PROFESSIONAL RESPONSIBILITY FINAL EXAMINATION

PROFESSOR NIVALA
TIME LIMIT: 2 HOURS

This exam consists of 4 pages (including this sheet). There are two questions totaling 200 possible points. Question 1 is worth 80 points, Question 2 is worth 120 points.

The only material you will be allowed to use is the Model Rules of Professional Conduct which accompany this examination.

Please write legibly using blue or black ink. Write on every other line. You may use both sides of a page. Start each new question in a new bluebook; make sure that you include your exam number and the question number on each bluebook.

PROFESSIONAL RESPONSIBILITY FINAL EXAMINATION

PROFESSOR NIVALA SPRING 1996

Ouestion 1 80 Points

You are an associate in the Washington, D.C. office of the law firm of Abel & Baker, a multi-city law firm. Roberts Ltd. is a coal silo construction general contractor which, in January, 1996, retained attorney Robert Zimmerman of Charleston, West Virginia, regarding the collapse of a silo built by its subcontractor, Cantfall, Inc. in West Virginia. The silo was completed in January, 1995 and collapsed in May, 1995. Cantfall was insured by Failsafe Insurance Company.

In June, 1995, Failsafe hired Daniel Dowell, an attorney in Abel & Baker's Charleston, West Virginia office, to evaluate whether Failsafe was obligated to defend Cantfall under the terms of its policy. After reviewing materials supplied by Failsafe, Mr. Dowell concluded that Failsafe was obligated to do so. In July, 1995, Failsafe retained the firm of Moore & Moore to represent Cantfall in any disputes arising from the silo collapse.

In April, 1996, Abel & Baker announced a long-proposed merger with the firm of Reight & Wright; Robert Zimmerman was designated as an "of counsel" member of Reight & Wright. This designation was retained in the public announcement of the merger which also said that the two firms would practice under the name of Abel & Baker.

You are currently assigned to work with Melissa Sylvester, the Abel & Baker partner responsible for resolving questions of professional responsibility within the firm. The above facts were disclosed when merging the client lists of Abel & Baker and Reight & Wright. Ms. Sylvester wants a memo from you discussing issues raised by this situation including your recommendation for a course of action. Consider only issues arising under the Rules of Professional Responsibility which accompany this examination.

Ouestion 2 120 Points

Attorney Alan Allswell has a family relations practice in Xerxes County, the most heavily populated county in our state. In 1993, Debra Doe, a pregnant unmarried adult, was referred to Allswell by her doctor for purposes of facilitating the adoption of her child. Allswell assisted Doe in selecting Mr. and Mrs. Fairgood as the adopting family. The Fairgoods were long-time clients of Allswell.

Allswell discussed the nature and consequences of adoption with Doe, helped her obtain information necessary for the adoption, helped her prepare the necessary paperwork, and, upon birth of the baby, prepared the surrender papers, obtained the necessary medical information, and coordinated physical transfer of custody. Doe later appeared before the proper court accompanied by Allswell and affirmed the surrender of her child and executed the consent necessary to complete the adoption.

In 1994, Zelma Zoe, a pregnant unmarried minor, was referred to Allswell by her doctor for purposes of facilitiating the adoption of her child. Allswell met with Zoe and her father on several occasions to review the background of prospective adopting parents, all of whom were present or past clients of Allswell. Zoe and her father both claim that Allswell stated that he would represent Zoe in this adoption. Zoe selected Mr. and Mrs. Wrightways as the adopting family; the Wrightways had retained Allswell in 1993 to help them adopt a child.

Allswell advised Zoe regarding the nature and consequences of adoption, answered her questions, and advised her regarding the procedures to be followed. He also paid for her hospital stay by making disbursements through his escrow account. After the baby was born, Zoe went to Allswell's office and signed an extra-judicial consent form which Allswell then filed with the proper court. Such consents are accepted when the best interests of the child require it; our appellate courts have specifically validated such consents in cases involving unmarried minor mothers.

You are a staff attorney for our state's Attorney Grievance Commission. Doe and Zoe have both filed complaints against Allswell. Discuss the issues of professional responsibility raised by these facts, limiting your discussion to those issues arising under the Rules of Professional Responsibility which accompany this examination.

Page 1

In the Matter of Stanley B. MICHELMAN, an Attorney and Counselor-at-Law. Grievance Committee for the Ninth Judicial District, Petitioner; Stanley B. Michelman, Respondent.

Supreme Court, Appellate Division, Second Department.

Sept. 12, 1994.

In disciplinary proceeding, the Supreme Court, Appellate Division, held that representing and/or advising both adoptive parents and biological mother in two private placement adoptions, and misleading biological mother regarding availability of open adoptions in state warrants three-year suspension from practice of law.

So ordered.

Representing and/or advising both adoptive parents and biological mother in two private placement adoptions, and misleading biological mother regarding availability of open adoptions in state, warrants three-year suspension from practice of law. Code of Prof.Resp., DR 1-102, subd. A, par. 4, DR 5-104, subd. A, par. 2, DR 5-105; DR 1-102, subd. A, par. 7 (now par. 8).

**409 *87 Gary L. Casella, White Plains (Maryann Yanarella, of counsel), for petitioner.

Herzfeld & Rubin, New York City (Emanuel Gold, of counsel), for respondent.

Before *92 MANGANO, P.J., and THOMPSON, SULLIVAN, LAWRENCE and J. O'BRIEN, JJ.

*88 PER CURIAM.

In this proceeding, the respondent was charged with six allegations of professional misconduct. The Special Referee sustained all six charges. The Grievance Committee now moves to confirm the report of the Special

Referee and the respondent cross-moves to reject the findings of the Special Referee and to dismiss the charges against him. These charges stem from the respondent's conduct in connection with two separate private placement adoptions. Charges One and Two arise from an adoption brought in the Westchester County Surrogate's Court and Charges Three through Six arise from an adoption brought in the Nassau County Family Court.

Charge One of the petition alleged that the respondent engaged in an impermissible conflict **410 of interest by representing and/ or advising both adoptive parents and the biological mother in a private placement adoption in violation of Code of Professional Responsibility, DR 5-105. In or about 1987, a biological mother was referred to the respondent by a medical doctor and the respondent assisted the biological mother in selecting adoptive parents who were his The respondent represented the clients. adoptive parents in the private placement Westchester adoption in the Surrogate's Court. The respondent discussed the nature and consequences of adoption with the biological mother, obtained background information from her, and prepared various documents to forward to the biological mother concerning her health, family history, and the history of the birth father. The respondent also prepared and forwarded to the biological mother documents she would be required to execute after the birth of her child. Upon the birth of the child, the respondent prepared the surrender papers for execution by the biological mother. obtained information, and coordinated arrangements to obtain custody.

The respondent arranged for his associate to be present when the biological mother surrendered custody of the child. The associate advised the biological mother of the information contained in the affidavit of consent and supervised execution of the surrender documents. The respondent attempted to schedule a court appearance for the biological mother to reaffirm her consent to the adoption.





By decision of the Surrogate's Court, Westchester County, dated October 28, 1988, the appearance of the biological *89 mother and her judicial consent were dispensed with in the best interests of the child and the extrajudicial consent was accepted to satisfy the requirement of the biological mother's consent.

Upon ascertaining the circumstances under which the extra-judicial consent and affidavit was executed, the court sua sponte recalled the decision of October 28, 1988, which dispensed with the biological mother's in-court consent. The court appointed an attorney to advise the biological mother of her rights, to inform her of the consequences of the execution of a consent to the adoption, and to represent her in the adoption proceeding. The attorney thereafter located the biological mother, who appeared in court on February 8, 1990, to affirm the surrender of her child and to execute a judicial consent.

Charge Two alleged that the respondent gave advice to a person who was not represented by a lawyer where the interests of that person were or had a reasonable possibility of being in conflict with the interests of his client in violation of Code of Professional Responsibility, DR 7-104(A)(2), based on the factual allegations set forth in Charge One.

Charge Three alleged that the respondent engaged in an impermissible conflict of interest by representing and/or advising both the adoptive parents and the biological mother in a private placement adoption in violation of Code of Professional Responsibility, DR 5-105. In or about December 1989, the biological mother in a private placement adoption, which was later finalized in the Nassau County Family Court, was referred to the respondent by a medical doctor. The respondent met with the biological mother on several occasions and reviewed the background of several prospective adoptive parents with her. According to testimony of the biological mother and her father, the respondent expressly stated that he would represent the biological mother in this adoption.

respondent arranged for telephone communications between the biological mother and the adoptive parents, who were his clients.

The respondent advised the biological mother regarding the nature and consequences of adoption, answered her questions, advised her regarding the potential availability of "open adoptions," and discussed with her various procedures that would occur depending upon whether she decided to give birth in New York or New Jersey. respondent arranged for the *90 biological mother's room and board. Disbursements on behalf were made through respondent's escrow account.

Upon learning that the biological mother had been admitted to a medical facility in New Jersey where she gave birth, the respondent **411 coordinated arrangements for the adoptive parents to obtain physical custody of the child. On or about February 23, 1990, the day after the child's birth, the biological mother went to the respondent's office and signed an extra-judicial consent and other documents prepared by the respondent for her signature. The respondent answered any questions the biological mother and/or her parents had regarding these documents. According to the testimony of the biological mother and her father, the respondent stated for the first time that he was representing the adoptive parents and was not representing the biological mother.

Charge Four alleged that the respondent has been guilty of conduct involving dishonesty, fraud, deceit or misrepresentation and/or engaging in conduct which adversely reflects on his fitness to practice law in violation of Code of Professional Responsibility DR 1-102(A)(4) and (former [6]) then applicable (now [8]). The respondent was retained by the adoptive parents in March 1989 with respect to the private adoption involved in Charge Three. The respondent knew or should have known that his conduct would and did lead the biological mother to believe that the respondent was representing her.





(Cite as: 202 A.D.2d 87, *90, 616 N.Y.S.2d 409, **411)

Charge Five alleged that the respondent gave advice to a person who was not represented by a lawyer where the interests of such person were or had a reasonable possibility of being in conflict with the interests of his client in violation of Code of Professional Responsibility, DR 7-104(A)(2) based on the factual allegations of Charge Three.

Charge Six alleged that the respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Code of Professional Responsibility, DR 1-102(A)(4) based on the factual allegations contained in Charge Three. The respondent misled the biological mother regarding the availability of "open adoptions" in New York State.

Upon review of the evidence adduced, we conclude that the Special Referee properly sustained all six charges. Accordingly, the petitioner's motion to confirm is granted and the respondent's cross motion is denied in its entirety.

In determining an appropriate measure of discipline to impose. the respondent emphasizes that the underlying adoptions *91 were completed successfully in that both adoptive parents and biological mothers were satisfied with the outcomes. The respondent further accuses former Surrogate Brewster of the Surrogate's Court, Westchester County, of harboring baseless antagonism against him and denies that he purposefully made misrepresentations before the Surrogate's Court. The respondent is nevertheless guilty of serious professional misconduct. He has been the subject of three Letters of Admonition from the petitioner and has received several other warnings as well.

On March 20, 1974, the Chairman of the Committee on Grievances of the Association of the Bar of the City of New York notified the respondent that the Committee determined not to present formal charges to the petitioner but advised the respondent that his representation of adoptive parents in proceedings in which his former law associates represent the biological mother was improper and should not be engaged in. The respondent was advised that if the Grievance Committee received a substantiated complaint improper conduct on his part at some future date, the matter would be reopened. respondent acknowledged receipt of the aforesaid letter and agreed to comply with the proscriptions.

In a decision dated December 3, 1987, the Honorable Mara T. Thorpe of the Family Court, New York County, before whom the respondent had appeared, discussed the inescapable conflict of interest between the two sets of parents in a private placement adoption (Matter of Male D., 137 Misc.2d 1016, 523 N.Y.S.2d 369). The respondent acknowledged receipt of a copy of this decision.

Two decisions from former Westchester County Surrogate Evans Brewster, dated July 17 and July 19, 1989, respectively, expressly point out the impropriety of representing or advising both the adoptive parents and biological mother in a private placement adoption. Surrogate Brewster noted that the attorney for the adoptive parents has an affirmative obligation to instruct the birth **412 mother on both her right to and her need for independent counsel. She should also be advised that reasonable attorney's fees will be paid by the adoptive parents in the event she cannot afford counsel. Surrogate Brewster referred the respondent's conduct in the Westchester adoption to the Grievance Committee.

Two Letters of Admonition were issued to the respondent on *92 or about May 3, 1990, for conduct similar to that in the two adoption matters underlying the instant disciplinary proceeding. In each case, the Grievance Committee considered and rejected the respondent's position that the adoption could not have gone forward because the birth mother did not wish to have independent According to the Grievance counsel. Committee, the respondent's actions could have seriously jeopardized his clients' interests inasmuch as the consent of the





biological mothers under these circumstances has been held to be insufficient.

On February 8, 1994, the Grievance Committee admonished the respondent for engaging in deceitful conduct before this court regarding his appeals from orders of the Surrogate's Court, Westchester reducing his fees in adoption matters.

In an order dated April 6, 1992, this court found that the respondent had included in his appendix on appeal certain "Time Preparation and Record-Keeping" sheets which were dehors the record and which had not been submitted to the Surrogate's Court in connection with his application for attorney's The respondent failed to take any remedial steps to correct this court's reliance upon those documents.

Under the circumstances, the respondent is suspended from the practice of law for three years.

ORDERED that the petitioner's motion to confirm the report of the Special Referee is granted; and it is further,

ORDERED that the respondent's cross motion to reject the findings of the Special Referee to dismiss the charges against him is denied; and it is further,

ORDERED that the respondent, Stanley B. Michelman, is suspended from the practice of law for a period of three years, commencing October 13, 1994, and continuing until the further order of this court, with leave to the respondent to apply for reinstatement no sooner than six months prior to the expiration of the said period of three years, upon furnishing satisfactory proof (a) that during the said period he refrained from practicing or attempting to practice law, (b) that he has fully complied with this order and with the terms and provisions of the written rules governing the conduct of disbarred, suspended and resigned attorneys (22 NYCRR 691.10). and (c) *93 that he has otherwise properly conducted himself; and it is further,

ORDERED that pursuant to Judiciary Law § 90, during the period of suspension and until the further order of this court, the respondent Stanley B. Michelman shall desist and refrain (1) from practicing law in any form, either as principal or agent, clerk or employee of another, (2) from appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission or other public authority, (3) from giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) from holding himself out in any way as an attorney and counselor-at-law.

END OF DOCUMENT





(Cite as: 898 F.Supp. 356)

ROBERTS & SCHAEFER COMPANY, a corporation, and Mingo Logan Coal Company, a corporation, Plaintiffs,

SAN-CON, INC., a corporation, Defendant and Third-Party Plaintiff,

GLEN ROARK CONSTRUCTION CO., and Ultrasonic Specialists, Inc., a corporation, Third-Party Defendants.

Civ. A. No. 3:94-0832.

United States District Court, S.D. West Virginia, Huntington Division.

Sept. 14, 1995.

In action against contractor for professional negligence, contractor moved to disqualify plaintiff's attorney. The District Court, Goodwin, J., held that attorney was disqualified, by conflict of interest, from representing client, in action by client against contractor for professional negligence.

Motion granted.

[1] ATTORNEY AND CLIENT **21.15** 45k21.15

Attorney was disqualified, by conflict of interest, from representing client, in action by client against contractor for professional negligence, where attorney's law firm was hired by contractor's insurer to evaluate the dispute, even though attorney was of counsel rather than a partner and prior representation took place before merger of attorney's former firm with attorney's current firm. W.Va.Rules of Prof.Conduct, Rule 1.7(a).

[2] ATTORNEY AND CLIENT \$\infty\$ 21.15 45k21.15

Attorney's characterization of himself "of counsel" to law firm is insufficient to avoid having that law firm's conflicts of interest imputed to attorney. W.Va.Rules of Prof.Conduct, Rule 1.10.

[3] ASSOCIATIONS ← 1 41k1

"Association" is the act of a number of persons uniting together for some special purpose or business.

See publication Words and Phrases for other judicial constructions and definitions.

[4] ATTORNEY AND CLIENT **21.15** 45k21.15

Rule of professional conduct permitting law firms to set up screening procedures around former government attorneys with confidential government information does not apply to private attorneys. W.Va.Rules of Prof.Conduct, Rule 1.11(b).

*357 Daniel A. Ruley, Jr., Ruley & Everett, Parkersburg, WV, Robert J. Franco, Bollinger, Ruberry & Garvey, Chicago, IL, for Roberts & Schaefer Co. and Mingo Logan Coal Co.

Paul K. Vey, Pietragallo, Bosick & Gordon, Pittsburgh, PA, for San-Con, Inc.

John L. MacCorkle, Meyer, Darragh, Buckler, Bebenek & Eck, Charleston, WV, for Glen Roark Const. Co.

George N. Stewart, Zimmer Kunz, Pittsburgh, PA, for Ultrasonic Specialists, Inc.

MEMORANDUM OPINION AND ORDER

GOODWIN, District Judge.

[1] Pending before the Court is the motion of the defendant San Con, Inc. (San Con) to disqualify Daniel A. Ruley, Jr. and the law firm of Steptoe & Johnson as counsel for the plaintiffs Roberts & Schaefer Company (Roberts & Schaefer) and Mingo Logan Coal Company (Mingo Logan). The Court finds that Mr. Ruley's continued representation of the plaintiffs presents a conflict of interest. The Court therefore concludes that absent a waiver of the conflict of interest by San Con, Mr. Ruley and Steptoe & Johnson are disqualified from continuing to represent the plaintiffs.





(Cite as: 898 F.Supp. 356, *357)

I. Background

Roberts & Schaefer hired San Con as a subcontractor to build a coal storage silo for Mingo Logan. Within a year after San Con completed work on the silo, the silo collapsed. This case addresses liability for that collapse.

After the silo's collapse but before this lawsuit, Mt. Hawley Insurance Company (Mt. Hawley), San Con's insurer, hired the law firm of Steptoe & Johnson to evaluate the Mt. Hawley forwarded materials relating to San Con's role in the matter to James R. Watson, a partner in Steptoe & Johnson. Mr. Watson's office is in Charleston, West Virginia. Not realizing that Steptoe & Johnson had a conflict of interest because of its ongoing representation of Roberts & Schaefer (not the precise subject of this motion to disqualify), [FN1] Mr. Watson agreed to review the matter for San Con. Mr. Watson performed the requested review *358 and then prepared and forwarded an evaluation letter to San Con and its insurer Mt. Hawley.

FN1. Apparently, Steptoe & Johnson conducted a conflict-of-interest determination, pursuant to the requirements of Rule 1.7 cmt. of the West Virginia Rules of Professional Conduct (W.Va.R.Prof.Conduct), but failed to discover the conflict because Steptoe & Johnson previously had listed Roberts & Schaefer under the name of its parent company, Jupiter Industries, Inc.

Thereafter, Roberts & Schaefer contacted Steptoe & Johnson about representing Roberts & Schaefer in its dispute with San Con over liability for collapse of the silo. Only at this point did Steptoe & Johnson discover the original conflict of interest that should have precluded Steptoe & Johnson representing San Con in the first place. [FN2] Mr. Watson and Steptoe & Johnson then withdrew from their representation of San Con. [FN3] Steptoe & Johnson likewise declined to represent Roberts & Schaefer and Mingo Logan because of Mr. Watson's former representation of San Con in this precise matter.

FN2. W.Va.R.Prof.Conduct 1.7(a) precluded Mr. Watson from continuing to represent San Con absent consent. Rule 1.7(a) provides: A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation.

FN3. W.Va.R.Prof.Conduct 1.16(a)(1) mandates withdrawal when continued "representation will result in violation of the rules of professional conduct...."

Shortly after Steptoe & Johnson's withdrawal, San Con retained its current counsel Pietragallo, Bosick & Gordon. Roberts & Schaefer hired Daniel A. Ruley, Jr., then a partner in the Parkersburg, West Virginia law firm of Ruley & Everett. Mr. Ruley filed this lawsuit on the plaintiffs' behalf. In May 1995, the law firms of Steptoe & Johnson and Ruley & Everett merged. The merger announcement stated in pertinent part:

The law firms of Steptoe & Johnson of Clarksburg, Charleston, Morgantown, Martinsburg, Charles Town, Wheeling, West Virginia and Hagerstown, Maryland and Ruley & Everett of Parkersburg, West Virginia are pleased to announce the merger of their practices under the name of Steptoe & Johnson[.]

A list of all the attorneys in the newly merged firm, including the name of Daniel A. Ruley, Jr., accompanied the announcement.

Before the formal merger announcement, Steptoe & Johnson, apparently believing that it otherwise would have to withdraw, wrote to San Con and its insurer Mt. Hawley requesting "a waiver of any conflict of interest in Ruley's continued employment" as counsel for the plaintiffs in this lawsuit. Before receiving a response, Steptoe & Johnson and Ruley & Everett merged. Shortly afterward, San Con declined to waive the conflict and requested that the plaintiffs obtain other counsel. Mr. Ruley and Steptoe & Johnson did





not step aside. Instead, in an effort to turn two "wrongs" into a "right," they filed a motion to determine that Mr. Ruley was not disqualified from continuing to represent the plaintiffs.

The Court declined to address the issue of disqualification in this initial motion. The Court concluded that absent a motion to disqualify, Mr. Ruley and Steptoe & Johnson should determine for themselves whether continued representation of the plaintiffs was proper. See West Virginia Rules of Professional Conduct (W.Va.R.Prof.Conduct) 1.7 cmt. Since that time, however, San Con has filed a motion to disqualify Mr. Ruley and Steptoe & Johnson from representing the plaintiffs. Thus the issue of disqualification is properly before the Court.

San Con bases its motion to disqualify Mr. Ruley and Steptoe & Johnson on the plain language of W.Va.R.Prof.Conduct 1.9 and 1.10. Mr. Ruley and Steptoe & Johnson argue, however, that their "of counsel" relationship W.Va.R.Prof.Conduct makes inapplicable. Alternatively, Mr. Ruley and Steptoe & Johnson argue that the Court should not strictly apply those rules in this case, but instead should permit them to continue to represent the plaintiffs because they have set up a "Chinese wall" around Mr. Watson and the information gained from San Con and its insurer Mt. Hawley. affidavit, Robert M. Steptoe, managing partner of Steptoe and Johnson, states that he advised Mr. Watson and Mr. Ruley not to discuss this litigation and instructed Mr. Watson to place his entire file in a safety *359 deposit box and to delete all related documents from Steptoe & Johnson's computers and word processing equipment. Mr. Ruley and Steptoe & Johnson believe that these safeguards should be sufficient to protect any confidential information from San Con, while permitting Mr. Ruley to continue to represent the plaintiffs.

II. Discussion

Rule 3.01 of this district's Local Rules of General Procedure provides that the [Rules] of Professional Conduct of the American Bar Association (ABA), the Model Federal Rules of Disciplinary Enforcement as adopted by this Court, and the [Rules] of Professional Conduct as adopted by the Supreme Court of Appeals of West Virginia provide the basic ethical considerations and disciplinary rules for the conduct of attorneys practicing in this Court. In reviewing San Con's motion to disqualify Mr. Ruley and Steptoe & Johnson, the Court is guided by the principle that motions to disqualify counsel should be viewed with extreme caution because of their potential as a method of harassment. W.Va.R.Prof.Conduct 1.7 cmt. On the other hand, disqualification is appropriate when representation of a client will result in the violation of the Rules of Professional Conduct orother law. W.Va.R.Prof.Conduct 1.16(a)(1).

The Court is also guided by the opinion of the United States Court of Appeals for the Fourth Circuit in United States v. Clarkson, 567 F.2d 270 (4th Cir.1977). In Clarkson, the Fourth Circuit stated:

In determining whether to disqualify counsel for conflict of interest, the trial court is not to weigh the circumstances "with hair-splitting nicety" but, in the proper exercise of its supervisory power over the members of the bar and with a view of preventing "the appearance of impropriety," it is to resolve all doubts in favor of disqualification. Neither is the court to consider whether the motives of counsel in seeking to appear despite his conflict are pure or corrupt; in either case the disqualification is plain.

Id. at 273 n. 3 (citations omitted). Although the Fourth Circuit enunciated this standard in an opinion that antedates both the ABA's and West Virginia's adoption of the Rules of Professional Conduct and placed this standard in a footnote, other courts, including the West Virginia Supreme Court of Appeals, continue to rely on this standard. See Rogers v. Pittston Co., 800 F.Supp. 350, (W.D.Va.1992), aff'd, 996 F.2d 1212 (4th Cir.1993); Stitz v. Bethlehem Steel Co., 650 F.Supp. 914, 916 (D.Md.1987); Garlow v. Zakaib, 186 W.Va. 457, 413 S.E.2d 112, 115-16 (1991).





(Cite as: 898 F.Supp. 356, *359)

The Court is aware that the comments to W.Va.R.Prof.Conduct 1.10 and the Model "appearance criticize the impropriety" standard referred to in Clarkson and originally contained in the ABA's Code of Professional Responsibility. The Court, however, does not believe that those criticisms are wholly valid. First, the comment to Rule 1.10 criticizes the "appearance of impropriety" standard for including "any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client." The Court believes that the standard includes an objective component and thus requires a showing that a reasonable former client would be concerned by the conflict. The "appearance of impropriety" standard should not be rejected, as the comment to Rule 1.10 implies, on the ground that it is subjective.

Second, the comment to Rule 1.10 criticizes the "appearance of impropriety" standard for failing to define impropriety. If anything, this criticism simply recognizes a weakness in all ethical regulation: a single set of rules cannot address all ethical dilemmas or violations. Just as "impropriety" cannot be defined with exactitude, neither can terms such as "substantially related matter" and "materially adverse."

A.

The plaintiffs concede that Mr. Watson, the Steptoe & Johnson attorney who originally reviewed the case for San Con, now is disqualified from representing the plaintiffs in this litigation by W.Va.R.Prof.Conduct 1.9. Rule 1.9 provides in relevant part:

*360 A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation....

Mr. Watson has represented San Con in the precise matter that is the subject of this

litigation, and the plaintiffs' interests are materially adverse to the interests of San Con. Watson therefore cannot represent the plaintiffs in this litigation regardless of "whether confidences were in fact imparted to [Mr. Watson] by [San Con or Mt. Hawley]" in the prior representation. Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980).

B.

[2] Despite conceding that Mr. Watson cannot represent them in this litigation, the plaintiffs argue that there is no conflict of interest because Mr. Ruley will be of counsel, not a partner, associate, or employee of Steptoe & Johnson. According to Mr. Ruley, "of counsel" status makes him an independent contractor to Steptoe & Johnson and the imputed disqualification rule inapplicable. On the record before the Court, this argument appears to be little more than a post hoc effort to deal with the conflict of interest caused by the merger of Steptoe & Johnson and Ruley & Everett. The merger announcement clearly lists Mr. Ruley as an attorney at Steptoe & Johnson. The comment to Rule 1.10 states: "[If [two practitioners] present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules." Once the merger occurred and Steptoe & Johnson and Ruley & Everett held themselves out as one firm with Mr. Ruley as an attorney in that firm, it was too late for the parties to recharacterize their relationship.

[3] Furthermore, even if Mr. Ruley characterizes himself as "of counsel" to Steptoe & Johnson, such an arrangement would be insufficient to avoid having Steptoe & Johnson's conflicts imputed to Mr. Ruley. Rule 1.10 applies to lawyers who are "associated" in a firm. Black's Law Dictionary defines "association" as "the act of a number of persons in uniting together for some special purpose or business." Id. at 111 (5th ed. 1979). Assuming that Mr. Ruley and Steptoe & Johnson intended to create an "of counsel" relationship, such was a combining for a special purpose and thus qualifies as an association within the meaning of Rule 1.10.





(Cite as: 898 F.Supp. 356, *360)

See Mustang Enters., Inc. v. Plug-In Storage Sys., Inc., 874 F.Supp. 881, 884, supplemented by 1995 WL 55226 (N.D.III.1995); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-388, pt. II (1994); Forest J. Bowman, "Affiliations"

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.

The plain language of both Rule 1.10(a) and 1.10(b) clearly preclude Mr. Ruley and Steptoe & Johnson from continuing to represent the plaintiffs. The plaintiffs do not dispute that San Con is a former client within the meaning of Rule 1.9. The plaintiffs similarly do not dispute that during his representation of San Con, Mr. Watson acquired confidential information protected by Rules *361 1.6 and 1.9(b), that the representation was in the same or a substantially related matter, or that San Con's interests are materially adverse to the plaintiffs' interests.

Rather, the plaintiffs argue that the provisions of Rule 1.10 are not as absolute as they first would appear. The plaintiffs cite the comments to Rule 1.10, the language of other

provisions in the Rules, and case law, as well as a trend to liberalize the rules of imputed disqualification as support for their proposition. The Court finds none of these arguments persuasive.

loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association....

A rule based on a functional analysis is more appropriate [than per se rules of disqualification or the "appearance of impropriety" standard] for determining the questions of vicarious disqualification.

The plaintiffs read this language as requiring the Court to conduct a functional analysis of the competing interests involved separate and apart from Rule 1.10 to determine whether screening procedures would be appropriate. The plaintiffs miss the point. Rule 1.10 is "[a] rule based on a functional analysis" and incorporates the competing interests within its language. As far as Rule 1.10(b) is concerned, for example, the balance of competing interests tips in favor of disqualification when member of the firm has acquired confidential information from the former client, the representation is in the same or a substantially related matter, and the interests of the former client are materially adverse to those of the new client: otherwise, the balance tips against disqualification.

2.





(Cite as: 898 F.Supp. 356, *361)

[4] The plaintiffs also p

[4] The plaintiffs also point to W.Va.R.Prof.Conduct 1.11(b), which permits law firms to set up screening procedures around former government attorneys with confidential government information, as support for their assertion that screening procedures would be appropriate in this case. [FN4] But Rule 1.11(b) merely illustrates that a functional approach to conflicts of interest may lead to different rules in different contexts. As the Second Circuit explained in Armstrong v. McAlpin, 625 F.2d 433, 443 (2d Cir.1980) (en banc), vacated on other grounds, 449 U.S. 1106, 101 S.Ct. 911, 66 L.Ed.2d 835 (1981):

FN4. W.Va.R.Prof.Conduct 1.12(c) permits similar screening procedures for law firms that hire former judges, arbitrators, and law clerks.

[Disapproval of screening procedures] may hamper the government's efforts to hire qualified attorneys; the latter may fear that government service will transform them into Marys," "Typhoid legal shunned prospective private employers because them may result in disqualification of an entire firm in a possibly wide range of cases.

Because of the differences between government-to-private-firm moves and private-firm-to-private-firm moves, the West Virginia Supreme Court of Appeals and the drafters of the Model Rules adopted different rules for these different types of moves. The fact that they chose to do so weakens, rather than strengthens, the plaintiffs' argument.

3.

The plaintiffs rely on INA Underwriters Ins. Co. v. Rubin, 635 F.Supp. 1 (E.D.Penn.1983), and Nemours Foundation v. Gilbane, Aetna, Federal Ins. Co., 632 F.Supp. 418 *362 (D.Del.1986), as support for their argument that screening is permissible in the private-firm-to-private-firm context. The Court agrees that Rubin and Nemours, although distinguishable, can be read as support for the plaintiffs' argument. The Court, however, notes that the majority of courts considering

this issue have rejected the approach taken by the Rubin and Nemours courts. See, e.g., Mustang Enters., Inc. v. Plug-In Storage Sys., Inc., 874 F.Supp. 881, 885, supplemented by 1995 WL 55226 (N.D.Ill.1995); United States v. Davis, 780 F.Supp. 21, 23-24 (D.D.C.1991); Lansing-Delaware Water Dist. v. Oak Lane Park, Inc., 248 Kan. 563, 808 P.2d 1369, 1377 (1991).

In Rubin, the conflict of interest arose because an attorney for the firm that represented the plaintiff previously had met with the defendant in a prospective client interview. In that interview, the defendant provided the attorney with confidential information substantially related to the litigation. The Rubin court, in concluding that screening was appropriate, relied primarily on the fact that the attorney had never represented or attempted to represent the plaintiff as a client. The Rubin court's approach, although decided under the Code of Professional Responsibility, is consistent with the letter, although possibly not the spirit, of W.Va.R.Prof.Conduct 1.9 and 1.10 because these rules apply to "clients" and "former clients." The defendant in Rubin was neither.

In Nemours, an attorney who worked in a minor role as counsel for the plaintiff, went to work for the firm representing the defendants. The district court in Nemours conducted a functional analysis separate and apart from Delaware's Rules of Professional Conduct. The facts in Nemours are distinguishable from this case because the attorney's role in Nemours had been minor (i.e., "the duties which typically characterize the life of a young associate"), he only worked on the case over a four month period, and he had no recollection of any confidential information. Nemours, 632 F.Supp. at 420, 429. In this case, by contrast, Mr. Watson's role as primary evaluator of San Con's case appears far more significant. Additionally, the Nemours court implied that the plaintiff's motive in raising this issue five months after the attorney's move was harassment. Id. at 431. The Court does not question San Con's motives in this Despite being able to distinguish Nemours and Rubin, the Court, as explained





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W.Va.R.Prof.Conduct 1.11 (former government attorneys) and 1.12 (former judges, arbitrators, and law clerks) illustrate well this trend, as does Tentative Draft No. 4 of the proposed Restatement of the Law Governing Lawyers. Section 204 of the proposed Restatement provides in relevant part:

The restrictions upon an affiliated lawyer ... do not restrict that lawyer when: ...

- (2) The restriction is of representation adverse to a former client ... and there is no reasonable prospect that confidential information of the former client will be used with material adverse effect on the former client because:
- (a) The confidential client information communicated to the personally-prohibited lawyer is not likely to be significant in the later case;
- (b) Adequate screening measures are in effect to eliminate involvement by the personally-prohibited lawyer in the representation; and
- (c) Timely and adequate notice of the screening has been provided to all affected clients....

Based on the language in the proposed Restatement, the district courts in Rubin, supra, and Nemours, supra, easily could have reached the conclusions that they did. In this case, however, even the proposed Restatement rule would not permit Mr. Ruley to continue to represent the plaintiffs because Mr. Watson and Steptoe & Johnson, in attempting to create a Chinese wall around Mr. Watson, apparently believe that Mr. *363 Watson has confidential information bearing on the central issues in this case. [FN5]

entities. According to the preamble of the W.Va.R.Prof.Conduct. "[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." In an age of sagging public confidence in our legal system, maintaining confidence in that system and in the legal profession is of the utmost importance. In this regard, courts should be reluctant to sacrifice the interests of clients and former clients for the perceived business interest of lawyers, especially when the state supreme court, in promulgating the Rules of Professional Conduct, has failed to adopt While these considerations contrary rules. may dampen law firm mergers, such is the price that lawyers must pay for their special status in our society.

In a recent article, Professor Forest J. Bowman, a noted authority in the field of legal ethics and the plaintiffs' expert, wrote: "Law firm mergers present potential conflicts of interest problems that require attention early in the process of negotiating the Forest J. Bowman, Conflicts of Interest in Law Firm Mergers, Bowman's Ethics & Malpractice Alert, Oct. 1992, at 1. In that article, Professor Bowman discussed the decision of the Third Circuit in In re Eastern Sugar Antitrust Litigation, 697 F.2d 524 (3d Cir.1982), requiring pre-merger notification of conflicts of interest to the court where the litigation is taking place. Although this Court believes that such a prophylactic rule is unnecessary in the typical case, the court agrees with Professor Bowman that Eastern Sugar "should be required reading for members of every law firm contemplating merger" and that the parties to a potential merger should address and resolve potential





conflicts of interest before they merge, rather than afterward. Bowman, supra, at 1.

Unfortunately, Steptoe & Johnson and Ruley & Everett failed to heed this advice. The firms clearly recognized the obvious conflict of interest involved in this case-Steptoe and Johnson when it originally declined to represent the plaintiffs and Mr. Ruley when he wrote to San Con and Mt. Hawley asking for their consent to his continued representation of the plaintiffs. The problem in this case is that the firms apparently did not discover the conflict of interest involved until shortly before their official merger date. As a result, they were left in an awkward position when San Con refused the consent to Mr. Ruley's continued representation of the plaintiffs. Lawyers and law firms must consider and address the effects of mergers and new associations on their clients well in advance of when such events occur.

D.

The Court notes the concerns of Mr. Ruley and Steptoe & Johnson that their professional integrity and ability to guard client confidences are being called into question by the disqualification motion. Addressing similar concerns, the district court in Rogers v. Pittston, 800 F.Supp. 350, 354-55 (W.D.Va.1992), aff'd, 996 F.2d 1212 (4th Cir.1993), stated:

This Court has no doubt that Johnson [the challenged attorney] testified truthfully to his lack of knowledge to any confidences. Furthermore, this Court is convinced that Johnson has made every effort to ensure that he was acting in an ethical manner. However, it is not for the court to consider "whether the motives of counsel in seeking to appear despite his conflict are pure or corrupt; in either case the disqualification is plain."

This Court certainly does not question the integrity of Mr. Ruley and the other Steptoe & Johnson attorneys involved in this case nor their assurances that San Con's confidences will remain confidential. This Court also understands the sensitivity of lawyers who

perceive that opposing counsel is questioning *364 their personal integrity and ability to guard client confidences.

Nevertheless, lawyers must avoid responding to such motions with personal attacks. In their response to San Con's motion to disqualify Mr. Ruley and Steptoe & Johnson, the plaintiffs wrote:

It appears that what San Con really intends to communicate darkly ... is insinuation and innuendo to the effect that Steptoe & Johnson in general and Bob Steptoe, Jim Watson and Dan Ruley in particular lack sufficient integrity to not breach the confidences communicated between San Con and Watson and to suggest otherwise is naive. It is fair to add that the experience of the undersigned has been that people who throw such insinuation or innuendo at others sometimes have personal familiarity with it.

(Emphasis added.)

West Virginia's Code of Professional "While my duty is to Courtesy states: zealously represent my client, I will treat opposing counsel with courtesy and respect. I will refrain from unnecessary or unjustified criticism of the Court, my adversary or my adversary's client." The comment to W.Va.R.Prof.Conduct 3.5 provides that "[r]efraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants." The Court believes that the above statement crossed the line between zealous representation and unnecessary ad hominem personal attack and thus has no place in a litigant's brief. The Court will not countenance such attacks.

III. Conclusion

For the foregoing reasons, the Court GRANTS San Con's motion to disqualify Daniel A. Ruley, Jr. and Steptoe & Johnson from continued representation of the plaintiffs in this action. The Court DIRECTS the Clerk to send a copy of this Order to counsel of record.

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