

## **Conflicts: Dealing with Multi-Party Issues**

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*I consider ethics, as well as religion, as supplements to law in the government of man. ~ Thomas Jefferson*

*Lawyers are the only persons in whom ignorance of the law is not punished. ~ JEREMY BENTHAM, The Canadian Bar Journal, Jun. 1966*

#### **I. The Model Rules of Professional Conduct**

##### **a. Preamble [9]**

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

#### **b. MRPC Rule 1.7. Conflict Of Interest: Current Clients**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

#### **Cases:**

- *Boston Scientific Corp. v. Johnson & Johnson, Inc.*, 647 F. Supp. 2d 369 (D. Delaware 2009). In *Boston Scientific*, the District Court in Delaware held that even though the law firm representing plaintiffs in a lawsuit was in violation of Rule 1.7, as that same law firm had done legal work for the defendant (or, as the court explained, some parent company or subsidiary within defendant's large corporate structure, with the question of which company that had received legal services remaining unanswered), that disqualification was not warranted. The court allowed the law firm to continue to represent plaintiffs because (i) the concurrent representation of the plaintiff and defendant by the large global law firm involved unrelated matters, and (ii) the lawyers working for the plaintiff in the lawsuit were based in Washington, D.C., while the lawyers working for the defendant on the unrelated matters were based in its European offices, and an "ethical wall" had been implemented between those two offices.

- *Craig v. Carrigo*, 340 Ark. 624 (2000). In *Craig*, the Arkansas Supreme Court held that an attorney could represent both the estate and a beneficiary. Under Arkansas law, "it is not necessarily a conflict of interest for an attorney to represent both the estate and the only devisee in the will." Furthermore, the court held that there was no showing of the dual representation being prejudicial to any of the other parties involved in the probate proceeding.

- *Galderma Labs, L.P. v. Actavis Mid Atlantic, LLC*, 927 F. Supp. 2d 390 (N.D. Texas 2013). “The communication necessary to obtain informed consent varies with the situation involved.” *citing* MRPC 1.0, comment 6. Client sophistication “is indeed relevant” to that analysis. Those clients who are “experienced in legal matters generally and in making decision of the type involved” will generally need less information and explanation than others, for the disclosure to be adequate for the client to give informed consent. Galderma – one of the “world’s leading dermatology companies” with annual sales of over 1.8 billion dollars, the filer of 5,500 patent applications, and global operations – was found to be a highly sophisticated client. Galderma was also found to be “sophisticated in its legal experience”, with its own legal department and general counsel, as well as outside counsel representing it in approximately a dozen different lawsuits across the U.S. Based on this level of sophistication and other factors, the court held that the prior informed consent that Galderma signed was an effective waiver of any later conflict claims.

- *El Camino Resources, Ltd. v. Huntington Nat. Bank*, 623 F. Supp. 2d 863 (W.D. Michigan 2007) (“*El Camino*”). In *El Camino*, two plaintiffs in a civil fraud action filed a motion to disqualify the firm representing the defendant, on the grounds that that same firm had a conflict of interest as it had an attorney client relationship with those parties. The defense firm tried to deflect the motion to disqualify by its showing that it had since made the decision to terminate its attorney/client relationship with the adverse party, and the now “former” representation wasn’t substantially related to the current lawsuit. The District Court in Michigan was not amused, and took issue with the defense firm’s breach of its duty of loyalty to the now “former” client, explaining that “[t]he courts universally hold that a law firm will not be allowed to drop a client in order to resolve a direct conflict of interest, thereby turning a present client into a former client.” The court went on to hold that “the status of the attorney/client relationship is assessed at the time the conflict arises, not at the time the motion to disqualify is presented to the court,” because otherwise, “the challenged attorney could always convert a present client into a ‘former’ client by choosing when to cease to represent the disfavored client.” Not to mention that by firing a current client solely to take on a new, more attractive client is a “dramatic form of disloyalty.” And, when the issue of a conflict of interest is raised with a current client, the “substantially related test is not applicable.” A law firm simply cannot represent a party that is adverse to any of its current clients, absent compliance with 1.7(b).

- Compare:

- *Ricciardi v. Sylvester Sheet Metal*, 1994 WL 406834 (D. New Hampshire 1994). The court in *Ricciardi* denied a motion to disqualify an attorney representing multiple defendants in a civil law suit surrounding allegations of sexual harassment in the workplace, finding that the “mere possibility” of a conflict in the representation of co-defendants is not sufficient to disqualify an attorney. In accord with the ABA Comments on the Model Rule, the court held that (1) the likelihood of a conflict between the co-defendants was minimal, and (2) the requirements of Rule 1.7(b) had been met because defense counsel advised her clients of the potential for a conflict and secured their consent to multiple representation. The motion to disqualify was denied.

With:

- *In Interest of Kahn*, 2015 WL 7739375 (Mem. Opin. Dec. 1, 2015) (Tex. App. – Houston [14th Dist.] 2015) (hereinafter, *Kahn*). In a commercial case with claims for breach of contract, fraud, conversion, and fraudulent transfer, a Texas court of appeals held that a serious risk of adversity was present among multiple defendants, **based on the language in the plaintiff’s live pleadings**. The plaintiff alleged that one of the named defendants had fraudulently transferred the Plaintiff’s investment funds to other named defendants. The court of appeals found that this mere allegation was sufficient to show that the defendants were adverse to one another. The attorney who

had entered an appearance as counsel for all defendants was disqualified from serving as counsel for *any of* the named defendants. (The court in *Kahn* did not address whether conflict waivers would have remedied the situation, nor was there any indication that defense counsel for the multiple defendants ever attempted to have waivers signed.)

- *Oneida Indian Nation v. County of Oneida*, 802 F.Supp.2d 395 (2011).

Three groups of Oneida Indian Nation brought an action against the State of New York and two counties, seeking redress for allegedly unlawful transfers of approximately 250,000 acres of ancestral land in central New York. Most of plaintiff's claims were dismissed. However, the law firm ("Law Firm") representing the Oneida Nation, filed a motion to have the Court recognize its right to collect its legal fees pursuant to a retainer agreement in connection with its previous representation of the Oneida Nation. The Court found that Law Firm was equitably entitled to its legal fees.

During the Court's deliberations, it determined that the Law Firm's duty to accept or decline representation did not violate any ethical standards by entering into the retainer agreement with Oneida Nation, even though the firm's attorneys, their family members, and their clients owned portions of the subject land, and where the parties to the suit agreed that the suits would only be brought against the State of New York and the two counties. Citing New York Rule 1200.24, the Court ruled the Law Firm did not have any direct or substantial stake in the outcome of the litigation, and the Law Firm specifically disclosed its limitations of its representation of the Oneida Nation in light of its obligations to other clients.

The Court stated that the Law Firm did not violate ethical standards by simultaneously representing the Oneida Indian Nation groups of New York, Wisconsin, and Canada in suits against the State of New York because all three groups had the same interest in procuring monetary compensation from New York at the time the parties entered into the retainer agreement with the Law Firm, and because the Law Firm had acquired written consent for joint representation from all three groups.

- *Kelley's Case*, 137 N.H. 314 (1993). This case arose out of Edgar Kelley's representation of Ms. Kendra Stanley and Ms. Anna Hamm, both being beneficiaries of a trust created by their father and funded through the residuary clause of their father's Will.

Ms. Stanley met with Mr. Kelley to discuss the estate. She was concerned about possible overreaching and undue influence exercised by a long-time employee of her father's who was a beneficiary under the Will, and a trustee of the trust established for the benefit of the Ms. Stanley and Ms. Hamm.

Mr. Kelley recommended a Will contest and suggested that the contest would be strengthened if Ms. Hamm joined in the suit. Ms. Hamm met with Mr. Kelley and his associate. She was informed that she had the right to waive the Will and take her statutory share of the estate. However, both Ms. Stanley and Ms. Hamm chose to move forward with the Will contest, and retained Mr. Kelley as their attorney. The fee agreement signed both clients provided that "Ms. Stanley and Ms. Hamm understand and agree that each retains Mr. Kelley in her respective individual capacity, that their interests are coincidental, but not identical." However, a few months later, Ms. Hamm exercised her right to waive the Will.

In the Probate Court, the executors of the Will objected to Mr. Kelley's joint representation of both Ms. Stanley and Ms. Hamm, and moved to disqualify Mr. Kelley and his associate because

Ms. Hamm's election to take her statutory share of the estate could have a "substantial negative impact upon a pour-over provision of the trust" which is the only source of benefits for Ms. Stanley.

In February, 1989, Ms. Stanley and Ms. Hamm each signed a memorandum stating: "Attorney Kelley has shown me a copy of the ABA Model Rule 1.7 of the New Hampshire Rules of Professional Conduct and within the provisions of Rule 1.7, I do desire Attorney Kelley and his associate to continue representing my interests in the Will contest." However, on April 25, 1989, the Probate Court disqualified the attorneys from representing Ms. Stanley.

In its ruling against the attorneys, the Court stated that although the ABA Model Rule 1.7 provides that clients can waive a potential conflict after consultation and with knowledge of the consequences, there are situations in which even if the client consents to the representation, a lawyer should decline to represent the client. The Court ruled that a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, and the lawyer involved cannot properly ask for such an agreement or provide representation on the basis of the client's consent. The attorneys' representation of both women, who had substantially different interests in the estate, presented a fundamental conflict and violated Rule 1.7.

- *Liapis v. Dist. Ct.*, 282 P.3d 733 (2012). Ms. Marie Liapis filed a divorce petition against her husband, Theodore Liapis, in which she also sought disposition of the couple's property, permanent spousal support, and her attorney fees and costs. Mr. Liapis answered the complaint pro se, but later retained the couple's son, Mark Liapis, as his attorney.

A settlement conference was scheduled, and each party filed a statement in preparation for the conference. In her statement, Ms. Liapis objected to her son's representation of his father, Theodore.

The original petition for writ of mandamus raised two issues regarding attorney disqualification: Should an attorney who represents one of his parents in a divorce action between both parents be disqualified either (1) because the attorney's representation will constitute an appearance of impropriety; or (2) because representing the parent will violate the concurrent conflict-of-interest rule 1.7 of the Nevada Rule of Professional Conduct?

The Supreme Court of Nevada ruled that speculative contentions of conflict of interest cannot justify disqualification of counsel. The Court stated that appearance of "impropriety" is no longer recognized by the ABA, and the court does not recognize the appearance of impropriety as a basis for disqualifying counsel based solely on a familial relationship with the attorney. Therefore, the parties' son representing his father in a divorce action – without more -- did not support the son's disqualification.

The Court also concluded that absent an ethical breach by the attorney that affects the fairness of the entire litigation or a proven confidential relationship between the non-client parent and the attorney, the non-client parent lacks standing to seek disqualification under Rule 1.7.

- Compare:
  - *In the Matter of the Disciplinary Proceeding Against Larry A. Botimer*, 166 Wash. 2d 759 (2009) ("*Botimer*"). In *Botimer*, an attorney in Washington was disciplined by his state bar association, after the Disciplinary Board found that he had represented multiple parties who were all members of the same family, in several family business transactions and estate planning matters, without obtaining informed written consent

to do so from any of his clients. The Washington Supreme Court held that because the lawyer failed to obtain written consent from his clients, wherein each consented to his representation of other family members who simply had the *potential* of having competing claims and interests, he violated Washington's professional rules of conduct and was suspended from practicing for six months.

And

- *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. California 2003). Here, the district court in California found that an advance conflict waiver that was signed by First Data Corp. fully informed First Data Corp. of its law firm's prior relationship, and intent to continue an attorney-client relationship, with Visa. Under California state law, an advance conflict waiver of "*potential* future conflicts" is permitted, "even if the waiver does not specifically state the exact nature of the future conflict." So long as the waiver was fully informed, it is sufficient as a defense to later conflicts. So, when First Data Corp. and Visa were later on opposite sides of a commercial lawsuit, First Data's effort to disqualify its law firm from representing Visa were unsuccessful. The waiver letter was a fully informed letter, and immediately upon recognizing the conflict, an ethical wall was put in place between the two different law firm offices and attorneys who had done work for each party.

With:

- *Gen. Motors Acceptance Corp./Crenshaw, Dupree & Milam, L.L.P. v. Crenshaw, Dupree & Milam, L.L.P./Gen. Motors Acceptance Corp.*, 986 S.W.2d 632 (Tex. App.-El Paso 1998) ("*GMAC*"). In *GMAC*, parties to transaction involving the purchase of a car dealership and financing associated with same were represented by lawyers in the same firm.<sup>1</sup> Despite the fact that the law firm had obtained a Waiver of a Conflict of Interest signed by the potential purchaser of the dealership, who had been long time clients of the firm, the party who signed the waiver later contended that the waiver was ineffective because it was never explained to them, they were never given the opportunity to obtain other counsel, and the firm never explained to them how its professional judgment might be adversely affected by their representation of the other party. The El Paso Court of Appeals, without any formal analysis, determined that the conflicts waiver was not valid.<sup>2</sup>

### c. MRPC Rule 1.8. Conflict Of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

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<sup>1</sup> **Disclaimer.** None of the information or opinions expressed herein are official statements of any law firm, title company, or other organization that either of the authors are currently, or have previously been, associated with.

<sup>2</sup> **Practice Tip.** The authors have provided a draft conflict waiver to these materials, attached here as **Appendix B**. However, we offer no opinions as to the validity or enforceability of this form in any jurisdiction and encourage all practitioners to take extra precautions to explain a conflict waiver to an existing client, present that client with the opportunity to obtain other counsel, and explained to that client that multiple representation carries with it the risk that the professional judgment of the lawyers in that firm may be adversely affected by representing more than one party. And, most importantly, those additional conversations and explanations should also be documented and kept in the client's file.

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

#### **d. MPRC 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.

#### Cases:

- *NCNB Texas National Bank v. Coker*, 765 S.W.2d 398 (Tex. 1989) (“*NCNB*”). The Texas Supreme Court set out its “substantial relation” test for determining whether an attorney is precluded from representing a new client due to its prior representation of a potentially adverse party. In *NCNB*, NCNB Texas National Bank sued Western Fire & Casualty Insurance Company, alleging wrongful collection and retention of funds and other related claims surrounding a foreclosure action on equipment that was serving as collateral for leases held by the bank and appropriate accounting and remission of sales proceeds. Western filed a motion to disqualify counsel for NCNB, because that law firm had previously represented Western Fire in a separate lawsuit. The issue in the prior Western Fire case revolved around the ability to effect a unilateral termination of reinsurance treaties. The trial court issued an order of disqualification, and it stated in pertinent part, that: “The court further finds the subject matter involved in both representations are similar enough for there to be an appearance that the attorney-client confidences which could have been disclosed by the defendant might be relevant to the law firm's representation of the plaintiff in this suit.” *NCNB*, 765 S.W.2d at 400 (emphasis added). NCNB filed its petition for writ of mandamus, urging the Supreme Court to issue mandamus.

The Court set out its “substantial relation” test as the standard for a motion to disqualify based on prior representation of an adverse party. “When contemplating whether disqualification of counsel is proper, the court must determine whether the matters embraced within the pending suit are *substantially related* to the factual matters involved in the previous suit.” *NCNB Texas Nat. Bank v. Coker*, 765 S.W.2d 398, 399-400 (Tex. 1989). The Court went on to say, “The severity of the remedy requested requires the movant to establish a preponderance of the facts indicating a substantial relation between the two representations. The moving party must prove the existence of a prior attorney-client relationship in which the factual matters involved **were so related to the facts in the pending litigation that it creates a genuine threat that confidences revealed to his former counsel will be divulged to his present adversary**. Sustaining this burden requires evidence of specific similarities capable of being recited in the disqualification order. *NCNB Texas Nat. Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989) (emphasis added).

- *In re Kaiser Group Intern, Inc.*, 272 B.R. 846 (U.S. Bank. Ct Delaware 2002). In *Kaiser*, a motion to disqualify was filed in a bankruptcy adversary proceeding, because counsel for the debtor had previously represented one of the parties asserting claims against the debtor in the



adversary proceeding. The court refused to make any findings regarding whether an actual conflict under Rule 1.7 or 1.9 existed. Rather, the court concluded that the party seeking disqualification had previously waived its complaint when, upon being advised of the representation of another party in litigation against it, it did not object, but rather, it requested implementation of a Chinese Wall between attorneys representing the Debtor and the attorneys that had historically represented that party, and the firm complied with the request.

- *First American Carriers, Inc. v. Kroger Co.*, 302 Ark. 86 (1990). An eleven vehicle accident gave rise to this lawsuit. During the post-accident investigations, two of the potential defendants both unknowingly hired lawyers who worked for the same firm. Immediately upon discovery of the lawsuit, one of the lawyers severed his relationship with the party, since a conflict existed as between the two defendants. That lawyer had been hired by an insurance company for the owner of the vehicle involved in the accident; and, during the course of the minimal work done by the lawyer for the insurance company, the lawyer never communicated with the insured, and never directly provided any information to the insured. Once a lawsuit was filed, the law firm filed an appearance on behalf of the party it continued to represent. The insured retained separate counsel; that law firm filed a motion to disqualify the first law firm, on the basis that a violation of Rule 1.9 had occurred. The motion was granted and affirmed on appeal, based on the court's analysis that under ABA opinions on ethics, "when a liability insurer retains a lawyer to defend an insured, the insured is the lawyer's client", and that albeit brief, during its representation of the insured, the lawyer could have obtained confidential information from one defendant that could be used against another. Imputing violations of Rule 1.9 to the entire firm, the law firm was disqualified from helping any of the parties in this matter.
- *Nelson v. Green Builders*, 823 F. Supp. 1439 (E.D. Wisconsin 1993).

In addressing a motion to disqualify, the threshold question is whether there existed an attorney-client relationship that subjected a lawyer to the ethical obligation of preserving confidential communications. A party establishes an implied attorney-client relationship if it show that: (1) that it submitted confidential information to a lawyer, and (2) that it did so with the reasonable belief that the lawyer was acting as the party's attorney. A fiduciary relationship may arise solely from the nature of the work performed and the circumstances under which confidential information is divulged.

A representation is substantially related to a prior representation when the lawyer *could have obtained* confidential information in the first that would have been relevant in the second. (emphasis in original; citing *La Salle National Bank v. County of Lake*, 703 F.2d 252, 255 (7<sup>th</sup> Cir. 1983).

If the court finds that the representations are substantially related, then a presumption arises that the lawyer received confidential information during his or her prior representation. If a lawyer "switches sides" during the course of ongoing litigation, the presumption becomes irrebuttable. But, if an attorney goes to a new firm, and later, then new firm represents an adversary of the former firm, then the presumption can be rebutted.

- *Norman v. Norman*, 333 Ark. 644 (1998). Mr. Burt Newell, the attorney for Josephine Norman, filed a petition to enforce an alimony provision contained in the divorce decree dissolving the marriage between herself and former husband, Robert Norman. Shortly after she filed her petition, Mr. Norman moved to disqualify Mr. Newell and the firm of Bachelor, Newell and Oliver, from representing Ms. Norman, alleging a conflict of interest because Latt Bachelor, a current partner of Mr. Newell, was also a former associate of George Callahan, who had

represented Mr. Norman during the divorce proceeding. Mr. Norman asserted that Mr. Bachelor would be prohibited from representing Ms. Norman because the current litigation involved the same matter in which Mr. Bachelor's former firm had represented him, and he had not consented to the representation. He also alleged that Mr. Newell was prohibited from representing Ms. Norman under the rule of implied disqualification.

Citing Rules 1.9(b) and 1.10(a) of the Arkansas Rules of Professional Conduct, the Arkansas Supreme Court ruled that the law firm and its attorney representing former wife in an action to enforce the divorce decree would be disqualified, where the former husband had been represented in the original dissolution proceeding by a former associate of one of the firm's partners. The firm was held to have shared conflict-of-interest disability of the partner, and the action to enforce alimony provision of the divorce decree was substantially related to the initial divorce proceeding. Therefore, the interests of the parties were materially adverse, and when the partner was associated with husband's former attorney, no measures were taken to restrict access to the client's information.

In its analysis, the Arkansas Supreme Court stated that in determining whether an attorney acquired actual knowledge of information protected under the conflict of interest rules, the attorney is presumed to have all confidential knowledge that any member of the first firm possessed, which is rebuttable, and the attorney is presumed to share that knowledge with all members of the second firm.

The Court ruled that Mr. Bachelor did have a conflict of interest under Rule 1.9, which would prevent him from representing Ms. Norman, and this conflict is imputed to his partners, including Mr. Newell. Further, the Court balanced Ms. Norman's right to choose counsel with Mr. Norman's right to protection of confidences transmitted, or likely to have been acquired, during the divorce proceeding, the court concluded that disqualification of Mr. Newell and his firm was warranted.

#### **e. MRPC 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

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(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.

**Cases:**

- *Nelson v. Green Builders*, 823 F. Supp. 1439 (E.D. Wisconsin 1993).

Attorney represented individual who had been a limited partner in a limited partnership, along with performing some work for the partnership. Subsequent to that representation, three of the partners sued the limited partnership in a derivative action. The attorney who had represented the limited partner now worked for the firm that was hired to defend the limited partnership. Because the attorney's prior work was substantially related to the new lawsuit, the court was faced with determining whether the entire firm should be disqualified from representing the partnership because of the attorney's prior work for the plaintiff. The court disqualified the entire firm, because the firm failed to effectively screen the new lawyer who had previously done work for one of the Plaintiffs from the case at the time the firm became aware of the potential conflict, and refused to acknowledge that a conflict existed or to otherwise withdraw from the case.

#### **f. MRPC Rule 1.13 - Organization As Client**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized 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 that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

- *Musheno v. Gensemer*, 897 F. Supp. 833 (1995). This case involved a shareholder derivative action initiated in state court and removed to the Federal District Court where the plaintiff shareholders moved to disqualify the law firm from continuing its dual representation of the corporation and its board of directors. The Federal District Court held that disqualification of the law firm was appropriate.

Citing Rule 1.13 of the Pennsylvania Rules of Professional Conduct, the Court held that employment of or representation by an attorney representing the corporation and its board of directors in a derivative action would be disqualified from representing the corporation, where

the original complaint alleged fraud and self-dealing by the directors, revealing a clear divergence of interests between the corporation and its directors.

**g. MRPC Rule 1.16. Declining Or Terminating Representation**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the rules of professional conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

**h. MRPC Rule 5.3. Responsibilities Regarding Nonlawyer Assistance**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
  - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

**Cases:**

- *Zimmerman v. Mahaska Bottling Co.*, 270 Kan. 810 (2001). In *Zimmerman*, the Kansas Supreme Court was faced with the question of whether a non-lawyer law firm employee had gained confidential material about a litigation matter during her employment with one law firm, prior to accepting employment at another law firm that was representing the other side in the same litigation matter. The Supreme Court held that the record supported a finding that the law firm employee had gained knowledge of material and confidential facts at her prior place of employment. The court further explained that based upon Rule 5.3, the same standards of conduct apply to non-lawyers and lawyers alike, since “other non-attorney staff members are regularly exposed to confidential client information as a part of their everyday work.” And, under Rule 1.10, a conflict for one lawyer is a conflict for the entire firm, unless other measures are implemented (i.e., Chinese wall). So, the question at hand was, since this non-lawyer employee had been exposed to confidential client information at her former place of employment, could the new firm implement some sort of Chinese wall, to keep the entire firm from being disqualified from serving as opposing counsel in the same litigation? The court held that a Chinese wall would not be effective – primarily because Kansas disciplinary rules do not expressly provide for them as an effective measure for lawyers. Therefore, neither are non-lawyers allowed to rely on any such protection as a defense to a disqualification motion impacting the entire firm.
- *In re Columbia Valley Healthcare System, L.P.*, 320 S.W.3d 819, 828 (Tex. 2010) (“*Columbia Valley*”). Similarly, in *Columbia Valley*, a legal assistant’s change of employment resulted in a law firm being disqualified from representing one of its clients. In *Columbia Valley*, a legal assistant in Texas worked for a law firm that represented a regional medical center in a variety of matters. In the normal course of her work for that firm, she was responsible for maintaining records and filing many privileged documents and attorney notes, she was present for meetings with consulting experts, meetings regarding defense strategy, settlement negotiations, and meetings regarding strategy for adding other parties to the suit. She also prepared correspondence to the client and its insurer. After she resigned from her position, and before leaving the firm, she signed a confidentiality agreement agreeing that if she obtained work at a different law firm, she would not work on any matter that she had previously worked on at the first firm. Approximately eleven months later, she was hired by a small firm with three lawyers to serve as a legal assistant for one of those 3 lawyers. That attorney was representing plaintiffs who were pursuing a medical malpractice claim against the regional medical center where the legal assistant had previously worked. At the time she was hired, she and her new law firm discussed her prior work history and her supervising attorney orally instructed her not to work on any case with which she had prior involvement. But, the new firm did not otherwise have any written screening policies in effect. Her supervising attorney later suffered some severe medical complications, so he was in and out of the office for a period of time. Despite the oral instructions from her new supervising attorney, the legal assistant had contact with the same file she had worked with at her prior firm. Her work included: (1) filing correspondence related to the Leal case; (2) rescheduling a docket control conference; (3) preparing an order and sending correspondence to counsel concerning a docket control conference; (4) calling the former firm’s legal assistant regarding the docket control conference; (5) calendaring dates regarding the case on her supervising attorney’s calendar; and (6) making a copy of a birth certificate and social security card in the case. When her supervising attorney learned that she had scheduled the docket control conference, he again orally instructed her not to work on the case, and held a meeting

where he informed both her that her employment would be terminated if this happened again. *Columbia Valley*, 320 S.W.3d at 823.

By this time, the regional medical center had discovered that a legal assistant who had previously worked for its law firm was now employed by another firm who had a case pending against it. The regional medical center filed a motion to disqualify. The motion was denied, and a subsequent appeal was denied; but, on appeal to the Supreme Court, the Texas Supreme Court held that the simple informal admonition to the legal assistant to not work on the file at her new place of employment was not enough. Rather, the Court held that a law firm that hires a non-lawyer employee that previously worked for another law firm must implement certain “other reasonable measures” to properly shield the employee from any files that employee may have worked on previously. These “other reasonable steps” must include “formal, institutional measures” to keep the employee away from the case and which do actually keep the employee away from the case. Because these formal institutional measures had not been followed, the second firm was disqualified from serving as counsel for the plaintiffs in the medical malpractice claim against the regional health center.

## II. Sample Forms

*NOTE: The following examples are for illustrative purposes only. Your risks may be different than those described. You are encouraged to modify the example letters to suit your individual practice needs.*

### Example 1 Litigation – Joint/Multiple Representation

Client 1  
Address

Client 2  
Address

Re: [Subject]

Gentlemen:

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

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

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

In the event a conflict does develop between \_\_\_\_\_ and \_\_\_\_\_, this law firm will have the right to terminate its representation of \_\_\_\_\_ and continue on behalf of \_\_\_\_\_. We will have the right to take positions adverse to \_\_\_\_\_ and use information that we obtained from \_\_\_\_\_ during our representation of him. There may be circumstances where this would not be appropriate, and a court might not permit it. This is further to confirm that we have urged \_\_\_\_\_ to retain other counsel to review this letter and the arrangement proposed above.

Very truly yours,

Counsel's name

Agreed to by:

\_\_\_\_\_  
Client 1

\_\_\_\_\_  
Client 2



**Example 2**  
**Litigation – Joint/Multiple Representation**

Date

Client 1  
Address  
Address

Client 2  
Address  
Address

Re: [Subject]

Gentlemen:

You (“the Client”) have requested that this law firm (“the Firm”) assist \_\_\_\_\_ with legal services relating to \_\_\_\_\_ and to represent you in all matters related to same. This letter will formalize the Client’s agreement to retain the services of the Firm as follows:

**Hourly Rates**

The billing rates for work on this file will be as follows:

**Expenses**

It will be the Client’s responsibility to pay all costs and expenses beyond the hourly attorneys’ fees. We will provide you with an invoice or documentation of all costs and expenses incurred.

**Withdrawal of Representation**

The Firm may withdraw from Client’s representation in this matter when any of the following factors is present:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes may be criminal or fraudulent;
- (3) the client has used the lawyer’s services to perpetrate a crime or fraud;
- (4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services, including an obligation to pay the lawyer’s fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists. Good cause includes, but is not limited to: (i) failing to timely respond to requests for documents/information; or (ii) failing to meaningfully participate in the representation.

As a condition precedent to acceptance of employment by the Firm, Client agrees to cooperate and comply fully with all reasonable requests by the Firm on any matter encompassed by or made the basis of this document, including prompt payment of fees, costs, and expenses on the occurrence of any of the events set out in this document.

In the event of withdrawal from employment, the Firm will take reasonable steps to avoid foreseeable prejudice to the rights of Client, including giving due notice to Client, allowing time for employment of other counsel, delivering to Client all papers and property to which Client is entitled, and complying with the applicable laws and rules.

The Firm shall withdraw if discharged by Client. Such discharge shall be communicated in writing to the Firm. If permission for withdrawal from employment is required by the rules of the court, the Firm shall withdraw upon permission of said court.

**Choice of Law and Venue**

In the event that litigation arises out of this Engagement of Services Agreement, venue shall only be in \_\_\_\_\_. \_\_\_\_\_ law shall govern all terms of this agreement. This agreement is performable in \_\_\_\_\_.

**Multiple Representation**

By entering in this Agreement, as we have discussed on multiple occasions, the Client acknowledges and consents to the Firm's representation of additional parties in this matter, whose interests are currently aligned with Client's. At this time, the Firm does not believe that our joint representation will compromise our ability to represent Client and each additional client fairly and effectively.

As we have discussed, the interests of our clients in this matter are generally consistent. However, it is recognized and understood that, while unexpected in this matter, differences may exist or become evident during the course of our representation. In the event a conflict does develop between Client and other clients, the Firm will have the right to terminate its representation of any of its clients, including the Client, and continue to represent the remaining clients.

**Entire Agreement of the Parties**

This Engagement of Services Agreement sets forth the entire agreement between the Client and the Firm regarding \_\_\_\_\_. By signing below the Client acknowledges that he has read the agreement in its entirety and agrees to each term. The Client also agrees that he has had the opportunity to consult with another attorney concerning the terms of this agreement before they are signed by him. By signing this agreement the Client acknowledges that he voluntarily accepts each and every term and understands them.

Very truly yours,

Counsel's name

Agreed to by:

\_\_\_\_\_  
Client 1

\_\_\_\_\_  
Client 2

**Example 3  
Advance Waiver**

Date:

ABC Client  
Address  
Address

Re: Advance Waiver for Other Matters

Dear ABC Client:

\_\_\_\_\_ is retaining us to handle a commercial real estate transaction because commercial real estate transactions constitute a major part of this firm's practice. In the past we have been adverse to ABC client in both litigation and transactional matters. We expect to be asked by other clients to be adverse to ABC client in the future.

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

Thank you very much.

Very truly yours,

Counsel

Agreed to by:

\_\_\_\_\_  
ABC client

**Example 4**  
**Serving as Director on Bank Board**

Date:

Chairman of Board  
The Bank  
Address

Re: Service on The Bank's Board

Dear [Chair]:

You have asked me to serve as a Director of The Bank. I have obtained the permission of my law firm and agree to do so. You and I have discussed several issues that my service may raise, and I wish to summarize those issues here.

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

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

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

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

I have urged you to discuss my possible service as Director with a lawyer not in my firm, and you have indicated that you have sought the advice of independent counsel.

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

Very truly yours,

Counsel

## Example 5

### Husband and Wife Waiver of Conflict Letter (Estate Planning)

Date:

Mr. and Mrs. Client  
Address

Dear Mr. and Mrs. Client:

You have retained us to perform estate planning services for you. Those services will include a review of your assets and liabilities, meeting with you to determine your financial and estate planning objectives, and the preparation of various documents, which may include wills, trusts, and possibly a Marital Agreement governing your relative rights in each other's property during lifetime and/or at death.

Although you share a common interest in developing an estate plan, you should also understand that our estate planning recommendations may affect your relative interests differently. Any agreement materially affecting the classification of your property may have disproportionate consequences to each of you. Although we will attempt not to act as advocate for one of you in connection with your estate planning to the detriment of the other, that objective may not be possible to attain in an absolute sense. In other words, one or the other of you may receive relatively greater benefits under the recommended marital agreement than you would in the absence of an agreement. Furthermore, it obviously will not be possible for us to maintain the confidentiality of information relating to your estate planning as between the two of you. Accordingly, our representation of both of you creates a conflict of interest of which you should be aware.

On the other hand, dual representation in circumstances such as these may be far more economical than for you each to retain separate counsel to develop an estate plan. In addition, your overall estate planning may be better coordinated by dual representation.

It is our present belief that, under existing circumstances, we can represent both of you without adversely affecting our attorney-client relationship with either of you. Nevertheless, you each should feel free to seek independent counsel if you prefer so that your respective interests are independently represented and any confidences are preserved.

If you wish for us to represent both of you, please execute the enclosed Consent to Dual Representation and return it to me for my records.

Very truly yours,

Counsel

Consent to Representation Despite Conflicts

I have reviewed the above, and I realize that there are many areas of differing interests, as well as potential or real conflicts of interest between my husband and me in connection with our estate planning and related matters. I understand that, at any time, either my husband or I may have separate, independent counsel in connection with these matters. After considering all of the above, I request that you and your firm represent me in my estate planning and related matters. I also understand that, as between each of us and you and your firm, confidential communications you receive from either of us may be shared with the other; however, as to third parties, you will maintain our confidences.

\_\_\_\_\_  
[Wife]

I have reviewed the above, and I realize that there are many areas of differing interests, as well as potential or real conflicts of interest between my wife and me in connection with our estate planning and related matters. I understand that, at any time, either my wife or I may have separate, independent counsel in connection with these matters. After considering all of the above, I request that you and your firm represent me in my estate planning and related matters. I also understand that, as between each of us and you and your firm, confidential communications you receive from either of us may be shared with the other; however, as to third parties, you will maintain our confidences.

\_\_\_\_\_  
[Husband]



**Example 6**

**Conflict Waiver -- Joint Representation of Multiple Clients**

Date:

Client A

Client B

Dear Client A and Client B:

You have asked us to represent you [Client A] and [Client B] jointly in connection with [full description of matter]. We would be pleased to do so, subject to the following understandings.

Although the interests of [Client A] and [Client B] in this matter are generally consistent, it is recognized and understood that differences may exist or become evident during the course of our representation. Notwithstanding these possibilities, [Client A] and [Client B], have determined that it is in their individual and mutual interests to have a single law firm represent them jointly in connection with [full description of matter]. Potential conflicts of interest, including but not limited to:

Accordingly, this confirms agreement of [Client A] and [Client B] that we may represent them jointly in connection with the above-described matter. This will also confirm that [Client A] and [Client B] have each agreed to waive any conflict of interest arising out of, and that you will not object to, our representation of each other in the matter described herein.

It is further understood and agreed that we may freely convey necessary information provided to us by one client to the other, and that there will be no secrets as between [Client A] and [Client B] unless both of you expressly agree to the contrary.

If you need to edit the terms of this letter, or wish to discuss any related issues, please contact us at your earliest convenience. However, if you agree that the foregoing accurately reflects our understanding, please sign and return the enclosed copy of this letter.

Very truly yours,

Counsel

Agreed to by:

\_\_\_\_\_  
Client A

\_\_\_\_\_  
Client B