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CONFLICTS OF INTEREST IN WYOMING

John M. Burman

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I. INTRODUCTION

In a state with a small number of lawyers, avoiding conflicts of interest is difficult, at best. It is well worth the effort, however, as the potential adverse ethical and legal consequences can be significant. While a lawyer may think that conflicts can be avoided by limiting his or her practice to a certain area or areas, avoiding conflicts is impossible. Conflicts arise in all types of law practice and in all settings. The question, therefore, is not if conflicts will arise, but when; and when they do, how should the lawyer handle them to avoid ethical and/or legal problems?

Not all conflicts of interest preclude representation. The keys for lawyers are to: (1) timely identify potential and/or actual conflicts; (2) properly evaluate them to determine if and under what circumstances disclosure is appropriate and whether a waiver of the conflict is permissible; (3) follow the proper procedures and standards in obtaining a waiver if a waiver is permissible; and (4) follow the proper procedure for declining or terminating representation if waiver is not permissible or the client or other party chooses not to waive the conflict.

This article sets out the general standards which apply to conflicts of interest, addresses common situations which present actual or potential conflicts of interest, and contains the procedures and standards which should be followed in handling such conflicts. It is intended to provide guidance to Wyoming lawyers in identifying, properly handling, and avoiding Impermissible conflicts and potential conflicts of interest.

II. GENERAL CONFLICT OF INTEREST STANDARDS

An attorney must represent every client zealously. Loyalty to the client, therefore, is the touchstone of the attorney-client relationship. The obligation of loyalty is grounded in the law of agency, which applies since a lawyer is an agent for each of his or her clients. Agents owe their princi-


3. See, e.g., CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1 (A lawyer is a “fiduciary agent” for the lawyer’s clients.).
pals an unwavering duty of loyalty, including fiduciary and confidentiality obligations. As both an agent and a fiduciary, a lawyer must subordinate his or her interests to the client's. Accordingly, except in those rare instances where a lawyer's duties to the court or the lawyer's duty to an innocent third party override the duty to the client, a lawyer's obligation to the client is paramount. Anything which threatens an attorney's loyalty or a client's confidentiality is, therefore, a conflict of interest, or at least a potential conflict of interest. Any actual or potential conflict of interest must be detected, properly evaluated, and properly handled to avoid ethical and/or malpractice problems.

**Ethical Standards**

1. Sources of conflicts

Conflicts emerge from at least three different sources. First, the interests of clients, whether former, current, or prospective, may diverge. Second, the interests of a non-client third party may conflict with those of a client. Third, the lawyer's own interests, or those of an employee of the lawyer's, may be inconsistent with those of a client or prospective clients.

Client-client conflicts are often obvious. When one client wishes to sue another, or when one client wishes to purchase property from another, for example, the divergence of interests is plain. It is less obvious, however, when two clients have interests which appear to be congruent. Co-parties to litigation, for example, may well have some common interests, but the potential for diverging interests is always present. Lawyers must be alert, therefore, to potential conflicts, not just existing ones. The interests of a prospective client may conflict with those of a current or former client, and that conflict, too, must be identified and properly handled.

The interests of non-parties may also be significant. Third-party payers, such as insurance companies, employers, or parents, may have objectives which differ from the represented party's. Also, the lawyer may feel obligations to other third parties, such as family members or friends, who may be affected by the lawyer's representation of a particular client.

4. Restatement (Second) of Agency § 39 (1958) ("Agent must act for the benefit of the principal").
5. Id. at § 13.
6. Id. at § 395.
A lawyer's own interests may create insurmountable conflicts. Many clients, or prospective clients, have done things which a lawyer finds morally offensive. A lawyer's feelings about a client or a client's actions may prevent the lawyer from pursuing the client's objectives diligently, meaning the lawyer may not ethically represent the client.

2. Timing of conflicts

Conflicts may arise at any time. Some are concurrent, meaning that the interests of current clients, a current and a potential client, or two potential clients are or may be in conflict. A concurrent conflict may also involve a conflict between the interests of a third party and a client or potential client. Others are successive, meaning that the interests of a former client or former prospective client conflict with the interests of a current client or a potential client. Whatever the type and regardless of when they arise, certain general ethical standards apply to all conflicts.

3. Classification of conflicts

The Wyoming Rules of Professional Conduct classify conflicts of interest into three categories of severity.\(^{10}\) From most severe to least, they are: (1) clients and/or prospective clients with interests which are "directly adverse" to each other; (2) conflicts which "materially limit" a lawyer's representation of a client or a prospective client; and (3) de minimus conflicts. The classification of conflicts into those where clients' interests are "directly adverse" or those where representation would be "materially limited" does not end the inquiry. Rule 1.7 prohibits a lawyer from representing a client under certain circumstances, permits representation under others, despite a conflict, and permits, by omission, and without disclosure, representation when the only conflicts are *de minimus.*\(^{11}\)

4. Conflicts involving clients and/or prospective clients with "directly adverse" interests

The potentially most severe conflicts are those in which the interests of one client are "directly adverse" to the interests of another client or a potential client. Such conflicts arise when, for example, a married couple seeks joint representation in a divorce or two parties to a real estate transaction contact one lawyer to prepare documents to implement a transaction. While the parties may believe, and say, they are in agreement, their interests, if not their positions, are directly adverse. Accordingly, a concurrent conflict exists, or will exist if the lawyer undertakes the joint representation. A concurrent conflict will also arise when a lawyer represents one party in litiga-

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tion and is then contacted by an adverse party. In such a case, the interests of a potential client are directly adverse to those of an existing client.

Where the interests of clients and/or potential clients, are "directly adverse," a lawyer "shall not" represent a client or potential client "unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." 12

The exception to the rule divides "directly adverse" conflicts into two categories. Those which may be waived, and those which may not. Accordingly, after discerning the existence of an actual or potential conflict, the next step for the lawyer is to determine whether the conflict is one which may be waived.

A conflict may be waived if the lawyer "reasonably believes" the representation of each client will not be adversely affected in spite of the conflict. The term "reasonably believes" means that "the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." 13 In other words, the lawyer must subjectively believe that the conflict will not adversely affect the representation and the belief must be the objectively reasonable belief of the proverbial reasonable lawyer. Representation is objectively reasonable if "a disinterested lawyer" would conclude that the client may agree to the representation. 14

It is inherently impossible for a lawyer evaluating whether he or she has a conflict to be disinterested; by definition, the lawyer is interested. Accordingly, while it is not required by the rule, the only safe path in such circumstances is for the lawyer or the potential client to consult a truly disinterested lawyer. At a minimum the lawyer seeking the waiver should advise and affirmatively recommend that the individual from whom the waiver is being sought consult a disinterested lawyer. As discussed below, that recommendation should be, but is not required to be, in writing. 15

The determination of whether a conflict may be waived must be made before the lawyer asks the client for a waiver. If a conflict is one where a disinterested lawyer would conclude that the client should not agree to a

12. Id. Rule 1.7(a).
13. Id. Terminology [8].
14. Id. Rule 1.7, cmt. [5].
15. See infra notes 16 through 23 and accompanying text.
waiver, "the lawyer cannot properly ask for [a waiver] . . . or provide representation on the basis of the client's consent."16 In short, it is unethical to even ask for a waiver if a reasonable lawyer would not do so. A disinterested lawyer, of course, would not ask for consent when the parties' interests are "substantially different."17 Similarly, it is unethical to represent a client who has consented to a waiver in circumstances where a disinterested lawyer would find a waiver to be inappropriate.

If the conflict is one that may be waived by the client's consent, then consent must be properly obtained. A client's consent is effective only if given after "consultation." "Consultation" means the lawyer has "communicat[ed] . . . information reasonably sufficient to permit the client to appreciate the significance of the matter in question."18 This requirement is really only a restatement of the lawyer's general obligation to "explain a matter to [the client] to the extent reasonably necessary to permit the client to make [an] informed decision[]. . . ."19 Clients need to be told, however, that consent may be withdrawn at any time and for any reason.

Except when the conflict involves a business transaction,20 the Rules do not require that consent be in writing. It is a foolish lawyer, however, who does not obtain written consent from each party. Further, the document should be more than a simple consent. It should contain: (1) a description of the conflict; (2) an explanation of the consequences and potential consequences of that conflict; (3) a statement of the potential consequences of agreeing to waive the conflict; and (4) an affirmative recommendation that the individual consult another lawyer before agreeing to a waiver. While such an advisory may result in a refusal to waive the conflict, it is far better to learn of a party's concerns up front, instead of later. If a disagreement subsequently arises about whether the consent was given after "consultation," the burden will be on the lawyer to prove that consent was freely given after adequate consultation.21 A document, signed by the client, which contains "sufficient information" to allow the client to understand the significance of his or her consent, and a recommendation to seek outside counsel, will be critical to meeting that burden.

18. WYOMING RULES OF PROFESSIONAL CONDUCT Terminology [2].
19. Id. Rule 1.4(b).
20. Id. Rule 1.8(a)(3).
5. Conflicts where the lawyer’s representation of a client will be “materially limited” by some other interest

Conflicts may arise even when the interests of two clients or potential clients are not directly adverse. Consider, for example, the following, common situations. An insurance company hires a lawyer to defend an insured. A parent hires a lawyer to represent her minor child. An adult child hires a lawyer to prepare an estate plan for his mother. Co-defendants in a negligence action hire a lawyer to represent them jointly. Co-defendants in a criminal action hire the same lawyer. Or, a parent alleged to have abused her child contacts a lawyer who was abused as a child. In each of the above situations, the lawyer’s loyalty to his or her client may be compromised by either external or internal pressures.

Paragraph (b) of Rule 1.7 is designed to cover any conflict of interest, whatever the source, which may “materially limit” a lawyer’s representation of a client:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved. (Emphasis added)

Although the Rules do not define “materially limit,” the question of materiality has become a functional one. That is, will the lawyer’s other responsibilities or interests potentially interfere with the lawyer’s independent professional judgment, and/or is there the possibility of the disclosure of confidential information to any third party? In either event, the lawyer’s representation may be “materially limited.”

The standards for determining whether a conflict may be waived are the same as when a conflict is “directly adverse.” That is, would a “disinterested” lawyer agree that the client should consent? The procedures for ob-

22. Representing co-defendants in a criminal trial raises such serious conflict of interest issues that it is generally prohibited in Wyoming as violative of the right to effective assistance of counsel. See infra notes 243 through 265 and accompanying text.
23. See WOLFRAM, supra note 3, at § 7.2.5.
taining consent are also the same. It must be informed, and it should be, although it is not required to be, in writing.

6. De Minimus Conflicts

There is some conflict present in virtually every attorney-client relationship. In private practice, for example, an attorney has an inherent interest in maximizing his or her fees, while the client has an interest in minimizing them. Similarly, a lawyer may have represented a prospective client's former spouse in a wholly unrelated matter. Such conflicts do not involve the "directly" adverse or the "materially limit" standards of Rule 1.7(a) and (b). They do not, therefore, potentially preclude representation. The rules do not even require disclosure of such conflicts. Although the consequences of a de minimus conflict are, naturally, de minimus, an important question arises. Which conflicts or potential conflicts are de minimus?

There is no easy or obvious rule to apply in determining whether a conflict is de minimus. The issue is important, of course, because any conflict which is more than de minimus must at least be disclosed. The safest rule to follow is to adopt the standard for deciding whether a conflict may be waived, the disinterested lawyer standard. The question thus becomes whether a disinterested lawyer would find the conflict to be de minimus. The answer will usually be that if you find yourself even asking the question, it is probably not a de minimus conflict. Even if it is, disclosure is the safest route.

No negative consequences can arise from the disclosure of any conflict, even de minimus ones. The "worst" thing that can happen is that the client will object to continued representation. There is no better time to find out the client's concerns than at the outset of representation, when there is still time to avoid a problem.

7. Former client conflicts of interest

The end of an attorney-client relationship does not signal the end of the attorney's duties. The duty of confidentiality continues indefinitely.24 A lawyer may not, therefore, ever disclose information "relating to the representation" of a former client. In addition, the lawyer's duty of loyalty continues; information learned from or about one client may not be subsequently used to the disadvantage of the former client.25 Taken together, the continuation of the interrelated duties of confidentiality and loyalty mean that a conflict of interest may arise between the interests of a former client

24. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.6, cmt. [22] (LEXIS 1999).
25. Id. Rule 1.9(c) (Lawyer may not use information protected by Rule 1.6 to the disadvantage of a former client).
and those of a current or prospective client. A lawyer must be able, therefore, to determine the identity of all former clients of the firm, as well as the nature of the representation. Accordingly, every lawyer must develop and maintain a conflicts database.26

Rule 1.9 governs former client conflicts of interest. Paragraph (a) addresses a lawyer who switches sides, i.e., a lawyer represents client X in a matter, and later represents client Y against former client X in another. Paragraph (b) addresses a lawyer who switches firms and the former firm represented client X against client Y, and the new firm represents client Y against client X. This section discusses paragraph (a); paragraph (b) is discussed in detail below.27 Regardless of whether the conflict arises under (a) or (b), the key to the proper application of Rule 1.9 is identifying the former client before undertaking any significant work for a current client or accepting a new client whose interests are in conflict with a former client's.

Once a former client has been identified, Rule 1.9(a) requires lawyers to use a two step analysis when the lawyer represents or is asked to represent a client with interests which may conflict with those of the former client. First, is the new matter “the same or substantially related” to the matter involving the former client? Second, if there is such a relationship, are the interests of the current or prospective client “materially adverse” to the interests of the former client? If not, there is no conflict. If the answer is yes, the rules presume that the lawyer obtained confidential information from the former client and that he or she will use it in the new matter. The presumption is irrebuttable; it is irrelevant that the lawyer obtained no confidential information, forgot or has no record of that information, or that the lawyer will not use it in the new representation. A conflict exists and the lawyer may not undertake the new representation unless the former client consents “after consultation.”

The scope of a “matter” for purposes of Rule 1.9 depends “on the facts of a particular situation or transaction.”28 The critical question is the extent of the lawyer’s involvement in the previous transaction. If the lawyer was “directly involved in a specific transaction,” subsequent representation of other clients with “materially adverse interests clearly is prohibited.”29 The principles of Rule 1.7 apply to the determination of whether the interests of the former client are “materially adverse.”30 In other words, if a disinterested lawyer would conclude that the interests of the former and new client

27. See notes 436 - 439 infra and accompanying text.
29. Id.
30. Id. Rule 1.9 cmt. [1].
are "materially adverse," representation is unethical unless the former client consents after consultation.

The Wyoming Supreme Court discussed and applied the former client conflict of interest principles of Rule 1.9(a) to disqualify a lawyer in Carlson v. Langdon. In Carlson, an attorney, A.B., had been involved with representing Leva Carlson and/or Carl Carlson, Leva’s adult son, in a series of business transactions, including the drafting of a lease agreement between the two; there were, however, no engagement or termination letters, or any record of who had paid for A.B.’s services. It was unclear therefore, whether A.B. had represented Leva, Carl, or both. Later, Leva contacted A.B. to advise her about her rights under the lease with respect to Carl. A.B. advised Leva that the lease gave her certain rights, to Carl’s detriment, and he notified Carl that the position Leva was asserting was correct. Carl retained another lawyer and sued Leva (and a bank whose interests were somewhat aligned with Leva’s). A.B. answered on behalf of the co-defendant bank. Carl’s new lawyer requested that A.B. withdraw because of the conflict. He refused, claiming he had never represented Carl. A motion to disqualify A.B. was denied. The case went to the Wyoming Supreme Court on a petition for writ of certiorari, which was granted. Before evaluating whether to disqualify A.B., which involved an analysis of the effect of Rule 1.9, the court had to determine which of the two individual’s were A.B.’s clients.

The court began with the principle that an attorney-client relationship may arise by implication. Furthermore, the court said, the burden is on the lawyer to clarify the existence or non-existence of an attorney-client relationship. Both Leva and Carl had consulted the lawyer for the purpose of obtaining legal advice, and nothing in the record indicated that the lawyer had told Carl that he represented Leva alone or that Carl should obtain independent counsel. Accordingly, in the absence of evidence that A.B. had taken steps to “dispel” Carl’s belief, it was reasonable for Carl to believe that A.B. was his lawyer. And as Carl’s lawyer, A.B. owed him an unending duty of confidentiality.

32. The use of an engagement letter, always a good idea, is even more important when a lawyer represents multiple parties in a transaction and/or an entity. The letter can, and should, identify the client(s), the party, and the scope of representation. Identifying the client is particularly important when an entity, or a nascent entity, is involved. The letter should specify whether the lawyer represents the entity, individual’s within the entity, or both. Normally, a lawyer represents the organization, and not the individuals within the organization. See WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.13(a) (LEXIS 1999). If the entity is a client, the letter should identify the person or persons with whom the attorney should interact and upon whom he or she may rely for direction in the representation. See infra notes 290 - 299 and accompanying text.
34. Id. at 348.
After deciding that A.B. had been Carl’s lawyer, the court relied on Rule 1.9(a) to reverse the trial court’s denial of the motion to disqualify. The purpose of the rule, said the court, “is the protection of confidentiality.”35 Once there has been a showing of a former attorney-client relationship in a substantially related matter, the court will presume that the former client communicated confidential information to the attorney. Such a presumption is necessary, continued the court, to enforce “the lawyer’s duty of absolute fidelity. . . .”36 Raising that presumption did not, however, end the court’s inquiry. The question became whether that presumption may be rebutted.

As the Wyoming Supreme Court observed, courts around the country are divided on the issue of whether the presumption that a client conveys confidential information to his or her lawyer may be rebutted. Wyoming sided with the majority: “We adopt the majority view of irrebuttable presumption . . . even though we recognize that disqualification of an attorney may prevent another client from obtaining the services of the attorney of his choice.”37 Such a rule “offers greater assurance that confidential information will be protected and assists in avoiding any appearance of impropriety.”38 It is also consistent with Wyoming Rule of Professional Conduct 1.9.

8. Conflicts Caused by Prospective Clients or Former Prospective Clients

Conflicts may also result from consultations with prospective clients who never become clients. Such conflicts are easily overlooked, until raised by another party. Then it may be too late.

Two scenarios are common. First, a prospective client contacts a lawyer about representation. The decision about whether to accept a client is usually not made without at least some information. Accordingly, the lawyer and the prospective client meet. The lawyer may also conduct a preliminary investigation into the facts and/or the applicable law. The lawyer then decides not to accept the client,39 who goes elsewhere. Later, the law-

35. Id.
37. Carlson, 751 P.2d at 349.
38. Id.
39. When a lawyer decides not to accept a case, a non-engagement letter should be sent to the prospective client. That letter, which should be sent by certified mail, should say: (1) the lawyer is unable to represent the prospective client; (2) the materials, if any, which were left with the lawyer are being returned; (3) the lawyer has formed no opinion as to the merits of the potential case; and (4) the prospective client should consult another lawyer as soon as possible because a statute of limitations may ultimately bar the claims. The letter should not say why the lawyer is unable to take the case, advise the client that he or she has a good case, or when the statute of limitations will run. A copy of the non-engagement letter, with the return receipt attached, should be retained. For a sample non-engagement letter, see Martin, Jr., supra note 26, at app. C.
yer undertakes to represent a client with interests adverse to those of the rejected prospective client. Suddenly, a motion to disqualify appears based on the lawyer’s long-forgotten consideration of representing a prospective client.

In the second situation, a prospective client contacts a lawyer about representation. As part of a routine conflicts check, the lawyer finds that another lawyer in the firm represents or represented the adverse party, either in litigation or in a transaction. The lawyer properly declines representation because of the conflict. Later, the lawyer whom the prospective client ultimately retains moves to disqualify the first lawyer because of that lawyer’s acquisition of confidential information from the then prospective client. While the lawyer may have collected only enough information to determine the existence of a conflict, that may be enough to have learned important, confidential information. Indeed, the very identity of the prospective client and/or the client’s purpose for seeking representation may be critical pieces of information.

The ABA’s Standing Committee on Ethics and Professional Responsibility has issued a Formal Opinion on lawyers’ duties regarding information received from prospective clients, as well as the conflict of interest implications raised by prospective client contacts. The opinion contains important guidance.

First, the ABA’s opinion affirms the position of the ABA Model Rules and the Wyoming Rules that information received from a prospective client who never becomes a client is confidential under Rule 1.6. Further, just as with information regarding clients, the obligation of confidentiality never ends. Second, the prospective client must be treated as a client for purposes of evaluating the existence of a conflict of interest. Sometimes, the information received from a prospective client who never becomes a client may be so critical as to require the lawyer to decline or terminate representation of another party. Consider the following example:

Client A hires attorney X to represent him in seeking to purchase a piece of property to develop. The property has been on the market for quite some time, and the price is dropping far below the original asking price. Shortly thereafter, B contacts the same attorney, or another attorney in the firm, to represent her in seeking to acquire

41. Id. See also WYOMING RULES OF PROFESSIONAL CONDUCT Scope [3] (LEXIS 1999).
42. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. [22] (LEXIS 1999); see also RESTATEMENT (SECOND) OF AGENCY, § 396(b) (1957) (stating an agent’s duty to keep the principal’s confidences continues after the termination of the agency relationship).
44. See id. The example is based on a hypothetical contained in the ABA’s opinion. Id.
the same property for the same purpose. Neither A nor B wants anyone to know of their plans, and each hopes to buy the property at a low price. If A learns of B's plans, or if B learns of A's, it will significantly affect their plans. Accordingly, simply by talking to B and learning why she wants representation, X has learned confidential information which can be useful to A, information which can be used to the detriment of B. The objectives of A and B are in obvious conflict. Furthermore, X owes each a duty of confidentiality, and cannot, therefore, tell either of the other's intentions. Three questions arise. First, may X represent A and B? Second, may X continue to represent A? Finally, may X tell A of B's intentions?

The first question is easily answered. X (and the others in X's firm) cannot represent B. The second is not so easy. B, through other counsel, may seek to disqualify X because X has acquired critical information about B's intentions which can be used to A's benefit. In response, X may assert that X acted properly in every respect, seeking and obtaining only that information which was necessary to determine if a conflict existed. The ABA sides with X.45 X may continue to represent A, even though X has acquired confidential information. X may not, however, inform A of B's identity and intentions until and unless the information becomes generally known. The only restriction is that if X determines that the inability to disclose information about B before it is generally known will materially limit the representation, continued representation is impermissible under Rule 1.7(b).

The ABA's opinion identifies three steps lawyers should take to avoid involuntary disqualification. First, lawyers have an ethical duty to adopt reasonable procedures to enable them to identify conflicts of interest before undertaking representation of a client.46 Second, lawyers need to limit the information they initially receive from prospective clients to that which is necessary to determine if there is a conflict of interest. Third, if a lawyer learns information from a prospective client which could be used to the benefit of one of the firm's existing clients, that lawyer should be screened from involvement in the client's matter.47 By taking such measures, a firm may be able to successfully resist a motion to disqualify. Failure to do so may lead to involuntary disqualification.48

45. Id.
46. Id.
47. Screening is often not permitted, especially in small firms, and the entire firm will be disqualified. For a discussion of imputed disqualification, see notes 49 - 53 and accompanying text.
48. Attorney disqualification is discussed infra at notes 74 - 106 and accompanying text.
9. Imputed Disqualification

One of the most easily overlooked rules is the rule of imputed disqualification. If one lawyer in a "firm" may not represent a client because of a conflict of interest, neither may any of the other lawyers in the firm. The reference to lawyers in a "firm" raises an important threshold question. What is a "firm"? After that question is answered, and all the lawyers in the "firm" are identified, the rule means that a lawyer must be able to determine the identity of all of the firm's former and current clients, as well as former prospective clients from whom the firm has received confidential information.

The term "firm" clearly applies to lawyers associated in a partnership, a PC, or an LLC, as well as in-house counsel. It may also apply to lawyers who have no formal legal affiliation, but circumstances suggest that they should be treated as a firm for purposes of conflicts of interest. Lawyers who share office space, for example, or who have some other cooperative or consultative arrangement may be deemed to be a "firm" for conflict of interest purposes. This is because a "firm" includes:

[L]awyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization. Whether two (2) or more lawyers constitute a firm within this definition can depend on the specific facts . . . 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 confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.49

Thus, the label lawyers give to their association is not dispositive. Whether lawyers are a "firm" requires a functional analysis. The important questions are: (1) whether the lawyers in question have taken steps to ensure their independence; and (2) whether the lawyers have "mutual access to confidential information." For example, sole practitioners who share office space and staff may have a difficult time convincing a client, a court, or the Board of Professional Responsibility, that they are not a "firm" for purposes of the rule on imputed disqualification. Practical questions, such as who has keys to the office and the file cabinets, or a password to the computer, will be more important than the narrow legal question of whether there is any formal relationship between or among the lawyers. A firm which hires a

49. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.10(a) (LEXIS 1999); See also, RESTATEMENT OF LAW GOVERNING LAWYERS § 203 (Proposed Final Draft No. 1 1996).
lawyer temporarily must also be careful that it does not thereby inherit that lawyer’s conflicts, whether personal or professional. Ultimately, the question is “whether the physical organization and actual operation of the office space is such that the confidential client information of each lawyer is secure from the other.”

Assuming a conflict with one lawyer, the other lawyers in the firm are held to the same standards for evaluating conflicts. Also, a client may agree to a waiver under the same circumstances.

Legal Standards

Avoiding conflicts of interest is not simply a matter of legal ethics. It is a matter of legal responsibility.

As discussed above, lawyers are agents and fiduciaries for their clients. Accordingly, they have a duty to act “solely for the benefit” of their principals (their clients) in all matters connected with the representation. By definition, a lawyer with a conflict of interest has other obligations which prevent him or her from acting “solely” for the benefit of the client. The failure to act solely for the benefit of a client may result in a malpractice claim.

A Wyoming lawyer must act with “that degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in Wyoming.” The failure to do so is malpractice. In a malpractice case based on a lawyer’s having had an impermissible conflict of interest or the lawyer’s failure to properly obtain waiver of a conflict, the plaintiff’s expert will likely testify that a reasonable, careful and prudent lawyer, as any reasonable agent, will act solely for the benefit of the client, the principal. Accordingly, such a lawyer will avoid impermissible con-

53. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.7(c) (LEXIS 1999). The only exception is the disqualification of a lawyer because of a familial relationship with the attorney who represents an adverse party. Rule 1.8(i) precludes a lawyer who is related to another lawyer as parent, child, sibling or spouse, from undertaking an representation which is “directly adverse” to the related lawyer’s client. The disqualification is personal, only, and is not imputed to the other lawyers in the firm. Id. Rule 1.8(i) cmt. [10].
54. WOLFRAM, supra, note 3, at § 4.1.
56. See supra, notes 2 - 7 and accompanying text.
licts of interest unless a waiver is permissible and properly obtained. Since conflicts which may lead to malpractice liability are also unethical, malpractice cases often involve the relationship between the Rules and the common law standard of conduct.

The Wyoming Supreme Court has not addressed the admissibility of the Rules of Professional Conduct and/or a lawyer's violation of them in a legal malpractice action. By their own terms, the Rules "are not designed to be a basis for civil liability." In accordance with that precept, the Wyoming Supreme Court has held that the Rules do not create a private cause of action for a non-client. The Rules are silent on, and the court has not addressed, the question of whether the Rules are admissible as evidence of the legal standard of conduct for lawyers in Wyoming, or if a violation of the Rules is admissible as evidence of a lawyer's breach of the standard. Given the development of the case law around the country, however, Wyoming lawyers should assume that the Rules will be admissible.

Courts disagree about the role of ethical standards in malpractice cases. Consequently, although almost all courts allow the admission of ethical rules, four different standards have emerged: (1) a small minority of courts have held that ethical standards are not admissible; (2) several courts admit ethical standards, but with significant restrictions (e.g., the ethical standards are not evidence of the standard of conduct since they "may or may not" coincide with the legal standard. An expert is needed, therefore, to establish the standard of conduct and the relationship between the standard and the ethical rules); (3) more courts admit ethical standards with fewer restrictions (e.g., it is illogical to say the ethical standards do not

59. See, e.g., Ishmail v. Millington, 50 Cal. Rptr 592, 596 (Cal. App. 1966) (holding that a lawyer who represented both spouses in a divorce may have committed malpractice by failing to fully advise wife of dual representation and by failing to advise her to obtain independent counsel). See also Annotation, Malpractice Liability of Attorney Representing Conflicting Interests, 28 A.L.R.3d 389 (1969 & Supp. 1999).
60. WYOMING RULES OF PROFESSIONAL CONDUCT Scope [6] (LEXIS 1999) ("Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.").
62. Compare Allen v. Letkoft, Duncan, Grimes & Dernier, P.C., 453 S.E.2d 719 (Ga. 1995) (holding that rules of professional conduct are relevant to the standard of care in a legal malpractice case if they are designed to protect clients) and Hizey v. Carpenter, 830 P.2d 646, 654 (Wash. 1992) (holding that jury may not be informed of standards of ethical conduct). For a collection of cases addressing the issue, see Annotation, Admissibility and Effect of Evidence of Professional Ethics Rules in Legal Malpractice Action, 50 A.L.R.5th 301 (1997).
64. See, e.g., Hizey v. Carpenter, 830 P.2d at 654.
65. See, e.g., Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400, 404 (Tenn. 1991) (holding that ethical standards "are not irrelevant in determining the standard of care. . .").
play a part in establishing the legal standard of conduct); and (4) in Michigan, violation of a rule creates a rebuttable presumption that a lawyer's conduct falls below the legal standard of conduct. Of those views, the third is gaining primacy; it has been adopted by most recent opinions. As the South Carolina Supreme Court recently noted: "a majority of courts permit discussion of such a violation at trial as some evidence of the common law duty of care." Generally, courts which admit ethical standards require the plaintiff's expert to testify that the applicable rules reflect the standard of conduct, and that the defendant breached the standard of conduct, not just the rules of ethics. Among those courts adopting the majority view are the Montana Supreme Court and the United States Court of Appeals for the Tenth Circuit (in a case applying Colorado law).

Although the Wyoming Supreme Court has been protective of lawyers, it would be unwise to assume that the court will not allow evidence of malpractice to include applicable provisions of the Wyoming Rules of Professional Conduct and the lawyer's violation of them. For although there is disagreement about the place of the rules in malpractice cases, the great weight of authority supports at least limited admissibility. Furthermore, the reasoning behind the majority view is persuasive. As the Georgia Supreme Court said, "[g]iven the . . . fundamental nature of their purpose, it would not be logical or reasonable to say that the Bar Rules, in general, do not play a role in shaping the 'care and skill' ordinarily exercised by attorneys practicing law in Georgia." The same is true in Wyoming. Assuming a rule of ethics, such as a conflict of interest rule, was intended to protect clients, and an expert testifies that the rule reflects the standard of conduct and that the lawyer breached that standard, evidence of

68. Note, The Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard, supra note 63, at 1105.
69. Smith v. Haysworth, Marion, McKay & Gerard, 472 S.E.2d at 613.
71. Miami International Realty Co. v. Paynter, 841 F.2d 348 (10th Cir. 1988) (holding that it is permissible for expert to testify about Code of Professional Responsibility and that lawyer's conduct which violated Code was "substandard.").
72. See, e.g., Boller v. Western Law Associates, 828 P.2d 1194, 1185-87 (Wyo. 1992), cert denied, 506 U.S. 869 (construing statute of limitations to bar legal malpractice claim even though the appellants alleged that the appellees' actions had prevented timely discovery and the statute of limitations defense had not been raised before the district court). See id. at 188-91 (Macy and Thomas, JJ, dissenting). The author was one of the attorneys for the appellants in Boller; see also Brooks v. Zebre, 792 P.2d at 200-201 (refusing to allow a non-client to sue a lawyer for negligence or violation of the Rules of Professional Conduct).
73. Allen v. Lefkof, Duncan, Grimes & Dermer, P.C., 453 S.E.2d at 721.
the Rules and their breach ought to be admissible. Any other approach would be illogical.

Even if the Wyoming Supreme Court were to adopt the minority view that the Wyoming Rules of Professional Conduct were not admissible, a violation of those rules could still lead indirectly to malpractice liability. The reason is that the lawyer's conduct, not the violation of the rules, is the ultimate issue. Liability may not result because the conduct was unethical, but because a reasonable lawyer would have avoided the conflict of interest (or received informed consent to a waiver). In addition, the expert testimony in any malpractice case will be that the reasonable lawyer has in place a method of detecting potential conflicts, and responds appropriately once they are detected. Accordingly, conflicts of interest present legal malpractice issues, not simply potential ethical violations.

III. ATTORNEY DISQUALIFICATION

A conflict of interest which arises during litigation may have one or more of several adverse consequences. It may result in: (1) the filing of a grievance against the lawyer because of a violation of the Rules of Professional Conduct; (2) a malpractice action against the attorney with the conflict; and/or (3) the disqualification of the attorney (and his or her firm) from representing any of the parties to the litigation. This section addresses the third potential consequence: the disqualification of the lawyer and the lawyer's firm.

The responsibility to detect and avoid improper conflicts rests with each lawyer. "Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation." If the conflict is one which may not be waived, if the waiver is improperly obtained, or if the waiver is rescinded, continued representation violates the Rules. Nevertheless, if a lawyer either fails to detect a conflict or proceeds in spite of the conflict or the withdrawal of consent, the issue may be raised by the court, sua sponte, or by another party to the litigation:

74. Courts have also responded to inappropriate conflicts by ordering the forfeiture of attorney's fees, or setting aside a judgment. WOLFRAM, supra note 3, at § 7.17.
75. WYOMING RULES OF PROFESSIONAL CONDUCT RULE 1.7 cmt. [14] (LEXIS 1999).
76. In addition to those conflicts which may not be waived because a reasonable lawyer would not find it appropriate (see supra notes 9 - 48 and accompanying discussion), the Wyoming Rules of Professional Conduct contain an easily overlooked prohibition regarding waiver by former clients. A former client that is a government entity may not consent to the waiver of a conflict. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (LEXIS 1999).
77. Id. Rule 1.16(a)(1) (dictating that a lawyer must decline or withdraw from representation if continued representation would violate the Rules of Professional Conduct.).
In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility [to properly resolve a conflict] . . . Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question."

It is also possible, of course, that a lawyer has acted properly in all respects, but a conflict arises after the initiation of the litigation or consent to the representation has been rescinded. The issue, therefore, is not necessarily whether the lawyer has committed misconduct by violating one of the Rules of Professional Conduct. Rather, the issue may be whether the lawyer should be disqualified, notwithstanding his or her good faith compliance with the rules.

*Trial Courts' Authority to Disqualify Attorneys*

Although lawyer discipline is generally within the purview of the Wyoming Board of Professional Responsibility," the Wyoming Supreme Court has said that trial courts are “charged with the responsibility of supervising the conduct of attorneys practicing before [them]." That supervisory responsibility “includes a duty to disqualify an attorney when it is appropriate." The question becomes, therefore, when is disqualification appropriate?

*Standing to Move for Disqualification*

As noted above, a court may raise the issue of attorney disqualification on its own motion. In criminal cases, the court has an affirmative obligation to inquire into conflicts in situations involving multiple representation. Assuming the court does not raise the issue, the question becomes who else may?

The commentary to Rule 1.7 provides that “opposing counsel may properly raise the question [of an impermissible conflict]." That does not mean, however, that counsel for any opposing party in litigation will have standing to bring a motion to disqualify, even where there is an apparent violation of the rules.

Standing to move to disqualify depends on a showing that continued representation by the lawyer with the conflict will “materially harm a cogni-

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78. Id. Rule 1.7 Cmt. [14].
79. Id. Rule 8.5; see also DISCIPLINARY CODE FOR THE WYOMING STATE BAR Rule 1 (LEXIS 1999).
81. Id.
zable interest of the objecting party."\textsuperscript{84} The interest normally threatened is the confidentiality of information previously obtained by the lawyer whose disqualification is sought. That threat exists when the lawyer has previously represented the party seeking disqualification. As a general rule, therefore, courts do not disqualify a lawyer unless a former client of the lawyer seeks disqualification.\textsuperscript{85}

The standing requirement does not mean that the moving party must be a former client. It is sufficient if there is some likelihood that the lawyer has gained confidential information about the moving party.\textsuperscript{86} That may occur through previous representation of the moving party, or concurrent representation of a person or entity, such as a corporate subsidiary, that is related in some way to the party seeking disqualification.

Finally, courts have found that any party may move for disqualification if the public interest is "so greatly implicated,"\textsuperscript{87} or if the attorney's unethical conduct is "manifest and glaring" or "open and obvious."\textsuperscript{88} Even if there is no objection to the moving party's standing, the court may raise the issue on its own.\textsuperscript{89}

\textbf{Procedure, Burden, and Standards}

The procedure to bring the matter before a court is a motion to disqualify. The motion is normally accompanied by affidavits, and there is generally no need for an evidentiary hearing.\textsuperscript{90}

In \textit{Rose v. Rose}, the Wyoming Supreme Court adopted principles to govern motions to disqualify:

The decision to grant or deny a motion to disqualify counsel is within the discretion of the trial court . . . The moving party has the burden of establishing grounds for disqualification . . . The goal of the court should be to shape a remedy which will assure fairness to the parties and the integrity of the judicial process . . . Whenever possible, courts should endeavor to reach a solution that is least burdensome to the client.\textsuperscript{91}

\textsuperscript{84} WOLFRAM, \textit{supra} note 3, at \S 7.1.7; see also Dawson v. City of Bartlesville, 901 F.Supp. 314, 415 (N.D. Okla. 1995) (holding that invocation of Rule 1.7 alone does not provide standing for a party seeking disqualification).\textsuperscript{85} In Re Yam Processing Patent Validity Litigation, 530 F.2d 83, 88-89 (5th Cir. 1976).
\textsuperscript{86} WOLFRAM, \textit{supra} note 3, at \S 7.1.7.
\textsuperscript{88} In Re Yam Patent Validity Litigation, 530 F.2d 83 at 89.
\textsuperscript{89} Dawson, 901 F.Supp. at 314.
\textsuperscript{90} WOLFRAM, \textit{supra} note 3, at \S 7.1.7.
\textsuperscript{91} Rose v. Rose, 849 P.2d 1321, 1325 (Wyo. 1993) (quoting Weaver v. Millard, 819 P.2d 110, 114-15 (Id. 1991)).
Although the court did not elaborate on the "grounds for disqualification" in the *Rose* decision, its earlier decision in *Carlson v. Langdon* provides important guidance.

In *Carlson*, the Wyoming Supreme Court reversed a trial court's denial of a motion to disqualify an attorney who had previously represented the party seeking disqualification. Because of the previous representation, the court found there to be an irrebuttable presumption that the client had conveyed confidential information to his former attorney. The court found that protecting against the disclosure of confidential information is an integral purpose of the conflict of interest rules. Accordingly, if the matter in litigation was "related in some substantial way" to the earlier representation, the attorney was foreclosed from representing an adverse party.03

The rule which emerges from *Rose* and *Carlson* is that grounds for disqualification exist if there is a threat to the confidentiality principles of the attorney-client relationship. A threat exists if the matter is "substantially related" to a lawyer's previous representation of a client. All a former client need show, therefore, is that there is a "substantial relationship" between the subject of the former representation and the current litigation. If there is a substantial relationship, there will be no inquiry into whether there is an actual breach of confidentiality; a breach will be irrebuttablly presumed.

A party seeking disqualification that is not a former client cannot, by definition, show a substantial relationship. The moving party will have to show much more. Although the precise standard is unclear, one court has said that a non-former client must show that the attorney's unethical conduct is so "open and obvious" that the court has "a plain duty to act."04

*Disqualification of Firm*

As a general matter, the rule of imputed disqualification, Rule 1.10, makes it unethical for any lawyer in a firm to act when one of the lawyers in the firm has an impermissible conflict of interest.05 As usual, no opinion of the Wyoming Supreme Court speaks directly to the issue of whether the disqualification of one lawyer in a firm should be imputed to the entire firm.

Courts in some jurisdictions have not applied the rule of imputed disqualification rigidly when an individual lawyer is disqualified.06 They per-

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92. 751 P.2d 344 (Wyo. 1988). The case is discussed extensively above at footnotes 31 - 38 and accompanying text.
93. Id. at 349.
94. In Re Yarn Processing Patent Validity Litigation, 530 F.2d 83, 89 (5th Cir. 1989).
95. Imputed disqualification is discussed in detail at supra notes 49 - 53 and accompanying text.
mit the firm to continue if the tainted lawyer is screened from involvement in or knowledge of the matter. Such screens are often referred to as “Chinese Walls.” Although screening has been permitted by some courts, lawyers in Wyoming should expect a more rigid application of the principle of imputed disqualification.

Three reasons suggest the Wyoming Supreme Court will not recognize “Chinese Walls” as an adequate method of protecting former client confidences such that a firm may continue representation, despite the presence of a tainted lawyer. First, the Wyoming rules do not permit Chinese Walls to cure a conflict. Second, the small size of firms in Wyoming makes it very difficult, if not impossible, to erect workable screens. Third, the court’s reasoning in Carlson leads to the conclusion that attempts to avoid the disqualification of a firm by erecting a screen around a tainted lawyer are unlikely to succeed. The opinion places significant importance on Rule 1.9’s focus on protecting client confidences. Prohibiting “Chinese Walls” would also further that purpose. The court emphasizes the importance of “avoiding any appearance of impropriety.” Allowing a firm to continue with a “Chinese Wall” to screen a tainted lawyer creates, rather than avoids, the appearance of impropriety. Wyoming lawyers should assume, therefore, that the disqualification of an individual lawyer in a firm because of a former client conflict of interest will result in the imputed disqualification of the entire firm.

Waiver of Objection

The timing of a motion to disqualify is important. A motion which is not brought promptly upon learning of the conflict will likely be opposed on the basis that the objection has been waived. The objection may succeed. Courts have adopted the general rule that an objecting party may not delay the filing of the motion until the opposing party has developed a significant reliance on the lawyer with the conflict. The rule makes good sense.

The commentary to Rule 1.7 warns courts that motions to disqualify “should be viewed with caution” because they “can be misused as a technique of harassment.” And the Scope section of the Rules declares that “the purposes of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.” One such procedural tactic is to wait to file a motion to disqualify until the other party has invested substantial time and money in its attorney, making the substitution of counsel both expensive and difficult. Waiting in the face of a known conflict may well

97. See e.g., Kala v. Aluminum Smelting & Refining Co., 688 N.E.2d 258, 266 (Ohio 1998).
98. WOLFRAM, supra note 3, at § 7.17.
be perceived by a court as just the kind of abuse against which the Rules warn.

Appellate Review

A trial court’s ruling on a motion to dismiss is not a final order subject to review by the Wyoming Supreme Court. The ruling will not, therefore, normally be reviewable until after a decision on the merits. The Court does have discretion, however, to review such an order pursuant to a writ of certiorari. It did so in the Carlson case because the case raised a serious and unsettled question in Wyoming, and because waiting until the end of the case would have been to the detriment of the parties.

As noted earlier, whether to grant a motion to disqualify is discretionary with the trial court. Accordingly, the Wyoming Supreme Court will reverse only for abuse of discretion.

Successor Counsel

If a lawyer or a firm is disqualified, the now unrepresented party will need to obtain successor counsel. Whether the disqualified attorney may communicate with the successor attorney depends on the reasons for the disqualification.

Perhaps the most common basis for disqualification is that the disqualified attorney has obtained, or is irrevocably presumed to have obtained, confidential information from the moving party through previous representation of that party. The only way to prevent the communication of that confidential information to the successor attorney is to prohibit communications between the disqualified attorney and the successor counsel. That is the rule generally applied by the courts. There is to be no communication without the permission of the court or the affected party, and generally only if the absence of communication would create an unreasonable hardship for the party.

If the disqualification is not based on protecting client confidentiality, the need to prohibit communication is greatly lessened. Even so, successor counsel should obtain consent of the affected party or a court order before engaging in any communication.

101. Id. A federal court’s ruling on a motion to disqualify is neither a final order nor an appealable interlocutory or collateral order. Firestone Tire & Rubber Company v. Risjord, 449 U.S. 368, 374 (1982), cited in Carlson, 751 P.2d at 350; see also Amey v. Finney, 967 F.2d 418, 422 (10th Cir. 1992).
103. Id.
104. WOLFRAM, supra note 3, at § 7.1.7.
105. Id.
Motion to Clarify

An attorney who is uncertain about whether he or she may be disqualified if another party files a motion need not simply wait for the other shoe to drop, while both attorneys' fees and the client's reliance on that attorney mount. A concerned lawyer may bring a motion seeking a court order that he or she may continue in a case, notwithstanding a conflict of interest which the lawyer believes should not result in disqualification.106

A motion to clarify allows an attorney and his or her client to avoid incurring attorneys' fees and building client reliance while waiting for the possible filing of a motion to disqualify. The matter may be brought before the court and resolved. Whatever the result, the case may move on to the merits.

IV. SPECIAL CONFLICT OF INTEREST RULES IN CRIMINAL DEFENSE

Conflicts of interest in criminal cases normally arise when one attorney represents two or more defendants (such representation may occur at any time from investigation through appeal). The conflicts inherent in such joint representation present special issues. In addition to ethical, malpractice, and attorney disqualification concerns, a conflict of interest in a criminal case has Constitutional significance. This is because the right to counsel guaranteed by the United States and Wyoming Constitutions includes the right to representation by counsel free from impermissible conflicts. Prosecutors, too, may have impermissible conflicts of interest.

The United States Constitution

The Sixth Amendment to the United States' Constitution says: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." That right has been applied to the states through the Fourteenth Amendment. 107 The United States Supreme Court has interpreted that right to include the right to the effective assistance of counsel.108 Assistance may be ineffective because an attorney's performance is compromised by a conflict of interest.

John Sullivan was one of three persons charged with murder. At separate trials, Sullivan was convicted of first degree murder, while the others were acquitted. All were represented by the same two privately retained attorneys; no objection was made to the joint representation at any of the

After an unsuccessful appeal, Sullivan sought *habeas corpus* relief in federal court, alleging ineffective assistance of counsel because of the attorneys’ conflicts. The United States Supreme Court held that since Sullivan had not objected to the conflict at trial, he must show “an actual conflict of interest adversely affected his lawyer’s performance.” In other words, the Supreme Court applied the general Sixth Amendment standard, articulated in *Strickland v. Washington*.

Several years later, in *Nix v. Whiteside*, the United States Supreme Court cautioned that while conflicts of interest are of Constitutional concern, a breach of ethical conflict of interest standards may not be tantamount to a Sixth Amendment violation: “[u]nder the Strickland standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.” Courts must not, therefore, construe the Sixth Amendment “so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state’s proper authority to define and apply the standards of professional conduct. . . .” The Court’s deferential approach to the states’ authority to regulate lawyers has become a hallmark of the Rehnquist Court.

The Sixth Amendment rule about conflicts of interest is now clear. If there is no objection at trial to the joint representation, the defendant must show that: (1) counsel’s performance was deficient, i.e. not within the scope of reasonableness; and (2) the deficient performance prejudiced the defense, i.e., that errors were so serious as to deprive the defendant(s) of a fair trial.

By contrast, a defendant who objects to joint representation “must” be given an opportunity to show that the conflict will impermissibly impair a fair trial, i.e., prejudice will be presumed if there is no such opportunity.

After such an objection, continued joint representation will be a violation of the Sixth Amendment unless the trial court determines that the potential for conflict is too remote.

Finally, in *Wheat v. United States*, the Court held that the federal courts have an independent interest in ensuring that criminal trials are conducted in conformance with ethical standards and that criminal proceedings “appear

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109. *Id.* at 337-38.
110. *Id.* at 348.
113. *Id.*
114. See, e.g., *Florida Bar v. Went For It*, 515 U.S. 618, (1995) (“The [Florida] Bar has a substantial interest in both protecting injured Floridians from invasive conduct by lawyers and in preventing the erosion of confidence in the profession that such repeated invasions has engendered.”).
115. *Cuyler*, at 348.
116. *Id.*
117. Holloway v. Arkansas, 435 U.S. 475, 483 (1978) (holding the trial court has a duty to investigate a timely objection to multiple representation. The failure to do so will result in reversal.) *Id.*
fair to all who observe them."

Although a court must "recognize a presumption in favor of [defendants'] counsel of choice . . . that presumption may be overcome not only by a demonstration of actual conflict, but by a showing of a serious potential for conflict." Accordingly, when an actual conflict exists, a trial court has the discretion to decline a proffered waiver and grant the prosecution's motion to disqualify defense counsel. A potential conflict may be insufficient, however, and disqualification of defense counsel because of a potential conflict may be reversible error.

The Wyoming Constitution

The Wyoming Constitution also guarantees the right to representation in criminal trials. "In all criminal prosecutions the accused shall have the right to defend in person and by counsel. . . ." While the Wyoming Supreme Court has often looked to federal precedent in construing provisions of the Wyoming Constitution, it has not rigidly adhered to that precedent.

In Shongutsie v State, the Wyoming Supreme Court considered the effect of an attorney's joint representation of criminal defendants on the defendants' right to effective assistance of counsel under the Wyoming Constitution. In particular, the Court examined whether an attorney's joint representation of two criminal defendants should create a presumption that the defendants were denied the effective assistance of counsel because of the potential for conflicts of interest. Rejecting federal precedent interpreting the Sixth Amendment right to effective assistance of counsel, the Court said "we deem it no longer prudent to follow the federal [interpretation] . . . we choose to more firmly protect the defendant's right to representation by an attorney who is free from any conflict of interest."

The court gave three reasons for its rule: (1) the court wanted to discourage attorneys from accepting the role of dual advocate and thereby "compromise their most fundamental duty—loyalty to the individual client;" (2) the rule promotes the effective administration of justice by ensuring that judges guard defendants' rights; and (3) the rule ensures that all

119. Id. at 164.
120. Id.
121. Alcocer v Superior Court, 254 Cal Rptr. 72, 79 (1988) (holding that trial court acted prematurely in granting prosecution's motion to disqualify, over defendant's objection, because of potential conflict of interest resulting from counsel's representation of potential prosecution witness); cf. People v Peoples, 60 Cal Rptr., 2d 173, 177 (1997), review denied (holding that defendant is incompetent to waive conflict involving third parties).
123. See, e.g., Cutbirth v State, 751 P.2d 1257, 1263 (Wyo. 1988) (relying on federal precedent to evaluate claims of ineffective assistance of appellate counsel).
125. Id. at 366.
defendants are aware of their constitutional right to be represented by an attorney free from conflicts.126

If co-defendants wish to waive the conflict, the trial court must advise each defendant, on the record, of the right to representation by an attorney without a conflict and the dangers inherent in multiple representation. Finally, the court must find that there is no real conflict before accepting the waivers.127 The rule against multiple representation applies whether co-defendants are tried together or separately.128

Rules of Criminal Procedure

Both the Federal and Wyoming rules of criminal procedure address conflicts of interest. Federal Rule 44(c) says that when there is joint representation:

[T]he court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.129

Wyoming's Rule 44(c) contains a similar admonition, with one important difference:

[T]he court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe that no conflict of interest is likely to arise, the court shall order separate representation.130

The difference is in the language of the last sentence of each rule which appears in italics. The Wyoming rule specifically requires the trial court to order separate representation, while the Federal rule merely requires the trial court to take "appropriate" measures. The Wyoming Supreme Court has interpreted the Wyoming rule to be "somewhat stricter" than (and preferable to) the Federal Rule.131 Wyoming's "bright line position," according to the Wyoming Supreme Court, "serves to protect the defendant . . . [and] it pro-

126. Id. at 367-68.
128. Kenney, 837 P.2d at 673.
129. FED. R. CRIM. P. Rule 44(c) (emphasis added).
130. WYO. R. CRIM. P. Rule 44(c) (LEXIS 1999) (emphasis added).
131. Id.
cepts the prosecutor from a subsequent claim of an invalid guilty verdict. . . .”

**Ethical Standards**

Representation of co-parties in litigation falls under Wyoming Rule of Professional Conduct 1.7(b). A lawyer shall not represent a client if the representation will be “materially limited” by the lawyer’s other responsibilities. In criminal defense, the potential conflict when a lawyer represents multiple parties is “so grave” that the Rules say that “ordinarily a lawyer should decline to represent more than one (1) codefendant.”

The American Bar Association has established “Standards for Criminal Justice.” The standards contain a similar admonition for defense counsel: “The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several co-defendants except in unusual situations. . . .” If the defendants desire joint representation, they must give “informed consent,” and that consent should be on the record.

The ABA Standards are more than a good idea. They have been cited with approval by the United States Supreme Court as embodying “prevailing norms of practice” for purposes of determining whether an attorney has provided Constitutionally acceptable effective representation.

**Prosecutors’ Standing to Move for Disqualification**

Standing to move for disqualification of an attorney with a conflict of interest is discussed above. The standing requirement is usually satisfied by finding that the continued involvement of the attorney in question would “materially harm a cognizable interest of the objecting party” (usually a confidential relationship). In the absence of a former client relationship (except with part-time prosecutors, discussed below), the application of the standing doctrine in criminal cases involving multiple representation has been controversial.

Courts have found standing in the state’s general interest in the proper administration of justice and every lawyer’s obligation to raise ethical vio-

132. *Id.*
133. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (LEXIS 1999).
134. *Id.* cmt. [6].
136. *Id.* at 4-3.5(c)(i) and (ii).
138. See notes 82 – 89 and accompanying text.
139. *Id.* at 14 (quoting WOLFRAM, MODERN LEGAL ETHICS § 7.1.7 (1986)).
lations with the court.\textsuperscript{140} In the words of one court, disqualification was appropriate where a defense attorney’s conflict of interest “posed a significant threat . . . to the integrity of the judicial process.”\textsuperscript{141} Other courts have denied disqualification, however, in the absence of a specific showing of an actual or potential conflict “which would impede” the functioning of the system.\textsuperscript{142}

\textit{Prosecutors’ Conflicts of Interest}

1. General standards

Prosecutors, too, must avoid impermissible conflicts of interest. In addition to the general conflict of interest provisions of the Wyoming Rules of Professional Conduct, prosecutors have a higher duty. According to the Rules, “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”\textsuperscript{143} So much power is vested in prosecutors that they have been described as holding “quasi judicial position[s].”\textsuperscript{144} As quasi judicial officers, prosecutors are held to a higher ethical standard. They must avoid “even the appearance of impropriety.”\textsuperscript{145} In addition to the Rules of Professional Conduct, the ABA has established standards for prosecutors.\textsuperscript{146}

The standards, which are intended as “a guide to professional conduct,”\textsuperscript{147} say that prosecutors should “avoid” conflicts of interest.\textsuperscript{148} Prosecutors, as any lawyers, must be aware of former client conflicts. A prosecutor who was in private practice is not to use information obtained from a former client to that individual’s disadvantage unless the information becomes generally known.\textsuperscript{149} A prosecutor is to base decisions on his or her professional judgment, unaffected by “his or her own political, financial, business, property, or personal interests.”\textsuperscript{150}

\begin{itemize}
\item \textsuperscript{140} United States v. Gopman, 531 F.2d 262, 265 (5th Cir. 1976); see also United States v. Clarkson, 567 F.2d 270, 271, n. 1 (4th Cir. 1977); and WOLFRAM, supra, note 3 at § 7.1.7.
\item \textsuperscript{141} People v. Peoples, 60 Cal. Rptr. 2d at 177.
\item \textsuperscript{142} See, e.g., In re Special February 1977 Grand Jury, 581 F.2d 1262, 1265 (7th Cir. 1978) and Alcocer v. Superior Court, 254 Cal. Rptr. 72, 79 (1988).
\item \textsuperscript{143} WYOMING RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. [1] (LEXIS 1999).
\item \textsuperscript{144} Ganger v. Peyton, 370 F.2d 709, 714 (4th Cir. 1967).
\item \textsuperscript{145} State v. Ross, 829 S.W.2d 948, 951, (quoting State v. Boyd, 560 S.W.2d 296, 297 (Mo. App. 1977)).
\item \textsuperscript{146} ABA STANDARDS FOR CRIMINAL JUSTICE, the Prosecution Function (1992) \textit{reproduced in} GILLERS and SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 531-545 (Aspen 1999).
\item \textsuperscript{147} Id. Standard 3-1.1.
\item \textsuperscript{148} Id. Standard 3-1.3.
\item \textsuperscript{149} Id. Standard 3.1.3(d); see also WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.9(c) (containing a similar proscription).
\item \textsuperscript{150} ABA STANDARDS FOR CRIMINAL JUSTICE, supra note 146, at 3-1.3(f); \textit{see also} WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (explaining that a lawyer shall not represent a client if the lawyer’s representation will be “materially limited by . . . the lawyer’s own interests.”)
\end{itemize}
2. Special problems of part-time prosecutors

In Wyoming, some county attorneys and many city prosecutors are part-time prosecutors. They combine their prosecutorial duties with private practices. That combination presents special conflict of interest issues. Few standards exist to guide part-time prosecutors. As a result, they face what one commentator described as the "daunting task of balancing a private practice with prosecutorial duties... [without] a coherent set of guidelines for minimizing the impact of conflicts of interest."[^151]

Naturally, the general conflict of interest provisions which apply to prosecutors, discussed above, apply to part-time prosecutors. However, just as naturally, those provisions do not address the unique problems presented by combining private practice and prosecution. The potential conflicts fall into two general categories: Those which arise when a part-time prosecutor represents an individual in another criminal matter, and those which result from a part-time prosecutor's involvement in civil matters.

a. Representation of criminal defendants

A common issue is whether a part-time prosecutor may represent a criminal defendant in a different court. The issue is common because it makes sense for a criminal defendant to ask a part-time prosecutor for representation. The prosecutor, after all, likely has experience and expertise in criminal matters. The prosecutor also faces a significant conflict of interest.

It should go without saying that a prosecutor may not ethically represent a defendant in the court where the lawyer prosecutes. To do so would be a direct conflict prohibited by rule 1.7(a). The request, therefore, is invariably to represent a defendant in another court, e.g., in a different county (for a county attorney), a different city or county (for a city attorney), or in federal court (for either). The differences between county and city prosecutors has led to different standards for each, with considerably greater restrictions on county prosecutors.

The Wyoming Rules of Professional Conduct are silent, and the Wyoming Supreme Court has not spoken on the issue of part-time prosecutors. The ABA Standards for Criminal Justice provide minimal assistance. They say only that a part-time prosecutor who also represents criminal defendants "should not represent a defendant in criminal proceedings in a jurisdiction where he or she is also employed as a prosecutor."[^152] While that prescription sounds simple, it isn't. Two questions arise. First, what is "the jurisdiction?" Second, does the rule of imputed disqualification prevent any

[^152]: A.B.A. STANDARDS FOR CRIMINAL JUSTICE supra note 146, at 3-1.3(b).
lawyer in the "firm" from representing a criminal defendant in the jurisdiction, however defined.

b. Part-time county attorneys

A county and prosecuting attorney in Wyoming, or a deputy, may engage in private practice unless the Board of County Commissioners says otherwise.\textsuperscript{153} Whether full-time or part-time, a county prosecutor's statutory duties include acting "as a prosecutor for the state. . . ."\textsuperscript{154} Accordingly, a county attorney prosecutes felonies, misdemeanors and delinquent acts in the name of "the State of Wyoming," not simply on behalf of the county. County attorneys' close relationship with the State is further illustrated by their statutory relationship with the Wyoming Attorney General. If a county attorney wants help with a case, he or she may request it from the Attorney General,\textsuperscript{155} the state's chief lawyer.\textsuperscript{156} In addition, the Division of Criminal Investigation in the Attorney General's Office has "concurrent jurisdiction and powers with . . . other law enforcement agencies and officers in the state."\textsuperscript{157} Among the Division's responsibilities are supervising the Wyoming law enforcement academy.\textsuperscript{158} County law enforcement agencies also work closely with the Division. They are required by law, for example, to cooperate with the Division in establishing and maintaining a uniform system of identification of criminals.\textsuperscript{159} Accordingly, county attorneys often work directly with State employees, not just county employees, in prosecuting crimes.

If a part-time prosecutor were to represent a criminal defendant in another county, he or she might well need to impeach and discredit the same peace officers and/or Division of Criminal Investigation employees whose testimony formed the basis for previous prosecutions, and upon whom the lawyer will need to rely in the future. Allowing a prosecutor to assume an adversarial role will inevitably be destructive to the working relationship between the prosecutor and law enforcement personnel, as well as detrimental to the integrity of the criminal justice system. In addition, a defense lawyer may need to challenge the constitutionality of the statute under which the defendant has been charged. The prosecutorial duties of part-

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  \item 153. WYO. STAT. ANN. § 18-3-303(b) (LEXIS 1999). By contrast, district attorneys, deputy district attorneys, and assistant district attorneys may not engage in private law practice. WYO. STAT. ANN. §§ 9-1-802(c), 806(b), and 807(b).
  \item 154. WYO. STAT. ANN. §§ 9-1-104(a)(i)(LEXIS 1999)(emphasis added) (dictating that a district attorney acts as the prosecutor for the state) and 18-3-302(b) (affirming that if a county does not have a district attorney, the county attorney "shall have the jurisdiction, responsibilities, and duties of the district attorney . . . .")
  \item 155. WYO. STAT. ANN. § 9-1-603(d) (LEXIS 1999).
  \item 156. Id. § 9-1-603(a).
  \item 157. Id. § 9-1-616(b).
  \item 158. Id. § 9-1-633.
  \item 159. Id. § 9-1-624(b).
\end{itemize}
time prosecutors create "conscious and unconscious influences such that they may be reluctant to attack the constitutionality of the laws they have sworn to uphold. . . ." The problem is obvious, a lawyer may be prosecuting persons under the same statute in another court.

Under the Wyoming Code of Professional Responsibility, the predecessor to the Rules of Professional Conduct, lawyers were to "avoid even the appearance of professional impropriety." That language was omitted from the Rules, but it still finds frequent expression when courts or ethics committees consider the propriety of part-time prosecutors representing criminal defendants. While the language is gone, the concept is still important. As the Utah Supreme Court said recently, courts, not just lawyers, need to "ensure faith in the impartiality and integrity of the justice system [and] the appearance of fairness and impartiality in the adjudication must be diligently maintained." A part-time prosecutor representing a criminal defendant in another court creates an "unavoidable appearance of impropriety. . . ."

The prevailing view, therefore, is that "the jurisdiction" for purposes of the prohibition on prosecutors representing criminal defendants is the state. Once "jurisdiction" is defined, applying that definition to attorneys in Wyoming is relatively simple. Under the general conflict of interest standards of the Wyoming Rules of Professional Conduct, a lawyer may not represent opposing parties in litigation, even if the matters are "wholly unrelated." Since a county attorney in Wyoming represents the State, he or she may not ethically represent a criminal defendant in a case in which the State is the adverse party, i.e., in any case brought by another county attorney. Waiver of the conflict, generally permissible under Rule 1.7, is

161. Wyoming Rules of Professional Conduct Rule 1.7 cmt. [9] (LEXIS 1999) (advocating inconsistent positions in different cases is ordinarily permissible unless the interests of either client would be adversely affected. The concern is heightened, however, when a part-time prosecutor, a "quasi judicial officer," is challenging a criminal statute in one case and prosecuting under it in another.)
164. Id.
167. Id. The comment suggests that exceptions may exist where a client represents an entity with diverse operations. The ABA has interpreted that language to allow an attorney to represent a corporate subsidiary against a corporate client in civil matters in limited circumstances. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-390 (1995). Three members of the Committee dissented vigorously. Further, the language has never been construed to permit a part-time county prosecutor to represent a criminal defendant in another county. Id. at 11-15.

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not a viable solution. A county attorney who represents “the State” is acting on behalf of the public, and “the public cannot consent”\textsuperscript{164} to a conflict.

Some authorities treat part-time county attorneys and part-time city attorneys the same, prohibiting either from undertaking representation of a criminal defendant in another court.\textsuperscript{169} Others distinguish between the two.\textsuperscript{170} That distinction has merit.

c. Part-time city prosecutors\textsuperscript{171}

The Wyoming Statutes are silent about the powers and duties of city prosecutors.\textsuperscript{172} Cities and towns, of course, have only those powers delegated to them by the Legislature.\textsuperscript{173} Their delegated power includes the authority to adopt ordinances and enforce them by imposing fines not to exceed $750.00, jail terms of not more than six months, or both.\textsuperscript{174} Attorneys hired by cities or towns, therefore, act on behalf of the municipality; they do not have authority to act on behalf of the state. Furthermore, there is no statutory relationship between the Attorney General and city attorneys. Consequently, city prosecutors do not represent or act on behalf of the State; rather, they represent municipalities. Therefore, Rule 1.7’s prohibition on a lawyer representing opposing parties in unrelated matters does not apply. Nevertheless, conflict of interest concerns remain.

First, city prosecutors work closely with law enforcement, usually the local police department. The local police departments must, as county law enforcement agencies, work with the Division of Criminal Investigation.\textsuperscript{175} It is unlikely, however, that an attorney who represents a criminal defendant in a different county will need to use law enforcement personnel from that county or the state to prosecute crimes in the lawyer’s home town.\textsuperscript{176} Second, city prosecutors often rely on State employees for assistance. State employees are sometimes called as expert witnesses in cases such as Driv-

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\item[168.] The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Op. No. 88-008 (1988); see also RESTATEMENT OF THE LAW GOVERNING LAWYERS § 202 cmt. g(ii) (Proposed Final Draft No. 1. 1996) (“Decisional law in a minority of states has limited the extent to which a governmental client may consent to a conflict of interest.”).
\item[170.] See, e.g., The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Op. No. 88-008 (1988).
\item[171.] The author was a part-time city prosecutor in Laramie, Wyoming, while maintaining a private practice as a member of a firm.
\item[172.] The Wyoming Statutes contain only oblique references to city attorneys. WYO. STAT. ANN. § 15-4-202(c) (LEXIS 1999) says that “[t]he city attorney is not required to perform any service other than legal service.” Subdivision (d) exempts city attorneys from merit selection. Id.
\item[173.] Wyoming State Treasurer v. City of Rawlins, 510 P.2d 301 (Wyo. 1973).
\item[174.] WYO. STAT. ANN. § 15-1-103(xii) (LEXIS 1999).
\item[175.] See, e.g., WYO. STAT. ANN. § 9-1-624(b) (LEXIS 1999).
\item[176.] See, e.g., State v. Brandley, 972 P.2d 78, 84 (Utah Ct. App. 1998) (holding that a part-time city prosecutor who represents a criminal defendant in another county would have “little need” to have testimony in support of prosecutions in home town from peace officers in that county).
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ing Under the Influence. Those same employees could be prosecution witnesses in a case in another jurisdiction where a city prosecutor is representing a criminal defendant. Third, the public perception concerns still exist. As one court put it, when an attorney acts in the dual role of city prosecutor and criminal defense attorney, that dual role "erodes public confidence in the criminal justice system." ¹⁷⁷ Since the relationship with the State is not as close as it is for county attorneys, city attorneys have often been held to a different, more lenient standard than county attorneys in evaluating whether they may represent criminal defendants before another court.

There will always be concerns when a city prosecutor represents a criminal defendant in State District Court. Instead of an outright prohibition on such representation, however, the better view is that there is "a narrow set of circumstances" in which it is ethically acceptable, if not advisable, for a part-time city prosecutor to represent a criminal defendant in state court in a different county. Those circumstances are: ¹⁷⁸

(1) The criminal statute under which the defendant was charged is fundamentally different than the city ordinances which the attorney is responsible for enforcing (e.g., homicide vs. driving under the influence);

(2) The criminal charges do not involve the city or city officials;

(3) The law enforcement officers involved are not of the type who are involved in violations of city ordinances (e.g., state troopers vs. local police officers);

(4) The defendant is not a city resident; and

(5) As city prosecutor, the lawyer has no official involvement outside the city's jurisdiction.

There is authority to the contrary. The Utah Supreme Court has held that the conflict posed by a part-time city attorney's prosecutorial duties and his duty to a criminal defendant in state court are so severe that they require a per se prohibition on part-time prosecutors acting as appointed counsel for indigent defendants. ¹⁷⁹ The court did not decide if the conflict was constitutionally impermissible, but it concluded that "vital interests of the criminal justice system are jeopardized when a city prosecutor is appointed to assist in the defense of an accused." ¹⁸⁰ Pursuant to its inherent supervisory power over the courts, and its express power to regulate the practice of law, the

¹⁸⁰. Id.
court banned the appointment as defense counsel of any attorney with prosecutorial obligations. Failure to comply with the ban would result in "per se" reversal. The Utah Court of Appeals subsequently narrowed the Brown opinion by declining to apply the rule of per se disqualification to the partner of part-time city prosecutors who was hired to represent a criminal defendant in state court.

The per se prohibition seems inappropriate. As the dissent in Brown noted, the defense attorney's prosecutorial duties were limited to violations of city ordinances, while the defendant had been charged with unrelated crimes (murder and felony assault) under state law. Further, the "distinct differences" in the prosecutorial duties of county and city attorneys justifies treating them differently so that the former should be prohibited from criminal defense work in state courts and the latter should not be.

d. Representation in federal court

The same concepts should apply when a part-time county or city prosecutor wishes to represent a defendant in federal court. Neither represents the United States, the charging party in federal court. Accordingly, neither should be automatically precluded from representing a criminal defendant in that forum.

Assuming the existence of circumstances similar to the "narrow circumstances" where it is permissible for a city prosecutor to represent a criminal defendant in state court, it should be ethically permissible for a part-time county or city prosecutor to act as a defense attorney in federal court. Even though the "jurisdiction" might be geographically coterminous, e.g., the State of Wyoming, part-time county prosecutors (and part-time city prosecutors) should not be automatically precluded from criminal defense work in federal court. Instead, the circumstances of each case should be evaluated to see if they present an insurmountable conflict. The five factors listed above regarding city prosecutors can be easily modified for use in federal court. Only if all five are satisfied should the attorney proceed.

Authority does exist for the contrary view. In at least two states, the ban on part-time county prosecutors representing criminal defendants in

181. Id. at 857.
182. Id.
185. Id.
186. See notes 171 - 185 and accompanying text.
187. Id.
state court has been extended to preclude criminal defense in federal court in the state. That position seems unduly restrictive.

e. Imputed disqualification

However one defines "the jurisdiction," the rule of imputed disqualification is usually, and should be, applied to the other lawyer's in the part-time prosecutor's firm. The Wyoming Rules of Professional Conduct are clear: "[w]hen lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so. . . ." In the context of part-time prosecutors, the Ohio Board of Commissioners on Grievances and Discipline echoed that general standard: "[w]hen a member of a law firm may not accept employment . . . other members of that law firm are likewise precluded from accepting such employment." Consequently, when the prosecutor is ethically prohibited from representing an accused criminal defendant, others in the firm are, as well.

It has been suggested that the rule of imputed disqualification should not be applied rigidly when one attorney in a firm is a part-time prosecutor. The Utah Court of Appeals recently held that in the absence of an actual conflict of interest, a lawyer whose partner was a part-time city prosecutor could ethically, and constitutionally, represent a criminal defendant in another county. The court focused on the relationship between the lawyer involved in representing the accused (the partner of prosecutors) and the peace officers who were involved. First, the court said that since the defense attorney had no prosecutorial responsibilities, he "thus would never have occasion to need a police officer's testimony" in a future case. Second, the lawyer's associates, who were prosecutors, would have no need of the testimony of the peace officers involved in the criminal matter in the other county. Finally, the court noted that the accused was not being asked to "confide in a prosecutor . . . [but] in an attorney who merely shares an association with attorneys who prosecute elsewhere." These factors, in the court's view, justified departing from the rule of imputed disqualification.

The court's reasoning Brandley is not persuasive. First, it assumes that the partners of a prosecutor will never have occasion to act in the prosecutor's stead. In a small firm which acts as city prosecutor, it is possible, if

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188. Underwood, supra note 151, at 38 (citing authorities from Kentucky and South Carolina).
189. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.10(a)(LEXIS 1999). The general principles of imputed disqualification are discussed at supra notes 19-53 and accompanying text.
192. Id. at 84.
193. Id.
194. Id. at 85.
not likely, that the attorney who acts as primary city prosecutor will be gone on occasion.195 When that happens, another attorney in the firm will likely act in the absent attorney's place. Second, the suggestion that a client imparting information to one lawyer in a firm is not the same as telling another runs counter to the very basis of the principles of imputed disqualification. A lawyer, and the lawyer's firm, owes each client the duties of confidentiality and loyalty. Communicating with one lawyer (or staff person) in a firm is the functional equivalent of communicating with every other person in the firm. The better view is that access to information, rather than actual knowledge, is the key. The Missouri Court of Appeals took that approach in disqualifying a part-time prosecutor and reversing a conviction.196 The part-time prosecutor's "access to privileged information," even in the absence of evidence of actual knowledge, raised an unacceptable conflict of interest.197 The rule of imputed disqualification, in sum, should be applied to part-time prosecutors, and their firms, for the same reasons it is applied in general.

2. Representation in civil matters

As discussed above, there are significant limitations on the ability of a part-time prosecutor with a private practice to represent criminal defendants. Representing clients in civil matters can also pose conflicts, with implications on both the attorney's role as a prosecutor, and on the attorney's role in civil practice. An inappropriate conflict poses both ethical and constitutional problems.

The potential for conflicts is enormous. To begin with, every person in the county where a part-time county attorney prosecutes or in the municipality where a part-time city attorney prosecutes, is a potential criminal defendant. Such a person might be a client or a former client of the prosecutor, or the prosecutor's firm, the adverse party in a lawsuit or other transaction in which the prosecutor or the prosecutor's firm is involved, or a witness in a lawsuit in which the lawyer is involved. Any of the above scenarios presents a troublesome conflict.

a. Current clients

A lawyer may not ethically prosecute a client.198 The rule of imputed disqualification makes it unethical to prosecute the clients of any other law-

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195. In my experience as a former part-time city prosecutor with a private practice as a member of a firm, it was not uncommon for others in the firm to fill in for me as the prosecutor.

196. State v. Ross, 829 S.W.2d 948 (Mo.1992).

197. Id. at 951 (quoting State v. Wacaser, 794 S.W.2d 190 (Mo. banc 1990)).

198. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. [8] (LEXIS 1999) ("Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated.").
yer in the firm.\textsuperscript{199} But while the rules are reasonably straight-forward, their application is not.

A part-time prosecutor cannot anticipate who will become a defendant, especially in municipal court. Simply receiving a traffic citation renders a person a defendant in a misdemeanor case.\textsuperscript{200} More serious offenses, such as DUIs, are also unpredictable. As a result, a current firm client might suddenly become a defendant, especially in city court.

If a current client becomes a defendant in a criminal matter, there are three potentially available options. The firm may: (1) continue to represent the client in the original matter and not prosecute; (2) withdraw from the original matter and continue with the prosecution; or (3) withdraw from both matters. Options (1) or (2) may be unavailable, i.e., unethical, in any given situation.

Unless a part-time prosecutor and/or the firm chooses not to represent clients who live in the geographic area where the firm prosecutes, conflicts will inevitably arise. When that happens, the firm will have to limit its role in some way; it simply cannot prosecute and continue to represent the client. Assuming that the firm recuses itself promptly from the prosecution, it should be permitted to continue with the other representation. The exception will be if the lawyer learns something which creates a conflict. For example, an attorney representing a parent in a divorce case may, at the client's request, be arguing vigorously for custody. That person is then charged with DUI and resisting arrest. The police report about the incident suggests behavior which causes the attorney to believe that custody would be inappropriate. If knowing that information would cause the lawyer's representation of the parent to be "materially limited," continued representation would be inappropriate.\textsuperscript{201} The opposite approach, withdrawal from the civil matter in favor of prosecution, is often more difficult. Whether it is ethical depends on several factors.

The first issue facing a firm which wishes to terminate its relationship with a client in a civil matter is whether doing so is ethical. Rule 1.16 governs the termination of representation by withdrawal. Since prosecuting a client is impermissible under the rules, withdrawal is required under paragraph (a) of that rule because to continue the representation would result in

\textsuperscript{199} Imputed disqualification is discussed at supra notes 49 - 53 and accompanying text. \textit{See also} Underwood, supra note 151, at 59.

\textsuperscript{200} The possibilities for conflicts are almost endless. In addition to traffic offenses, municipalities routinely issue citations for animals without licenses, animals running at large, loud parties, weeds in the alley, etc. Any such citation may be issued to a client of the firm's. If the person who received the citation contests it, the firm is squarely in the middle of an impermissible conflict of interest.

\textsuperscript{201} \textsc{Wyoming Rules of Professional Conduct} Rule 1.7(b) (LEXIS 1999); \textit{see also} supra notes 436 - 439 and accompanying text.
a violation of the rules.\textsuperscript{202} When the firm withdraws, it must "take steps to the extent reasonably practicable to protect [the] client's interests."\textsuperscript{203} Such steps may include giving "reasonable notice . . . allowing time for employment of other counsel . . . and refunding any advance payment of fee that has not been earned."\textsuperscript{204} The second issue is if withdrawal is permissible.

An attorney's right to withdraw is contingent on whether the attorney has entered an appearance in a court on behalf of the client.\textsuperscript{205} If so, the attorney may withdraw only with the court's permission.\textsuperscript{206} If permission to withdraw is denied, the lawyer's ethical obligation is clear. The lawyer "shall continue representation notwithstanding good cause for terminating the representation."\textsuperscript{207} Courts have broad discretion in deciding whether to permit withdrawal. Permission may be denied if permitting withdrawal would adversely affect the client.\textsuperscript{208} A law firm may not have the option, therefore, of withdrawing from representation of a client in a civil matter so that the firm, or a lawyer in it, may prosecute the individual involved. Furthermore, if the firm does terminate its relationship with a client whom it then intends to prosecute, the firm faces former client conflict of interest issues. Those issues are discussed below.

At times, terminating an attorney-client relationship with one client will not allow the attorney to continue representing another. The problem is that a concurrent conflict of interest may preclude representation of both clients pursuant to Rule 1.7. Then, after the lawyer withdraws from representing one client, a former client conflict of interest may preclude representation of the other.\textsuperscript{209} The only ethical course of action, therefore, may be to withdraw from representing either client.

\textsuperscript{202} Wyoming Rules of Professional Conduct Rule 1.1(a)(i) (LEXIS 1999) (to continue would be a violation of the conflict of interest rules, rule 1.7, in particular.).
\textsuperscript{203} Id. at 1.16(d).
\textsuperscript{204} Id.
\textsuperscript{205} Uniform Rules for the District Courts of the State of Wyoming Rule 102(c) (LEXIS 1999) ("Counsel will not be permitted to withdraw from a case except upon court order."). The Uniform Rules also apply in County Courts. Uniform Rules for the County Courts of Wyoming Rule 1.02 (LEXIS 1999). Similarly, an attorney who has entered an appearance in the Wyoming Supreme Court may not withdraw "without written consent of the appellate court . . ." Wyoming Rules of Appellate Procedure Rule 19.02 (LEXIS 1999). The same rule applies in federal court in Wyoming. Local Rules of the United States District Court for the District of Wyoming Rule 83.12.3(b) (explaining that a lawyer who has entered an appearance may withdraw "with court permission").
\textsuperscript{206} Id.
\textsuperscript{207} Wyoming Rules of Professional Conduct Rule 1.16(c) (LEXIS 1999).
\textsuperscript{208} See, e.g., In re Lathen, 654 P.2d 1110, 1112 (Or. 1982) (denying counsel's request to withdraw immediately before trial because it would create a substantial hardship to the client).
b. Former clients

An attorney’s continuing obligations of loyalty and confidentiality impose restrictions on representing future clients with conflicting interests.\(^{210}\) Rule 1.9, the general former client conflict of interest rule, applies. A prosecutor may not, therefore, prosecute a former client if there is a substantial relationship between the former representation and the prosecution, and the interests of the new client (the city or the county) are materially adverse to the former client’s.\(^{211}\) Further, a part-time prosecutor may not use confidential information about a former client learned during a previous representation to the disadvantage of the former client.\(^{211}\)

c. Adverse party conflicts

A conflict may exist because a criminal defendant is also the adverse party in a civil case. In *Ganger v. Peyton*,\(^{210}\) for example, the Fourth Circuit reviewed the grant of a writ of *habeus corpus* based on the conflict created when a part-time prosecutor simultaneously prosecuted a person and represented the person’s wife in a divorce proceeding. A prosecutor, said the court, “is an officer of the court, holding a quasi judicial position . . . vested with a vast quantum of discretion which is necessary for the vindication of the public interest.”\(^{214}\) The conflict presented by representing the accused’s wife made it impossible for the court to “ascertain what would have happened if the prosecuting attorney had been free to exercise the fair discretion which he owed” to the accused.\(^{211}\) The prosecutor’s conduct was not simply improper, it “violate[d] the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment.”\(^{216}\) The only remedy was to affirm the district court’s grant of a writ of *habeas corpus* and vacate the sentence of the state trial court.\(^{217}\) The United States Supreme Court has taken a similar view.

In *Young v. United States*, a federal district court appointed the attorney for the prevailing party in a trademark infringement case to act as a special prosecutor for the purpose of bringing criminal contempt proceedings against another party for alleged violations of the court’s order.\(^{211}\) The Court reversed. Writing for the majority, Justice Brennan said the appointment of an interested attorney as a special prosecutor was a “fundamental

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210. See supra notes 2 - 23 and accompanying discussion.
211. *Wyoming Rules of Professional Conduct* Rule 1.9(a) (LEXIS 1999); see also *Underwood*, supra note 151, at 66-67.
213. 379 F.2d 709 (4th Cir. 1967).
214. Id. at 714 (internal citations omitted).
215. Id.
216. Id.
217. Id. at 715; see also *Underwood*, supra note 151, at 71-86.
and pervasive" error which "undermine[d] confidence in the integrity of the criminal proceeding." As with any fundamental error, prejudice was presumed, and the Government was denied the opportunity to show that the appointment of an interested attorney was "harmless error."

The conflict exists because of the prosecutor's position of power over the adverse party, not because of more traditional conflict of interest concerns. Prosecutorial powers such as the discretion to bring or decline to bring criminal charges, or to enter or reject a plea bargain, create the potential for a part-time prosecutor to gain an advantage in civil litigation through the threat, explicit or implied, of criminal proceedings. Such threats are expressly prohibited by the Wyoming Rules of Professional Conduct: "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

Part-time prosecutors occupy a unique position. Unlike the great majority of lawyers, they wear the mantle of prosecutorial power. With that power comes responsibility. Because the potential for real or perceived abuse of prosecutorial power is enormous, a part-time prosecutor needs to be sensitive to the perceptions of opposing parties who are or become the subject of criminal proceedings.

d. Other conflicts

A conflict may also arise when a person is involved in a civil matter, although not as a party, and is a criminal defendant. Consider, for example, a person who is to serve as a witness in a civil matter, on behalf of either party. That individual's testimony could harm or hurt the interests of the client of a part-time prosecutor. Once again, the part-time prosecutor is in a position to reward or punish the witness for his or her testimony through decisions about charging or not charging, etc.

It would be a foolish lawyer, indeed, who made any kind of agreement to go easy on a person in exchange for beneficial testimony. But the reality of an imbalance of power exists, and the appearance, alone, is sufficient to create an impermissible conflict. The concern is identical to the problem which exists when a part-time prosecutor represented the wife of an accused in a divorce action. The attorney's dual role as prosecutor and civil attorney makes it impossible for a reviewing court to "ascertain what would have

219. Id. at 810.
220. Id. at 809.
221. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 4.4(b) (LEXIS 1999). The ABA Model Rules do not contain a paragraph (b). Accordingly, the ABA ethics opinion regarding the use of criminal threats to gain an advantage in a civil matter should be viewed with great caution by Wyoming lawyers. See, ABA Comm. on Professional Ethics and Grievances, Formal Op. 92-363 (1992) (declaring that the Model Rules do not prohibit a lawyer from using the possibility of pressing for criminal charges against the opposing party in a private civil matter to gain a benefit for a client).
happened if the prosecuting attorney had been free to exercise the fair discretion which he owed to the accused. Accordingly, when faced with such a situation, the part-time prosecutor should withdraw from the criminal matter or the civil matter, and may be required to withdraw from both.

3. Part-time judges

Many municipal judges and justices of the peace in Wyoming work on a part-time basis. They are allowed to maintain a private practice in addition to their judicial obligations. The combination of functions poses even more potential conflicts than combining prosecution and private practice.

In addition to the ethical standards for lawyers as set forth in the Wyoming Rules of Professional Conduct, all judges, including part-time judges, must comply with the more exacting principles of the Wyoming Code of Judicial Conduct. This is because judges, in the words of the Wyoming Supreme Court, bear "heavy moral, social and professional responsibilities..." Those responsibilities must be discharged in a manner that builds, rather than destroys, public confidence. And although the Code generally prohibits judges from practicing law, part-time judges are exempt from that prohibition.

The Code of Judicial Conduct begins with the proposition that every judge "should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." Integrity and independence depend, in large part, on public confidence in the system. Confidence, in turn, depends on "the impartiality of the judiciary. . . ."

223. For a discussion of when a lawyer must withdraw from all further involvement in a matter, see supra notes 54 - 73 and accompanying text.
224. The statutes are silent about municipal judges. It is common, however, for them to be part-time and to also practice law. A justice of the peace who is a lawyer may practice law "so long as that practice does not conflict with his duties as justice of the peace." WYO. STAT. ANN. § 5-4-206 (LEXIS 1999); A county court judge may not practice law. WYO. STAT. ANN. § 5-5-121 (LEXIS 1999).
225. WYOMING CODE OF JUDICIAL CONDUCT, Application of the Code of Judicial Conduct A. (LEXIS 1999) ("Anyone . . . who is an officer of a judicial system and who perform judicial functions, such as a magistrate, court commissioner, special master or referee, is a judge within the meaning of this Code.").
227. WYOMING CODE OF JUDICIAL CONDUCT Canon 4G (LEXIS 1999).
228. Part-time judges, whether continuing or periodic, are exempt from Canon 4G, which proscribes judges from practicing law. Id. Canon 4C(1), and 4D(1)(b).
229. Id. Canon I (LEXIS 1999).
230. Id. Canon I Commentary.
Although the appearance of impropriety standard is no longer part of a lawyer’s express ethical duties, it is a fundamental tenant of the Code of Judicial Conduct: “A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge’s Activities.” And as a public figure, a judge “must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen. . . .” or the ordinary lawyer. This mandate applies “to both the professional and personal conduct of a judge.” As it is not possible to catalogue the acts which create an appearance of impropriety, judges are directed to consider “whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”

The appearances of impropriety standard has been expressly adopted by the Wyoming Supreme Court as applicable to part-time judges. “A justice of the peace by virtue of the dual capacities of judge[s] and private practitioner, must be extremely diligent in avoiding even the appearance of impropriety. . . .” Such an appearance exists when the judicial office is used for private gain.

Under the appearances standard, many actions by a part-time judge create problems of perception. Consider a part-time judge whose private, civil practice includes involvement in any of the following: (1) representing a person who is a criminal defendant in either the judge’s court or another court in the jurisdiction; (2) representing a person whose spouse, significant other or family member is a criminal defendant; (3) involvement in a civil matter in which a witness (or witnesses) will be testifying before the judge in a criminal matter; or (4) involvement in a civil matter in which a lawyer who regularly appears before the judge represents another party (or even a co-party). While the only specific restriction is that the law partner of a justice of the peace may not appear before that justice, each of the above scenarios presents sufficiently significant perception problems that it should be avoided.

231. That standard was in Canon 9 of the Wyoming Code of Professional Responsibility. It was removed from the ABA Model Rules which were adopted, with modifications, in Wyoming in 1986.
232. WYOMING CODE OF JUDICIAL CONDUCT Canon 2 (LEXIS 1999).
233. Id. Canon 2A Commentary.
234. Id.
235. Id.
236. Matter of Johnson, 568 P.2d 855, 866 (Wyo. 1977). Although the opinion was written at a time when the Wyoming Code of Professional Responsibility contained the avoidance of impropriety standard, the Johnson opinion does not rely on or even mention that standard. The elimination of that standard from the Rules of Professional Conduct which were subsequently adopted (but not from the Code of Judicial Conduct) should not, therefore, be construed to eliminate the standard’s applicability to judges.
237. Id.
238. WYO. STAT. ANN. § 5-4-111 (LEXIS 1999).
A part-time judge also needs to be ready to recuse himself or herself when persons with whom the judge has or had a professional relationship appear in court. A part-time judge should not, of course, sit on a case in which the defendant is a client or client of the firm with which the judge is associated or the adverse party in a matter in which the judge was involved as a lawyer. Similarly, if the defendant is a former client, or a former adverse party, the judge may need to step aside. Even if the former matter was completely unrelated, the issue of the appearance of impropriety remains. That is, the perception that a person received more or less favorable treatment than others in similar situations.

Assuming the bench as a part-time judge will substantially curtail a lawyer’s practice, but as the Code of Judicial Conduct mandates, a judge must act, both personally and professionally, in a manner which preserves and promotes the “integrity and independence of the judiciary.” Further, a judge’s judicial responsibilities “take precedence over all the judge’s other activities.” A part-time judge’s “other activities” may include, of course, the practice of law. Accordingly, part-time judges “must be extremely diligent in avoiding even the appearance of impropriety.” If necessary to avoid that appearance, the judge’s law practice must take a back seat to his or her judicial responsibilities.

4. Special problems of public defenders

The great majority of persons accused of crimes, or involved in related proceedings, are represented by a public defender. Persons charged with violations of Wyoming Statutes are eligible to be represented by the Wyoming Public Defender, either through full-time or part-time assistant public defenders, or by private attorneys designated and paid by the Public Defender. The Federal Public Defender for the Districts of Wyoming and Colorado provides appointed counsel for persons charged with federal offenses who are indigent. In municipal courts, representation of indigent defendants charged with crimes for which a jail sentence is a possible punishment is usually furnished by private attorneys who accept appointments. Whether part-time or full-time, public defenders face significant conflict of interest issues.

239. WYO. CODE OF JUDICIAL CONDUCT Canon 1 (LEXIS 1999).
240. Id. Canon 3A.
241. Id. Canon 3A.
242. WYO. STAT. ANN. § 7-6-105(a) (LEXIS 1999)
243. Id. §104(f) ("The governor may appoint full or part-time assistant public defenders . . . ") Id. Full-time assistants may not engage in private practice; part-time assistants may. Id. § 104(h).
244. WYO. CRIM. P. Rule 44(e) (LEXIS 1999).
245. The State Public Defender is precluded by law from representing persons in municipal court. WYO. STAT. ANN. § 7-6-112(a)(iii). While there are no Wyoming statutory provisions about appointing counsel for violations of municipal ordinances, such a right is guaranteed by the United States and
Perhaps the most serious conflict which occurs regularly is that presented by an attorney's representation of multiple criminal defendants in the same matter. That issue is discussed in detail above. The conflict and the Wyoming Supreme Court's rule of presumed prejudice in the absence of independent counsel for each defendant present vexing issues for public defenders in Wyoming because of the rule of imputed disqualification.

As previously discussed, the rule of imputed disqualification precludes any of the lawyers in a "firm" from representing a client when any one of them could not ethically do so. A "firm" includes "lawyers employed in . . . [an] organization. . . ." The Rules make no express exception for a firm which has offices in more than one locale, as does the Wyoming Public Defender. The Wyoming Public Defender's office is an "organization" which employs lawyers. It is, therefore, a "firm" as defined by the rules. The rigid application of the rule of imputed disqualification to the entire office, however, would create difficult and significant problems since that office is often the only potentially available source of legal representation for indigent criminal defendants.

The applicability of the rule of imputed disqualification to public defenders' offices has generated considerable controversy around the country. Two general views have emerged. First, a rule of per se disqualification has been applied when the various public defenders' offices within a jurisdiction are subject to common control, and there is common access to confidential client information. Second, a rule that conflicts based on joint representation by more than one public defender should be evaluated case by case using the "disinterested lawyer" standard. Even the per se disqualification rule, however, may not require the disqualification of public defenders in different offices.

The approach of the United States Court of Appeals for the Tenth Circuit exemplifies the per se disqualification approach. Michael Selsor and an associate, Mr. Dodson, were accused of robbing a convenience store in Tulsa, Oklahoma, and murdering one clerk and injuring another during the

Wyoming constitutions, as well as Rule 44(a) of the Wyoming Rules of Criminal Procedure, if the sentence for the charged crime involves a possible jail term.

See supra notes 107 - 37 and accompanying text.

See supra notes 49 - 53 and accompanying text.

Wyoming Rule of Professional Conduct Terminology (LEXIS 1999); see also id. Rule 1.10 cmt. [1].


robbery. Over objection, they were tried together and represented by the same two public defenders from the Tulsa County public defenders office. Their convictions and sentences were affirmed. Selsor sought habeus corpus relief in federal court, alleging inter alia, ineffective assistance of counsel because of the conflict posed by the joint representation. The Tenth Circuit affirmed the district court’s grant of relief.

The Tenth Circuit adopted the per se disqualification approach suggested by the ABA Committee on Ethics and Professionalism in Informal Opinion 1418. The ABA was asked whether it was permissible for public defenders in different cities to represent criminal defendants with conflicting interests in the same case. The answer was a qualified no. If the public defender’s offices are affiliated, joint representation is inappropriate. Offices in different cities are “affiliated,” according to the ABA, if they are subject to the “common control” of the Chief Public Defender. The solution proffered by the ABA is to have one defendant represented by appointed counsel “outside” the public defender’s office. By directing the two public defenders to represent Selsor and Dodson, despite timely objection, the trial court had failed to adequately protect the defendants’ constitutional right to effective assistance of counsel, and “conditional habeus relief” was granted.

Courts in other jurisdictions have held, however, that the rule of per se disqualification does not necessarily apply to public defender offices in different localities. In McCall v. District Court, for example the Colorado Supreme Court applied the rule of imputed disqualification to all assistant public defenders in “the local public defender’s” office. Accordingly, conflicts of one attorney within the local office would be imputed to the other lawyers in the office. The court was not asked, and did not address, whether the imputed disqualification would extend to offices in other locales. Other courts have rejected the per se rule in favor of a case-by-case approach.

252. Id. at 1494.
254. 81 F.3d at 1496.
255. Selsor, 81 F.3d at 1502, n. 5.
256. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1418 (1978). The opinion is based on DR 5-105(D) of the ABA Model Code of Professional Responsibility. In most states, including Wyoming, the Code has been superseded by the adoption of the ABA Model Rules of Professional Responsibility. Rule 1.10 of the Model Rules, which is identical to Wyoming Rule 1.10, is substantially similar to DR 5-105(D).
257. Id.
258. Id.
259. Selsor, 81 F.3d at 1503.
261. Id. at 1228.
The case-by-case approach is best illustrated by the Maryland Court of Appeals's decision in *Graves v. State.* The court began by acknowledging that every case where the public defender's office represents two or more joint defendants presents potential conflicts of interest. Accordingly, the public defender, as any lawyer, must evaluate the degree of the potential conflict. When the office determines that the potential is such that other counsel should be appointed, the case should be assigned outside the office; and assignment to "another district public defender's office" is one of the acceptable alternatives.

The case-by-case approach, when properly applied, represents an ethical resolution of the imputed disqualification dilemma. While public defenders should not be held to a lesser standard than private attorneys in providing conflict-free representation with an assurance of client confidentiality, those objectives can be accomplished in other ways. The first step is for the lawyers involved to be in different physical locations, even if the offices are in the same municipality, with no access to information in the other office. Questions such as who has keys to the office and the file cabinets, who has a password to the computer, and are the computers networked will be critical. Different physical locations are meaningless if the lawyers in the different offices have effective access to information via computer networking. Second, different individuals should supervise the lawyers. Although all lawyers in the Wyoming Public Defender's office are, by statute, subject to the ultimate control of the Public Defender, she can certainly delegate responsibility for a case and/or certain attorneys to someone else within the office, screening herself from any involvement in or information about the matter. Establishing effective procedures does not, however, end the matter. Trial courts retain ultimate responsibility and authority to ensure that criminal defendants have conflict-free representation.

Wyoming Rule of Criminal Procedure 44(c) sets the standard. It applies, inter alia, whenever two or more defendants are represented by "assigned counsel who are associated in the practice of law." Since members of the state public defender's office are "associated in the practice of law," Rule 44(c) applies. Accordingly, the trial court "shall promptly inquire" into the joint representation and "personally advise" the defendants of their right to effective representation of counsel. The rule concludes with the directive that "[u]nless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall order separate representation." An arrangement under which attorneys "associated" in the public defender's office do not have access to information about the other defen-

263. Id. at 133.
264. Id.
265. WYO. STAT. ANN. § 7-5-103(c)(v) (LEXIS 1999).
dant(s) and are not subject to common control should meet the "good cause" language of the rule. In every case involving joint defendants and attorneys from the public defender's office, therefore, the court should, on the record, make the required inquiry and give the requisite advisements. Before approving an arrangement such as described above, the court must find "good cause to believe no conflict of interest is likely to arise" before approving anything short of completely separate representation.

The typical conflict of interest issue which arises in criminal defense is joint representation. Under the Wyoming Constitution and the Wyoming Rules of Criminal Procedure, joint representation is prohibited unless the co-defendants knowingly waive the right to conflict free counsel on the record. That standard applies whether co-defendants are tried together or separately, and the waiver must be made knowingly. This puts a burden on defense counsel and the courts to apprise codefendants of the risks of joint representation before requesting or accepting a waiver.

V. THIRD PARTY PAYERS

Lawyers frequently represent clients with the understanding that someone else will pay for the lawyer's services. Often, in fact, a lawyer agrees to represent a client only because someone with the means to pay for the lawyer's services has agreed to do so. While such an arrangement is permissible, a third party payer relationship creates numerous potential conflicts of interest. Lawyers must handle those conflicts properly to avoid both ethical and legal problems.

Third party payers are common in many areas of law practice. In civil litigation, defense attorneys are often paid by insurance companies or by a litigant's employer. In criminal defense, third party payers include the state, which provides public defenders for indigent defendants. An employer, legal or otherwise, may also desire to provide counsel for an employee charged with a crime in connection with the operation's activities. Lawyers involved in business transactions, particularly the formation of new entities, are often paid by someone other than the new entity (which may have no assets). The line between the interests of the individuals who own a small business entity and the interests of the entity itself is often blurry. Parents often pay for lawyers for their minor children when they run afoul of the law. Estate planning lawyers often find themselves in the middle of family situations where the identities of the client and the payer are unclear. And prepaid legal plans necessarily involve a third party payer. Nearly all lawyers, in short, become involved in third party payer relationships. They need to be aware, therefore, of the potential conflicts inherent in third party payer arrangements and how to structure a lawyer-client relationship to avoid impermissible conflicts.
The Threshold Question: Who is the Client?

As with many conflict of interest issues, the threshold question is who is the client? The question is important because most of a lawyer’s ethical and legal duties arise upon the formation of the lawyer-client relationship.\(^\text{266}\) It is the client, for example, who sets the objectives of the representation.\(^\text{267}\) It decides, in a civil case, whether to accept an offer of settlement or compromise;\(^\text{268}\) it determines, in a criminal case, which plea to enter, whether to waive a jury trial, and whether to testify;\(^\text{269}\) and with whom, in all cases, the lawyer must communicate.\(^\text{270}\) In addition, since many of a lawyer’s legal duties are to the client,\(^\text{271}\) it is usually the client who may bring an action for legal malpractice.\(^\text{272}\) One might think that identifying the client would be clear. Often it is, but too often it is not. Consider the following common situations.

1. Insurance defense counsel

A great number of lawsuits involve liability insurance. In such cases, the named defendant is represented by an attorney hired by the insurance company with which the defendant had previously entered into an insurance contract. Pursuant to that contract, the normal relationship among a third party payer, the client, and counsel is altered. By agreement between the insured and the insurer, the insurance carrier is obliged to hire (and pay) a lawyer to represent the insured, and is further obliged to indemnify the defendant up to a specified amount in the event of a settlement or a judgment. In addition, most insurance contracts not only require the insured to cooperate with the insurer, they allow the insurer to control the defense, including the selection and direction of defense counsel.\(^\text{273}\)

The tripartite relationship among insurer, insured, and defense counsel, raises numerous ethical issues. Among them are the questions of who is the client and to whom does the lawyer owe legal and ethical obligations. Although the Wyoming Rules suggest an answer, and many states’ ethics committees and courts have issued opinions trying to clarify the issue, those attempts are ultimately unsatisfactory, leaving nearly as many questions as

\(^\text{266. Wyoming Rules of Professional Conduct Scope [2] (LEXIS 1999). The exception is the obligation of confidentiality. That duty arises at the instant a lawyer considers whether to enter into an attorney-client relationship. Id.}\)

\(^\text{267. Wyoming Rules of Professional Conduct Rule 1.2(a) (LEXIS 1999). A lawyer must also consult with the client about the means to be used to accomplish the client’s goals. Id.}\)

\(^\text{268. Id.}\)

\(^\text{269. Id.}\)

\(^\text{270. Id. Rule 1.4}\)

\(^\text{271. Lawyers also have duties to the court and the public. See, e.g., Wyoming Rules of Professional Conduct Rules 3.1, 3.3, 3.4, 3.5, and 6.1 (LEXIS 1999).}\)

\(^\text{272. Bowen v. Smith, 838 P.2d 186, 190 (Wyo. 1992) (holding that a lawyer-client relationship is a prerequisite to an action for legal malpractice).}\)

they answer. The reason is simple. The tripartite relationship is *sui generis*; ethical rules do not address the situation directly, and "there is an awkwardness in attempts" to apply them.274 Two general views have emerged. Defense counsel represents either one client (the insured) or two (the insured and the insurer).275 As Professors Silver and Syverud have pointed out, however, "it is perilous and inappropriate to adhere to either the one client’ or the two clients’ view."276 The better view is that an attorney-client relationship necessarily arises by contract, either expressed or implied.277 In any given situation, therefore, an attorney can agree to represent either the insured, alone, or the insured and the insurance company, jointly.278 It is, nevertheless, worthwhile to be familiar with the debate.

The official commentary to the Wyoming Rules of Professional Conduct says that the insured is the client. Rule 1.2 addresses the "Scope of Representation." Comment [4] refers to "a lawyer [who] has been retained by an insurer to represent an insured. . . ." The language that the lawyer "represent[s] the insured" certainly suggests that the insured is the client. Identical or similar language has been adopted in most states since thirty-nine states (and the District of Columbia and the Virgin Islands) have adopted some form of the ABA Model Rules,279 and the commentary to Model Rule 1.2 contains the language adopted in Wyoming and quoted above.280 The dispute, however, is far from ended. The statement in the commentary that a lawyer represents the insured has become universally accepted. The question left unanswered is whether the lawyer also represents the insurance carrier (such joint representation would, of course, create a multitude of conflict of interest issues). Does the lawyer, in other words, have one client or two? States disagree.

In Colorado, for example, the Bar Ethics Committee has opined that the insured is the client to whom the lawyer owes the duty of loyalty, regardless of any contractual arrangement between the lawyer and the insurance carrier.281 The lawyer’s relationship with the insurance carrier is "less clear," but it is not, according to the committee, a lawyer-client relationship. The New Jersey Ethics Committee has reached a similar conclusion. The lawyer hired by an insurance company represents the insured.282 Accord-

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275. For discussions of the question of whom does the insurance defense lawyer represent, see C. Silver and K. Syverud, supra note 271, at 273-80; and Nancy J. Moore, supra note 274, at 261-66.

276. Charles Silver and Kent Syverud, supra note 273, at 274-75.

277. Id.

278. Id.

279. ABA COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS at 517 (1997).


ingly, the lawyer must give "undivided loyalty" to the insured, the client.\textsuperscript{283} In doing so, "the attorney will sometimes act contrary to the insurer's interest. Yet anything less than undivided loyalty does not give the insured a full defense."\textsuperscript{284}

The other view is that the lawyer represents both the insured and the insurer as co-clients.\textsuperscript{285} Even under this view, however, the lawyer's "primary" client is the insured, and his or her interests come first.\textsuperscript{286} This view is unsatisfactory, however, because a hierarchy of clients, with some more important than others, is incompatible with the fundamental principle that a lawyer, as a fiduciary, must put his or her client's interests first. By contrast, the competing view that a lawyer represents the insured alone, albeit with a third party payer, and not the carrier, is much more in keeping with the general nature of the lawyer-client relationship.

Whatever view one takes, the primacy of the lawyer's duties to the insured becomes clear when the interests of the carrier and the insured actually diverge. For example, when an insurer retains a lawyer for an insured with a reservation of rights, an obvious divergence of interests exists. In such a situation, the general view is that the lawyer represents the insured, first and foremost.\textsuperscript{287} Authority does exist for the contrary position. Circumstances may be such that notwithstanding a tender of defense subject to a reservation of rights, a court should not assume that counsel for the insured, although retained by the insurer, "will defend in a manner that prejudices" the insured.\textsuperscript{288}

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\textsuperscript{283} Insurance Carrier and Insured Where Questions of Coverage is in Issue).
\textsuperscript{284} Richard H. Jerry, 17 A.J. Trial Advoc. 101, 141, \textit{quoted in} Pa. Bar Comm. Prof. Resp., Formal Op. 96-196 (1997) at 3 ("Ethical Concerns of Insurance Defense Counsel with Comments Appropriate to Staff Trial Lawyers); \textit{see also} Ill. St. Bar Advisory Op. No. 98-08 (1999) (Topic: Conflict of Interest: Insurance Representation: Multiple Representation). (Lawyer retained by insurance company to represent insureds "has that same professional obligation that would exist had the lawyer been personally retained by the insured.").
\textsuperscript{285} Richard H. Jerry, \textit{supra}, note 283.
\textsuperscript{286} See \textit{e.g.}, Pa. Bar Comm. Prof. Resp., Formal Op. 96-196 (1997) at 6 (Ethical Concerns of Insurance Defense Counsel with Comments Appropriate to Staff Trial Lawyers) (An insurance company and its insured are considered co-clients so long as their positions are "substantially the same."); Cal. St. Bar. Comm. Prof. Resp. Op. No. 1995-139 (1995) ("To Whom Does an Attorney Owe Duties When He or She Acts as Insurance Defense Counsel.").
\textsuperscript{287} Richard H. Jerry, \textit{supra}, note 283.
\textsuperscript{289} U.S. Underwriters, Inc. Co. v. TNP Trucking, Inc., 44 F.Supp.2d 489, 492 (E.D. N.Y. 1999) (holding that nothing in the record supported either parties' argument that a factual scenario might exist which would cause a potential conflict of interest). \textit{Id.} at 491.
To wait for an actual conflict of interest to emerge before deciding that insurance defense counsel represents the insured, and not the carrier, makes no sense. The better approach is for the insured, the insurer, and the lawyer, to expressly agree that the lawyer has one client, the insured. The insurance carrier is not, of course, just another third party payer. It is a payer which, by prior agreement with the insured, now the client, has certain rights regarding the conduct of the litigation. How far those rights should be allowed to go raises another question. At some point, allowing a third party to assume complete control may well be against public policy.\(^{289}\)

2. Employees or Agents

Individuals are often sued in their official capacities as employees or agents of some entity, private or public. The entity is sued, too, either directly or under a theory of *respondeat superior*. Furthermore, the individual may not be personally liable, even if there is an adverse judgment, because of a statute, contract, or policy of indemnification. Generally, the entity hires a lawyer who often acts as the *de facto* lawyer for the employee or agent, who usually does not retain separate counsel. So whom does the lawyer represent, the entity, the employee, or both?

Rule 1.13(a) says that a lawyer for an organization represents “the organization, acting through its duly authorized constituents.” The rule goes on to say, however, that a lawyer may represent both the organization and its employee(s) or agent(s), subject to the rules on conflicts of interest.\(^{290}\) But there is an important qualification. Since a lawyer who represents an organization must communicate with some of its constituents, the lawyer has a special disclosure obligation. He or she must “explain the identity of the client [the organization] when it is apparent that the organization’s interests are adverse to those of the constituent with whom the lawyer is dealing.”\(^{291}\)

Conflicts of interest are inherent in nearly every case where an entity and one or more of its employees or agents are sued. The reason is simple. The individual’s interest is to have no personal liability, even if the entity has to pay. The entity’s interest may be to defend on the basis that the employee was acting beyond the scope of his or her authority, thereby limiting the entity’s liability. A lawyer for the entity should be careful, therefore, not to allow an individual to think that the lawyer represents him or her, unless that is the case. The lawyer should be aware that most individuals will assume that the entity’s lawyer is their lawyer and that the interests of

\(^{289}\) The Tennessee Supreme Court recently said that an arrangement “which effectively limits . . . the attorney’s professional judgment on behalf of or loyalty to the client is prohibited by the Code [of Professional Responsibility] . . . .” Petition of Youngblood, 895 S.W.2d 322, 328 (Tenn. 1995).

\(^{290}\) *WYOMING RULES OF PROFESSIONAL CONDUCT* Rule 1.13(e) (LEXIS 1999).

\(^{291}\) *Id.* Rule 1.13(d).
the entity and the individual are the same. That is a dangerous assumption, both for the individual and for the entity’s lawyer. It should be promptly corrected, preferably in writing, and the Rules put the burden squarely on the lawyer to do so.\textsuperscript{292} The Wyoming Supreme Court has embraced this principle. A lawyer’s failure to correct an individual’s reasonable belief that he or she has a lawyer may lead to an implied attorney-client relationship.\textsuperscript{293} If a lawyer represents an employee, rather than an employer, the lawyer “should be reluctant to look to the employer for direction unless the employee’s informed consent is obtained and the lawyer reasonably believes that the employee’s interests will not be adversely affected.”\textsuperscript{294} In addition, employers, unlike insurers, generally have no contractual right to control the defense.\textsuperscript{295}

3. Criminal Defendants

The most common attorney-client relationship in criminal matters is that an indigent criminal defendant is represented by a public defender. Since public defenders are invariably paid by some governmental entity, either as salaried employees or contract attorneys, there is a third party payer relationship. It is well settled, however, that the individual is the client, not the governmental entity.\textsuperscript{296} The lawyer’s duties, therefore, are owed to the defendant, not to the agency.

When a private third party, known or unknown, pays for the representation of an indigent defendant, the same rule applies. The client is the defendant, not the payer.\textsuperscript{297} Such an arrangement presents special ethical concerns for defense lawyers and courts. Those concerns are discussed below.\textsuperscript{298}

4. New Business Entities

When an individual or group of individuals decides to form a business entity, the identity of the client is often cloudy. Once an entity is formed, the lawyer usually represents it, not the entity’s constituents.\textsuperscript{299} Before formation, the answer is less clear and there are several possibilities. The client may be one of the individuals who is forming the entity. It may be part
or all of the group of individuals who is forming the entity, or it may be the entity to be formed, acting through the persons who wish to form it. The diverse options indicate the diversity of interests involved. Nevertheless, it is almost impossible, or at least unrealistic, to involve attorneys to represent the various interests of everyone involved in forming the entity, especially if it is a small business, even though the situation is rife with potential conflicts of interest. There is, however, an answer to the ethical conundrum.

An engagement letter, or letters (if there are multiple individuals involved) should specify the identity of the client(s), the identity of the payer(s), and the scope of the lawyer’s responsibilities. Also, if the client is an entity, the letter should identify the person or persons who are authorized to communicate with the lawyer about the representation and upon whom the lawyer may rely for guidance in the representation. While such letters are not required, they should be used for all clients, especially where the identities of the client, the payer, or both, are murky.300

A lawyer who was involved in forming an entity may be asked to represent the entity after it is formed. It is permissible to do so, subject to the possibility of a former client conflict of interest. If, for example, the lawyer represented one or more of the individuals who formed the entity, and then undertakes to represent the entity, there is obvious potential for conflict between the interests of the entity and those of the persons previously represented. That potential conflict may ultimately become an actual conflict and require the lawyer to withdraw from any involvement in a matter involving a dispute between the entity and one, some, or all of its founder(s).301

5. Small Businesses

Small businesses often operate through a legal entity, such as a corporation or partnership. In many cases, the same individuals own the stock, serve on the board of directors, and are the entity’s officers. They may also consult the business’s lawyer for assistance with personal legal matters. It is easy, and natural, for laypersons to assume that “their lawyer” represents them, as well as the business. If that belief is reasonable, the lawyer will have a dual relationship. Under such circumstances, the persons involved generally pay little attention to the questions of who is the client and who will be paying the bill in any given circumstances. The lawyer, however,

301. For a discussion of former client conflicts of interest, see supra notes 24 - 38, and accompanying text.
should not be so cavalier. Absent an agreement to the contrary, the lawyer represents the entity, not the individuals. To avoid misperceptions about the lawyer's role, it should be clarified, preferably in writing.

6. Juveniles

Minors are usually unable to hire lawyers when they run afoul of the law or are otherwise involved in the legal system. Accordingly, a child's parents or a government agency often retain a lawyer to represent the child. In such situations, the lawyer represents the juvenile, and not the third party payer. (The issue of whether a lawyer appointed to serve as a guardian ad litem represents the child or the best interests of the child is difficult and complex. It is beyond the scope of this article.) As with any third party payer relationship, however, the lawyer who fails to clarify the identity of the client and to whom the lawyer's duties flow may be held to have also formed an attorney-client relationship with the parents, which will present a host of conflict of interest and confidentiality issues.

7. Estate Planning

Conflict of interest issues are common in estate planning. Married persons often ask an attorney to do estate planning for both of them. That often makes sense because the couple has the same interests, especially if they have the same children. However, the potential conflict of interest is readily apparent. Spouses may have differing ideas or understandings about who should benefit from their largesse, even if they express agreement when together. One may hear a different tune when visiting with spouses individually. If that occurs, the lawyer will be in a difficult position. On the one hand, the lawyer has a conflict of interest because of the spouses' differing ideas. On the other hand, he owes each a duty of confidentiality, meaning that neither can be informed of the other's views. The only ethical path in such circumstances is to withdraw from the representation without disclosing why.

A divergence of opinions is more common with second marriages. Neither spouse may want his or her estate to wind up in the hands of the other spouse's family. The lawyer needs to be sure to identify the client and the scope of the representation. The client may be either or both of the individuals. If it is to be both, the potential conflict of interest needs to be disclosed, discussed, and waived, preferably in writing.

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303. Nancy J. Moore, supra note 274, at 610 (citing the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 (Proposed Final Draft No. 1, 1996)).
Another common conflict of interests problem is when an adult child accompanies an elderly parent to meet with a lawyer to discuss estate planning. Often, the adult child takes an active role in initiating the process and in consulting with the lawyer about what should be done and how. The potential conflict is obvious. First, there may be other adult children who may live far away and do not take an active role in the parent’s affairs. Second, the adult child is an interested party who will likely be a primary beneficiary of the estate planning. Third, he or she may already have some effective control over the assets of the parent through an arrangement such as a joint bank account or joint tenancy of real or personal property. Since the estate planning is, ostensibly, being done for the parent’s benefit, he or she is the client, even though the adult child may be actually directing the representation by telling the lawyer what “mom wants.” The identity of the payer is also often muddled, especially when there has been some commingling of assets. All the lawyer can do is document the relationship and, in so doing, identify the client and the payer. To ensure that he or she is fulfilling his or her duty to the client to implement the client’s wishes, the lawyer should, if possible, meet privately with the parent (the client). The story the lawyer hears may be very different than when the adult child is present. Also, if the adult child is to be present for conferences with the lawyer, the engagement letter should include a consent to his or her presence and the disclosure of otherwise confidential information to a non-client.\(^{304}\)

8. Prepaid Legal Plans

Prepaid legal plans are similar to insurance companies in that individuals “purchase” representation in advance by the payment of premiums, either directly or through an employer.\(^{305}\) Many concerns quickly develop with this type of situation. Does a lawyer hired by the plan represent the individual, the plan, or both? The answer is also the same. A lawyer can agree to represent the individual alone, or the individual and the plan jointly. All parties will benefit if the retainer agreement between the lawyer and the payer clarifies the identity of the client and the plan’s role in the litigation. The agreement should then be discussed with the client, whose informed consent should be obtained. If there is no express agreement, the better view is that the lawyer represents the individual, not the plan, and the lawyer owes his or her primary loyalty to the individual.

The ABA’s Committee on Ethics and Professional Responsibility has issued an opinion discussing prepaid legal service plans.\(^{306}\) The Committee

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304. The problem will be magnified if the adult child is a former or on-going client who brings in his or her parent for an estate plan.
305. Employer paid legal plans are growing rapidly. As of August 1999, some 2.6 million employees were covered by such plans, a thirty percent increase since 1994. Armour, Legal Aid is Latest Job Perk, The Denver Post, August 30, 1999, at 6A.
Endorses lawyers' participation in such arrangements under the following circumstances. First, the lawyer must be allowed to exercise independent professional judgment on behalf of individual clients. Second, the lawyer must maintain client confidences. Third, the lawyer is held to the normal standards of legal and ethical competence. Finally, the plan may not involve improper advertising or solicitation. If it does, the lawyer cannot turn a blind eye since it is the lawyer's obligation to ensure that the plan is in compliance with applicable ethical rules.307

Third Party Payers: General Ethical Standards

Once the identity of the client is confirmed and clarified, a lawyer-client relationship with a third party payer is subject to several conflict of interest provisions of the Wyoming Rules of Professional Conduct. First, the general conflict of interest standards of Rule 1.7 apply. Second, Rules 1.8 and 5.4 impose special requirements on a lawyer when there is a third party payer.

The general standards on concurrent conflicts of interest are contained in Rule 1.7.308 Paragraph (b) is applicable to third party payers. A lawyer "shall not" represent a client if the representation of that client "may be materially limited by the lawyer's responsibilities to . . . a third person, or by the lawyer's own interests. . . ."309 A third party payer relationship creates the potential for a material limitation because of the interests of the third party payer and the lawyer.

A third party payer's interests are, at least in part, obvious, and they are often different from the client's. The payer has an interest in minimizing attorney's fees and its own potential liability. The payer may also have an interest in the precedential value of the case, and be relatively unconcerned about its effect on an individual defendant.310 Similarly, the lawyer may have his or her own interests. Insurance defense counsel, for example, may wish to maintain an ongoing, lucrative relationship with the third party payer. The client, of course, does not share that interest. If the payer's and/or the lawyer's interests materially limit the lawyer's representation,
Rule 1.7(b) prohibits continued representation in the absence of an appropriate waiver (and some conflicts are not waivable). Even if the rule is satisfied, however, Rules 1.8(f) and 5.4(c) contain specific provisions about third party payers.

Rule 1.8(f) says that a lawyer, "shall not accept compensation . . . from one other than the client unless:

(1) the client consents after consultation;

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

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

The rule contains both substantive and procedural requirements which must be satisfied every time there is a third party payer.

First, although the requirement that the client consent after consultation appears to be procedural, it contains an important substantive standard. The standard is the general client consent standard from Rule 1.7, client consent is not sufficient. Further, a lawyer may not ethically ask for consent, unless the lawyer "reasonably believes" that the representation will not be adversely affected. The language from Rule 1.7 applies to third party payers because Comment [4] to Rule 1.8 states: "an arrangement [for a third party payer] must also conform to the requirements of . . . Rule 1.7 concerning conflict of interest." Accordingly, a lawyer may request client consent to a third party payer when a "disinterested lawyer" would think it reasonable to do so.

Client consent is ineffective unless it is given "after consultation." The Rules define "consultation" as the "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." A client will not likely know of or understand the significance of the potential conflict of interest created by having a third party pay unless the lawyer informs the client how the conflict could affect the representation. Similarly, the client should be informed of the steps the lawyer will take to protect against inappropriate interference by the payer in the lawyer's relationship with the client, and especially that the lawyer will not communicate with the payer without the client's consent.

311. See supra notes 10 - 23 and accompanying text.
312. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.8(f) (LEXIS 1999) (emphasis added).
314. Id. Terminology [2]. This is a restatement of the general requirement that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Id. Rule 1.4(b).
Second, there must be no interference in the lawyer’s professional independence or the lawyer-client relationship. This requirement is essentially a restatement of a lawyer’s fundamental responsibility to provide independent professional advice.\(^{315}\) Professional independence is of such importance that all the conflict of interest rules can be viewed as designed to preserve and protect a lawyer’s ability to give, and a client’s rights to receive, such advice. The second half of the rule, that there be no interference with the lawyer-client relationship, further emphasizes the primacy of the client’s interests.

The lawyer-client relationship involves a broad array of duties. It includes, for example, the lawyer’s duty of communication. Rule 1.4(a) contains a general requirement to keep a client “reasonably informed.” In the insurance defense context, this has been interpreted to mean that the lawyer has a duty to communicate all settlement offers to the client, even when the lawyer thinks the offer is not *bona fide.*\(^{316}\) The holding makes sense because it is the client, not the lawyer or the insurer, who has the ultimate authority to accept or reject a settlement offer.\(^{317}\) Similarly, the lawyer must place the client’s interests above the payer’s financial interests. If there is a disagreement about costs which the lawyer believes are reasonably necessary to protect the client’s rights, the lawyer should ask for the necessary funds. If the payer refuses, the lawyer may have to withdraw.\(^{318}\)

Third, the lawyer must protect information protected by Rule 1.6. This language is, again, a restatement of a lawyer’s general confidentiality obligation, but it may be the area of greatest concern to clients. The language of Rule 1.6 is unambiguous: “[a] lawyer shall not reveal information relating to representation of a client . . .” Although there is no exception for disclosing information to a third party payer, there is good reason to repeat the language in Rule 1.8(f). Third party payers often want (and expect) information regarding the representation which clients do not want them to know. The inclusion of the language on preserving client confidences reminds lawyers and payers alike that such information is protected. This duty of confidentiality is so important that the New York City Bar Ethics Committee has said that an insurance defense lawyer may not disclose information to the carrier even when the information may eliminate the carrier’s responsibility for paying.\(^{319}\)

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315. *See id.* Rule 5.4.
317. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (LEXIS 1999).
319. N.Y. City Law Assn Comm. Prof. Eth. Op. No. 669 (89-2) (May 17, 1989) ("Obligation of Lawyers Appointed by Insurance Company to Provide Representation to an Insured When Lawyer Learns Confidential Information of Client That Would be Grounds for Denial of Coverage.") Lawyer who learns confidential information from insured that would be a basis for denying coverage may not
Rule 5.3 is entitled "Professional independence of a lawyer." The rule addresses third party payers by restating the requirement of Rule 1.8(f): "[a] lawyer shall not permit a person who . . . pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment. . . ." The importance of independence is such that the source of payment is irrelevant. An arrangement for a non-client to pay "should not interfere with the lawyer's professional judgment."\(^{320}\)

1. Special considerations for insurance defense counsel

Whether one assumes that an insurance defense attorney's only client is the insured or that such a lawyer has co-clients with his or her primary obligation to the insured, significant issues of professional independence remain. These concerns are increasing as insurance companies attempt to control the amount of attorneys' fees they pay. Two methods are now common and becoming more so: (1) litigation guidelines; and (2) third party audits of attorneys' bills. Each raises significant ethical issues. The former implicates lawyers' independence and creates a potentially severe conflict of interest. The latter, which is beyond the scope of this article, may result in the disclosure of confidential information in violation of Rule 1.6.\(^{321}\) The next step, an insurance company's employment of in-house staff counsel, allows even greater control, but creates concomitantly greater conflicts of interest. Whether an insurance company may directly employ lawyers to represent insureds is also beyond the scope of this article.\(^{322}\)

Several years ago, managed care became a common method of attempting to curb rising health care costs.\(^{323}\) Under managed care, physicians must seek approval from third party payers, either insurance companies or

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320. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 5.4 cmt. (LEXIS 1999).
322. States have taken varying positions on whether counsel employed by an insurer may represent insureds. See, e.g., North Carolina State Bar, Ethics Op. 151 (1993) ("Representation of Insureds and Insurer") (explaining that in-house counsel for an insurance company man not represent the insured.); and Pa. Bar Comm. Prof. Resp., Formal Op. 96-196 (1997) (Ethical Concerns of Insurance Defense Counsel with Comments Appropriate to Staff Trial Lawyers) (discussing where there is no question of coverage, in-house attorneys may represent the insurance company and the insured as co-clients if each consents after consultation.). See also Nancy J. Moore, Conflicts of Interest for In-House Counsel: Issues Emerging From the Expanding Role of the Attorney-Employee, 39 S. TEX. L. REV. 497 (1998).
323. The section is based, in part, on John M. Burman, Litigation Guidelines and Third Party Audits, WYOMING LAWYER (Aug. 1999), at 12.
governmental entities, before furnishing services to patients which the physicians believe to be medically necessary and which the patients desire to receive. The rise in the increase in health care costs has slowed, and managed care appears to deserve part of the credit. Slowing the rise in health care cost increases has not, however, been without costs. To achieve control, the independence of physicians has been significantly curtailed. Physicians complain that health care payers impose "a bewildering plethora of formularies, which has turned even routine prescribing into a bureaucratic nightmare." The combination of control by payers and reduced autonomy for physicians has reached the stage that self-employed physicians are discussing unionizing because they believe they are effectively "employees" of the insurance companies. 

Managed care is now coming to the legal profession. Its name is litigation guidelines. Just as physicians must seek approval before performing many medical procedures, and justify their medical necessity, some lawyers must do the same regarding legal services they wish to provide to clients. A significant question for lawyers is how to respond to the conflict between the economic constraints imposed by third party payers' litigation guidelines and the lawyers' responsibility to provide proper representation to their clients, the insureds.

Litigation guidelines take many forms. Some, such as billing periodicity requirements, are reasonably unobtrusive. Some, such as not compensating lawyers for time spent preparing for and making telephone calls which are not completed or making deposition arrangements, ignore reality and simply reduce or eliminate compensation for time which lawyers reasonably devote to representing clients. Others, such as reimbursing paralegals, and not lawyers, for reviewing depositions or medical records (lawyers get paid only for reviewing summaries prepared by paralegals) seem shortsighted. Finally, some, such as not reimbursing for computer research without prior approval, virtually invite malpractice (when a reasonable lawyer would conduct computer research, the failure to do so may be malpractice, even if the insurer will not pay). Whatever the guidelines, however, two constants emerge. First, litigation guidelines will slow and ultimately reduce a lawyer's cash flow. Second, a lawyer's ethical and legal obligations are unaffected by such guidelines.

Every lawyer has an ethical and a legal duty to provide competent representation to every client. The duty is the same if the lawyer is well-
compensated, poorly compensated, or receives no compensation at all.\textsuperscript{29} Similarly, an insurance company’s insistence on a lawyer’s adherence to litigation guidelines cannot affect that lawyer’s ethical and legal obligations; they remain the same.\textsuperscript{30} Even if the insurance contract gives the insurer complete discretion to control the litigation, a lawyer “must exercise independent judgment on behalf of the client.”\textsuperscript{31} The only question for a lawyer, therefore, is whether he or she is willing to represent an insured on the terms offered by the insurance company. Those terms may include litigation guidelines which the lawyer regards as inappropriately interfering with his or her professional independence.

Limitations on reimbursement do not limit the lawyer’s ethical (or legal) obligation to provide competent representation to the insured. Such an agreement may, however, be unethical. As the Tennessee Supreme Court said recently, an arrangement “which effectively limits . . . the attorney’s professional judgment on behalf of or loyalty to the client is prohibited by the Code [of Professional Responsibility]. . .”\textsuperscript{32}

In the final analysis, the question of what a lawyer should do is simple. If a reasonable lawyer would provide legal services for which the insurer will not reimburse the lawyer, the obligation to furnish those services remains. Payment or non-payment for those services is irrelevant. The choice, therefore, is clear. Accept the litigation guidelines, understanding they do not reduce the lawyer’s legal and/or ethical obligations, or reject them and the client and the insurance company. At least some firms are rejecting them. According to the Chairman of the Dallas Bar Association’s Tort and Insurance Practice Section, “[m]ore and more law firms are telling insurance companies to go elsewhere.”\textsuperscript{33}

\textsuperscript{29} “shall provide competent representation: . . .”).
\textsuperscript{30} Moore v. Lubnau, 855 P.2d 1245, 1250 (Wyo. 1993) (holding that a lawyer must act with the “degree of care, skill, diligence, and knowledge [of] . . . a reasonable, careful, and prudent lawyer in Wyoming”).
\textsuperscript{31} See Kelly v. Roussalis, 776 P.2d 1016, 1019 (Wyo. 1989) (holding that a real estate broker who voluntarily undertakes to assist friend for no compensation held to standard of reasonable care).
\textsuperscript{32} Id.
\textsuperscript{33} New York State Bar Ass’n Committee on Professional Ethics, Opinion 716 (March 3, 1999) (“Lawyer’s Submission of Client Billing Records to Outside Auditor Employed by Insurance Company”). See also WYOMING RULES OF PROFESSIONAL CONDUCT Rules 1.8(b)(2) and 5.4(c) (LEXIS 1999).
\textsuperscript{34} Petition of Youngblood, 895 S.W.2d at 328; see also Opinion of the Disciplinary Commission of the Alabama State Bar, Third Party Auditing of Lawyer’s Billing-Confidentiality Problems and Interference with Representation 60 ALA. LAW. 35 (January, 1999) (emphasis added )“(A) lawyer should not permit an insurance company, which pays the lawyer to render legal services to its insured, to interfere with the lawyer’s independence of professional judgment . . . through the acceptance of litigation management guidelines which have that effect”).
Insurance defense counsel will, inevitably, face a difficult ethical dilemma. On the one hand, the lawyer owes an unfettered obligation of loyalty to the client. On the other, the client has, by prior agreement, given control over the litigation to a third party, the insurer. In the final analysis, however, an insurance defense lawyer owes primary loyalty to the insured, whose interests take precedence over those of the insurer:

"In giving undivided loyalty to the insured, the attorney will sometimes act contrary to the insurer's interest. Yet anything less than undivided loyalty does not give the insured a full defense. The burden of resolving the conflict in the insured's favor should rest on the insurer, who assumed a fiduciary obligation toward the insured in exchange for the insured's premiums."

2. Special considerations for private criminal defense counsel

A potentially significant conflict arises when an indigent criminal defendant's attorney is retained and paid by a private third party, whether known or unknown, particularly when that third party is the alleged operator of the criminal activity in question. The severity of the potential conflict has drawn the attention of the United States Supreme Court. Such a third party payer arrangement, said the Court, includes the "risk . . . that the lawyer will prevent his client from obtaining leniency by preventing the client from offering testimony against his former employer or from taking other actions contrary to the employer's interests." The scenario is common in cases involving drug conspiracies, and sufficiently serious to impose additional obligations on trial judges.

In *Quintero v. United States*, the Ninth Circuit addressed the conflict presented by an unknown third party paying for the defense of an indigent person. The Court's *per curiam* opinion begins with this admonition:

This opinion is being published to alert trial judges, particularly in drug cases, to determine whether or not third parties are paying the fees of retained counsel when the defendant is indigent and, if so, whether the defendant understands the potential conflict of interest that may exist in such an arrangement and voluntarily waives that conflict.

336. 33 F.3d 1133 (9th Cir. 1994).
337. Id. at 1134 (emphasis added).
The court’s concern was that such a conflict may reach the level of a Sixth Amendment ineffective assistance of counsel claim.338 Because the drug conspiracy at issue involved large sums of money, and the defendant had rejected a plea agreement on the advice of counsel, the court ordered an evidentiary hearing on the issue of whether the conflict impermissibly and unconstitutionally affected the attorney’s performance.339 Further, the court expressed its concern that a third party payer arrangement such as that alleged not only affected the rights of the individual defendant, “the court has been prevented by trickery from making certain that justice was accomplished.”340

The potential conflict posed by an unknown third party payer is potentially as significant as the conflict posed when a lawyer represents more than one co-defendant. In the latter situation, the solution is clear. The Wyoming Supreme Court decided to “firmly protect the defendant’s right to representation by an attorney who is free from any conflict of interest.”341 Accordingly, a defendant’s waiver of that right is permissible only if given knowingly and voluntarily on the record.342 Since the risks presented by an unknown third party payer are similar, the solution should be, as well. When a trial judge learns or suspects that an indigent criminal defendant is being represented by an attorney paid by an unknown third party payer, the court has a duty to inquire further.343 If a conflict of interest exists and is not knowingly and voluntarily waived, the court should not allow the lawyer with the conflict to continue.344 The reason is simple. While an individual’s right to choose counsel is important, it may be outweighed by the court’s interest in maintaining the integrity of the justice system. If necessary to prevent “a fraud upon the court,”345 an attorney may be disqualified, even if the client has consented to the lawyer’s involvement.346

338. Id. at 1135.
339. Id. at 1136.
340. Id. at n. 3.
342. Id. at 369; see also WYO.R. CRIM. P. Rule 44(c) (LEXIS 1999).
343. Wood v. Georgia, 450 U.S. at 272. The identity of the fee payer and the fee arrangements are generally not protected by the attorney-client privilege. See, e.g., Ralls v. United States, 52 F.3d 223, 225 (9th Cir. 1999); and Hueck v. State, 590 N.E.2d 581, 584 (Ind. App. 1 Dist. 1992) (holding that if, however, the third party payer is also a client, the identity and payment arrangements may be privileged “if disclosure would convey the substance of a confidential professional communication between the attorney and the client”) Id. (citing In re Grand Jury Proceedings (Hirsch), 803 F.2d, 49, 49 (9th Cir. 1986), corrected by 817 F.2d 64.).
344. Id. 450 U.S. at 272.
345. Quintero v. United States, 33 F.3d 1133, 1136 n. 3 (9th Cir. 1994).
346. See, e.g., Wood v. Georgia, 450 U.S. at 273-74 (holding that in a probation revocation proceeding where attorney had a conflict created by a third party payer, the court must hold hearing “untainted” by lawyer’s presence unless defendant voluntarily and knowingly waives the conflict).
3. Special considerations for lawyers who represent juveniles

A lawyer who represents a minor has a special problem. A child is, by definition, legally incompetent to do certain things. If the child is young, he or she may also be incompetent in fact. This raises difficult issues regarding client consent to a third party payer and whether the client is capable of making informed decisions about the representation. The rules provide some guidance.

Rule 1.14 is entitled "Client under a disability." It applies whenever a client is impaired for any reason. It begins with the principle that the lawyer-client relationship should be as normal as possible: "[w]hen a client's ability to make adequately informed decisions in connection with the representation is impaired . . . the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Comment [1] reminds lawyers that "a client lacking legal competence often has the ability to understand, deliberate upon and make conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent, the law recognizes intermediate degrees of competence. For example, children as young as five (5) or six (6) years of age . . . are regarded as having opinions that are entitled to weight in . . . custody [proceedings] . . . " However, if the lawyer "reasonably believes" that the client cannot act to protect his or her own interests, the lawyer may seek the appointment of a guardian to do so. The Rules acknowledge, however, that it may not be possible to have a guardian appointed. In such cases, the lawyer may have to act as the de facto guardian. If that occurs, the lawyer must carefully document what he or she is doing and why.

A client's young age is immaterial to the lawyer's obligations. The lawyer must satisfy his or her regular legal and ethical duties. That includes communicating and consulting with the client in a manner appropriate to the client's age and understanding. If the lawyer believes that the client is unable to understand something, the lawyer should document why he or she believes that, the action that the lawyer is taking, and, perhaps most importantly, why the lawyer is doing so.

Summary

Third party payer arrangements are both common and permissible. Lawyers should take certain steps, however, in every case where payment will be from a non-client. First, the lawyer must inform the client of the inherent conflict of interest created by the situation. Second, the lawyer

347. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (LEXIS 1999).
348. Id. Rule 1.14(b).
349. Id. Rule 1.14 cmt. [2].
must consult with the client about what that conflict means. The consultation should include an explanation of how the lawyer will ensure the integrity of the lawyer's professional relationship with the client, especially that information will not be disclosed to the payer without the client's consent. Third, as in all conflict of interest situations, the client should be advised of the right to consult outside counsel about the conflict. Fourth, the lawyer must obtain the client's consent. While the rules do not require it to be in writing, it should be. The consent should include the explanation of the conflict and its potential effects. Fifth, the lawyer should be sure to keep the client informed of all developments in the case. Finally, the lawyer should be alert for and notify the client if one of the potential conflicts becomes an actual conflict.

While it should go without saying, it bears repeating. Documentation is critical. All of the foregoing should be done in writing every time there is a third party payer. Nothing bad, and only good, can happen when a client is properly informed and gives knowing consent to a third party payer relationship.

VI. BUSINESS TRANSACTIONS WITH CLIENTS

Serious conflict of interest issues arise when a lawyer becomes involved in a business transaction with a client. The reason is simple. A lawyer has a fiduciary relationship with every client. Accordingly, he or she has the same relationship with each client that a trustee has with a beneficiary. In such a relationship, one party, the lawyer or trustee, occupies a position of trust and influence over the other, and is supposed to be watching out for the interests of that person. Such a relationship has been referred to by the Wyoming Supreme Court as a "confidential relationship." Business dealings between persons in a confidential relationship dramatically alter that relationship. Instead of focusing primarily on the interests of the subordinate party, the dominant party has a new and conflicting obligation—his or her own business interests. Accordingly, business transactions in such a context are inherently suspect. If the subordinate party subsequently challenges the fairness of a business transaction with the dominant party, that party "has the burden to establish that the transaction was fair and conducted in good faith." The principles applied to confidential relationships by the courts have been incorporated into the Rules of Professional Conduct, which strongly discourage lawyers from entering into business transactions with clients. Unfortunately, lawyers often ignore the warning.

352. Id. at 1170.
Business transactions between lawyers and their clients are, regrettably, common. Innumerable disciplinary and malpractice opinions involve lawyer-client business transactions, and the supply of misbehaving lawyers appears to be limitless. More lawyers get into ethical and/or legal hot water because of business transactions with their clients than for any other reason.

Lawyers’ business transactions with clients take many forms. Common transactions include loans to or from clients, a lawyer taking an interest in a business venture as the lawyer’s fee, or a lawyer investing services or money in a business venture. Whatever the form, attorney-client business transactions present a host of troublesome issues. A lawyer’s failure to properly resolve those issues may lead to a sanction for unethical behavior, civil liability for malpractice, and vicarious liability for the lawyer’s firm.

Lawyers have many opportunities, and often receive invitations, to become involved with clients in business transactions, and with good reason. As Professor Wolfram has observed, “many lawyers acquire impressive knowledge and a sense of judgment in business matters through their practice, and many clients come to regard their lawyers as both trusted legal advisers and respected business colleagues.” Those same virtues create significant concerns.

Clients’ trust and respect provide opportunities for lawyers to exercise undue influence and overreaching in business transactions. Accordingly, while lawyers doing business with their clients is permissible, it is strongly discouraged by the Wyoming Rules of Professional Conduct and the courts. It is an area, according to the Missouri Supreme Court, which is “fraught with pitfalls and traps and the court is without choice to hold the attorney to the highest standards.”

The Threshold Question: Is There a Lawyer-Client Relationship?

A lawyer often learns of a business opportunity from a former or current client, rather than from a person whom the lawyer has never represented. While that makes sense, it also creates problems. When a lawyer learns of a business opportunity from a former or current client, the threshold question for the lawyer is whether there is a current lawyer-client relationship with the other party or parties to the potential business deal, or only a former client relationship. If there is no current lawyer-client relationship, the former client provisions of Rule 1.9 apply and the business relationship is unlikely to be improper, although the lawyer will have to take care that his or her participation does not develop into an attorney-client relationship.

353. Wolfram, supra note 2, at § 8.11.1, p. 479.
354. In re Lowther, 611 S.W.2d 1, 2 (Mo. 1981).
If there is an on-going lawyer-client relationship, however, the very restrictive provisions of Rules 1.7 and 1.8(a) apply.

Whether there is a current attorney-client relationship or only a former client relationship should be an easy inquiry. Unfortunately, it is often difficult.

If the lawyer is currently working on matters for the client, the existence of an attorney-client relationship will be (or at least it should be) obvious. The lawyer is likely logging time and/or sending bills, both irrefutable evidence of a lawyer-client relationship. More problematic is the lawyer who has completed one or more matters for a client and has no matters pending. The lawyer may believe that the absence of any current work means there is no lawyer-client relationship. The client generally believes to the contrary; many clients, once they have been to a lawyer, regard that lawyer as "their lawyer," and they expect "their" lawyer to be looking out for "their" interests at all times. As discussed above,355 where there is disagreement about the existence of an attorney-client relationship, the Rules356 and the Wyoming Supreme Court357 say that the client’s belief, not the lawyer’s, controls.

If the lawyer follows a practice of using letters of engagement when matters begin, and closing letters at the conclusion of those matters, there will be a good documentary record of the relationship of the parties. The client or former client will also not be mistaken about the relationship. If the lawyer does not use appropriate letters, a critical issue arises. Are the circumstances such that a person could reasonably believe there is a continuing lawyer-client relationship? If so, a court may find the existence of such a relationship, even where the lawyer is not currently performing work for the client and believes there is no such relationship.

The burden of clarifying the existence or non-existence of an attorney-client relationship is on the lawyer.358 Whether there is such a relationship “should be clarified in writing, so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs when the lawyer has ceased to do so.”359 Accordingly, if the lawyer believes there is no lawyer-client relationship, and there is no termination letter in the file, the lawyer should prepare one and discuss the situation with the client before taking any further action, even if the lawyer has no intention of entering into a business trans-

355. See infra notes 409 - 414 and accompanying text.
356. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. [3] (LEXIS 1999) ("Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing...")
359. Id.
action with the client. It is simply bad practice to leave clients uncertain about their status.

Once the non-existence of a current lawyer-client relationship has been established, the lawyer must take care that his or her involvement in the business transaction does not itself give rise to a new attorney client relationship. The Oregon Supreme Court has held, for example, that a lawyer’s involvement in a partnership created a lawyer-client relationship where the partnership had no outside counsel. The only reasonable assumption, said the court, was that “some of the work the lawyer does for the partnership is ‘legal’ and is for each of the individual partners, including the lawyer.”

Other courts have been more forgiving. In Peachtree Plantations, Inc., the South Carolina Supreme Court said that although a lawyer in a business partnership had performed legal services for the partners previously, there was no current lawyer-client relationship with the partnership, or with any of the partners, because the lawyer had not been expected to exercise his independent professional judgment on behalf of the partnership.

The cases make clear that in the absence of documentation of the non-existence of a lawyer-client relationship, such a relationship may exist by implication because of the lawyer’s active involvement in the business transaction. Without proper documentation to clarify the parties’ responsibilities, including that the lawyer will not perform legal services for the business entity, the lawyer is asking for trouble. In a subsequent dispute about the lawyer’s role, the reasonable expectations of the other party, a de facto client, should control. It is one more reason to use engagement and closing letters.

**Lawyer-Client Business Transactions: The Ethical Standards**

The Wyoming Rules of Professional Conduct discourage, but do not prohibit, lawyer-client business transactions. If there is to be such a relationship, however, the Rules regulate it more strictly than any other type of conflict. Business transactions with clients are subject not only to the general conflict of interest standards of Rule 1.7, which regulate and prohibit

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360. In re Gant, 645 P.2d 23 (Or. 1982).
361. Id.
363. Id.
some conflicts, they are also governed by the more restrictive provisions of Rule 1.8(a).

The general standards on concurrent conflicts of interest are contained in Rule 1.7. Paragraph (b) is applicable to attorney-client business transactions: “[a] lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests.”

A lawyer who enters into a business transaction with a client obviously has his or her “own interests,” i.e., the business interests in question. If those interests “materially limit” the lawyer’s representation, Rule 1.7(b) prohibits continued representation in the absence of an appropriate waiver (and some conflicts are not waivable). Even if Rule 1.7(b) is satisfied, Rule 1.8(a) imposes a higher standard on a lawyer who wishes to enter into a business transaction with a client.

Rule 1.8(a) directly discusses and governs lawyer-client business transactions:

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 to the client in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel; and

(3) the client consents in writing thereto.

The rule contains both substantive and procedural requirements. It is a violation of the rule for a lawyer to enter into a business transaction with a client which either does not meet the substantive standard or fails to satisfy the procedural steps.

The substantive standard is that the transaction must be “fair and reasonable to the client.” The official commentary to Rule 1.8 suggests that in determining whether that standard has been met, “a review by independent

365. For a discussion of those standards, see supra notes 10-23 and accompanying text.
366. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (LEXIS 1999). That rule contains provisions for waiver of some such conflicts, but those waiver provisions are less stringent than the requirements of Rule 1.8(a).
367. See supra notes 10-23 and accompanying text.
368. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.8(a) (LEXIS1999) (emphasis added).
counsel on behalf of the client is often advisable.”369 That suggestion is more than just a good idea. It is the only way to protect the client, and it is the only way the lawyer can protect himself or herself. Even if a client believes such consultation is not necessary, the lawyer should insist on outside counsel to protect the lawyer if the deal goes sour and the client begins to look for someone to blame. If the client declines to seek independent counsel after being advised to do so, the lawyer should document both the giving of the advice and the client’s decision not to consult an independent attorney.

Even assuming the transaction is “fair and reasonable,” a lawyer may not proceed until three procedural steps have been taken. A lawyer who misses even one of them will be subject to discipline, even though the transaction was fair to the client.370

First, the terms of the proposed business transaction, and the lawyer’s role in it, must be “fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client.”371 This is the only conflict of interest provision of the Rules which requires that the lawyer communicate the existence of the conflict to the client in writing. It is, of course, always advisable to disclose a conflict and its potential effects in writing. Rules 1.7 and 1.9 do not, however, contain such requirements; only Rule 1.8(a) does. Furthermore, the manner of disclosure is specified: “a manner which can be reasonably understood by the client.” The practical meaning of this standard will vary, therefore, with the relative sophistication of the client. A business person may reasonably be expected to understand a different type of disclosure than an elderly layperson (from whom lawyers seem prone to borrow money, and for which they are severely disciplined).372

Second, after the written disclosure, the lawyer must give the client “a reasonable opportunity to seek the advice of outside counsel.”373 A question which has frequently arisen is whether this means that the lawyer may simply advise the client of the client’s right to seek outside counsel, or whether the lawyer needs to affirmatively recommend that the client do so. The latter view is by far the better practice. The recommendation should, naturally, be part of the written disclosure which the lawyer makes. If the client does not wish to seek outside counsel, that, too, should be reflected in the

369. Such a review is also suggested by the procedural requirements. Id. Rule 1.9 cmt. [1].
370. See, e.g., In re Charfoos, 183 B.R. 131 (Bank. E.D. Mich. 1994) (holding that disclosure obligations applicable even where the client is financially sophisticated and has independent knowledge of the terms of the transaction).
373. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.8(a)(2) (LEXIS 1999).
consent form, along with a statement that the client is aware of the recommendation to seek counsel, the reasons for the recommendation, and that the client is electing not to do so, despite the risks associated with that failure.

The written disclosure and consent requirements rest on the cardinal principle that a lawyer is a fiduciary and an agent for each client. As such, a lawyer is ethically and legally obligated to subordinate the lawyer's interests to the client's. Furthermore, a lawyer has a duty to obtain a client's informed consent to all aspects of the representation, including whether to enter into a lawyer-client relationship.

A lawyer has the duty to explain potential conflicts of interest in sufficient detail to allow a client to make an informed decision about whether to enter into or continue a lawyer-client relationship. That duty applies with extra force when the conflict is because of a business transaction involving the lawyer and the client. The client is entitled to have sufficient information to make an informed decision about whether to continue the lawyer-client relationship. In addition, the client is entitled to receive enough information to make an informed decision about whether to enter into a business relationship with the lawyer.

Third, the client must consent in writing. As with the Rule 1.8(a)(1) requirement for a written disclosure, this is the only conflict of interest waiver provision in the rules which requires the client's consent to be in writing, clear evidence of the skepticism with which the Wyoming Supreme Court, which adopted the Rule, views lawyer-client business transactions.

Vicarious Liability for A Lawyer's Improper Business Transaction with a Client

Law partners are, of course, jointly and severally liable for the actions or inactions of the lawyer's partners and/or associates if they "relate to the course of the partnership business." Adopting another form of organization, such as a professional corporation or an LLC will not eliminate such liability. Further, the firm is vicariously liable for the malpractice liability

374. See, e.g., WOLFRAM, supra note 3, at § 387.
376. See WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (LEXIS 1999) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").
378. WOLFRAM, supra note 3, at § 16.2.3.
379. See WYO. STAT. ANN. § 17-3-102 (LEXIS 1999)(determining that each member of a professional corporation "shall remain as fully liable and responsible for his professional activities... as though practicing individually rather than in a corporation") and WYO. STAT. ANN. § 17-15-103(b) (LEXIS 1999) (Each licensed member of an LLC which offers professional services "shall remain as fully liable and responsible for his professional activities... as though practicing individually rather
of one of the attorneys who practices with the firm if the loss or injury was caused “[by] actionable conduct of a partner acting in the ordinary course of business of the partnership or with the authority of the partnership.”

When a lawyer in a firm enters into a business transaction with a client, the question becomes whether a lawyer’s partners or a lawyer’s firm are liable for injuries arising out of that lawyer’s business transaction with a client. Twenty years ago the answer was invariably “no.” Today, the answer is probably “yes.”

Until the mid-1980s, courts were reluctant to hold a law firm liable for damages caused by the decision of one lawyer in the firm to enter into a business transaction with a client by borrowing money from the client. The rationale was the so-called “club model” of law practice. That is, each member of a firm was allowed to “assume[] that other firm members act appropriately and passively allow[] her colleagues to do their own thing.” Under this view, the practice of law was thought to be primarily non-commercial. Accordingly, one lawyer’s business transaction with a client was generally held to be outside the ordinary course of the firm’s practice, thereby absolving the firm and its other members from liability. The result, of course, was that innocent clients were sacrificed in favor of protecting lawyers. Fortunately for clients, and unfortunately for lawyers, the club model has been replaced by the “professional model.”

The professional model reflects a shift in courts’ view of the practice of law. Courts now tend to “emphasize the professional, business nature of law practice, as well as the firm’s institutional obligations to its clients. This model normally holds the law firm responsible for firm’s members’ debts [resulting from a loan from a client].” A firm may not, therefore, “passively permit its members to borrow from its clients.” The Kansas Supreme Court’s decision in Phillips v. Carson, et al, is instructive.

David Carson practiced with the Kansas law firm of Carson, Fields, Boal, Jeservich & Asner. Carson handled the probate of the estate of Robert L. Phillips. While the estate was pending, Carson borrowed $200,000.00 from Mr. Phillips’s wife, Thelma. When Carson did not repay the loan, she sued Carson and his law firm for malpractice. On appeal, the Kansas Su-

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370. WYO. STAT. § 17-21-305(a) (LEXIS 1999); see also WOLFRAM, supra note 3, at § 16.2.3.
372. Id. at 107.
373. Id. at 118.
374. Id. at 108.
375. Id. at 135.
376. 731 P.2d 820 (Kan. 1987); see also Roach v. Mead, 722 P.2d 1233 (Or. 1986).
377. The factual scenario leading to liability is described at 731 P.2d at 823-24.
preme Court affirmed summary judgment against Carson, and reversed summary judgment in favor of the firm.

The Phillips opinion begins with the proposition that lawyer business transactions with clients are "subject to strict and crucial scrutiny, and such agreements are construed in a manner most favorable to the client." The court then had little difficulty finding Carson liable for malpractice: Carson had a duty, said the court, "to advise Mrs. Phillips of the legal ramifications of the transactions [and] . . . to recommend that she secure independent counsel." His failure to do so not only breached his ethical obligations, it breached his legal duties, leading to civil liability. The court then turned to the issue of the firm's vicarious liability.

A firm may be held liable for a lawyer's business transactions if they are done with the actual or apparent authority of the firm. Since it was unlikely that the firm had authorized Carson to borrow from a client, the court focused on the issue of apparent authority. Carson, noted the court, had written to Mrs. Phillips on firm stationery, no one in the firm had ever told Mrs. Phillips that the lawyer was acting individually, not as a firm member, attorneys in the firm commonly used firm supplies for personal work, and there was no firm policy against business transactions with clients. These factors, said the court, raised a material factual issue of whether the attorney was "carrying on the usual business of the partnership." The trial court had erred, therefore, in granting summary judgment to the firm on the basis that Carson was acting outside of the firm's normal course of business. Since the practices which the court discussed are relatively common, the opinion should cause lawyers to pause and reconsider how their firms operate. Changes to eliminate potential liability might be in order.

Nothing, of course, can protect a firm completely from vicarious liability if one lawyer in the firm borrows money from a client. The most important step a firm can take is to affirmatively "prohibit[] its members from borrowing from firm clients." Such a provision can be included in the firm's partnership agreement, the firm's employee handbook, or a memorandum to the firm's lawyers. Further, "it may be advisable for the firm to communicate this policy directly to its clients." Whatever actions a firm takes, it should assume that the club model is gone. Courts will no

388. Id. at 832.
389. Id. at 833.
390. Id.
391. Id. at 836.
392. Id.
393. Id.
394. Id.
395. Kalish, supra note 381, at 142.
396. Id.
longer protect firms at the expense of innocent clients. Instead, the professional model will likely, and should, be applied.

Serving on a Client’s Board of Directors.

Lawyers are often asked to serve on the board of directors of a corporate client. Agreeing to do so creates a significant conflict of interest, as well as significant potential liability.

1. Ethical Considerations

A lawyer who serves on the board of directors of a corporate client has an inherent conflict of interest. On the one hand, the lawyer represents the corporation.\textsuperscript{397} The lawyer must, therefore, “exercise disinterested, professional judgment and render candid advice”\textsuperscript{398} to the corporation. On the other hand, as a director, the lawyer must act in “the best interests of the corporation.”\textsuperscript{399} Those duties may diverge.

Rule 1.7(b) is the applicable rule. A lawyer “shall not” represent a client if the lawyer’s representation will be “materially limited by the lawyer’s responsibilities to . . . a third person. . . .” As a director, a lawyer will have responsibilities to the corporation, a third person. The question, therefore, is whether those responsibilities will “materially limit” the lawyer’s representation of the client.

The Rules do not prohibit a lawyer from serving in the dual roles of corporate director and corporate counsel. The commentary to the rules cautions that a lawyer contemplating undertaking such a dual role should determine whether the responsibilities of the two roles may conflict.\textsuperscript{400} The commentary is not particularly helpful since the potential for conflicts will always be present. The only questions, therefore, are whether the lawyer will put himself or herself in a position which is likely to be, or become, contrary to the lawyer’s interests, and contrary to the corporation’s.

The ABA’s Committee on Ethics and Professional Responsibility has issued an opinion about the ethical propriety of a lawyer serving as both corporate counsel and a corporate director.\textsuperscript{401} While acknowledging, at some length, that such a dual role presents “ethical concerns,” the opinion concludes that the Model Rules “do not prohibit a lawyer from serving as a director of a corporation while simultaneously serving as its legal counsel.

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398. \textit{Id.} Rule 2.1.
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Despite its conclusion that a lawyer may do both, the opinion notes several recurrent problem areas, and concludes with specific guidelines for a lawyer in a dual role.

A lawyer who is considering serving both as corporate counsel and a corporate director should: (1) "reasonably ensure" that corporate management understands the differing responsibilities the lawyer will have when acting as the corporation's lawyer or a board member; (2) "reasonably assure" that corporate management and the board understand that the attorney-client privilege may not include anything other than communications between the board and the lawyer when the lawyer is acting only as the corporation's lawyer; (3) "excuse herself as a director" from any discussions or deliberations which involve the corporation's relationship with the lawyer's firm, such as whether to continue to retain it and, if so, on what terms; (4) "maintain . . . independent professional judgment required of a competent lawyer," advising against actions or inactions which are illegal, even though favored by management; (5) "perform diligently the duties of counsel" after the board makes a decision with which the attorney disagrees; and (6) "decline any representation as counsel when the lawyer's interest as a director conflicts with the responsibilities" of a competent attorney.

The reason for the ABA's extensive opinion, with its plethora of cautionary notes and suggestions, is that the potential for conflicts is very high, so high that one wonders why the opinion does not conclude that such a dual role is ethically impermissible. In the final analysis, the high number and degree of concerns expressed by the ABA are such that a lawyer who strives to follow the opinion's admonitions while serving in both capacities will have to curtail his or her activities to such an extent that it "would so infringe upon both the lawyer and the corporate client that the better course is not to serve in such a dual capacity."

Although the better course is not to serve both as corporate counsel and a corporate director, the rules do not prohibit a lawyer from doing so. Rather, the lawyer must comply with all relevant conflict of interest standards. This means, among other things, that the lawyer must make the appropriate disclosures and obtain the appropriate consents, and the ABA recommends that this be done in writing. While it is ethically permissible to fulfill both roles in at least some circumstances, the potential legal liability argues strongly in favor of avoiding such a dual role.

402. Id.
403. Id.
404. Robert W. Martin, Jr., Lawyers as Members of the Client's Boards of Directors, COMMUNIQUÉ 22 (June 1998).
405. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 98-410 (1998) ("the lawyer-
2. Legal malpractice issues.

Corporate directors may be sued. If that occurs, the lawyer who is on the board will become a defendant in the lawsuit. He or she will not be able to represent the corporation in the lawsuit; nor will other lawyers in the firm. In addition, if there is a determination of liability, "[m]ost [legal] malpractice carriers will not cover the activity of lawyers who also function as board members."406 While the corporation may generally insure directors, many directors' policies do not cover a lawyer who serves the dual role of attorney and corporate director (or officer). A lawyer may, therefore, be completely exposed, with the exception that one may argue that the lawyer's firm is vicariously liable for the lawyer's actions as a member of the board of directors. The argument that a firm is liable for the debts of a lawyer in the firm who borrows money from a client can easily be applied. That is, if it is part of the ordinary course of a firm's business for lawyers in the firm to serve on clients' boards of directors, the firm should be responsible for the actions taken by a lawyer while serving as a member of the board.

The potential ethical and liability problems should convince lawyers to adopt a firm policy of not serving on the boards of directors of clients, and prohibiting others in the firm from doing so. If you simply cannot resist the lure of a directorship, however; there is an easy answer. Accept the directorship, but stop serving as the corporation's attorney. Be a businessperson or a lawyer, but not both.

Summary

While the Wyoming Rules of Professional Conduct do not prohibit lawyers from entering into business transactions with clients, they discourage them. The requirements for written disclosure and written consent, which are unique in the rules, are ample testimony to the Court's concern with such arrangements. In litigation, too, courts view lawyer-client business transactions with considerable skepticism. That skepticism is rooted in the fiduciary nature of the lawyer-client relationship which requires that a lawyer subordinate his or her interests to the client's, and the confidential relationship which is an inherent part of every attorney-client relationship.

In a business relationship, the attorney's normal role is inevitably altered by the lawyer's new interest—his or her business interest. Clients are

director should consider providing a written memorandum in addition to an oral explanation about the potential conflicting roles of lawyer and director.

406. Martin, Jr., supra note 402, at 199. The Individual Attorney's Supplement used by ALPS, which insures a large number of lawyers in Wyoming, contains the following question: "Do you serve as director or officer of, or do you exercise any fiduciary control over, any business enterprise, other than the applicant firm, including profit and not for profit organizations?"
generally unaware of the lawyer's changed relationship and the lawyer's conflicting responsibilities. The client, therefore, often has mistaken assumptions about the lawyer's role. Only when those assumptions are corrected, and the client makes an informed decision to proceed, should the lawyer-client relationship continue.

In the final analysis, the words of the Iowa Supreme Court are apt: "[The] safest and perhaps best course would [be] to refuse to participate personally in the transaction."407

VII. CONFLICTS OF INTEREST WHEN A LAWYER SWITCHES FIRMS

When a lawyer switches firms, a myriad of issues arise. Along with financial and personal issues, potential conflicts of interest abound, particularly if the lawyer remains in practice in the same geographical area. The potential conflicts raise both ethical and legal concerns. It is possible, however, and not difficult, to switch firms without running afoul of ethical and/or legal standards.408

Before embarking on a discussion of a lawyer's ethical and legal duties when he or she switches firms, it is important to consider the nature of the attorney-client relationship. Specifically, is a client the client of the firm, the client of a lawyer within the firm, or both? The answer has important ethical and legal implications.

The Dual Nature of the Attorney-Client Relationship

The Wyoming Rules of Professional Conduct do not define the attorney-client relationship or the contours of that relationship once it has arisen. Instead, the Rules assume, for the most part, the "traditional" relationship between an individual client and an individual lawyer. While the rules recognize that many attorney-client relationships involve an attorney representing an entity client,409 they do not define the relationship between a multi-lawyer firm and a client (except to say that all members of a firm are disqualified from representing a client when any one of the lawyers in the firm would be,410 and that supervisory lawyers and subordinate lawyers in a firm have some different responsibilities411). Accordingly, whether there is an attorney-client relationship depends on "principles of substantive law

408. This section presupposes that the lawyers are in private practice both before and after the switch. Switching from government employment to private practice or vice versa raises different issues that are addressed by Rules 1.11 and 1.12. See Ann B. Stevens, Wyoming Rules of Professional Conduct: A Comparative Analysis, 23 LAND AND WATER L. REV. 463, 483 (1988).
410. Id. Rule 1.10.
411. Id. Rules 5.1 and 5.2.
external to the[] Rules. . . ."412 Similarly, the nature of that relationship is defined by substantive law.413

There is surprisingly little law on the question of whether a client is a client of an individual lawyer in a firm or a client of the firm. The authority which exists supports the notion of a dual relationship. A client of a firm has an attorney-client relationship with the lawyer or lawyers who work directly on the client’s behalf, as well as with the firm itself.414 This notion is consistent with the agency based rules of liability which make a firm responsible for the acts or omissions of every lawyer within the firm. It also has important implications when a lawyer decides to leave a firm because both the departing lawyer and the remaining firm will owe ethical and legal duties to their joint clients.

1. Ethical Issues

Potential conflicts of interest may appear even before a lawyer actually switches employment. They may arise when the lawyer begins to actively search for alternate employment. Simply exploring other job prospects may create conflicts of interest which need to be disclosed to clients and which may result in disqualification of the lawyer from further representation of a client.

a. Exploring Job Prospects

A lawyer looking for another job suddenly has an interest, obtaining another job, which his or her clients have no reason to expect the lawyer to have. The interest in obtaining alternative employment becomes a conflict of interest issue if it interferes with the lawyer’s independent professional judgement. Any interference with a lawyer’s professional judgment must be disclosed to the client. And if the conflict must be disclosed, the question becomes whether the client may waive the conflict. The answer depends on the circumstances.

Rule 1.7(b) sets the standard. A lawyer shall not represent a client “if the representation may be materially limited by the lawyer’s . . . own interests . . . unless . . . the lawyer reasonably believes the representation will not be adversely affected; and the client consents after consultation.” The questions are apparent. Will the representation be “materially limited”? If
so, would a reasonable lawyer agree to continued representation by the lawyer with the conflict? Has the client consented after consultation?415

A conflict of interest resulting from job prospecting may arise in either of at least two ways. In a small town, both are likely. First, a lawyer exploring job prospects in the town where he or she practices will, likely, be seeking employment from a firm which represents clients who have an adversarial relationship with one or more of the current firm’s clients. The lawyer’s interest in employment with a firm which represents clients with opposing interests may improperly limit one or more of four fundamental duties a lawyer owes to his or her clients:“(1) the duty to serve clients without material limitations imposed by the lawyer’s own interests; (2) the duty to represent clients zealously; (3) the duty to protect client confidences; and (4) the duty to communicate to each client the information reasonably sufficient to allow the client to make informed decisions about the representation.

The question for a job-seeking lawyer is when must he or she disclose the job exploration to a client. According to the ABA Committee on Ethics and Professional Responsibility, the answer depends on “concreteness, communication and mutuality.”416 “Concreteness” means something more than idle speculation; a job exploration is concrete when the lawyer agrees to participate in a substantive discussion with a prospective employer. “Communication” is simpler. Has the lawyer communicated his or her interest to the other firm? If so, the potential conflict is apparent. “Mutuality” exists when the interest of the lawyer is reciprocated by the other firm. When those criteria are met, and when the lawyer is playing a significant role in representing a client, the lawyer must disclose the job exploration to a client when the other firm represents a party with interests adverse to the client’s.417 If the client does not consent to continued representation, after “consultation,” the client must withdraw from the representation. This is one of those rare situations, however, where there is no imputed disqualification.418 The firm may continue with the representation (with the client’s consent).

Second, an indirect conflict will almost always exist because of clients’ expectations. A client may have hired a particular lawyer, at least in part, because he or she is part of a firm which has a good reputation. Conversely,

415. “Consultation” means “communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.” WYOMING RULES OF PROFESSIONAL CONDUCT Terminology (2) (LEXIS 1999).
417. Id. at 4.
418. Id.
419. Id. at 5.
a client may have hired an individual lawyer without regard to that lawyer's membership in or association with a firm. In the former situation, the lawyer's exploration of leaving the firm is likely to be a material fact to the client, and one the client is entitled to know, regardless of the lawyer's level of competence or zeal. The client may feel that spending time and energy working with a lawyer who may be leaving the firm is a waste of time and effort, which the client will resent. The latter situation is somewhat different. The time spent with the lawyer is likely not duplicative since the client will probably move with the lawyer.

A lawyer exploring job prospects may wish to keep his or her job search quiet. While that desire is only natural, there comes a time when the lawyer's intentions become a relevant and important factor which must be disclosed to clients. At that point, a lawyer should not speculate on which clients might want to know; all clients are entitled to that information so that they can make informed decisions about their representation.

b. Notification of Clients

After a lawyer decides to switch firms, clients must be promptly notified of the switch. Such a notice is not only permissible, it is required.

The ABA Committee on Ethics and Professional Responsibility has expressly approved a notice sent to clients after a lawyer left a firm.420 The Committee approved a notice which: (1) was sent immediately after the lawyer left the firm; (2) was sent only to clients with whom the lawyer had an active lawyer-client relationship immediately before changing firms; (3) clearly related to open and pending matters for which the lawyer had direct professional responsibility; (4) was sent promptly after the change; (5) did not urge the client to change representation (although it said the departing lawyer was willing to undertake representation); (6) made clear the clients' right to choose which lawyer would represent the client in the future; and (7) was not disparaging of the former firm. The Committee subsequently clarified its opinion by noting that the same standards apply to partners or associates who leave a firm.421

While notifying clients that a lawyer has departed to begin practicing with a new firm is permissible, a lawyer must be careful not to engage in pre-departure solicitation of the soon to be former firm's clients. The ABA Committee on Ethics and Professional Responsibility recently interpreted the ABA Model Rules, which are similar to the Wyoming rules, to bar pre-departure solicitation: "[c]ontacting the clients of the present firm before a

lawyer begins employment with a new firm for the purpose of soliciting their business is not permitted.” The Committee was not asked, and did not address, pre-departure notification where solicitation is not the purpose. Compelling policy reasons suggest, however, that a lawyer may provide such notification when the purpose is to notify clients of material facts, rather than to solicit them to move.

The dual nature of the attorney-client relationship imposes ethical and legal obligations on both the departing lawyer and the remaining lawyer(s) in the firm regarding the clients the departing lawyer is currently representing. One of those duties is to keep clients “reasonably informed” about the client’s matter. The departure of a client’s lawyer from the firm is a material fact which a client is entitled to know so that the client can make an “informed decision” about future representation. Waiting until after the lawyer’s departure limits, rather than fosters, informed client decision-making.

A client is free to switch lawyers at any time, regardless of the type of contract the client has with the lawyer. As a result of this right and a client’s right to make informed decisions about continued representation, the departing lawyer and the remaining firm should notify current clients of the departure and what that means for the clients as soon as the decision to leave is made, not after it is implemented. The question is how should that notification be done.

The best approach to client notification is a joint letter from the departing lawyer and the remaining firm to clients with whom the departing lawyer has an active lawyer-client relationship with open matters. The letter should advise clients of the departure and provide factual information about the clients’ options regarding further representation. Specifically, clients need to know that they have the right to: (1) continued representation by the firm (assuming the firm is ready, willing, and able to competently undertake such representation); (2) representation by the departing lawyer and his or her new firm; or (3) secure other representation altogether. If a client does not wish to have the departing lawyer or the remaining firm continue the representation, or if neither is prepared to undertake continued representation, the lawyers have a joint obligation to assist the client in obtaining appropriate representation.

424. Id. at 1.4(b).
425. See, e.g., Robert W. Hillman, Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaking, 67 Tex. L. Rev. 1, 17 (Nov. 1988) (explaining that while the client is free to switch lawyers, the client will likely remain liable to the client’s former lawyer for the lawyer’s fees and costs incurred during the course of the representation).
Unless the acrimony between the lawyers makes joint notification impossible, a joint letter will not only fulfill all parties’ obligations to notify their joint clients, it may be the only way to avoid allegations of improper solicitation and/or legal claims against the departing lawyer. So long as the notification is not a solicitation, it should be permissible either before or after the lawyer’s departure.

c. Solicitation of Clients

The issue which has caused the most controversy is whether a departing lawyer may ethically and/or legally solicit clients to leave the firm along with the departing lawyer and switch to the departing lawyer’s new firm. Neither the ethical nor the legal standard is clear.

The Wyoming Rule of Professional Conduct which addresses the solicitation of prospective clients has recently been amended.426 Rule 7.3 prohibits lawyers from soliciting prospective clients “with whom the lawyer has no family or prior professional relationship” (the old rule contained identical language). The Rule appears to allow solicitation by a departing lawyer.

First, the rule regulates contact with “prospective clients.” Since a departing lawyer already has an attorney-client relationship with his or her ongoing clients, the rule does not seem to apply to pre-departure solicitation of clients, particularly in light of the United States Supreme Court’s opinion in Shapero v. Kentucky Bar Association427 (allowing direct mail solicitation of potential clients).

Second, the rule prohibits “direct contact” when the lawyer has “no prior professional relationship” with the prospective client. Before leaving a firm, the departing lawyer has, by definition, a professional relationship with existing clients, and a “prior” relationship with former clients. Similarly, after leaving the firm, the lawyer has a “prior” professional relationship with his or her former clients.

As noted above, the ABA Committee on Ethics and Professional Responsibility recently interpreted similar language in the ABA Model Rules to prohibit predeparture solicitation: “[c]ontacting the clients of the present firm before a lawyer begins employment with a new firm for the purpose of soliciting their business is not permitted.”428 The Opinion does not explain...
the basis for the prohibition; it merely cites Informal Opinion 1457, discussed above.

While Wyoming Rule 7.3 does not contain a clear ethical prohibition on soliciting current or former clients to move with a departing lawyer, the ABA Committee’s opinion is certainly reason for pause. The better approach remains a joint notice from the departing (or departed) lawyer and the remaining firm.

Even if the ambiguity of the ethical standards does not cause a lawyer to avoid any semblance of solicitation of firm clients, the risk of potential legal liability should. Those potential consequences are discussed below.

d. Notification and Approval of Court

Once a lawyer enters an appearance in court on behalf of a client, the lawyer represents that client “for all purposes.” The lawyer may not withdraw from the case without court approval, and except in the event of “extraordinary circumstances,” such approval will be conditioned upon the substitution of other counsel.

In most cases, the departing attorney has entered an appearance on behalf of or as part of the firm. Accordingly, the individual lawyer and the firm are both considered to represent the client, and neither may withdraw without court approval. Since court approval will be given upon substitution of counsel, it is imperative that the departing lawyer and the remaining firm sort out who is going to represent each client on whose behalf an appearance has been entered. Once that decision has been made, the appropriate motions can be filed to clarify the court record. Until orders have been signed and entered reflecting substitution of counsel, both departing

negotiations with adverse firm or party).

429. There are two primary theories of liability: (1) intentional interference with contract; and (2) breach of fiduciary duty to the firm. See, e.g., Johnson, supra note 414, at 73.

430. See notes 432 - 499 and accompanying text.


432. UNIFORM RULES FOR THE DISTRICT COURTS OF THE STATE OF WYOMING Rule 102(a)(2) (LEXIS 1999). See also UNIFORM RULES FOR THE COUNTY COURTS OF THE STATE OF WYOMING Rule 1.02 (the Uniform Rules for the District Courts of Wyoming shall govern the practice before the county courts of Wyoming), and WYO. R. APP. P. Rule 19.02 (LEXIS 1999) (providing that no lawyer who has appeared in a matter before the Supreme Court may withdraw without consent of the appellate court).

433. UNIFORM RULES FOR THE DISTRICT COURTS OF WYOMING Rule 102(c) (LEXIS 1999).
lawyer and the remaining firm will be ethically and legally responsible for representing each client for "all purposes."

e. Conflict Checking

A lawyer who joins a firm also brings new potential conflicts, regardless of whether the lawyer brings clients. The former client conflict of interest rule means that the new lawyer may be disqualified from representing a current client of the new firm. Further, the rule of imputed disqualification may disqualify the entire firm. It is only prudent, therefore, for the firm to carefully check for conflicts before agreeing to hire a new lawyer and/or accept the lawyer's clients. The task may be large since every client of the lawyer's former firm is, by definition, a former client of the lawyer who has switched firms. Accordingly, a plethora of former client conflicts exist. Such conflicts are subject to different, more lenient standards, however, than normal former client conflicts of interest.434 The question of whether to disqualify a firm based on a lawyer having switched firms is, ultimately, a "functional analysis" designed to "preserve[e] confidentiality and avoid[] positions adverse to a client"435 The standard for disqualification, therefore, is more forgiving than for regular former client conflicts.

Rule 1.9(b) contains the applicable standards when a lawyer switches firms (Rule 1.9(a) addresses regular former client conflicts.) The first two questions are similar to the questions asked under paragraph (a), which applies when a lawyer switches sides. That is, (1) does the new firm represent a client in a matter which is "substantially related" to a matter in which the former firm represented a different client? If so, (2) are the positions of the former firm's client and the new firm's client "materially adverse?" If the answer to both of these questions is yes a third question arises (in a normal former client conflict, an affirmative answer to the first two questions disqualifies a lawyer; the third question is never asked). Did the lawyer switching firms acquire confidential information which is material to the matter? If the lawyer did, the rule prohibits the new firm from involvement in the matter, even if the new firm's client is a long-time client and the firm has been involved in the matter for a significant time. The use of a "Chinese wall" or other device to screen the new lawyer from involvement in the matter is not sufficient. If the lawyer has material, confidential information, it is presumed that he or she will share it with the new firm. That presumption may not be rebutted. The only exception is that the conflict may be waived, under some conditions, by the former client "after consultation."436

434. For a discussion of the normal rules for former client conflicts of interest, see supra notes 24 - 37 and accompanying text.
435. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.9 cmt.[6].
436. In evaluating former client conflicts of interest, including the question of whether the conflict may be waived, the principles of Rule 1.7 apply. WYOMING RULES OF PROFESSIONAL CONDUCT Rule
The reason for the different standard when a lawyer switches firms is that the Rules attempt to balance several competing interests which are not present, or which are present to a lesser degree, in ordinary former client conflict situations.\textsuperscript{397} First, all clients have reasonable expectations of loyalty and confidentiality. Those are plainly implicated when a lawyer switches firms. Second, clients should have discretion in choosing their lawyers. Finally, the rules "should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association."\textsuperscript{439} The rules contain an important procedural standard. If disqualification of the new firm is sought, the burden of proof will be on the new firm, the firm opposing disqualification.\textsuperscript{439}

As with any potential conflict, a firm hiring a lawyer from another firm must perform a conflicts check before hiring the lawyer to avoid disqualifying the firm from continuing to represent a client in a matter.

3. Legal Issues

Lawyers in a firm have legal obligations to their clients, to each other, and to the firm. The departure of a lawyer, therefore, necessarily has potentially significant legal ramifications. This section discusses the nature of the legal obligations lawyers in a firm owe the firm and each other, and how to terminate those obligations without incurring legal liability.

a. Obligations to the Firm

A lawyer in a firm, whether an associate or partner,\textsuperscript{440} has duties to the firm. These duties are substantially similar, although a partner, not surprisingly, has higher duties.

Associates are employees and agents of the firm.\textsuperscript{441} As agents, they owe the firm a fiduciary obligation under principles of agency law.\textsuperscript{442} That obligation, generally speaking, is to subordinate the associate's personal interests to the firm's.\textsuperscript{443}

\textsuperscript{19} cmt.[1] (LEXIS 1999). This means of course that a conflict may be waived only if a disinterested lawyer would think it appropriate to do so. \textit{id.} Rule 1.7 cmt. [5].
\textsuperscript{438} \textit{id.}
\textsuperscript{439} \textit{id.} cmt. [5].
\textsuperscript{440} A shareholder in a professional corporation or a limited liability company is the functional equivalent of a partner for liability purposes. See e.g., \textit{Wyo. Stat. Ann.} § 17-15-103(b)(LEXIS) (liability of professionals who practice in a limited liability company); \textit{and Wyo. Stat. Ann.} § 17-3-102 (LEXIS 1999) (liability of professionals who practice in a professional corporation.).
\textsuperscript{442} \textit{id.} \textit{see also} \textit{Restatement (Second) of Agency} § 13 (1958) ("An agent is a fiduciary with respect to matters within the scope of his agency").
A fundamental principle of agency law is that an agent’s loyalty to his or her principal precludes the agent from competing with or acting contrary to the best interests of the principal during the term of the agency.” As a result of the law of agency, therefore, an associate who is preparing to leave a law firm must be careful that none of his or her preparations undermine the firm’s practice. Any steps which undercut the firm’s economic well-being, such as improperly soliciting firm clients, may result in liability for breach of the attorney’s fiduciary duty to the firm.

Just as an associate is an agent for a law firm, so too is a partner. Accordingly, a partner is bound by the same fiduciary duties to the firm.” In addition, a partner is a co-owner. As a co-owner, a partner has an even higher duty to the firm than does an associate:

Partners are trustees for each other, and in all proceedings connected with the conduct of the partnership every partner is bound to act in the highest good faith to his copartner and may not obtain any advantage over him in the partnership affairs by the slightest misrepresentation, concealment, threat or adverse pressure of any kind.”

It is difficult to articulate the specifics of a duty higher than a fiduciary duty. The words “higher duty” are perhaps best understood as expressing the view that partners owe the highest legal duty to their law partners. But what does that mean?

Professor Hillman has prepared guidelines for withdrawing partners.” Any partner, or associate, considering leaving a firm should consult them carefully. In general terms: (1) a partner considering withdrawing from a firm generally has no affirmative obligation to disclose his or her thoughts;” (2) the lawyer may not, however, misrepresent those contemplations if asked; (3) after a partner has decided to leave, the partner must give the firm reasonable notice of that intention;” (4) a departing partner may make limited logistical arrangements in anticipation of leaving, but those activities are limited by the prohibition on disclosing information about the firm or its clients to third parties;” and (5) any solicitation of firm clients should be done only after the firm has been informed of the partner’s

1968).
444. RESTATEMENT (SECOND) OF AGENCY § 13 (1958)
448. Id. at 1002-04.
449. Id. at 1004-07.
450. Id. at 1008-09.
intent to withdraw,451 and even then, solicitation may lead to ethical and/or civil liability.

d. Solicitation of Clients

Although a common practice in the nineteenth century, lawyer solicitation of clients has been subject to ethical restrictions since the adoption of the first lawyer codes of ethics shortly after the turn of the century.452 After a loosening of restrictions in the 1980s and early 1990s,453 the United States Supreme Court has reversed course and endorsed states’ authority to impose ethical restrictions on lawyer solicitation.454 Apart from ethical issues, client solicitation raises potential legal issues.

The potential legal consequences of client solicitation when a lawyer switches firms are murky. All that may be safely said is that client solicitation may lead to legal liability to the firm.

Whether client solicitation by a departing lawyer will lead to legal liability depends on a variety of factors such as: (1) the departing lawyer’s status with the firm, i.e., is the lawyer a partner or an associate; (2) when the solicitation occurred, i.e., before or after departure; and (3) the nature of the solicitation.

Firms have based their claims against departing lawyers on two causes of action: (1) intentional interference with contract and; (2) breach of fiduciary duty to the firm.455 Liability may exist under either.

i. Intentional Interference with Contract

Alan Epstein, Richard Weisbrod, Arnold Wolf, and Sanford Jablon were associates at the Philadelphia law firm of Adler, Barish, Daniels, Levin and Creskoff. While still working for the firm, the four associates decided to form their own firm.456 Before leaving Adler, Barish, the four lawyers took two steps to facilitate the opening of their new firm which landed them in litigation. First, they arranged for a line of credit from a bank, secured with the expected legal fees from eighty-eight cases on which the associates were working and which they expected to take with them.

451. Id. at 1009; see also discussion infra at notes 452 - 455 and accompanying text.
452. For a brief history of lawyer solicitation and the rise of ethical prohibitions, see WOLFRAM, supra note 3, at § 14.2.5.
453. See, e.g., Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988) (striking down Kentucky’s prohibition on direct mail solicitation of potential clients.)
454. See Florida Bar v. Went For It, 515 U.S. 618 (1995) (upholding Florida’s rule prohibiting plaintiffs’ lawyers from contacting accident victims by direct mail for thirty days after the accident). Wyoming’s new rule 7.3 echoes the Florida requirement of a thirty-day waiting period. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 7.3(c) (LEXIS 1999).
455. See Johnson, SOLICITATION OF CLIENTS BY DEPARTING ATTORNEYS, supra note 412, at 73.
Second, they embarked on a campaign to persuade Adler, Barish clients to move to the new firm.\textsuperscript{457} Part of the campaign involved sending forms to selected clients which the clients could use to discharge Adler, Barish as their attorneys and select the associates’ new firm.

When the firm learned of the associates’ actions, it sought an injunction to prevent the now former associates from contacting firm clients. The injunction was granted by the trial court, dissolved by the intermediate court of appeals, and reinstated by the Pennsylvania Supreme Court; the Supreme Court also held that the associates’ conduct was actionable as intentional interference with contract.\textsuperscript{458}

The Pennsylvania Supreme Court analyzed the associates’ contacts with Adler, Barish clients under the Restatement’s view of intentional interference with contract,\textsuperscript{459} the view which has been expressly adopted in Wyoming.\textsuperscript{460} There was no doubt, said the court, that there had been intentional interference with the firm’s contracts with clients; the only question was whether the interference was improper.\textsuperscript{461} The court found that the forms the associates sent to clients inviting them to switch to the new firm improperly failed to indicate the existing firm’s willingness to continue the representation.\textsuperscript{462} This omission improperly interfered with the clients’ ability to make informed decisions about future representation.\textsuperscript{463} It was, therefore, actionable as intentional interference with contract.

While the Adler, Barish court found the associates’ conduct actionable as intentional interference with contract, decisions imposing liability on lawyers for such interference are rare.\textsuperscript{464} The more well-reasoned and recognized claim is for breach of fiduciary duty.

\textit{ii. Breach of Fiduciary Duty}

The breach of fiduciary duty has been raised as both an independent cause of action, and a consideration relevant to claims for intentional interference with contract.\textsuperscript{465} While the concept that a lawyer leaving a firm has a fiduciary duty to the firm is widely accepted, there is “jurisprudential uncertainty”\textsuperscript{466} as to the nature of the obligations a departing lawyer owes to the former firm and the consequences of their breach in the context of law

\textsuperscript{457} Id.
\textsuperscript{458} Id.
\textsuperscript{459} Id. at 1183.
\textsuperscript{460} First Wyoming Bank, Casper v. Mudge, 748 P.2d 713, 715 (Wyo. 1988).
\textsuperscript{461} Adler, Barish, 393 A.2d at 1183.
\textsuperscript{462} Id. at 1184.
\textsuperscript{463} Id.
\textsuperscript{464} Johnson, supra note 412, at 77.
\textsuperscript{465} Id. at 99.
\textsuperscript{466} Id.
firm dissolutions, some activities by a departing lawyer may lead to civil liability.

The New York Court of Appeals, New York's highest court, recently addressed the question of whether a departing partner's solicitation of firm clients was a breach of fiduciary duty. The answer was yes, under some circumstances. The court began by reaffirming law partners' fiduciary obligations to each other. The court acknowledged that it was difficult to draw "hard lines" to define the contours of a lawyer's fiduciary duty to his or her partners, the court laid out some broad parameters. On the one hand, the court found it to be perfectly permissible for a departing lawyer to locate space and make "alternative affiliations," even confidentially, before leaving. On the other hand, the court held that a partner breaches his or her fiduciary duty to the partners by "[s]ecretly attempting to lure firm clients (even those the partner has brought into the law firm and personally represented), ... lying to clients about their rights with respect to the choice of counsel, lying to partners about plans to leave and abandoning the firm on short notice (taking clients and files). ... " The court also held that a partner's false statement of intentions with respect to his future with the firm may be actionable fraud.

The removal of client files by a departing lawyer implicates a departing lawyer's fiduciary duty to the firm, and is bound to create problems unless done by agreement of the attorneys and the client. Client files, of course, belong to the client, subject to the attorney's right to assert a lien. Nevertheless, the removal of client files without the consent of the firm "[a]ppears certain to be regarded as a breach of fiduciary duties. ...

467. Graubard Mollen, et al, 653 N.E.2d at 1179; see also Dowd and Dowd, Ltd. v. Gleason, 672 N.E.2d 854, 862-63 (Ill. App. 1995), modified, 693 N.E.2d 353 (Ill. 1998) (denying summary judgment to departing lawyers where law firm sued for breach of fiduciary duty where departing associates and partner made substantial plans, including client solicitation, before leaving the firm).


469. Id. at 1183.

470. Id. 1183-84; see also In re Silverberg, 438 N.Y.S.2d 143, 144 (N.Y.App.Div. 1981).


472. See Wyoming Rules of Professional Conduct Rule 1.16(d) (LEXIS 1999) (explaining that at the termination of the attorney-client relationship the attorney shall "[s]urrender[] papers and property to which the client is entitled . . ."); and ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977) ("The attorney must return all of the material supplied by the client to the attorney . . . He must also deliver the 'end product' . . .") Other authorities opine that the entire file belongs to the client. See, e.g., Committee on Professional and Judicial Ethics of the State Bar of Mich., Op. Cl-722 (1982).


While it is not possible to describe a lawyer's fiduciary duties with precision, it is foolish to assume that the lack of clarity means there are none, or that they will not support a lawsuit. There are, and they will. The consistent basis for lawsuits based on breach of fiduciary duty is pre-departure solicitation of firm clients.

c. Pre or Post-Departure Solicitation

The timing of solicitation is important. Courts look more critically at pre-departure solicitation than post-departure solicitation because they generally analyze solicitation under agency law as reflected in the Restatement. As discussed above, an agent may not act contrary to the principle's interests during the term of the agency relationship. Once the agency relationship has ended, however, the former agent may compete with the former principle, subject to certain limitations.

A former agent has a duty not to use or disclose confidential information, such as "[w]ritten lists of names," in post-departure competition. The former agent is normally entitled, however, to use "the names of customers retained in his memory as the result of his work for the principal ... ." Drawing a line between "written" and "memorized" lists seems nearly impossible, and not particularly meaningful. Nevertheless, the Restatement's admonition that a departing agent may not take advantage of a confidential relationship has been adopted by the courts.

In the Adler, Barish opinion, for example, the court said the departing associates were free to compete with their former firm "upon termination" of their employment so long as they did not take advantage of the confidential relationship which was created during their employment. The court focused on the special relationship of trust that the associates had been able to develop with firm clients because of their employment with the firm.

Two arguments support the contrary position that departing lawyers should be allowed to solicit firm clients before departing: (1) clients have a right to choose their lawyers; and (2) lawyers should have professional autonomy to work where they wish, and with clients who wish to have them. Some courts have relied on one or both of those reasons to permit solicitation by departing lawyers.

475. RESTATEMENT (SECOND) AGENCY § 396 (1958).
476. Id. cmt. b.
In *Koeppel v. Schroeder*, a three partners in a New York law firm left to form their own firm. Earlier, the firm's partners had entered into an agreement governing the termination of a lawyer's association with the firm; it provided that a departing partner could remove client files if the clients had consented to the substitution of counsel. After the three partners left, they sent letters to five hundred of the former firm's clients, advising them of the lawyers' departure and the formation of the new firm, and enclosing a "consent to change attorney" form with a business reply envelope. The lawyers' former firm sued, seeking, and receiving, *inter alia*, a preliminary injunction prohibiting the departed lawyers from further solicitation of firm clients. The Appellate Division reversed, finding that the trial court had erred in issuing the injunction. The court distinguished the *Adler, Barish* decision, saying that it had involved "salaried associates of the firm [who] had no agreement with the partners entitling them to seek the clients' consent to substitute them for the firm." Since there was an agreement in the case before the court, once the lawyers left, they become competitors, and "'[a] competitor who lawfully induces termination of a contract terminable at will commits no ethical violation . . . ." It seems clear, however, that in the absence of an agreement which permitted a departing partner to remove client files with client consent, the lawyers' actions would have been legally impermissible.

Although the boundaries of legally permissible conduct are not clear, avoiding liability, or even litigation, over client solicitation is simple. An agreed upon notice of a lawyer's departure sent jointly by the departing lawyer(s) and the remaining firm does not lead to litigation, liability, or ethical problems. Such a notice also fulfills the lawyers' joint ethical and legal obligations to their clients.

*The Ethical Propriety and Legality of No-Compete Agreements*

No compete agreements are common in many professions. As a condition of employment, a person agrees not to compete with the employer for a specified term in a specified area should the employee leave. While common in some professions, such agreements are unethical for lawyers.

Rule 5.6 addresses "restrictions on [a lawyer's] right to practice." It prohibits no-compete agreements, whether prospective or retrospective. Paragraph (a) says that a lawyer "shall not participate in offering or making a partnership or employment agreement that restricts the right of a lawyer to

480. Id. at 667.
481. Id. at 667-68.
482. Id. at 668.
483. Id. at 669.
484. Id.
practice after termination of the relationship, except an agreement concerning benefits upon retirement." The broad applicability of the rule is clear from the language "shall not participate in offering or making." Whether partner or associate, employer or employee, lawyers may not ethically have any part in a no-compete agreement.

The commentary to Rule 5.6 addresses the reasons for the ban. A no-compete agreement limits lawyers' "professional autonomy [and] limits the freedom of clients to choose a lawyer."43 While the former justification is self-serving, at best, the latter may justify the prohibition.

While clearly unethical in nearly all states,44 "[m]any firms have incorporated provisions in their partnership or employment agreements that are designed to limit departing lawyers' ability or willingness to lure clients from the firm."45 And while most courts find such agreements unenforceable as against public policy, courts in some jurisdictions have enforced them, "leaving the question of the attorneys' ethics violations to disciplinary authorities."46

The Wyoming Supreme Court has not addressed the enforceability of no-compete agreements among lawyers. It has, however, with respect to other professionals. While such agreements are traditionally disfavored in Wyoming as restraints on trade, they are enforceable under some conditions.47 The Court has adopted the "rule of reason inquiry from the Restatement of Contracts."48 Accordingly, the party seeking to enforce an agreement or covenant not to compete must show that the restriction "is reasonable and has a fair relation to, and is necessary for, the business interests for which protection is sought."49

In Hopper v. All Pet Animal Clinic, Inc., the Wyoming Supreme Court enforced a covenant not to compete in which a veterinarian had agreed not to engage in small animal practice for three years within a five mile radius of the Laramie City limits.42 The court concluded that "[a] well-crafted covenant not to compete preserves a careful and necessary economic balance in our society...[and] preventing unfair competition from employees who misuse trade secrets or special influence over customers serves public

43. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 5.6 cmt. [I] (LEXIS 1999).
44. No-compete agreements are ethical in Maine and California. ABA/BNA Lawyers' Manual on Professional Conduct, LMPC 51:1207-08.
45. Id. at 51:1201; see also Christopher D. Goble, You Can't Take it With You: Enforcing Noncompetition Agreements Between Law Firms and Withdrawing Attorneys, 30 LAND & WATER L. REV. 179, 180 (1995).
46. Id. at 51:1201.
47. Id. at 51:1201. see also Christopher D. Goble, You Can't Take it With You: Enforcing Noncompetition Agreements Between Law Firms and Withdrawing Attorneys, 30 LAND & WATER L. REV. 179, 180 (1995).
50. Id.
51. Id.
52. Id. at 536.
In the final analysis, therefore, serving public policy is the key to enforceability. One of those policy factors, present in Hopper, may be missing in a typical no-compete agreement among lawyers. Its absence, arguably, distinguishes lawyers.

The veterinarian in Hopper had agreed not to engage in the "practice of small animal medicine" for three years within a five mile radius of the Laramie corporate limits. This restriction did not prevent the veterinarian from engaging in large animal medicine, and did not, therefore, prevent Dr. Hopper from earning a living as a veterinarian without relocating. While it would be possible for an agreement among lawyers to specify practice areas, the more common agreement will be not to engage in the practice of law. The breadth of such an agreement may make it unenforceable.

Another factor in the Hopper case seems to favor enforcing no-compete agreements among lawyers. The court noted that the covenant at issue did not harm the public. Dr. Hopper's services, said the court, were "neither unique nor uncommon," and were available elsewhere in Laramie. Lawyers are much more common than veterinarians. Accordingly, it is hard to make a compelling case that a lawyer's services are unique, and lawyers are certainly not uncommon.

It is difficult to distinguish lawyers from other professions, and the ethical prohibition on lawyers' no-compete agreements has often been criticized. Nevertheless, two considerations suggest that such agreements will not be enforced. First, the Wyoming Supreme Court has relied on lawyers' ethical standards in determining how lawyers should behave. The clear prohibition in Rule 5.6(a) will likely carry significant weight with the court. Second, the great weight of authority around the country is that such agreements are both unethical and legally unenforceable. Entering into an agreement which is clearly unethical and probably unenforceable is foolish at best.
Paragraph (b) of Rule 5.6 contains another restriction on lawyers' practice. A lawyer may not ethically agree to restrict his or her practice as part of a settlement agreement "between private parties." A lawyer may not, therefore, settle a client's case if part of the agreement is an agreement that the lawyer will not engage in certain practices, such as an agreement by a lawyer not to represent other plaintiffs against the same defendant.

Summary

Switching firms creates a host of ethical and legal conflict of interest issues. Many of them can be avoided if the departing lawyer and the remaining lawyers in the firm work cooperatively to notify clients and fulfill their joint obligations to their joint clients. Unfortunately, the dissolution of a firm almost inevitably engenders sufficient acrimony that it is difficult, at best, for the lawyers involved to work together to properly discharge their duties to their clients and each other.

While acrimony is common when a lawyer leaves a firm, the ethical and legal stakes are so high that the lawyers need to put aside their differences and cooperate. If they cannot, lawyers should be the first, not the last, to recognize the need to involve counsel to assist in the ethically and legally proper dissolution of the firm.

VIII. Support Staff Conflicts of Interest

Lawyers commonly employ, either permanently or temporarily, a support staff of secretaries, investigators, law student interns, and/or paraprofessionals. The employing lawyer is responsible, both legally and ethically, for the conduct of those employees, including their conflicts of interest.

Lawyers' ethical codes have long contained express provisions regulating lawyers' conflicts of interest. While they do not directly address support staff conflicts of interest, lawyers need to be as concerned about such conflicts as they are about their own. The reason is that support staff conflicts threaten clients' expectations of loyalty and confidentiality as much as do lawyers' conflicts. Accordingly, support staff conflicts of interest may lead to the same consequences: grievances (against the lawyer), disqualification (of the lawyer), and/or a malpractice action (against the lawyer).

500. Id. cmt. [2]. The ABA's Model Rules now provide an exception. ABA Model Rule 1.17, adopted in 1990, allows a no-compete agreement as part of the sale of a law practice. ABA Compendium of Professional Responsibility Rules and Standards 58 n. 8 (1997). See also ABA Model Rules Rule 5.6 cmt. [3]. The Wyoming Rules, which were adopted in 1986, have not been amended to include Rule 1.17, or any similar provision.


Not surprisingly, support staff conflicts of interest, whether professional or personal, represent a growing area of concern for lawyers and clients. While some of the standards which apply to support staff conflicts are the same as the standards which apply to lawyers, there are, at least arguably, important differences.

**Attorneys' Ethical Responsibilities for Non-lawyer Employees**

An attorney’s ethical responsibility regarding non-lawyer employees varies with the attorney’s status in a firm. A partner or supervisory lawyer (or sole practitioner) has a general responsibility to ensure that the firm makes “reasonable efforts to ensure” that the conduct of any nonlawyer employee “is compatible with the professional obligations of the lawyer.”\(^{503}\) An associate does not have that general obligation, but an associate who has “direct supervisory authority” over a nonlawyer employee must make “reasonable efforts” to ensure that the employee’s conduct is “compatible with the lawyer’s professional obligations.”\(^{504}\) The failure to satisfy these standards is, of course, a violation of the Rules which may lead to a sanction.

In addition to sanctions for improper supervision, lawyers may, under certain circumstances, be held responsible for employees’ misconduct. A lawyer “shall be responsible” for any conduct of [an] employee which would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer “orders or ... ratifies” the employee’s improper conduct, or if the lawyer is a partner in the firm or has direct supervisory authority over the employee and “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”\(^{505}\)

One of the ways a lawyer may discharge the supervisory obligation is through proper employee training. A lawyer who is responsible for the actions of employees “should give such assistants appropriate instructions and supervision concerning the ethical aspects of their employment ... .”\(^{506}\) That training should, at a minimum, include a discussion of the obligations of confidentiality and loyalty to clients.\(^{507}\) Both of those concepts, of course, include avoiding personal or professional conflicts of interest.

**Support Staff Conflicts of Interest**

Support staff conflicts of interest arise under the same circumstances as

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503. *Id.* Rule 5.3(a).
504. *Id.* Rule 5.3(b).
505. *Id.*
506. *Id.* Rule 5.3 cmt.
507. The lawyer should document the training to show that the supervisory obligation has been properly discharged.
lawyer conflicts of interest. Some arise concurrently; others arise successively.

1. Concurrent Conflicts.

A concurrent conflict arises when two or more clients have differing interests, or when the interests of a client and an employee are divergent. The interest may be professional or personal.

The Utah State Bar Ethics Advisory Committee recently addressed the conflict which arose when a law firm represented a criminal defendant and an investigator employed by the firm was a potential witness for the prosecution in the same matter. The committee said that the firm’s representation of the client would be materially limited by the employing lawyer’s having to impeach the firm’s employee. Accordingly, Utah Rule 1.7 (which is identical to Wyoming’s Rule 1.7) precluded the firm from the representation because of the material limitation created by the investigator’s conflict of interest. Similarly, the Illinois State Bar Association has issued an advisory opinion saying that it is improper for assistant public defenders who share an office to represent joint defendants when they also share secretarial and investigatory staff.

Impermissible conflicts may also arise in civil cases. For example, it is improper for a lawyer to sue a government agency when one of the lawyer’s part-time employees is a member of the board that governs the agency.

The rule which emerges is simple. Support staff concurrent conflicts are essentially the same as lawyer conflicts. A firm’s conflict checking should, therefore, include every employee of the firm, not just the lawyers.

2. Successive Conflicts

Perhaps the most easily overlooked support staff conflicts result from previous employment. Just as a lawyer who switches firms may disqualify the new firm from representation because of the lawyer’s previous association, an employee who switches firms may cause the same result.

When a lawyer switches firms, the new firm may not continue to represent a client if: (1) the lawyer’s previous firm represented a client in a mat-

509. Id.
510. Illinois State Bar Advisory Opinion on Professional Conduct, Opinion No. 91-17. There may also be an impermissible conflict whenever two members of a public defender’s office represent co-defendants in a criminal case. Compare Okeasi v. Arizona, 871 F.2d 727, 729 (Ariz. App. 1994) (holding that Maricopa County Public Defender’s office is a firm for purposes of conflicts of interest); and People v. Banks, 520 N.E.2d 617, 620-21 (Ill. 1987) (holding that public defender’s offices are unlike private law firms for purposes of conflicts of interest).
511. Illinois State Bar Association, Advisory Opinion No. 95-09
ter which is substantially related; (2) the interests of the former firm’s client and the new firm’s client are materially adverse; and (3) the lawyer switching firms obtained confidential information material to the representation. The conflict may be waived by the former client unless the former client is a governmental entity. When it comes to support staff employees, however, some authorities impose a less rigid rule.

The American Bar Association’s Committee on Ethics and Professional Responsibility has addressed the disqualification of a firm because of a nonlawyer who switches firms. According to the ABA, a law firm which employs a nonlawyer who formerly worked for another firm, and who has confidential information about a former client whose interests are adverse to a client of the new firm’s, may continue representing a client whose interests conflict with the interests of a client of the former firm, as long as: (1) the new firm screens the nonlawyer from participating in matters involving those clients; and (2) the nonlawyer does not disclose any information about those clients to the new firm. A number of courts have applied a similar standard.

In Kapco v. C & O Enterprises, Inc., a two-attorney firm (the old firm) moved to disqualify a law firm (the new firm) which represented a party with opposing interests and which had hired the old firm’s secretary. The court denied the motion because the new firm had been able to show “clearly and effectively” that the secretary had not shared confidential information. The Kapco court’s analysis illustrates both the similarities and differences between how lawyers and non-lawyers are treated.

The first step is identical. Is there a “substantial relationship” between matters at the old firm and matters at the new firm? If so, there is a presumption that the nonlawyer employee (or lawyer) had access to confidential information. The second step is also the same. Has that presumption of access to information been rebutted? The standard now changes. For lawyers, the failure to rebut that presumption results in disqualification of the new firm, unless the client consents. For nonlawyer employees, however, the failure to rebut the presumption simply results in a second presumption,

512. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) (LEXIS 1999); see also discussion at supra notes 434 - 439 and accompanying text.
513. Id. Rule 1.9(a). A former client’s waiver of a conflict is not effective unless made “after consultation.” Id.; see also id. cmt. [10].
516. Id. at 1238-39; see also Makia Corp. v. United States, 819 F. Supp. 1099, 1104 (Ct. Int’l Trade 1993); Grant v. The Thirteenth Court of Appeals, 888 S.W.2d 466 (Tex. 1994), and Phoenix Founders, Inc., v. Marshall, 887 S.W.2d 831 (Tex. 1994).
517. WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) cmt. [9] (LEXIS 1999). The new firm is disqualified “when the lawyer involved has actual knowledge” of confidential information. Id.; see also supra notes 434 - 439 and accompanying discussion.
the employee has shared or will share confidential information with the new firm. Even that presumption may be rebutted. The rebuttal must, however, be made "clearly and effectively." If that can be done, the new firm may continue the representation, even though the new employee has confidential information about clients of the old firm.

The difference in the standards is based on two intriguing, often unspoken, assumptions. First, that a lawyer who has confidential information acquired during former employment will not maintain that confidentiality; the risk that he or she will pass on the information to the new firm is so great that the only solution is disqualification. Second, a nonlawyer employee who has confidential information from former employment will preserve client confidences. The assumption that non-professionals, who are usually not subject to codes of ethics (paralegals generally are518), are more trustworthy and that client confidences are secure despite a change of employment, seems unwarranted. For as one court has noted, "a nonlawyer would be more likely to reveal confidential information because he or she might not be as sensitive to the need to safeguard the information as would be an attorney."519

In an unsatisfactory attempt to explain the disparate treatment of lawyers and nonlawyers, the ABA says there are "additional considerations" which suggest that nonlawyers should be treated differently than lawyers. Those considerations are: (1) nonlawyer employees should have "as much mobility in employment opportunity as possible consistent with the protection of clients' interests,"520 and (2) Rule 5.3 imposes supervisory obligations on the lawyers; these obligations include appropriate admonitions to nonlawyer employees which will help protect clients' expectations. It is unclear, however, why such considerations do not apply with equal force to lawyers. Neither of the ABA's proffered reasons satisfactorily explains why clients' confidences are safe when a nonlawyer employee switches firms.

The ABA's opinion has important limits. There are two circumstances where a nonlawyer's former employment should result in disqualification of the new firm: (1) information from the employee has been disclosed to the lawyers in the new firm; and/or (2) screening of the new employee would be ineffective. The ABA does not elaborate on the latter point, but it seems that screening will, necessarily, be less effective in a small firm where the

518. See National Federation of Paralegal Associations Model Code of Ethics and Professional Responsibility Canon 8 (stating that a paralegal shall avoid conflicts of interest . . . ); and National Association of Legal Assistants Canon 9 (stating that a legal assistant's conduct is guided by bar associations' codes of professional responsibility . . . ).
employee will have access and be expected to work on all the firm’s files.\textsuperscript{521}

Not all courts agree with the ABA’s relaxed rule for support staff. In\textit{Williams v. Trans World Airlines, Inc.},\textsuperscript{522} for example, the court refused to apply a different standard to nonlawyers. The only way to protect clients’ expectations of privacy and to preserve public trust in the administration of justice, said the court, is to “subject . . . ‘agents’ of lawyers to the same disability lawyers have when they leave legal employment with confidential information.”\textsuperscript{523} Similarly, the Nevada Supreme Court has expressly rejected the ABA’s opinion.\textsuperscript{524}

Ingrid Decker was a legal secretary.\textsuperscript{525} Early in 1995, she went to work for Thorndal, Backus, Armstrong & Balkenbush, a law firm which represented the Ciaffones in a wrongful death case against Skyline Restaurant. Although she worked for the firm for several months, she was only tangentially involved in the Ciaffone matter. In September of the same year, Ms. Decker became a legal secretary for Gullock, Koning, Markley & Killebrew, the firm which represented Skyline in the case involving Ciaffone. Although the new firm “screened” Decker from the Ciaffone matter, the Thorndal firm, her former employer, moved to disqualify Decker’s new employer because Decker had switched employment. The motion was granted and the firm appealed.

The Nevada Supreme Court concluded that nonlawyer employees who switch firms “are subject to the same rules governing imputed disqualification” as are lawyers.\textsuperscript{526} Accordingly, screening of nonlawyer personnel is not ethically sufficient. The reason is simple, “[t]o hold otherwise would grant less protection to the confidential and privileged information obtained by a nonlawyer than that obtained by a lawyer.”\textsuperscript{527} Such a result would be contrary to a client’s reasonable expectations of confidentiality and the Nevada rules.

The Nevada rule regarding a lawyer’s responsibilities for nonlawyer employees is the same as Wyoming’s. A supervisory lawyer or a sole practitioner “shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compati-

\begin{footnotesize}
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\item \textsuperscript{521} When it comes to lawyers’ access to client information, the Wyoming Rules suggest a functional test because access to information is “essentially a question of fact.” \textit{WYOMING RULES OF PROFESSIONAL CONDUCT} Rule 1.9 cmt. [7] (LEXIS 1999). Lawyers in small firms may have “general access to files of all clients,” whereas lawyers in a large firm may have access only to a “limited number of clients.” \textit{id.} Such a test, it seems, should apply with equal force to nonlawyer employees.
\item \textsuperscript{522} \textit{588 F. Supp. 1037} (W.D. Mo. 1984).
\item \textsuperscript{523} \textit{id.} at 1044.
\item \textsuperscript{524} Ciaffone \textit{v. Eighth Judicial District Court of the State of Nevada}, 945 P 2d 950 (Nev. 1997).
\item \textsuperscript{525} \textit{id.} at 951.
\item \textsuperscript{526} \textit{id.} at 952.
\item \textsuperscript{527} \textit{id.}
\end{itemize}
\end{footnotesize}
ble with the professional obligations of the lawyer.”528 That rule, said the court, means that lawyers and nonlawyers should be subject to the same standards for disqualification.529

The approach of the Nevada Supreme Court is far better than the ABA’s because it promotes the confidentiality of the attorney-client relationship, a relationship which the Nevada Supreme Court accurately described as “sacrosanct.”530 It cannot be protected unless the same standards apply to lawyers and nonlawyers. Accordingly, when faced with a motion to disqualify a law firm because a lawyer or nonlawyer has switched sides, a trial court has a “duty” to disqualify if necessary to protect the confidentiality of that relationship.531

**Lawyers’ Responsibilities When Hiring Non-lawyer Employee**

As usual, there is no Wyoming authority on point. The safer approach is, naturally, to apply the standard articulated in the Williams case; nonlawyer employee conflicts of interest should be treated just as lawyer conflicts are. Since there is substantial authority for a different standard, Wyoming lawyers should, at a minimum, follow the employer guidelines established by the ABA.

Rule 5.3, discussed above, makes lawyers responsible for certain conduct of nonlawyer employees. That supervisory responsibility imposes duties on both the lawyer who hires a nonlawyer employee from another law firm and the former employer.532

Upon learning that a former employee has become employed by another law firm, the former employer should “consider advising the employing firm that the [employee] must be isolated from participating in [any] matter” in which clients of the former firm are involved as adverse parties.533 If the former employer is not satisfied that the new firm has taken adequate measures to prevent the employee from participating in or disclosing information about the former firm’s clients, the lawyer should consider filing a motion to disqualify the new firm from representation in any adverse matters. Lawyers should note that their obligation to protect their clients’ reasonable expectations of confidentiality seems to require that they take appropriate steps when an employee leaves the firm, not simply that they “consider” doing so.

528. *Id.* (quoting Nevada SCR 187, which is identical to Wyoming Rule of Professional Conduct 5.3(b)).
529. *Id.*
530. *Id.* at 952.
531. *Id.*
533. *Id.* at 3.
The new employer also has obligations. He or she should: (1) admonish a new employee to be alert for any legal matters in which the new employee may have been involved in former employment; and (2) if such a matter arises, the new employee "should be cautioned" not to disclose any information gained while with the former employer, and not to work on any matter in which he or she was previously involved.

If a motion to disqualify the new firm comes before the court, the new firm will have to be able to prove what steps it took to fulfill its obligations. The ultimate question will be how it "clearly and effectively" prevented the dissemination of information from the new employee. In a typical Wyoming firm, that may be impossible. If the firm secretary has access to all files, and works on all cases in the firm, it will be difficult to show that he or she has been effectively screened from the case at issue. Even if the new firm is able to show that it discharged its obligations in accord with the ABA's guidelines (and cases such as Katco), a Wyoming court may choose to adopt the view expressed in the Williams case. That is, the only way to protect former clients' reasonable expectation of confidentiality is to hold nonlawyers to the same standards that apply to lawyers who leave employment with confidential information. 538

Imputed Disqualification

A theme which emerges from support staff conflict of interest opinions is that the imputed disqualification rules apply to support staff, not just to attorneys. The safer approach, therefore, is for lawyers to assume that the same personal or professional circumstances which would give rise to a conflict of interest for an attorney will create a conflict of interest (for the lawyer or law firm) when a nonlawyer employee is involved.

Every law firm should take the following three steps to avoid support staff conflicts of interest which may be imputed to the firm. First, the firm's conflict system should be broadened to include all the firm's employees, not just the lawyers. Second, when the firm hires a nonlawyer employee or a lawyer, even temporarily, it should perform a conflicts check, regardless of whether the new employee has worked for another firm (there may be some other personal or professional conflicts). Third, the firm should develop a training program to inform support staff personnel about conflicts of interest. 539

534. Id.
535. 588 F. Supp. at 1044.
536. See WYOMING RULES OF PROFESSIONAL CONDUCT Rule 1.10 (LEXIS 1999).
537. A partner in a law firm, a solo practitioner, or a supervisor in an organizational setting, such as a government law office, must "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the [nonlawyer's] conduct is compatible with the professional obliga-
IX. CONCLUSION

Potential conflicts of interest and actual conflicts are inevitable. The only way to avoid them altogether is to stop practicing. Fortunately, avoiding conflicts is neither ethically nor legally required. Instead, lawyers must detect potential and actual conflicts, and then respond properly. Detecting conflicts depends on creating and maintaining a conflicts database. After a conflict is detected, the proper response contains several possible steps. First, the conflict must be evaluated and classified. Second, if the conflict is \textit{de minimus}, it need not be disclosed (though the lawyer may wish to) and representation may continue. Third, if the conflict cannot be waived, i.e., a disinterested lawyer would find waiver to be inappropriate, the lawyer must not accept the client or must withdraw from representation. Fourth, if the conflict may be waived, it must be disclosed to the affected party or parties, and their consent may be sought after consultation about the consequences and potential consequences of the conflict and waiving the conflict. Finally, while disclosure and waiver are not required to be in writing unless the conflict involves a business transaction, they should be.

Anything which threatens a client's reasonable expectations of loyalty and confidentiality is a potential conflict, if not an actual one. The circumstances which may give rise to a conflict are, therefore, limitless. And while this article cannot begin to describe all of the myriad of conflicts which lawyers may confront, the general principles for detecting, evaluating, and responding to conflicts apply, regardless of the circumstances.