1 of 1 DOCUMENT

ARIZONA COURT RULES ANNOTATED

*** This document reflects changes received by the publisher through January 5, 2012 ***
***Annotations are current through December 15, 2011 ***

ARIZONA RULES OF PROFESSIONAL CONDUCT
CLIENT-LAWYER RELATIONSHIP

Ariz. Rules of Prof'l Conduct R. 1.7 (2012)

Review Court Orders which may amend this Rule.

ER 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 each affected client gives informed consent, confirmed in writing, and:

(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; and

(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.

HISTORY: Effective December 1, 2003 by R-02-0045.

NOTES:
COMMENT

GENERAL PRINCIPLES. [1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see *ER 1.8*. For former client conflicts of interest, see *ER 1.9*. For conflicts of interest involving prospective clients, see *ER 1.18*. For definitions of "informed consent" and "confirmed in writing," see *ER 1.0(e)* and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected

under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and nonlitigation matters the person and issues involved. See also *ER 5.1*, Comment [2]. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see *ER 1.3*, Comment [4] and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See *ER 1.16*. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See *ER 1.9*. See also Comments [5] and [28].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. In these circumstances, the lawyer may withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See *ER 1.16*. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See *ER 1.9(c)*.

IDENTIFYING CONFLICTS OF INTEREST: DIRECTLY ADVERSE. [6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a lawyer acts directly adversely to a client if it will be necessary for the lawyer to cross-examine a client who appears as a witness in a lawsuit involving another client. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Although directly adverse conflicts arise most frequently in litigation, they also arise in transactional matters. For example, if a lawyer is asked to represent a seller in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

IDENTIFYING CONFLICTS OF INTEREST: MATERIAL LIMITATION. [8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

LAWYER'S RESPONSIBILITIES TO FORMER CLIENTS AND OTHER THIRD PERSONS. [9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under *ER 1.9* or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

PERSONAL INTEREST CONFLICTS. [10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See *ER 1.8* for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also *ER 1.10* (personal interest conflicts under *ER 1.7* ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where the lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See ERs 1.8(*l*) and 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See *ER 1.8(j).*

INTEREST OF PERSON PAYING FOR LAWYER'S SERVICE. [13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of the fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See *ER 1.8(f).* If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

PROHIBITED REPRESENTATIONS. [14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See *ER 1.1* (competence) and *ER 1.3* (diligence). In determining whether a multiple-client conflict is consentable, one factor to be considered is whether the representation will be provided by a single lawyer or by different lawyers in the same firm.

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under *ER 1.0(m)*), such representation may be precluded by paragraph (b)(1).

INFORMED CONSENT. [18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See *ER 1.0(e)* (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information

must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [29] and [30] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. The cost benefits of common representation may be considered by the affected client in determining whether common representation is in the client's interests.

CONSENT CONFIRMED IN WRITING. [20] Paragraph (b) requires the lawyer to obtain the informed consent of each client, confirmed in writing. Such a writing may consist of a document executed by the client or oral consent that the lawyer promptly records and transmits to the client. See *ER 1.0(b)*. See also *ER 1.0(n)* (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing. The writing need not take any particular form; it should, however, include disclosure of the relevant circumstances and reasonably foreseeable risks of the conflict of interest, as well as the client's agreement to the representation despite such risks.

CONSENT TO FUTURE CONFLICT. [21] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that an unforeseeable conflict may arise, such consent is more likely to be effective, particularly if the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

CONFLICTS IN LITIGATION. [22] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[23] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interest of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expecta-

tions in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[24] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

NONLITIGATION CONFLICTS. [25] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[26] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present, as when one spouse owns significantly more property than the other or has children by a prior marriage. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[27] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interest are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interest by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

SPECIAL CONSIDERATIONS IN COMMON REPRESENTATION. [28] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[29] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[30] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client attempts to keep something in confidence between the lawyer and that client, which is not to be disclosed to the other client. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the

lawyer will use that information to that client's benefit. See *ER 1.4*. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[31] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See *ER 1.2(c)*.

[32] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of *ER 1.9* concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in *ER 1.16*.

ORGANIZATIONAL CLIENTS. [33] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See *ER 1.13(a)*. Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[34] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

LexisNexis 50 State Surveys, Legislation & Regulations

Attorneys Admitted Elsewhere

JUDICIAL DECISIONS

ANALYSIS
In General.
Attorney-Client Relationship.
Concurrent Representation.
Confidential Information.
Disclosure.
Disqualification.
Finances.
Ineffective Counsel.
Loyalty to Client.
Motion to Withdraw.
Notice.
Parties' Consent.

Sexual Harassment.

IN GENERAL.

The first step in analyzing whether attorney violated this rule is to determine whether attorney's representation of client A was materially limited by his responsibilities to client B. If attorney's representation of client A was not limited by his responsibility to client B, there is no conflict. If, on the other hand, attorney's representation was limited, then the rule requires that attorney reasonably believe that his representation will not be adversely affected, and attorney must obtain his client's consent after consultation. *In re Shannon, 179 Ariz. 52, 876 P.2d 548 (1994).*

A substantial discrepancy in the parties' testimony is a basis for finding that a conflict of interest exists. *In re Shannon, 179 Ariz. 52, 876 P.2d 548 (1994).*

ATTORNEY-CLIENT RELATIONSHIP.

Because there was no evidence of any conflict between the insurer and its insured, a dual attorney-client relationship existed, and the insurer was entitled to bring a malpractice action against the attorney who represented both the insurer and the insured. *Paradigm Ins. Co. v. Langerman Law Offices, 196 Ariz. 573, 2 P.3d 663, 1999 Ariz. App. LEXIS 158 (Ct. App. 1999),* vacated, in part, and remanded as to whether Langerman actually breached its duty to *Paradigm, 349 Ariz. Adv. Rep. 11, 24 P.3d 593 (Ariz. 2001).*

Because the successors in estate case were not clients of either the personal representative or his attorney, there was no fiduciary duty to the successors; thus, the appellate court reversed the trial court's conclusion that attorney violated this rule and former rule 2.2, relating to a lawyer's or law firm's duty to a client. *Snell & Wilmer L.L.P. v. Fegen, 197 Ariz. 252, 3 P.3d 1172, 2000 Ariz. App. LEXIS 32 (Ct. App. 2000).*

Attorney, who was a creditor of client's, and who represented her on both the dissolution and bankruptcy, without informing her in writing of the potential conflict of interest presented, violated subsection (b). *In re Owens, 182 Ariz. 121, 893 P.2d 1284 (1995).*

In attorney-client business ventures, an attorney is deemed to be dealing with a client as a protector rather than as an adversary. *In re Pappas, 159 Ariz. 516, 768 P.2d 1161 (1988).*

An attorney-client relationship does not require the payment of a fee but may be implied from the parties' conduct; the relationship is proven by showing that the party sought and received advice and assistance from the attorney in matters pertinent to the legal profession. *In re Petrie, 154 Ariz. 295, 742 P.2d 796 (1987).*

CONCURRENT REPRESENTATION.

Attorney who, either directly or de facto, represented a client and the tenants of that client without discussing the potential conflict of interest that existed between them was censured and ordered to pay costs. *In re Clark, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2002 Ariz. LEXIS 21* (Feb. 13, 2002).

Absent an actual or apparent conflict of interest between the insurer and the insured, an attorney may represent both. *Paradigm Ins. Co. v. Langerman Law Offices, 196 Ariz. 573, 2 P.3d 663, 1999 Ariz. App. LEXIS 158 (Ct. App. 1999),* vacated, in part, and remanded as to whether Langerman actually breached its duty to *Paradigm, 349 Ariz. Adv. Rep. 11, 24 P.3d 593 (Ariz. 2001).*

Attorney, suffering from drug and alcohol problems, was suspended for two years where the attorney represented a husband in divorce proceedings over a two year period, yet in the midst of this period attorney agreed to represent the wife, who was a police officer, in proceedings before the Police Officer Standards and Training board, on assault and battery charges upon a woman she believed to be her husband's girlfriend, and further, the attorney wrote a letter to his client/husband about his client/police officer/wife, advising him that it might be appropriate to file criminal assault charges against his client/police officer/wife to prevent her from committing further acts of violence toward him. *In re Politi, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2001 Ariz. LEXIS 21* (Feb. 16, 2001).

Attorney violated this rule by representing two different sets of prospective adoptive parents in the same adoption matter. *In re Petrie, 154 Ariz. 295, 742 P.2d 796 (1987).*

An informed risk-benefit balancing approach is applied to the question of joint representation of co-parties with testimonial discrepancies among them. *Sellers v. Superior Court, 154 Ariz. 281, 742 P.2d 292 (Ct. App. 1987).*

Where attorney for defendant simultaneously represented a prosecution witness in a divorce, the attorney had a conflict of interest. *State v. Jenkins, 148 Ariz. 463, 715 P.2d 716 (1986).*

Concurrent representation does not become a problem unless the interests of the clients are adverse or become adverse during the trial. *Alexander v. Superior Court ex rel. Maricopa, 141 Ariz. 157, 685 P.2d 1309 (1984).*

CONFIDENTIAL INFORMATION.

The trial court should not have required defense counsel to disclose confidential information when counsel avowed that counsel had an ethical conflict requiring withdrawal. *Maricopa County Pub. Defender's Office v. Superior Court, 187 Ariz. 162, 927 P.2d 822 (Ct. App. 1996).*

DISCLOSURE.

Where attorney represented group of incorporators as well as individual incorporator in his personal affairs, attorney should have fully disclosed his conflict or declined multiple representation. *In re Ireland, 146 Ariz. 340, 706 P.2d 352 (1985).*

DISQUALIFICATION.

Law firm could represent plaintiff against two defendants who were members of a defense group in which an attorney with the firm participated. *Ariz. R. Prof. Conduct 1.7* was not implicated, and even if the attorney had a disqualifying conflict stemming from his participation in the defense group, the firm had timely and appropriately screened the attorney pursuant to *Ariz. R. Prof. Conduct 1.10(d). Roosevelt Irrigation Dist. v. Salt River Project Agric. Improvement & Power Dist., -- F. Supp. 2d --, 2011 U.S. Dist. LEXIS 96162* (D. Ariz. Aug. 26, 2011).

Law firm was disqualified from representing plaintiff against defendants not members of a defense group.because some of those defendants were former clients of certain attorneys in the firm whose representation of the former clients was the same or substantially related to the instant matter, screening was unavailable, one of the former clients did not waive its conflict, and the attorneys' conflicts were imputed to the firm. Roosevelt Irrigation Dist. v. Salt River Project Agric. *Improvement & Power Dist., -- F. Supp. 2d --, 2011 U.S. Dist. LEXIS 96162* (D. Ariz. Aug. 26, 2011).

Violation of an ethical rule prohibiting representation of a client with interests contrary to another client does not require automatic disqualification; a trial court will consider cases individually, focusing on the specific violation, in order to determine whether extreme sanction of disqualification is warranted. *Research Corp. Technologies, Inc. v. Hewlett-Packard Co., 936 F. Supp. 697 (D. Ariz. 1996).*

Disqualification is primarily a question for the lawyer undertaking representation; however, a court may raise the question of disqualification on its own. *Sellers v. Superior Court, 154 Ariz. 281, 742 P.2d 292 (Ct. App. 1987).*

The trial court's failure to provide an opportunity for a briefing and separate hearing on the issue of disqualification of counsel due to conflict of interest improperly deprived the defendants and the reviewing court of an opportunity to address questions relating to disqualification; remand for full consideration of the issue was necessary. *Sellers v. Superior Court, 154 Ariz. 281, 742 P.2d 292 (Ct. App. 1987).*

The appearance of impropriety survives as a part of conflict of interest, and an appearance of impropriety should be enough to cause an attorney to closely scrutinize his conduct; it does not necessarily follow that it must disqualify him in every case, and where the conflict is so remote that there is insufficient appearance of wrongdoing, disqualification is not required. *Gomez v. Superior Court, 149 Ariz. 223, 717 P.2d 902 (1986).*

FINANCES.

Attorney was suspended for two years where he charged excessive fees, charged fees he had agreed not to charge, took a retainer which created a conflict of interest, and engaged in improper financial dealings with his clients. *In re Cain, 174 Ariz. 592, 852 P.2d 407 (1993).*

Attorney violated this rule by representing clients and others in a financial transaction when the various interests of these multiple clients impaired or adversely affected his independent professional judgment. *In re Pappas, 159 Ariz. 516, 768 P.2d 1161 (1988).*

INEFFECTIVE COUNSEL.

The attorney's implicit advocacy against his client, the defendant in a drug trial, at the time of client's wife's sentencing, amounted to ineffective assistance in this case. *State v. Padilla, 176 Ariz. 81, 859 P.2d 191 (Ct. App. 1993).*

A violation of this rule does not result in an automatic finding of ineffectiveness of counsel. *State v. Jenkins, 148 Ariz. 463, 715 P.2d 716 (1986); State v. Martinez-Serna, 166 Ariz. 423, 803 P.2d 416 (1990).*

LOYALTY TO CLIENT.

Because a lawyer's duty of loyalty to a client is founded on the influence created by the attorney-client relationship, rather than the relationship itself, the duty of loyalty may continue after the relationship is terminated. *Fiduciary Servs., Inc. v. Shano, 177 Ariz. 550, 869 P.2d 1203 (Ct. App. 1993).*

In attempting to protect the confidentiality and loyalty interest of a former client, a lawyer's representation of a new client may be hobbled; for this reason, this rule prohibits the representation of the second client when that representation would be materially limited by the lawyer's responsibilities to the first client. *Fiduciary Servs., Inc. v. Shano, 177 Ariz. 550, 869 P.2d 1203 (Ct. App. 1993).*

MOTION TO WITHDRAW.

The guarantees of the Sixth Amendment include the right to an attorney with undivided loyalty, counsel must be free to zealously defend the accused in a conflict-free environment; counsel has a duty to move to withdraw upon a good faith belief that a conflict exists, the trial court then determines whether withdrawal was appropriate. *Romley v. Schneider, 202 Ariz. 362, 45 P.3d 685, 2002 Ariz. App. LEXIS 17 (Ct. App. 2002).*

Where the public defender's continued representation of defendant would have resulted in a violation of this rule, the trial court abused its discretion when it denied defense counsel's motion to withdraw. *Okeani v. Superior Court, 178 Ariz. 180, 871 P.2d 727 (Ct. App. 1993).*

NOTICE.

Subsection (b) does not require written notice to client of conflict of interest. *In re Owens, 182 Ariz. 121, 893 P.2d 1284 (1995).*

PARTIES' CONSENT.

Where plaintiffs' attorney testified at a hearing on plaintiffs' successful preliminary injunction motion as to defendants' attempt to punish her for representing plaintiffs by making defamatory statements about her and her law firm, defendants were not entitled to disqualification of plaintiffs' attorney because, inter alia, plaintiffs filed an affidavit stating that they were aware of the conflict that defendants alleged but nevertheless wished to retain the attorney and her law firm. *Xcentric Ventures, LLC v. Stanley, -- F. Supp. 2d --, 2007 U.S. Dist. LEXIS 55459* (D. Ariz. July 27, 2007).

It may be possible for an attorney to represent multiple parties to an adoption, but only after full disclosure and consent of the parties. *In re Petrie, 154 Ariz. 295, 742 P.2d 796 (1987).*

In some instances of conflict of interest, consensual waiver will not suffice. *Sellers v. Superior Court, 154 Ariz. 281, 742 P.2d 292 (Ct. App. 1987).*

It was proper for an attorney, after representing one party against a second party and receiving the consent of both parties, to perform legal work for the second party unrelated to the former matter and later file suit against the second party for and on behalf of the first party. *In re Bentley, 141 Ariz. 593, 688 P.2d 601 (1984).*

SEXUAL HARASSMENT.

Attorney was representing client in a domestic matter and was censured for, inter alia, making inquiries of client concerning personal matters of a sexual nature and embracing her upon arrival and departure making the client uncomfortable; the attorney discipline commission held that regardless whether or not the client expressed her discomfort or not, there was a violation of *Ariz. R. Prof. Conduct 1.7. In re Moore, -- Ariz. --, -- P.3d --, 2002 Ariz. LEXIS 36* (Mar. 5, 2002).

It does not matter that the words "sexual harassment" do not appear in the rules, subsection (b) of this rule prohibits a lawyer from representing a client if that representation is going to be materially limited by the lawyer's own interests; clearly sexual harassment by a lawyer serves the lawyer's interest and not the client's. *In re Piatt, 191 Ariz. 24, 951 P.2d 889 (1997).*

1 of 1 DOCUMENT

ARIZONA COURT RULES ANNOTATED

*** This document reflects changes received by the publisher through January 5, 2012 ***
***Annotations are current through December 15, 2011 ***

ARIZONA RULES OF PROFESSIONAL CONDUCT
CLIENT-LAWYER RELATIONSHIP

Ariz. Rules of Prof'l Conduct R. 1.8 (2012)

Review Court Orders which may amend this Rule.

ER 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

(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 *ER 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;

(2) make an agreement prospectively limiting the client's right to report the lawyer to appropriate professional authorities; or

(3) settle such allegations, claims, or potential claims 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.

(*l*) A lawyer related to another lawyer as parent, child, sibling, spouse or cohabitant shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

HISTORY: Effective December 1, 2003 by R-02-0045.

NOTES:
COMMENT

BUSINESS TRANSACTIONS BETWEEN CLIENT AND LAWYER. [1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See *ER 5.7*. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by *ER 1.5*, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See *ER 1.0(e)* (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of *ER 1.7*. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that *ER 1.7* will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

USE OF INFORMATION RELATED TO REPRESENTATION. [5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See ERs 1.2(d), 1.6, 1.9(c), 1.14, 3.3, 4.1(b), 8.1 and 8.3.

GIFTS TO LAWYERS. [6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer or a related person a more substantial gift, paragraph (c) does not prohibit the lawyer or related person from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not solicit a substantial gift to be made to the lawyer or related person, or for the benefit of the lawyer or a related person, except where the lawyer is related to the client as set forth in paragraph (c). Nothing in paragraph (c) is intended to interfere with a lawyer's efforts on behalf of a charitable institution, provided that the lawyer or related person has no financial interest in the charitable institution.

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in *ER 1.7* when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

LITERARY RIGHTS. [9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fees shall consist of a share in ownership in the property, if the arrangement conforms to *ER 1.5* and paragraphs (a) and (i).

FINANCIAL ASSISTANCE. [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

PERSON PAYING FOR LAWYER'S SERVICES. [11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also *ER 5.4(c)* (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with *ER 1.7*. The lawyer must also conform to the requirements of *ER 1.6* concerning confidentiality. Under *ER 1.7(a)*, a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under *ER 1.7(b)*, the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under *ER 1.7(b)*, the informed consent must be confirmed in writing.

AGGREGATE SETTLEMENTS. [Amended by R-04-0030, effective December 1, 2005] [13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under *ER 1.7*, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, *ER 1.2(a)* protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also *ER 1.0(e)* (definition of informed consent). This rule does not apply to lawyers representing governmental agencies or officials unless, in the particular action, there is a potential for a conflict of interest between the jointly represented government agencies or officials on the issue of settlement. Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

LIMITING LIABILITY AND SETTLING CLAIMS. [14] Agreements prospectively limiting a lawyer's liability for malpractice, whether made at the outset of the representation or at any time when the client is unaware of a claim or potential claim, are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a lim-

ited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for that lawyer's own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with *ER 1.2* that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel. Notwithstanding the provisions of paragraph (h)(3), agreements that purport to limit a person's ability to report professional misconduct are not binding on disciplinary authorities.

ACQUIRING PROPRIETARY INTEREST IN LITIGATION. [16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by *ER 1.5*.

CLIENT-LAWYER SEXUAL RELATIONSHIPS. [17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See *ER 1.7(a) (2)*.

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

IMPUTATION OF PROHIBITIONS [20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraphs (j) and (*l*) are personal and are not applied to associated lawyers.

PERSONAL RELATIONSHIPS BETWEEN LAWYERS [21] *ER 1.8* (*l*) applies to related lawyers who are in different firms. A lawyer related to another lawyer, e.g., as parent, child, sibling, spouse or cohabitant ordinarily may not represent a client in a matter where the other lawyer is representing another party, unless each client gives informed

consent. The disqualification arising from the relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See *ER 1.10*.

LexisNexis 50 State Surveys, Legislation & Regulations

Attorneys Admitted Elsewhere

JUDICIAL DECISIONS

ANALYSIS
Applicability.
Attorneys' Fees.

-- Litigation Expenses.

-- Retaining Liens.

-- Security Interest.
Disclosure.
Financial Assistance.
Independent Counsel.
Interest Adverse to Client.
Limiting Attorney's Liability.
Prohibited Transactions.

APPLICABILITY.

Where plaintiffs' attorney testified at a hearing on plaintiffs' preliminary injunction motion as to defendants' attempt to punish her for representing plaintiffs by making defamatory statements about her and her law firm, defendants were not entitled to disqualification of plaintiffs' attorney; although the defamatory statements at issue adversely affected the business interest of plaintiffs' attorney and her firm, plaintiffs' attorney did not acquire a cognizable proprietary interest in the litigation. *Xcentric Ventures, LLC v. Stanley, -- F. Supp. 2d --, 2007 U.S. Dist. LEXIS 55459* (D. Ariz. July 27, 2007).

The application of this rule is not limited to those situations in which the lawyer is acting as counsel in the very transaction in which his interests are adverse to his client, it applies also to transactions in which, although the lawyer is not formally in an attorney-client relationship with the adverse party, it may fairly be said that because of other transactions the lawyer is a protector rather than an adversary. *In re Neville, 147 Ariz. 106, 708 P.2d 1297 (1985).*

ATTORNEYS' FEES.

--LITIGATION EXPENSES.

This rule does not forbid a lawyer from entering into a contract obligating him to advance his clients' litigation expenses. *Cahn v. Fisher, 167 Ariz. 219, 805 P.2d 1040 (Ct. App. 1990).*

--RETAINING LIENS.

An attorney has a retaining lien as security for the general balance due him for professional services and disbursements upon the papers and other chattels of his client, which come into his possession in his professional capacity. *National Sales & Serv. Co. v. Superior Court, 136 Ariz. 544, 667 P.2d 738 (1983).*

It is proper for attorney's retaining lien to apply to the lawyer's and the staff's research notes and internal memoranda concerning the case; this kind of paper work, the work product of the lawyer's efforts, is clearly the lawyer's property and remains his property at least until he is paid. *National Sales & Serv. Co. v. Superior Court, 136 Ariz. 544, 667 P.2d 738 (1983).*

It is improper for an attorney's retaining lien to attach to a document given by the client to the lawyer for a purpose inconsistent with the fixing of a lien upon it. *National Sales & Serv. Co. v. Superior Court, 136 Ariz. 544, 667 P.2d 738 (1983).*

--SECURITY INTEREST.

An attorney may acquire a contractual security interest in the subject matter of the litigation at the inception of the case. *Skarecky & Horenstein v. 3605 N. 36th St. Co., 170 Ariz. 424, 825 P.2d 949 (Ct. App. 1991).*

A law firm's acceptance of a client's assignment of the beneficial interest of a deed of trust, intended to secure payment of attorney's fees in a lawsuit concerning the promissory note secured by that deed of trust, does not violate this rule. *Skarecky & Horenstein v. 3605 N. 36th St. Co., 170 Ariz. 424, 825 P.2d 949 (Ct. App. 1991).*

An attorney may accept an assignment of a client's property involved in the litigation so long as it is not absolute and is limited to security for his fees. An absolute assignment would create an impermissible proprietary interest. *Skarecky & Horenstein v. 3605 N. 36th St. Co., 170 Ariz. 424, 825 P.2d 949 (Ct. App. 1991).*

The assignment of a beneficial interest of a deed of trust, intended to secure payment of attorneys' fees, does not violate this rule. The assignment creates only a security interest, which, if the client fails to pay his attorney, is enforceable in an independent action against the debtor. *Skarecky & Horenstein v. 3605 N. 36th St. Co., 170 Ariz. 424, 825 P.2d 949 (Ct. App. 1991).*

DISCLOSURE.

Even though attorney told client he was not representing him in a land deal per se and he was acting on behalf of himself and his partnership as sellers of the property, the evidence was sufficient to find that respondent was representing client in the land sale. *In re Spear, 160 Ariz. 545, 774 P.2d 1335 (1989).*

The consent after full disclosure required by this rule must be the client's consent, after full explanation, to all terms that are either advantageous to the lawyer or disadvantageous to the client. *In re Neville, 147 Ariz. 106, 708 P.2d 1297 (1985).*

FINANCIAL ASSISTANCE.

Attorney's act of loaning money to a client during a personal injury case was unethical because the attorney acquired a proprietary interest in the litigation. *In re Moak, 205 Ariz. 351, 416 Ariz. Adv. Rep. 19, 71 P.3d 343, 2003 Ariz. LEXIS 81 (2003).*

Attorney was suspended for two years where he charged excessive fees, charged fees he had agreed not to charge, took a retainer which created a conflict of interest, and engaged in improper financial dealings with his clients. *In re Cain, 174 Ariz. 592, 852 P.2d 407 (1993).*

Attorney was properly censured where he advanced financial assistance to his client, failed to inform the client or get her consent regarding a payment to the opposing side, and failed to keep his clients informed as to the status of the lawsuits he was engaged to handle. *In re Bowen, 144 Ariz. 92, 695 P.2d 1130 (1985).*

INDEPENDENT COUNSEL.

Attorney violated this rule when he entered into a business transaction with the client, without providing the client an opportunity to seek the advice of independent counsel and without obtaining his written consent. *In re Redondo, 176 Ariz. 334, 861 P.2d 619 (1993).*

When a lawyer receives a personal benefit apart from the client's fee from a transaction in which he represents a client, the lawyer's ethical obligation is not always fulfilled by merely disclosing the existence of the personal stake, explaining the potential consequences, and obtaining the client's consent. There is an inherent potential for a conflict of interest in such situations, and the lawyer must always ensure that his or her personal interest does not interfere with the unfettered exercise of professional judgment the client is entitled to expect under the circumstances. The best way to achieve this, is to see that the client has independent advice. *In re Breen, 171 Ariz. 462, 830 P.2d 462 (1992).*

INTEREST ADVERSE TO CLIENT.

Where the attorney engaged in conduct involving a clear conflict of interest without seeking to protect his client, knowingly injured his client by failing to repay a loan, then listing the client as a creditor on the bankruptcy, the attorney violated this rule. *In re Jones, 175 Ariz. 141, 854 P.2d 775 (1993).*

Attorney violated this rule when he acquired ownership interest adverse to clients' without transmitting, in writing, the potential legal significance of the transaction as well as his advice that they seek outside counsel. *In re Marce, 177 Ariz. 275, 867 P.2d 845 (1993).*

Automobile sub-lease agreement between attorney and client which did not fully protect the interests of the client violated subsection (a) of this rule. *In re Clemmens, 172 Ariz. 501, 838 P.2d 1262 (1992).*

Attorney violated this rule because without client's consent and without making full disclosure, he continued representing them in a financial transaction under circumstances where his professional judgment was factually impaired and compromised by his own financial interests. *In re Pappas, 159 Ariz. 516, 768 P.2d 1161 (1988).*

Attorney violated this rule, by representing clients and others in a financial transaction when the various interests of these multiple clients impaired or adversely affected his independent professional judgment. *In re Pappas, 159 Ariz. 516, 768 P.2d 1161 (1988).*

LIMITING ATTORNEY'S LIABILITY.

Actions warranted six month suspension of practice, enrollment in law office management assistance program and restitution to client where attorney attempted to limit his liability to a client by conditioning the $3,000 payment on her signing a release letter, without advising her to seek independent counsel, in violation of this rule. *In re Carrasco, 176 Ariz. 459, 862 P.2d 219 (1993).*

PROHIBITED TRANSACTIONS.

An attorney was suspended for 30 days for, pursuant to his client's wishes and without undue influence, preparing an original will and subsequent amendments to it for his long-standing client and friend and designating himself as beneficiary of estate. *In re Davies, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2001 Ariz. LEXIS 211* (Dec. 12, 2001).

1 of 1 DOCUMENT

ARIZONA COURT RULES ANNOTATED

*** This document reflects changes received by the publisher through January 5, 2012 ***
***Annotations are current through December 15, 2011 ***

ARIZONA RULES OF PROFESSIONAL CONDUCT
CLIENT-LAWYER RELATIONSHIP

Ariz. Rules of Prof'l Conduct R. 1.6 (2012)

Review Court Orders which may amend this Rule.

ER 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 or required by paragraphs (b), (c) or (d), or *ER 3.3(a)(3)*.

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

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

(1) 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;

(2) to 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;

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

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

(5) to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.

(6) to prevent reasonably certain death or substantial bodily harm.

HISTORY: Effective December 1, 2003 by R-02-0045; amended by R-08-0014, effective Jan. 1, 2010.

NOTES:
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 *ER 1.18* for the lawyer's duties with respect to information provided to the lawyer by a prospective client, *ER 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 ERs 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 *ER 1.0(e)* for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. 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 also applies in such situations 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.

[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 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.

[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

DISCLOSURE ADVERSE TO CLIENT. [7] 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) recognizes the overriding value of life and physical integrity, and requires the lawyer to make a disclosure in order to prevent homicide or serious bodily injury that the lawyer reasonably believes is intended by a client. In addition, under paragraph (c), the lawyer has discretion to make a disclosure of the client's intention to commit a crime and the information necessary to prevent it. It is very difficult for a lawyer to "know" when such unlawful purposes will actually be carried out, for the client may have a change of mind.

[8] Paragraph (c) permits the lawyer to reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime. Paragraph (c) does not require the lawyer to reveal the intention of a client to commit wrongful conduct, but the lawyer may not counsel or assist a client in conduct the lawyer knows is criminal or fraudulent. See *ER 1.2(d)*; see also *ER 1.16* with respect to the lawyer's obligation or right to withdraw from the representation from the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct, in connection with this Rule, the lawyer may make inquiry within the organization as indicated in *ER 1.13(b)*.

[9] The range of situations where disclosure is permitted by paragraph (d)(1) of the Rule is both broader and narrower than those encompassed by paragraph (c). Paragraph (c) permits disclosure only of a client's intent to commit a future crime, but is not limited to instances where the client seeks to use the lawyer's services in doing so. Paragraph (d)(1), on the other hand, applies to both crimes and frauds on the part of the client, and applies to both on-going conduct as well as that contemplated for the future. The instances in which paragraph (d)(1) would permit disclosure, however, are limited to those where the lawyer's services are or were involved, and where the resulting injury is to the financial interests or property of others. In addition to this Rule, a lawyer has a duty under *ER 3.3* not to use false evidence.

[10] Paragraph (d)(2) 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 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 mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (d)(2) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[11] 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 (d)(3) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[12] 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 (d)(4) 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.

[13] A lawyer entitled to a fee is permitted by paragraph (d)(4) 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.

[14] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes *ER 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 *ER 1.4*. If, however, the other law supersedes this Rule and requires disclosure, paragraph (d)(5) permits the lawyer to make such disclosures as are necessary to comply with the law.

[15] Paragraph (d)(5) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise and except for permissive disclosure under paragraphs (c) or (d), assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by this Rule, the attorney-client privilege, the work product doctrine, or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal. See *ER 1.4*. Unless review is sought, however, paragraph (d)(5) permits the lawyer to comply with the court's order.

[16] In situations not covered by the mandatory disclosure requirements of paragraph (b), paragraph (d)(6) permits discretionary disclosure when the lawyer reasonably believes disclosure is necessary to prevent reasonably certain death or substantial bodily harm.

[17] Paragraph (d) 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 lawyers to the fullest extent practicable.

[18] Paragraph (d) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (d)(1) through (d)(5). 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 (d) 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 this Rule. See ERs 1.2(d), 4.1(b), 8.1 and 8.3. *ER 3.3*, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See *ER 3.3(b)*.

WITHDRAWAL. [19] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in *ER 1.16(a)(1)*. After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in *ER 1.6*. Neither this Rule nor *ER 1.8(b)* nor *ER 1.16(d)* prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

ACTING COMPETENTLY TO PRESERVE CONFIDENTIALITY. [20] 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 ERs 1.1, 5.1 and 5.3.

[21] 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. [22] The duty of confidentiality continues after the client-lawyer relationship has terminated. See *ER 1.9(c)(2)*. See *ER 1.9(c)(1)* for the prohibition against using such information to the disadvantage of the former client.

LexisNexis 50 State Surveys, Legislation & Regulations

Attorneys Admitted Elsewhere

JUDICIAL DECISIONS

ANALYSIS
Construction.
Attorney-Client Relationship.
Concealment.
Confidentiality.
Conflict of Interest.
Disclosure.

-- Adverse to Client.

-- Refusal.

-- Required.

Nonprivileged Information.
Privileged Information.

CONSTRUCTION.

This rule is much broader than the attorney-client privilege. It protects all information, relating to the representation, from noncompulsory disclosure. *Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).*

ATTORNEY-CLIENT RELATIONSHIP.

The guarantees of the Sixth Amendment include the right to an attorney with undivided loyalty, counsel must be free to zealously defend the accused in a conflict-free environment; counsel has a duty to move to withdraw upon a good faith belief that a conflict exists, the trial court then determines whether withdrawal was appropriate. *Romley v. Schneider, 202 Ariz. 362, 45 P.3d 685, 2002 Ariz. App. LEXIS 17 (Ct. App. 2002).*

The appropriate test to determine if an attorney-client relationship exists is a subjective one, where the court looks to the nature of the work performed and to the circumstances under which the confidences were divulged. *Alexander v. Superior Court ex rel. Maricopa, 141 Ariz. 157, 685 P.2d 1309 (1984).*

CONCEALMENT.

Although the attorney did not affirmatively conceal his former client's offense from the authorities, rather, he failed to take affirmative steps to report the offense, and he ethically could have reported the offense, but was not required to do so. *In re Morris, 164 Ariz. 391, 793 P.2d 544 (1990).*

CONFIDENTIALITY.

Where the public defender's continued representation of defendant would have resulted in a violation of *ER 1.7, 1.3* and this rule, the trial court abused its discretion when it denied defense counsel's motion to withdraw. *Okeani v. Superior Court, 178 Ariz. 180, 871 P.2d 727 (Ct. App. 1993).*

CONFLICT OF INTEREST.

The trial court should not have required defense counsel to disclose confidential information when counsel avowed that counsel had an ethical conflict requiring withdrawal. *Maricopa County Pub. Defender's Office v. Superior Court, 187 Ariz. 162, 927 P.2d 822 (Ct. App. 1996).*

DISCLOSURE.

--ADVERSE TO CLIENT.

An ex parte conference between plaintiff, his attorney, and the trial judge was improper and was held to have prejudiced the opposing party. *In re Evans, 162 Ariz. 197, 782 P.2d 315 (1989).*

--REFUSAL.

Attorney violated subdivision (d) where after a client terminated attorney's representation, he refused the client and her new attorney access to client's file. *In re Struthers, 179 Ariz. 216, 877 P.2d 789 (1994).*

--REQUIRED.

Defendant sent a facsimile which made threats against his defense counsel to the Maricopa County Public Defender's Office; although the communication was confidential, the letter was appropriately disclosed. *State v. Hampton, 208 Ariz. 241, 430 Ariz. Adv. Rep. 29, 92 P.3d 871, 2004 Ariz. LEXIS 75 (2004).*

Any requirement that the defendant's attorney turn over to the prosecutor physical evidence, which may aid in the conviction of the defendant, may harm the attorney-client relationship; however, this reason, by itself, is not sufficient to avoid disclosure. *Hitch v. Pima County Superior Court, 146 Ariz. 588, 708 P.2d 72 (1985).*

NONPRIVILEGED INFORMATION.

A communication is not privileged simply because a lawyer has a duty to keep it confidential; a lawyer must reveal nonprivileged information when required to do so. *Samaritan Found. v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).*

If the client himself does not treat the particular communication as privileged, that communication will not be recognized as a confidence by the court. *Alexander v. Superior Court ex rel. Maricopa, 141 Ariz. 157, 685 P.2d 1309 (1984).*

PRIVILEGED INFORMATION.

A communication between a client and his attorney is considered confidential, and therefore privileged, if the communication was made in the context of the attorney-client relationship and was maintained in confidence. *Alexander v. Superior Court ex rel. Maricopa, 141 Ariz. 157, 685 P.2d 1309 (1984).*

1 of 1 DOCUMENT

ARIZONA COURT RULES ANNOTATED

*** This document reflects changes received by the publisher through January 5, 2012 ***
***Annotations are current through December 15, 2011 ***

ARIZONA RULES OF PROFESSIONAL CONDUCT
PREAMBLE

Ariz. Rules of Prof'l Conduct R. 1.0 (2012)

Review Court Orders which may amend this Rule.

ER 1.0. Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. Whether government lawyers should be treated as a firm depends on the particular Rule involved and the specific facts of the situation.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(*l*) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

HISTORY: Effective December 1, 2003 by R-02-0045.

NOTES:
COMMENT

CONFIRMED IN WRITING. [1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

FIRM. [2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

FRAUD. [5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

INFORMED CONSENT. [6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See ERs 1.2(c), 1.6(a), 1.7(b), 1.8(a), and 1.9(b).

The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See ERs 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., ERs 1.5(e)(2), 1.8(a) and (g). For a definition of "signed," see paragraph (n).

SCREENED. [8] This definition applies to situations where screeening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under ERs 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

LexisNexis 50 State Surveys, Legislation & Regulations

Attorneys Admitted Elsewhere

1 of 1 DOCUMENT

ARIZONA COURT RULES ANNOTATED

*** This document reflects changes received by the publisher through January 5, 2012 ***
***Annotations are current through December 15, 2011 ***

ARIZONA RULES OF PROFESSIONAL CONDUCT
CLIENT-LAWYER RELATIONSHIP

Ariz. Rules of Prof'l Conduct R. 1.4 (2012)

Review Court Orders which may amend this Rule.

ER 1.4. Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in *ER 1.0(e)*, is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) In a criminal case, a lawyer shall promptly inform a client of all proffered plea agreements.

HISTORY: Effective December 1, 2003 by R-02-0045.

NOTES:
COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

COMMUNICATING WITH CLIENT. [2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer. See *ER 1.2(a).*

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations -- depending on both the importance of the action under consideration and the feasibility of consulting with the client -- this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

EXPLAINING MATTERS. [5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in *ER 1.0(e)*.

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See *ER 1.14*. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See *ER 1.13*. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

WITHHOLDING INFORMATION. [7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. ER 3.4(c) directs compliance with such rules or orders.

LexisNexis 50 State Surveys, Legislation & Regulations

Attorneys Admitted Elsewhere

JUDICIAL DECISIONS

ANALYSIS
Attorney Discipline.
Censure.
Disbarment.
Failure to Communicate.

-- Case Status.

-- False Statements.

-- Inadequate Explanation.

-- Neglected Requests for Information.

-- Plea Bargain.

-- Settlement Offers.
Lack of Diligence.

-- Failure to Act Promptly.

-- Failure to Inform Client.
Obligation to Inform.
Prejudicial Neglect.
Standard of Proof.

ATTORNEY DISCIPLINE.

Attorney failed to properly represent client in lawsuit she had filed, when attorney failed to provide adequate discovery and did not communicate settlement offers to client or attend settlement conferences. *In re Bayless, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2002 Ariz. LEXIS 73* (May 1, 2002).

Attorney was suspended and ordered to pay restitution and costs, where, inter alia, he did not communicate with his clients or provide them with billing statements or an account of his time. *In re Cimino, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2002 Ariz. LEXIS 111* (July 3, 2002).

Attorney was suspended for three months and placed on probation for two years, where, he contacted an opposing party directly despite the fact that he knew the party was represented by counsel. *In re Velez, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2002 Ariz. LEXIS 165* (Sept. 27, 2002).

Attorney was suspended for three months and placed on probation for two years, where, in a motion for the award for attorney's fees, the attorney did not fully inform the court of his fee agreement with his clients, that he charged them $100 per hour instead of the $150 he claimed to the court. *In re Velez, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2002 Ariz. LEXIS 165* (Sept. 27, 2002).

CENSURE.

Attorney was censured where, inter alia, he failed to abide by his clients' decisions regarding the objectives of representation, failed to consult with them as to the means by which objectives were to be pursued, and failed to act with reasonable diligence; he also failed to respond to bar enquiries. *In re Oakley, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2002 Ariz. LEXIS 54* (Apr. 19, 2002).

DISBARMENT.

Attorney, who had been disciplined numerous times in the past, was disbarred and ordered to pay restitution where she failed to consult with clients and abide by their decisions, failed to act with reasonable diligence and promptness in representing clients, failed to keep clients reasonably informed about the status of their case and failed to properly withdraw from the representation and take steps reasonably practicable to protect the clients interests. *In re Davis, -- Ariz. --, -- P.2d --, 2000 Ariz. LEXIS 20* (Mar. 15, 2000).

Attorney was disbarred and ordered to pay restitution to clients for failure to pursue his clients' claims, neglect of clients' affairs, and violations of the terms of a previous disciplinary order. *In re Phelps, -- Ariz. --, -- P.2d --, 2000 Ariz. LEXIS 11* (Feb. 17, 2000).

FAILURE TO COMMUNICATE.

--CASE STATUS.

Attorney representing clients on numerous matters was censured, inter alia, for failure to respond to status inquiries by medical providers and failure to advise providers that clients' cases had settled; the commission on attorney discipline however found that the negligence had caused little or no actual injury. *In re Estrada, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2002 Ariz. LEXIS 31* (Mar. 5, 2002).

Where attorney failed to appear for scheduled hearings and court appearances, failed to act with reasonable diligence and promptness, and failed to communicate with his client or to advise as to the status of the case, amongst other violations, the attorney was suspended from the practice of law for two years, ordered to pay restitution, and was to be placed on probation for a year following reinstatement. *In re Moore, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2000 Ariz. LEXIS 116* (Nov. 8, 2000).

Where attorney (1) was retained to represent a client in a personal injury case and failed both to communicate with the client, (2) was retained to defend a client in a civil suit and failed to communicate with his client and to appear for a hearing, (3) filed a motion to set aside a default judgment while he was suspended from the practice of law, and (4) failed to respond to the State Bar's inquiry and refused to cooperate in the investigation of these matters the attorney was disbarred and ordered to pay costs and restitution. *In re Meyer, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2000 Ariz. LEXIS 96* (Sept. 29, 2000).

Attorney was censured, placed on probation for a period of one year, required to attend the State Bar's Ethics Enhancement Program, and ordered to pay costs of the disciplinary proceedings where the attorney represented clients in a bankruptcy matter but failed to communicate with his clients, failed to file their bankruptcy petition, and failed to respond to the State Bar's inquiry of the matter. *In re Hull, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2000 Ariz. LEXIS 85* (Aug. 28, 2000).

Attorney was censured, ordered to pay restitution to the client, and ordered to pay costs and expenses incurred by the State Bar in connection with the disciplinary proceedings where the attorney failed to discuss the case and appeal issues with his client; failed to timely advise the client that his conviction was affirmed, and then failed to consult with his client regarding his available options. *In re Griffith, -- Ariz. --, -- P.2d --, 2000 Ariz. LEXIS 35* (May 5, 2000).

The evidence supports a finding that defendant repeatedly failed to comply with reasonable requests for information in violation of this rule. *In re Curtis, 184 Ariz. 256, 908 P.2d 472 (1995).*

Where attorney's failure to communicate was knowing, the presence of two mitigating factors and the absence of any aggravating factors for the violation made censure and condemnation the appropriate penalty. *In re Curtis, 184 Ariz. 256, 908 P.2d 472 (1995).*

Where there is no causal connection established between attorney's ethical violations, including his knowing failure to communicate, and any significant harm suffered by client as a result of his misconduct, suspension is not an appropriate sanction. *In re Curtis, 184 Ariz. 256, 908 P.2d 472 (1995).*

Attorney was censured and placed on probation where she had failed to provide competent representation; failed to act with reasonable diligence and promptness in her representation failed to keep clients apprised as to case status; and failed to cooperate with the state bar's investigations into her conduct. *In re O'Brien-Reyes, 177 Ariz. 362, 868 P.2d 945 (1994).*

Where attorney, who had been previously informally reprimanded, failed to respond to discovery requests, failed to notify his client of vital information regarding her case, entered into a stipulation without clients' consent, and failed to cooperate with arbitrator, he was suspended for 90 days, was assigned to practice under a monitor, was required to complete additional continuing legal education classes, and to pay costs to the state bar. *In re Ziman, 174 Ariz. 61, 847 P.2d 106 (1993).*

Where attorney failed to keep his clients informed about the status of their cases and retainers, failed to return documents to his clients after handling their cases, and failed to respond to the state bar's repeated inquiries into various matters he was censured, and ordered to pay restitution and costs to the *State Bar. In re Martinez, 174 Ariz. 197, 848 P.2d 282 (1993).*

Where lawyer was found to have failed to diligently and competently pursue client's claim, communicate with client about the dismissal of an original complaint and filing of a second lawsuit, and a settlement offer prior to tendering it to opposing counsel, and where lawyer improperly filed a lis pendens where the complaint did not involve title to

property, in light of previous discipline and the lawyer's failure to comply with probation, suspension for one year was an appropriate sanction. *In re Coburn, 171 Ariz. 533, 832 P.2d 186 (1992).*

Lawyer's conduct demonstrated a failure to maintain adequate communication with his client and keep her informed of the status of her case. *In re Talmadge, 171 Ariz. 548, 832 P.2d 201 (1992).*

Attorney's suspension from the practice of law for a period of three months was properly ordered, where attorney undertook representation in a malpractice action, and failed to communicate with his client regarding the status of the case and where, attorney failed to take any action whatsoever regarding the case. *In re Anderson, 163 Ariz. 362, 788 P.2d 95 (1990).*

Attorney was properly censured where he advanced financial assistance to his client, failed to inform the client or get her consent regarding a payment to the opposing side, and failed to keep his clients informed as to the status of the lawsuits he was engaged to handle. *In re Bowen, 144 Ariz. 92, 695 P.2d 1130 (1985).*

--FALSE STATEMENTS.

Attorney who failed to promptly return files and unearned fees to clients, failed to properly terminate representation, and told clients he had performed work which he had not completed was suspended from the practice of law for one year and ordered to pay restitution for numerous violations of the *Rules of Professional Conduct. In re Neuzil, -- Ariz. --, -- P.2d --, 2000 Ariz. LEXIS 53* (June 1, 2000).

--INADEQUATE EXPLANATION.

Attorney who did not inform clients as to what efforts or strategies he was employing, or that other attorneys were going to take over some operations, or of the extent of the exposure of the client to potential personal liability, failed to communicate with his client in order to keep the client abreast of the status of the case and to provide sufficient information to allow the client to make an informed decision. *Little Pat, Inc. v. Conter (In re Soll), 181 Bankr. 433 (Bankr. D. Ariz. 1995).*

Attorney violated subsection (b) by failing to explain the litigation to client to the extent necessary to permit them to make informed decisions regarding attorney's continued representation of client. *In re Shannon, 179 Ariz. 52, 876 P.2d 548 (1994).*

Attorney's failure to adequately communicate with the client during the pendency of this lawsuit and failure to notify the client that the case was dismissed, warranted censure and placement on probation for a period of one year under the condition that he make restitution. *In re Kaplan, 179 Ariz. 175, 877 P.2d 274 (1994).*

Attorney's failure to consult with his client regarding the possiblity of instructing the jury on lesser included offenses demonstrated, clearly and convincingly, that he violated this rule. *In re Wolfram, 174 Ariz. 49, 847 P.2d 94 (1993).*

Public censure was the appropriate sanction for lawyer who was negligent in failing to pursue his client's interests, and failing to maintain adequate communication. *In re Ames, 171 Ariz. 125, 829 P.2d 315 (1992).*

A statutory suspension followed by a two-year period of probation was warranted, where attorney failed to adequately communicate with his clients or keep them informed of the developments in their case, failed to comply with discovery which necessitated a motion to compel, and in addition, he failed to timely respond to the state bar complaint. *In re Cassalia, 173 Ariz. 372, 843 P.2d 654 (1992).*

Attorney violated this rule where he not only failed to keep his client informed, as required by this rule, but did not explain the matter to his client so that decisions, vital to his client, could be intelligently made. *In re Cardenas, 164 Ariz. 149, 791 P.2d 1032 (1990).*

Where the public and the clients of a consulting company had every reason to believe they were dealing with respondent and where respondant failed to communicate with his clients because his nonlawyer employees failed to communicate with him, attorney violated this rule. *In re Galbasini, 163 Ariz. 120, 786 P.2d 971 (1990).*

--NEGLECTED REQUESTS FOR INFORMATION.

Attorney was censured and ordered to pay costs and expenses where the attorney accepted representation of a client regarding a DUI offense, accepted a retainer, failed to interview witnesses, failed to return unearned portion of the retainer, and failed to respond to subsequent requests for a refund. *In re Crimmins, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2001 Ariz. LEXIS 39* (Mar. 7, 2001).

Where attorney failed to perform services for which he was retained, failed to communicate with his clients, failed to respond to their repeated inquiries, failed to return unearned retainers, failed to return clients' original documents and files needed to protect their legal rights; and where attorney also engaged in the practice of law while suspended for nonpayment of bar dues and noncompliance with mandatory continuing legal education requirements, and failed to respond or cooperate in the State Bar's investigation of these matters, the attorney was suspended for two years and ordered to pay costs and restitution. *In re McFadden, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2000 Ariz. LEXIS 97* (Sept. 29, 2000).

Where attorney retained for divorce proceeding failed to return client's telephone calls and failed to transfer the file to subsequent counsel, which caused the client to incur additional attorney's fees and costs and attorney later failed to respond and cooperate with the state bar in the investigation of said matters, he was suspended for violations of this rule, *ER 1.16(d), ER 8.1(b), ER 8.4(d),* and *Arizona Supreme Court Rule 51(h)* and (i). *In re Sill, -- Ariz. --, -- P.2d --, 2000 Ariz. LEXIS 32* (Apr. 26, 2000).

Attorney who abandoned his law practice without informing the client that he was discontinuing representation, left the state without informing the client of his whereabouts, and failed to respond, in violation of this rule, *ER 1.1, ER 1.2, ER 1.3, ER 1.15, ER 1.16(d), ER 8.1,* and *Supreme Court Rule 51(h)* and (i), exhibited a pattern of misconduct and bad faith obstruction of the disciplinary proceeding warranting disbarment. *In re Peartree, 180 Ariz. 518, 885 P.2d 1083 (1994).*

Attorney violated this rule, where some clients' requests for information were neglected. *In re Struthers, 179 Ariz. 216, 877 P.2d 789 (1994).*

Attorney failed to adequately communicate with all six of the subject clients. *In re Brown, 175 Ariz. 134, 854 P.2d 768 (1993).*

Two years probation was appropriate for attorney who violated this rule, when he failed to contact clients concerning their difficulties with the law firm, failed to report back to clients concerning a refund, and failed to follow up the clients to ensure that satisfaction with representation. *In re Lenaburg, 177 Ariz. 20, 864 P.2d 1052 (1993).*

--PLEA BARGAIN.

Attorney was suspended from the practice of law for a period of two years where he committed several offenses, including failure to communicate information regarding plea bargains to his client. *In re Weisling, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2001 Ariz. LEXIS 41* (Mar. 23, 2001).

--SETTLEMENT OFFERS.

Where attorney failed to disclose a conflict of interest, failed to provide information to clients to make an informed decision regarding settlement, failed to convey settlement offers to all plaintiffs, failed to consult with all plaintiffs regarding the classification of plaintiffs and coerced some plaintiffs into settling in violation of ERs 1.4, 1.7(b) and 1.8(g), the attorney was suspended for six months and ordered to pay costs and resititution. *In re North, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2001 Ariz. LEXIS 45* (Mar. 28, 2001).

LACK OF DILIGENCE.

--FAILURE TO ACT PROMPTLY.

Debtor's attorney violated standards of professional conduct when he ceased appearing to represent the debtor, and failed to respond to a motion to dismiss the debtor's adversary proceeding, without taking steps to withdraw from representation. *In re Madison, -- Bankr. --, 2011 Bankr. LEXIS 1165* (Bankr. D. Ariz. Mar. 30, 2011).

Debtor's attorney violated standards of professional conduct when he ceased appearing to represent the debtor, and failed to respond to a motion to dismiss the debtor's adversary proceeding, without taking steps to withdraw from representation. *In re Madison, -- Bankr. --, 2011 Bankr. LEXIS 1165* (Bankr. D. Ariz. Mar. 30, 2011).

Attorney failed to keep a client reasonably informed about a personal injury case and failed to use reasonable promptness to file a complaint before the statute of limitations expired. *In re Moak, 205 Ariz. 351, 416 Ariz. Adv. Rep. 19, 71 P.3d 343, 2003 Ariz. LEXIS 81 (2003).*

--FAILURE TO INFORM CLIENT.

Attorney was censured and assessed costs of the disciplinary proceedings where the attorney in a domestic relations case was instructed by the court to file appropriate documents evidencing an agreement and failed to do so, and failed to keep his client informed regarding the status of the case so that the client was forced to retain new counsel upon termination of representation. *In re MacDonald, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2000 Ariz. LEXIS 93* (Sept. 20, 2000).

Respondent was ordered to pay restitution for failing to diligently represent a client or to notify the client that respondent was terminating his practice, for abandoning a client and causing serious harm to the client including financial loss and the loss of certain legal rights, and for failing to respond or cooperate with the State Bar in the investigation. *In re Carey, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2000 Ariz. LEXIS 86* (August 25, 2000).

Attorney's abandonment of clients without notice in order to serve his own interests, leaving them to fend for themselves until he returned, violated *Ethical Rule 1.3* and this rule. *In re Hirschfeld, 192 Ariz. 40, 960 P.2d 640 (1998),* cert. denied, *525 U.S. 1122, 119 S. Ct. 904, 142 L. Ed. 2d 903 (1999).*

A member of the state bar of Arizona, was censured for inattention to his clients and their cases in violation of his duties and obligations as a lawyer. *In re Augenstein, 177 Ariz. 581, 870 P.2d 399 (1994).*

OBLIGATION TO INFORM.

Attorney was disbarred where, inter alia, he represented clients which resulted in a settlement and upon settlement, the attorney failed to provide an accounting relating to the money they provided for costs, and he also failed to respond to a reasonable request for information from the state bar. *In re Hovell, -- Ariz. --, -- Ariz. Adv. Rep. --, -- P.3d --, 2002 Ariz. LEXIS 48* (Mar. 28, 2002).

The intentionality or unintentionality of an attorney's conduct is irrelevant in determining a violation of this rule; the question is simply whether or not the attorney provided the client with sufficient information to enable the client to make an informed decision regarding the representation. *In re Shannon, 179 Ariz. 52, 876 P.2d 548 (1994).*

A lawyer has an obligation to explain the problem, lay out the significant choices, and help the client make an informed, rational decision. *In re Wolfram, 174 Ariz. 49, 847 P.2d 94 (1993).*

Summary judgment for insurer was proper on failure to communicate and to settle issue raised by insureds, where insurer failed to notify insureds of settlement offer, because, having hired an attorney to represent the insureds, that obligation belonged to the attorney. *Lloyd v. State Farm Mut. Auto. Ins. Co., 176 Ariz. 247, 860 P.2d 1300 (Ct. App. 1992).*

PREJUDICIAL NEGLECT.

Disbarment was appropriate for attorney whose actions included conversion of funds, failure to perform work for which he was retained and for which he accepted retainers, failure to pursue the clients' cases with diligence and competence, failure to maintain communication with clients, misrepresentation to clients concerning the status of their cases, failure to return client files and property, practice of law after being placed on interim suspension, threatening adverse parties with physical violence, failure to remit money received on the clients' behalf, and allowing clients' cases to be dismissed or delayed. *In re Woltman, 178 Ariz. 548, 875 P.2d 781 (1994).*

When a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding, censure is the appropriate disciplinary action. *In re Ames, 171 Ariz. 125, 829 P.2d 315 (1992).*

In failing to actively pursue his client's case and failing to respond to letters from his client, despite his statements to the contrary, an attorney was clearly negligent, and censure was the appropriate sanction. *In re Talmadge, 171 Ariz. 548, 832 P.2d 201 (1992).*

Attorney's failure to keep a client informed about the status of a case despite the client's repeated reasonable requests for information was a case of negligence rather than knowing failure to communicate where it was due to attorney's inability to keep abreast of his rapidly expanded law practice. *In re Rice, 173 Ariz. 376, 843 P.2d 1268 (1992).*

STANDARD OF PROOF.

Clear and convincing evidence established respondent's violations of this section. *In re Brady, 186 Ariz. 370, 923 P.2d 836 (1996).*

unpaid balance by the periodic rate of .xxx% per month (XX PERCENT [xx%] ANNUAL PERCENTAGE RATE). The unpaid balance will bear interest until paid.

- Joint Representation (two or more clients)

We are representing both you _____ and _____ in the same or a related matter. At this time, such representation is permitted because there does not appear to be a conflict of interest between the parties. This may change and a conflict may arise at some later point in the representation. We will continue to evaluate the case and the existence of any possible conflicts of interest. Should a conflict arise, we will advise all affected clients and comply with the requirements of Ethical Rule 1.7, which may include withdrawal. In addition, all parties agree and provide their consent that we may discuss the case with one or all of you, together or apart, and that we will not keep information confidential between the parties while jointly representing you.

> [NOTE TO LAWYER: You must discuss with your clients and should clearly articulate prior to or within a reasonable time after beginning your joint representation which client will get the original file and which will be given a copy of the original file at the conclusion of the representation. See ER 1.16(d), comment 9.]

- Limited Scope Representation

LIMITED SCOPE: _____ hires **[NAME/LAW FIRM]** to pursue claims he or she may have in connection with [INSERT DESCRIPTION OF REPRESENTATION OF WHAT YOU SPECIFICALLY ANTICIPATE DOING, INCLUDING WHEN THE REPRESENTATION STARTS AND WHEN THE REPRESENTATION CONCLUDES (e.g. DECREE IS ENTERED). ALSO INDICATE WHAT IS NOT INCLUDED IN THIS FEE AGREEMENT, (e.g. APPEAL, MISTRIAL, QUADRO AND IF FURTHER REPRESENTATION IS NEEDED AFTER THAT A SEPARATE FEE AGREEMENT WILL BE DRAFTED).

You are agreeing that the scope of this representation is limited as follows:

Notwithstanding anything to the contrary in this agreement, this representation is terminated when the services listed in this document have been completed, and you will not expect any further services to be performed, including document-drafting, giving legal advice, or court appearances, unless you sign a new fee agreement with this firm.

Unless the opposing party or attorney knows of this firm's representation, you are considered to be unrepresented; you will be expected to communicate with the opposing party or attorney as though you do not have a lawyer representing you.

07-04: Joint Representation; Conflicts; Communication; Informed Consent

11/2007

The representation of multiple clients in a single litigation matter is generally permissible so long as the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each client, the representation does not involve the assertion of a claim by one client against another client, and each client gives informed consent, confirmed in writing. Ethical Rule ("ER") 1.7(b). The requirement of informed consent arises only if, as an initial matter, the lawyer determines that the lawyer can, in fact, competently and diligently represent each client in the particular matter. Once that determination is made, the lawyer bears the burden of showing that there was adequate disclosure to each client and that each client gave an informed consent.

The disclosures required to obtain the client's "informed consent" will depend on the facts and circumstances of the particular matter. The lawyer must explain the possible effects of the common representation on the lawyer's obligations of loyalty, confidentiality and the attorney-client privilege. In addition to the confirming writing required by ER 1.7(b), informed consent usually will require that the lawyer explain the advantages and disadvantages of the common representation in sufficient detail so that each client can understand why separate counsel may be desirable. Finally, during the course of the matter, the lawyer must continue to evaluate whether conflicts have arisen that may require additional disclosures and consent or withdrawal from the representation.

FACTS

The inquiring lawyer seeks to represent multiple plaintiffs bringing claims against a defendant in a single matter and has asked for comment on a proposed written disclosure ("consent form") that each client would be asked to sign. This opinion references the proposed consent form for purposes of illustration only, and is intended to set forth general guidelines that lawyers should undertake in determining whether the representation of multiple clients in litigation is permissible and, if so, the general subject matter of required disclosures under ER 1.7.[1]

QUESTION PRESENTED

Where a lawyer seeks to represent multiple clients in a single litigation matter, what information must the lawyer adequately communicate to the clients to satisfy ER 1.7's requirement of an "informed consent, confirmed in writing"?[2]

RELEVANT ETHICAL RULES

ER 1.0 Terminology

> (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
>
> (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
>
> . . .
>
> (e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
>
> . . .
>
> (h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
>
> (i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
>
> . . .
>
> (n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.
>
> . . . .

ER 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 or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).
>
> . . . .

ER 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 each affected client gives informed consent, confirmed in writing, and:

(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; and
(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.

RELEVANT ARIZONA ETHICS OPINIONS

Ariz. Ethics Ops. 96-04, 02-06

OTHER RELEVANT ETHICS OPINIONS

ABA Formal Op. 06-438; D.C. Bar Op. 327

OPINION

The Ethical Rules specifically contemplate that a lawyer may represent multiple clients. *See* ER 1.8, cmt 13. The potential benefits of multiple representation include "reduced legal fees, the avoidance of unnecessary future conflicts, and, in litigation, the opportunity to present a united front." *Sellers v. Superior Court*, 154 Ariz. 281, 286, 742 P.2d 292, 297 (App. 1987). However, representation of multiple clients in a single matter presents a significant risk of materially limiting the interests of individual clients. Both *Sellers v. Superior Court* and Ariz. Ethics Op. 96-04 (February 1996) [3] illustrate the type of conflicts that can arise when a lawyer undertakes to represent multiple clients in the same matter. The ABA/BNA Lawyer's Manual on Professional Conduct cautions that "clients seeking shared representation often do not understand the risks and disadvantages of shared counsel," including that there can be "no secrets inside the joint attorney-client relationship," and that if interests later diverge, the clients may be forced to hire new counsel. ABA/BNA Lawyer's Manual on Professional Conduct §51:305 (2005). Based on these and other inherent risks of joint representation, ER 1.7(b) bars representations involving concurrent conflicts unless the lawyer obtains the clients' "informed consent, confirmed in writing."

Notably, not all conflicts are "consentable." ER 1.7(b)(1) first requires that "the lawyer reasonably believe[] that the lawyer will be able to provide competent and diligent representation to each affected client." Thus, even if the client consent form is comprehensive, the clients' waiver is only effective if the lawyer held a reasonable belief that he or she could competently and diligently represent each of the involved clients. ER 1.7, cmts 2, 14 and 15; *see also* ER 1.0(a), (h) and (i). For example, Comment 28 to ER 1.7 cautions against representation of multiple clients in the same matter where "contentious litigation or negotiations" between the clients are "imminent or contemplated." The lawyer should evaluate whether other circumstances unique to the particular matter may make the representation impermissible or require special disclosures, such as the limited financial resources of a defendant where multiple plaintiffs are being represented. This standard requires that the attorney be sufficiently familiar with the facts underlying the proposed representation to reasonably make this threshold determination of whether the representation is permissible under the ethical rules. *See, e.g., Felix v. Balkin*, 49 F. Supp. 2d 260, 270 (S.D.N.Y. 1999) ("[a]ccepting a common representation is not a risk-free activity" and "it is incumbent upon the attorney to learn the essential facts in order both to form a professional opinion that interests are, in fact, common and not adverse, and to explain fully to each client the implications of the common representation").

This opinion therefore assumes that the inquiring lawyer is satisfied that the representation is permissible and that the conflict is, indeed, "consentable." *See In re Bentley*, 141 Ariz. 593, 596, 688 P.2d 601, 604 (1984) (applying DR 5-105(C) to hold that representation created an impermissible conflict of interest because "[e]ven with full disclosure, not all conflicts may be waived by consent of the parties"); *In re Petrie*, 154 Ariz. 295, 742 P.2d 796 (1987) (similar).

Although the disclosures need not take any particular form, a lawyer seeking "informed consent" to joint representation generally is required to orally discuss the potential risks and advantages of the joint representation to ensure that each client fully appreciates the risks and has an opportunity to ask questions. ER 1.7, cmt 20. ER 1.0 thus provides that the requirement of an informed consent "confirmed in writing," "denotes informed consent that is given in writing... *confirming an oral informed consent*." ER 1.0(b) (emphasis supplied). "The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages... and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns." ER 1.7, cmt 20. Here, the inquiring attorney's proposed consent form recites that the law firm has explained the potential risks of the joint representation and that the clients have been permitted to ask questions about those issues. In each case, the lawyer undertaking to represent multiple clients must evaluate whether such explanation was in fact adequate to fully inform the clients under the governing Ethical Rules and the general guidelines discussed below.

To obtain any client's informed consent, the lawyer must communicate "adequate information" about the "risks" and "alternatives" of the multiple party representation. The specific disclosures required depend in large part on "the nature of the conflict and the nature of the risks involved" given the facts and circumstances of the particular matter. ER 1.7, cmt 18. One such circumstance that should be considered is the level of each client's legal sophistication. ER 1.0, cmt 6 ("[i]n determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally"); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 122 cmt c(i) (2000) ("clients differ as to their sophistication and experience, and situations differ in terms of their complexity and the subtlety of the conflicts presented"). Unsophisticated clients, such as clients without independent or in-house legal counsel, may require more detailed explanation than other clients who are experienced in litigation or multi-party representations. Depending on the complexity of the matter, it may be appropriate for the lawyer to advise the client to seek independent counsel to assist in evaluating the potential conflicts, although this is not always required. ER 1.0, cmt 6.

A lawyer "must make reasonable efforts to ensure that the client... possesses information reasonably adequate to make an informed decision." ER 1.0, cmt 6. With respect to the required content of the disclosure, Comment 18 to ER 1.7 indicates that the lawyer must explain the "implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved." Such information includes disclosing to the client: (1) the conflicting or potentially conflicting interests of the other clients; (2) the potential courses of action that may be foreclosed or limited by the joint representation; (3) the effect of the representation upon the client's confidential information and on the attorney-client privilege; (4) any reservations the lawyer would have about the representation if the lawyer were representing only the client being advised; and (5) the consequences on the representation if one client later withdraws their consent to the joint representation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 122 cmt c(i)

(2000); ABA/BNA Lawyer's Manual on Professional Conduct §51:309-311 (2005). The lawyer must explain the conflict in enough detail that the clients can "understand the reasons why it may be desirable for each to have independent counsel, with undivided loyalty to the interests of each of them." DANIEL J. MCAULIFFE, ARIZONA LEGAL ETHICS HANDBOOK §0.1:415 (2d ed. 2003 with 2006 supp.) (quoting *Sellers v. Superior Court*, *supra*, and discussing "informed consent" requirement of Arizona law).

While the confirming writing "need not take any particular form[,] it should, however, include disclosure of the relevant circumstances and reasonably foreseeable risks of the conflict of interest, as well as the client's agreement to the representation despite such risks." [4] ER 1.7, cmt 20. While there is no "one size fits all" template for ER 1.7's required disclosures or for the content of the confirming writing, the proposed consent form provided by the inquiring lawyer for the Committee's consideration illustrates the following general topic areas that should be addressed, in addition to others that may be required by particular circumstances of the proposed representation:

(1) *Conflicting Testimony*. The implications of testimonial conflicts among jointly represented parties is addressed in *Sellers v. Superior Court*, where the defendants had all consented in advance to the joint representation, with knowledge of testimonial conflicts, yet an argument was made in the context of a motion for disqualification that those conflicts presented an "untenable" conflict at the outset on the facts of that case. Although the inquiring lawyer's consent form appropriately identifies the potential for testimonial and other conflicts, it may be prudent to provide further explanation on how such testimonial conflicts could negatively impact the claims of each individual client, assuming that was not done orally. *Sellers*, 154 Ariz. at 287, 742 P.2d at 298 (on remand following disqualification order, trial court should consider whether the ER 1.7 disclosure "encompass[ed] the divergence of interest among defendants and the potential significance of their testimonial disparities"). Furthermore, any known testimonial conflicts should be evaluated to determine whether the conflict is "consentable."

(2) *Conflicting Settlement Positions*. The consent form appropriately discloses that there may be conflicts among clients with respect to settlement, including that "there may be different possibilities of settlements of the claims." It recites the clients' understanding that "a lump sum settlement offer to all plaintiffs" is "not permissible," that the law firm may reject such an offer and demand individual settlement offers, and that each plaintiff is free to accept or reject its individual settlement offer. This opinion assumes that the inquiring lawyer, in discussing the topic of settlement, orally discussed the advantages and disadvantages of the various settlement approaches, including the possible disadvantages of requiring individual offers (as opposed to aggregate offers). Additionally, because individual offers are being required, it should also be made clear to each client that information on the individual settlement offer it receives, and any response thereto, cannot be kept confidential from the other jointly represented plaintiffs. *See* ER 1.8, cmt 13 (noting that ER 1.8 is a corollary of ER 1.7 and requires that "before any settlement offer... is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement... is accepted"); *see also* ABA Formal Op. 06-438 (February 10, 2006) (with respect to aggregate settlement offers under ER 1.8, lawyer must provide each client with detailed information on every other client's participation in the proposed settlement, along with explanation of how costs will be allocated).[5]

(3) *Attorney-client Privilege*. Lawyers undertaking a joint representation must carefully explain to each client the effect of the joint representation on the attorney-client privilege. As the comments to ER 1.7 reflect, the lawyer must disclose that there is no attorney-client privilege between jointly represented clients during the pendency of the matter, and the implications that arise from the absence of any such privilege. ER 1.7, cmts 29, 30 and 31; *see Federal Deposit Ins. Corp. v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000) (privilege is "inapplicable to disputes between joint clients"). Additional disclosures also should be made on the topic of confidentiality and the possibility that withdrawal may be required in the future if untenable conflicts arise, as further discussed below.

(4) *Withdrawal of the lawyer in the case of a conflict*. The inquiring lawyer should disclose that the firm may be forced to withdraw if an untenable conflict arises during the representation, and the delays and expense that could result should such withdrawal be required. ABA/BNA Lawyer's Manual on Professional Conduct §51:309-311 (2005) (lawyer should disclose that withdrawal may be required if one joint client asks the lawyer not to reveal information to another); Ariz. Ethics Op. 02-06 (September 2002) ("Aggregate representation also is ethically proper if the disclosure to each client includes an explanation that the lawyer may have to withdraw from representing *each* client if a conflict arises *among* the clients") (emphasis in original); ER 1.7, cmt 30 ("The lawyer should . . . advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other").[6]

(5) *Confidentiality*. Disclosures should be made concerning the impact of the joint representation on the confidentiality of each client's communications with the lawyer. As noted in Ariz. Ethics Op. 02-06, "information shared by one co-client that is necessary for the representation of the other joint clients will be shared with the other co-clients because there is no individual confidentiality when a joint representation exists." Hence, the clients should be advised that all information provided by them in connection with the representation will be available to the other clients and that the normal confidentiality obligations of the lawyer do not apply as between the jointly represented clients. *See* ER 1.7, cmt. [30]; ER 1.6(a) (lawyer shall not reveal confidential information "unless the client gives informed consent"). As noted above, it also should be explained that if one joint client instructs the lawyer not to share material information with other joint clients, a conflict is created that may require the lawyer's withdrawal from the joint representation. *See* D.C. Bar Op. 327 (March 2005) (addressing lawyer's obligation to share otherwise confidential information with all clients in a joint representation).

CONCLUSION

The adequacy of any disclosure under ER 1.7 ultimately depends on the particular risks posed by the facts and circumstances of each case. This opinion sets forth general procedures and guidelines for determining whether representation is permissible under ER 1.7, and the content of the required disclosures. The inquiring lawyer is best suited to determine whether the consent form, along with oral disclosures, is adequate based on those facts and circumstances. Additionally, at the time any settlement offer is received, the inquiring lawyer should re-evaluate whether additional disclosure and consent is required under ER 1.8. *See* ABA Formal Op. 06-438. Finally, in cases of joint representation, lawyers must evaluate on an ongoing basis whether future developments in the case create issues that require additional disclosures and consent to the multiple representation or possible withdrawal.

_____

[1] As the opinion makes clear, the disclosures required to obtain an informed consent, and the content of the confirming writing, will depend on the unique facts and circumstances of each matter. Depending on the nature and complexity of the matter, different disclosures may be appropriate or required under the Ethical Rules or the general guidelines set forth in this opinion.

[2] This opinion addresses only the information that must be disclosed to obtain an informed consent under ER 1.7, and does not address other information that must be contained in a client representation agreement under other provisions of the Ethical Rules.

[3] *Sellers* involved a trial court order disqualifying defense counsel, who represented 11 defendants in a civil case. The Court of Appeals ruled

that the disqualification had been prematurely ordered. Ariz. Ethics Op. 96-04 discussed conflict-of-interest and fee issues that arise when a law firm represents both a driver and passenger in a personal-injury case against another driver.

[4] As the comments to ER 1.7 reflect, the purpose of the confirming writing is both to emphasize the seriousness of the client's consent and to avoid later disputes and ambiguities about what was disclosed. [ER 1.7, cmt 20 ("[T]he writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.")]

[5] ABA Formal Op. 06-438 states that the special disclosure requirements of ER 1.8 apply whenever "any two or more clients consent to have their matters resolved together." The opinion notes that an aggregate settlement within the meaning of ER 1.8 can take a variety of forms, and may include an offer that specifies the amount to be paid to each individual client. The inquiring lawyer should evaluate any settlement offer received to determine whether it is, in substance, an aggregate offer that would trigger the additional disclosure requirements of ER 1.8.

[6] In limited circumstances a lawyer may be able to obtain informed consent allowing each client to keep certain information confidential. *See* ER 1.7, cmt 30.

Delmar Miller et al. v. Mike Alagna et al.

ED CV 99-0176 RT (RZx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

138 F. Supp. 2d 1252*; *2000 U.S. Dist. LEXIS 21083

July 18, 2000, Decided

DISPOSITION: [**1] DEFENDANTS PAUL BUGAR'S AND DAN HOTARD'S MOTION TO DISQUALIFY CHRISTENSEN, MILLER, FINK, JACOBS, GLASER, WEIL & SHAPIRO AND THE CITY ATTORNEY'S OFFICE OF THE DEFENDANT CITY OF RIVERSIDE GRANTED.

COUNSEL: For DELMER MILLER, DAVID MILLER, JR, plaintiffs: Andrew I Roth, Roth & Roth, Riverside, CA.

For DELMER MILLER, DAVID MILLER, JR, plaintiffs: Eric G Ferrer, Johnnie L Cochran, Jr, Cochran Cherry Givens & Smith, Los Angeles, CA.

For MIKE ALAGNA, WAYNE STEWART, defendants: Devonne L Midson, William J Hadden, Silver Hadden & Silver, Santa Monica, CA.

For PAUL BUGAR, DAN HOTARD, GREG PREECE, RIVERSIDE CITY OF, defendants: Theresa J Macellaro, Christensen Miller Fink Jacobs Glaser Weil & Shapiro, Los Angeles, CA.

For PAUL BUGAR, DAN HOTARD, GREG PREECE, RIVERSIDE CITY OF, defendants: Stan Tokio Yamamoto, Gregory P Priamos, Riverside City Attorney, Riverside, CA.

For PAUL BUGAR, DAN HOTARD, defendants: Gregory G Petersen, Delores Marie Giacometto, Petersen Law Firm, Costa Mesa, CA.

For GREG PREECE, RIVERSIDE CITY OF, defendants: Louis R Miller, Christensen Miller Fink Jacobs Glaser Weil & Shapiro, Los Angeles, CA.

For GREG PREECE, defendant: Corey William Glave, [**2] Charles A Goldwasser, Charles A Goldwasser Law Offices, Los Angeles, CA.

For PAUL BUGAR, DAN HOTARD, counter-claimants: Theresa J Macellaro, Christensen Miller Fink Jacobs Glaser Weil & Shapiro, Los Angeles, CA.

For PAUL BUGAR, DAN HOTARD, counter-claimants: Stan Tokio Yamamoto, Gregory P Priamos, Riverside City Attorney, Riverside, CA.

For PAUL BUGAR, DAN HOTARD, counter-claimants: Gregory G Petersen, Delores Marie Giacometto, Petersen Law Firm, Costa Mesa, CA.

For DELMER MILLER, DAVID MILLER, JR, counter-defendants: Andrew I Roth, Roth & Roth, Riverside, CA.

For DELMER MILLER, DAVID MILLER, JR, counter-defendants: Eric G Ferrer, Johnnie L Cochran, Jr, Cochran Cherry Givens & Smith, Los Angeles, CA.

For PAUL BUGAR, DAN HOTARD, cross-claimants: Theresa J Macellaro, Christensen Miller Fink Jacobs Glaser Weil & Shapiro, Los Angeles, CA.

For PAUL BUGAR, DAN HOTARD, cross-claimants: Stan Tokio Yamamoto, Gregory P Priamos, Riverside City Attorney, Riverside, CA.

For PAUL BUGAR, DAN HOTARD, cross-claimants: Gregory G Petersen, Delores Marie Giacometto, Petersen Law Firm, Costa Mesa, CA.

For RIVERSIDE CITY OF, cross-defendant: Louis R Miller, Theresa [**3] J Macellaro, Christensen Miller Fink Jacobs Glaser Weil & Shapiro, Los Angeles, CA.

For RIVERSIDE CITY OF, GERALD CARROLL, cross-defendants: Kristin A Pelletier, LeBoeuf Lamb Greene & MacRae, Richard R Terzian, Bannan Green Frank & Terzian, Los Angeles, CA.

For RIVERSIDE CITY OF, cross-defendant: Stan Tokio Yamamoto, Gregory P Priamos, Riverside City Attorney, Riverside, CA.

For MIKE ALAGNA, WAYNE STEWART, third-party plaintiffs: William J Hadden, Silver Hadden & Silver, Santa Monica, CA.

For GREG PREECE, RIVERSIDE CITY OF, third-party plaintiffs: Louis R Miller, Theresa J Macellaro, Christensen Miller Fink Jacobs Glaser Weil & Shapiro, Los Angeles, CA.

For GREG PREECE, RIVERSIDE CITY OF, third-party plaintiffs: Stan Tokio Yamamoto, Gregory P Priamos, Riverside City Attorney, Riverside, CA.

JUDGES: PRESENT HONORABLE ROBERT J. TIMLIN, JUDGE.

OPINION BY: ROBERT J. TIMLIN

OPINION

[*1253] PROCEEDINGS ORDER GRANTING DEFENDANTS PAUL BUGAR'S AND DAN HOTARD'S MOTION TO DISQUALIFY CHRISTENSEN, MILLER, FINK, JACOBS, GLASER, WEIL & SHAPIRO AND THE CITY ATTORNEY'S OFFICE OF THE DEFENDANT CITY OF RIVERSIDE

The Court, the Honorable Robert J Timlin, has read and considered: 1) Defendants, [**4] Cross-Claimants, and Counter-Claimants [*1254] Paul Bugar and Dan Hotard ("Bugar" and "Hotard")'s motion for preliminary injunction and/or motion to disqualify Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP ("Christensen, Miller") and the City Attorney's Office of the City of Riverside ("City Attorney's Office"), 2) Defendant Greg Preece ("Preece") and Defendant City of Riverside ("the City") (collectively, "Defendants")'s opposition to Bugar and Hotard's motion, and 3) Bugar and Hotard's reply Based on such consideration, the Court concludes as follows:

I.

BACKGROUND

Tyisha Miller was shot and killed by City police officers on December 28, 1998, while she was seated in a parked car at a gas station. In anticipation of a civil suit being filed by the Tyisha Miller's survivors, the City in January 1999 retained Christensen, Miller to defend the City and the individual police officers involved in the shooting. On May 18, 1999, Delmer Miller and David Miller ("Tyisha Miller's parents"), individually and in their capacity as the successors in interest to the estate of Tyisha Miller, initiated this action against City police officers Bugar, Hotard, Mike Alagna ("Alagna"), [**5] Wayne Stewart ("Stewart"), and Preece (collectively, "the officers") and the City.

In the first amended complaint ("FAC"), Tyisha Miller's parents set forth a cause of action against the City and the individual officers, including Bugar and Hotard, for the wrongful death of Tyisha Miller based on assault and battery ("first wrongful death claim") and negligence ("second wrongful death claim"). Their wrongful death claim is also based on negligent hiring, training and retention ("third wrongful death claim") against the City and Preece.

The FAC contains the following state survival causes of action brought by Tyisha Miller's parents on behalf of Tyisha Miller's estate: 1) assault and battery, against all defendants except Preece, 2) intentional infliction of emotional distress, against all defendants, 3) negligence, against all defendants, and 4) negligent hiring, training, and retention, against the City and Preece.

The FAC further contains federal claims against all the defendants for: 1) violations of constitutional rights under the *First, Fourth, Fifth,* and *Fourteenth Amendments to the United States Constitution* based on Tyisha Miller's death under *42 U.S.C. § 1983* [**6] ("*Section 1983*"); 2) conspiracy with racial animus in violation of civil rights under *42 U.S. C § 1985(3)* (*Section 1985(3)*"); and 3) neglect to prevent civil rights violations in violation of civil rights *Section 1985(3)* and *42 U.S.C. § 1986* ("*Section 1986*").

In January 1999, the City Attorney's Officer and Christensen, Miller were retained to represent Bugar and Hotard in this actio.n

On July 12, 1999 the City separated Bugar and Hotard's employment Alagna and Stewart's employment was terminated on the same date. Preece's employment was terminated on September 1, 1999. In July 1999,

Bugar and Hotard retained the Petersen Law Firm to defend them in this action. Between July and October 12, 1999, Bugar and Hotard notified Christensen, Miller that they had retained separate attorneys and no longer wanted Christensen, Miller to represent them. [1] The Peterson [*1255] law firm filed its entry of appearance on August 16, 1999 for Bugar and Hotard On October 13, 1999 Christensen, Miller withdrew as their counsel.

1 Bugar and Hotard contend that they gave notice to Christensen, Miller in July 1999, and Christensen, Miller counters that they did not have notice until October 1999. However, it is unnecessary for the Court to resolve this factual dispute for the purposes of deciding this motion.

[**7] Neither the City Attorney's Office nor Christensen, Miller informed the individual officers, including Bugar and Hotard, of a potential or actual conflict of interest between the City and the individual officers whom they jointly represented until after Bugar and Hotard were separated from employment by the City. [2] After being so notified, Bugar and Hotard refused to sign any agreement as proposed by the City Attorney's Office and Christensen, Miller regarding conflicts of interest or a joint defense.

2 In a letter to defendants Bugar, Hotard, Alagna, Stewart, and Preece dated August 3, 1999, Christensen, Miller acknowledged that there was a potential conflict of interest.

II.

ANALYSIS

Bugar and Hotard contend that Christensen, Miller should be disqualified from representing any party to this action and the City Attorney's Office should be disqualified from representing them and Alagna, Preece, and Stewart. They argue that Christensen, Miller and the City Attorney's Office, by reason of the civil rights [**8] claims against the City and the individual officers, including Bugar and Hotard, had a potential conflict of interest by representing multiple parties, whose interests may be adverse. Consequently, Christensen, Miller and the City Attorney's Office should have obtained Bugar's and Hotard's informed written consent to such multiple representation before they began such representation. Christensen, Miller and the City Attorney's Office do not dispute the fact that they never obtained the informed written consent of Bugar and Hotard, nor that they represented Bugar and Hotard and the other defendants from January to July of 1999. Rather they argue that there was no obligation to obtain Bugar and Hotard's informed written consent because there was no conflict of interest between Bugar and Hotard and the City, and that a potential conflict only arose, if at all, when the officers, including Bugar and Hotard, were fired. Christensen, Miller and the City Attorney's Office further argue that a potential conflict of interest does not justify their disqualification.

A. Lack of Informed Written Consent

Pursuant to Local Rule 2 5 1, the United States District Court for the Central District [**9] of California ("Central District Court") adopts the California Rules of Professional Conduct and the decisions of any applicable court. See *Blecher v. Northwest Airlines, Inc., 858 F. Supp. 1442, 1451 (C D Cal 1994)*. California Rule of Professional Conduct Rule 3-310(C)(1) ("Rule 3-310(C)(1)") prohibits an attorney from representing multiple clients when those clients have a potential conflict of interest unless the attorney first obtains the informed written consent of the clients. [3]

3 California Rules of Professional Conduct Rule 3-310 provides, in pertinent part:

A member shall not, without the informed written consent of each client:

. . .

(C)(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict.

"The rule against representing conflicting interests is designed not only to prevent the dishonest lawyer from fraudulent conduct, but also to prevent the honest [*1256] lawyer from having to choose between conflicting duties, rather than to [**10] enforce to their full extent the legal rights of each client." *In re Jaeger, 213 B.R. 578, 584 (C D. Cal 1997)*, citing *Anderson v. Eaton, 211 Cal. 113, 116, 293 P. 788 (1930)*, see also In re Sklar, 2 Cal St Bar Ct Rptr 602, 616 (1993). A potential conflict of interest exists when "there is a possibility of an actual conflict arising in the future, resulting from developments that have not yet occurred or facts that have not yet become known." Id. A conflict is actual if the representation of one client may be rendered less effective by reason of the shared attorney representing the other client. See id.

The duty to avoid conflicts arises at the beginning of the representation See Sklar, 2 Cal. State Bar Ct. Rtpr. at 615-616 (noting that "the duty to avoid conflicts . . . arises at the outset of the employment when there has been little if any opportunity for investigation into the merits of the case.") Whether the attorney believes there is no conflict of interest between joint clients is irrelevant. See *id. at 616* (rejecting the attorney's argument that he did

not need to obtain the informed consent of his clients when he believed there was no [**11] conflict between them). As the Central District Court has noted: "because obtaining a written waiver requires little effort, informs and protects clients, and avoids costly evidentiary and credibility disputes, the rule is inflexible." *Blecher, 858 F. Supp. at 1454* (commenting on Rule 3-310(C)'s predecessor, Rule 5-102(B)).

In part, the rule requiring the informed written consent when there is a potential conflict of interest between clients is designed to protect clients from sharing confidences without realizing the potential impact or consequences of doing so. See Sklar, 2 Cal. State Bar Ct. Rtpr. at 616. In California there is a "joint client" or "common interest" exception to the attorney-client privilege. When "two or more clients have retained or consulted a lawyer upon a matter of common interest . . . neither may claim the privilege in an action by one against the other." *Zador Corp. v. Kwan, 31 Cal. App. 4th 1285, 1294, 37 Cal. Rptr. 2d 754, 759 (1995)* (citations and internal quotations omitted). Therefore, the failure of an attorney to disclose a potential conflict of interest and to obtain the clients' written consent exposes clients to the risk of sharing [**12] confidences without realizing the impact of doing so. See *Jaeger, 213 B.R. at 586*. Accordingly, the informed consent by clients is critical to any joint representation, and it is the absence thereof or the scope of any such informed consent which determines whether an attorney should be disqualified. See *31 Cal. App. 4th at 1294-1295*.

The failure of an attorney to obtain the informed written consent of clients when there is a potential conflict of interest is grounds for disqualification by either client. As Jaeger explains, "the failure to obtain a written consent to a potential conflict of interest . . . in effect gives a wild card to each of the clients. At any time thereafter during the representation, any of the clients may play the wild card and require the withdrawal of the attorney (and the attorney's law firm) entirely from the case." *213 B.R. at 586*.

Both as a matter of law and by examining the relevant facts here, it is clear that there was a potential conflict of interest at the outset of the City Attorney's Office and Christensen, Miller's representation of the City and Bugar and Hotard. Under the California Rule, a potential conflict of interest giving rise to the [*1257] obligation [**13] to obtain informed written consent exists whenever an attorney represents more than one client in the same lawsuit. See *Jaeger, 213 B.R. at 584* ("California rules always require the informed written consent of each client before an attorney may jointly represent two or more clients in the same lawsuit"); see also *Zador, 31 Cal. App. 4th at 1295, 37 Cal. Rptr. 2d at 759* ("Informed consent is required before an attorney can jointly represent clients in the same matter.")

The circumstances of the instant action demonstrate that there were potential conflicts of interests at the instant the City Attorney's Office and Christensen, Miller accepted the representation of the City and Bugar and Hotard. The City and Bugar and Hotard are being sued by Tyisha Miller's parents as her survivors for claims arising out of the fatal shooting of her by certain City officers, including Bugar and Hotard.

For the period January to mid July 1999, while the City Attorney's Office and Christensen, Miller represented the City and Bugar and Hotard, Bugar and Hotard fully disclosed to those attorneys everything they knew about the shooting incident, their involvement and other officers' [**14] involvement including decisions, plans, tactics and actions they took individually or collectively. Further, they discussed with the City Attorney and Christensen, Miller legal strategies including possible defenses they and the other defendants, including the City, may adopt in defending the allegations against them in the FAC. These communications were the ultimate sharing of confidences by Bugar and Hotard with the City Attorney and Christensen, Miller.

The Court concludes that the reasons stated in the declarations and points and authorities regarding Bugar and Hotard's instant motion are sufficient to support a reasonable apprehension by them that the City's Attorneys -- City Attorney and Christensen, Miller -- contrary to their fiduciary duty of loyalty to them but by reason of a similar obligation of loyalty to the City may use such shared confidences to their detriment but to the benefit of the City.

Their specific concerns in part relate to the City, in defending itself against the Monell claims against it, will assert that Bugar and Hotard during the subject incident did not follow the City's policies and practices regarding use of force, including lethal force, as they [**15] were trained. In other words, the City's use of force policies, practices and training program did not cause constitutional harm to Tyisha Miller. It was Bugar and Hotard's failure to follow such that caused the harm. Further, in developing and pursuing such a defense, the City Attorney and Christensen, Miller, would use confidential information received from Bugar and Hotard during their meetings with them. Bugar and Hotard's defense will apparently be in part that their actions, plans and decisions regarding the subject incident including their use of force was consistent with their training or that the policies, practices and training they received from the City were inadequate to enable them to properly respond to the circumstances which they confronted that night.

This concern by Bugar and Hotard regarding the potential conflict of interest, of which they were not notified by the City Attorney or Christensen, Miller, is substantially supported by the fact that Christensen, Miller prepared a proposed motion to dismiss the complaint containing language to the effect that all the defendants including the City and Bugar and Hotard believed that the City police chief's decision that the [**16] employment of the five officers involved in the incident, including Bugar and Hotard, should be terminated by [*1258] reason of their conduct in developing an unreasonably dangerous plan during the incident, was "unfounded and incorrect." Bugar and Hotard present evidence demonstrating that Christensen, Miller, however, decided not to use that language because the City Attorney told the law firm that it could not take a position adverse to its chief of police or the City by asserting the chief's decision was wrong. (See Letter from Mr Ken Yuwiller to the City Attorney dated July 21, 1999, exhibit H to the declaration of Ms Delores M Giacometto, dated February 4, 2000, in support of the Bugar and Hotard motion to disqualify Christensen, Miller and the City Attorney's Office.)

Defendants respond that they offered to file two separate briefs, one for the City and one for the individual officers, including Bugar and Hotard, which in effect reflected different positions on whether the chief's decision was wrong. This approach does not dissuade the Court as to the existence of a potential conflict of interest (See Declaration of Theresa J Macellaro, February 16, 2000.) Rather, the fact that [**17] Christensen, Miller would even offer to write separate legal briefs taking opposing positions highlights the existence of the potential conflict of interest.

In the Court's view, the City Attorney and Christensen, Miller have and had a potential conflict of interest in jointly representing the City and Bugar and Hotard regarding the unreasonable use of force allegations found in the claims in the FAC pursuant to *42 USC § 1983* for violation of the *Fourth Amendment* and the state wrongful death claim based on assault and battery as well as other state law claims. [4]

> 4 Defendants' reliance on *Minneapolis Police Officers Fed'n v. City of Minneapolis, 488 N.W.2d 817, 819 (Minn Ct App. 1992)* for the proposition that no conflict of interest exists between a city and an individual officer defendant when the city agrees to indemnify the officer is misplaced. The court in Minneapolis Police Officers Fed'n did not address whether informed consent was required for multiple representation, but rather whether an attorney was allowed under any circumstances to represent both the city and the individual officer. Accordingly, the court was concerned with whether there was an actual, rather than potential, conflict of interest between the clients See *Minneapolis Police Officers Fed'n, 488 N.W.2d at 819-820*. The analysis in Minneapolis Police Officers Fed'n actually supports this Court's conclusion relating to the existence of a potential conflict of interest. The court stated that the existence of an indemnification agreement, and resulting coincident financial interests, "substantially reduce[s]," but does not eliminate, "the possibility of conflict of interest."

[**18] Therefore, the moment the City Attorney's Office and Christensen, Miller embarked on multiple representation of the City and Bugar and Hotard, there existed potential conflicts of interest between the City and Bugar and Hotard giving rise to the attorneys' obligation to obtain the informed written consent of the City and Bugar to such joint representation before such representation began. [5]

> 5 Because the Court concludes the City Attorney's Office and Christensen, Miller represented multiple clients without their informed written consent while there were potential conflicts of interest, the Court need not address whether any actual conflict of interest exists.

B. Laches -- Alleged Lack of Delay in Bringing the Motion to Disqualify

If Bugar and Hotard delayed in bringing the instant motion to dismiss, it may be considered by the Court in determining whether to disqualify the City Attorney's Office and Christensen, Miller.

> Motions to disqualify are often used as a tactical device to delay litigation [**19] Where a party opposing the motion can demonstrate prima facie evidence of unreasonable [*1259] delay in bringing the motion causing prejudice to the present client, disqualification should not be ordered. The burden then shifts back to the party seeking disqualification to justify the delay.

Zador, 31 Cal. App. 4th at 1302, 37 Cal. Rptr. 2d at 764. However, a disqualification motion should be denied only if the delay and ensuing prejudice are extreme. See id.; see also *Forrest et al. v. Baeza et al., 58 Cal. App. 4th 65, 77, 67 Cal. Rptr. 2d 857, 865 (1997)* ("The

delay must be extreme in terms of time and consequence.") (citation and internal quotations omitted), *River West, Inc. et al. v. Nickel, 188 Cal. App. 3d 1297, 1309, 234 Cal. Rptr. 33 (1987)* (describing the due to delay exception for denying disqualification as "narrow").

The River West court denied a motion to disqualify when the motion was filed more than three years after the client had knowledge of the potential conflict and after the attorney worked over 3,000 hours on the case and charged approximately $ 387,000. Comparatively, in *Earl Scheib, Inc. v. Superior Court, 253 Cal. App. 2d 703, 706, 61 Cal. Rptr. 386 (1967)*, [**20] the motion for disqualification was brought four months after the potential conflict became apparent. The lower court denied the motion as untimely, and the appellate court reversed, holding that a four month delay should not have precluded the lower court from considering the motion for disqualification.

Defendants argue that Bugar and Hotard knew or should have known from the day of the Tyisha Miller shooting that they were at risk of being terminated. However, the date that the Court must be concerned with is the date Bugar and Hotard actually became aware there was a potential conflict of interest between them and the City in defending against the suit filed by the Millers. Defendants fail to address when this occurred. From the evidence before the Court, the earliest mention in any document of any potential or actual conflict of interest between the individual officers and the City was in a letter dated July 21, 1999 sent by Silver, Hadden & Silver, the firm representing the officers in their employment related matters, to the City Attorney, a copy of which was sent to Bugar and Hotard.

Bugar and Hotard filed an application for a TRO regarding the disqualification of the City Attorney's [**21] Office and Chrisensen, Miller on January 24, 2000. Thus, at the most, Bugar and Hotard waited six months after they had knowledge of a potential conflict of interest. Six months is much closer to the four months which the Earl Scheib court found insufficient to deny the disqualification motion than to the three years plus which was considered inexcusable delay in River West. Furthermore, although the City asserts that thousands of attorney hours have been spent since January 1999, regarding this case, it makes no effort to estimate the number of attorney hours consumed *after* Bugar and Hotard had any actual knowledge of a potential conflict of interest. Therefore, the Court concludes that Defendants fail to demonstrate a prima facie case of inexcusable delay Thus, the Bugar and Hotard have no burden to justify any delay. Accordingly, the Court will not deny Bugar and Hotard's motion for disqualification based on any delay in bringing the motion.

Accordingly, because neither the City Attorney's Office nor Christensen, Miller ever obtained the informed written consent of Bugar and Hotard when there was a potential conflict of interest prior to their representation of Bugar and [**22] Hotard, the Court will grant Bugar and Hotard's motion to disqualify the City Attorney's Office and Christensen, Miller from representing the City and Preece as defendants and [*1260] pursuant to a joint defense agreement between the City and Alagna and Stewart. [6]

6 Because the Court has adjudicated and will grant Bugar and Hotard's motion to disqualify, the Court need not address their motion for preliminary injunction requesting the same relief.

III.

DISPOSITION

IT IS ORDERED THAT the City Attorney's Office and Christensen, Miller are disqualified from representing any party in the defense of the civil lawsuit filed by the Millers or in any related cross or counter-claims.

DARRYL T. COGGINS Plaintiff, VERSUS COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, POLICE OFFICER JAMES VARA, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, POLICE OFFICER CRAIG BUONORA, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, AND JOHN DOES 1-10, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY, Defendants.

No 07-CV-3624 (JFB) (AKT)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

615 F. Supp. 2d 11*; *2009 U.S. Dist. LEXIS 1726

January 5, 2009, Decided

PRIOR HISTORY: *Coggins v. County of Nassau, 2008 U.S. Dist. LEXIS 48239 (E.D.N.Y., June 20, 2008)*

COUNSEL: [**1] For Plaintiff: Frederick K. Brewington, Esq., Law Offices of Frederick K. Brewington, Hempstead, New York.

For Buonora, Defendant: Laurence Jeffrey Weingard, Esq., Law Offices of Laurence Jeffrey Weingard, New York, New York.

For Nassau County, the Police Department, Vara, and John Does 1-10, Defendant: Donna Napolitano, Esq., Nassau County Attorney's Office, Mineola, New York.

JUDGES: JOSEPH F. BIANCO, United States District Judge.

OPINION BY: JOSEPH F. BIANCO

OPINION

[*15] **MEMORANDUM AND ORDER**

JOSEPH F. BIANCO, District Judge:

Plaintiff Darryl T. Coggins ("Coggins " or "plaintiff") brings the instant action against defendants County of Nassau ("Nassau County" or "County"), Nassau County Police Department ("Police Department"), Police Officer James Vara ("Vara"), in his individual and official capacity, Police Officer Craig Buonora ("Buonora"), in his individual and official capacity, and John Does 1-10, in their individual and official capacities (collectively, "defendants"), pursuant to *42 U.S.C. §§ 1981* and *1983* and New York State tort law. On March 17, 2005, a grand jury empaneled by the Nassau County District Attorney's Office (the "DA's Office") indicted Coggins on charges of unlawful possession of a weapon, and the [**2] complaint alleges that defendants actively prosecuted Coggins on those charges despite their knowledge that he was innocent. The complaint further alleges that Officers Vara and Buonora conspired to commit perjury during the grand jury proceedings. After dismissing all charges against plaintiff, Buonora was indicted for perjury and subsequently pled guilty to a misdemeanor charge of perjury.

On November 26, 2007, Buonora received a determination from the Nassau County Police Officer Indemnification Board ("Board") holding that his actions were not within the proper discharge of his duties or within the scope of his employment and, therefore, he was not entitled to representation by the County Attorney of Nassau County ("County Attorney"). However, Buonora was provided with an opportunity to challenge that determination before the Board. While challenging that determination, Buonora retained other counsel in this case. On March 14, 2008, after Buonora's presentation to the Board, the Board changed its position and made a determination that Buonora's actions were within the proper discharge of his duties and within the scope of his employment and, therefore, he would be entitled to legal [**3] representation and indemnification by the County for any judgment against him. On June 26, 2008, the

County Attorney advised Buonora by letter that the County Attorney was prepared to resume representation of Buonora in this lawsuit based on the March 14, 2008 determination by the Board.

Buonora now moves for an Order or Declaratory Judgment to the effect that [*16] the County Attorney is estopped from resuming her role as counsel for Buonora, on the grounds that the County Attorney has already abandoned his defense or waived her right to represent Buonora. Alternatively, within the context of such motion, Buonora asserts that the County Attorney should be disqualified from representing Buonora on conflict of interest grounds. Specifically, Buonora contends that the County Attorney's proposed representation of him presents a conflict of interest with both co-defendant Nassau County and co-defendant Vara. Under either theory of relief, Buonora claims to be statutorily entitled to private counsel of his own choosing at the County's expense. For the following reasons, Buonora's motion is denied in its entirety.

I. BACKGROUND

A. Facts

The underlying facts giving rise to this litigation are comprehensively [**4] described by this Court in a prior Memorandum and Order addressing Buonora's motion to dismiss and for summary judgment, dated June 20, 2008. Thus, the Court presumes the parties' familiarity with the underlying lawsuit brought by Coggins and only describes the facts to the extent that they are relevant to resolution of the instant motion.

This lawsuit arises out of criminal proceedings against Coggins, during which he was arrested and charged in Nassau County with two counts of Criminal Possession of a Weapon in the Third Degree, in violation of Penal Law *§§ 265.02(3)* and *(4)*. (Complaint ("Compl.") P 19.) According to the complaint, Coggins was innocent of the crimes with which he was charged, and defendants knew that Coggins was innocent. (Compl. PP 20, 42, 48.) The complaint alleges that defendants "actively instigated and encouraged the prosecution of plaintiff" and, *inter alia*, manufactured the charges against plaintiff, withheld information that would have exonerated him, and deprived plaintiff of his due process rights. (Compl. PP 32, 33, 35, 43, 46.) Coggins now asserts claims of civil rights violations, conspiracy, and New York state intentional torts against defendants.

Following [**5] the dismissal of the criminal charges against plaintiff, Buonora was indicted for perjury in connection with the testimony that he gave to the grand jury in the underlying criminal action against plaintiff. (Buonora Memorandum of Law ("Buonora Mem."), at 2.) Buonora claims that Vara was granted transactional immunity in exchange for his testimony in the grand jury proceedings considering perjury charges against Buonora. (Buonora Affidavit ("Buonora Aff.") P 13; Buonora Mem., at 2.) Buonora subsequently pled guilty to one count of misdemeanor perjury and was disciplined by the Police Department. (Buonora Mem., at 2.)

Buonora was served with the complaint in this case in September 2007. The complaint alleged that Buonora "was a police officer employed by the County, under the direction of the Nassau Police and County and was acting in furtherance of the scope of his employment . . . . " (Compl. P 13.) The County Attorney at that time acted on his behalf in seeking and receiving two extensions of time in which to respond to the complaint. (Buonora Mem., at 2, Exs. A and B; Buonora Aff. P 4; County Defendants' Memorandum of Law in Opposition ("County Def. Mem."), at 6.) In September 2007, [**6] after the filing of the complaint by Coggins, the law offices of Mr. Laurence Jeffrey Weingard ("Mr. Weingard" or "counsel for Buonora"), current counsel for Buonora, was "retained by Buonora to monitor his defense . . . and encourage the County Attorney to undertake his defense, assert various issues including the defense of absolute immunity." (Weingard Affidavit ("Weingard Aff.") P 5.)

[*17] On November 27, 2007, Buonora received notice of a determination by the Board, which had voted on November 26, 2007, holding that his actions were not within the proper discharge of his duties or within the scope of his employment. (Buonora Aff. P 5; Buonora Mem., at Exs. C, E and F.) Buonora was given the opportunity to present additional facts and personally appear before the Board prior to the determination becoming final, which, had he failed to appear before the Board, would occur within fifteen days of his receipt of the determination. (Buonora Mem., at 4 and Ex. E.) Buonora also was notified by a letter dated November 26, 2007 from the County Attorney that the County Attorney's Office would not be defending him in this matter. [1] (Buonora Aff. P 5; Buonora Mem., at 3 and Ex. E.)

1 As Buonora correctly [**7] notes, the Deputy County Attorney's letter refers to the November 26, 2007 determination as an "initial determination" and states that "before the final determination is made you may request an opportunity to appear before the Board and present additional facts. . . . The Board will consider any additional facts and arguments you may make prior to making its final determination." (Buonora Mem., at Ex. E.) However, as noted *infra*, there are no statutory provisions regarding an "initial" deter-

> mination by the Board, as opposed to a "final" determination. Moreover, there are no procedures codified in the law at all, including the procedures described in the Deputy County Attorney's letter, for challenging a determination by the Board. Finally, there is language in the November 26, 2007 determination, below the signature line, that suggests that it is a "final decision of the Board," contrary to the description in the Deputy County Attorney's letter. (Buonora Mem., at Ex. F.)

At that point, Buonora fully engaged the services of Mr. Weingard, who had previously represented him in connection with the criminal charges against him, as well as the Police Department's disciplinary charges, to [**8] represent Buonora's interests in this action. (Buonora Aff. P 6.) In connection with these services, Buonora claims to have paid substantial sums of money for legal fees and expenses. (Buonora Aff. P 6.)

On December 5, 2007, the County Attorney filed an answer in this case on behalf of the County of Nassau, the Nassau County Police Department and Officer Vara ("County Defendants"). In their answer, the County Defendants claimed that Vara "performed [his duties] in good faith, without malice and with reasonable and proper cause in the ordinary course of [his] duties" (County Def. Answer, at 8 P 4), and that "if the plaintiff sustained the damages as alleged in the Complaint, such damages were sustained through and by virtue of the conduct of parties other than the County Defendants, over whom the County Defendants exercised no control, without any negligence on the part of the County defendants, its agents, servants or employees contributing thereto." (County Def. Answer, at 9 P 13.) Buonora alleges that these defenses asserted by the County Defendants imply that Buonora did not act in good faith in the ordinary course of his duties and that Buonora was responsible for the damages, if [**9] any, sustained by Coggins. (Buonora Mem., at 20.)

On December 6, 2007, Buonora notified the Board that he wanted to appear before it to present additional information to challenge the November 26, 2007 determination, and, in the intervening time period, Buonora filed in this case a motion to dismiss the complaint and for summary judgment. Buonora, along with his current counsel, appeared at a hearing before the Board on March 14, 2008. (Buonora Aff. P 7-8; Buonora Mem., at Ex. G.) Also present at this hearing were representatives of the County Attorney's office. (Buonora Mem., at 5; County Def. Mem., at 7.) On that date, the Board changed its [*18] position and issued another determination that Buonora's actions were within the proper discharge of his duties and within the scope of his employment and, as a result, he would be indemnified for any judgment by the County. (Buonora Aff. P 9; Buonora Mem., at Ex. J.)

On March 28, 2008, counsel for Buonora sought a determination in writing from the County Attorney that it would be inappropriate for her to undertake Buonora's representation "given [the County Attorney's] prior conduct and the fact that a conflict of interest exists between Officer [**10] Vara and Officer Buonora that precludes the County Attorney from representing both individuals." (Buonora Mem., at 6 and Ex. L.) On April 14, 2008, the County Attorney stated in a letter to Buonora's counsel that he should submit his billing records to the County Attorney and that he could continue to represent Buonora until the completion of the oral argument for Buonora's motions to dismiss and for summary judgment. (Buonora Mem., at 6 and Ex. M.)

On June 26, 2008, Buonora received a letter from the County Attorney stating that (1) Buonora was entitled to representation by the County Attorney, although he was free to decline it and pay his own legal fees going forward, (2) the County Attorney did not believe that there was any conflict of interest with the County representing all defendants, (3) Buonora had four days to accept the County Attorney's offer of representation, and (4) if "at any time during the litigation, the County Attorney or a court of competent jurisdiction determines that, because of a conflict of interest with the County or another defendant, it would not be appropriate for the County Attorney to represent [him] in this lawsuit, [he] will be entitled to be represented [**11] by private counsel chosen by the County Attorney, and such counsel will be paid reasonable attorney's fees and costs as determined by the County Attorney, so long as the alleged act or omission occurred while [he was] acting within the scope of [his] public employment or duties." (Buonora Aff. P 10; Buonora Mem., at Ex. O.)

B. Procedural History

Coggins filed his complaint on August 28, 2007. On December 5, 2007, an answer was filed on behalf of the County Defendants. Buonora submitted a motion to dismiss and motion for summary judgment on January 24, 2008, and on June 20, 2008, the Court granted the motion to dismiss with respect to Coggins' claims for malicious prosecution and abuse of process under New York State law and denied the motion on all other grounds. [2] Upon receiving the Court's Memorandum and Order, Buonora filed his answer with a crossclaim against Nassau County and filed a notice of appeal to the United States Court of Appeals for the Second Circuit.

> 2 The Court dismissed the claims for malicious prosecution and abuse of process on the grounds that plaintiff had failed to plead the requisite spe-

cial damages with specificity. Plaintiff was granted leave to amend the complaint [**12] within sixty days of the Memorandum and Order, and an amended complaint was filed on August 19, 2008. The Court also denied Buonora's motion for summary judgment as premature, without prejudice to it being renewed at the close of discovery.

Buonora filed the instant motion on August 19, 2008. The County submitted its opposition papers on September 19, 2008, and Buonora replied on October 2, 2008. The Court held oral argument on this motion on December 23, 2008.

II. DISCUSSION

A. Ripeness

The Court first addresses the County Attorney's argument that subject matter jurisdiction is lacking in this Court because [*19] Buonora's motion for declaratory judgment -- which seeks to disqualify the County Attorney based upon, among other things, a conflict of interest theory -- is not "ripe" for adjudication. (County Def. Mem., at 9.) As a threshold matter, the Court finds that Buonora's motion for the County Attorney's disqualification does present an "actual case or controversy" within the meaning of Article III and, therefore, is ripe for adjudication before this Court. [3]

3 In any event, even if the Court were to find that the conflict of interest issue is not ripe, Buonora's motion on estoppel and waiver [**13] grounds would still merit a decision by this Court. The County Attorney does not argue that these issues are also not ripe for adjudication.

Pursuant to the Declaratory Judgment Act, *Section 2201* of Title 28:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201. The ripeness doctrine relates to whether the "actual controversy" requirement is met, and it "has as its source the Case or Controversy Clause ofArticle III of the Constitution, and hence goes, in a fundamental way, to the existence of jurisdiction." *Simmonds v. I.N.S., 326 F.3d 351, 357 (2d Cir. 2003)*.

"A party seeking a declaratory judgment bears the burden of proving that the district court has jurisdiction." *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos., 241 F.3d 154, 177 (2d Cir. 2001)* (citing *Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 95, 113 S. Ct. 1967, 124 L. Ed. 2d 1 (1993))*. Jurisdiction [**14] exists only if there is an "actual controversy," *id*., defined as one that is "real and substantial . . . admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Olin Corp. v. Consol. Aluminum Corp., 5 F.3d 10, 17 (2d Cir. 1993)* (internal citation and quotation marks omitted); *see also Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co., 411 F.3d 384, 388 (2d Cir. 2005)* ("The standard for ripeness in a declaratory judgment action is that 'there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'") (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826 (1941)*); *U.S. Underwriters Ins. Co. v. Kum Gang, Inc., 443 F. Supp. 2d 348, 352 (E.D.N.Y. 2006)* ("A court cannot adjudicate conjectural or hypothetical cases or controversies. A controversy cannot be a mere possibility or probability that a person may be adversely affected in the future.") (citing *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))* (additional citation omitted); *Georgia-Pacific Consumer Products, LP v. Int'l Paper Co., 566 F. Supp. 2d 246, 256 (S.D.N.Y. 2008)* [**15] (stating that relief should only be granted where it can be "of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.") (citing *E.R. Squibb & Sons, Inc., 241 F.3d at 177*). "Whether a real and immediate controversy exists in a particular case is a matter of degree and must be determined on a case-by-case basis." *Kidder, Peabody & Co., Inc. v. Maxus Energy Corp., 925 F.2d 556, 562 (2d Cir. 1991)*. "Several courts have acknowledged the difficulty of line-drawing between those cases [*20] in which a controversy is of a hypothetical or speculative nature, and those that present issues of 'sufficient immediacy and reality' to warrant declaratory relief." *M.V.B. Collision, Inc. v. Allstate Ins. Co., No. 07 Civ. 0187 (JFB)(JO), 2007 U.S. Dist. LEXIS 57930, 2007 WL 2288046, at *7 (E.D.N.Y. August 8, 2007)* (quoting *Duane Reade, Inc., 411 F.3d at 388*); *see also Reichhold Chem., Inc. v. Travelers Ins. Co., 544 F. Supp. 645, 650 (E.D. Mich. 1982)* ("The difference between an abstract question and a controversy contemplated by the Declaratory Judgment Act is necessarily one of degree and, as such, it is extremely difficult to fashion a precise test for determining [**16] the exist-

ence, or non-existence, of an actual controversy in every fact situation.").

Even if a matter satisfies the "actual controversy" requirement, "[t]he decision to grant declaratory relief rests in the sound discretion of the district court." *M.V.B. Collision, Inc., 2007 U.S. Dist. LEXIS 57930, 2007 WL 2288046, at *7* (additional internal citations omitted); *Dow Jones & Co., Inc. v. Harrods Ltd., 346 F.3d 357, 359 (2d Cir. 2003)* ("Courts have consistently interpreted [the Declaratory Judgment Act's] permissive language as a broad grant of discretion to district courts to refuse to exercise jurisdiction over a declaratory action that they would otherwise be empowered to hear."). In using its discretionary power to decide whether to entertain an action for declaratory judgment, the Second Circuit has long instructed district courts to ask: (1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; and (2) whether a judgment would finalize the controversy and offer relief from uncertainty. *See Broadview Chem. Corp. v. Loctite Corp., 417 F.2d 998, 1001 (2d Cir. 1969)*. As set forth by the Second Circuit in *Dow Jones, 346 F.3d at 359-60*, district courts may also consider: [**17] "(1) whether the proposed remedy is being used merely for 'procedural fencing' or a 'race to res judicata'; (2) whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and (3) whether there is a better or more effective remedy." *Id*. Therefore, "[t]he ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Ehrenfeld v. Mahfouz, 489 F.3d 542, 542 (2d Cir. 2007)* (quoting *Nat'l Park Hospitality Ass'n v. DOI, 538 U.S. 803, 808, 123 S. Ct. 2026, 155 L. Ed. 2d 1017, (2003))* (internal quotation marks omitted); *see also Simmonds, 326 F.3d at 356-57* ("'Ripeness' is a term that has been used to describe two overlapping threshold criteria for the exercise of a federal court's jurisdiction.") (distinguishing between Constitutional and prudential ripeness). In this case, the County Attorney argues that the conflict of interest issue presented by Buonora is not Constitutionally ripe. The doctrine of Constitutional ripeness "prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless [**18] the resolution of an actual dispute requires it." *Simmonds, 326 F.3d at 357*.

With respect to the instant motion, there is no difficult "line-drawing," *M.V.B. Collision, Inc., 2007 U.S. Dist. LEXIS 57930, 2007 WL 2288046, at *7*, distinguishing this case from others failing to meet the standard for ripeness. The County Attorney asserts that this Court lacks jurisdiction because the conflict of interest issue fails to present an actual "case or controversy." (County Def. Mem., at 10.) However, the Court disagrees. Because the issue presented to the Court concerns Buonora's current legal representation rights vis-a-vis his co-defendants and the County Attorney, the standard for ripeness -- that "there is a substantial controversy . . . between [the] [*21] parties," *Maryland Cas. Co., 312 U.S. at 273* -- is plainly satisfied. *See Duane Reade, Inc., 411 F.3d at 384* (additional internal citation omitted). Moreover, there is no basis for this Court to dismiss this motion based on its discretionary or prudential power, since the "judgment will serve a useful purpose in clarifying or settling the legal issues involved." *Broadview Chem. Corp., 417 F.2d at 1001*.

Simply put, the controversy at issue here is not speculative. Buonora [**19] claims, among other things, that conflicts of interest between the County Defendants and him warrant disqualification of the County Attorney as counsel for Buonora. A decision by the Court is thus necessary at this juncture for the proper resolution of any proposed joint representation by the County Attorney. A resolution by the Court is also required to give Buonora the opportunity to accept the terms of the County Attorney's representation or decline it, understanding that he will either be indemnified by the County for his legal expenses (if the instant motion by Buonora is granted) or will not (if the instant motion is denied). The Court's decision on this matter will undoubtedly affect the parties' representation by specific counsel, as well as the allocation of fees and costs of counsel, and, in this respect, the decision will have a concrete effect that is neither hypothetical nor advisory in nature. Indeed, "the judgment will serve a useful purpose in clarifying or settling the legal issues involved" and would "offer relief from uncertainty." *Broadview Chem. Corp., 417 F.2d at 1001*.

Moreover, the County Attorney's argument that such a conflict of interest may not exist goes [**20] to the merits of the dispute, and not to whether or not this Court lacks the jurisdiction to resolve it. Indeed, the County Attorney's line of reasoning is circular and simultaneously posits that (1) the Court cannot decide the issue of whether or not there exists a conflict of interest because the issue is not ripe, and (2) the Court should recognize that a conflict does in fact not exist. (County Def. Mem., at 11.) In other words, if the Court is able to determine -- in the face of assertions to the contrary by one of the parties -- that a conflict of interest does not exist at this juncture, then that itself is the resolution of a substantial controversy over which it has jurisdiction, since the Court would not be able to decide the conflict of interest issue in the first place if no jurisdiction exists. The Court disagrees, therefore, that it lacks the power to decide the instant motion based on conflict of interest grounds because the issue is not ripe. This matter presents a "con-

crete dispute affecting cognizable current concerns of the parties within the meaning of Article III, " *id*., and, therefore, is ripe for declaratory adjudication.

B. Equitable Estoppel and Waiver

Buonora's [**21] first argument is that the County Attorney wrongly abandoned his defense at the time of the November 26, 2007 determination by the Board and, thus, is estopped from now assuming his representation. (Buonora Mem., at 8.) Buonora also argues that the County Attorney has waived her right to assume Buonora's defense by voluntarily relinquishing the right to represent him. (Buonora Mem., at 15.) The Court addresses these related issues in turn and, for the reasons set forth below, denies Buonora's motion on both equitable estoppel and waiver grounds.

1. Equitable Estoppel

a. Legal Standard

"Equitable estoppel is grounded on notions of fair dealing and good conscience and is designed to aid the law in the administration of justice where injustice would otherwise result." *In re Ionosphere* [*22] *Clubs, Inc., 85 F. 3d 992, 999 (2d Cir. 1996)* (internal citations omitted). "'Estoppel' generally means that one party in a dispute should not be permitted to reap any benefit from its own misrepresentations." *U.S. v. Schmitt, 999 F. Supp. 317, 360 (E.D.N.Y. 1998)*; *see also Airco Alloys Div. v. Niagara Mohawk Power Corp., 76 A.D.2d 68, 81, 430 N.Y.S.2d 179 (N.Y. App. Div. 1980)* ("Equitable estoppel prevents one from denying [**22] his own expressed or implied admission which has in good faith been accepted and acted upon by another."). "Equitable estoppel is an equitable remedy, and its application turns upon a close examination of the facts and the equities." *Halifax Fund, L.P. v. MRV Commc'ns, Inc., No. 00 Civ. 4878 HB, 2001 U.S. Dist. LEXIS 20933, 2001 WL 1622261, at *3 (S.D.N.Y. December 18, 2001).*

In order to prevail on the theory of equitable estoppel under New York law, the party seeking estoppel must demonstrate, with respect to himself, a lack of knowledge of the true facts; reliance upon the conduct of the party estopped; and a prejudicial change in position." *River Seafoods Inc. v. J.P. Morgan Chase Bank, 19 A.D.3d 120, 122, 796 N.Y.S.2d 71 (N.Y. App. Div. 2005)* (citing *BWA Corp. v. Alltrans Express U.S.A. Inc., 112 A.D.2d 850, 853, 493 N.Y.S.2d 1 (N.Y. App. Div. 1985)* and *Airco Alloys Div., 76 A.D.2d at 81-82*). The party seeking estoppel must also show, by clear and convincing evidence, with respect to the party being estopped, "(1) [c]onduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently [**23] seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts (21 N.Y.Jur., Estoppel, § 21). " *BWA Corp., 112 A.D.2d at 853* (also citing *Matter of Carr, 99 A.D.2d 390, 394, 473 N.Y.S.2d 179)*; *see also Readco, Inc. v. Marine Midland Bank, 81 F.3d 295, 302 (2d Cir. 1996)*; *MCI LLC v. Rutgers Cas. Ins. Co., No. 06 Civ. 4412 (THK), 2007 U.S. Dist. LEXIS 59241, 2007 WL 2325867, at * 16 (S.D.N.Y. August 13, 2007)* (citing *Gen. Elec. Capital Corp. v. Armadora, 37 F.3d 41, 45 (2d Cir.1994)*; *Halifax Fund, L.P., 2001 U.S. Dist. LEXIS 20933, 2001 WL 1622261, at *3*; *Longview Equity Fund LP v. McAndrew, 2007 U.S. Dist. LEXIS 4581, 2007 WL 186769, at *4*. "Any misrepresentation [] need not be intentional; '[i]t is sufficient that the party being estopped knew or had reason to believe that their acts or inaction might prejudice the party asserting the estoppel.'" *MCI LLC, 2007 U.S. Dist. LEXIS 59241, 2007 WL 2325867, at *16 n.17* (quoting *Sterling v. Interlake Indus., Inc., 154 F.R.D. 579, 585 (E.D.N.Y. 1994)*; *see also One Beacon Ins. Co. v. Old Williamsburg Candle Corp., 386 F. Supp. 2d 394, 401 (S.D.N.Y. 2005)* ("An innocent misleading of another party may estop one from claiming the benefits of [**24] his or her deception.") (citing *State Farm Ins. Co. v. Lofstad, 278 A.D.2d 224, 225, 717 N.Y.S.2d 287 (N.Y. App. Div. 2000)).*

The Appellate Division has clearly expressed New York's "rather restrictive" view of equitable estoppel:

> This doctrine precludes a party at law and in equity from denying or asserting the contrary of any material fact which he has induced another to believe and to act on in a particular manner. It 'rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury.' (*Triple Cities Constr. Co. v. Maryland Cas. Co., 4 N.Y.2d 443, 448, 151 N.E.2d 856, 176 N.Y.S.2d 292*, quoting *Metro. Life Ins. Co. v. Childs Co., 230 N.Y. 285, 292, 130 N.E. 295)*. Parties are estopped to deny the reality of the state of things which they have made to appear to exist and [*23] upon which others have been made to rely. It does not operate to create rights otherwise nonexistent; it operates merely to preclude the denial of a right claimed otherwise to have arisen (21 N.Y. Jur., Estoppel, §§ 17-18).

Holm v. C.M.P Sheet Metal, Inc., 89 A.D.2d 229, 234, 455 N.Y.S.2d 429 (N.Y. App. Div. 1982); *accord Wilson v. Hevesi, No. 96 Civ. 1185 (SAS), 1998 U.S. Dist. LEXIS 9695, 1998 WL 351861, at *6 (S.D.N.Y. 1998)* ("New York courts have consistently held [**25] that the doctrine of equitable estoppel cannot be invoked to create a right where one does not otherwise exist."); *McLaughlin v. Berle, 71 A.D.2d 707, 418 N.Y.S.2d 246 (N.Y. App. Div. 1979)* (estoppel should be applied only "when failure to do so would operate to defeat a right legally and rightfully obtained. It cannot operate to create a right."). "[T]he doctrine of equitable estoppel is to be invoked sparingly and only under exceptional circumstances." *Tang v.Jinro America, Inc., No. 03 Civ. 6477 (CPS), 2005 U.S. Dist. LEXIS 44988, 2005 WL 2548267, at *5 (E.D.N.Y. October 11, 2005)* (citing *Badgett v. N.Y.C. Health & Hosps. Corp., 227 A.D.2d 127, 128, 641 N.Y.S.2d 299 (N.Y. App. Div. 1996)*; *Morgan Stanley High Yield Sec., Inc. v. Seven Circle Gaming Corp., 269 F. Supp. 2d 206, 220 (S.D.N.Y. 2003)* (quoting same).

b. Application

Under the circumstances of this case, the elements of equitable estoppel have not been satisfied. First, Buonora has not shown, with respect to the actions of the County Attorney, "[c]onduct which amounts to a false representation or concealment of material facts." *BWA Corp., 112 A.D.2d at 853*. "As the cases make clear, the doctrine of equitable estoppel requires proof that the defendant made an *actual misrepresentation* [**26] *or* committed some other *affirmative wrongdoing." Powers Mercantile Corp. v. Feinberg, 109 A.D.2d 117, 490 N.Y.S.2d 190, 193 (N.Y. App. Div. 1985)* (emphasis added). Buonora argues that the misrepresentation at issue was the County Attorney's assertion "that she would not defend him in this action and that he was not entitled to a defense at County expense." (Buonora Mem., at 15.) The Court disagrees, however, that this statement by the County Attorney constituted a misrepresentation or affirmative wrongdoing for the purposes of estoppel. *See Powers Mercantile Corp., 109 A.D.2d at 122*; *accord Drozd v. I.N.S., 155 F.3d 81, 90 (2d Cir. 1998)* ("Based on this record, there is no evidence that any United States official committed any wrongdoing. Accordingly, Drozd's claim falls short of the "affirmative misconduct" that is a prerequisite to estoppel."); *Readco, Inc. v. Marine Midland Bank, 81 F.3d 295, 302 (2d Cir. 1996)* ("Under any of these theories, plaintiffs cannot make out a claim for equitable estoppel because they cannot satisfy the first element, a false representation or concealment of material facts. As we discussed above, nothing in § 6(r) required that Marine and Eagle Rock complete an audit prior [**27] to the closing."); *Jofen v. Epoch Biosciences, Inc., No. 01 Civ. 4129 (JGK), 2002 U.S. Dist. LEXIS 12189, 2002 WL 1461351, at *8 (S.D.N.Y. July 8, 2002)* ("These allegations fail to state a claim because there is no allegation of a false representation or concealment of material facts"). To the extent that the County Attorney was following the Board's November 26, 2007 determination in declining to represent Buonora, the Court finds that no misrepresentation or wrongdoing on the part of the County Attorney occurred. [4]

4 Moreover, this statement by the County Attorney is not a misrepresentation of *fact*, as required by the elements of equitable estoppel, to the extent that the County Attorney declined Buonora's representation based on an interpretation of the statutory law. *See Gen. Auth. for Supply Commodities, Cairo, Egypt v. Ins. Co. of N. Am., 951 F. Supp. 1097, 1111 (S.D.N.Y. 1997)* (internal citations and quotations omitted). If this issue is simply a dispute over the legal interpretation of the relevant state statutes, then equitable estoppel is inapplicable. *See id. at 1112* ("In each of the documents upon which plaintiff claims to have relied, the representations contained therein express opinions regarding [**28] the Bonds' compliance with the Contract, not facts regarding the Bonds themselves."). In any event, the County Attorney made no misrepresentation that is legally cognizable for purposes of equitable estoppel.

[*24] The basis of Buonora's estoppel claim is his assertion that Buonora had a statutory entitlement to counsel up until the time of the Board's "final" determination, and the County Attorney was fully aware of this fact when she told him that she was unable to represent him in this case following the Board's November 26, 2007 determination. According to Buonora, since the County Attorney's refusal to represent Buonora on these grounds constituted a knowing misrepresentation upon which Buonora, in seeking outside counsel, detrimentally relied, she should be estopped from claiming that she is now able to represent Buonora. In particular, Buonora claims that his statutory entitlement to legal representation by the County Attorney was triggered by the allegations in the complaint, and that "[t]he County Attorney, by her arbitrary decision to rely upon a preliminary finding by the Nassau County Police Officer Indemnification Board, to deny him a defense and require him to obtain his own [**29] counsel, at his own expense, to defend his interests, violated Officer Buonora's due process rights." (Buonora Mem., at 9.)

The Court is not persuaded, however, that Buonora had such a legal entitlement to the County Attorney's representation following the Board's November 26, 2007 determination that his actions were not within the proper discharge of his duties or within the scope of his employment. Buonora asserts that the County had "an abso-

lute duty to defend Officer Buonora from the time the plaintiff filed his complaint until such time as there was a 'final determination' that Officer Buonora's conduct was outside the scope of employment." (Buonora Mem., at 12). More specifically, Buonora contends that "there was a statutory scheme in place by which Officer Buonora could defend this property right (the right to appear and present additional information before there was a final determination by the Nassau County Police Officer Indemnification Board pursuant to Municipal Law *§ 50-l*) . . . . " (Buonora Mem., at 10). However, there is nothing in the statutory language that supports this claim. General Municipal Law *Section 50-l*("*Section 50-l*") does not provide Nassau County police officers [**30] with any right to "appear and present additional information" before a "final determination." The text of the statute reads:

> *Notwithstanding the provisions of any other law, code or charter*, the county of Nassau shall provide for the defense of any civil action or proceeding brought against a duly appointed police officer of the Nassau county police department and shall indemnify and save harmless such police officer from any judgment of a court of competent jurisdiction whenever such action, proceeding or judgment is for damages, including punitive or exemplary damages, arising out of a negligent act or other tort of such police officer committed while in the proper discharge of his duties and within the scope of his employment. *Such proper discharge and scope shall be determined by a majority vote of a panel* consisting of one member appointed by the Nassau county board of supervisors, one member appointed by the Nassau county executive, and the third member being the Nassau county police commissioner or a deputy police commissioner.

[*25] *N.Y. Gen. Mun. Law § 50-l* (emphases added). Thus, there is no language in this provision, nor in any other statutory provision, that confers a right to [**31] appear and present additional information to the Board preceding a "final" determination provided to Nassau County police officers. [5] In fact, there is no reference at all in *Section 50-l* or any other statute to an "initial" and then "final" determination by the Board; rather, it simply refers to the issue being "determined" by the Board.

> 5 As discussed *infra*, the Court recognizes that Buonora was afforded an opportunity to challenge the November 26, 2007 determination within fifteen days and to request an opportunity to appear before the Board to present additional facts. However, as confirmed at oral argument, those additional procedures are not codified in any law and appear to have developed as a matter of practice over time. Thus, although Buonora argues that (under *Section 50-l*) this November 26, 2007 determination by a majority vote of the Board was insufficient to trigger the County Attorney's denial of his defense because Buonora was provided with an additional opportunity to challenge it, there is nothing in *Section 50-l* that suggests that the County should ignore or put on hold any determination (which conforms with the requirement of *Section 50-l*) while such a challenge [**32] is taking place.

Buonora directs the Court's attention to a provision in the Nassau County Administrative Code ("Administrative Code" or "Code") to support his claim that he was in fact entitled to legal representation by the County Attorney until the Board's final determination. The relevant part of the Nassau County Administrative Code provides that:

> The County shall provide for the defense of an employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties, or which is brought to enforce a provision of section nineteen hundred eighty-one or nineteen hundred eighty-three of title forty-two of the United States code.

Nassau County Admin. Code § 22-2.8(2)(a). Buonora's position with respect to the Administrative Code, however, is equally untenable. First, the Code also does not mention any right of employees to appear and present additional information prior to any determination by any governmental body. Moreover, even though Buonora argues that the Code applies to his case, he concedes that [**33] *General Municipal Law Section 50-l* gives the Board the authority to determine whether or not to defend or indemnify an officer's actions, based on whether the officer acted within the scope of his employment. (*See* Buonora Reply Memorandum, at 4) ("While it is true that General Municipal Law *Section 50-l* supercedes any other statute, its provisions are not applicable until such time as the Board reaches a final determination.") Indeed, the County Attorney's letter informing Buonora of the Board's November 26, 2007 determination made

clear that "[p]ursuant to *General Municipal Law § 50-l*, it is the function of the Nassau County Police Indemnification Board ("the Board") to determine whether the act or omission complained of was committed while in the proper discharge of your duties and within the scope of your public employment." (Buonora Mem., at Ex. E.) Buonora fails to explain, however, the relationship between the two statutes and why both apply to his case, but purportedly at different time periods. It is inconsistent for Buonora to claim that his legal representation rights are governed by the Code before a "final determination" by the Board, but that his rights following the Board's [**34] decision are governed by *General Municipal Law Section 50-l*. There is no support in the statutory language or in any case law applying these statutes to support [*26] the contention that one statute applies in the time period up until a "final" Board determination, while the other statute applies afterwards. In fact, Buonora's argument is belied by the fact that there is no reference to a "final determination" used in the statutory language at all.

It is clear from the language of the statutes that *Municipal Law Section 50-l* specifically applies to Nassau County Police Officers "notwithstanding any other law." *Id*. Consistent with that provision, it is clear that the Board was acting pursuant to its authority under *Section 50-l* in issuing the November 26, 2007 determination. (*See* Buonora Mem., at Ex. E.) Therefore, just as there exists no statutory language limiting the Board's authority to a "final determination," there is no basis in Buonora's claim that the November 26, 2007 determination lacked the authority pursuant to which the County Attorney could decline Buonora's defense. (Buonora's Mem., at 13.) The Board did subsequently allow Buonora the opportunity to appear and present information [**35] relating to his defense and indemnification, Buonora did appear before the Board, and the Board ultimately changed its determination. However, Buonora is unable to point to any specific language or cases requiring the Board to make its determination binding on the County Attorney only after allowing the officer in question to present facts on his behalf. In fact, the express language of *Section 50-l* suggests otherwise -- that the Board is vested with the complete authority to make its own determination in deciding whether or not to indemnify or represent any police officers. In other words, a "determination" (even if it can be later be reconsidered) is sufficient, since *Section 50-l* makes no reference to "initial" or "final" determinations. The language of the County Attorney's letter of November 26, 2007, also makes this clear: "If the Board determines the acts were committed while in the proper discharge of your duties and within the scope of your employment, the County would indemnify you for any award of damages against you. " (Buonora Mem., at Ex. E.) If the Board makes a subsequent good faith determination that Buonora was entitled to legal representation by the County Attorney, [**36] it has the right to amend its determination in light of new facts or evidence. In fact, had the Deputy County Attorney's letter referred to the November 26, 2007 determination as a "final" determination which Buonora could appeal and challenge, then this issue may not have been raised at all; in fact, contrary to the November 26, 2007 letter, the County Attorney now describes the second determination as an "appeal" of the first, (County Def. Mem., at 6-7). *Cf. Dun & Bradstreet Corp. Found. v. U.S. Postal Serv., 946 F.2d 189, 193 (2d Cir. 1991)* (stating that in the federal agency context, "[i]t is widely accepted that an agency may, on its own initiative, reconsider its interim or even its final decisions, regardless of whether the applicable statute and agency regulations expressly provide for such review") (internal citations omitted). However, regardless of the particular words used to describe these determinations, it is clear that a determination by a majority vote of the Board, even if it can be subsequently amended or revised based on a challenge by the police officer or new facts, is a determination under the plain language of *Section 50-l*, upon which the County Attorney can [**37] properly act in agreeing or declining to provide a defense in a civil action.

To the extent that Buonora further contends that any such interpretation of *Section 50-l* by the County violates his due process rights, the Court disagrees. In particular, Buonora argues that due process is violated by stripping him of his defense and indemnification [*27] based upon a determination made by the Board on November 26, 2007, without him being present and before he is given an opportunity to challenge that determination. However, in order to assert a violation of procedural due process rights, the plaintiff must "first identify a property right, second show that the [government] has deprived him of *that* right, and third show that the deprivation was effected without due process." *Local 342, Long Island Public Serv. Employees, UMD, ILA, AFL-CIO v. Town Bd. of Huntington, 31 F.3d 1191, 1194 (2d Cir. 1994)* (citation omitted) (emphasis in original). Thus, as the Supreme Court noted in *Board of Regents v. Roth*, procedural due process requirements "apply only to the deprivation of interests encompassed by the *Fourteenth Amendment's* protection of liberty and *property*." *408 U.S. 564, 569, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)* (emphasis added). [**38] Such property interests are determined and created by state laws that "secure certain benefits and that support claims of entitlement to those benefits." *Id. at 577*. Thus, "to have a legally cognizable property-type interest in a governmental benefit, an applicant 'must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" *Colson v. Sillman, 35 F.3d 106, 108 (2d Cir. 1994)* (quoting *Roth, 408 U.S. at 577*). "Whether the

benefit invests the applicant with a 'claim of entitlement' or merely a 'unilateral expectation' is determined by the amount of direction the disbursing agency retains." *Colson, 35 F.3d at 108* (citation omitted). In other words, if the governmental entity is given full discretion to deny the benefit, no property interest can exist. *See Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999)*; *Walz v. Town of Smithtown, 46 F.3d 162, 167-68 (2d Cir. 1995)*; *Plaza Health Laboratories, Inc. v. Perales, 878 F.2d 577, 581 (2d Cir. 1989)*. Here, because *Section 50-l* gives the Board full, unfettered discretion to make the "discharge and scope" determination, there is no constitutionally protected "property interest" [**39] in such a determination that can be the foundation for a procedural due process claim. *See, e.g., Perez v. City of New York, No. 97 Civ. 4162 (JSR), 1997 U.S. Dist. LEXIS 19093, 1997 WL 742536, at *2 (S.D.N.Y. Dec. 2, 1997)* ("Since [General Municipal Law *Section 50-k*] therefore vests the City with full discretion to deny representation and indemnification to persons in plaintiff's situation, plaintiff lacks the entitlement necessary to create a constitutionally protected interest. Moreover to the extent that plaintiff alleges that his procedural due process rights were violated because he was not given notice of the reasons for the City's decision, the short answer is that he is not entitled to notice and an opportunity to be heard unless he has a protected interest and, as discussed above, no such interest is created for him by this statute.") (citations omitted). Therefore, Buonora's claim -- that the denial of indemnification based upon the November 26, 2007 determination by the Board (which was prior to Buonora being provided with an opportunity to be heard and to challenge the determination) violated his procedural due process rights -- is without merit.

Buonora's reliance on *Galvani v. Nassau County Police Indemnification Board, 242 A.D.2d 64, 674 N.Y.S.2d 690 (N.Y. App. Div. 1998)* [**40] is similarly misplaced. In *Galvani*, the Appellate Division held that an injured party who was awarded damages in a civil rights action against a Nassau County police officer did not have standing to challenge the decision by the Nassau County Police Indemnification Board not to indemnify that officer. That holding is inapposite to this case and provides no support for Buonora's position. Moreover, the fact that, in *Galvani*, the Board did not make that determination until after the trial (and therefore the [*28] County defended the officer during the trial) does not suggest that, when the Board makes a determination prior to the trial, the County cannot discontinue the defense at that time. In this case, the Board made a determination before trial, but it is in the complete discretion of the Board to make that determination whenever it so chooses. There is nothing in the administrative code or municipal law that directs the Board to do otherwise. Therefore, the applicable statutory law makes clear that Buonora was not entitled to a defense by the County Attorney following the Board's determination that his actions were outside the scope of his employment. Because Buonora did not possess a [**41] right to representation by the County Attorney under Municipal Law *Section 50-l* under such circumstances, he cannot look to the doctrine of estoppel to create one. [6] *See Peterson v. City of New York, No. 97 Civ. 4505, 1998 U.S. Dist. LEXIS 7082, 1998 WL 247530 at * 7 (S.D.N.Y. May 14, 1998).*

> 6 Buonora's references and comparisons to the New York State Public Officer's Law *Section 18* are also inapposite, because the Board is given specific statutory authority in Nassau County to determine whether to defend or indemnify an officer under Municipal Law *Section 50-l*. As asserted by Buonora, the provision analogous to New York State Public Officer's Law *Section 18* is the Nassau County Administrative Code, not Municipal Law *Section 50-l*. (Buonora Mem., at 13.).

In sum, the Court is not persuaded that in following the November 26, 2007 determination by the Board, the County Attorney made an "erroneous determination" under *Section 50-l* not to represent Buonora (Buonora Mem., at 9), even though the Board was going to provide Buonora with the opportunity to appear and challenge that determination. The County Attorney did not act inappropriately in not appearing on behalf of Buonora under such circumstances, since, as Mr. [**42] Weingard attests himself, there is no dispute that "the County Attorney's decision was based upon the preliminary determination of the Nassau County Police Indemnification Board that Officer Buonora [sic] actions were not within the proper discharge of his duties and outside the scope of his employment." (Weingard Aff. P 7.) By following the Board's determination, the County Attorney did not "arbitrarily supercede[] the statutory authority and render[] her decision denying Officer Buonora a defense at county expense." (Buonora's Mem., at 10.) She did not "voluntarily disqualif[y] herself" nor "chose. . . to determine that it would be inappropriate to defend him in this action." (Buonora Mem., at 14.) Instead, it was the Board's determination that resulted in the County Attorney's communications to Buonora and his counsel, and the County Attorney simply followed the determination of the Board, as statutorily directed. Even though Buonora claims that the County Attorney acted "in violation of the law," he does not point to any part of the administrative code or municipal law stating that she had to wait for any challenges by Buonora to the Board's determination (or a "final determination") [**43] before informing Buonora to seek private counsel. Importantly, as noted previously, there is no mention of "final determination" in any part of the statutory language, nor is there a dis-

tinction between a "preliminary" or "initial" and "final" determination by the Board in its rulings. In fact, the documents reflecting the Board's November 26, 2007 and March 14, 2008 determinations reveal that their formats were identical. (*See* Buonora Mem., at Exs. F and I.) Not only is there no label or identifier on the documents indicating that one determination was "preliminary" and the latter "*final*," but the bottom of both pages states that "[t]he signature of each Board member participating in the decision attests only to the final decision of the Board and should not [*29] be construed as being necessarily reflective of the individual's vote on the final decision." (Buonora Mem., at Exs. F and I.) (emphasis added).

Not only has Buonora failed to show that the County Attorney made a misrepresentation of material fact for the purposes of equitable estoppel, he has also failed to show that he has suffered any prejudice as a consequence of her actions. *See, e.g., River Seafoods Inc., 19 A.D.3d at 122.* [**44] Buonora argues that he had "to retain his own counsel to fully defend this matter and assume the costs of his own defense," but any costs that he had to assume in the time between the November 26, 2007 determination and the County Attorney's offer to assume Buonora's representation following the March 14, 2008 determination will now be reimbursed by the County. (*See* Buonora Mem., at Ex. O.) There was also no prejudice to Buonora in terms of adequate legal representation, since Buonora was able to immediately retain the services of private counsel, who was already familiar with his case and who had already been retained by Buonora beforehand to "monitor his defense." (Weingard Aff. P 5.) Accordingly, because Buonora has plainly failed as a matter of law to satisfy the elements of equitable estoppel required under New York law, the Court denies his motion on equitable estoppel grounds. [7]

> 7 Moreover, even assuming *arguendo* that Buonora could meet his burden regarding the elements of equitable estoppel, the law of equitable estoppel against a governmental body would likely bar any such claim of estoppel against the Board or Nassau County. *Petrelli v. City of Mount Vernon, 9 F.3d 250, 256 (2d Cir. 1993)*; [**45] *see also, e.g., New York State Med. Transporters Assoc. v. Perales, 77 N.Y.2d 126, 130, 566 N.E.2d 134, 564 N.Y.S.2d 1007 (N.Y. 1990)* (estoppel against a governmental agency foreclosed "'in all but the rarest cases.'" (citation omitted)); *City of New York v. City Civil Serv. Comm'n, 60 N.Y.2d 436, 458 N.E.2d 354, 470 N.Y.S.2d 113 (N.Y. 1983)* ("estoppel may not be applied to preclude a State or municipal agency from discharging its statutory responsibility."); *Hamptons Hosp. & Med. Ctr., Inc. v. Moore, 52 N.Y.2d 88, 417 N.E.2d 533, 436 N.Y.S.2d 239, (N.Y. 1981)* ("In principle it would be unthinkable that [a government agency] through mistake or otherwise could be estopped from discharging the responsibility vested in it by legislative enactment."); *Schmitt, 999 F.Supp. at 360* ("The New York Court of Appeals has repeatedly held that estoppel will not lie against municipalities, public agencies or governmental subdivisions."); *Drozd, 155 F.3d at 90* ("The doctrine of equitable estoppel is not available against the government 'except in the most serious of circumstances,' *United States v. RePass, 688 F.2d 154, 158 (2d Cir.1982)*, and is applied 'with the utmost caution and restraint,' *Estate of Carberry v. Comm'r of Internal Revenue, 933 F.2d 1124, 1127 (2d Cir.1991)* (internal quotation [**46] marks and citations omitted)."); *Shelton v. Wing, 256 A.D.2d 1143, 1144, 684 N.Y.S.2d 726 (N.Y. App. Div. 1998)* (distinguished by, *Bd. of Educ. of N. Tonawanda City Sch. Dist. v. Mills, 263 A.D.2d 574, 693 N.Y.S.2d 271 (N.Y. App. Div. 1999))* (holding that estoppel cannot be invoked against county Department of Social Services); *28 Am. Jur. 2d Estoppel and Waiver § 150* ("In general, courts do not distinguish among state and its political subdivisions (such as counties, municipal corporations, and towns) with respect to the availability of estoppel."). The Court sees no such extraordinary circumstances in the present case to warrant equitable estoppel against a governmental body. Indeed, as noted supra, Buonora's claim does not even satisfy the ordinary elements of the doctrine of equitable estoppel.

2. Waiver

a. Legal Standard

Under New York law, "[t]o establish waiver, it is necessary to show that there has been an intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it." *Airco Alloys Div., 76 A.D.2d at 81*(internal quotations and citation omitted); *see also Jordan v. Can You Imagine, Inc., 485 F. Supp. 2d 493, 499* [*30] *(S.D.N.Y. 2007)* ("Waiver requires the voluntary [**47] and intentional abandonment of a known right which, but for the waiver, would have been enforceable.") (internal citations omitted); *Laguardia Assocs. v. Holiday Hospitality Franchising, Inc., 92 F. Supp. 2d 119, 129-30 (E.D.N.Y. 2000)* (same). Waiver may be established by affirmative conduct or by a failure to act that evinces the intent to abandon the right. *Jordan v. Can You Imagine, Inc., 485 F. Supp. 2d at 499* (internal citations omitted).

The doctrines of waiver and estoppel are closely akin, but there are some important distinctions. "[A] waiver is a voluntary and intentional abandonment or relinquishment of a known right, whereas an equitable estoppel may arise even though there was no intention on the part of the party estopped to relinquish or change any existing right . . . . Among other distinctions, waiver involves the act and conduct of only one of the parties . . . . " *28 Am. Jur. 2d Estoppel and Waiver § 36*.

b. Application

The Court determines in this case that there is no "known right" that the County Attorney has relinquished. Thus, Buonora's motion on waiver grounds also fails. As discussed *supra*, the County Attorney's decision to deny Buonora representation after the [**48] Board's November 26, 2007 determination was not a relinquishment of a right, but rather the implementation of the language of *Section 50-l*, which does not provide for such defense and indemnification in a civil action once a determination is made by the Board that the officer was acting outside the scope of employment. For these reasons, the Court denies Buonora's motion on the ground that the County Attorney waived her right to represent Buonora between the November 26, 2007 determination by the Board and the reversal of its position on March 14, 2008.

C. Disqualification of Counsel

Disqualification is viewed "with disfavor in this circuit," *In re Bohack Corp., 607 F.2d 258, 263 (2d Cir. 1979)*, because it "impinges on parties' rights to employ the attorney of their choice." *United States Football League v. Nat'l Football League, 605 F. Supp. 1448, 1452 (S.D.N.Y. 1985)* (citation omitted). In particular, the Second Circuit has noted the "high standard of proof" required for disqualification motions because, among other things, they are "often interposed for tactical reasons, and that even when made in the best of faith, such motions inevitably cause delay." *Evans v. Artek Sys. Corp., 715 F.2d 788, 791 (2d Cir. 1983)*; [**49] *accord Gov't India v. Cook Indus., Inc., 569 F.2d 737, 739 (2d Cir. 1978)*.

Nevertheless, the disqualification of counsel "is a matter committed to the sound discretion of the district court." *Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72 (2d Cir. 1990)*. A federal court's power to disqualify an attorney derives from its "inherent power to 'preserve the integrity of the adversary process,'" *Hempstead Video, Inc. v. Inc. Vill. of Valley Stream, 409 F.3d 127, 132 (2d Cir. 2005)* (quoting *Bd. of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979))*, and "is only appropriate where allowing the representation to continue would pose a significant risk of trial taint." *Glueck v. Jonathan Logan, Inc., 653 F.2d 746, 748 (2d Cir. 1981)* (internal quotation marks omitted). In exercising this power, courts look for "general guidance" to the American Bar Association ("ABA") and state disciplinary rules, although "not every violation of a disciplinary rule will necessarily lead to disqualification." [8] *Hempstead Video Inc., 409 F.3d at 132*.

> 8 The Court also notes that *Civil Rule 1.5(b)(5) of the Local Rules of the U.S. District Courts for the Southern and Eastern Districts of New York* binds attorneys [**50] appearing before those courts to the New York State Lawyer's Code of Professional Responsibility. *Local Civ. R. 1.5(b)(5)*; *see, e.g., United States v. Hammad, 846 F.2d 854, 857-58 (2d Cir. 1988)*; *Polycast Tech. Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990)* ("[I]n this Court federal law incorporates by reference the Code of Professional Responsibility.").

[*31] 1. Conflict of Interest Between Officer

Buonora and Officer Vara Buonora argues that a conflict of interest exists between himself and co-defendant Vara, one that Buonora is unwilling to waive. (Buonora Mem., at 8.) Specifically, Buonora argues that the County Attorney should be disqualified pursuant to Ethical Consideration 5-15 of the ABA Code of Professional Responsibility, which provides that:

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests, [**51] and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests.

ABA Code of Prof. Resp. EC 5-15. At this stage, the Court disagrees with Buonora and does not find that the joint representation of Officers Buonora and Vara poses a "significant risk of trial taint," *Glueck, 653 F.2d at 748*, that, if not remedied, would "undermine[] the [C]ourt's confidence in the vigor of the attorney's representation of his client[s]." *Nyquist, 590 F.2d at 1246*.

As evidence of the conflict between his and Vara's interests, Buonora argues that "it is very likely that the testimony of both officers will differ with respect to the

events that are the subject of this action -- testimony on behalf of Officer Vara that can not be gauged at present ' " (Buonora Mem., at 22) (footnote omitted.) As previously discussed by this Court in its Memorandum and Order ruling on Buonora's motion to dismiss and motion for summary judgment, it is far from clear that the testimony of Vara will be inconsistent with that of Buonora. In arguing his previous motion, counsel for Buonora claimed that Vara's and Buonora's grand jury testimonies were [**52] inconsistent and, therefore, could not provide a basis for conspiracy. As set forth in this Court's prior Memorandum and Order, after carefully reviewing this testimony, the Court wholly disagreed. The Court pointed to specific testimony to show that "one could reasonably infer from this testimony that Vara and Buonora testified consistently regarding the very issue about which Buonora perjured himself, *i.e.*, the actions he took during the period that Vara was chasing Coggins, especially with respect to Buonora's purported retrieval of the gun in question." Memorandum and Order, dated June 20, 2008, 07 Civ. 3624 (JFB)(AKT). Even plaintiff alleges in his complaint that Vara and Buonora provided mutually consistent testimony. (Compl. PP 23-24, 67). Moreover, Buonora himself insists that the sole content of his false testimony regarded "who had discovered a handgun found at the location where Coggins had fled police." (Buonora Mem., at 1). The Court concludes that the evidence is far from clear that Vara's likely testimony conflicts with that of Buonora, especially in light of Buonora's guilty plea, and that separate counsel for Buonora and Vara is either prudent or necessary at this [**53] juncture.

[*32] Importantly, even though counsel for Buonora did not dispute at oral argument for purposes of his motions to dismiss and for summary judgment that Buonora provided false testimony before the grand jury, this is not necessarily inconsistent with Vara's having provided truthful testimony during the grand jury proceedings. Thus, the fact that Buonora pled guilty to perjury and was disciplined by the Police Department is not sufficient to warrant disqualification of the County Attorney from representing both Buonora and Vara. Also, because Buonora has already been disciplined by the Department for his perjurious testimony, the Court is not persuaded that sheer speculation by Buonora about the possibility of further disciplinary actions resulting from potential conflicting testimony by Vara and Buonora is cause for disqualification of the County Attorney. (*See* Buonora Mem., at 22.)

In addition, Buonora refers to the answer filed by the County Attorney on behalf of the County Defendants, stating that "[b]y appearing on behalf of Officer Vara and refusing to do so on Officer Buonora's behalf, the County has explicitly demonstrated that it views the position, and, importantly, the [**54] defense of these Officer's [sic] differently." (Buonora Mem., at 20). However, as discussed *supra*, the Court has determined that the County Attorney's appearance on behalf of only the County Defendants did not necessarily imply any position with respect to Buonora; rather, her failure to appear on behalf of Buonora was simply the result of following the Board's November 26, 2007 determination. Thus, any references to Vara's actions or those of the County defendants (and concomitant omissions with respect to Buonora's actions) did not suggest that the County Attorney was taking any opposing, negative position with respect to Buonora. Thus, based on this record, the Court declines to disqualify the County Attorney on the basis of any purported potential or actual conflict of interest between Officers Buonora and Vara.

2. Conflict of Interest Between Officer Buonora and the County

Buonora also argues that a conflict of interest exists between himself and the County such that the County Attorney should be disqualified from assuming his representation. The Court disagrees, however, and also denies Buonora's motion for the County Attorney's disqualification on these grounds.

Buonora first asserts [**55] that "the County Attorney had an absolute statutory obligation to defend Officer Buonora in this action pursuant to the Nassau County Administrative Code" and that she "arbitrarily and summarily acted on her own accord to deprive Officer Buonora of a defense at County expense." (Buonora Mem., at 19-20). The Court has already rejected this argument, however, as discussed *supra*.

As further evidence of this conflict with the County, Buonora states that the County Attorney's answer on behalf of the County Defendants implicitly attributed guilt to Buonora for any harm to Coggins. In particular, he alleges that the answer stated "that the plaintiff's damages, if any, were as a result of conduct of parties other than the parties they were appearing for. In other words, . . . the County Attorney has previously alleged that [Buonora is] responsible for plaintiff's alleged damages." (Buonora Aff. P 16.) The Court finds that this is insufficient evidence to suggest that the County or County Attorney views the defense of Buonora in a way that conflicts with the defense of the County Defendants. As discussed *supra*, the Court finds that the County Attorney merely followed the Board's initial determination [**56] not to defend Buonora, and this accounts for any omitted references to Buonora in the answer.

[*33] In fact, the interests of the County, Buonora, and Vara appear to be aligned following the Board's March 14, 2008 determination. Even Buonora concedes, "at the end of the day, due to the final determinations of

the Nassau County Police Officer Indemnification Board that both Officer Vara and Officer Buonora acted within the proper discharge of their duties and within the scope of their employment, the County of Nassau, her employer and a party to the action is financially responsible for any verdict or judgment entered against both officers." (Buonora Mem., at 22.) Thus, any judgment against Buonora will effectively be one against the County. Thus, the Court rejects as unlikely the contention that "the County Attorney may, perhaps unconsciously, seek to create distance between [Officer Buonora] and the County [or Officer Vara]. " (Buonora Mem., at 21-22) (quoting *Death v. Salem, 111 A.D.2d 778, 781, 490 N.Y.S.2d 526 (N.Y. App. Div. 1985).*) Moreover, the Second Circuit has made clear that automatic disqualification does not result where there is joint representation of the County and its employees. *See Norton v. Town of Islip, 2006 U.S. Dist. LEXIS 60459, 2006 WL 2465031, at *5 (E.D.N.Y. 2006)* [**57] ("the Second Circuit has been clear that 'in *Dunton* . . . this Court declined to create a per se rule requiring disqualification whenever a municipality and its employees are jointly represented in a *Section 1983* case. Rather a case-by-case determination is required.'") (quoting *Patterson v. Balsamico, 440 F.3d 104, 114 (2d Cir. 2006)).* The Court is unable to conclude that, based upon the current record, the County Attorney's multiple representation of Buonora and the County Defendants requires disqualification because of any potential or actual conflicts of interest.

Buonora refers repeatedly to *Death v. Salem, 111 A.D.2d 778, 780, 490 N.Y.S.2d 526 (N.Y. App. Div.1985)* as a situation analogous to the one at hand. However, unlike the attorney in *Death*, there is no indication that the County Attorney has clearly shown disparate treatment toward Buonora. *See Death v. Salem, 111 A.D.2d 778, 780, 490 N.Y.S.2d 526 (N.Y. App. Div. 1985)*; *cf. Dunton v. Suffolk County, State of N.Y., 729 F.2d 903, 909 (2d Cir. 1984)* (finding disqualification where "the County Attorney would take a basic position throughout the litigation which was adverse to Pfeiffer's interest."); *Baker v. Gerould, 2005 U.S. Dist. LEXIS 26498, 2005 WL 2406003, at *4 (W.D.N.Y. 2005)* (rejecting [**58] the argument that "the Attorney General's office--as the entity statutorily charged with representing the State's interests, has a built-in incentive to argue against the employee's interest, namely, by seeking to prove that if a constitutional violation in fact occurred, the employee committed it outside the scope of his employment.") In *Death*, the county attorney had submitted a joint answer on behalf of *all* of the defendants, and answered differently with respect to one of the defendants. *See Death, 111 A.D.2d at 779*. [9] Here, there is no "unusual treatment" that has been accorded Buonora, either in the answer or in the County Attorney's decision not to join in his prior motion or appeal. Rather, the County Attorney was simply not representing him at that time. Although Buonora argues otherwise, the County Attorney's failure to join in Buonora's motion or appeal with respect to his defense of absolute immunity (Buonora Mem., at 21), is not evidence of a conflict of interest. Because the County Attorney [*34] has taken the same position with respect to all of the County Defendants, this is no indication that she views the defense of Buonora any differently than that of the other defendants. [**59]

> 9 The County Attorney correctly points out that *Death* analyzed New York State Public Officer's Law *Section 18(3)(b)*, which is analogous to Administrative Code Section 22-2.8(2)(b) and not General Municipal Law *Section 50-l*. Nonetheless, its analysis regarding a potential conflict of interest among co-defendants is instructive and not tied to any particular statute.

Finally, Buonora's bald assertions and speculation as to what actions were attributable to the County Attorney when she or representatives of her office appeared before the Board at the time of its November 26, 2007 determination are also insufficient to warrant disqualification by the Court. (*See* Buonora Mem., at 21.) ("While we are . . . not in possession of the transcript of the prior meeting(s) where evidence was presented to the Board which led to the Board's preliminary determination . . . it is not a stretch to believe that the evidence presented to the Board *ex parte* at the earlier meeting(s) was presented in a manner less than favorable to Officer Buonora's interests.") Not only are such actions speculative at best, the County Attorney has fervently denied presenting Buonora in a negative light at that time, (County [**60] Def. Mem., at 24), and Buonora has provided no evidence to the contrary.

In light of the possibility that a potential conflict of interest may arise between Buonora and the County and/or Vara, the Court, while declining to disqualify the County Attorney at this juncture based upon the current record, denies Buonora's motion to request separate counsel with no prejudice to his renewing the motion at a later date if necessary. *See, e.g., Dunton, 729 F.2d at 909* ("[a] court is under a continuing obligation to supervise the members of its Bar."). Thus far, there is no reason for disqualification of the County Attorney in her representation of Buonora -- which again is an extreme and disfavored action in this Circuit where the Board's March 14, 2008 determination is that Buonora did in fact act within the scope of his employment. The County Attorney never attempted to shift any culpability to Buonora and recognizes "[m]ore importantly, now that the Board has determined that Buonora was acting within the scope of his employment and voted to indemnify and defend him, the County Attorney cannot now or anytime in the future,

make any representation with regard to Buonora that would create a [**61] conflict of interest." (County Def. Mem., at 24.) Moreover, as confirmed at oral argument, after discussing the facts of the instant case with Officer Vara and having reviewed the grand jury testimony of Buonora and Vara from the Coggins grand jury proceeding, the County Attorney does not believe there is a basis to conclude that the factual and/or legal positions of the three named defendants in this litigation are such that a conflict of interest exists and the Court has no basis, given the current record, to conclude otherwise.

Accordingly, having considered the applicable ethical rules to guide the Court's discretion as well as all other relevant factors, the Court concludes that, based upon the current record, disqualification under the circumstances of this case is not warranted.

III. CONCLUSION

For the foregoing reasons, Buonora's motion for a declaratory judgment is denied in its entirety.

SO ORDERED.

JOSEPH F. BIANCO

United States District Judge

Dated: January 5, 2009

Central Islip, NY

PAUL WILLIAMS, et al., Plaintiffs, vs. CITY OF ROME, et al., Defendants.

6:08-CV-14 (DNH/GJD)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

2008 U.S. Dist. LEXIS 58667

July 22, 2008, Decided
July 22, 2008, Filed

SUBSEQUENT HISTORY: Summary judgment granted, in part, summary judgment denied, in part by, Claim dismissed by, Complaint dismissed at, in part *Williams v. City of Rome, 2009 U.S. Dist. LEXIS 60266 (N.D.N.Y, July 15, 2009)*

COUNSEL: [*1] A.J. BOSMAN, ESQ. for Plaintiffs.

DIANE M. MARTIN-GRANDE, ESQ. for Defendants.

JUDGES: Hon. Gustave J. DiBianco, U.S. Magistrate Judge.

OPINION BY: Hon. Gustave J. DiBianco

OPINION

ORDER

On June 17, 2008, a telephonic *Rule 16* conference was held in this action. The court issued a Uniform Pretrial Scheduling Order on June 23, 2008. (Dkt. No. 28). During the telephone conference, the court discussed a possible issue arising due to defense counsel's representation of all the municipal defendants, including the City of Rome and individual police officers.

In addition to defense counsel's ethical obligation to inform each client of the potential adverse consequences of joint representation, this court has a continuing obligation to supervise the bar and assure litigants a fair trial. *See Dunton v. County of Suffolk, 729 F.2d 903, 908-09 (2d Cir. 1984)*. Accordingly, it is my duty to ensure that each defendant in this action represented by Diane M. Martin-Grande, Esq. fully appreciates the potential inherent conflict in joint representation of multiple defendants and understands the potential threat a conflict may pose to each defendant's interests. *Id. at 909*.

It is therefore hereby **ORDERED** as follows:

1. If it has not already [*2] been accomplished, Attorney Martin-Grande shall within **ten (10) days** of the date of this order send a letter to each client in this action a) outlining the circumstances under which an actual or potential conflict of interest may arise, and b) advising whether counsel plans to take a position adverse to that client's interests at trial. A listing of some of the ways in which such a conflict may manifest itself in an action such as this is attached to this order.

2. If, after being informed in writing of the potential or actual conflict, any defendant wishes to retain separate counsel, that defendant should notify the Court within **thirty (30) days** of the date of this order of the identity of counsel that will represent the party.

3. In the event that the defendants wish to proceed while being represented by their current counsel, however, I will require additional assurance that they have made an informed decision to do so, notwithstanding the potential for conflict. That assurance must be in the form of a sworn statement, authorizing representation of that party: a) acknowledging that he or she has been given written notice by counsel of the potential for conflict; b) acknowledging that [*3] he or she understands the potential conflict and its ramifications; and c) stating that he or she is authorized to, and knowingly and voluntarily has, chosen to proceed with joint representation. That affidavit, together with the letters sent in accordance with paragraph (1) above, shall be submitted to the court, directly to my chambers, within **forty (40) days** of the date of this order for filing under seal.

4. If defendants choose to proceed with joint representation, I will review defense counsel's letters of notification and the parties' affidavits *in camera* to determine if the parties have knowingly and voluntarily waived their right to separate, independent counsel.

5. If I determine that the potential conflict is of a nature which ***can be waived*** and the defendants' waiver of the potential conflict is knowing and voluntary, I will allow the parties to proceed with joint representation.

6. If I determine that the defendants have not been adequately informed or have not knowingly and voluntarily waived their right to separate, independent counsel, I will order further action as necessary to safeguard the integrity of these proceedings.

7. A party who consents to joint representation [*4] will not be deemed to have waived his or her right to retain independent counsel if an unforeseen conflict arises during the course of the litigation. The parties are hereby notified, however, that absent a change in circumstances, any waiver of the actual or potential conflict presented as a result of joint representation shall be final, for purposes of these proceedings, and they may not raise the issue prior to, or at trial.

8. Copies of this order shall be served electronically by the clerk to all counsel in this action.

Dated: July 22, 2008

/s/ Gustave J. DiBianco

Hon. Gustave J. DiBianco

U.S. Magistrate Judge

ATTACHMENT

Listed below are some, but not all, of the circumstances in which a conflict of interest may arise when two or more defendants are jointly represented by a single attorney or law firm. The list is not exhaustive but serves only to illustrate examples of the types of conflicts that may result from joint representation. An attorney should also advise a defendant of other possible conflicts, specific to the facts of the particular case.

1) It may be in the best interests of the government entity to assert as a defense that a defendant was not acting within the scope of his [*5] or her employment at the time of the events in issue. However, such a defense would operate to the detriment of an individual defendant and might place his or her defense in conflict with that of the government entity.

2) The attorney may receive information from one defendant which is helpful to one defendant, but which undermines the defense of another defendant. Where both defendants are represented by the same attorney or law firm, the attorney-client privilege may prevent the attorney or law firm from using that information in the defense of the defendant for whom the information is favorable.

3) The plaintiff may offer to settle or dismiss claims against one defendant in return for cooperation with the plaintiffs case. If a defendant receives such an offer, a lawyer or law firm jointly representing defendants may not be able to provide unbiased advice on whether to accept or reject the offer because the acceptance of the offer may undermine the case of other defendants whom the attorney or law firm represents.

4) During jury selection at trial, a particular potential juror may be perceived as favorable to one defendant but unfavorable to another. Where these defendants are jointly [*6] represented by one attorney or law firm, the attorney must choose the interests of one defendant over those of the other in determining whether to select or reject that potential juror.

5) In questioning a defendant during his own testimony, an attorney who jointly represents another defendant in the same case may be inclined to limit or eliminate certain questions where, although the answers would be helpful to the defense of one defendant, those answers may undermine the defense of another defendant.

6) In questioning non-party witnesses during testimony, an attorney who jointly represents two or more defendants in the same case may be inclined to limit or eliminate certain questions where, although the answers would be helpful to the defense of one defendant, those answers may undermine the defense of another defendant.

7) In determining which witnesses and which exhibits to present at trial, an attorney or law firm jointly representing two or more defendant in the same case may be inclined not to offer certain witnesses or exhibits because, although that evidence may be helpful to the defense of one defendant, it undermines the defense of another defendant.

8) If two or more defendants [*7] are found liable for punitive damages and a trial is held on that issue, a lawyer of law firm jointly representing two or more defendants in the same case may be inclined to argue to the fact finder that one defendant was less responsible or less culpable than another. However, while such an argument may benefit the defense of that defendant, it may undermine the defense of another defendant who, the argument would suggest, was more responsible or more culpable.