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## ARTICLES

### Lawyer Websites: ABA Formal Opinion 10-457 and Beyond

By John C. Martin

You're a talented litigator, and you want the world to know it. You're wondering how best to use the Internet to help you grow your business. Your firm has a website, so you look it over. And you find it so . . . drab. Where are the tales of your past successes? The list of the clients for whom you've achieved victory? Most important, how does this website help *potential* clients get to know you (perhaps by giving them a taste of the excellent advice you'll be able to give them after the retainer check clears)? A revision is definitely in order, but can you accomplish it without running afoul of the ABA Model Rules of Professional Conduct or their state counterparts?

#### ABA Formal Opinion 10-457 and Some Basic Rules of the Road

In August 2010, the ABA Standing Committee on Ethics and Professional Responsibility provided guidance for attorneys looking to answer such questions. [ABA Formal Opinion 10-457](#), entitled "Lawyer Websites," provides an important review of the ethical issues that can arise when attorneys use their websites to communicate with the public, and it furnishes an excellent starting point for litigators who want to build their online presence while adhering to the highest standards of professional practice.

#### Lawyer Information: Honesty Includes Timely Updates

Opinion 10-457 begins with a discussion of website content. Noting that attorney websites typically contain biographical information about lawyers, contact information, and information about the law firm, it points out that all of this information constitutes a "communication about the lawyer or the lawyer's services" and is therefore subject to the requirements of [ABA Model Rule of Professional Conduct 7.1](#). ABA Formal Op. 10-457 at 1. Rule 7.1 provides in part that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services," which (as Opinion 10-457 notes) parallels other provisions of the Model Rules that prohibit lawyers from making false or misleading statements, such as Model Rule 8.4(c) (a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation") and Model Rule 4.1(a) (prohibiting a lawyer from making "a false statement of material fact or law" to a third party during the course of a representation). *See* ABA Formal Op. 10-457 at 1.

But a lawyer's website needs to do more than simply avoid fraud. In noting that "these rules allow a lawyer to include accurate information that is not misleading about the lawyer and the lawyer's law firm, including contact information and information about the law practice" (ABA Formal Op. 10-457 at 2), the opinion adds an important reminder. Rule 7.1 states that "[a] communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."

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Accordingly, it is not enough for the information to be accurate when posted; instead, “[t]o avoid misleading readers, this information should be updated on a regular basis.” *Id.* For example, a website that fails to reflect that a lawyer has left the firm not only is bad advertising, because it could only serve to disappoint prospective clients, but could also conceivably form the basis for an ethics complaint. *Id.* at 2 n.5 (citing Mo. Bar Informal Advisory Op. 20060005 (2006) (noting firm obligation to remove lawyer’s biographical information within reasonable time of departure)).

### **Legal Advice: Showing Your Talents Without Inviting Conflicts**

Following its discussion of the factual content that may be communicated by websites, Opinion 10-457 turns to the legal information that websites may contain. Noting that such information may “assist the public in understanding the law and in identifying when and how to obtain legal services,” the opinion notes that lawyers “may offer accurate legal information that does not materially mislead reasonable readers.” ABA Formal Op. 10-457 at 2. As with factual information, lawyers “should make sure that legal information is factual and current,” and, in particular, lawyers should include qualifying statements that avoid creating unjustified expectations. *Id.*

But Opinion 10-457 also draws a distinction between legal “information” and legal “advice.” Acknowledging that lawyers who speak to groups “generally have been characterized as offering only general legal information,” the opinion also notes that “lawyers who answer fact-specific legal questions may be characterized as offering personal legal advice, especially if the lawyer is responding to a question that can reasonably be understood to refer to the questioner’s individual circumstances.” ABA Formal Op. 10-457 at 3. It therefore notes that previous ABA formal opinions have recommended that lawyers who provide general legal information expressly “characterize the information as general in nature and caution that it should not be understood as a substitute for personal legal advice.” *Id.* This warning is especially appropriate for website visitors “who may be inexperienced in using legal services” and therefore “may believe that they can rely on general legal information to solve their specific problem.” *Id.*

But, for the inexperienced website visitor, the potential for immediate interactivity that makes web advertising particularly useful also creates another risk. If a website does not merely provide legal information but provides the opportunity for visitors to ask questions, visitors might believe not only that they are getting specific advice on their specific problems but also that they are getting it *from their own attorney*. That’s a problem. While attorneys no doubt hope that their websites will help create new and profitable client relationships, most lawyers would like to avoid creating inadvertent lawyer-client relationships that serve only to *prevent* them from taking on business.

Opinion 10-457 confronts the possibility of such inadvertent lawyer-client relationships and suggests how to avoid them. The opinion notes that inquiries from a website visitor may trigger a lawyer’s obligations under [ABA Model Rule 1.18](#), entitled “Duties to Prospective Client.” ABA



Formal Op. 10-457 at 3. Rule 1.18(a) defines a prospective client as “a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.” Once such a discussion has occurred, Rule 1.18(b) prohibits any use or disclosure of information learned by the lawyer without the same informed consent that a *former* client would need to give under Model Rule 1.9. Moreover, those nondisclosure duties may be disqualifying. A lawyer who has received information that “could be significantly harmful” to the prospective client may not represent others with adverse interests in the same or related matters, which is also true of a law firm. *See* Model Rules of Prof’l Conduct R. 1.18(c). That disqualification can be overcome only with the prospective client’s informed consent or, for a firm, by taking measures to limit dissemination of the information, including screening of the disqualified lawyer from the subsequent matter. *See* Model Rules of Prof’l Conduct R. 1.18(d).

Opinion 10-457 notes that Rule 1.18’s reference to a “discussion” with a lawyer contemplates a two-way communication but that such a communication must necessarily begin with an initial communication from either lawyer or client. ABA Formal Op. 10-457 at 4. Although the commentary on the rule notes that “a person who communicated information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship is not a ‘prospective client,’” a lawyer website that specifically requests or invites submission of information concerning legal matters would lead to a “discussion” within the meaning of the rule were a prospective client to take the website up on the offer. *Id.* But just as a lawyer’s participation in a bilateral discussion in a telephone, mail, or email exchange concerning the creation of a client-lawyer relationship provides the lawyer with an opportunity to limit or encourage the flow of information, minimizing the duties owed under Rule 1.18, so too can lawyers limit the reasonable expectations of website visitors concerning the lawyer’s willingness to enter into a representation. Opinion 10-457 suggests, for example, that a website that does nothing more than provide background and contact information for firm lawyers “does not create a reasonable expectation that the lawyer is willing to discuss a specific client-lawyer relationship” (though the response to an email submitted by a visitor might), while a website that encouraged visitors to “submit a personal inquiry about a proposed representation on a conveniently-provided website electronic form” might well be deemed to invite submission of confidential information. *Id.*

Between these examples, the opinion suggests that “it may be difficult to predict when the overall message of a given website communicated a willingness by a lawyer to discuss a particular prospective client-lawyer relationship.” ABA Formal Op. 10-457 at 5. It does suggest, however, that cautionary language may help avoid inadvertent (and disqualifying) lawyer-client relationships. To avoid such misunderstandings, lawyer websites might include language advising that no client-lawyer relationship is intended, that no legal advice has been given, that visitor information may not be confidential, or that the lawyer will not be prevented from representing an adverse party. *Id.* at 6. The opinion cautions, however, that such disclosures and disclaimers will be effective only if “reasonably understandable, properly placed, and not



misleading”—including making sure that the information is “conspicuously placed to assure that the reader is likely to see it before proceeding.” *Id.*

## **Beyond Formal Opinion 10-457**

Formal Opinion 10-457 provides an excellent overview of the unique issues associated with web advertising. It is worth noting, however, that web advertising, like any advertising, is subject to further ethical rules and that the very rules and issues addressed by Formal Opinion 10-457 are currently being reviewed by the ABA Commission on Ethics 20/20.

## **Advertising Is Advertising**

While Formal Opinion 10-457 focuses heavily on the need to avoid false or misleading statements under Rule 7.1, lawyers seeking to update their websites should keep in mind that even nonfraudulent statements may run afoul of the Model Rules and their state counterparts. In its present form, [Model Rule 7.2](#) both contains broad prohibitions against giving anything of value in exchange for recommending the lawyer’s service (with some exceptions for normal advertising costs and certain specified qualified referral services and arrangements) and requires disclosure of the lawyer or firm responsible for the advertisement’s content. [Model Rule 7.3](#) addresses direct solicitation of clients, placing limits on individualized outreach. [Model Rule 7.4](#), in turn, permits lawyers to communicate the particular fields in which they practice, while limiting claims that lawyers are certified specialists in particular areas. These rules apply to all advertisements—web or otherwise. Moreover, they vary significantly between states. (The ABA’s Center for Professional Responsibility maintains an updated [list of those differences](#).) Revisions to a website must therefore be carefully scrutinized to ensure that they comply with the particular advertising rules in force in the jurisdictions in which the firm and its lawyers practice.

## **Client Information: Keeping Confidences and Avoiding Prohibited Endorsements**

Moreover, while litigators always want to advertise their past victories, advertisements that identify former clients present additional ethical challenges.

First and foremost, attorneys need to make sure that their former clients do not object to their representation being used to attract new clients. In addressing the need for attorney websites to contain accurate information, Opinion 10-457 briefly mentions another limitation on the information that may be contained on a website: While “[s]pecific information that identifies current or former clients or the scope of their matters” may be disclosed, such disclosure requires the informed consent of current or former clients under [Model Rule 1.6](#) and [Model Rule 1.9](#). ABA Formal Op. 10-457 at 2. Rule 1.6 provides that a lawyer generally “shall not reveal information relating to the representation of a client unless the client gives informed consent” or “the disclosure is impliedly authorized in order to carry out the representation.” Rule 1.9 similarly provides that a lawyer shall not “reveal information relating to the representation” except as otherwise permitted by the rules. As Opinion 10-457 notes, these rules serve to protect not merely privileged information, but “all information relating to the representation, whatever

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its source.” Model Rules of Prof’l Conduct R. 1.6 cmt. 3. This includes even “publicly available information.” ABA Formal Op. 10-457 at 2 n.7. Indeed, the opinion notes that website disclosure of client-identifying information does not fall within Rule 1.6’s exception for “impliedly authorized” disclosures because “the disclosure is not being made to carry out the representation of a client, but to promote the lawyer or the law firm.” *Id.* at 2.

Moreover, the advertising rules may create further limitations on the use of testimonials from clients who *want* to help their lawyers attract new business. The official comment to Rule 7.1 takes a fairly dim view of even truthful statements concerning lawyer achievements in past cases. Comment [3] to Rule 7.1 states that such statements “may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client’s case.” Following this lead, many state counterparts to the Model Rules expressly preclude or limit the use of client testimonials and other statements about past cases. *See, e.g.*, [Fla. R. Prof’l Conduct 4-7.2\(b\)\(1\)\(E\)](#) (prohibiting testimonials); [Va. R. Prof’l Conduct 7.2\(a\)\(3\)](#) (precluding advertisement of “specific or cumulative case results” without prominent disclaimers as to the uniqueness of factors involved). Indeed, at least one state has sought to preclude lawyers from “adopting” client ratings maintained on Avvo—a lawyer rating and referral service—on grounds that it violated prohibitions about advertising past successes. *See* Gregory Hanthorn, “Potential Ethical and Professionalism Concerns with Testimonials on Professional/Social Networking Sites” (available to Section of Litigation members on [the Ethics and Professionalism Committee website](#)); *see also* [S.C. Bar Ethics Advisory Op. 09-10](#) (addressing ethical issues associated with “claiming” third-party website listings with peer and client endorsements).

### **Changes on the Way: The Ethics 20/20 Commission**

Finally, any discussion of web advertising should note that the rules are changing. At the time of this writing, the ABA Commission on Ethics 20/20 had just released its [Initial Proposal Regarding Lawyers’ Use of Technology and Client Development](#), which proposes changes to Model Rules 1.18, 7.2, and 7.3 aimed at addressing many of the issues associated with the use of modern technology to generate new business for lawyers. Proposed modifications to Rule 1.18 would eliminate the need for a “discussion” to trigger the rule, allowing a “communication” to do so in circumstances where the prospective client “has a reasonable expectation that the lawyer is willing to consider forming a client-lawyer relationship.” Additional proposed commentary on this rule adopts many of the positions taken in Formal Opinion 10-457, noting that the existence of disclaimers, along with past history, may determine whether a visitor to a website should be deemed a prospective client. Amendments to Rule 7.2’s comment make specific reference to the Internet and electronic communication, and make clear (for example) that the paid recommendations prohibited by the rule do not include payments made to generate Internet-based client leads so long as the person generating the leads does not recommend the lawyer. Proposed amendments to Rule 7.3’s comment confirm that website advertisements and emails



that do not involve real-time contact do not qualify as the type of direct contacts that fall within that rule's scope.

These Ethics 20/20 proposals do not represent a radical change to the rules governing web advertising. They do serve as reminders, however, of the challenges associated with the use of new technologies to promote one's practice. A lawyer considering making use (or better use) of the web should therefore keep in mind both the novel issues raised by the increased interactivity that is made possible by technological development (making clear, for example, that the lawyer cannot promise to keep visitors' confidences or act as their lawyer without an agreement that follows a conflict screen) as well as older issues that the ready availability of web advertisement brings to the fore (such as the need to make sure clients consent to public reference to their representation).

**Keywords:** litigation, ethics and professionalism, model rule 7.1, formal opinion 10-457, model rule 1.18, ethics 20/20

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## Loyalty under Attack: The Pernicious Prospective Waiver

By Lawrence J. Fox

Sometimes when we talk lawyer ethics, we immediately turn to the black letter of the rules, the text of the comments, and the wise counsel of bar opinions, then assume our best litigator posture to justify the conduct at issue. In that process, we often lose our focus on the values that lie behind the rules. Yet, it is those values, more than any comment, that should inform our professional conduct.

For this reason, any discussion of prospective waivers of conflicts of interest must start and end by never losing sight of the fact that what we are addressing is the fiduciary obligation of lawyers to be loyal to our clients; this bedrock commitment separates lawyers from investment bankers, insurance agents, or stockbrokers. As professionals, we are not only obliged, but should also be proud, to put the interests of our clients ahead of our own.

To reflect this fiduciary duty, our profession has adopted a fundamental rule. It provides that we shall not take a position directly adverse to a client. Period. No ifs, ands, or buts. There is no "you can take a position adverse in a transaction." There is no "you can take a position directly adverse in an unrelated matter." There is no "it's OK for your law firm colleague to take a position directly adverse to your client."



We could have drafted a loyalty rule that included any or all of those exceptions. But we did not. And that was clearly the right decision. Our willingness to embrace an expansive loyalty rule—with full imputation to all lawyers employed in the same practice setting—is designed to ensure that no client has cause to worry whether the lawyer will give less than full dedication to the client’s matter.

The corollary to this broad mandate of loyalty is a rule that permits a client to waive a conflict under certain conditions. But in creating this escape valve from the basic rule of loyalty, the profession again has proceeded with care, structuring the waiver process to protect the client.

First, no lawyer may even ask for a waiver until that lawyer determines that the undertaking of the multiple representations that the waiver would permit will not have an adverse impact on the affected representations. Too few lawyers recognize, although they must, that their mere seeking of a waiver can run afoul of the rules if an objective lawyer would conclude that the requirements of Rule 1.7(b)(1) of the Model Rules of Professional Conduct were not met.

Second, the details about the proposed conflicting representation must be disclosed to the affected clients. What parties are involved? How much money is at issue? What is the nature of the transaction or claim? Answering those questions partially fulfills the requirement in our rules that the client give informed consent to the lawyer’s undertaking the conflicted representation.

Third, the other half of the informed consent requirement is a full explanation to the clients of the risks and implications to the affected clients if the waiver were granted. While some have questioned how effectively a lawyer who hopes to secure a consent will provide full and fair disclosure in this respect, lawyers in fact recognize that the rules impose this important obligation on them and that their failure to undertake it conscientiously will result in a waiver that could be challenged later as subject to overreaching.

Fourth, the securing of the waiver must be confirmed in a writing, sent to the client, in which the ethical lawyer will provide a full description of the discussion the lawyer conducted with the client prior to seeking the waiver. This writing requirement not only makes concrete and reiterates an oral conversation but also protects the lawyer from a “forgetful” client.

Why this elaborate framework for waivers? Because the profession has determined that when our rules of loyalty are triggered—that is, when a conflict is identified—the clients and only the clients have complete autonomy to decide, if the conflict is in fact susceptible of being waived, whether a waiver should be granted. Indeed, it would be the height of unethical behavior if any lawyer ever took advantage of the lawyer’s position of prestige and power, even in the most subtle way, to pressure a client to grant a waiver.

It is against this backdrop that the issue of seeking of prospective waivers must be judged. What started as a trickle has now become a flood, as major law firms have embraced the practice of



inserting into every retainer letter, often buried on page 5 in paragraph 16, a wholesale prospective waiver that would permit the law firm to take on any representation against the new client so long as the matters are not substantially related. No limitation as to matters that are not waivable under Rule 1.7(b)(1). No limitation as to time. No limitation as to matters not litigated. No limitation as to the subject matter of the adverse representation. No limitation as to the identity of the adverse party or parties who would be represented adverse to the client that is granting the prospective waiver.

Can such a waiver come close to being given with informed consent? Of course not. Let us list what the client doesn't know. When will the consent be pulled out of the bottom drawer? How will the representation of the client have proceeded? Were additional matters undertaken? What confidential information will the client have shared with the waiver-snaring lawyer from the date the waiver was secured? Who is the adverse party? What is the nature of the adverse matter? A transaction? Litigation? Friendly or contentious? Treble damages? Reputation-destroying?

In short, no one could assert, consistent with the standard established by Rule 11 of the Federal Rules of Civil Procedure, that informed consent can be secured under such circumstances. To which the defenders of these prospective waivers respond, while that is true, the clients know what they don't know. Therefore, they say, at least as to what the proponents broadly refer to as sophisticated clients, these consenting adults can give informed consent—that is, provide what is required to be obtained under the rule—because they recognize how uninformed they are!

Can one imagine a more Orwellian definition of informed consent? You've given informed consent because you are a sentient being who knows he or she is uninformed. The entire argument makes a mockery of the rules, in effect saying, not that these lawyers have obtained "informed consent" but that these lawyers are above the rules, that when one deals in the rarified air of AmLaw 100 law firms and their clients, there are no ethical boundaries. The rules of professional conduct—our profession's sacred pact with our clients, carefully crafted and promulgated by our state supreme courts—are mere words on paper that can be contracted away on a wholesale basis because these rules are, frankly, a nuisance that requires these great law firms to turn away lucrative engagements they hate . . . hate to lose.

There are so many unflattering aspects to this prospective waiver epidemic that one can only record a few in this space. The first is the real reason these firms seek these waivers. It is because they don't trust their clients. They are afraid that when an actual conflict arises, instead of giving instant permission to their lawyers to take on the new matter, these clients might, just might, take the time to evaluate the conflicting new matter and make an independent determination not to waive. Imagine that! Clients actually exercising the autonomy that the rules guarantee them. How can these firms allow that?

Of course, that is not the way these firms describe it. They assert they are protecting themselves from unreasonable clients who "hold up" their lawyers by arbitrarily informing their lawyers—

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for no good reason—that they prefer that their lawyers not undertake the proposed matter. The disparaging way these lawyers describe such noncompliant clients stands in stark contrast to how these lawyers felt when the now-recalcitrant clients first engaged the lawyers. Their rhetoric also reflects the very antithesis of the loyalty to clients to which our profession alleges it is committed.

Second, although they will never admit it, these firms do it to make more money. If one does not have to ask the client whether the lawyer can take on a conflicting matter, then there is no chance the client will not waive, and the new matter can be reeled in, adding whatever revenue the delicious new matter provides. The irony here is that it is precisely those lawyers who least need the money who snatch these wholesale prospective waivers to the greatest extent possible—in every engagement letter. In fact, it is the law firms at the very pinnacle of the law firm food chain who started this pernicious practice, raised it to a high art form, and defend it most vigorously today. One must ask why firms with profits per partner in the multiple millions feel the need to squeeze a few extra shekels of revenue per partner at the expense of wholesale destruction of the essences of client loyalty and informed consent. Though one might understand how a struggling neighborhood solo could grate at losing a prospective client to Rule 1.7(a)'s requirements, the securing of prospective waivers by globe girdling behemoths is inexplicable.

Third, one cannot ignore the arrogance and sense of entitlement that the justification of prospective waivers reflects. The proponents argue that they are so accomplished, their expertise and experience so difficult to replicate, their value added so outsized that to deny the rest of the client world an opportunity to feast at their troughs is a professional tragedy.

Imagine the ego of those who assert these propositions. Is it really true that, in a nation of almost 1 million practicing lawyers and almost 100 law firms with over 500 lawyers, that there is one, and only one, lawyer in any given area whose talent rises so far above the rest to lend any credibility to this argument? Of course not. But the proponents of prospective waivers always repeat the well-worn argument that they only seek prospective waivers to protect the client's access to their Mike Schmidt of tax shelters, ignoring in the process not only that they are only talking about "protecting" prospective clients but also that those who pay the very dear price for this "protection" are their actual, present, fee-paying, flesh-and-blood clients who, but for the uninformed, unethical prospective waivers, the lawyers would be protecting to the full extent anticipated by our rules.

Given the foregoing, is there any place for prospective waivers? Of course there is. A classic example would be a prospective waiver from a bank client whom the lawyer is defending in employment discrimination cases. Asking that bank to grant a prospective waiver so that the lawyer's firm can represent borrowers on loan transactions (but not lender liability suits) would certainly provide informed consent to a prospective category of matters that the sophisticated bank could waive in advance, even if the identity of the borrower, the loan amount, and the purpose of the loan are all unknown at the time the waiver is secured.

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Yet, even then, the prospective waiver could not be viewed as ironclad. If subsequent unanticipated matters are taken on by the lawyer for the bank or if the bank, in the course of being represented by the lawyer on employment or other matters, shares confidential information with the lawyer relating to its lending practices, the prospective waiver would be no more than an invitation to further consultation and consent.

In short, the watchword for all waivers must be informed consent. This means that any prospective waiver, no matter how contrived, should be subject to challenge by the affected client if the client can make a reasonable argument that the client's consent now turns out to be uninformed. This construct preserves the loyalty that lawyers owe clients, provides clients with the autonomy they deserve, and places the interests of clients properly ahead of the interests of the lawyers in enhancing the bottom line.

**Keywords:** litigation, ethics and professionalism, Rule 1.7(b)(1), FRCP 11, prospective waiver

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## Freedom of Contract and Advance Conflict Waivers: Fair Play for Consenting Adults

By Steven C. Krane

The following is a dramatization in three acts of a situation that, in words or substance, regularly occurs in the United States. The resemblance to any particular set of facts, or to any particular individuals, living, dead, or as yet unborn, is purely coincidental.

### Act I

CLARA: Hello, Leo. I finally have a problem that I hope you can help me with.

LEO: Good to hear from you, Clara. I'm sure that if I can't help you, one of the other 999 lawyers in my firm can.

CLARA: That's great. My company has a little matter pending in Smallville for one of our subsidiaries, and while I think it will go away quickly, I want to make sure it is handled properly. Our regular outside counsel will take the lead, but I know your firm has a Smallville office, and I would like you to be local counsel.

LEO: Local counsel, huh? Well, we don't usually take on that sort of engagement.

CLARA: Why not?

LEO: Well, because of conflict concerns.

CLARA: Conflict concerns?

LEO: Sure, Clara. You can understand the situation. Your company is a diversified business

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with a few hundred subsidiaries and several different lines of business. We have thousands of other clients who may want us to represent them across the table from, or even in litigation against, some particular piece of your enterprise. We may already be adverse to you, or even represent one of your company's subsidiaries somewhere, but I'm running a conflict check as we speak to be sure.

CLARA: I don't see why any of that should be a problem, Leo. You're a big firm with a thousand lawyers and offices around the world. I wouldn't have a problem with you being adverse to us as long as what you're doing for another client isn't affecting your work for us.

LEO: Well, in that case, I'd like to get assurance from you that if we take on this little matter in Smallville for your sub, it won't preclude us from being adverse to you in the future.

CLARA: That's understandable. We have lots of law firms; you have lots of clients. We're not looking to block you from ever being on the other side of a matter. But there would have to be some limits.

LEO: Like what?

CLARA: Well, this may not be a big case for you, but we still wouldn't want you to be adverse to us in anything related to this matter.

LEO: That seems fair. What the ethics opinions suggest in this situation is that we agree to limit the scope of our representation to the particular subsidiary in question so that we don't even have an issue about a conflict if what some other client wants us to undertake is adverse to some other piece of your company.

CLARA: Well, we would consider your representation of the sub to really relate to the company's whole Acme group of businesses. All the businesses in the Acme group are really interrelated.

LEO: OK. Send me a list of the subs in the Acme group so we can be sure to have them in our conflict checking database.

CLARA: What else?

LEO: Well, even as to those subs in the Acme group, we would want to be able to take on adverse representations that aren't substantially related to the little matter in Smallville, like you said.

CLARA: I can understand that, too. We really want you guys to handle this for us. So, we're willing to agree to those ground rules. Why don't you draft an engagement letter for us to review. I'd like to have it reviewed by our regular outside counsel, you know, the firm you will be working with in this little matter.

LEO: Sure. I want you to be completely comfortable with this understanding. We want to avoid technical conflict issues that don't really have any material effect on our representation of your company.

CLARA: I'm sure it will be fine, Leo. Thank you for taking this on.

LEO: Our pleasure, Clara.

## Act II

*Leo's firm has prepared an engagement letter containing an advance conflict of interest waiver. Clara's outside counsel reviewed it and negotiated its language. Leo's firm agreed to the*



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*proposed changes, none of which related to the waiver language. Clara signed the letter, and the Smallville representation began. Six months have passed since the initial conversation between Leo and Clara.*

LEO: Clara, I just got a letter from Oscar, your outside counsel in the little matter in Smallville on which we've been helping you.

CLARA: I know.

LEO: Well, they're complaining that some of the lawyers in my firm's Metropolis office are representing some entrepreneur in a matter adverse to one of your subsidiaries in the Zephyr group.

CLARA: I know.

LEO: But, Clara, we had an agreement that we could do exactly that. The matter in Metropolis isn't adverse to the Acme group subsidiaries, and on top of that, it has nothing to do with Smallville matter.

CLARA: I know.

LEO: Well, if you know, I must confess that I don't understand your position.

CLARA: Well, Leo, it's like this. You never should have asked me to waive conflicts in advance. My lawyers advise me that it wasn't proper. You took advantage of me, my legal staff, and my whole company. The waiver is simply not enforceable.

LEO: But, Clara, you're a lawyer. You had Oscar's firm review our engagement letter, and they had no problem with the limitation on the scope of the representation or the conflict waiver language. You knew why we wanted those provisions and what you were agreeing to. I am at a loss to understand why you won't live up to your bargain.

CLARA: Well, that's just how it is. Oscar says that it doesn't matter that he originally told me it was fine to agree to this. Frankly, we're not happy with the Metropolis matter, Leo, and we're not happy with you guys handling it. Oscar says we can stop you from representing those people in Metropolis regardless of our agreement.

LEO: Well, in that case, Clara, we have no alternative. We will have to withdraw from representing you in the Smallville matter. It's clear that you want to get out of your agreement with us. So, the only fair thing to do is for you to get other counsel in Smallville. Our role has been very limited. So, it shouldn't be a problem to make a swift and efficient transition. I'm sure we can give you several recommendations.

CLARA: Don't threaten me, Leo! You can't walk out on us for no good reason! We insist that you continue to handle the little matter in Smallville like you agreed to do and that you drop the Metropolis matter.

LEO: Let me see if I can sum this up, Clara. You signed an agreement with us that you had reviewed and approved by outside counsel six months ago, and now you want to renege on your contractual commitments while holding us to our part of the bargain. Not to mention you want to do this to the detriment of our other clients, who relied on the fact that you had agreed to the advance waiver, like we told you they would.

CLARA: Well, I guess that's a fair summary, Leo. Oscar says we're the client, and the client is always right. It's a one-way street. When clients fight lawyers, the client always wins, and the



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lawyer always loses. That's because the ethics rules treat all clients the same, regardless of whether we're a little old lady or a huge corporate conglomerate with lots of lawyers running around giving it advice. You took advantage of us, and that's that!

LEO: Clara, I'm flabbergasted. You're not being fair, either to my firm or to our clients in Metropolis.

CLARA: I don't care. You have our position.

LEO: Well, then we will see you in court.

### Act III

*One month later.*

A JUDGE: Counsel, I have reviewed the written submissions, heard the testimony of your respective ethics experts, and heard your oral presentations. The agreements that the client made with the law firm with respect to limiting the scope of the representation to a group of subsidiaries, and as to the waiver of future conflicts, are simply not enforceable. The firm shall be barred from handling the Metropolis matter.

### Epilogue

What has happened here? A large and sophisticated corporation, represented by in-house and independent counsel, hired a law firm to represent it in a discrete matter subject to certain freely negotiated conditions. There has been no change in circumstances other than the fact that the firm exercised rights it had under the agreement to undertake a new representation that was adverse to subsidiaries in a different line of business from those being represented. The new matter had no relationship whatsoever to the matter on which the firm was providing legal services to the corporation.

The corporation was allowed, in effect, to excise a portion of its agreement with the law firm with which it no longer wishes to comply. The law firm is required to continue representing the corporation and to withdraw from the new representation. The firm's new client, utterly innocent in this process, has to find new counsel and start from scratch, to the tactical advantage of the renegeing client.

Does any of this make sense? Most of the ethics committees that have addressed this issue (including the American Bar Association's Standing Committee on Ethics and Professional Responsibility) have approved of, if not encouraged, agreements between clients and lawyers in which the clients and lawyers agree at the outset on how they will view conflicts that may arise in the future. Laying out the terms of the engagement up front, in writing, so that both sides understand any limitations on the scope of the representation, has been viewed as a worthy goal in the best interests of client and lawyer. A 2007 survey revealed that 64 percent of law firms of all sizes throughout the country include advance conflict waiver language in their standard retainer agreements. *See 2007 Law Firm Risk Management Survey 9 (IntApp Inc. 2007).*



Unfortunately, the handful of courts that have been asked to enforce agreements limiting the scope of representations or advance conflict waivers have declined to do so, even in factual settings remarkably like that dramatized above. The organized bar has been trying to sell these agreements to the legal profession, but the courts have not been buying.

The notion that a client, particularly a sophisticated one represented by in-house or independent counsel, is not competent to enter into an agreement with a law firm defining the scope of the representation and providing for advance waivers of conflicts of interest, and can renege on such undertakings virtually on a whim to the detriment of other clients who have relied on the existence of such agreements, is at best a prime example of how our one-size-fits-all approach to the regulation of client-lawyer relationships is outdated and outmoded, and at worst a perpetuation of the paternalistic and overprotective mind-set of many of those who draft, interpret, and apply our rules of professional conduct.

Permitting unilateral nullification of advance conflict waivers is not only unnecessary and nonsensical but also contrary to the interests of clients in general. If law firms are forced to choose between representing a large client in a small matter at the risk of complete preclusion from adverse representations at least for the duration of the representation, many firms will decide as a business matter to decline the representation and send the client elsewhere. The result will be fewer firms available to clients seeking counsel of their choice in important, but not highly remunerative, matters.

The best way to address the competing concerns of clients—both current and prospective—and their lawyers is to encourage discussions like the initial one between Clara and Leo and to enforce such agreements bilaterally. That is what makes sense. It is also eminently fair. The notion that clients are fragile and must be coddled and protected against overreaching by lawyers must be rejected, in favor of a *modus vivendi* in which the legitimate and reasonable expectations of clients and lawyers can be respected and enforced.

**Keywords:** litigation, ethics and professionalism, advance conflict waivers, SCEPR

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## Accused of Bias, Judge Recuses Himself from 17 Ongoing Cases

By Thomas G. Wilkinson Jr. and Michael Zabel

Can joint representation with independent counsel remedy a conflict of interest? In a recent criminal case in the [U.S. District Court for the Western District of Pennsylvania](#), a federal judge

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denied the public defender's request to withdraw over a conflict of interest from a prior representation and instead ordered the public defender to obtain separate counsel who could independently manage any claimed conflict. When later accused of bias against the defender's office, the judge voluntarily recused himself from 17 ongoing criminal cases.

### **Conflict, Withdrawal, and Independent Counsel**

The dispute over the alleged conflicts arose in *United States v. Vue*, No. 2:09-00048 (W.D. Pa. Sept. 20, 2010), a case in which the [Federal Public Defender](#) (FPD) had been appointed to defend Youa Vue, a convicted felon who was indicted for possession of a firearm. When the FPD learned that it had formerly represented the confidential informant whose information was used to obtain the search warrant for Mr. Vue's home, the FPD sought permission in consecutive motions to withdraw from the case, claiming that its representation of Mr. Vue would conflict with its former representation of the informant.

[Judge Arthur J. Schwab](#) denied both motions, finding that neither motion was "specific or illuminating with regard to the nature of alleged conflict, nor did it set forth any particulars about the former representation . . . and how that might conflict with the representation of Mr. Vue." As a protective measure, the judge ordered the FPD to secure, as part of a joint representation effort, separate counsel who could represent Mr. Vue with regard to areas in which the FPD had a conflict of interest. Judge Schwab further observed that the FPD had a safe harbor in [Pennsylvania Rule of Professional Conduct 1.16\(c\)](#), which states that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

### **The Interests of Criminal Justice**

In rejecting the FPD's requests to withdraw or to stay the proceedings against Mr. Vue pending appeal, the judge also criticized "a certain few [assistant federal public defenders'] increasingly common practice of filing numerous, boilerplate motions for extensions of time," which, in at least one prior case involving the FPD, had kept a criminal defendant incarcerated for a longer period than his actual sentence required. Judge Schwab noted that in the Vue case, the FPD had filed nine motions for time extensions over a period of almost a year, threatening Mr. Vue's and the public's right to a speedy trial, and that further delays ran a similar risk of Mr. Vue serving time beyond his sentence.

The presence of independent counsel (without withdrawal by the FPD), the judge found, therefore not only protected the FPD against breach of its professional duty but also protected the defendant's rights and served the interests of justice by allowing sentencing to proceed more quickly.

### **Prophylactic Recusal**

After Judge Schwab denied its requests to withdraw, the FPD filed motions in 21 other criminal cases being presided over by the judge. The FPD requested that Judge Schwab recuse himself from the cases because of alleged bias shown by the judge in the Vue case against the FPD



office. In his initial response, Judge Schwab offered to recuse himself from those cases, provided that the FPD submit an affidavit from each defendant that the defendant had read and approved the FPD's request. The U.S. Attorney's Office requested that the judge reconsider.

In subsequently ruling on the motions for disqualification, Judge Schwab looked to [28 U.S.C. § 455](#), the statute governing disqualification of federal judges, and found that "no reasonable observer . . . would find any bias or lack of impartiality . . . toward the [FPD] or any of the dedicated and professional Assistant Public Defenders in that Office, let alone toward any of their clients." Lack of bias notwithstanding, Judge Schwab also held that the circumstance "calls for unusual measures to prevent what has real potential to disrupt the fair and orderly administration of justice." The judge then voluntarily recused himself from 17 of the 21 cases, and from all future criminal cases involving the FPD through the end of 2011.

In three of the four cases from which the judge did not recuse himself, he found it against public interest and the "prudent use of judicial resources" to do so. Appeals in those three cases are currently pending before the Third Circuit Court of Appeals; all three appeals concern, in part, the denial of the FPD's motions to disqualify. In the fourth case, new counsel was appointed for the defendant and the FPD was allowed to withdraw.

**Keywords:** litigation, ethics and professionalism, Vue, PRCP 1.16(c), FPD

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## Service During Disaster as a Form of Professionalism

By Larry D. Smith and Robert V. Goldsmith III

*"We make a living by what we get, but we make a life by what we give."*  
– Winston Churchill

In the aftermath of Hurricane Katrina in 2005, attorneys mobilized within days to begin sculpting the American Bar Association (ABA) website into a clearinghouse of information for affected individuals. [In The Wake of the Storm: The ABA Response to Hurricane Katrina](#), A Midyear activity report, ABA, 2006 at 10. The website was up and running by Wednesday, August 31, just three days after the storm. *Id.* at 11. By the end of November, the ABA Katrina website had received 50,000 visitors and nearly 2,000 offers of assistance. *Id.* at 12. Over the course of the next year, thousands of attorneys volunteered their services across the southeastern United States. State bar organizations continue to maintain websites created to assist storm victims on a pro bono basis for problems ranging from locating lost loved ones to estate-settlement issues.

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The recent rash of tornadoes that swept across the Southeast was deadly and devastating. Between April 25 and April 28, 2011, an estimated 312 tornadoes occurred; 201 are confirmed by survey. [April 2011 tornado information](#), National Oceanic and Atmospheric Administration. To date, the April storms are responsible for 326 fatalities, with a record-setting 309 occurring during the 24-hour period beginning April 27, 2011. Among the most devastating twisters was an estimated F4 that tracked 80 miles through Alabama, from Tuscaloosa to Birmingham, reaching a maximum width of 1.5 miles and causing at least 65 fatalities. *Id.* When the storms subsided, the National Weather Service Weather Forecast Office cited a minimum of 24 killer tornadoes spanning six states. The disaster sparked action in the legal community on a scale not seen since Hurricane Katrina.

Within hours, the state bars of Alabama, Tennessee, Georgia, Mississippi, and Virginia began to mobilize their respective members to provide service to the community. Alabama, the most severely impacted area, saw its attorneys fill streets with chainsaws and clearing equipment before turning to legal work. Alyce Spruell, president of the Alabama Bar, said of Alabama attorneys, “A lot of our bar members have been out working in soup kitchens or doing debris removal. There’s some law practice going on right now, but not a lot.” The Alabama Bar formed a disaster-assistance plan consisting of a community hotline that funneled calls to volunteers from the Young Lawyers Division, provided free legal clinics at the University of Alabama School of Law open to anyone affected, formed a discretionary fund, and provided a Disaster Assistance tab on its [website](#). Attorneys from around the state responded to the affected areas to work in food lines, assist in debris removal, transport medical supplies, serve as translators, and undoubtedly, in myriad other capacities.

The assistance for the affected areas, particularly Alabama, spread quickly through the legal community as lawyers near and far responded to calls for help. Using relationships formed in the practice of law, lawyers mobilized corporations, schools, professional sports teams, legal professionals, and others to join in a common effort to help storm victims.

Less than one month later, on May 24, a similar storm struck the Midwest, producing a tornado that devastated the town of Joplin, Missouri. The F5 in Joplin, reported to be three-quarters of a mile wide, remained on the ground for five miles and had winds in excess of 200 miles per hour. [May 2011 tornado information](#), National Oceanic and Atmospheric Administration. Preliminary reports attribute 139 deaths and 750 injuries to the twister, making it the deadliest single tornado since modern recordkeeping began. *Id.*

The Missouri Bar saw its members respond to the crisis in similar fashion, on both personal and professional levels. Missouri attorneys answered the call to duty by offering short-term legal advice to those in the disaster area, making donations to the Red Cross or to local charities, and within a week, staffing a Multiple Agency Resource Center set up by the Red Cross in Joplin. Email from John Johnston, President of the Missouri Bar (June 1, 2011). The Missouri Bar initiated several programs designed to streamline the lawyer-referral process and ensure that those in need were connected with an attorney that could provide assistance. [Missouri Bar Disaster Assistance Program](#).

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Disasters bring out the best (and the worst) in human nature. They demonstrate to a weary public and to one another that being an attorney stands for more than being technically proficient. As the rigors of a law practice bear down, particularly in economic hard times, it is easy to omit community service from busy calendars. Disasters bring, with harsh reality, a call to duty.

Of course, in addition to looking out for others, lawyers may also be victims and must look out for themselves, their families, and their practices. On May 12, 2011, as this article was going to print, the Section Council of the ABA Law Practice Management Section voted at its 2011 Spring Council meeting, to cosponsor the Recommendation of the Special Committee on Disaster and Preparedness. Among other recommendations, it urges lawyers and firms to prepare for disasters so if one strikes they will be better able to survive themselves and continue to serve their clients. It also urges state and local bars to create permanent/standing committees related to disasters and to participate in community-wide efforts with the courts, legal institutions, emergency-management agencies, and others. As Stephen N. Zack, current president of the ABA, notes,

History has taught us that there is always another natural disaster lurking, but in today's world we must also prepare for manmade disasters. Disaster preparedness is the least important thing until it becomes the most important thing. It has to be done before it is too late. In times of crises, it is our duty to make sure that our justice system continues to operate: That's when they are needed most. There is nothing more important than making sure we are prepared, now.

Attorneys are neither magicians nor makers of widgets. Our various roles are often difficult to explain or defend in the public eye. Thus, in addition to being a good and right thing to do, disaster-relief efforts provide a way to reinforce a positive image of the profession. Often such efforts are magnified because, although natural disasters do not discriminate, their effects are felt more deeply in already disaffected economic communities, often home to minorities and historically disadvantaged groups.

The *Merriam Webster Encyclopedia* defines professionalism as “the conduct, aims or qualities that characterize or mark a profession or a professional.” The actions we take, “on the court or off,” in court or in the community, reflect upon us individually but also upon us as professionals. Becoming an attorney includes an unspoken agreement to be measured by a higher standard of accountability to the public. Fortunately, the very qualities of professionalism that serve us well in the heat of advocacy equip us in times of external challenge: being firm but reasonable, focused but cooperative, and ethical beyond reproach.

Lawyers are leaders. The influence of attorneys extends beyond what they physically contribute to immediate disaster efforts. The Council on Litigation Management (CLM) is the largest fully inclusive defense organization of its kind, comprising thousands of insurance companies, corporations, corporate counsel, risk managers, insurance professionals, claims adjusters, and

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attorneys. Two years ago, at the suggestion of one of its attorney members, CLM pioneered a program offering local volunteering opportunities for members who attend its annual conferences. This year, New Orleans hosted the CLM's annual conference. The event offered two alternative volunteering opportunities to CLM members. Hundreds of members signed up to spend an afternoon replanting a city park ravaged by Hurricane Katrina or working with the Beacon of Hope, a grassroots organization helping rebuild neighborhoods in New Orleans. As busloads of weary volunteers arrived back at their conference hotel, they were greeted by a lobby lined with hotel employees applauding and saying "thank you" as the volunteers passed by. CLM Executive Director Adam Potter says of the new volunteering program: "It's important for us at the CLM to demonstrate the value of volunteerism. So many of our Members and Fellows are active in their own communities and by bringing all that spirit and talent together in one city, we hope to reenergize each individual's commitment to making a difference."

Lawyers render service, and service is needed in times of disaster. Contact the state bars of the affected states and offer what you can. Start a collection campaign for needed items. Send a team from your firm to help rebuild. Provide free legal services. Humility and assistance is a bridge over troubled waters. Service, which forms that bridge, is a badge of professionalism.

**Keywords:** litigation, ethics and professionalism, Hurricane Katrina, tornado

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### NEWS & DEVELOPMENTS

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## Judge Recommends Vigilante Justice, Garners Suspension

A Mississippi County Justice Court judge was suspended for nine months after the judge recommended that citizens take fighting crime into their own hands. The Legal Profession Blog [reports](#) that at a defendant's sentencing hearing, the judge stated on the record in open court:

I could assure you that if anything like this ever happened to anybody that I know, my advice to them would be do not use the court, handle it themselves.

I would like for everyone in this court to know that had I had this to do over again we would never had went to a grand jury, that we would have taken care of this down at Biggersville, Mississippi, down on the farm like things should have been taken care of.

Apparently the judge decided to take a play from Batman's book and become the symbol that Biggersville needed. The Supreme Court of Mississippi [disagreed](#). The court also went on to

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reverse the commission’s finding as to count two, which involved the potentially illegal handling of DUI cases by the judge.

— [\*Josh Camson, Pittsburgh, PA\*](#)

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## Third Circuit Overturns Sanctions for Rule 3.5 Violation

In a case of first impression, the Third Circuit Court of Appeals overturned a magistrate judge’s order finding that an attorney violated Rule 3.5 of the Rules of Professional Conduct. After a jury trial, the attorney contacted one of the jurors in the case. The phone call lasted about a minute, when the juror informed the attorney she didn’t feel comfortable talking to him. The attorney then ended the call. Afterward, the juror sent the presiding judge a letter. The judge, without conducting a hearing or calling witnesses, entered an order that stated that the ‘attorney “engaged in misconduct by his post-verdict communication with a juror in contravention of American Bar Association Model Rule of Professional Conduct 3.5(c).’ (App. 3).” The Third Circuit explains that “[t]he court stated that it would not disbar, suspend, or reprimand counsel pursuant to Local Rule 83.2(b)(3) or initiate disciplinary proceedings pursuant to Local Rule 83.2(b)(5). Instead, the magistrate judge referred the matter to the Virgin Islands Bar Association for a ‘formal investigation and disciplinary proceedings.’ (App. 4).”

In its [opinion](#), the Third Circuit found that the attorney did not violate Rule 3.5. The court further held that the lower court judge violated the attorney’s due process rights by not properly adhering to the local rules. Beyond the ethical issue of first impression, the opinion is worth reading for its discussion of standing. The circuit courts are split on whether an attorney has standing to appeal from a non-sanctioned reprimand. The Third Circuit obviously held that the attorney did have standing, because the judge’s order directly undermined the attorney’s “professional reputation and standing in the community.”

— [\*Josh Camson, Pittsburgh, PA\*](#)

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ABA Section of Litigation Ethics & Professionalism Committee

<http://apps.americanbar.org/litigation/committees/ethics/>