacated the district court's dismissal of the complaint for lack of personal jurisdiction, holding that the district court erred when it determined that the situs of the alleged injury was outside of New York for purposes of CPLR § 302(a)(3), and we remanded for further consideration of the personal jurisdiction question. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 794 (2d Cir.1999) ("*BBL I* "). On remand, the district court held that personal jurisdiction was proper under New York law but that the exercise of this jurisdiction over the defendant would not comport with federal due process constraints. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, No. 96 Civ. 7233, 2001 WL 893362 (S.D.N.Y. Aug. 8, 2001) ("*BBL II* "). While we agree with the district court that the New York long-arm statute provides jurisdiction over the defendant, we do not agree that the exercise of personal jurisdiction over the defendant in this case violates due process. Accordingly, we vacate and remand, again.

BACKGROUND

The underlying facts in the dispute in this case are laid out in detail in our prior ***123** opinion, familiarity with which is assumed. *BBL I*, 171 F.3d at 781-84.

In brief, in November 1989, plaintiff-appellant Bank Brussels Lambert ("BBL"), a Belgian banking corporation, joined a five-member lending group led by The Chase Manhattan Bank, N.A. ("Chase New York") that negotiated a secured $245 million revolving credit agreement with two oil companies, collectively known as "Arochem." The primary collateral put up by Arochem was to be its petroleum refinery in Puerto Rico. Chase New York recommended to the lending group that it retain defendant Fiddler Gonzalez & Rodriguez ("Fiddler"), a Puerto Rican law firm, as local counsel for the limited purpose of providing an opinion letter as to the validity and enforceability of the security interest being acquired by the lending group. Fiddler provided the requested opinion letter to the lending group, and the loan closed on January 17, 1990. Five days later, as per the terms of the credit agreement, BBL disbursed $75 million from its New York branch to Arochem.

On December 23, 1991, Arochem defaulted on the loan. Shortly thereafter, Will Harris, the president and majority shareholder of Arochem, was convicted of multiple counts of bank fraud, and during those proceedings it came to light that Arochem may have systematically misreported its assets to the lending group. BBL sued Chase New York for fraud and breach of contract, and during discovery in that case it inadvertently came to light that Fiddler had received documents in an unrelated representation of Chase Manhattan's Puerto Rico branch ("Chase Puerto Rico") which suggested that Arochem was fraudulently manipulating its accounting and financial reports. BBL then commenced the instant suit against Fiddler for breach of fiduciary duty and breach of contract.

Fiddler moved in the district court to dismiss the complaint for lack of personal jurisdiction, which the district court granted in an opinion and order dated April 17, 1998. The district court held that none of the bases for jurisdiction set out in New York's long-arm statute, CPLR § 302, were satisfied.

In *BBL I*, we agreed with the district court except with respect to § 302(a)(3), which applies to persons who commit a tortious act outside New York which causes injury inside the state. *Id.* at 786-93. Contrary to the district court, we determined that if BBL had sufficiently averred a tort by Fiddler, the situs of the injury alleged was New York, as the location where the "first effect of the tort"--namely, the disbursement of funds to Arochem by BBL's New York branch--took place. *Id.* at 790-93. We therefore remanded to the district court for it to determine: (1) whether BBL had sufficiently averred facts constituting a tort; (2) if so, whether the remaining requirements of CPLR § 302(a)(3) had been satisfied; and (3) if so, whether exercise of jurisdiction would comport with the requirements of federal due process. *Id.* at 794.

On remand, the district court determined, first, that BBL's complaint had made out a legally sufficient claim for legal malpractice under Puerto Rican law. *BBL II*, 2001 WL 893362, at *2-*3. Specifically, the district court held that Fiddler's duty of loyalty to its client BBL might have required Fiddler, upon learning of Arochem's financial manipulations, to either disclose that information or, if Fiddler could not do so because that information was privileged, to withdraw from representation of the lending group. *Id.* at *1. Although the district court expressed skepticism as to whether BBL could ever prove

causation, it held sufficient BBL's allegation that, had Fiddler withdrawn, ***124** BBL would have refused to participate in the credit agreement. *Id.* at *3.

Turning to the two subsections of CPLR § 302(a)(3), the district court next held that subsection (ii), which relates to whether the defendant should reasonably have expected its acts to have consequences in New York, was not satisfied because Fiddler had not sought out the representation and had therefore not purposefully affiliated itself with New York. *Id.* at *4. However, with respect to subsection (i), the district court held that Fiddler's longtime maintenance of an apartment in New York counted as a "persistent course of conduct" and that therefore personal jurisdiction under the long-arm statute had been established. *Id.* at *3.

Addressing the final question of federal due process, however, the district court held that it could exercise neither specific nor general jurisdiction over the defendant because the "minimum contacts" threshold had not been satisfied. *Id.* at *5-*7. With respect to general jurisdiction, the court held that Fiddler's contacts with New York were insufficiently continuous and systematic. *Id.* at *6-*7. With respect to specific jurisdiction, the court held that because Fiddler had not specifically sought out the representation which gave rise to the claim, Fiddler had not purposefully availed itself of the privilege of doing business in New York. *Id.* at *5. Because the district court found that the minimum-contacts test had not been satisfied, it did not reach the issue of whether the exercise of personal jurisdiction over Fiddler would be reasonable. *Id.* at *7. The district court, therefore, again dismissed the complaint for lack of personal jurisdiction, and this appeal followed.

DISCUSSION

[1][2] With exceptions not relevant here, a district court sitting in a diversity action such as this may exercise personal jurisdiction to the same extent as the courts of general jurisdiction of the state in which it sits. Fed.R.Civ.P. 4(k)(1)(A). Accordingly, resolution of a motion to dismiss for lack of personal jurisdiction made in the Southern District of New York requires a two-step analysis. First, the court must determine if New York law would confer upon its courts the jurisdiction to reach the defendant, which in this case could only be possible under the New York long-arm statute, CPLR § 302. If there is a statutory basis for jurisdiction, the court must then determine whether New York's extension of jurisdiction in such a case would be permissible under the Due Process Clause of the Fourteenth Amendment. *BBL I*, 171 F.3d at 784. We review a district court's dismissal for want of personal jurisdiction *de novo*. *Id.*

I. Long-Arm Jurisdiction under CPLR § 302(a)(3)

[3] As noted, the only statutory ground on which we remanded to the district court for further proceedings was CPLR § 302(a)(3). This provision states as follows:

> As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
> ....
> 3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
> ***125** (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

CPLR § 302. Because there is no dispute that the "act" forming the basis of the plaintiff's complaint, namely, the failure of Fiddler to either inform BBL of the Arochem allegations of which it became aware or to withdraw as counsel, took place outside New York, and because we held in our first opinion that the injury allegedly caused by this act occurred in New York for § 302(a)(3) purposes, *BBL I*, 171 F.3d at 792, it remained for the district court only to determine, first, whether plaintiff sufficiently alleged that the act was "tortious," and second, whether plaintiff satisfied either (or both) of subsections (i) and (ii).

In order to satisfy the first element, plaintiff had to aver facts constituting "a tort under the law of the pertinent jurisdiction." *Id.* at 786. Because both parties have assumed that the law of Puerto Rico rather than New York governs whether the acts alleged are tortious, and neither side has identified any material difference between the two jurisdictions' laws in this regard, we will likewise so assume, without deciding, which jurisdiction's law is the proper one. We are also mindful of the fact that the

inquiry at this stage is the preliminary question of jurisdiction, distinct from an inquiry into ultimate liability on the merits, *see* *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 460, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965), thus plaintiff need not actually prove that defendant committed a tort but rather need only state a colorable cause of action. *See* Vincent C. Alexander, *Practice Commentaries*, C302:5, 7B McKinney's Consol. Laws of N.Y. 134 (2001).

[4][5] The district court held that plaintiff had stated a colorable tort claim under the law of Puerto Rico for legal malpractice based on an attorney's duty of loyalty to his client. *BBL II*, 2001 WL 893362, at *2. We agree. As the district court correctly noted, Puerto Rican courts have determined that a conflict may arise where, in the course of successive or simultaneous representations of clients, "the adequate representation of a subsequent or simultaneous client may require disclosure of the other client's confidences." *Id.* at *2 (quoting *In re Belen Trujillo*, 126 D.P.R. 743, 754 (1990) (English trans.)) Upon discovering such a conflict, the attorney must withdraw from the representation without divulging any confidential communications. *Id.*

Defendant Fiddler does not dispute this as a correct statement of the law with regards to representational conflicts in Puerto Rico. It argues, rather, that because it was retained only for the limited purpose of providing an opinion letter on the security interest being provided to the lenders, the information Fiddler received about Arochem's financial dealings fell beyond the scope of its representation and therefore presented no conflict requiring its withdrawal. Fiddler has not presented and we have not found any law, regulation or judicial opinion suggesting that Puerto Rico, or any other jurisdiction for that matter, would take such a miserly view of an attorney's duty of loyalty to his or her client. Fiddler likely had no duty to seek out information beyond what was necessary for the limited task for which it was retained, but plaintiff's tort allegations here invoke Fiddler's obligations once information material to the business decisions of Fiddler's clients came into Fiddler's possession, not any broader affirmative duty to investigate. [FN1] ***126** As the district court concluded, the plaintiff's assertion that "Fiddler, as BBL's attorney, was obligated to disclose the Chase Puerto Rico information as relevant to [BBL's] decision with respect to the RCA loan, thus creating a conflict that should have led it to withdraw from representation of both clients .... sufficiently alleges a breach of duty that gives rise to a claim for legal malpractice." *Id.* As stated above, we need not finally decide the merits of plaintiff's malpractice action; it suffices that plaintiff has stated a colorable tort claim so as to give the district court jurisdiction to determine the merits. [FN2]

FN1. This point distinguishes the case on which defendant primarily relies, *Macawber Eng'g, Inc. v. Robson & Miller*, 47 F.3d 253 (8th Cir.1995). The *Macawber* court held that a claim for negligence based on an alleged failure to act is viable only where counsel had a duty to act, and that local counsel had no duty to take steps in a litigation beyond the limited scope of its representation. *Id.* at 256-57. The existence of the duty alleged to have been breached here, however, hinges not on the scope of the agreed representation but rather on an ethical duty attendant to every representation.

FN2. We similarly agree with the district court that the plaintiff has stated a colorable claim with respect to causation. It is not inherently implausible that, had Fiddler withdrawn representation prior to the closing, even without divulging the communications from Chase Puerto Rico, BBL would have at least inquired into the reasons and this inquiry may have led to BBL's withdrawal. Whether BBL can ever prove this is, of course, another matter.

Turning to the two subsections of § 302(a)(3), the district court found that subsection (i) had been satisfied by Fiddler's "persistent course of conduct" in New York of renting of an apartment for some eight years in Manhattan. *Id.* at *3. This apartment was available for the use of the firm's partners, and, while it had apparently been largely used for vacations, defendant admits that at times the apartment was used for firm business and the firm claims the apartment as a business expense. *BBL I*, 171 F.3d at 782. We therefore agree that this long-term apartment rental was sufficient to constitute a persistent course of conduct by the firm. Although this jurisdictional predicate has not often been expounded upon in the New York courts, there is nothing in the plain language of § 302(a)(3)(i) which suggests that the relevant contacts must be solely business-related; in fact, this predicate's juxtaposition as an alternative to "regularly do[ing] or solicit[ing] business" suggests precisely the opposite. *See also* *David Tunick, Inc. v. Kornfeld*, 813 F.Supp. 988, 991 (S.D.N.Y.1993)

(considering both business and non-business activities of art dealer); *In re Union Carbide Corp. Consumer Prods. Bus. Secs. Litig.*, 666 F.Supp. 547, 571 (S.D.N.Y.1987) (listing defendant's leisure travel and negotiation of personal loan in addition to business-related meetings); *Granada Television, Int'l, Ltd. v. Lorindy Pics. Int'l Inc.*, 606 F.Supp. 68, 72 n. 5 (S.D.N.Y.1984) ("[T]he persistent course of conduct may involve a great range of human activity which, while it might fall beyond the pale of 'business' conduct, would, because of its consistency, serve as a solid link of jurisdiction to New York.") (quoting J. McLaughlin, *Practice Commentary, § 302*, McKinney's Consol. Laws of N.Y. (1972)). Nor do we accept the defendant's argument that, despite the fact that this apartment was maintained by the firm both for business purposes and as compensation to its members, these contacts should not be imputed to the firm.

[6] Defendant argues that "to read CPLR 302(a)(3)(i) as somehow providing a basis for long-arm jurisdiction based on the mere rental of an apartment in a hotel would render that provision unconstitutional." Of course, it is not the "mere ***127** rental" that satisfies § 302(a)(3)(i), it is the long-term (i.e., "persistent") rental and use, coupled with the commission of a tortious act causing injury in New York, which confers long-arm jurisdiction. Moreover, as the New York Court of Appeals has made clear, the constitutional analysis is a distinct step from the statutory one; it is only once the long-arm statute is deemed satisfied that the court need examine whether due process is likewise comported with. *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 214, 713 N.Y.S.2d 304, 735 N.E.2d 883 (2000).

Finding long-arm jurisdiction to be present under CPLR § 302(a)(3)(i), we have no need to determine whether it is also present under § 302(a)(3)(ii). [FN3]

FN3. The district court held that there was no jurisdiction under § 302(a)(3)(ii) because Fiddler's contacts did not show purposeful availment-a requirement which, while not obviously present in the statute, the district court felt was mandated by our decision in *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236 (2d Cir.1999). *BBL II*, 2001 WL 893362, at *4. Subsequent to *Kernan*, however, the Court of Appeals decided *LaMarca*, in which "purposeful availment" is not made a part of the court's § 302(a)(3)(ii) analysis, *LaMarca*, 95 N.Y.2d at 214-16, 713 N.Y.S.2d 304, 735 N.E.2d 883, but rather only a part of its constitutional determination, *id.* at 216-19, 713 N.Y.S.2d 304, 735 N.E.2d 883. Because we do not ultimately reach the question of whether jurisdiction is proper under § 302(a)(3)(ii), we need not decide whether the district court was correct in its reading of *Kernan* and, if so, whether *Kernan* has been effectively overruled by *LaMarca*.

II. Due Process

Having determined that the New York long-arm statute would extend the state's jurisdiction over defendant in this case, we turn to whether the exercise of this jurisdiction comports with federal due process. To do so, we undertake an analysis consisting of two components: the "minimum contacts" test and the "reasonableness" inquiry. *Metro. Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir.1996).

[7][8][9] The first of these tests asks whether the defendant "has 'certain minimum contacts [with the forum] ... such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 152 (2d Cir.2001) (quoting *Calder v. Jones*, 465 U.S. 783, 788, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984)) (alteration in original; some internal quotation marks omitted). Where "the claim arises out of, or relates to, the defendant's contacts with the forum"--i.e., specific jurisdiction--minimum contacts exist "where the defendant 'purposefully availed' itself of the privilege of doing business in the forum and could foresee being 'haled into court' there." *Id.; accord Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-76, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). A state may assert "general jurisdiction"--i.e., jurisdiction irrespective of whether the claim arises from or relates to the defendant's forum contacts--only where these contacts are "continuous and systematic." *U.S. Titan*, 241 F.3d at 152; *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415- 16, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).

We have no quarrel with the district court's conclusion that general jurisdiction could not be maintained over defendant in these circumstances. *BBL II*, 2001 WL 893362, at *6-*7. With regard to specific jurisdiction, however, the district court took too narrow a view of the relevant contacts.

[10] The district court focused on the contacts which directly gave rise to the cause of action:

> ***128** BBL argues that because Fiddler's opinion was a condition precedent to the RCA, a New York-based loan transaction, and addressed to the banks care of Chase in New York and because Fiddler communicated with the banks and their counsel, all located in New York, regarding the opinion, Fiddler has sufficient New York contacts to support a finding of specific jurisdiction. Again, nothing about any of these contacts demonstrates Fiddler's purposeful availment of the New York forum. Fiddler did not solicit the banks to be retained for the opinion letter, the opinion letter solely concerned issues of Puerto Rico law and the other New York contacts such as communication by telephone, fax and mail are incidental to its unsolicited representation of New York based clients.

Id. at *5 (citation omitted). Were these the only contacts relevant to the jurisdictional determination, we might very well agree with the district court that no purposeful availment had been demonstrated. However, there were other contacts between defendant and New York. As noted above, Fiddler maintained an apartment in New York at least partially (and, judging by its being accounted for as a business expense, perhaps even primarily) for the purpose of better servicing its New York clients. *BBL I*, 171 F.3d at 782. Fiddler also faxed newsletters regarding Puerto Rican legal developments to numerous persons in New York. *BBL II*, 2001 WL 893362, at *6. The record also shows that Fiddler has performed work for numerous New York clients and New York law firms, *BBL I*, 171 F.3d at 782, and in its marketing materials the firm has touted, *inter alia*, its "close relationship with the Federal Reserve Bank of New York."

The district court considered some of these contacts under its general jurisdiction analysis, but did not do so with respect to specific jurisdiction. Yet, while these contacts may not have directly given rise to the plaintiff's cause of action, they certainly "relate to" it. Law firms obtain new business largely through reputation and word of mouth, and thus the activities of a firm which maintains its presence and reputation in a particular legal market certainly can be said to be a proximate cause of the engagements it obtains in that market. *See Burger King*, 471 U.S. at 473-74, 105 S.Ct. 2174 (noting that "where individuals purposefully derive benefit from their interstate activities, it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities" (internal quotation marks and citations omitted)). Specifically with respect to the engagement which gave rise to the instant cause of action, we noted in our prior opinion that Fiddler had been recommended by Chase largely because Fiddler had performed well for Chase, through its Puerto Rico branch, in the past. *BBL I*, 171 F.3d at 782.

These contacts are not the kind of "random, fortuitous, or attenuated contacts" or "unilateral activity of another party or a third person" that the purposeful availment requirement is designed to eliminate as a basis for jurisdiction. *Burger King*, 471 U.S. at 475, 105 S.Ct. 2174 (internal quotation marks omitted). The engagement which gave rise to the dispute here is not simply one of a string of fortunate coincidences for the firm. Rather, the picture which emerges from the above facts is that of a law firm which seeks to be known in the New York legal market, makes efforts to promote and maintain a client base there, and profits substantially therefrom. [FN4] ***129** Under such circumstances, we see nothing fundamentally unfair about requiring the firm to defend itself in the New York courts when a dispute arises from its representation of a New York client--a representation which developed in a market it had deliberately cultivated and which, after all, the firm voluntarily undertook.

> FN4. The district court relied heavily on *Sher v. Johnson*, 911 F.2d 1357 (9th Cir.1990), for its holding. *See BBL II*, 2001 WL 893362, at *5. In *Sher*, the court held that a Florida law firm which had been solicited to represent a California defendant in a Florida criminal case could not, consistent with due process, be subjected to a malpractice suit in California court solely based on the representation and the communications and travel to California incident to it. 911 F.2d at 1362-63. The *Sher* court specifically noted, however, that the defendant law firm in that case, unlike the defendant here, had "take[n] no affirmative action to promote business within the forum state." *Id.* at 1363.

[11][12][13] The second part of the jurisdictional analysis asks "whether the assertion of personal jurisdiction comports with 'traditional notions of fair play and substantial justice'--that is, whether it is reasonable under the circumstances of the particular case." [FN5] *Metro. Life*, 84 F.3d at 568 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945)). Courts are to

consider five factors in evaluating reasonableness: "(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in furthering substantive social policies." *Id.* at 568 (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113-14, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), and *Burger King*, 471 U.S. at 476-77, 105 S.Ct. 2174), *cited in* *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 244-45 (2d Cir.1999); *Chaiken v. VV Publ'g Corp.*, 119 F.3d 1018, 1028- 30 (2d Cir.1997). Where a plaintiff makes the threshold showing of the minimum contacts required for the first test, a defendant must present "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Metro. Life*, 84 F.3d at 568 (quoting *Burger King*, 471 U.S. at 477, 105 S.Ct. 2174). The import of the "reasonableness" inquiry varies inversely with the strength of the "minimum contacts" showing--a strong (or weak) showing by the plaintiff on "minimum contacts" reduces (or increases) the weight given to "reasonableness." *Id.* at 568-69 (citing *Burger King*, 471 U.S. at 477, 105 S.Ct. 2174).

> FN5. Although the district court did not reach the reasonableness component of the analysis, the issue remains reviewable on appeal because it was "pressed or passed upon below." *United States v. Harrell*, 268 F.3d 141, 146 (2d Cir.2001) (citing James Wm. Moore, et al., 19 *Moore's Federal Practice* § 205.05[1] (3d ed.2000)) (defining "pressed or passed upon below" as "when it fairly appears in the record as having been raised or decided").

[14] Regardless of how the strength of the "minimum contacts" showing is characterized here, however, Fiddler fails to meet its required burden of proof on the five "reasonableness" factors. Fiddler's maintenance, and frequent use of, its apartment in Manhattan, together with the sizable revenue it earns from international clients, certainly belies any claim that the exercise of jurisdiction by New York will impose an undue burden on the firm under the first factor. Even if forcing the defendant to litigate in a forum relatively distant from its home base were found to be a burden, the argument would provide defendant only weak support, if any, because "the conveniences of modern communication and transportation ease what would ***130** have been a serious burden only a few decades ago." *Id.* at 574. New York, as the center of the loan transaction and home to the BBL branch which disbursed the funds, has an unquestionable interest in adjudicating the claim under the second factor. (While New York's interest may be no greater than Puerto Rico's in adjudicating the responsibilities of its attorneys, it is a substantial interest nonetheless.) The third and fourth factors both implicate the ease of access to evidence and the convenience of witnesses, *id.*, an issue which both supports and undermines defendant's position given that both jurisdictions are marked with the traces of the transaction in issue. Even though many of the witnesses and much of the evidence (such as the Fiddler and Chase Puerto Rico personnel involved) will likely be located in Puerto Rico, others, such as the BBL personnel, will likely be located in New York. Defendant did not address the fifth factor, but holding defendant subject to jurisdiction in New York does not appear likely to erode any shared social policies.

In sum, defendant's showing on these factors does not convince us that this case is the "exceptional situation" where exercise of jurisdiction is unreasonable even though minimum contacts are present. *See id.* at 575, 105 S.Ct. 2174 ("[D]ismissals resulting from the application of the reasonableness test should be few and far between...."). We therefore conclude upon *de novo* review, contrary to the district court, that due process permits the exercise of personal jurisdiction over defendant in these circumstances.

CONCLUSION

We agree with the district court that personal jurisdiction over defendant is proper under the New York long-arm statute, but, unlike the district court, we also find that the exercise of this jurisdiction is consistent with federal due process. Accordingly, we vacate the district court judgment dismissing the action and remand for further proceedings.

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Briefs and Other Related Documents (Back to top)

• 2002 WL 32348703 (Appellate Brief) Brief for Defendant-Appellee (Jan. 28, 2002)Original Image of this Document (PDF)

• 2001 WL 34378331 (Appellate Brief) Brief for Plaintiff-Appellant (Dec. 27, 2001)Original Image of

this Document (PDF)

• 01-9026 (Docket)
(Aug. 30, 2001)

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Briefs and Other Related Documents

United States Court of Appeals,
Second Circuit.

BANK BRUSSELS LAMBERT, Plaintiff-Appellant,
v.
FIDDLER GONZALEZ & RODRIGUEZ,
Defendant-Appellee.

Docket No. 98-7706

Argued Jan. 12, 1999.
Decided March 26, 1999.

Client, a Belgian bank with a New York branch, sued its Puerto Rican law firm for fraud, breach of fiduciary duty and breach of implied contractual duties of candor and full disclosure, in connection with legal services performed. The United States District Court for the Southern District of New York, Lawrence M. McKenna, J., 1998 WL 182434, dismissed suit for lack of personal jurisdiction. Client appealed. The Court of Appeals, Sotomayor, Circuit Judge, held that: (1) law firm did not transact business in New York; (2) law firm did not contract to supply business in New York; (3) law firm did not commit tort within New York; but (4) if law firm committed tort outside New York, that tort caused injury within New York.

Affirmed in part, vacated in part and remanded.

West Headnotes

[1] Federal Courts 417
170Bk417
Generally, amenability of foreign corporation to suit in federal court in diversity action is determined in accordance with law of state where court sits, with federal law entering picture only for purpose of deciding whether state's assertion of jurisdiction contravenes constitutional guarantee.

[2] Constitutional Law 305(5)
92k305(5)

[2] Federal Courts 76.1
170Bk76.1
(Formerly 170Bk76)
District court resolving issue of personal jurisdiction must first determine whether there is jurisdiction over defendant under relevant forum state's laws, and then determine whether exercise of jurisdiction under these laws is consistent with federal due process requirements. U.S.C.A. Const.Amend. 14.

[3] Federal Courts 776
170Bk776
District court's dismissal of action for want of personal decision is reviewed de novo.

[4] Federal Civil Procedure 1825
170Ak1825
When responding to motion to dismiss for lack of personal jurisdiction, plaintiff bears burden of establishing that court has jurisdiction over defendant. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

[5] Federal Civil Procedure 1825
170Ak1825
Where court has chosen not to conduct full-blown evidentiary hearing on motion to dismiss for lack of personal jurisdiction, plaintiff need make only prima facie showing of jurisdiction through its own affidavits and supporting materials. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

[6] Federal Civil Procedure 1825
170Ak1825
Where parties have conducted extensive discovery regarding defendant's contacts with forum state, but no evidentiary hearing has been held on motion to dismiss for lack of personal jurisdiction, plaintiff's prima facie showing must include averment of facts that, if credited by ultimate trier of fact, would suffice to establish jurisdiction over defendant. Fed.Rules Civ.Proc.Rule 12(b)(2), 28 U.S.C.A.

[7] Courts 12(2.15)
106k12(2.15)
In order for court to obtain personal jurisdiction over party under "transaction of business" prong of New York's long-arm statute, party need not be physically present in state at time of service, rather, statute extends jurisdiction of New York state courts to any nonresident who has purposely availed himself of privilege of conducting activities within New York and thereby invoked benefits and protections of its laws; single transaction would be sufficient to fulfill this requirement, so long as relevant cause of action also arises from that transaction. N.Y.McKinney's CPLR 302(a), par. 1.

[8] Courts 12(2.15)
106k12(2.15)

To determine whether party has "transacted business" in New York, within meaning of that state's long-arm statute, courts must look at totality of circumstances concerning party's interactions with, and activities within, the state. N.Y.McKinney's CPLR 302(a), par. 1.

[9] Federal Courts 85
170Bk85
Although Puerto Rican law firm, in preparing local security documents for revolving credit agreement executed in New York, communicated with New York branch bank by phone, fax and possibly mail, firm did not transact business in New York, as required to support assertion of jurisdiction over firm under New York's long-arm statute; firm was originally recommended by another lender, firm performed all of its legal research and writing services in Puerto Rico and none of its partners or agents either entered New York or were required to be physically present to perform any of these services. N.Y.McKinney's CPLR 302(a), par. 1.

[10] Federal Courts 85
170Bk85
Although Puerto Rican law firm's opinion was condition precedent to closing of revolving credit agreement in New York, firm did not thereby contract to supply goods or services in New York, as required to support assertion of jurisdiction over firm under that state's long-arm statute, where firm was not involved in closing of deal via telephone or otherwise and did not represent any party in connection with closing. N.Y.McKinney's CPLR 302(a), par. 1.

[11] Federal Courts 85
170Bk85
Puerto Rican law firm did not commit tortious act in New York, as required to support jurisdiction under that state's long-arm statute, by sending allegedly fraudulent opinion to banks in New York; firm was not physically present in New York, and its failure to transmit certain information was not an act committed in New York. N.Y.McKinney's CPLR 302(a), par. 2.

[12] Courts 12(2.25)
106k12(2.25)
Courts determining whether there is injury in New York sufficient to warrant jurisdiction over person who "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state," or "expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce," must generally apply situs-of-injury test, which asks them to locate original event which caused the injury. N.Y.McKinney's CPLR 302(a), par. 3.

[13] Federal Courts 85
170Bk85
Although Puerto Rican law firm's allegedly tortious failure to disclose information to client bank regarding borrower occurred in Puerto Rico, alleged tort caused injury to bank in New York, as would support jurisdiction under New York long-arm statute, since New York was place where bank first disbursed its funds to borrower, which was first step in process that generated its ultimate economic loss. N.Y.McKinney's CPLR 302(a), par. 3.

***781** LANCE GOTTHOFFER, Oppenheimer Wolff & Donnelly, New York, N.Y. (Peter A. Stroili, of counsel), for Plaintiff-Appellant.

ROBERT E. KUSHNER, D'Amato & Lynch, New York, N.Y. (Thomas M. Gandolfo, Ann G. Kayman, of counsel), for Defendant-Appellee.

Before: JACOBS and SOTOMAYOR, Circuit Judges, and SAND, [FN*] District Judge.

> FN* The Honorable Leonard B. Sand, District Judge of the United States District Court for the Southern District of New York, sitting by designation.

SOTOMAYOR, Circuit Judge:

Plaintiff-appellant Bank Brussels Lambert appeals from an order of the United States District Court for the Southern District of New York (McKenna, *J.*) granting defendant's Rule 12(b)(2) motion to dismiss the complaint for lack of personal jurisdiction. Plaintiff brought suit for fraud, breach of fiduciary duty and breach of the implied contractual duties of candor and full disclosure, all in connection with legal services performed on its behalf by defendant-appellee law firm Fiddler Gonzalez & Rodriguez. The district court held that personal jurisdiction over the defendant was unwarranted under New York's long-arm statute, C.P.L.R. § 302(a) subsections (1), (2) and (3), and under the common law co-conspirator and aider and abettor doctrines. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, No. 96 Civ. 7233(LMM), 1998 WL 182434 (S.D.N.Y. Apr. 17, 1998). We agree with all of the court's jurisdictional rulings but one. The district court erred by finding that the "injury" alleged in this case occurred outside of New York, and that jurisdiction under § 302(a)(3) was inappropriate on that ground. From the record on appeal, it is,

however, unclear whether plaintiff has even averred sufficient facts to establish a tort, as is required for jurisdiction under § 302(a)(3). We therefore remand to the district court to determine whether plaintiff has sufficiently alleged an actionable tort and whether plaintiff has met the other requirements for jurisdiction under subparts (i) or (ii) of § 302(a)(3).

BACKGROUND

Bank Brussels Lambert ("BBL") is a banking corporation organized and existing under the laws of Belgium, with its principal place of business in Brussels, ***782** Belgium. BBL has a New York branch registered with the United States Comptroller of Currency, and BBL conducted all of the relevant activities in this case through its New York branch.

Fiddler Gonzalez & Rodriguez ("Fiddler") is a law firm with its principal place of business in San Juan, Puerto Rico. Many New York corporations, as well as corporations from around the world, retain Fiddler to address issues of Puerto Rican law, and Fiddler appears to derive a substantial percentage of its income from these out-of-state clients. Often, these clients seek Fiddler's services because of referrals from other clients. The parties dispute whether Fiddler also solicits some business from New York clients through telefaxes. Although most of Fiddler's assets are located in Puerto Rico, and although Fiddler performs most of its services on the island, Fiddler owns an apartment in Manhattan, which it claims as a business expense on its tax forms, and which at least two partners have used for business trips that were subsequent and unrelated to the transactions in this case.

In November 1989, BBL joined a five-member lending group (collectively, the "banks") that was negotiating a secured $245,000,000 revolving credit agreement ("RCA") with two affiliated oil companies, known collectively as "Arochem." Arochem has its principal place of business in Stamford, Connecticut. The lending group was headed by The Chase Manhattan Bank, N.A. ("Chase New York"), and all five lenders were either New York domiciliaries or sought to participate in the loan through their New York branches. As principal collateral for the loan, Arochem offered a security interest in one of its main oil refineries, which was located in Puerto Rico, as well as certain of its inventories.

Before accepting the collateral and closing on the loan, the banks required an opinion from a Puerto Rican law firm concerning the validity and enforceability of the security interests they were acquiring. Chase New York recommended Fiddler for the job, largely because Fiddler had performed well over the course of a long-standing attorney-client relationship with the Chase Manhattan branch in Puerto Rico ("Chase Puerto Rico"). Fiddler was subsequently contacted to help execute the relevant security documents and to provide the needed opinion. In the process, the banks sent Fiddler a draft RCA, which described the contemplated loan transaction and stated that Fiddler's opinion would be a condition precedent to the loan disbursements as follows:

> *Initial Loan.* The obligation of any Bank to make its initial Loan or the issuance of the initial Letter of Credit hereunder is subject to the receipt by the Agent of the following documents, each of which shall be satisfactory to the Agent in form and substance:
>
> . . . . .
>
> *Opinion of Special Puerto Rico Counsel to the Lender*. An opinion of Fiddler, Gonzalez & Rodriguez, special Puerto Rico counsel to the Banks, substantially in the Form of Exhibit G hereto.

Draft RCA dated Dec. 19, 1989, at ¶ 6.01(e). Exhibit G, which was also sent to Fiddler, was a model opinion concerning a security interest in Arochem's Puerto Rican oil refinery. The draft RCA specified that the agreement would be governed by New York law and contained a New York choice of forum provision. Shortly after receiving these materials, Fiddler agreed to act as the bank's special Puerto Rican counsel and perform the tasks indicated.

Fiddler performed all of its relevant legal research and writing in Puerto Rico and attended the closing of the relevant security documents on the island. Neither Fiddler's partners nor its agents entered New York in connection with any of these services. On occasion, however, Fiddler contacted one or more of the banks or ***783** their counsel in New York to discuss the opinion drafting process or the security documents. Fiddler also responded to similar contacts from these parties. In December 1989, Fiddler completed its first draft opinion. The opinion acknowledged that Fiddler had agreed to act as special Puerto Rico counsel for the banks and that Fiddler was furnishing the opinion in connection with the RCA between Arochem and the banks. The draft opinion was, however, addressed only to Chase Puerto Rico in San Juan.

Each of the banks was represented by separate counsel, but the primary liaison between all of the banks and Fiddler was the New York law firm of Milbank, Tweed, Hadley & McCloy ("Milbank Tweed"). After receiving Fiddler's first draft opinion, both Milbank Tweed and BBL's separate New York counsel contacted Fiddler to request that the opinion be addressed to all the banks. Fiddler agreed to address the final opinion to:

> The Chase Manhattan bank, N.A. ("Chase") individually, and as Agent for the banks and other Lenders (the "Banks"), and to the Banks party to the Revolving Credit Agreement dated as of January 1, 1990 and to Chase as Intercreditor Agent for Chase, Drexel Burnham Lambert Trade Finance Inc. and the Banks under the Intercreditor Agreement dated as of January 1, 1990
> 1 Chase Manhattan Plaza
> New York, New York

Fiddler Opinion at 1. The RCA did not list the addresses of each bank individually, and it is unclear from the record whether Fiddler knew that all five participating banks were either New York banks or New York branches of banks located elsewhere. The final opinion did, however, explicitly reference the RCA transaction and state that "[t]his opinion is being rendered ... for your exclusive benefit in connection with the transactions described herein." *Id.*

The final RCA was dated January 1, 1990, and the loan closed in New York on January 17, 1990. The agreement--just like the draft sent to Fiddler--contained New York choice of law and forum provisions. Disbursement of the loan was also still conditioned on Chase New York's receipt of Fiddler's opinion. Although the parties dispute whether Fiddler sent its final opinion to Chase in New York or delivered it to one of Chase New York's agents at the closing of the security documents in Puerto Rico, the opinion was received by January 22, 1990, and Fiddler addressed it to Chase New York, as agreed. On January 22, 1990, BBL disbursed $75,000,000 to Arochem, as was required under the RCA. BBL made this disbursement from an account in New York.

Nearly two years later, on December 23, 1991, Arochem defaulted on the RCA loan. Shortly thereafter, Will Harris, the president and majority shareholder of Arochem, was convicted of multiple counts of bank fraud, *see* *United States v. Harris*, 79 F.3d 223 (2d Cir.1996), and in these proceedings, it became apparent that Arochem may have systematically misreported the value of its assets to the RCA lenders, *see* *id.* at 226. In February 1992, Arochem filed for bankruptcy, and BBL subsequently sued Chase New York for fraud and breach of contract in connection with its role in closing the RCA transaction.

In the course of discovery, Fiddler inadvertently produced several attorney-client memoranda that Chase Puerto Puerto Rico had provided to Pedro Polanco, a Fiddler partner, on January 17, 1990. Although the memoranda were furnished to Polanco on the same day as the RCA closing, they related to a separate representation of Chase Puerto Rico, as Polanco was not involved in any way with the Arochem RCA. According to BBL, these exchanged memoranda suggested that Harris had been manipulating the company's accounting procedures and financial reports in order to purchase Arochem stock from a second shareholder at an artificially ***784** depressed price, thereby enhancing his position in an ongoing dispute with a third shareholder. Fiddler also produced several related documents that Fiddler allegedly helped Chase Puerto Rico prepare in order to sanitize the record of these activities.

In light of these newly discovered documents, BBL commenced the present action against Fiddler. BBL complained that Fiddler's opinion merely followed the model Exhibit G and omitted to mention the newly learned information from Chase Puerto Rico, even though the honesty of Arochem's management and the integrity of its financial reporting were relevant to BBL's decision to fund the Arochem loan. BBL argued that Fiddler's actions thus constituted fraud, breach of fiduciary duty and breach of the parties' contract for legal services.

Fiddler responded to BBL's complaint with a motion to dismiss asserting lack of personal jurisdiction, failure to bring the action within the relevant statutes of limitations and failure to plead fraud with sufficient particularity. The district court dismissed the action for lack of personal jurisdiction, holding that C.P.L.R. § 302 failed to provide a jurisdictional basis for this action against Fiddler. The court also held that BBL failed to allege sufficient facts to establish personal jurisdiction under the common law aider and abettor or co-conspirator doctrines. This appeal followed.

DISCUSSION

A. Standards of Review and the Existence of a Tort

[1][2][3] The issue on appeal is whether there are

grounds to exercise personal jurisdiction over Fiddler in this case. As a general rule, "the amenability of a foreign corporation to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits, with 'federal law' entering the picture only for the purpose of deciding whether a state's assertion of jurisdiction contravenes a constitutional guarantee." *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 223 (2d Cir.1963) (en banc); *see also Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir.1996). District courts resolving issues of personal jurisdiction must therefore engage in a two-part analysis. First, they must determine whether there is jurisdiction over the defendant under the relevant forum state's laws--which, in this case, are the various subsections of New York's C.P.L.R. § 302(a) and the common law co-conspirator and aider and abettor doctrines. Second, they must determine whether an exercise of jurisdiction under these laws is consistent with federal due process requirements. *See Met. Life*, 84 F.3d at 567. We review a district court's dismissal of an action for want of personal decision *de novo*. *Id.*

[4][5][6] When responding to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant. *See Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 507 (2d Cir.1994). Where a "court [has chosen] not to conduct a full-blown evidentiary hearing on the motion, the plaintiff need make only a prima facie showing of jurisdiction through its own affidavits and supporting materials." *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir.1981). Where as here, however, "the parties have conducted extensive discovery regarding the defendant's contacts with the forum state, but no evidentiary hearing has been held--'the plaintiff's prima facie showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by [the ultimate trier of fact], would suffice to establish jurisdiction over the defendant.' " *Met. Life*, 84 F.3d at 567 (quoting *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir.1990)). In this case, both C.P.L.R. § 302(a)(2) and § 302(a)(3) require either a ***785** tort inside of New York [FN1] or a tort outside of New York that causes injury within the state [FN2] in order to establish jurisdiction. BBL also argues for jurisdiction under § 302(a)(1) in part by alleging that Fiddler engaged in tortious activity that arose out of a transaction of business in New York or a contract to perform services in the state. In order to succeed under any of these theories under *Met Life*, BBL must therefore aver facts that if credited, would suffice to establish all the requirements under one of § 302(a)'s subsections, including the commission of a tort, the allegation fatally missing in *PI, Inc. v. Quality Products, Inc.*, 907 F.Supp. 752, 762 (S.D.N.Y.1995) (refusing to exercise personal jurisdiction under § 302(a)(2)--which confers jurisdiction over persons who commit torts in New York--because plaintiff "failed to state a cause of action for fraud distinct from a claim for breach of contract").

FN1. C.P.L.R. § 302(a)(2) allows for "personal jurisdiction over any non-domiciliary ... who in person or through an agent ... commits *a tortious act within the state* ...." (Emphasis added).

FN2. C.P.L.R. § 302(a)(3) allows for personal jurisdiction over "any non-domiciliary ... who in person or through an agent ... commits a *tortious act without the state causing injury to person and property within the state*," so long as certain other requirements are also met, as outlined in subsections (i) and (ii). (Emphasis added.)

With regard to its tort allegations for fraud and breach of fiduciary duty, BBL does not claim that Fiddler's opinion contained any affirmative misrepresentations. Rather, BBL argues that as result of either its attorney-client relationship with BBL or its contract to provide legal services to BBL, Fiddler had an affirmative duty to disclose information obtained during its separate attorney-client consultation with Chase Puerto Rico on January 17, 1990. Under the law of most states, this contention would be plainly wrong because Fiddler would have had an affirmative duty *not* to disclose any information obtained under the cloak of the attorney-client privilege. *See, e.g.*, Model Rules of Professional Conduct Rule 1.6 (1995) (imposing broad requirement of client confidentiality); N.Y.Code of Professional Responsibility EC 4-1 (McKinney's 1998) ("Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer."); *see also In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 731 F.2d 1032, 1036 (2d Cir.1984). At most, Fiddler might have had a duty to withdraw upon discovery of the conflict. *See, e.g.*, Model Rules of Professional Conduct Rule 1.16(a)(1) (requiring withdrawal from

representation when continued representation would require violation of rules governing the attorney-client relationship); N.Y.Code of Professional Responsibility EC 4-5, notes of decisions ¶ 2 ("An attorney representing joint clients must withdraw from the joint representation if information obtained 'in confidence' from one of the joint clients gives rise to a conflict of interest with the other joint client"). Moreover, Fiddler would have had this duty to withdraw under circumstances that did not reveal the contents of the privileged materials. *See, e.g.*, Model Rules of Professional Conduct, Rule 1.6 cmt. 16 ("After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6."); N.Y.Code of Professional Responsibility EC 4-5 (stating that in all cases, "[c]are should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another"). It is thus far from clear that BBL has averred sufficient facts to establish an actionable tort in this case, as is required under several of its jurisdictional theories.

At this stage, we nevertheless decline to dismiss any of BBL's arguments on these grounds. Puerto Rico is a mixed civil and ***786** common law rather than a pure common law jurisdiction. *See, e.g., Ennio M. Colon Garcia et al., Puerto Rico: A Mixed Legal System: The Magistrates and the Courts*, 32 Rev. Jur. U.I.P.R. 257, 257 (1998) ("Puerto Rico has a distinct mixture of civil law tradition and common law influences that in essence come together to define what is known in laymen's terms as a 'mixed jurisdiction.' "). Puerto Rico is also a commonwealth rather than a state, and it has a unique status in our federal system. *See, e.g., Examining Board v. Flores de Otero*, 426 U.S. 572, 596, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976). Consequently, some of our most familiar common law tort concepts may be inapplicable there. *See Ennio M. Colon Garcia et al., Puerto Rico: A Mixed Legal System: Judicial Reception of Common Law*, 32 Rev. Jur. U.I.P.R. 285, 288-90 ("[T]he Law of Torts of Puerto Rico was of romanized civil law tradition upon arrival of the United States forces in 1898[and] ... the efforts of the Supreme Court of Puerto Rico [have generally been] to preserve the civil law tradition [against common law influences] in the construction of the articles concerned with torts."). Puerto Rico also has its own code of professional conduct. *Compare* Code of Professional Ethics of Puerto Rico, 4 L.P.R.A.App. IX *with, e.g.*, ABA Model Code of Professional Responsibility. All of these points, finally, invite the more basic question of whether New York or Puerto Rico law applies in determining whether a tort occurred in this case. Although these questions are absolutely crucial to many of the present jurisdictional analyses, we will not decide them here because neither the district court nor the parties has had an opportunity to address them and because it is unclear whether the parties have taken or need discovery on these issues. Any subsequent finding of personal jurisdiction premised on the existence of a tort will, however, have to address whether BBL has sufficiently averred a tort under the law of the pertinent jurisdiction.

B. Long-Arm Jurisdiction Under the District Court's Rulings

As stated above, the district court dismissed this case on the ground that it lacked personal jurisdiction over Fiddler under N.Y.C.P.L.R. § 302(a)(1), (2) and (3) and under the common law co-conspirator and aider and abettor doctrines. Although most of these rulings will be mooted if BBL has failed to aver an actionable tort, BBL has properly challenged the district court's rulings before this Court, and both parties have briefed these issues in detail. In addition, BBL's argument for jurisdiction under § 302(a)(1) is premised on an allegation of contractual breach as well as tortious conduct. We address jurisdiction under all of the bases asserted by BBL, both in light of these facts and in order to prevent the issues from arising again after remand. *Cf. United States v. Jean-Baptiste*, 166 F.3d 102 (2d Cir.1999) ("Although these issues are, for purposes of this appeal, mooted by our decision above, we address them briefly in light of the likelihood that they would recur at a new trial.").

(1) C.P.L.R. § 302(a)(1)--*Transaction of Business or Contract to Supply Goods/Services in New York*

BBL argues that the district court has personal jurisdiction over Fiddler under C.P.L.R. § 302(a)(1), which states that "a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent ... [1] transacts any business within the state or [2] contracts anywhere to supply goods or services in the state...." This subsection thus has two prongs, either of which can form a basis for the exercise of personal jurisdiction over a non-domiciliary. *See, e.g., Holness v. Maritime Overseas Corp.*, 251 A.D.2d 220, 676 N.Y.S.2d 540, 544 (1st Dep't 1998); *Etra v. Matta*, 61 N.Y.2d 455, 458-59, 474 N.Y.S.2d 687, 463 N.E.2d 3 (1984). BBL argues for jurisdiction under both prongs.

***787** (i) *Transaction of Business Within the State*

[7] It is well settled that in order for a court to obtain personal jurisdiction over a party under the "transaction of business" prong of § 302(a)(1), the party need not be physically present in the state at the time of service. *See Parke-Bernet Galleries v. Franklyn*, 26 N.Y.2d 13, 16, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970). Rather, § 302(a)(1) extends the jurisdiction of New York state courts to any nonresident who has 'purposely availed [himself] of the privilege of conducting activities within New York and thereby invoked the benefits and protections of its laws....' *Id.* at 18, 308 N.Y.S.2d 337, 256 N.E.2d 506. "[A] 'single transaction would be sufficient to fulfill this requirement,' " *id.* at 284, so long as the relevant cause of action also arises from that transaction. [FN3] *See George Reiner & Co. v. Schwartz*, 41 N.Y.2d 648, 651, 394 N.Y.S.2d 844, 363 N.E.2d 551 (1977).

> FN3. The cause of action need not be for breach of contract, however. *See Singer v. Walker*, 15 N.Y.2d 443, 466, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965) ("It is clear that paragraph 1 is not limited to actions in contract; it applies as well to actions in tort when supported by a sufficient showing of facts [to establish that the tort arose out of the relevant transaction].").

[8] To determine whether a party has "transacted business" in New York, courts must look at the totality of circumstances concerning the party's interactions with, and activities within, the state. *See, e.g., Peekskill Community Hosp. v. Graphic Media, Inc.*, 198 A.D.2d 337, 338, 604 N.Y.S.2d 120 (2d Dep't 1993); *Etra*, 61 N.Y.2d at 459, 474 N.Y.S.2d 687, 463 N.E.2d 3. The New York Court of Appeals has found a transaction of business when, for example, a foreign corporation used a New York distributor to ship substantial quantities of goods into the state, the sales of which were produced by means of solicitations and advertisements in the state. *See Singer v. Walker*, 15 N.Y.2d 443, 466-67, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965). The Court of Appeals has, however, also held that there was no transaction of business in New York when a respondent was domiciled out of state, conducted his personal business activities out of state, had no office, bank account or telephone listings in New York, and neither solicited business in the state nor "entered th[e] State in connection with his dealings" with the New York plaintiff. *See Ferrante*, 26 N.Y.2d at 284, 309 N.Y.S.2d 913, 258 N.E.2d 202. The court explained that "in order to sustain jurisdiction, there must be some transaction attributable to the one sought to be held *which occurs in New York.*" *Id.* (emphasis added).

[9] On the undisputed facts of this case, Fiddler is a law firm located and incorporated in Puerto Rico. It performed all of its legal research and writing services in preparing the Fiddler opinion and closing the relevant security documents in Puerto Rico, and none of its partners or agents either entered New York or were required to be physically present to perform any of these services. Although Fiddler may have solicited some business from New York corporations through telefaxes, BBL's Vice President conceded that "[t]he Fiddler firm was proposed by Chase [New York]," and was contacted to perform legal services on the basis of this recommendation. (LaBelle Decl. ¶ 6.) Consequently, the present action does not arise out of any alleged New York business solicitations, as would be required for § 302(a)(1) jurisdiction premised on solicitations. *See, e.g., Holness*, 676 N.Y.S.2d at 543; *George Reiner*, 41 N.Y.2d at 648, 394 N.Y.S.2d 844, 363 N.E.2d 551. Thus, under the totality of circumstances, none of BBL's causes of action appear to have arisen from a transaction of business in New York.

BBL argues, however, that "lawyers and other professionals today transact business with their pens, their fax machines and their conference calls--not with their feet. As such physical presence in New York is ***788** not a condition precedent for application of C.P.L.R. § 302(a)(1)." (Pl.'s Br. at 29.) The best New York Court of Appeals case that BBL could have cited for this proposition--but did not--is *Parke-Bernet Galleries, Inc. v. Franklyn*, 26 N.Y.2d 13, 308 N.Y.S.2d 337, 256 N.E.2d 506 (1970). There, an auction took place in New York, and on the day before the auction, the defendant called the plaintiff and requested that " 'telephonic communication be established between [him] and [Parke-Bernet] during the course of the bidding,' so that he might keep abreast of and take part in the bidding while the auction was actually going on." *Id.* at 15, 308 N.Y.S.2d 337, 256 N.E.2d 506. The defendant later confirmed by telegram his desire to participate in the auction. The plaintiff agreed and created an open telephone line for the defendant, through which he ultimately bought two paintings at the auction. In a subsequent action for breach of contract, which arose out of a failure to pay for the paintings, the Court of Appeals held that the defendant's activities constituted business transactions that occurred within the state for §

302(a)(1) purposes. The court reasoned that "[i]t is important to emphasize that one need not be physically present in order to be subject to the jurisdiction of our courts under C.P.L.R. [§] 302 for, particularly in this day of instant long-range communications, one can engage in extensive purposeful activity here without actually setting foot in the State." *Id.* at 16, 308 N.Y.S.2d 337, 256 N.E.2d 506.

In *Etra v. Matta*, 61 N.Y.2d 455, 474 N.Y.S.2d 687, 463 N.E.2d 3 (1984), however, the Court of Appeals examined a quite different series of telephonic and written communications and held that they did not amount to a "transaction of business." *Etra* involved a decedent who was a resident of New York and who had a severe heart condition. The decedent sought treatment for his condition from a specialized physician in Massachusetts, who treated him in Massachusetts. "Because decedent's treatment program involved the continued use of Aprindine, available only from a clinical investigator such as [the defendant], decedent was [also] provided with a supply of the drug to take back to New York." *Id.* at 457-58, 474 N.Y.S.2d 687, 463 N.E.2d 3. Thereafter, the defendant continued to act as a medical consultant by sending telephonic and written communications to the decedent's primary physicians, who continued treating him in New York. The defendant may also have sent additional Aprindine to the plaintiff in New York. The Court of Appeals nevertheless held that "[v]iewing the totality of [the defendant's] contacts with this State, in the form of written and telephonic communications and the additional provision of the experimental drug, we believe them to be too insubstantial to amount to such a 'transaction of business' as to warrant subjecting [the defendant] to suit in this forum." *Id.* at 458-59, 474 N.Y.S.2d 687, 463 N.E.2d 3.

Although Fiddler communicated with plaintiff in New York by phone, fax and possibly mail, the present case is ultimately much more like *Etra* than *Parke-Bernet.* All of Fiddler's communications involved either the negotiation of the original agreement for legal services, editorial comments during the process of preparing the final Fiddler opinion or interactions concerning the closing of the security documents in Puerto Rico. In none of these communications did Fiddler, like the defendant in *Parke-Bernet,* project itself into New York to participate in any activities localized in the state or to represent the banks during any New York transactions. Although the RCA transaction occurred in New York, there is no allegation, for example, that Fiddler represented the banks during the RCA closing; and the only closing that Fiddler attended was for the security documents, which occurred in Puerto Rico. *Etra* rather than *Parke-Bernet* is the relevant precedent on the facts of this case. *See also Mayes v. Leipziger*, 674 F.2d 178, 185 (2d Cir.1982) (holding that whatever the reach of § 302(a)(1) may be, "no court ***789** has extended § 302(a)(1) to reach a nondomiciliary who never entered New York, who was solicited outside of New York, who performed outside of New York such services as were performed, and who is alleged to have neglected to perform other services outside of New York").

(ii) *Contract Anywhere to Supply Goods or Services in the State*

BBL also argues that the district court had jurisdiction over Fiddler under the second prong to § 302(a)(1), which extends jurisdiction to defendants who "contract anywhere to supply goods or services in the state." The New York Legislature added this second prong to the provision in 1979 in order to "ease the plight of New York residents seeking to obtain jurisdiction over those outside its borders who may be deemed virtually or constructively to do business in this state." *Waldorf Associates, Inc. v. Neville*, 141 Misc.2d 150, 533 N.Y.S.2d 182, 185 (Sup.Ct.1988). This provision captures cases where there are minimal contacts in New York, and, for example, a contract is made elsewhere for goods to be delivered or services to be performed in New York. *See* Report of the Law Revision Commission for 1979, Leg. Doc. No. 65, 1979 N.Y. Laws A-31, A-59 (McKinney's). Thus, even if a defendant never enters the state to negotiate one of these contracts, to complete performance or for any other reason, the second prong of § 302(a)(1) can provide long-arm jurisdiction over a defendant who has minimal contacts with the state and who has entered a contract anywhere to supply goods or services in the state. *See, e.g., Island Wholesale Wood Supplies, Inc. v. Blanchard Indus., Inc.*, 101 A.D.2d 878, 879-80, 476 N.Y.S.2d 192 (2d Dep't 1984).

In support of its argument for § 302(a)(1) jurisdiction, BBL cites *Schur v. Porter*, 712 F.Supp. 1140 (S.D.N.Y.1989), and reads it as standing for the proposition that § 302(a)(1) grants personal jurisdiction over out-of-state law firms whenever they provide services in connection with transactions located in New York. In *Schur,* an out-of-state attorney was retained to break up a joint interest in two New York corporations, which had been held by

three New York residents, and to form a partnership between them for the ownership and control of the residual New York properties. The attorney drafted the relevant agreements in Maryland and only once entered New York in connection with these activities. Much as in *Parke-Bernet,* however, the attorney also projected himself into New York by representing the plaintiffs by telephone during the closing of the agreements, which took place in New York, was between New York residents and was governed by New York law. The court held that under these circumstances, the attorney "agreed to and did supply services in New York for a New York business transaction." *Id.* at 1145. Jurisdiction over him was therefore appropriate under § 302(a)(1).

[10] Although Fiddler's opinion was a condition precedent to the closing of the RCA, and although this transaction took place in New York and was governed by New York law, BBL has not alleged that Fiddler was ever involved in the closing of that deal via telephone or otherwise. Nor did Fiddler's duties involve any representation in connection with the closing. Thus, unlike in *Schur* and *Parke-Bernet,* Fiddler never projected itself into New York to perform services in the state and never purposefully availed itself of the privileges and benefits of performing any services in the state. All of the relevant services in this case were in fact performed in Puerto Rico, and § 302(a)(1) jurisdiction is therefore inappropriate.

(2) C.P.L.R. § 302(a)(2): *Tort Inside*

[11] BBL next argues that the district court has personal jurisdiction over Fiddler pursuant to C.P.L.R. § 302(a)(2), which gives the court "personal jurisdiction over any non-domiciliary ... who in person or through an agent ... commits a tortious act within the state...." At minimum, ***790** to qualify for jurisdiction under this subsection, "a defendant's act or omission [must have] occur[red] within the State." *Kramer v. Vogl,* 17 N.Y.2d 27, 31, 267 N.Y.S.2d 900, 215 N.E.2d 159 (1966). BBL does not contend that any of Fiddler's agents were ever physically present in New York to commit a tortious act but instead argues that Fiddler committed a "tortious act in New York" by sending a fraudulent opinion to the banks in New York. (*See* BBL's Br. at 32-38.)

As BBL concedes, its position is plainly inconsistent with this Court's recent interpretation of § 302(a)(2) in *Bensusan Restaurant Corp. v. King,* 126 F.3d 25 (2d Cir.1997). In *Bensusan,* we held that a defendant's physical presence in New York is a prerequisite to jurisdiction under § 302(a)(2). We explained in *Bensusan* that *Feathers v. McLucas,* 15 N.Y.2d 443, 261 N.Y.S.2d 8, 209 N.E.2d 68 (1965), the seminal New York Court of Appeals case on long-arm jurisdiction:

> adopted the view that C.P.L.R. § 302(a)(2) reaches only tortious acts performed by a defendant who was physically present in New York when he performed the wrongful act. The official Practice Commentary to C.P.L.R. § 302 explains that "if a New Jersey domiciliary were to lob a bazooka shell across the Hudson River at Grant's tomb, *Feathers* would appear to bar the New York courts from asserting personal jurisdiction over the New Jersey domiciliary [under § 302(a)(2)] in an action by an injured New York plaintiff."

Bensusan, 126 F.3d at 28.

BBL asks us to revisit *Bensusan* and decide whether a defendant's physical presence is required under New York law when a defendant sends affirmative misrepresentations into the state. This is not the case for such a re-evaluation, however. BBL's theory of fraud is premised on the contention that Fiddler, by virtue of either its attorney-client relationship with the banks or its contract for legal services, acquired an affirmative duty to disclose any materially relevant information obtained during its attorney-client representation of Chase Puerto Rico on January 17, 1990. BBL is thus suing not for affirmative misrepresentations placed in the final opinion but rather for Fiddler's failure to transmit this information at all. Fiddler's actions were more akin to an omission than to an act of sending misrepresentations into the state, and under New York law,

> [t]he failure of a man to do anything at all when he is physically in one State is not an "act" done or "committed" in another State. His decision not to act and his not acting are both personal events occurring in the physical situs. That they may have consequences elsewhere does not alter their personal localization as acts.

Platt Corp. v. Platt, 17 N.Y.2d 234, 237, 270 N.Y.S.2d 408, 217 N.E.2d 134 (1966) (cited with approval in *Bensusan,* 126 F.3d at 28); *see also Ferrante Equip. Co. v. Lasker-Goldman Corp.,* 26 N.Y.2d 280, 285, 309 N.Y.S.2d 913, 258 N.E.2d 202 (1970). Any torts alleged in this case were thus localized in Puerto Rico, and § 302(a)(2) cannot serve as a proper basis for jurisdiction over Fiddler.

(3) C.P.L.R. § 302(a)(3): *Tort Outside/Injury Inside*

BBL next argues that the district court had personal

jurisdiction over Fiddler under C.P.L.R. § 302(a)(3), which extends to any non-domiciliary who in person or through an agent:

> commits a tortious act without the state causing injury to person or property within the state ... if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue ***791** from interstate or international commerce....

The district court declined to exercise personal jurisdiction under this subsection because, in its view, although the alleged torts of omission occurred in Puerto Rico, "the situs of the injury to [BBL] cannot be considered to have been New York." *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, No. 96 Civ. 7233(LMM), 1998 WL 182434, at *3 (S.D.N.Y. Apr. 17, 1998). We disagree.

[12] As the district court noted, courts determining whether there is injury in New York sufficient to warrant § 302(a)(3) jurisdiction must generally apply a situs-of-injury test, which asks them to locate the "original event which caused the injury." *See Hermann v. Sharon Hosp., Inc.*, 135 A.D.2d 682, 683, 522 N.Y.S.2d 581 (2d Dep't 1987). This "original event" is, however, generally distinguished not only from the initial tort but from the final economic injury and the felt consequences of the tort. *See, e.g., id.* at 583; *Fantis Foods, Inc. v. Standard Importing Co., Inc.*, 49 N.Y.2d 317, 425 N.Y.S.2d 783, 402 N.E.2d 122 (1980); *Kramer v. Hotel Los Monteros S.A.*, 57 A.D.2d 756, 757, 394 N.Y.S.2d 415 (1st Dep't 1977). New York case law must therefore be examined very carefully to understand how these "original events" are identified.

In *Hermann*, for example, a group of doctors practicing in Connecticut were alleged to have negligently injured a patient who was visiting from New York. The tort in *Hermann* occurred in Connecticut because the doctors performed all of the relevant medical services in Connecticut. The plaintiff, however, felt the consequences when she was back in New York. The court nevertheless refused to find injury in New York because "[t]he situs of injury is the location of *the original event which caused the injury*, not the location where the resultant damages are subsequently felt by plaintiff." *Id.* at 583 (emphasis added). The court viewed this "original event" as having occurred in Connecticut, where the plaintiff was located when she received the medical treatment, and where the first effects of the doctors' alleged negligence--whether felt or not--were inflicted.

In *Sybron Corp. v. Wetzel*, 46 N.Y.2d 197, 413 N.Y.S.2d 127, 385 N.E.2d 1055 (1978), the New York Court of Appeals examined a commercial tort far more analogous to those alleged by BBL. The plaintiff in this case was Sybron, a New York corporation that had employed Wetzel, one of the defendants, for approximately thirty-four years. During the course of his employment, Wetzel had learned various protected trade secrets from Sybron before retiring and moving to Florida. De Dietrich, a foreign corporation and the other defendant in the case, subsequently opened a glass lining facility in New Jersey and sought to hire Wetzel to supervise the facility. Sybron brought suit to enjoin this employment, alleging that De Dietrich was attempting to engage in unfair competition by hiring Wetzel to divulge Sybron's trade secrets.

The only jurisdictional question in this case was related to De Dietrich, *see id.* at 203, 413 N.Y.S.2d 127, 385 N.E.2d 1055, and the court noted from the start that the alleged tort by De Dietrich was to take place out of state, in New Jersey. The court thus discussed whether this tort might cause injury in New York sufficient for § 302(a)(3) jurisdiction. The court reasoned that if De Dietrich were to hire Wetzel to divulge trade secrets in New Jersey (and were to obtain the consequent ability to produce better quality goods at lower prices), this act would very likely directly affect the decisions of certain New York customers to buy from De Dietrich rather than Sybron. These decisions would, in turn, ultimately cause economic damage to Sybron. The court thus viewed some of the original events that would cause Sybron injury as located in New York, where the relevant customers' buying ***792** habits would first be altered. [FN4] *See also Cleopatra Kohlique, Inc. v. New High Glass, Inc.*, 652 F.Supp. 1254, 1257 (E.D.N.Y.1987) ("Even if plaintiff was domiciled in another state, the loss of New York customers would constitute a New York injury.").

> FN4. In finding that the situs of injury was New York, the court stated not only that "the economic injury plaintiff seeks to avert stems from the threatened loss of New York customers" but that "it is New York where plaintiff manufactures and relined glass-lined equipment and the alleged trade secrets were acquired." *Sybron*, 46 N.Y.2d at 205, 413 N.Y.S.2d 127, 385 N.E.2d 1055. This

language of "acquisition" might be read to suggest that the court premised § 302(a)(3) jurisdiction in part on the fact that a tort occurred in New York. This language was, however, only dicta. The only person who "took" trade secrets from New York was Wetzel, but Wetzel did this before having any employment relationship with De Dietrich, and it was jurisdiction over De Dietrich, not Wetzel, that was at issue in the opinion. Moreover, the court was explaining why there was jurisdiction under § 302(a)(3) at this point, and § 302(a)(3) pertains only to torts outside New York that cause injury in the state. Because the court was not analyzing jurisdiction under § 302(a)(2)-- which pertains to torts occurring in the state--the existence of a tort in New York was irrelevant to its analysis.

[13] In the case of fraud or breach of fiduciary duty committed in another state, the critical question is thus where the first effect of the tort was located that ultimately produced the final economic injury. Although the alleged omissions in this case occurred in Puerto Rico, New York was the place where BBL first disbursed its funds to Arochem. BBL argues that it disbursed these funds only because it was unaware of the information that Chase Puerto Rico conveyed to Fiddler on January 17, 1990. It was also this disbursement that was the first step in the process that generated the ultimate economic loss to BBL. Much like Sybron's loss of New York customers, the disbursement of funds in this case was thus the first effect of the tort that caused the injury--or, alternatively stated, the "original event that caused the injury." *See also Hargrave v. Oki Nursery, Inc.*, 636 F.2d 897, 900 (2d Cir.1980) ("One immediate and direct 'injury' Oki's alleged tortious misrepresentations caused to plaintiffs was the loss of the money paid by them for the diseased vines. That injury was immediately felt in New York where plaintiffs were domiciled and doing business, where they were located when they received the misrepresentations, and where the vines were to be shipped."); *Marine Midland Bank v. Keplinger & Assocs., Inc.*, 488 F.Supp. 699, 703 (S.D.N.Y.1980) ("[S]ince all disbursements to ADDM or its creditors were made by MMB in New York, the situs of the injury was in New York."). *Cf. also Polish v. Threshold Technology, Inc.*, 72 Misc.2d 610, 340 N.Y.S.2d 354 (Sup.Ct.1972) (finding jurisdiction under § 302(a)(2) over defendant who sent letter containing affirmative misrepresentation into New York because plaintiff perused fraudulent letter in the state and parted with stock certificates there in reliance on the letter). Courts examining cases involving misrepresentations have, in fact, often found that the situs of injury is New York when the original reliance or other first event causing the injury occurs in New York, even if the defendant has never sent any misrepresentations into the state. *See, e.g.*, *Cleopatra*, 652 F.Supp. at 1256 (holding that misrepresentations made by defendant Fital in Italy, which were relied upon by a corporation in New York to buy certain mascara products, caused injury in New York); *Cavalier Label Co. v. Polytam, Ltd.*, 687 F.Supp. 872, 879 (S.D.N.Y.1988) (holding that although "defendant's principals allegedly made the representations when they were in Israel, and during a meeting of the parties in Italy ... Plaintiff has adequately alleged injury within the state [for § 302(a)(3) purposes] by asserting the loss of New York customers"). Under the situs-of-injury test, the "original event" that caused the economic harm to BBL was thus the disbursement of the funds, and BBL's injury occurred in New York for § 302(a)(3) purposes.

***793** Fiddler tries to avoid § 302(a)(3) jurisdiction by arguing that the location of injury in this case should be determined not by means of the situs-of-injury test but rather under this Court's holding in *American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp.*, 439 F.2d 428 (2d Cir.1971). Fiddler reads *American Eutectic* as standing for the proposition that with regard to commercial torts, the location of injury should be determined not by finding the "original event that causes the injury" but on the basis of where "the critical events associated with the dispute took place." *Id.* at 433. Fiddler misreads our holding in *American Eutectic.* In *American Eutectic,* we examined a tort of unfair competition and held that the situs of injury was the place where the plaintiff *lost business,* which is a holding completely consistent with *Sybron* and with our present analysis of § 302(a)(3). In fact, we noted in *American Eutectic* that there might even be injury in New York when a defendant's loss of customers occurs *outside* the state, so long as "the discernible local impact of the commercial injury to plaintiff" in New York is great enough. *Id.* at 435. After we decided *American Eutectic,* the New York Court of Appeals also explicitly held that the situs-of-injury test applies to "commercial torts [, even] ... where the locus of injury is not as readily identifiable as it is in torts causing [ordinary] physical harm." *Sybron*, 46 N.Y.2d at 205, 413 N.Y.S.2d 127, 385 N.E.2d 1055. *American Eutectic* thus does nothing to bar application of the situs-of-injury test to

commercial torts like the ones alleged in this case.

Meeting the situs-of-injury test is, however, not enough to establish jurisdiction under § 302(a)(3). A plaintiff must also meet one of two additional sets of requirements: under subpart (i), that the defendant "regularly ... solicit[ed] business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered" in New York; or under subpart (ii), that the defendant "should [have] reasonably expect[ed] the [tortious] act to have consequences in the state and derive[d] substantial revenue from interstate or international commerce."

Because the district court denied § 302(a)(3) jurisdiction after finding that the injury alleged in this case occurred outside of New York, the court never addressed the additional requirements for jurisdiction under subparts (i) or (ii) of this subsection. It is, moreover, unclear from the record whether discovery was ever fully completed on these issues. Further proceedings are therefore necessary to determine whether BBL can establish jurisdiction under § 302(a)(3), assuming that a tort has been adequately alleged.

(4) Aider and Abettor and Co-Conspirator Doctrines

BBL also argues that personal jurisdiction is warranted under the common law co-conspirator and aider and abettor doctrines. The district court was correct to conclude that these doctrines "are not pertinent because the complaint does not allege that defendant conspired with, or aided and abetted, anyone (including Chase, which plaintiff seems to have in mind)." *Bank Brussels Lambert*, 1998 WL 182434, at *2. BBL also points to nothing other than conclusory statements to support the existence of a conspiracy or aider and abettor relationship. *See Lehigh Valley Indus., Inc. v. Birenbaum*, 527 F.2d 87, 93 (2d Cir.1975) ("New York law seems to be clear that the bland assertion of conspiracy or agency is insufficient to establish jurisdiction [under the co-conspirator and aider and abettor doctrines]."); *see also Lamarr v. Klein*, 35 A.D.2d 248, 250-51, 315 N.Y.S.2d 695 (1st Dep't 1970) (holding that conclusory statements about defendant's role in conspiracy were insufficient to establish jurisdiction under the co-conspirator doctrine). Jurisdiction is therefore inappropriate under these common law doctrines.

***794 CONCLUSION**

For the reasons discussed, we affirm the district court's denial of personal jurisdiction over Fiddler on the basis of C.P.L.R. § 302(a) subsections (1) and (2) and under the common law aider and abettor and co-conspirator doctrines. We find, however, that (assuming *arguendo* that there has been a tort) the injury alleged in this case took place in New York, where BBL first disbursed its funds in connection with the RCA transaction, and that the district court therefore denied § 302(a)(3) jurisdiction on an erroneous ground. We also note, however, that Fiddler may have had a duty not to disclose to BBL information received from another client in another representation. Consequently, BBL may not have averred sufficient facts to establish a tort in this case, as is required for jurisdiction under § 302(a)(3). We therefore remand to determine whether BBL has sufficiently averred an actionable tort, whether the requirements for jurisdiction under subparts (i) or (ii) of § 302(a)(3) have also been met, and, if both of these questions are answered in the affirmative, whether an exercise of jurisdiction in this case would comport with federal due process requirements.

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Briefs and Other Related Documents (Back to top)

• 1998 WL 34094085 (Appellate Brief) Brief for Defendant-Appellee (Aug. 19, 1998)Original Image of this Document (PDF)

• 1998 WL 34094150 (Appellate Brief) Brief for Plaintiff-Appellant (Jul. 23, 1998)Original Image of this Document (PDF)

• 98-7706 (Docket) (May. 18, 1998)

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2005-02

CONFLICTS ARISING SOLELY FROM POSSESSION OF CONFIDENTIAL INFORMATION OF ANOTHER CLIENT

TOPIC: Conflicts of Interest; Duty of Confidentiality

DIGEST: The fact that a lawyer possesses confidences or secrets that might be relevant to a matter the lawyer is handling for another client but the lawyer cannot use or disclose does not without more create a conflict of interest barring the dual representation. The critical question is whether the representation of either client would be impaired. In particular, the lawyer has a conflict if the lawyer cannot avoid using the embargoed information in the representation of the second client or the possession of the embargoed information might reasonably affect the lawyer's independent professional judgment in the representation of that client. Whether that is the case depends on the facts and circumstances, including in particular the materiality of the information to the second representation and whether the information can be effectively segregated from the work on the second representation.

Whether the conflict can be waived depends on whether the lawyer can disclose sufficient information to the affected client to obtain informed consent and whether a disinterested lawyer would believe that the lawyer's professional judgment would not in fact be affected by possession of the information. If the lawyer is required to withdraw from the representation, the lawyer may not reveal the information giving rise to the conflict. Co-client representations present different considerations that are not addressed in this opinion.

CODE: DR 2-110(B)(2), Canon 4, DR 4-101, EC 4-5, DR 5-101, DR 5-105, DR 5-108, EC 5-1, Canon 6, Canon 7, DR 7-101, EC 7-1.

QUESTION: Where a lawyer has confidential information acquired in the course of the representation of one client that would be useful to another client, but their interests are not otherwise in conflict, can the lawyer continue the representation of the second client? If so, may the lawyer use the information in representing the second client? Must the lawyer do so?

DISCUSSION:

In the course of representing one client a lawyer may acquire information that would be of use to another current or future client, even when the interests of the two clients are not otherwise in conflict, in situations in which the lawyer is under an obligation not to disclose the information to the second client or use the information for the second client's benefit. For example:

Scenario 1: A lawyer represents the underwriters in a securities issuance and in the course of due diligence learns confidential information about the issuer. The lawyer owes a duty to the lawyer's clients, the underwriters, arising out of the underwriters' duties to the issuer, to keep the information learned about the issuer in due diligence confidential. After the securities issuance is completed, a long-time client requests the lawyer's assistance in seeking to acquire or enter into a transaction with the issuer. May the lawyer undertake the representation of the acquirer?

Scenario 2: A law firm represents an insurer in determining whether a claim by Company A for legal fees incurred in connection with an ongoing regulatory investigation is covered by Company A's "directors and officers" insurance policy. In that connection Company A supplies information about the investigation to the insurer's law firm under an understanding that the lawyers and the insurer will keep the information confidential. The law firm is then approached by regular Client B for assistance in forming a potential joint venture with Company A to which Company A will contribute the business being investigated by the regulators. May the law firm undertake the representation of Client B?

Scenario 3: A lawyer represents a state transportation agency in connection with planning a new rail line. To avoid land speculation, the agency insists that its deliberations about the route of the rail line be kept confidential. Another client asks the lawyer to assist it in acquiring one of several parcels of land in the general direction of the rail line. May the lawyer undertake the representation of the land purchaser?

Use or Disclosure of Confidences and Secrets of One Client for the Benefit of Another

We discuss first the questions of whether the lawyer may, or must, use information from the first representation for the benefit of the client in the second.

A lawyer has a duty to represent a client "zealously within the bounds of the law." Canon 7. This duty includes the duty to use all available information for the benefit of the client and to disclose to the client information that the lawyer possesses that is relevant to the affairs as to which the lawyer is employed and that might reasonably affect the client's conduct. N.Y. State 555 (1984); *Spector v. Mermelstein*, 485 F.2d 474, 479 (2d Cir. 1973); ABA MODEL RULES OF PROF'L CONDUCT R.1.3 cmt. 1, rule 1.4, rule 1.7 cmt. 31 (2003); RESTATEMENT (SECOND) OF AGENCY § 381 (1957); Geoffrey C. Hazard, *The Would-Be Client II*, NAT'L L.J., Jan. 29, 1996, at A19. It is clear, however, that the duty to use available information for the benefit of a client is qualified by duties of confidentiality to others, and in particular to other clients.

DR 7-101(A)(1) requires a lawyer "to seek the lawful objectives of the client through reasonably available means permitted by law *and the Disciplinary Rules*." (Emphasis added.) EC 7-1 likewise states, "The duty of a lawyer . . . is to represent the client zealously within the bounds of the law, *which includes Disciplinary Rules and enforceable professional obligations*." (Emphasis added.) Among the enforceable professional obligations set forth in the Disciplinary Rules is the duty not to use a confidence or secret for the advantage of any third person unless the client consents. DR 4-101(B)(3); DR 5-108(A)(2). It is thus clear that a client has no legitimate expectation that a lawyer will use confidential information of another client for the first client's benefit. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. d (2000) (hereinafter, "RESTATEMENT") ("Sometimes a lawyer may have a duty not to disclose information [to a client], for example because it has been obtained in confidence from another client . . . ."); N.Y. City 2001-1 (holding that a lawyer may not use information imparted by a prospective client for the benefit of an existing client, and noting that "there are many circumstances where a lawyer comes into possession of an adverse party's information and cannot use it"); ABA Formal Op. 358 (1990) ("It is not reasonable . . . for an existing client to expect that the lawyer will use, in connection with the representation, information relating to the representation of another client or a would-be client to the disadvantage of the other client."); N.Y. State 555 (1984) ("generally, the lawyer has no duty (and, indeed, no right) to disclose to one client confidential information learned from, or in the course of representing, another client"); N.Y. City 108 (1928-29) (holding that lawyer who had represented a creditor with an uncollected judgment could thereafter represent the debtor against another creditor "if the attorney does not divulge or use the secrets or confidence of his former client").

This conclusion is supported by the rules governing when a client is charged with a lawyer's knowledge. While a client is usually charged with a lawyer's knowledge relating to a representation, "[a] client is not charged with a lawyer's knowledge concerning a transaction in which the lawyer does not represent the client." RESTATEMENT § 28 cmt. b. *See also* RESTATEMENT (SECOND) OF AGENCY § 272 (1958) (providing that liability of a principal is affected by the knowledge of an agent "concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information").

This does not mean that a lawyer cannot use *any* information learned in one representation for the benefit of another client. Indeed, what a lawyer learns in a representation necessarily becomes part of the storehouse of knowledge and experience that the lawyer may draw on in the lawyer's career and that is part of the value the lawyer brings to each successive representation. We do not here attempt to define what information may not be used in a subsequent representation absent consent, beyond noting that, in general, any prohibition on using for one client's benefit information gained in representing another extends only to "confidences" and "secrets." *See* DR 4-101(B)(3); DR 5-108(A)(2). It is clear that not all information gained in the course of the professional relationship is either a "confidence" or a "secret." A "confidence" is information protected by the attorney-client privilege; a "secret" is information gained in the professional relationship that the client has, explicitly or implicitly, "requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A). *See also* RESTATEMENT § 60 cmt. j (permissible to use one client's confidential information for the benefit of another client if no "material risk of harm to the original client"); ABA MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 5 (2003) ("The Rule does not prohibit uses that do not disadvantage the client.").

Conflicts Created by Possession of Information from Another Representation

The next question is whether a conflict arises where a lawyer has confidential information of one client that would be of use to, but cannot be disclosed to, or used for the benefit of, another client. We are not considering situations in which the clients' interests are otherwise in conflict with respect to the matter, because then the lawyer would generally not be able to represent the two clients at all. If they are concurrent clients, DR 5-105 bars the lawyer from representing one against the other, absent consent. If the confidential information was acquired in the representation of a former client and would be useful to a current client whose interests are adverse to the former client, the two matters will often be substantially related so as to preclude the current representation (again, absent consent) under DR 5-108(A). *See, e.g.*, N.Y. State 723 (1999) ("The most important factor [in determining whether two matters are substantially related] is whether the . . . lawyer did or could have obtained confidences and secrets in the former representation that should be used against the former client in the current representation."). 1

The scenarios set forth at the outset of this opinion each present this question. In the first, the lawyer represented the underwriters in the first representation and is adverse to the issuer in the second. The lawyer is not adverse to his former clients, because at the time of the second representation, the underwriters (unless they are involved in the second matter as well) are indifferent to whether the acquirer or counterparty succeeds or not 2. But the lawyer has confidential information about the issuer that may be used against the issuer in representing the acquirer or counterparty. For example, the lawyer may have reviewed and kept copies of projections of financial results that would be useful to an acquirer or counterparty in deciding what price to bid or offer. Or the lawyer may have learned very damaging information --such as the prospect of indictment --that caused the earlier securities issuance not to go forward. While the acquirer or counterparty might eventually learn that information in the course of due diligence in the second transaction, having it earlier in the sales process might be useful. That information cannot, however, be disclosed because of the underwriters' demand (derived

from undertakings to the issuer and from the securities laws) that their lawyer not disclose due diligence information not otherwise disclosed in the prospectus.

Similarly in the second scenario, the insurance company may acquire relatively detailed information about the insured that might be useful to the acquirer (*e.g.*, the significance of the investigation, the insurance company's position on coverage). The insurance company may be indifferent to whether the business is transferred to the joint venture. In the third scenario, the lawyer is likely to know in advance of the general public the precise route of the rail line, information that would be very valuable if known to the land purchaser. 3

Conflicts Created by Possession of Information in Concurrent Representations

The Code expressly addresses whether the simultaneous or successive representations of clients results in a conflict of interest that would bar representation of one or both clients in two provisions: DR 5-105, dealing with conflicts between current clients, and DR 5-108, dealing with conflicts between a current client and a former client. In addition, DR 2-110(B)(2), which requires withdrawing from a representation if "continued employment will result in violation of a Disciplinary Rule," and DR 5-101, which addresses conflicts of interest arising from personal interests of a lawyer, play a role.

Under DR 5-105, a conflict arises between concurrent clients if the concurrent representation would "involve the lawyer in representing differing interests" or if "the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected."

The mere fact that the lawyer possesses information from another representation that would be useful to the client is not the representation of "differing interests." This is because, as set forth above, the second client does not have any legitimate expectation that the lawyer will use confidential information of the first client for the benefit of the second. 4

There are situations, however, where information that the lawyer has in his or her mind from the first representation is so material to the second representation that the lawyer cannot avoid using the information. In that situation, the lawyer can be said to represent "differing interests" in the sense that the representation of one client cannot be accomplished without violating the rights of another. Alternatively the lawyer can be said to be unable to proceed under DR 2-110(B)(2), because continued employment will mean violating a disciplinary rule, namely the requirement of DR 4-101(B)(3) that a lawyer may not use a confidence or secret for the advantage of another client. Regardless of how the conflict is characterized, the lawyer cannot proceed unless one client agrees to permit disclosure and use of the information or, in some circumstances, the other client agrees to limit the scope of the engagement. This last point is discussed further below.

Scenario 3 illustrates this problem. If the lawyer learns the precise routing of the rail route in advance of the public but at a time when it would be useful to the prospective land purchasing client, the lawyer could not pretend not to know that information in advising the client on which parcel to buy. 5

The second test set forth in DR 5-105 is whether the lawyer's exercise of independent professional judgment, which must be exercised zealously in the interests of the lawyer's client, will be or is likely to be adversely affected by the lawyer's possession of the information and the restriction on its disclosure or use. The issue is that a lawyer may steer so far clear of disclosing or using the embargoed information that the lawyer will not pursue other avenues that another lawyer might pursue to obtain the information. The lawyer, for example, may not recommend a course of conduct that he or she otherwise might, or not investigate a situation, for fear that the impetus was tainted by confidential information. The Los Angeles Bar Association explained this concept in responding to an inquiry in

which the lawyer knew facts about former Client A's dishonesty that would be highly material to Client B, who was contemplating entering into a transaction with Client A:

Knowing of A's dishonesty, Law Firm might be tempted to recommend that B take special precautions to protect itself, but would be forbidden from using A's confidences to its detriment in this manner. Thus, Law Firm would constantly have to second-guess whether its advice to B was affected by Law Firm's secret knowledge of A's dishonesty. As the court stated in *Goldstein v. Lees*, 46 Cal. App. 3d 614, 620 (1975): "It is difficult to believe that a counsel who scrupulously attempts to avoid the revelation of former client confidences --i.e., who makes every effort to steer clear of the danger zone --can offer the kind of undivided loyalty that a client has every right to expect and that our legal system demands."

Los Angeles Formal Op. 463 (1990). 6 *See also In re Compact Disc Minimum Advertised Price Antitrust Litig.*, MDL No. 1361, 2001 WL 243494, at *3 (D. Me. Mar. 12, 2001) (holding that law firm in consumer class action against retailers had a conflict where firm had undertaken not to sue or seek discovery from former retailer client, or use information obtained in that representation, because those undertakings "carry the distinct potential of reducing [the law firm's] effectiveness in representing the putative consumer plaintiff class vigorously"); N.C. Formal Op. 2003-9 (2004) (holding that lawyer had a conflict where lawyer could not use information from prior representation of another plaintiff against the same defendant because the "[a]ttorney's failure to use Plaintiff's confidential information would materially limit his representation of the other employees").

Under either test, whether the possession of the information will create a conflict will depend on the totality of the circumstances. A critical factor is the materiality of the information to the second representation. The more material the information, the more likely that a lawyer cannot avoid using it or, at least, that the lawyer's professional judgment on behalf of the client may be affected by knowledge of it. One element of materiality is whether the information in question would be uncovered in the ordinary course of the other matter. If so, then the information would be material only if it was important to have the information earlier than it would have been obtained in the ordinary course. In Scenarios 1 and 2, it may be that the information possessed by the lawyer from the prior due diligence and from the insurance company representation would inevitably be sought in conducting due diligence for the first transaction (either because there are standard questions that would uncover the information or because publicly available information about the target would signal the need to make such inquiry). 7 In that case, unless when the information is known is important, the possession of the information would not likely affect the representation. In Scenario 3, however, the value of the information about the rail routing is in its early possession, so the fact that the routing will eventually be public would not mitigate the conflict presented.

A second factor is the ease with which the information can be segregated from the work on the second matter to ensure that the information is not used. Here a significant consideration is the specificity of the information and whether it is of a kind that the lawyer will likely recall. The rail routing in Scenario 3 or the identity of the thief in N.Y. State 525 are examples of information that, once learned, cannot be pushed from the mind. The existence of financial projections in due diligence files that were not focused on in the earlier matter and are not recalled is unlikely to have any effect on the lawyer's judgment as long as the lawyer does not look at the files and the files are effectively sealed.

Conflicts Created by Possession of Information of a Former Client

The Code's rule with respect to former clients --the situation presented by Scenario 1 --does not include a provision that refers to the effect on the independent judgment of the lawyer in representing the current client. DR 5-108 contains two prohibitions: the lawyer may not represent a client "in the same or a substantially related matter in which that person's interests are materially adverse to the

interests of the former client"; and the lawyer may not "[u]se any confidences or secrets of the former client." In the situations we are considering, there is no conflict because the clients' interests are aligned or not adverse. While DR 5-108 does not itself contain a provision barring representation where the exercise of professional judgment would be affected because of duties to a former client, we believe that the same test of whether possession of the information might have an effect on the lawyer's judgment applies by virtue of DR 5-101. That rule bars a lawyer (absent consent) from accepting or continuing employment "if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests." If the lawyer's professional judgment on behalf of a client would be affected by knowledge of information from a prior representation that the lawyer cannot use or disclose, that is a "personal interest" under DR 5-101. *See* N.Y. State 628 (1992) (holding that lawyer has a conflict under DR 5-101 if his professional judgment in behalf of a client would be affected by possession of information arising out of a prior representation). *Cf.* ABA Formal Op. 358 (holding that where lawyer has information derived from a prospective client, "[t]he principal inquiry . . . is whether, as a result of the lawyer's duty to protect the information relating to the representation of the would-be client, the lawyer's representation of the existing client may be materially limited"). 8

Contrary Reasoning in Ethics Opinions and Court Cases

We are aware that there is language and reasoning in ethics opinions and some court cases that treat the mere possession of information that might be of use to one client, but that is protected as a confidence or secret, as creating a conflict requiring withdrawal. *See*, *e.g.*, N.Y. State 605 (1989) ("'absent considerations of waiver or client consent, no lawyer may ever undertake to represent an adverse party where information acquired in the course of a prior representation might be used to his former client's detriment'") (citation omitted); N.Y. State 492 (1978) (same). *See also Bank of Tokyo*, 650 N.Y.S.2d at 665 ("Absent a substantial relationship between the two matters, the party seeking disqualification must demonstrate that the attorney received confidential information about the party that is 'substantially related' to the current litigation."). As noted above, many of these authorities address situations in which the interests of the two affected clients are adverse (beyond the interest in having access to the information in question), and thus the results, or tests discussed, can be understood as elaborations of the basic conflicts rules. One of these opinions, however, N.Y. State 638 (1992), explains these results in terms that conflict with our analysis here. In addressing conflicts arising from possession of information derived from a former client, that opinion states:

[I]f Lawyer possesses a confidence and secret within the meaning of DR 4-101(A), which is not otherwise permitted to be disclosed by one of the several preconditions of DR 4-101(C), but which nevertheless must be used under Canon 7 to discharge faithfully and zealously the current proposed representation in a governmental capacity, Lawyer unquestionably cannot represent the government zealously under Canon 7 without violating DR 5-108(A)(2) and DR 4-101(B). . . . Zealous representation by the prosecutor would require disclosure, DR 7-101(A)(1), but DR 5-108(A)(2) and DR 4-101(B) would prohibit disclosure.

We believe this analysis ignores the express qualification of DR 7-101 that limits the obligation of zealous representation by duties contained elsewhere in the disciplinary rules, including the duty of confidentiality under Canon 4. 9 Moreover, the implications of such an analysis are boundless, because the duty to use information for the benefit of a client is very broad. It makes little sense to disqualify a lawyer because he or she has information that might be useful to the second client, regardless of materiality or significance. A more sensible result, at least where the interests of the clients are not adverse, and one more faithful to the language of the Code, (1) recognizes that lawyers regularly have information that they cannot use for the benefit of a client, and (2) focuses on the effect that possession of the information has on the representations in question.

The United States Court of Appeals for the Second Circuit also suggested an expansive test in *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779 (2d Cir. 1999), and *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120 (2d Cir. 2002), but there were in that case conflicts of interest and other factors that distinguish it from the situations addressed in this opinion. In that case, a bank consortium that included both Bank Brussels Lambert and Chase Manhattan Bank (as agent for the lending group) hired a Puerto Rican law firm to provide an opinion letter with respect to security the banks were obtaining as part of a loan transaction. During the representation, the law firm allegedly learned in the context of an unrelated representation of Chase that the borrower had been manipulating the borrower's accounting procedures and financial reports. In the context of a ruling on personal jurisdiction over the Puerto Rican law firm, the court affirmed the district court's holding that, under the Puerto Rico Canons of Professional Ethics, the law firm would have a conflict that required it to withdraw if it learned in the course of one representation information that would be material to another representation that it could not disclose to the second client. 305 F.3d at 125-26. 10 The Second Circuit suggested that the result would be the same under New York law. *Id*. at 125.

We note that the parties had not argued the law of New York or any jurisdiction other than Puerto Rico. *Id*. at 125. 11 But in any event, under the allegations recounted in the opinions, the law firm may have had a conflict of interest that would have necessitated withdrawal regardless of possession of information of use to Bank Brussels Lambert, since the plaintiff alleged that the law firm had "helped" Chase prepare documents "in order to sanitize the record of these activities." 171 F.3d at 783-84. 12 Even without this factor, however, it appears that the information allegedly withheld -that the clients' borrower was engaged in accounting fraud --may have been so material that the firm could not have continued the representation under the standards applied in this opinion.

Consent to Waive Conflict Created by Possession of Information

If there is a conflict, the question becomes whether the conflict is consentable. This will typically turn on two questions: whether sufficient information can be disclosed to each of the clients to obtain their informed consent; and whether a disinterested lawyer would conclude that the representation of each current client would in fact not be adversely affected by possession of the information. *See* DR 5-101; DR 5-105(C).

As to the first question, the ability to obtain consent may be hampered by the inability to disclose the information in question. In Scenario 2, for example, if the fact that the joint venture is being considered is itself confidential, the lawyer could not approach the insurance company for permission to use the information derived from the earlier representation.

The second test for consent is different from the second test for whether a conflict exists that is discussed above because the test for whether a conflict exists is whether the lawyer's professional judgment will be or might be affected, DR 5-101(A) ("will be or reasonably may be"); DR 5-105(A) ("will be or is likely to be"), while the test for whether the conflict is consentable is whether a disinterested lawyer would believe the representation would not in fact be adversely affected, DR 5-101(A) ("a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby"); DR 5-105(C) ("a disinterested lawyer would believe that the lawyer can competently represent the interest of each").

One other resolution of the conflict would be to limit the scope of the representation of the affected client going forward. This would require the informed consent of the client, to the extent that can be accomplished without disclosure of the protected information. N.Y. City 2001-3 ("In this connection, it is critical that the client whose engagement is being limited fully understands the implications of the limitation, including any restriction on communication with any separate counsel and the impact, if any, on the cost of handling the matter.").

Duties in Withdrawing from the Representation

If the possession of information that may create a conflict is identified at the outset of the representation, the lawyer must either obtain consent or decline the representation. If the lawyer declines the representation there will be no need to disclose the reason for the conflict. If the lawyer comes into possession of the information during the representation, or if the information becomes material only during the representation, and consent cannot be obtained, the lawyer must withdraw (or, in the case of matters before a tribunal, seek to withdraw) from the affected representation. DR 2-110(B)(2) (requiring withdrawal if "[t]he lawyer knows or it is obvious that continued employment will result in violation of a Disciplinary Rule").

The question of what the lawyer can or must say to the affected client upon withdrawing has arisen in the context of co-client representations and has split the authorities that have considered it. In N.Y. State 555 (1984), a majority of the New York State Bar Association ethics committee held that where one partner in a joint representation discloses to the lawyer in confidence that he was "actively breaching the partnership agreement," the lawyer could not disclose the information to the other co-client. A minority dissented, opining that the lawyer has the discretion, if not duty, to disclose the information in the course of withdrawing. The Restatement adopted the position of the New York State Bar minority. The Restatement concludes:

In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose. Beyond such a limited warning, the lawyer, after consideration of all relevant circumstances, has the further discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy.

RESTATEMENT § 60 cmt. *l*.

Whatever may be the correct result in the co-client situation, the Code does not contemplate an exception to the duty of confidentiality simply because the information may be highly relevant to another client. Rather, as we have said, the duty to use all available information for the benefit of the client is qualified by obligations of confidentiality to others. We conclude that where a lawyer is forced to withdraw from a representation because the lawyer cannot disclose or use material information of another client's, the lawyer is not at liberty to disclose the information. The lawyer should simply state that a conflict has arisen that requires withdrawal for professional reasons. As long as doing so does not effectively disclose the information, the lawyer may state that he or she has acquired information that raises a conflict that requires the lawyer to withdraw. Where identifying the client that "created" the conflict is not tantamount to disclosing the information, that client may be revealed.

CONCLUSION

In the course of representing clients, lawyers frequently come into possession of information that would be of use to other clients but that they cannot use for the latter clients' benefit. The possession of that information does not, without more, create a conflict of interest under the Code. The critical question is whether the representation of either client would be impaired. In particular, the lawyer has a conflict if the lawyer cannot avoid using the embargoed information in the representation of the

second client or the possession of the embargoed information might reasonably affect the lawyer's independent professional judgment in the representation of that client. Whether that is the case will often depend on the materiality of the information to the second representation and the extent to which the information can be effectively segregated from the work on the second representation. Even if the lawyer has a conflict, it may be possible in certain circumstances for the clients to waive the conflict without revealing the information in question. If the lawyer must withdraw, the lawyer should not reveal the embargoed information.

Dated: March, 2005

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1
We are aware of a number of court cases and older New York State ethics opinions that apply a two-part test to determine whether a conflict exists where a lawyer represents clients whose interests are adverse to those of a former client: whether the matters are substantially related and whether the lawyer received information in the prior representation that is substantially related, or of "use," to the present representation. *See, e.g., Nomura Sec. Int'l, Inc. v. Hu*, 658 N.Y.S.2d 608, 610 (App. Div. 1st Dept. 1997); *Bank of Tokyo Trust Co. v. Urban Food Malls Ltd.*, 650 N.Y.S.2d 654, 665 (App. Div. 1st Dept. 1996); N.Y. State 638 (1992); N.Y. State 628 (1991); N.Y. State 605 (1989); *see also* N.Y. State 492 (1978). As we discuss below, while we question the language and reasoning of one of the New York State ethics opinions, these cases and opinions address situations in which the interests of the lawyer's second client were clearly adverse to the interests of the first. Where that was not the case the court found no conflict. *See Nomura Sec.*, 658 N.Y.S.2d at 609-10 (noting that former client was merely a witness, not a party, and that his interests were in harmony with present client's). These cases and opinions thus do not present the question addressed in this opinion. To the extent they bear on interpretation of the Code, they may be seen as relating to the breadth of the "substantial relationship" test in DR 5-108.

2
See, e.g., Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc. , 82 Cal. Rptr. 2d 326, 332 (Ct. App. 1999) (reversing disqualification of underwriter's counsel in later lawsuit between underwriter and issuer because underwriter's counsel never represented issuer). A recent New York case concluded that the lawyer for the underwriter has fiduciary obligations toward the issuer that could result in disqualification from a later suit brought by the law firm against the issuer if the information the law firm obtained in due diligence was substantially related to the issues involved in the litigation. *HF Management Services, LLC v. Pistone*, Index No. 602832/04 (Sup. Ct. N.Y. Co. Feb. 16, 2005). A lawyer may wish to establish a clear understanding with the issuer that its possession of information of the non-client that is not used in any later representation would not constitute a conflict or lead to disqualification.

3
The example in the third scenario may not be perfect, because at least in some situations the state's interests in avoiding speculation and the purchaser's interest in picking the right parcel might be so directly adverse that they would give rise to a conflict even if the lawyer did not have access to inside information about the routing of the rail line.

4
We do not address in this opinion the situation of jointly represented co-clients, who often do have an expectation that all confidences and secrets relating to the joint representation will be shared. *See* N.Y. City 1999-7 (noting "the lack of any expectation by joint clients that their confidences concerning the joint representation will remain secret from each other"); N.Y. State 761 (2003) ("In a joint representation all confidences and secrets are deemed to be shared absent agreement of the co-clients to the contrary."); RESTATEMENT § 60 cmt. *l* ("Sharing of information among co-clients with respect to the matter involved in the representation is normal and typically expected."). *But see* N.Y. City 2004-2, text accompanying n.9 (holding that absent consent, lawyer "may not be able to pass on [to corporate client] the confidences and secrets of [the lawyer's] employee client"). In such situations, it may be that if one co-client discloses information to the lawyer

but demands that the lawyer keep the information from the other co-client, the lawyer will be representing differing interests and will not be able to continue the representation. *See*, *e.g.*, RESTATEMENT § 60 cmt. *l* ("The lawyer cannot continue in the representation without compromising either the duty of communication to the affected co-client or the expectation of confidentiality on the part of the communicating co-client. Moreover, continuing the joint representation without disclosure may mislead the affected client . . . ."); ABA MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 31 (2003); N.Y. State 761 (2003). *See also* N.Y. City 2004-2 (opining that lawyer representing co-clients should have a clear understanding with both clients, *inter alia*, "whether and what kind of confidential information will be shared" and what will happen if a conflict arises). *Cf. Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1185 (Fed. Cir. 1995) (noting the "apparent conflict" between an attorney's obligations to the Patent Office and the attorney's confidentiality obligations where attorney represents two clients seeking patents in closely related technologies that might have been prior art for each other).

5
Another example is presented by the scenario in N.Y. State 525 (1980). There, a lawyer had been consulted by a client about a theft. Thereafter, an employee of the client in seeking to hire the lawyer confessed to the lawyer that he, the employee, committed the theft. In this situation, the lawyer has a conflict in representing both clients even absent the confession, because the clients clearly have differing interests with respect to the theft. But even if that were not the case --if, for example, the thief were not a prospective client but instead a former employee of another client --the lawyer could not pursue an investigation of the theft without using the fact that the thief had confessed to the theft, yet (in our hypothetical) that information is embargoed.

6
In the Los Angeles opinion, the interests of former Client A and current Client B were clearly adverse, so there would likely have been a conflict under New York's rules regardless of the possession of information, but the discussion of the potential detrimental effect of the possession of information on the representation of Client B applies as well when the interest of the clients are not adverse.

7
In securities issuances, for example, the underwriter will inevitably conduct due diligence. *See* 15 U.S.C. § 77k(b)(3) (providing the underwriter with a defense to liability for material misstatements in a registration statement if it performs a reasonable investigation to ensure that all necessary disclosures were made).

8
Another source of such a test in a former-client situation would be a combination of Canon 6 (requiring a lawyer to represent a client "competently"), Canon 7 (requiring a lawyer to represent a client "zealously within the bounds of the law") and DR 2-110(B)(2) (requiring a lawyer to withdraw if continued employment would violate a disciplinary rule). Indeed, N.Y. State 628, the opinion referred to above in connection with the discussion of DR 5-101, also suggests elsewhere in the opinion that the source of the test in the case of former clients is Canons 6 and 7: "A lawyer possessing such confidences and secrets of the former client must evaluate whether such possession impairs his or her professional obligation to represent the current client competently and zealously within the meaning of Canon 6 and Canon 7" (also citing EC 5-1).

9
The opinions also cite EC 4-5 (*e.g.*, N.Y. State 605), the last sentence of which states, "Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, *and no employment should be accepted that might require such disclosure*." (Emphasis added.) This expansive interpretation of the EC, to mean that employment would "require such disclosure" where the information would be of use to the client, is inconsistent with the language of DR 7-101, which does not require disclosure of another client's confidences and secrets.

10
The Second Circuit said:
As the district court correctly noted, Puerto Rican courts have determined that a conflict may arise where, in the course of successive or simultaneous representations of clients, "the adequate representation of a subsequent or simultaneous client may require disclosure of the other client's confidences." [*Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, No. 96 Civ. 7233 (LMM), 2001 WL 893362, at *2 (S.D.N.Y. Aug. 8, 2001)] (quoting *In re Belen Trujillo*, 126 D.P.R. 743, 754 (1990) (English trans.)) Upon discovering such a conflict, the attorney must withdraw from the representation without divulging any confidential communications. *Id*.

305 F.3d at 125.

11
Indeed, the language from an earlier Puerto Rican Supreme Court decision on which the district court relied, *Belen Trujillo*, 126 D.P.R. at 754, was dictum.

12
In addition, Chase and Bank Brussels Lambert were co-clients of the law firm, and thus may have had a special duty of disclosure to each other, *see* note 4 *supra*. Whether such a heightened a duty would have extended to information obtained by one of the co-clients in a separate representation is open to question, however, and is a matter we do not address in this opinion.

PROBLEM SEVEN: CONFIDENTIALITY

You are an associate in a large firm. At a family holiday gathering, your brother-in-law, a corporate executive, complains that he was recently deposed by a very hostile lawyer in the course of an ongoing lawsuit involving his company. When he mentions the lawyer's name, you realize that your brother-in-law was deposed by a partner in your firm. You had been only dimly aware of the lawsuit.

When you return to work after the holiday, should you (and must you) say anything about this to the lawyers at your firm who are working on the litigation, or to others at the firm? If so, what (if anything) should the firm do?

See DR 5-101; DR 5-105(D) and (E).

their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of professional freedom.

EC 5-24 To assist a lawyer in preserving professional independence, a number of courses are available. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any of its directors, officers, or shareholders is a non-lawyer. Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his or her professional judgment from any non-lawyer. Various types of legal aid offices are administered by boards of directors composed of lawyers and non-lawyers. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and his or her individual client. Where a lawyer is employed by an organization, a written agreement that defines the relationship between the lawyer and the organization and provides for the lawyer's independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

DISICPLINARY RULES

DR 5-101 [§1200.20] Conflicts of Interest - Lawyer's Own Interests

A. A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

DR 5-102 [§1200.21] Lawyers as Witnesses.

A. A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, except that the lawyer may act as an advocate and also testify:

1. If the testimony will relate solely to an uncontested issue.
2. If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
3. If the testimony will relate solely to the nature and value of legal services

3. The client consents in writing, after full disclosure, to the terms of the transaction and to the lawyer's inherent conflict of interest in the transaction.

B. Prior to conclusion of all aspects of the matter giving rise to employment, a lawyer shall not negotiate or enter into any arrangement or understanding:

1. With a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the employment or proposed employment.
2. With any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of employment by a client or prospective client.

DR 5-105 [§1200.24] Conflict of Interest; Simultaneous Representation

A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 1200.24](C).

B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105 [1200.24](C).

C. In the situations covered by DR 5-105 [1200.24](A)and (B), a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

D. While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under DR 5-101 [1200.20](A), DR 5-105 [1200.24] (A) or (B), DR 5-108 [1200.27] (A) or (B), or DR 9-101 [1200.45] (B) except as otherwise provided therein.

E. A law firm shall keep records of prior engagements, which records shall be made at or near the time of such engagements and shall have a policy implementing a system by which proposed engagements are checked against current and previous engagements, so as to render effective assistance to lawyers within the firm in complying with DR 5-105 [1200.24] (D). Failure to keep records or to have a policy which complies with this subdivision, whether or not a violation of DR 5-105 [1200.24] (D) occurs, shall be a violation by the firm. In cases in which a violation of this subdivision by the firm is a substantial factor in causing a violation of DR 5-105 [1200.24] (D) by a lawyer, the firm, as well as the individual lawyer, shall also be responsible for the violation of DR 5-105 [1200.24] (D).

DR 5-106 [§1200.25] Settling Similar Claims of Clients.

A. A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against the clients, unless each client has consented after full disclosure of the implications of the aggregate settlement and the advantages and risks involved, including the

PROBLEM EIGHT: CONFIDENTIALITY

Two former classmates who are associates at different law firms meet for lunch. Associate #1 says that he is working on an antitrust case and that the plaintiff, the firm's client, has hired a particular Nobel Prize-winning economist from the University of Chicago as an expert. Associate #1 says that he has been learning about the relevant economics principles and meeting with the expert to help prepare the expert disclosure, which is very heady stuff! Associate #2 knows about the case, because – unbeknownst to her friend – her firm is working in the background, assisting the firm that is serving as the defendant's trial counsel. Since expert disclosure has not yet been made, Associate #2 suspects that the lawyers at her firm who are working on the case do not know that the opposing party has hired the Nobel laureate as an expert. She suspects these lawyers would like to know anything else they could about the expert's prospective testimony.

May Associate #2 keep her friend talking? After lunch, may she (or must she) report what she has learned to the lawyers at her firm who are working on the case?

See DR 1-102(A)(4); DR 7-101(A)(1).

1-107 when so dealing with the non-lawyer. Thus, a lawyer advising a client in connection with a discharge of chemical wastes may engage the services of and consult with an environmental engineer on that matter without the need to comply with DR 1-107. Likewise, the requirements of DR 1-107 need not be met when a lawyer retains an expert witness in a particular litigation.

EC 1-18 Depending upon the extent and nature of the relationship between the lawyer or law firm, on the one hand, and the non-legal professional or non-legal professional service firm, on the other hand, it may be appropriate to treat the parties to a contractual relationship permitted by DR 1-107 as a single law firm for purposes of these Disciplinary Rules, as would be the case if the non-legal professional or non-legal professional service firm were in an "of counsel" relationship with the lawyer or law firm. If the parties to the relationship are treated as a single law firm, the principal effects would be that conflicts of interest are imputed as between them pursuant to DR 5-105(D), and that the law firm would be required to maintain systems for determining whether such conflicts exist pursuant to DR 5-105(E). To the extent that the rules of ethics of the non-legal profession conflict with these Disciplinary Rules, the rules of the legal profession will still govern the conduct of the lawyers and the law firm participants in the relationship. A lawyer or law firm may also be subject to legal obligations arising from a relationship with non-lawyer professionals who are themselves subject to regulation.

DISCIPLINARY RULES

DR 1-101 [§1200.2] Maintaining Integrity and Competence of the Legal Profession.

A. A lawyer is subject to discipline if the lawyer has made a materially false statement in, or has deliberately failed to disclose a material fact requested in connection with, the lawyer's application for admission to the bar.

B. A lawyer shall not further the application for admission to the bar of another person that the lawyer knows to be unqualified in respect to character, education, or other relevant attribute.

DR 1-102 [§1200.3] Misconduct.

A. A lawyer or law firm shall not:

1. Violate a Disciplinary Rule.
2. Circumvent a Disciplinary Rule through actions of another.
3. Engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer.
4. Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
5. Engage in conduct that is prejudicial to the administration of justice.
6. Unlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation. Where there is a tribunal with jurisdiction to hear a complaint, if timely brought, other than a Departmental Disciplinary Committee, a complaint based on unlawful discrimination shall be

EC 7-35 All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which the judge presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if such party is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or if there is none, to the opposing party. A lawyer should not condone or participate in private importunities by another with a judge or hearing officer on behalf of the lawyer or the client.

EC 7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent the client zealously, the lawyer should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining independence, a lawyer should be respectful, courteous, and above-board in relations with a judge or hearing officer before whom the lawyer appears. The lawyer should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC 7-37 In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

EC 7-38 A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client. A lawyer should follow local customs of courtesy or practice, unless he or she gives timely notice to opposing counsel of the intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

EC 7-39 In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law.

DISCIPLINARY RULES

DR 7-101 [§1200.32] Representing a Client Zealously.

A. A lawyer shall not intentionally:

1. Fail to seek the lawful objectives of the client through reasonably available means permitted by law and the Disciplinary Rules, except as provided DR 7-101 [1200.32] (B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client, by being punctual in fulfilling all

professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
2. Fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under DR 2-110 [1200.15], DR 5-102 [1200.21] and DR 5-105 [1200.24].
3. Prejudice or damage the client during the course of the professional relationship, except as required under DR 7-102 [1200.33](B) or as authorized by DR 2-110 [1200.15].

B. In the representation of a client, a lawyer may:
1. Where permissible, exercise professional judgment to waive or fail to assert a right or position of the client.
2. Refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR 7-102 [§1200.33] Representing a Client Within the Bounds of the Law.

A. In the representation of a client, a lawyer shall not:
1. File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
2. Knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
3. Conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.
4. Knowingly use perjured testimony or false evidence.
5. Knowingly make a false statement of law or fact.
6. Participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.
7. Counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.
8. Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

B. A lawyer who receives information clearly establishing that:
1. The client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.
2. A person other than the client has perpetrated a fraud upon a tribunal shall reveal the fraud to the tribunal.

DR 7-103 [§1200.34] Performing the Duty of Public Prosecutor or Other Government Lawyer.

A. A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause.

B. A public prosecutor or other government lawyer in criminal litigation shall