

DELAWARE LAW REVIEW

VOLUME 12

2011

NUMBER 2

**Focusing On The Realities Of The Contracting Process — An Essential Step
To Achieve Justice In Contract Enforcement**

Russell A. Hakes

**The Handling Of A Claim For Tortious Interference With An At-Will
Employment Contract In The Delaware State Courts Versus The Delaware
District Court**

Charles B. Vincent

Engaging With The Realities Of The Corporate Family

Kristen Salvatore DePalma and Emily V. Burton

Ethical Risks Arising From Lawyers' Use of (and Refusal to Use) Social Media

Margaret M. DiBianca

Criminal Law: 2009 Delaware Supreme Court Decisions

Michael F. McTaggart

DELAWARE LAW REVIEW

Volume 12

2011

Number 2

TABLE OF CONTENTS

Focusing On The Realities Of The Contracting Process — An Essential Step To Achieve Justice In Contract Enforcement <i>Russell A. Hakes</i>	95
The Handling Of A Claim For Tortious Interference With An At-Will Employment Contract In The Delaware State Courts Versus The Delaware District Court <i>Charles B. Vincent</i>	121
Engaging With The Realities Of The Corporate Family <i>Kristen Salvatore DePalma and Emily V. Burton</i>	133
Ethical Risks Arising From Lawyers' Use of (and Refusal to Use) Social Media <i>Margaret M. DiBianca</i>	179
Criminal Law: 2009 Delaware Supreme Court Decisions <i>Michael F. McTaggart</i>	199

The *Delaware Law Review* (ISSN 1097-1874) is devoted to the publication of scholarly articles on legal subjects and issues, with a particular focus on Delaware law.

The views expressed in the articles in this issue are solely those of the authors and should not be attributed to the authors' firms, places of employment, or employers, including the State of Delaware, nor do they necessarily represent positions that the authors' law firms or employers might assert in litigation on behalf of clients unless an article specifically so states. While the articles are intended to accurately describe certain areas of the law, they are not intended to be and should not be construed as legal advice.

The *Delaware Law Review* is edited and published semi-annually by the Delaware State Bar Association, 301 North Market Street, Wilmington, Delaware 19801. (Telephone 302-658-5279.) Manuscripts may be submitted to the Editorial Board by email or hard copy using Microsoft Word and with text and endnotes conforming to *A Uniform System of Citation* (18th ed. 2005). Please contact the Delaware State Bar Association at the foregoing number to request a copy of our Manuscript Guidelines.

Subscriptions are accepted on an annual one volume basis at a price of \$40, payable in advance; single issues are available at a price of \$21, payable in advance. Notice of discontinuance of a subscription must be received by August of the expiration year, or the subscription will be renewed automatically for the next year.

Printed in the United States.

POSTMASTER: Send address changes to the *Delaware Law Review*, Delaware State Bar Association, 301 North Market Street, Wilmington, Delaware 19801.

© Delaware Law Review, 2011. All Rights Reserved.

DELAWARE LAW REVIEW

Editorial Board

Danielle Gibbs
Editor-in-Chief

Honorable Christopher S. Sontchi
Executive Editor

Patricia L. Enerio
Research Editor

Louis Hering
Assistant Executive Editor

Editors

Abby Lynn Adams
Michele Sherretta Budicak
Matthew E. Fischer
Karen E. Keller
Honorable J. Travis Laster
Peter S. Murphy

Mark M. Billion
Timothy R. Dudderar
Kurt M. Heyman
Robert J. Krapf
Michael F. McTaggart
Bruce A. Rogers

Advisors

Honorable Thomas L. Ambro
Patricia C. Hannigan

Delaware State Bar Association

Matthew M. Greenberg
President

Rina Marks
Executive Director

Rebecca Baird
Publications Editor

FOCUSING ON THE REALITIES OF THE CONTRACTING PROCESS — AN ESSENTIAL STEP TO ACHIEVE JUSTICE IN CONTRACT ENFORCEMENT

Russell A. Hakes*

A comparison of the process involved in creating a written contract with the principles and assumptions which underlie common law rules and doctrines that govern the enforcement of contracts reveals powerful inconsistencies. In effect, significant legal myths underlie the law in this area. Yet, the ability of private parties to structure their transactions and relationships is fundamental to our economic and social system. What can be done to bring the rules and doctrines governing contracts into harmony with reality? This article examines important realities of the contracting process and, based upon those realities, makes several recommendations that, if followed by courts, would help to harmonize common law contract rules and doctrine with real-world contract formation.

The process occurring between parties that results in a written or electronic document, the contract, has not received adequate focus in legal discourse. There has been significant scholarship on the topic of abuse of unequal bargaining power¹ and one-sided contracts,² which constitute important subparts of the contracting process. Other significant scholarly attention has been directed toward standardized provisions, or boilerplate, in contracts.³ However, the focus of

* Professor of Law, Widener University School of Law.

1. See, e.g., Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005); Daniel D. Barnhizer, *Power, Inequality and the Bargain: The Role of Bargaining Power in the Law of Contract - Symposium Introduction*, 2006 MICH. ST. L. REV. 841 (2006) (SYMPOSIUM); W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853 (2006); Larry A. DiMatteo, *Penalties as Rational Response to Bargaining Irrationality*, 2006 MICH. ST. L. REV. 883 (2006); Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH. ST. L. REV. 925 (2006); Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963 (2006); Curtis Bridgeman, *Misrepresented Intent in the Context of Unequal Bargaining Power*, 2006 MICH. ST. L. REV. 993 (2006); James F. Hogg, *Consumer Beware: The Varied Application of Unconscionability Doctrine to Exculpation and Indemnification Clauses in Michigan, Minnesota, and Washington*, 2006 MICH. ST. L. REV. 1011 (2006).

2. See, e.g., Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006).

3. See, e.g., Omri Ben-Shahar, *Foreword*, 104 MICH. L. REV. 821 (2006); Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire*, 104 MICH. L. REV. 837 (2006); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers*, 104 MICH. L. REV. 857 (2006); Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933 (2006); Omri Ben-Shahar & James J. White, *Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953 (2006); David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983 (2006); Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033 (2006); Kevin E. Davis, *The Role of Nonprofits in the Production of Boilerplate*, 104 MICH. L. REV. 1075 (2006); Michelle E. Boardman, *Contra Proferentem: The Allure of Ambiguous Boilerplate*, 104 MICH. L. REV. 1105 (2006); Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129 (2006); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175 (2006); Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223 (2006); Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235 (2006).

such scholarship generally has been to create, and then justify or criticize, theories regarding standard form contracts or contracts of adhesion and their effects in the relevant economic markets.

This article explores the contracting process more generally, with standard form contracts and contracts of adhesion comprising only a subset, albeit an important subset, of the contracts examined. Unequal bargaining power is present in most contracting processes, but is not always abused and can be effectively mitigated if the contracting process is understood and incorporated into the courts' interpretive and enforcement processes. The objective of this article is to highlight realities of the contracting process that can be used by courts to restructure some of the principles and assumptions that underlie common law contract rules and doctrines. The intent is to help courts resolve issues that are troubling to many legal observers.⁴ The prescriptions in this article would not undermine in any way the ability of private parties to structure their relationships via contract, but would strengthen contract law, thereby permitting contracts to more effectively fulfill their role in a free and vibrant society.

Part I of this article briefly describes the relevant historical and theoretical roots of some key doctrines governing contract enforcement. Part II explores the contracting process and identifies realities that can be applied to the interpretation and enforcement of contracts. Part III briefly explores an array of existing common law doctrines available to courts faced with the problems created by the contracting process and the shortcomings of those doctrines. Part IV makes specific recommendations for incorporating an understanding of the contracting process into judicial decisions in order to bring the common law in line with the realities of the contracting process and make the law governing contracts more robust in achieving justice and in facilitating private relationships in our society.

I. HISTORICAL AND THEORETICAL ANTECEDENTS

At the outset, it is essential to clarify the use of the term "contract" in this article. The term has three readily identifiable meanings. Those meanings are related, but each has a significantly different focus. The first possible meaning of the term "contract," a set of legally enforceable promises, is fundamentally captured, albeit with significantly different nuances, by the definitions of "contract" provided by the Restatement of the Law Second, Contracts (the "Restatement"),⁵ and the Uniform Commercial Code (the "UCC").⁶ The second possible meaning, the specialized body of law governing a set of legally enforceable promises, is frequently used in academic literature and is poignantly captured by the title of Grant Gilmore's well-known book, *The Death of Contract*.⁷ The third possible meaning, the written document (or the complete, readable, electronic document used on-line), is the meaning of most import to transactional lawyers (and probably the meaning understood by non-lawyers). When this article uses the term "contract," it is this third meaning to which the term refers. Employing this definition of "contract" has important implications. In much of the literature discussing contract doctrines and principles, an important concern is whether an enforceable obligation was created. That

4. A succinct but very informative history of scholarly works and views regarding standard form contracts is set forth in Johnston, *supra* note 3, at 860-64.

5. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

6. "'Contract' means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law." UCC § 1-201(11) (2003).

7. GRANT GILMORE, *THE DEATH OF CONTRACT* (OHIO STATE UNIVERSITY PRESS 1974).

issue arises only rarely when the term “contract” refers to the written document.⁸ In the context of a written contract, the common legal issues are: what do its terms mean, has there been a breach, and what are the remedies?

A few observations about the relationship of the other meanings of the term “contract” to the meaning used in this article are appropriate. The UCC definition - the resulting legal obligation between the parties⁹ - provides a concept that aids the study of the contracting process: drawing a distinction between the terms “agreement” – “the bargain of the parties in fact”¹⁰ – and “contract” – “the total legal obligation that results from the parties’ agreement.”¹¹ While the UCC, and thus that express distinction, only governs a limited universe of contracts, the distinction between the parties’ *bargain in fact* and the *legal obligation that arises out of it* is essential to understanding the contracting process, the resulting contract, and the law that should govern the contract. The distinction was drawn by Professor Karl Llewellyn in his article, *What Price Contract? – An Essay in Perspective*,¹² decades before the UCC was promulgated. In fact, as we analyze the contracting process, a similar distinction between the bargain in fact and the content of the resulting written contract becomes apparent.¹³ Two central and critical issues arise from the distinction between the bargain in fact and the written contract that arises from that bargain: what should be the resulting legal obligation, and what are the appropriate rules and procedures for ascertaining and enforcing that obligation?

When this article refers to the body of law known generally as “contract,” it uses the phrase “law governing contracts.” An examination of the question “what is encompassed in the body of law governing contracts” would produce a lengthy article, or perhaps even a book. A very useful short answer to the question, providing a valuable focus for this article, comes from Professor Lawrence Friedman’s social and economic study of the law governing contracts.¹⁴ He focused on the close tie between our free market economic system and our concept of freedom of contract, although he was certainly not the first to recognize that close relationship.¹⁵ In his study, Professor Friedman stated: “[T]he rough equation of the

8. Of course, there is always the question whether each party assented to the document, and sometimes the closely related issues of capacity to contract, *see, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 12-16, duress or undue influence, *see, e.g., id.* §§ 174-177, and fraudulent inducement, *see, e.g., id.* § 164. There are also interesting questions that arise if each party sends a different document; compare the offer/counter-offer approach at common law, *see, e.g., id.* §§ 39, 40, 59, & 61, with the so-called battle of the forms approach in the UCC, *see* UCC § 2-207 (2002).

9. *See supra* note 6.

10. The UCC’s definition of “agreement” is: “the bargain of the parties in fact as found in their language or by implication from other circumstances ...” UCC § 1-201(3) (2003).

11. *Id.* § 1-201(11).

12. 40 YALE L.J. 704 (1931). In that essay, Professor Llewellyn set forth and chose for purposes of the essay among four different concepts for the term “contract.” He described two of the concepts as involving “agreements-in-fact.” In describing the third, the concept he used in the essay, Llewellyn distinguished between the terms “‘promise’ for the promise-in-fact, [and] ‘contract’ for the legal effects of such a promise.” *Id.* at 707-08.

13. Llewellyn made a similar distinction by contrasting “dickered” terms with “boilerplate.” *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370-71 (1960).

14. LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY, 10, 22-23 (UNIVERSITY OF WISCONSIN PRESS 1965).

15. *See, e.g.*, Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454-56 (1908); Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 367-68 (1920); Friedrich Kessler, *CONTRACTS OF ADHESION--SOME THOUGHTS ABOUT FREEDOM OF CONTRACT*, 43 COLUM. L. REV. 629, 629 (1943).

free market and the law of contract has value. For one thing, it furnishes a workable criterion for measuring and defining what cases and activities should be treated as part of the law of contract.”¹⁶ He further distinguished the law governing contracts as being judge-made common law separate from regulatory efforts: “Since the law of contract concerns and provides legal support for the residue of economic behavior left unregulated (the free market), it naturally spends much of its energy asking: what range and type of transactions fall within the sphere of contract?”¹⁷ This concept closely approximates considering the law governing contracts to be that body of common law whereby our society permits private individuals to structure the legal relationship that will govern their behavior with each other concerning economic matters.¹⁸

Courts had been enforcing contractual-type obligations for centuries before the cases resolving those disputes were designated to be “contract law,” and such law was developed and studied under that rubric. Under early English common law, legal actions needed to fit within recognized forms of action. Three of those forms of action were the way that what we now consider “contract” disputes were resolved, covenant, debt, and assumpsit. Each of the three forms of action provides valuable insights into our modern law governing contracts and helps us understand why some of the principles of that law developed. Understanding that history can help guide us in determining the path future development should take.

An *action in covenant* was available for an obligation under seal. For an obligation under seal, two important facts were established: the party had authenticated the obligation and the terms of the obligation were known.¹⁹ Although contracts under seal play only a limited role in our law governing contracts today,²⁰ the approach of enforcing all provisions of a written contract clearly is consistent with, and possibly derived from, this early concept, even though a signature on a contract is not a seal.

The second common law form of action, debt, permitted actions for obligations that were not under seal if the obligation was to pay a definite sum of money, provided that money had been loaned, goods had been delivered, or services had been performed.²¹ Such actions were obviously of limited utility, but they did have the advantage to the courts of establishing a clear relationship between the remedy sought, money, and the action of the party that had not performed an obligation.

Eventually actions in debt were replaced by actions in assumpsit, the third of the relevant common law forms of action, as the situations in which assumpsit was available were expanded to include more and more of what we now consider contractual disputes.²² The term assumpsit refers to an undertaking to do something.²³ The action in assumpsit was

16. FRIEDMAN, *supra* note 14, at 23.

17. *Id.*

18. *See* notes 38-42 and accompanying text *infra*.

19. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1941).

20. Contracts under seal are acknowledged as being subject to special rules. *See* RESTATEMENT (SECOND) OF CONTRACTS § 6(A). Some jurisdictions, including Delaware, recognize contracts under seal, but only for limited purposes. *See* DEL. CODE ANN. TIT. 10, § 8106(a) (2009); *Di Biase v. A & D, Inc.*, 351 A.2d 865, 867 (Del. Super. 1976). Under the UCC, the effect of sealed instruments is eliminated in contracts for the sale of goods. *See* UCC § 2-203 (2002).

21. *See* W. S. Holdsworth, *Debt, Assumpsit and Consideration*, 11 MICH. L. REV. 347, 348 (1913).

22. *Id.* at 348-51.

23. *Id.* at 594-98.

originally meant to address physical injury to persons or property that arose from a consensual undertaking.²⁴ A central concept of the law governing contracts arising from this origin in *assumpsit* is the idea of an undertaking, which, perhaps better than the concept of a promise, captures the essence of why a contract should be enforced. Undertaking has a strong tie to the idea of agreeing to, or bargaining for, the obligation. As the *assumpsit* form of action expanded, the concept of consideration developed as a way to qualify for that form of action.²⁵ Consideration, as a key element of the law governing contracts today, inherently involves something that is bargained for.²⁶

Forty years ago, in April 1970, Professor Grant Gilmore gave a series of lectures at Ohio State University, which he subsequently elaborated upon and published in his book, *The Death of Contract*.²⁷ Under any of the three meanings of the term, “contract” is obviously still very much alive forty years later. However, what Professor Gilmore was discussing and agreeing with, the “Contract is Dead” movement, was based upon valid points made by a group of legal scholars and provides some profound truths in understanding the current law governing contracts. Gilmore’s key point was that the general theory of contract, as a specialized body of law with a coherent philosophy, had been changing dramatically throughout the twentieth century, and many significant initial conceptions of that classical contract theory could be said to be dying, if they had not already died. That death resulted from both codifications of certain areas of law covered by the general theory of contract²⁸ and significant changes in doctrines arising from court decisions and scholarly analysis.

Dean Langdell, Justice Holmes, and Professor Williston promulgated classical contract theory almost out of whole cloth in the late-nineteenth century.²⁹ Professor Gilmore credited Justice Cardozo and Professor Corbin as engineers of the destruction of that theory, primarily by demonstrating that the theory was historically wrong.³⁰ One such error was the attempt to doctrinally require consideration before a promise could be enforced; other justifications had long been recognized by courts.³¹

A central feature of classical contract theory that was losing force was its attempt to shift from a subjective theory of contract, captured to a significant extent by the concept of meeting of the minds, to an objective theory,³² which focused

24. Scholars have demonstrated that tort law played a significant role in the origins of the law governing contract; actions in *assumpsit* are where this occurred. See Allan E. Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 594-96 (1969).

25. *Id.*

26. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

27. GILMORE, *supra* note 7.

28. The UCC, developed and promulgated in the 1940’s and 1950’s by the National Conference of Commissioners on Uniform State Laws in cooperation with the American Law Institute, constitutes a significant example of this. The codification of areas of the law included within “contract” under the classical theory, however, was much broader and earlier than this, and included insurance law, labor law, and antitrust law. See FRIEDMAN, *supra* note 14, at 23-24.

29. See GILMORE, *supra* note 7, at 12-34.

30. See *id.* at 57-58.

31. Promises could be enforced based upon principles of reliance or restitution. Much of this changing theoretical model is reflected in tracing the development of Sections 75 and 90 of the Second Restatement of Contracts from the First Restatement of Contracts. See RESTATEMENT (FIRST) OF CONTRACTS §§ 75, 90; RESTATEMENT (SECOND) OF CONTRACTS §§ 75, 90.

32. The continuing inadequacy of the objective theory to describe actual court decisions is described in Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353 (2007).

on external manifestations of mutual assent.³³ The concept of assent,³⁴ tied closely by classical contract theory to its objective view, has important ramifications when the bargained-for exchange is documented by a written contract. Under an objective theory, the general rule is that a party's signature on the contract is clear evidence of such assent. The general rule loses logical force, however, where the provisions of the contract are not negotiated.³⁵

An important insight into the problems caused by the attempt to impose a completely objective theory onto the law governing contracts can be drawn from the work of Professor Richard Barnes in *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*.³⁶ Professor Barnes explains that the subjective concepts of unconscionability and contracts of adhesion were developments in the law governing contracts under an objective theory that were essential in order to preserve that theory. In other words, subjective elements or concepts needed to be grafted onto the law to bring it closer to reality. The converse should also be true. If courts had been enforcing contracts under a subjective theory, such doctrines would probably not have been necessary, because in situations involving unconscionability or contracts of adhesion, the same results should flow from a subjective determination of the substance of the parties' bargain. There is theoretical appeal to objectivity in the law governing contracts, because it is much easier to determine facts objectively than to try to understand what is subjectively going on in someone's mind. However, examining the contracting process without paying close attention to subjective realities will yield an incomplete understanding.

Another interesting reality of early court decisions that classical contract theorists ignored, or perhaps even intentionally hid, was that courts imposed a pre-contractual duty to bargain in good faith.³⁷ The reality that courts examining contracts prior to the development of classical contract theory would take into account the bargaining process and the parties' duties during that process reveals the deep and ancient roots of the idea of focusing on the process of contract creation as an important part of determining how to enforce them.

Another overarching theory that has been closely related to the development of the law governing contracts is the so-called "freedom of contract" the choice of the participants to enter into an agreement.³⁸ Professor Friedman described classical contract theory as "a deliberate relinquishment of the temptation to restrict untrammelled individual autonomy ... parties could be treated as individual economic units which, in theory, enjoyed complete mobility and freedom of decision."³⁹ He also observed that "the economic system of the United States gives freedom of contract (on which contract law depends) more legal scope than do pre-industrial and socialistic economic systems."⁴⁰ Professor P.S. Atiyah traces the

33. See GILMORE, *supra* note 7, at 35-44.

34. Assent is one of the few required elements to create a contract under the rules set forth in the Restatement. See RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

35. The decline of the importance of consent is clearly set forth in scholarly critiques of standard form contracts. See, e.g., Radin, *supra* note 3, at 1231-32; Rakoff, *supra* note 3, at 1237-38; Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEA. U. L. REV. 469 (2008).

36. 2005 LA. L. REV. 123 (2005).

37. See GILMORE, *supra* note 7, at 56 (discussing Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 Harv. L. Rev. 401 (1964)).

38. See P. S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 36, 402-03 (CLARENDON PRESS, OXFORD 1979).

39. FRIEDMAN, *supra* note 14, at 20-21.

40. *Id.* at 10.

development of the idea of freedom of contract from its origins in the industrial revolution in England (roughly 1779 through 1870) to its demise, or at least its significant limitation, from 1870 to the present.⁴¹ An important portion of this decline was caused by regulation: “In Statute law the process of overriding individual freedom of choice has been taken far beyond the lengths which most lawyers would regard as compatible with the principles of contract law.”⁴² This reality illustrates two important points. First, the contracting process inherently is tied to the freedom and autonomy of the actors, and second, that autonomy has too frequently resulted in injustices requiring legal intervention.

Out of this brief historical review, several important concepts and principles emerge. The law governing contracts has been and should be closely tied to the concept of bargaining and bargained-for exchanges. The attempt to create a completely objective theory of contract involved a shift from long-standing approaches, required the development of ameliorating doctrines, and created distortions in the concept of assent to terms in a contract. The nature of assent to a contract is an important concept to explore. The concept of freedom of contract is profoundly linked to our economic and social system, but it inherently facilitates abuse, which must be effectively addressed by our legal system. Finally, there are deep historical roots supporting courts’ consideration of the parties’ contracting process when determining whether and how to enforce the resulting contract.

II. THE CONTRACTING PROCESS

Examining the process of drafting contracts provides a number of valuable insights that courts can consider to more effectively resolve challenges to contract provisions. When two parties enter into an agreement, there is a bargaining process in which some type of exchange is agreed upon.⁴³ The concept of consideration itself contemplates a bargained-for exchange.⁴⁴ If the agreement is not evidenced by a written (including electronic) contract, the terms of the agreement would be established by proving what had been agreed upon in the bargaining process. Having the agreement evidenced by a contract dramatically simplifies proof of what was bargained for and agreed upon, but it also introduces new issues. Do the contract’s provisions accurately reflect what was bargained for? Did the party drafting the contract add provisions that were not part of the bargaining process?

When the agreement is evidenced by a contract, the events leading up to the production of that contract vary significantly depending upon many factors. Aside from the subjective factors that play a role, those factors include: the economic size of the agreement, the nature and amount of future interaction between the parties contemplated by the agreement, the number of legal issues the agreement raises, how frequently each party enters into that type of agreement, and each party’s bargaining power. Out of the many possible combinations of those factors, however, there are some important commonalities that assist in the analysis of whether to enforce or modify particular provisions in the resulting contract.

It is helpful, first, to identify the two extremes of the continuum. On one end is the so-called contract of adhesion⁴⁵ involving primarily, but not exclusively, contracts with consumers. These are becoming even more common with electronic

41. ATTYAH, *supra* note 38, at 398-505, 681-764.

42. *Id.* at 726.

43. The general rule requires a bargain to establish a “contract” with a few minor exceptions relating to promises that are enforceable without consideration. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17.

44. *See id.* §§ 17 cmt.a, 71.

45. This concept was first introduced in 1919 in connection with insurance contracts. *See Edwin Patterson, The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919). The concept was further developed several decades later in Friedrich

contracting on the internet.⁴⁶ The process at this extreme involves one party simply signing a contract that contains the minimal, essential and important, bargained-for content, together with many additional provisions added by the attorney for the other party to cover whatever the attorney, with the client's approval, deemed important to include for all similar transactions. The party who did not draft the contract is required to accept it in order to enter into the transaction. The additional content is often referred to as "boilerplate" and has been the subject of significant scholarly debate and attention.⁴⁷ It is not uncommon for the content of some of those additional provisions, or the failure to include provisions on certain issues, to be the result of perceived potential market reaction to such provisions.⁴⁸

The few bargained-for terms in these contracts are clearly assented to, but what is the nature of the assent, if any, to the remaining provisions?⁴⁹ Signing a contract leads to the assumption that the party read and understood the contract. But, scholars recognize, and some research has verified, that standard form contracts are not read by consumers.⁵⁰ Even attorneys with expertise in the area of contract law do not regularly read standard form contracts they sign. They understand the contracts are not negotiable and therefore do not waste their time. A recent news report describes Judge Richard Posner's statement at a conference that he did not read the extensive documentation he signed for a home equity loan and also describes managing attorneys from major New York law firms participating on conference panels and signing release forms without reading them.⁵¹ When addressing contracts of adhesion, courts have recognized that consumers do not read them, but, drawing upon the concept of assent, they often assert that the adhering party had the *opportunity* to read and understand the contract before going forward, or at least had the responsibility to read the contract to know what it was signing and agreeing to.⁵² The concept that such provisions could or should have been read, to say nothing of being understood, simply does not reflect real world activity.

continued from page 101

Kessler's *CONTRACTS OF ADHESION — SOME THOUGHTS ABOUT FREEDOM OF CONTRACT*. See 43 COLUM. L. REV. 629 (1943). More recently, contracts of adhesion were thoroughly and carefully explored in Todd D. Rakoff's *Contracts of Adhesion: An Essay in Reconstruction*. See 96 Harv. L. Rev. 1173, 1177-79 (1982).

46. See, e.g., Sam S. Han, *Predicting the Enforceability of Browse-Wrap Agreements in Ohio*, 36 OHIO N.U. L. REV. 31 (2010) (describing the dramatic expansion of internet contracting and attempting to predict enforceability of certain agreements under UETA); Ronald J. Mann & Travis Siebneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984 (2008) (suggesting, based on empirical data, that rapidly expanding electronic contracting is not as problematic as many have asserted); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002) (describing the rapidly growing field and suggesting new contract law may become necessary).

47. See note 3 and accompanying text *supra*.

48. Significant scholarly discussion has either described this aspect or criticized claims that it makes such provisions less of a concern. For a brief look into a segment of scholarly debate, see Mann & Siebneicher, *supra* note 46 (discussing evidence that pro-seller terms are much less common than many would predict) and Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1414-15 (1983) (using economic and psychological theories to suggest that legislation should focus on contract terms consumers actually find important).

49. See notes 34-35 and accompanying text *supra*.

50. Rakoff, *supra* note 45.

51. Debra Cassens Weiss, *Judge Posner Admits He Didn't Read Boilerplate for Home Equity Loan*, ABA JOURNAL LAW NEWS NOW, June 23, 2010 at http://www.abajournal.com/news/article/judge_posner_admits_he_didnt_read_boilerplate_for_home_equity_loan.

52. See, e.g., *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1362 (Del. Super. 1990); see, generally John D. Calamari, *Duty to Read: A Changing Concept*, 43 FORDHAM L. REV. 341 (1974).

At the opposite end of the continuum is the contract in which every single provision is fully negotiated by each party. Although the number of fully negotiated contracts is relatively small, those contracts are extremely important to an understanding of the contracting process. Such contracts typically involve attorneys representing each party drafting and negotiating the final product. One very interesting part of the process in this context is that different persons for each party are often involved in negotiating different parts of the contract. These contracts truly reflect the freedom of contract model, where the parties work out the details to which they are willing to commit. When such a contract is signed by each party, it accurately reflects what they have bargained for and assented to, limited only by the drafters' ability to accurately capture in the contract's wording what the parties agreed upon. A fully negotiated contract does not mean the parties have necessarily anticipated all issues that may arise and resolved them, but that shortcoming is of limited relevance to the key question: should courts enforce what the parties expressed in their finished product, the contract?

The part of the contract-drafting continuum lying between these two endpoints is the most critical to explore and understand. Most commonly, even when attorneys represent all parties to a contract, the parties do not fully negotiate each provision of the contract. For example, this author can count on one hand the number of truly, fully negotiated contracts on which he worked during ten years of practice as a transactional attorney. For the hundreds of other contracts negotiated with attorneys on both sides of the transaction during that period, one side, usually this author's clients, controlled the drafting process. This generally meant that the drafting and negotiation process began with a form the client had developed for that type of transaction.⁵³ When the other party's attorneys raised concerns about provisions in the initially produced drafts, we discussed, and occasionally modified, them. The other attorneys' client usually was most interested in the transaction being completed based on the key business terms that had been negotiated and did not give the attorneys free rein to carefully negotiate the other provisions in the contract, either because their client thought it unlikely the issues covered by those provisions would become important or because the client was not willing to pay the additional attorneys' fees that detailed negotiations of all the other provisions would entail. This author was occasionally on that side of the negotiations and experienced such an approach and limitations first hand.

The foregoing characterization of contract negotiations involving attorneys on both sides of the transaction is by no means limited to this author's personal experiences. Many transactional attorneys in large firms have described the contracting process they have experienced, and the approach described above is common. In contracts that are not fully negotiated, as long as the essential negotiated business terms of the transaction are included, the party not controlling the drafting will accept many additional provisions if they are within the realm of reason.

The reality that contract provisions are not fully negotiated, even when attorneys represent each side during contract negotiations, is vividly captured by this simple illustration. One of the clients my firm represented had approved forms for all the transactions it regularly negotiated and entered into. One such transaction was the purchase or sale of commercial real property. The client had two different form real estate purchase agreements - one for use if it was the buyer, the other if it was the seller. The "buyer" form was more than twice the length of the "seller" form. It was clear that, even after negotiation, the seller form would never resemble the buyer form and vice versa. It simply would have been too complicated to have that detailed a set of negotiations over the contract itself.

The lack of negotiation of all contractual provisions when both parties are represented by attorneys was also described by professors Omri Ben-Shahar and James White when they examined the process of contracting in the auto manufacturing business. They were surprised to learn how different the process was from what theories would have

53. Scholars have described a number of reasons that standard form provisions may be used, from control over the discretion given to agents in large organizations, *see, e.g.*, Ahdieh, *supra* note 3, at 1040 n.30, to cost savings devices in contract negotiations, *see, e.g., id.* at 1034.

predicted.⁵⁴ Although the parties were sophisticated and had legal counsel, their contracts were not fully negotiated. Instead, outside of the essential business terms, the contracts were standard forms and strongly one-sided.⁵⁵

Additional insights into the reality that many contract provisions are not fully negotiated are found in an article about preparing contracts governing information technology consulting services and software from the perspective of the user.⁵⁶ The author of that article noted that there were numerous articles on the subject viewed from the perspective of the provider of such services but that his article appeared to be the first to view the process from the perspective of the customer.⁵⁷ He also observed that in “more routine projects, it will not be appropriate to invest time and fees in the protracted negotiation that is likely to ensue.”⁵⁸ He further described his personal experience that in these contracts “vendors are willing to make at least some concessions in the areas discussed if the vendor’s need to balance risk and reward is respected.”⁵⁹ That last observation focuses us on another issue relevant to many of these *other provisions* in contracts. For one of the parties, the economic effect of certain provisions will be much more significant. If that provision is negotiated, it will take a form acceptable to the party most affected, but not overly detrimental to the other party. If the provision is not negotiated at all, however, it will by nature be very one-sided.

Additional insights into the contract drafting process in the center of the spectrum can be gleaned from several articles describing how to teach or enhance the process of drafting contracts. For example, in an article discussing the contract drafting course he designed to simulate actual law practice for students,⁶⁰ Professor Charles Lewis described a four step process: first, interview the client to determine the client’s goals; second, plan the contract so it will cover everything necessary to achieve those goals; third, negotiate the draft contract with the other party; and fourth, draft the final contract.⁶¹ He subsequently published a short article describing how the same techniques could be used by law firms to teach contract drafting to young associates.⁶²

In discussing the client interview, Professor Lewis provides important insight into the entire contract drafting process by observing “how hard it can be to get the facts from a person who does not know what to tell the lawyer, does not have all the information the lawyer needs, and may be misinformed.”⁶³ Implicit in this observation are two realities:

54. Ben-Shahar & White, *supra* note 3, at 956-64.

55. *Id.* at 981-82.

56. B. Robbins, *Computing the contract: Getting that tech stuff in writing – from a user’s perspective* 13 No. 5. BUS. LAW TODAY 45 (May/June 2004). The fact of incomplete contract negotiation, even where attorneys represent each party, was also illustrated in an article in *Business Law Today* discussing problems that arise when commercial leases are not carefully negotiated and drafted. See Jennifer L. Wolf, *Dangerous document: Buried land mines can sabotage the future*, 13 No. 4 BUS. LAW TODAY 10 (March/April 2004).

57. Robbins, 5 BUS. LAW TODAY at 45.

58. *Id.*

59. *Id.*

60. Charles C. Lewis, *The Contract Drafting Process: Integrating Contract Drafting in a Simulated Law Practice*, 11 CLINICAL L. REV. 241 (2004).

61. *Id.* at 268-69.

62. Charles C. Lewis, *Turning the Firm into a School*, 15 No. 3 BUS. LAW TODAY 25 (January/February 2006).

63. *Id.* at 27.

the provisions of a contract beyond the essential business terms are of a fundamentally different character from the essential business terms, and those bargaining for the essential business terms may not understand all the legal issues that could arise or how best to bargain for the provisions in the contract to govern those issues.

The reality that different persons must negotiate various contract provisions is captured by another author describing how attorneys should negotiate an information technology consulting service and software contract. He concludes that such contracts “require that counsel draw on the expertise of the client’s IT experts in order to adapt to the IT area the legal techniques that are effective in other situations.”⁶⁴ The appropriateness of different persons negotiating different parts of a contract is also reflected in an article describing what is involved in drafting effective arbitration provisions in LLC agreements.⁶⁵ That author recommends having litigators work closely with the transactional attorneys in drafting those provisions.

This particular reality of the contracting process results in either: both parties delegating parts of the negotiating process to different persons who will have an understanding of particular issues relating to the contract; or an inherently flawed attempt to achieve a truly bargained for set of functional contract terms. It is important to note that costs or resource allocation issues may well result in one party opting for the second of those possibilities. Thus, in contracts that are not fully negotiated, there is a significant chance that provisions in the contract beyond the essential terms are not only not negotiated but that they are not understood by one of the parties.

Additional valuable insights into the process of negotiating contracts whose provisions are closely related to specialized knowledge can be extracted from the recent experiences of task forces established by committees in the Section of Business Law of the American Bar Association. For example, the Banking Law Committee, Commercial Financial Services Committee, Consumer Financial Services Committee and Uniform Commercial Code Committee recently appointed a joint task force to draft a model Deposit Account Control Agreement (“DACA”) to help simplify the negotiation of secured transactions when part of the collateral is a deposit account.⁶⁶ In addition, the Commercial Finance Committee established a task force to draft a model First Lien/Second Lien Intercreditor Agreement (“Model Intercreditor Agreement”).⁶⁷

In drafting the DACA, representatives of the key players in such secured transactions worked for several years to complete the project. Even so, the members of the task force could not reach consensus on all terms. While there is always some difficulty associated with the drafting of a form document, because consideration must be given to situations that are not present in all transactions, the bigger challenge in the process of drafting the DACA was ensuring that each provision would be both effective and acceptable to each side of the transaction. “Although not everyone is in agreement with every provision, the DACA was forged in an effort to reach as broad a consensus as possible. There was wide representation, good will and good humor throughout [the] process.”⁶⁸ The result was a five-page document with two attachments totaling an

64. Robbins, *supra* note 56, at 49.

65. Dominick T. Gattuso, *Drafting Arbitration Provisions for LLC Agreements: The Devil is in the Details*, 18 No. 4 BUS. LAW TODAY 53 (March/April 2009). That article points out that several judges have made public comments about how many “inarticulately worded agreements [are] flowing through their courts.” *Id.* at 53.

66. Joint Task Force on Deposit Account Control Agreements, ABA Section of Business Law, “*Initial Report of the Joint Task Force on Deposit Account Control Agreements*” 61 BUS. LAW. 745 (2006) (hereinafter “*DACA Task Force Report*”).

67. Committee on Commercial Finance, ABA Section of Business Law, “*Report of the Model First Lien/Second Lien Intercreditor Agreement Task Force*,” 65 BUS. LAW. 809 (2010) (hereinafter “*Model Intercreditor Agreement Task Force Report*”).

68. DACA Task Force Report, *supra* note 66, at 780.

additional ten pages. The DACA contains several alternative provisions, as well as a number of provisions designed to be tailored to any specific transaction.

The typical deposit account control agreement, even in the most sophisticated secured financing, would be negotiated in a tiny fraction of the time it took to develop the DACA. Typically, the depository bank would produce a proposed form, and only the most critical provisions would be negotiated. Those negotiations would rarely, if ever, involve the persons on either side of the transaction who would be tasked with implementing the resulting detailed provisions.⁶⁹

The DACA task force's status reports during the drafting process, given at the spring and annual meetings of the Section of Business Law, were replete with discussion of how difficult (to the surprise of task force members) it had been to negotiate some provisions. Many of those difficult-to-negotiate provisions were relevant to how banks functioned in their back office operations. The attorneys on the task force who would normally negotiate such contracts learned much they would not have otherwise known because parties intimately familiar with such back office operations were brought to the negotiating table.

Similar experiences characterized the drafting of the Model Intercreditor Agreement. The process involved face-to-face meetings three times per year and regular meetings by conference call over a four year period.⁷⁰ The final agreement is 71 pages in length and includes 107 explanatory footnotes.⁷¹ The final report of the task force points out that the resulting form included alternative provisions favoring second lien lenders.⁷² The obvious implication of having alternative provisions is that, even after extensive negotiations, it was not possible to craft neutral provisions on all issues.

The second stage in contract drafting described by Professor Lewis, the planning stage, involves both foreseeing protections that will be needed in the event of a breach and anticipating ways to protect the client against external risks that may threaten the contractual arrangement.⁷³ To a very significant extent, a contract is a document prepared in anticipation of potential litigation. In fact, most of the provisions beyond the essential business terms are devoted to minimizing the possibility of litigation as well as to increasing the likelihood of faster resolution in the event litigation does arise.

Professors Scott and Triantis have suggested, contrary to much contract theory, that significant economic efficiencies might be created in many transactions by shifting the cost from the front end of the contracting process – attempting to anticipate and cover everything in the contract – to the back end –renegotiating or enforcing the contract.⁷⁴ This shift would be accomplished by the use of general standards (or “vague terms”) in the contract, such as reasonable care, as contrasted with more specific rules (or “precise terms”) in the contract.⁷⁵ Another alternative is to leave those provisions out of the contract. The absence of a contract term may reflect (i) a choice to reduce contracting costs (ii) a failure to anticipate the potential implications of the provisions chosen, or (iii) the extent to which one of the parties had greater control over the drafting of the contract.

69. See notes 85 - 87 and accompanying text, *infra* for a discussion of this issue.

70. Model Intercreditor Agreement Task Force Report, *supra* note 67, at 811-12. Over 200 attorneys were members of the task force, many of whom attended the meetings.

71. *Id.* at 813, 883.

72. *Id.* at 812.

73. Lewis, *supra* note 62, at 29.

74. Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 878-79 (2005).

75. *Id.* at 818-19.

A recent article in *Business Law Today* focused on learning to draft contracts by carefully using form contracts and rewriting them to apply to the current transaction and set forth a more expansive goal for that training effort: “[D]rafting contracts that effectuate their ... clients’ needs, and ... anticipate, and hopefully avoid, potential legal disputes.”⁷⁶ In addition to anticipating litigation, the article advocates drafting anticipated details of performance of the contract. Such provisions are important elements of a contract, but they are fundamentally different from the essential business terms of the bargain. Here, the attorneys’ focus is on regulating the transaction as it moves forward. These drafting techniques do not focus upon how to document what was negotiated, but upon how to anticipate and describe contingencies that may arise in the future and how to resolve those anticipated problems.

Professor Lewis’ planning stage discussion also includes consideration of contract provisions designed to achieve a result that is not in accordance with current applicable law.⁷⁷ Again, such provisions are designed to resolve potential problems. The idea is not to draft provisions that permit or require an illegality, but rather to achieve a different result by qualifying for a different set of legal rules. The concept is illustrated by an example in an article authored by Jennifer Wolf discussing commercial lease negotiations.⁷⁸ Under the general legal rule, contract covenants are dependent; the breach of a minor covenant by the landlord could excuse performance by the tenant, permitting it to withhold rent or terminate the lease. If the parties consider that possibility in connection with less critical landlord covenants in the lease however, they can expressly agree that such covenants are independent, thereby avoiding application of the general rule and eliminating the ability to withhold payment or terminate.⁷⁹ That same result of permitting the transaction to flow more smoothly could be achieved by the landlord including such a provision in its lease form that is not negotiated by the parties.

Ms. Wolf’s commercial lease article highlights an important reality in the difference between “essential business terms” and the other terms “[h]idden behind the essential terms.”⁸⁰ The *non-essential* terms are less likely to be fully negotiated and in many situations are not negotiated at all.⁸¹ Yet, the non-essential terms of a contract may be very beneficial to one of the parties and very problematic to the other.⁸² An example from the article that the author advises counsel for tenants to look for and avoid, is the common provision in leases giving the landlord a security interest in the tenant’s personal property on the leased premises.⁸³ The author advises attorneys that “careful reading and understanding of more than just the basic terms ... can help you identify and avoid [provisions] that may cause your client to incur unnecessary

76. Susan M. Chesler, *Drafting Effective Contracts: How to Revise, Edit, and Use Form Agreements*, 19 No. 2 BUS. LAW TODAY 35, 35 (November/December 2009).

77. Lewis, *supra* note 62, at 27.

78. Wolf, *supra* note 56.

79. *Id.* at 12 (citing as an example, *Wesson v. Leone Enterprises, Inc.*, 774 N.E.2d 622 (Mass. 2002) (failure by landlord permits tenant to terminate lease)).

80. *Id.* at 11.

81. See, e.g., note 54 and accompanying text *supra*.

82. Ben-Shahar & White, *supra* note 3, at 956-64.

83. *Id.* at 12. As a practicing attorney, I remember vividly preparing a form commercial lease which, at the client’s request, included such a security interest. When the client had its leasing agent look at the form before it was finalized, that clause was the only provision the leasing agent objected to. The objection was that it would hinder leasing the property to a tenant who read the lease carefully. The client decided to remove that provision.

legal or liability expenses.”⁸⁴ This advice raises an important question: If some of the provisions in a contract are not, in fact, negotiated by the parties, when should those provisions be part of the contract, and when should a court ignore or modify them? The nature of a party’s assent to non-essential terms differs from the nature of the party’s assent to essential terms, and this difference should be considered in the interpretation and enforcement process.

Non-essential provisions tend to be of greatest interest to attorneys and are intended to regulate the future relationship of the parties as their agreement moves forward. Two particular types of non-essential provisions are common: those governing the performance of the contract, which may include provisions designed to modify general legal rules, and those attempting to anticipate and deal with disputes.

One additional reality of contractual relationships needs to be explored. Oddly, the non-essential provisions that are of such interest to the parties during the negotiation of a contract are rarely reflective of the parties’ conduct after a contract is signed. The persons who negotiate a contract, or prepare the form to be used, are in most instances not the same persons who implement the contract on a day-to-day basis. As a result, even though the resulting contract is designed to govern the relationship between the parties as the transaction moves forward, it is not necessarily followed by the parties. Moreover, the completed contract is rarely used as a guide to instruct the employees who will implement the contract. In fact, more frequently than contract drafters would like to imagine, the contract is probably not even consulted when issues first arise. This is consistent with evidence scholars have presented of businesses negotiating with consumers who have entered into standard form contracts, after the contracts have been entered into, in ways that benefit the consumers and help develop more loyal customers.⁸⁵

Two other examples illustrate this reality. In their study of contracting in the automotive manufacturing industry, Professors Ben Shahaar and White describe one of the “Supplier Frequently Asked Questions” appended to Ford Motor Company’s “Global Terms and Conditions,” which explains that a particular provision in the contract is “never used literally and only infrequently used at all.”⁸⁶ The second example comes from a lawsuit between Wal Mart and a supplier. Wal Mart’s standard agreement required all changes to the agreement to be in writing and signed by both parties. When Wal Mart became dissatisfied with the product and was negotiating a change in settlement of the dispute, it made no attempt to create a written modification, but in a subsequent lawsuit filed by the supplier tried to enforce the \$600,000 settlement.⁸⁷ This disconnect between the provisions in a contract and the subsequent behavior of the parties is also illustrated by that fact that when conflicts arise between the parties, they are more frequently settled out of court than by judicial decision. In arriving at settlements of such disputes, the parties are not bound by the provisions of the contract, even if their starting negotiation posture was based on them. They have the opportunity to view the current dispute in the light of current conditions, whereas the contract provisions that could govern were prepared in anticipation of what might happen, and so are inherently not as directly on point as they could be.

What can be learned from the less-than-rigid adherence parties often give to provisions in their contracts? First, as contrasted with the essential business terms that are bargained for, the types of provisions that may get overlooked or ignored are an attempt by one, or if negotiated, both, of the parties to set down rules to govern the relationship going forward. One could refer to this as private legislation. Characterizing it in this way does not mean that it is outside the realm

84. *Id.* at 15.

85. *See, e.g., Johnston, supra note 3; Bebchuk & Posner, supra note 2.*

86. Ben-Shahaar & White, *supra* note 3, at 964.

87. *General Trading Int’l, Inc. v. Wal Mart Stores, Inc.*, 320 F.3d 831, 834-35 (8th Cir. 2003).

of private parties' appropriate actions, but it does establish a reason for taking a different approach when courts are called upon to interpret and enforce such provisions. Second, provisions which were designed to anticipate future circumstances may not be a good fit when the time for them to apply arises. Contracts, once entered into, can be modified by the parties, and any party can waive performance by the other party or a condition to its own performance. To the extent modification or waiver explains the actions of the parties, courts already have the rules when dealing with relevant contract provisions to find that under the facts of a particular case, a modification or waiver has occurred.

The third step in the contracting process described by Professor Lewis is the negotiation of terms with the other party. Professor Lewis' course contemplates a fully negotiated contract.

The fourth and final phase of the process is drafting the written contract. It is here that nuanced changes to negotiated terms may creep into the contract, intentionally or inadvertently. This can be avoided only where the party not controlling the drafting carefully reviews the resulting document. An effort to minimize the opportunity for such intentional or unintentional nuances is developing in many contexts, with the growing trend to limit negotiations to which of several alternative standard terms will be used in the contract. This process has been described as modularity in contracting.⁸⁸ The model agreements described earlier contemplate this approach in their use.

III. LEGAL DOCTRINES THAT MITIGATE CONTRACTING PROBLEMS

It is often said that “[t]he basic rule of contract law is that contracts are presumptively valid and enforceable according to their terms.”⁸⁹ There are a number of well-established legal principles that create exceptions to the basic rule. Courts have traditionally applied these doctrines conservatively, however. The doctrines and their conservative use appear inadequate to resolve problem contracts in light of contract drafting realities.

One straightforward-sounding rule that, on its face, would appear to resolve many of the problems identified, is that a contract is construed against the drafter in an appropriate case.⁹⁰ That description of the rule, however, is far broader than its standard application. First, the rule is only applied when a court is asked to interpret ambiguous terms.⁹¹ In addition, it is applied almost exclusively in construing contracts of adhesion.⁹² Furthermore, jurisdictions vary in how strictly they apply the rule.⁹³ It thus plays only a small role in resolving overreaching that may result when contracts are not fully negotiated.

88. See, e.g., Radin, *supra* note 3, at 1224-25; Davis, *supra* note 3, at 1078-79.

89. FRIEDMAN, *supra* note 14, at 23.

90. See RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

91. The rule was so described by the Supreme Court in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995).

92. See, e.g., *Neal v. State Farm Ins. Cos.*, 188 Cal. App. 2d 690, 695 (Cal. Ct. App. 1961). A contract of adhesion is a contract presented by one party for acceptance by the other party without change. See *supra* notes 45-48 and accompanying text. Contracts of adhesion are not unenforceable *per se*. See, e.g., *Cornejo v. Spenger's Fresh Fish Grotto*, No. C 09-05564 MHP, 2010 WL 1980236, *6 (N.D. Cal. May 17, 2010) (contracts of adhesion are so common something else has to be present to render it unenforceable).

93. Compare *Shelby County State Bank v. Van Diest Supply Co.*, 303 F.3d 832, 838 (7th Cir. 2002) (Iowa applies the rule strongly, construing the language “strictly” against the drafter), with *In re Liljeberg Enterprises, Inc.*, 304 F.3d 410, 440 (5th Cir. 2002) (Louisiana uses the rule only if there is no other way to resolve the ambiguity and then generally only for contracts of adhesion).

The doctrine of unconscionability provides another potential avenue for a court interpreting a contract and attempting to reach a just result. The doctrine of unconscionability was not in the First Restatement of Contracts, and its inclusion in the Second Restatement is further evidence of the inadequacy of classical contract theory and the need for legal doctrines that mitigate the problems it created.⁹⁴ The doctrine of unconscionability is available to preclude the enforcement of a contract, eliminate particular provisions, or limit the application of a term to avoid an unconscionable result.⁹⁵ For courts that require that both procedural and substantive unconscionability to be established to defeat a contract, or a provision thereof, procedural unconscionability is frequently established by proving that the contract is one of adhesion.⁹⁶ While the doctrine of unconscionability can be applied independent of whether the contract was one of adhesion, the doctrine is rarely used in contracts between two commercial parties.⁹⁷ Unconscionability is a doctrine courts can choose to use, and the situations in which courts employ it are captured by both the Restatement suggestion that it be used to prevent “oppression and unfair surprise”⁹⁸ and by the description by many courts when applying the doctrine that the challenged contract or provision “shocks the conscience of the court.”⁹⁹ Despite wide recognition, individual states apply the doctrine of unconscionability quite differently, as aptly illustrated by an article comparing the approaches of Michigan, Minnesota, and Washington.¹⁰⁰ The doctrine is available, but its name, as well as concepts like “oppression,” “unfair surprise” and “shocks the conscience” make it applicable only to deal with extreme provisions in contracts. The doctrine and its use still reflect strong deference to the provisions that appear in the contract.

Contract provisions can also be defeated if they are found to be contrary to public policy.¹⁰¹ For example, a New York court used that principle to support the grant of summary judgment to a former employee, finding a clause in her employment contract prohibiting the solicitation any of the former employer’s workers to constitute an unreasonable covenant restricting competition.¹⁰² While language as flexible as “public policy” would appear to create significant power for courts to defeat objectionable contract provisions, the doctrine is applied quite conservatively.¹⁰³ Much of the description of the doctrine in the Restatement focuses on public policy as drawn from legislation,¹⁰⁴ in effect reducing the doctrine to one that for the most part enforces legislative regulation of contracts.

94. Hogg, *supra* note 1, at 1012-18.

95. That description reflects both the rule set forth in the Restatement and the UCC. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); UCC § 2-302 (2002).

96. *See, e.g.*, 24 Hour Fitness, Inc. v. Superior Court, 66 Cal. App. 4th 1199, 1212-13 (Cal. Ct. App. 1998).

97. *See* Reznor v. J. Artist Management, Inc., 365 F. Supp. 2d 565, 577 (S.D.N.Y. 2005).

98. RESTATEMENT (SECOND) OF CONTRACTS § 208. cmt. b.

99. *See, e.g.*, California Grocers Ass’n, Inc. v. Bank of America, 22 Cal. App. 4th 205, 214-15 (Cal. Ct. App. 1994).

100. *See* Hogg, *supra* note 1.

101. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 178, 179, 181.

102. Lazer Inc. v. Kesselring, 823 N.Y.S. 2d 834, 835-36, 839 (N.Y. Sup. Ct. 2005).

103. The fact that courts’ use of this concept has been too reserved is discussed in Arnov-Richman, *supra* note 1.

104. RESTATEMENT (SECOND) OF CONTRACTS §§ 178(1), (3), 179(a), 181. But, judicially determined public policies can also be used under the doctrine, the prime example being the policy against restraint of trade. *Id.* §§ 179(b)(i), 186, 187, 188.

A duty of “good-faith and fair dealing” is also implied into every contract.¹⁰⁵ Again, the language is very broad and could arguably be used to limit many unfair contract provisions. Generally, however, the doctrine is asserted in complaints regarding another party’s performance under the contract. Under limited circumstances, this implied duty has been used to create a specific duty not otherwise expressly provided for in the contract or to limit a party’s enforcement of contract terms. For example, in *Trevino v. Merscorp*,¹⁰⁶ the defendant argued that it had no duties under a particular contract and thus the duty of good faith and fair dealing could not arise. In that case, the claims of breach of contract and breach of the duty of good faith survived a motion to dismiss.¹⁰⁷ Otherwise, however, the doctrine has been of limited utility in defeating unjust contract provisions.

Another principle courts have used to defeat contract provisions in standard form contracts is the test of whether the drafter had a reasonable expectation that the provision would not have been accepted by the consumer.¹⁰⁸ The argument has been asserted successfully in several cases. For example, in *Sears Roebuck and Co. v. Avery*,¹⁰⁹ a North Carolina court applying Arizona law invoked the reasonable expectations principle to defeat a unilaterally added provision requiring arbitration of disputes under a credit card agreement. The principle was also relied upon in *State Farm Fire & Cas. Ins. Co. v. Grabowski*¹¹⁰ to defeat an exclusionary clause in an umbrella insurance policy that was not contained in the basic auto insurance policy. In that case, however, the appellate court reversed the decision of the trial court because the issue of reasonable expectations had been submitted to the jury under an erroneous instruction. Namely, the instruction did not include the requirement that the party drafting the provision needed “reason to believe” that the consumer would not agree to it.¹¹¹ The court was concerned that the jury could have simply found the provision was “unusual” and not read by the policy holder.¹¹²

But, challenges under the doctrine have also been rejected in circumstances where application would appear to be ideal. In *Woodruff v. Anastasia International, Inc.*,¹¹³ the court considered a forum selection clause in a “click-through” agreement concerning the provision of foreign brides to American men. The court found the contract to be one of adhesion, but it also found that the forum selection clause requiring suit to be brought in Maine or Kentucky was “within the reasonable expectations of an ordinary person,” and upheld the trial court’s dismissal. How can it be anyone’s reasonable expectation when contracting for a foreign bride online that any resulting lawsuit would have to be brought in Maine or Kentucky?

105. See RESTATEMENT (SECOND) OF CONTRACTS §§ 205, 211 cmt.c.

106. 583 F. Supp. 2d 521, 532 (D. Del. 2008).

107. The allegations included the claim that under an express contractual right for the mortgagee to recover certain expenses, there was a breach because the expenses being charged were higher than those the mortgagee had worked out under independent contracts with other parties. *Id.* at 524-25, 533-34.

108. See RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (excluding from a standard form contract a provision the drafters had reason to know the other party would not assent to).

109. 593 S.E.2d 424, 430-31 (N.C. App. 2004).

110. 150 P.3d 275 (Ariz. Ct. App. 2007).

111. *Id.* at 281-82.

112. *Id.*

113. No. E2007-00874-COA-R3-CV, 2007 WL 4439677 (Tenn. Ct. App. Dec. 19, 2007).

The foregoing doctrines have long been available to achieve justice when enforcing contracts. Although courts recognize the doctrines, they are consistently applied very conservatively. The explanation appears to be that courts still defer as much as possible to party autonomy.

IV. PROPOSED CONTRACT PRINCIPLES TO ACHIEVE JUSTICE

There are two ways to counter the misuse of power in the drafting of contracts: legislative action and judicial action. Relying on legislative action reduces the influence of courts and delays corrective action until the relevant legislature decides to take action for a particular type of transaction. Another problem with legislative corrective action is that it is only partially effective or not well tailored to many specific situations.¹¹⁴ Judicial action has a far greater ability to adapt from situation to situation, without needing to rely on unpredictable rules. Relying on judicial action also gives parties who are willing to take the time to respond to common law rules the opportunity to modify their contracts to be in harmony with those rules.¹¹⁵ When courts do not clearly apply rules to limit what parties misusing economic power put in one-sided contracts, the drafters of such contracts have significantly fewer incentives to include terms that are just and fair.¹¹⁶ Thus, the court system is clearly the institution best situated to protect citizens from the unfair use of disparate bargaining power in drafting contracts by recognizing and considering the real world experience of the negotiating parties.

Explicitly recognizing that few contracts reflect fully negotiated transactions raises the important question: How can this knowledge be implemented to improve the law governing contracts? This author suggests separating contracts into meaningful categories and applying appropriate doctrines of contract interpretation to each.

One natural and meaningful category is contracts which have been fully negotiated. To a significant extent, the current rules of contract interpretation presume that all contract provisions are fully negotiated. For example, section 209(3) of the Restatement reflects this category of contract, when it provides: "Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression." Once the contract is determined to be integrated, the parol evidence rule applies and permits a court to consider information outside the writing only for limited purposes and in limited circumstances.¹¹⁷ Fully negotiated contracts do not require application of any of the doctrines limiting the enforcement of contract provisions; rather, the basic issues confronting courts are the meaning of ambiguous terms and how to apply contract provisions to situations that were not contemplated at the time of drafting. The law governing contracts is conceptually consistent with this category of contracts.

A second useful category would be contracts that were not fully negotiated, but in which each party was represented by counsel in drafting the contract. One obvious question that arises with respect to this category is how a court would

114. See, e.g., Hillman, *supra* note 3 (discussing ways in which well-intentioned legislative action can result in an overall effect that, in time, works against those intentions or results in counter-productive activities by those affected); Johnston, *supra* note 3, at 870 (describing credit card issuers' objections to proposed guidelines that would undermine beneficial approaches currently taken when working out problems with many consumers).

115. There is important evidence that many parties relying on standard form contracts pay little attention to judicial treatment of the provisions, especially in the insurance industry. See Boardman, *supra* note 3.

116. Occasionally the market will have some effect here to improve conditions. A recent article provides significant support for the fact that many parties continue to use clauses that courts have found to be unenforceable. See Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127 (2009).

117. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 213-216 (1981).

determine whether a contract falls within this category. Courts can readily identify and eliminate contracts of adhesion; they have done that for years. Courts can likewise readily determine whether one of the parties did not have an attorney involved in drafting the contract. Thus, the primary difficulty would seem to be distinguishing between those contracts that are “fully negotiated” and those that are not, even though counsel represented each party when the contract was drafted.

Before considering how courts might make that distinction, it is important to determine whether there are features of those contracts that require different treatment by courts. One may assume that where contracts are not fully negotiated, there is some level of economic power at play and thus a potential for abuse of that power by drafting unfair provisions covering the “non-essential matters.” To what extent should our legal rules facilitate this unequal use of economic power? In *Richard Whillock, Inc. v. Ashton Development, Inc.*,¹¹⁸ an appellate court in the State of California made a very interesting and provocative observation relevant to that question in a 1984 opinion:

Hard bargaining, “efficient” breaches and reasonable settlements of good faith disputes are all acceptable, even desirable, in our economic system. That system can be viewed as a game in which everybody wins, to one degree or another, so long as everyone plays by the common rules. Those rules are not limited to precepts of rationality and self-interest. They include equitable notions of fairness and propriety which preclude the wrongful exploitation of business exigencies to obtain disproportionate exchanges of values. Such exchanges make a mockery of freedom of contract and undermine the proper functioning of our economic system.¹¹⁹

While comparing our economic system to a game may be less than ideal, the concept of having common rules which “preclude wrongful exploitation” used to “obtain disproportionate exchanges” is significant to the present inquiry. In this second proposed category of contract, the party choosing not to fully negotiate the contract is making a business decision. Should a court second guess that decision if it results in contract provisions that are less than fair? It may be assumed that the party’s attorneys at least review each contract provision, ensuring that significantly unfair provisions will not survive, or will do so only with their client’s knowledge. “Wrongful exploitation” and “disproportionate exchanges” are thus unlikely when attorneys represent each party in the preparation of the contract, even if all the terms are not fully negotiated.

This suggests a rational and easy-to-apply approach to enforcing such contracts: treat contracts that were drafted with attorneys representing each party the same way fully negotiated contracts are treated. This approach supports certainty, an extremely important consideration to those drafting contracts. The approach also directly implicates and furthers the concepts underlying freedom of contract. There is an important benefit to giving the parties control of structuring the rules governing their relationship, because they have a much better understanding of the transaction governed by the contract than a court or legislature would have.

But, how should courts enforce the remaining contracts - those not fully negotiated and in which not all parties were represented by counsel during the drafting process? It is in these situations that parties face significantly greater risks of what the *Richard Whillock* court described as “the wrongful exploitation of business exigencies to obtain disproportionate exchanges of values,” which, the court concluded, make a “mockery of freedom of contract and undermine ... our economic system.”¹²⁰ Because the potentially unfair contract provisions in this category of contracts are products of attorneys for one party, without input from attorneys for the other party, there are no strong reasons to further subdivide

118. 157 Cal. App. 3d 1154 (Cal. Ct. App. 1984).

119. *Id.* at 1159.

120. *Id.*

this category.¹²¹ The next question is whether there are commonalities in these contracts that can be used to develop rules that would achieve justice in resolving contract disputes and avoid undermining freedom of contract and our economic system. It appears that three different general types of contract provisions can be identified from the contracting process that a court could use to resolve more justly the legal disputes that arise.

First, common to all contracts is the bargaining process, during which the parties agree on the essential terms of the transaction. In the simplest transactions, this may only be an offer and acceptance, using those terms in their generic, not their technical legal, sense. For example, the seller, or in some cases the buyer, of goods or services offers a price, a description of what is to be sold or bought, the amount involved, and the time the exchange is to occur. The other party then either agrees to the transaction on those terms or suggests modifications until an agreement is reached. Obviously, the more complex the agreement and the more bargaining that is involved, the greater the number of terms there will be that are important to the parties to specifically bargain for before completing the contract. I will refer to this group of contract terms as “bargained-for terms.” By definition, a fully negotiated contract contains only bargained-for terms.¹²²

The additional provisions in the contract, by definition, did not result from bargaining. It is important to keep in mind that the nature of assent to these additional provisions is fundamentally different from assent to bargained-for terms. The nature of assent to these additional terms was captured to a significant extent by Professor Llewellyn when he characterized consent to “boiler-plate” as being “on the implicit assumption and to the full extent that (1) it does not alter or impair the fair meaning of the dickered terms when read alone, and (2) that its terms are neither in the particular nor in the net manifestly unreasonable and unfair.”¹²³ Note that such assent is implied and thus has implications fundamentally different than the actual assent that describes the assent to bargained-for terms. Because assent to these terms is implied, courts will not violate the principle of freedom of contract if they modify or refuse to enforce one or more of these terms. The issue of the nature of assent and its implications is particularly important in contracts of adhesion where, more and more frequently, terms are added to a contract after it is initially signed, often referred to as “rolling contracts.”¹²⁴ Many scholars implicitly recognize the question of assent, but discount its importance, when they contend that terms in standard form contracts are more like integral parts of the product being purchased than they are independent parts of the transaction.¹²⁵

Among the additional provisions in these contracts are provisions that are very important to at least one of the parties but that are more technical in nature. Such provisions may be called “accompanying terms.” Accompanying terms would include, but not necessarily be limited to, those setting forth the details of performance during the life of the contract.¹²⁶ The nature and number of accompanying terms will obviously vary significantly from transaction to transaction.

121. This category would include, but certainly not be limited to, contracts of adhesion.

122. The fact that the terms have been bargained for does not mean that the particular terms chosen are not standardized terms that are used in other contracts. It refers to the fact that the concept covered by the term was negotiated and the content agreed upon.

123. LLEWELLYN, *THE COMMON LAW TRADITION*, *supra* note 13, at 371.

124. A brief, but clear, discussion of this is available in Ronald J. Mann, *Contracting for Credit*, 104 MICH. L. REV. 899, 902-03 (2006).

125. See Radin, *supra* note 3, at 1229-30; Baird, *supra* note 3, at 933; Bebchuk & Posner, *supra* note 2, at 829.

126. In setting forth his theory of how boilerplate terms can facilitate post-contractual bargaining with consumers, Professor Johnston makes a somewhat similar distinction by separating what he calls “performance terms” from what he refers to as “breakdown terms.” See Johnston, *supra* note 3, at 858. His distinction, however, is narrower, in that some of his “breakdown terms” may, in some transactions, fit within what I refer to as “accompanying terms.”

Where the parties will have a long-term relationship, such as with rental agreements, insurance contracts or employment contracts, the contract will obviously need and contain more accompanying terms. In a fully negotiated contract, the content of the provisions covering such matters would likely be different.

For example, when a borrower and lender negotiate a loan, the bargained-for terms are the amount of the loan, the interest rate, and the frequency, amount and number of payments. The accompanying terms would include items such as where and how payments are to be made, provisions regarding notices from one party to another, remedies available to the lender if payments are not made, and whether or not the borrower can pay the loan off early. Another good illustration of accompanying terms are those relating to back office operations included in the model DACA.¹²⁷ In the typical deposit account control agreement, the bargained-for terms are simply that the secured party can give instructions regarding the deposit account to the depository institution and that those instructions will be followed and given priority. Virtually all remaining provisions would fit into the category of accompanying terms.

The third category of contract provisions is best described as “risk allocation terms.” Some common examples of risk allocation terms are one-sided attorneys’ fees clauses, choice of forum clauses, choice of law clauses, arbitration clauses, indemnification clauses, and damage limitation clauses. Such provisions are often included in the label “boilerplate,” but that label is not precise enough for these purposes. In the introduction to a symposium on boilerplate, the term was defined as “the building blocks of standard-form, non-negotiated contracts.”¹²⁸ One of the included articles, however, discussed the use of boilerplate in sophisticated, negotiated, transactions.¹²⁹ The label boilerplate is not precise enough here because it is both under inclusive (risk allocation terms are not necessarily standardized provisions and they appear in contracts that are “negotiated,” but not fully) and over inclusive (accompanying terms in contracts of adhesion would certainly be included in the label boilerplate). These provisions could be labeled simply “additional terms,” but that label misses the motivation for placing them in the contract.

Risk allocation provisions are distinguishable because they are neither bargained-for terms (essential and central to the transaction) nor accompanying terms (important to the future performance of the transaction). Risk allocation terms are included in a contract because one party can imagine possible risks and would like to use its power as the drafter to allocate them to the other party. By their very nature, risk allocation terms reflect the use, and a clear potential for abuse, of contracting power.

The “risk allocation” label, however, needs further clarification, because some provisions that allocate risk could be bargained-for terms and some could be accompanying terms. In order to determine into which category a risk allocation provision falls, one must examine closely the nature of the transaction governed by the contract. For example, a party agreeing to provide trust services will consider indemnification provisions essential to what is being agreed upon, and failure to include such provisions would result in significantly higher costs for the services. Thus, the indemnification clause would be an accompanying term. A choice of law clause could be important because the nature of the transaction is such that a particular jurisdiction’s laws are essential to the transaction functioning effectively. Similar examples could be cited for a number of clauses allocating risks in many other types of contracts.

By focusing on each of the three types of contract terms: bargained-for terms, accompanying terms and risk allocation terms, one can craft solutions to the problems courts face in enforcing provisions in contracts that are not fully negotiated and do not involve attorneys representing all parties in the drafting process. Because of the differences

127. See the discussion in the paragraph following note 68 *supra*.

128. Omri Ben-Shahar, *supra* note 3, at 821.

129. Ahdieh, *supra* note 3, at 1035-36.

between how and why these types of provisions are drafted, there is practical as well as theoretical value in treating each type differently.

First, bargained-for terms accurately reflect assent and should be interpreted and enforced applying the same rules used to interpret and enforce fully negotiated contracts. This approach to bargained-for terms makes logical and theoretical sense and creates virtually no practical problems. Bargained-for terms fit nicely with the concept of freedom of contract that underlies those rules and has its roots in early contract theory.¹³⁰ Enforcing bargained-for terms under current contract rules promotes freedom of contract in an area where it makes perfect sense to let the parties operate freely and independently. If one of the parties to the contract had not been able to exercise free will in the bargaining process, or if one of the parties had misled the other in the bargaining process, those situations would raise concerns about enforcement, but existing contract doctrines are available to avoid enforcement.¹³¹ Conceptually, one can hardly refer to such situations as truly involving bargained-for exchanges, so there is no theoretical inconsistency.

This approach raises the question of how a court determines which provisions of the contract were bargained-for terms. In many disputes that arise under this category of contracts, it is not difficult to determine that the provisions at issue were not bargained for, particularly if the contract is a standard form contract or a contract of adhesion. To the extent that there is any uncertainty regarding whether any particular provision is a bargained-for term, eliminating application of the parol evidence rule would go a long way toward resolving that question. Treating such contracts as “integrated” so that the parol evidence rule may apply is an illustration of how current rules of the law governing contracts are out of harmony with the realities of the contracting process.¹³²

The next question is how courts should handle accompanying terms in this category of contracts. Accompanying terms are fundamentally different from bargained-for terms. They are of much greater importance to one party than to the other, yet they play an important role for both parties because they attempt to ensure that the contemplated transaction proceeds smoothly and rationally. How one-sided particular accompanying terms are will, of course, vary significantly from contract to contract. Considering these terms part of the parties’ bargain is not accurate; thus, it is not quite fitting to use the same contract principles that make sense when enforcing bargained-for terms. But, how much scrutiny should courts give to accompanying terms in the pursuit of justice?

For accompanying terms, it is not as hard to make the choice between blanket non-enforcement, which would eliminate the ability of the party drafting the contract and understanding the transaction to structure it in a meaningful and economic way, and enforcement with rational limitations. Because accompanying terms are important to the particular contractual relationship, the starting point should be to enforce them, but with the important caveat that the potential for unfairness and over-reaching needs to be policed as well.¹³³ Accompanying terms could well be the place to implement

130. See Kessler, *supra* note 15, at 630-31. Kessler concludes his discussion of the close tie between contract principles and the free enterprise system with a quote from an 1875 British case, *Printing and Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 462, 465 (1875), to the effect that courts are obligated to enforce contracts freely and voluntarily entered into.

131. Duress or undue influence over one of the parties either can prevent creation of an enforceable contract or make it voidable. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 174, 177 (1981). Abuse of a fiduciary relationship can make a contract voidable. See *id.* § 173. Fraudulent or material misrepresentations that induce assent to a contract can preclude creation of the contract or render it voidable. See *id.* §§ 163, 164.

132. Courts have recognized that in some contexts standard form integration clauses are to be given less force than negotiated integration clauses. See, e.g., *Wall v. CSX Transp., Inc.*, 471 F.3d 410, 416 (2d Cir. 2006) (the issue was whether fraudulent inducement had occurred).

133. “Accompanying terms” provide a much better fit for the arguments a number of law and economics scholars have made in support of boilerplate and standard form contracts. See, e.g., Baird, *supra* note 3; Bechuk & Posner, *supra* note 2.

doctrines currently in use in the law governing contracts that limit enforceability in some contexts. Doctrines of unconscionability, rational expectations and construing provisions against the drafter,¹³⁴ could achieve justice in those contracts where the accompanying terms reflect misuse of power in drafting the contract. Although those doctrines currently are typically applied hesitatingly by courts, that hesitation reflects the bias of giving significant deference to party choice and autonomy. Applying those principles more vigorously to accompanying terms, still provides the parties autonomy to structure the relationship, but avoids the fallacy that the provisions were actually the result of assent.

Finally, how should courts enforce risk allocation terms? These terms, by definition, are one-sided in nature. Should they simply be ignored as neither bargained for nor essential to the contractual relationship? Given the lack of assent to such terms and the inherent potential for overreaching, courts should feel much less restrained to modify or ignore such a provision and refuse to enforce it as part of the agreement. Automatically eliminating such terms, however, leaves resolution of whatever dispute implicated them to “default rules,” if such rules exist, or to whatever rules the court wants to create under the circumstances. Because of these problems, less severe options should be considered. If a particular risk allocation term could be rewritten to create mutuality on the issue, such an interpretation of that provision would be an easy solution. For example, a contract which provides for attorneys’ fees to be paid to one party could be read to apply the provision in favor of the other party as well. For example, a California statute provides that if a contract allows attorneys’ fees to be paid to one party, those fees are recoverable by whichever party prevails, and if those fees are only recoverable in certain types of disputes, the provision is read to apply to any dispute under the contract “unless each party was represented by counsel in the negotiation and execution of the contract.”¹³⁵

For risk allocation terms that cannot readily be expanded to become mutual obligations, courts could analyze the provisions and enforce only those found to be reasonable, or readily modified to become reasonable. Professor Rakoff suggested a similar approach in his 1983 article about contracts of adhesion: presume the provision is unenforceable and put the burden on the drafter to establish that it should be enforced.¹³⁶ A number of courts have cited Rakoff’s article to define a contract of adhesion, but none have cited it to apply his recommended approach. Limiting such an approach to risk allocation terms that cannot be cured by making them mutual and only applying it to contracts that were drafted without attorneys representing all parties should increase courts’ comfort with the approach.

This stricter approach would have been justified in the well-known Carnival Cruise Lines case.¹³⁷ In that case, the United States Supreme Court enforced a forum selection clause in a consumer contract that required any lawsuit to be brought in Florida, the location of the cruise line’s headquarters, notwithstanding that the consumers lived in the State of Washington, the cruise departed from and returned to Los Angeles, California, and the consumers’ cruise took them nowhere near Florida.¹³⁸ The Ninth Circuit had refused to enforce the provision, finding that it “was not freely bargained for.”¹³⁹ The Supreme Court reversed. Although the High Court recognized that the relevant precedent involved a fully negotiated contract, and that the litigants before the Court had no chance to negotiate theirs, the Court chose to enforce

134. See *supra* notes 89-112 and accompanying text.

135. CAL. CIV. CODE § 1717(a) (2009).

136. Rakoff, *supra* note 45, at 1245-46.

137. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

138. *Id.* at 587-88.

139. Shute v. Carnival Cruise Lines, 897 F.2d 377, 389 (9th Cir. 1990).

the forum selection clause because the cruise line had a special interest in limiting the fora for litigation, the clause dispelled confusion about where legal action could be brought, the provision might have reduced the cost of cruise tickets, and there was no evidence of bad faith or overreaching on the part of the cruise line.¹⁴⁰ In essence, the Supreme Court found the provision presumptively valid and placed the burden of defeating the provision on the challenging party. The Supreme Court's rationale is consistent with a freedom of contract model; the consumer could read the contract and, if dissatisfied, choose another cruise line. Unfortunately, this rationale ignores completely the realities of the contracting process. The dissenting Justices applied the better analysis; they determined that the contract was one of adhesion and that the forum selection clause should be enforced only if it could survive a strict scrutiny analysis or was determined to be reasonable.¹⁴¹

A key issue for courts applying these proposals is how they will determine whether the particular contract provision at issue is an accompanying term or a risk allocation term. The types of terms that are accompanying terms, and are therefore entitled to more deference by the courts, will vary from transaction to transaction. Central to this inquiry is the nature of the relationship created by the contract. Most accompanying terms can be readily identified simply by asking if the particular term governs a circumstance that has a significant probability of arising based simply on the nature of the transaction. To the extent that inquiry is inadequate, another question is whether the particular term clearly affected the pricing arrived at in the bargained-for terms. An example of a term classified as an accompanying term by the latter inquiry would be an indemnity clause in an escrow agreement or a trust agreement. Because different interpretive rules would be applied to accompanying terms than to risk allocation terms, the parties to the contract have an incentive to present evidence on the issue to the court, thereby helping it to make the determination when the characterization is less clear.

V. CONCLUSION

Investigating the realities of the contract drafting process reveals that, except in rare circumstances, all provisions in a contract generally are not bargained for and assented to by the parties. Yet, the principles applied by courts to resolve contract disputes are based upon faulty assumptions about the bargaining process. This article posits that contracts fall into one of two groups and that courts should develop appropriate rules for each. The first group, consisting of fully negotiated contracts and contracts that are not fully negotiated but are drafted with each party having the assistance of legal counsel, should be enforced using all the current rules and principles that are based on freedom of contract and deference to the autonomy of the contracting parties. These contracts do not even require application of existing doctrines that limit enforcement of some contract provisions.¹⁴²

The second group, consisting of contracts of adhesion and contracts not fully negotiated or not drafted with each party having the assistance of counsel, should be interpreted and enforced pursuant to a different set of rules and principles, which explicitly take into account the fact that the contract does not represent a completely bargained-for set of provisions. Courts have long recognized the unique nature of some contracts in the second group: standard form contracts and contracts of adhesion. Nevertheless, courts have generally interpreted those contracts pursuant to rules and principles

140. 499 U.S. at 592-95.

141. *Id.* at 597-602.

142. This is illustrated by the treatment given by the Ninth Circuit Court of Appeals to claims regarding pre-payment provisions in a note financing a commercial building in Los Angeles. The parties had been represented by counsel in the negotiation and drafting of the loan documents. Although it overturned the district court's award of sanctions, it gave short shrift to arguments to get around the contract provision. *Trident Center v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564, 566, 568-69 (9th Cir. 1988).

based on the implicit assumption that all contracts reflect agreement. That assumption creates the judicial expectation that before signing a contract a party is expected to have read and understood it, an expectation that does not reflect the realities of the contracting process.¹⁴³

This article recommends a new approach, which expands current legal rules and principles of interpretation in two ways. First, it includes with contracts of adhesion all other negotiated contracts in which all sides were not represented by counsel when the contract was drafted. Second, it proposes that courts explicitly recognize that those contracts are not fully negotiated and apply different rules, depending upon the type of provision being examined. Only bargained-for terms in those contracts would be enforced using traditional rules and principles. Accompanying terms would be subject to current rules and principles limiting the enforcement of contract provisions, but the principles would be applied more rigorously and with a broader ability to modify or limit the provisions. Finally, risk allocation terms would be interpreted and enforced with a high level of scrutiny and the court would be obligated to modify or eliminate those terms if necessary to achieve justice.

Whatever rules courts apply, drafters of contracts will be motivated to modify their contract provisions based upon those rules. If courts clearly recognize that many of our current rules and principles are still heavily influenced by the errors of classical contract theory and could be comfortably changed to track the realities of the contracting process, unjust provisions in contracts would not be enforced and freedom of contract would be enhanced. Certainty would not suffer, except to the extent contract provisions are drafted to push the limits. The approach suggested in this article would have a constructive effect on the contract drafting process and would result in contracts that are more substantively fair. If such an approach is not affirmatively and consistently implemented by the courts, the common law will continue to facilitate the misuse of power in the drafting process,¹⁴⁴ and only the occasional legislative attempt to direct parties' behavior will move the contracting process toward greater justice.

143. The same problem was articulated in an article comparing the treatment of standard form contracts in the United States with their treatment in Germany. See Eric Mills Holmes & Dagmar Thurmman, *New and Old Theory for Adjudicating Standardized Contracts*, A, 17 GA. J. INT'L & COMP. L. 323 (1987).

144. A similar conclusion about the current system is set forth in Danielle Kie Hart's *Contract Formation and the Entrenchment of Power*. See 41 LOY. U. CHI. L.J. 175 (2009).

THE HANDLING OF A CLAIM FOR TORTIOUS INTERFERENCE WITH AN AT-WILL EMPLOYMENT CONTRACT IN THE DELAWARE STATE COURTS VERSUS THE DELAWARE DISTRICT COURT

Charles B. Vincent*

The sudden end of an employee-employer relationship always has the potential to engender feelings of resentment, hostility, frustration, and perhaps even retribution among one or both of the parties. When the parties turn to litigation to resolve any remaining differences, the attorneys (and the courts) often face a litany of issues arising out of the former employment. Distinct issues arise when the former employee or employer believes that the employment relationship was cut short by the actions of a third party — often when an employee begins working for a competitor. The law generally protects against interference with contract, but when the contract is one for at-will employment, relief is typically more restricted.

Overall, the Delaware state and federal courts have been consistent in their approach to dismissing claims brought by former employees against third parties (such as co-workers or supervisors) for tortious interference with their at-will employment contract. This does not appear true, however, when tortious interference with an at-will contract claims are brought by employers against third-party interferers. Two recent Court of Chancery decisions illustrate this distinction and suggest that only the latter scenario may present a viable cause of action. As discussed in this article, the latter situation should be the only one where a tortious interference with an at-will contract claim could be capable of surviving a motion to dismiss.

In *Triton Construction Company, Inc. v. Eastern Shore Electrical Services, Inc.*,¹ the Court of Chancery rejected a former employer's claim for tortious interference with a former employee's at-will employment contract by the employee's new employer. To support this analysis, the Court of Chancery relied on two Delaware Superior Court decisions that held that an employee cannot bring a tortious interference claim against a third party for interference with an at-will employment contract. The court held that because there was no cause of action for tortious interference with an at-will employment relationship, the claim against defendants had to be dismissed.

Subsequently, in *Great American Opportunities v. Cherrydale Fundraising, LLC*,² the same member of the Court of Chancery took advantage of an opportunity to clarify and readdress the *Triton* issue when a similar tortious interference with contract claim was brought by a former employer against its former employee's new employer. When addressing the issue in this context, the court rejected the argument that the tortious interference claims against it should be dismissed pursuant to *Triton*. Instead, the court distinguished *Triton* and held that "claims for tortious interference with contract apply just as readily to an 'at-will' employee who has executed a valid employment contract as they do to an employee contractually obligated to remain with a company for a specified period of time."³

The Delaware District Court cases that have addressed this issue have taken a different approach. In particular, the District Court appears not to have adopted a blanket rejection of a claim for tortious interference with an at-will

* Charles B. Vincent is an attorney with the law firm Fish & Richardson P.C.

1. C.A. No. 3290-VCP, 2009 WL 7387115 (Del. Ch. May 18, 2009), *aff'd*, 988 A.2d 938 (Del. 2010).

2. C.A. No. 3718-VCP, 2010 WL 338219 (Del. Ch. Jan. 29, 2010).

3. *Id.* at *10.

employment contract as suggested in *Triton*. Rather, as analyzed in *Nelson v. Fleet National Bank*,⁴ the District Court's position is that the tort should be recognized because "[t]he gravamen of the tort is interference with the employment contract irrespective of the term of that contract," and predicted that the Delaware Supreme Court would reach the same conclusion based on the commentary to the *Restatement*.⁵

A review of the relevant, yet few, cases that have analyzed the issues surrounding this particular tort reveals that *Triton's* reasoning was incomplete. The conclusion reached in *Great American*, however, seems to resolve the issue of whether this particular claim can be brought in Delaware, although the analysis of why the claim should survive remains unsettled. While ultimate resolution as to the viability of this claim rests with the Delaware Supreme Court, the conclusion should be the same as that implied in *Great American* and based on the applicable commentary in the *Restatement (Second) of Torts* § 766: Delaware law should recognize a claim for tortious interference with an at-will employment contract as a viable cause of action only when it is brought by a former employer against the former employee's new employer.

I. TORTIOUS INTERFERENCE WITH CONTRACT

Delaware follows the *Restatement (Second) of Torts* § 766 with regard to claims for tortious interference with contract.⁶ Section 766 defines tortious interference with contract as follows:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.⁷

The *sine qua non* of a tortious interference with contract claim is a breach of a contract.⁸ Similarly, plaintiffs must be parties to the contract in order to have standing to pursue a claim for tortious interference,⁹ and the defendants cannot be parties to the contract with which they have allegedly interfered.¹⁰ After finding that these threshold requirements are

4. 949 F. Supp. 254 (D. Del. 1996).

5. *Id.* at 262.

6. *See, e.g.,* *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987).

7. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

8. *See* *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1265-66 (Del. 2004) (affirming the dismissal of a tortious interference claim as a matter of law where the complaint failed to state a claim for breach of contract); *see also* *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1036 (Del. Ch. 2006) (holding that a plaintiff must allege an underlying breach of contract to state a tortious interference claim); *Am. Homepatient, Inc. v. Collier*, C.A. No. 274-N, 2006 WL 1134170, at *4 (Del. Ch. Apr. 19, 2006) (same); *Griffin Corporate Servs., LLC v. Jacobs*, C.A. No. 396-N, 2005 WL 2000775, at *4 (Del. Ch. Aug. 11, 2005) (same).

9. *Bishop v. Murphy*, C.A. No. 05A-05-002-MMJ, 2006 WL 1067274, at *3 (Del. Super. Ct. Apr. 10, 2006) (granting summary judgment where plaintiffs were not parties to the contract at issue and therefore had "no standing to assert claims for breach of contract or tortious interference with contractual relations").

10. *Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 590 (Del. Ch. 1994) ("It is rudimentary that a party to a contract cannot be liable both for breach of that contract and for inducing that breach."); *CPM Indus., Inc. v. ICI Americas, Inc.*, 1990 WL 28574, at *1 (Del. Super. Ct. Feb. 27, 1990) (ORDER) (the "principle that a party to the contract cannot be sued thereunder for [tortious interference with contract] is well settled in Delaware").

met or are not in dispute such that a claim for tortious interference may be stated, the courts will address the elements to the tort. To establish tortious interference with contract, a plaintiff must show: (1) a valid contract (2) about which defendants knew, and (3) an intentional and (4) unjustified act that is the proximate cause of the breach of such contract, and (5) damages.¹¹

II. AT-WILL EMPLOYMENT DOCTRINE

Delaware has long adhered to the doctrine of at-will employment.¹² Under this doctrine and unless otherwise expressly stated, a contract for employment is “at-will in nature, with an indefinite duration”¹³ and permits employers to dismiss employees “without cause and regardless of motive.”¹⁴ An employer (and employee) has the freedom to “terminate an at-will employment contract for its own legitimate business, or even highly subjective, reasons.”¹⁵ Delaware also recognizes that an employment contract includes an implied covenant of good faith and fair dealing.¹⁶ Thus, the at-will employment doctrine helps to protect the expectations of both parties: first, the employer in its hiring decision as it pertains to the management of its business; and second, the employee in accepting and undertaking the offer of indefinite, at-will employment.¹⁷

III. THE INTERSECTION OF THE TORT AND THE LAW

A. The Delaware State Cases

Given that Delaware recognizes both the tort of interference with contract and the doctrine of at-will employment, employees have occasionally brought causes of action that purport to intersect the two ideas. Typically, plaintiffs in these cases are ex-employees and the defendants are their former employers and/or supervisors.

11. *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1266 (Del. 2004); *Irwin & Leighton, Inc. v. W.M. Anderson Co.*, 532 A.2d 983, 992 (Del. Ch. 1987); *DeBonaventura v. Nationwide Mut. Ins. Co.*, 419 A.2d 942, 947 (Del. Ch. 1980), *aff'd*, 428 A.2d 1151 (Del. 1981).

12. *E.g.*, *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000); *E.I. du Pont de Nemours & Co. v. Pressman*, 679 A.2d 436, 437 (Del. 1996); *Merrill v. Crothall-Am., Inc.*, 606 A.2d 96, 102 (Del. 1992); *Greer v. Arlington Mills Mfg. Co.*, 43 A. 609, 612 (Del. Super. 1899). This paper uses “at-will employment doctrine,” “employment at-will doctrine” and “the doctrine of at-will employment” interchangeably.

13. *Merrill*, 606 A.2d at 102.

14. *Pressman*, 679 A.2d at 437; *accord Lord*, 748 A.2d at 400. Delaware does recognize certain limited exceptions for employees to obtain relief for wrongful termination. *See Lord*, 748 A.2d at 400-01.

15. *Merrill*, 606 A.2d at 103; *see also Nye v. Univ. of Del.*, No. 315, 2005, 2006 WL 250003, at *3 (Del. 2006) (“Delaware adheres to the employment at-will doctrine, and has set a high threshold for an actionable breach of that covenant.”); *Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955, 970 n.24 (Del. Ch. 2004) (“[T]he common law of many states, including this one, emphasizes that, absent an employment contract, employees serve at-will and may, with extremely narrow exceptions, be terminated at any time for any reason not forbidden by statutory laws.”) (citation omitted).

16. *Merrill*, 606 A.2d at 101.

17. *See id.* at 101-02; *see also Pressman*, 679 A.2d at 449 (explaining that the covenant of good faith and fair dealing present in an at-will employment contract limits the parties in their exercise of the freedom to terminate in that it creates a cause of action if the dismissal is caused by “fraud, deceit and misrepresentation, either in the inducement or in intentionally fictionalizing in a material way the employee’s performance to cause dismissal”).

The first case addressing whether Delaware would recognize a former employee's claim for tortious interference with an at-will employment contract was *Rizzo v. E.I. du Pont de Nemours & Co.*¹⁸ *Rizzo* stands for the proposition that the Delaware at-will employment doctrine does not give rise to a claim of tortious interference.¹⁹ In that case, an ex-employee sued his former employer and supervisors, alleging that "their mistreatment of him forced him to retire early, resulting in reduced retirement benefits."²⁰ The Superior Court analyzed the issues through the lens of the doctrine of at-will employment, noting that there were few exceptions that permitted an at-will employee a cause of action for his or her termination. Accordingly, the court granted summary judgment in favor of defendants, holding that the underlying issue involved plaintiff's accusations that defendants violated their company policies in connection with his termination, which was not actionable as tortious interference for an at-will employee.²¹

The next case to address this issue came over a decade later in *Leblanc v. Redrow*.²² In *Leblanc*, the plaintiff-employee had been terminated a short time after one of her former employer's customers had complained about an incident between plaintiff and one of the customer's employees, which led to the customer requesting that he not have to deal with plaintiff anymore.²³ After plaintiff was terminated, she sued the customer for tortious interference with contract, claiming her allegedly wrongful termination was caused by the customer's complaint. The Superior Court, applying the holding in *Rizzo*, held that "where the employment is 'at will', meaning that it is terminable at the option of either party without justification and/or cause, no cause of action for tortious interference with contractual relations is recognized in this state."²⁴ The court went on to conclude that plaintiff's at-will employment by itself was sufficient to entitle defendants to summary judgment as a matter of law.²⁵ However, the court noted in dicta that even if there was a cause of action, the actions of "voicing a grievance" by a customer against an employee as had been alleged could not be "tortious" or wrongful.²⁶

Nearly a decade passed after *Leblanc* before a Delaware state court again addressed the issue of tortious interference with an at-will employment contract. In *Triton Construction Company v. Eastern Shore Electrical Services, Inc.*,²⁷ the Court of Chancery addressed this issue in the context of a lawsuit by a former employer against the former employee and his current employer and its principals. The court explained that the complaint alleged that the new employer tortiously interfered with plaintiff's contractual relationship with its former employee.²⁸ Applying *Leblanc* and *Rizzo*, the court held

18. C.A. No. 86C-JL-88, 1989 WL 135651 (Del. Super. Ct. Oct. 31, 1989).

19. *Id.* at *1-2.

20. *Id.* at *1.

21. *Id.* at *2.

22. C.A. No. 99C-02-170-CHT, 2001 WL 428686 (Del. Super. Ct. Apr. 19, 2001).

23. *Id.* at *1.

24. *Id.* at *2. The Superior Court also cited *Park v. Georgia Gulf Corp.*, C.A. No. 91-569-RRM, 1992 WL 714968 (D. Del. Sept. 14, 1992) for support.

25. *Leblanc*, 2001 WL 428686, at *2.

26. *Id.*

27. C.A. No. 3290-VCP, 2009 WL 1387115 (Del. Ch. May 18, 2009), *aff'd*, 988 A.2d 938 (Del. 2010).

28. *Id.* at *17. Plaintiff also brought claims for various breaches of fiduciary duty, tortious interference with prospective economic advantage, fraud, and misappropriation of trade secrets. *See id.* at *1, 5.

that because there was no cause of action for tortious interference with an at-will employment relationship, the claim against defendants had to be dismissed.²⁹ *Triton* was affirmed by the Delaware Supreme Court on the basis of the reasoning in the Court of Chancery's decision.³⁰ This particular aspect of the *Triton* decision, however, was not appealed.³¹

A few months later, in *Great American Opportunities v. Cherrydale Fundraising, LLC*,³² the Court of Chancery again addressed the issue of tortious interference with an at-will employment contract in the context of a suit by a former employer. The employees at issue had worked for one company, Kathryn Beich, Inc. ("KB"), before being recruited to work for a second company, Cherrydale Fundraising, LLC ("Cherrydale"). Contemporaneously with these actions, a third company, Great American Opportunities, Inc. ("Great American"), purchased most of KB's assets, including the right to pursue any causes of action KB may have had against Cherrydale.³³ Great American sued Cherrydale for tortious interference with contract and willful and malicious misappropriation of trade secrets. Cherrydale argued that under *Triton*, the tortious interference claim should have failed as a matter of law because the employees were at-will employees at KB.³⁴ The court acknowledged *Triton*'s holding, but rejected Cherrydale's proposition. Instead, the Court distinguished *Triton* and recognized that "claims for tortious interference with contract apply just as readily to an 'at-will' employee who has executed a valid employment contract as they do to an employee contractually obligated to remain with a company for a specified period of time."³⁵ The court went on to address the merits of the tortious interference claim and found that Cherrydale tortiously interfered with the contractual relationships with three former KB employees by "enticing or encouraging them to breach several provisions in their employment contracts."³⁶ Thus, while both *Triton* and *Great American* involved

29. *Id.* at *17.

30. 988 A.2d 938 (Del. 2010) (Table).

31. Opening Brief for the Plaintiff-Below, Appellant at ii, 2-3 *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.* (Del. Aug. 31, 2009) (No. 383, 2009) (Filing ID 26849275); Answering and Opening Brief for Defendants-Below, Appellees/Cross Appellants at i-ii, 3-4 *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.* (Del. Sept. 30, 2009) (No. 383, 2009) (Filing ID 27335241); Reply and Answering Brief for the Plaintiff-Below, Appellant/Cross-Appellee at 2-3 *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.* (Del. Oct. 30, 2009) (No. 383, 2009) (Filing ID 27821633); Reply Brief for Defendants-Below, Cross Appellants at 1 *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.* (Del. Nov. 9, 2009) (No. 383, 2009) (Filing ID 27952893). The issues raised on appeal and cross-appeal involved whether the Court of Chancery erred as a matter of law in its application of the rule mandating disgorgement of profits, the award of lost gross profits and damages, and the Court of Chancery's application of *Brophy v. Cities Service Co.*, 70 A.2d 5 (Del. Ch. 1949).

32. C.A. No. 3718-VCP, 2010 WL 338219 (Del. Ch. Jan. 29, 2010).

33. *Id.* at *2. In so doing, the court analyzed the first impression issue of "whether restrictive covenants contained in an employment agreement lacking an assignability clause are enforceable by a successor company that has purchased substantially all of the original employer's assets." *Id.* at *10-12. The conclusion and analysis reached by the court is beyond the scope of this article. The court held that absent specific language prohibiting assignment, reasonable restrictive covenants in employment contracts (such as noncompete covenants) are assignable and remain enforceable by the assignee under Delaware law so long as the assignee "engages in the same business as the assignor" and "regardless of whether the employment contract contains a clause expressly authorizing such assignability." *Id.* at *12.

34. *Id.* at *10.

35. *Id.*

36. *Id.* at *1; *id.* at *12-15.

at-will employment contracts, the tortious interference claim was sustained in the latter apparently on the basis that the at-will employment contract was contained in an executed writing.³⁷

B. The District Of Delaware Cases

Interestingly, three federal cases in the District of Delaware have also touched on this tort in the at-will context, although each in a different scenario. The first, referenced in *Leblanc*, was *Park v. Georgia Gulf Corp.*³⁸ The plaintiff in *Park* had been fired from defendant's employ and then sued his former employer and two of his co-workers for, among other things, his co-workers' tortious interference with his employment contract.³⁹ The District Court first found that his employment was at-will and consistent with Delaware law, could be terminated without cause.⁴⁰ Turning to the tortious interference claim, the court simply applied the holding in *Rizzo*, holding that "[w]here the contract ostensibly interfered with is an at-will employment contract, . . . the cause of action for tortious interference with contract does not lie."⁴¹ Accordingly, the court granted summary judgment in favor of defendants.

Following *Park*, the District Court next addressed the issue of tortious interference with an at-will contract in *Nelson v. Fleet National Bank*.⁴² In *Nelson*, the plaintiff brought an action for, among other things, tortious interference with contract against her former employer and supervisors related to the circumstances leading to her resignation. The court found that plaintiff had actually brought an action for intentional interference with another's performance of her own contract under *Restatement (Second) of Torts* § 766A, rather than tortious interference with contract under Section 766, in part because she had not alleged a breach of contract,⁴³ although the court recognized that such claims were typically analyzed under Section 766.⁴⁴

Relevant to this article, *Nelson* took up the issue of whether there could be a cause of action for tortious interference with an at-will employment contract brought by an employee, in light of the holdings from the Delaware Superior Court in *Rizzo* and the Delaware District Court in *Park*. The District Court acknowledged "Delaware's historical adherence to the at-will employment doctrine . . .,"⁴⁵ but predicted that "the Supreme Court of Delaware would hold an action for tortious interference with contract may be maintained in conjunction with an at-will employment contract."⁴⁶ To reach this

37. The written contract contained non-solicitation and non-competition provisions. *See id.* at *13-15.

38. C.A. No. 91-569-RRM, 1992 WL 714968 (D. Del. Sept. 14, 1992).

39. *Id.* at *1.

40. *Id.* at *7-8.

41. *Id.* at *9.

42. 949 F. Supp. 254 (D. Del. 1996).

43. *Id.* at 257 n.3. This distinction may be important given that there are no Delaware state cases that have adopted or have addressed this tort or this section of the *Restatement*. *See infra*.

44. *See id.*; *id.* at 261-62.

45. *Id.* at 262.

46. *Id.* at 261.

conclusion, it relied on commentary from Section 766 of the *Restatement*, which supported a cause of action for tortious interference with an at-will contract,⁴⁷ and a passage from *Prosser and Keeton on the Law of Torts*, which also opined that “the overwhelming majority of the cases have held that interference with employment or other contracts terminable at will is actionable, since until it is terminated the contract is a subsisting relation, of value to the plaintiff, and presumably to continue in effect.”⁴⁸ After distinguishing *Rizzo* based on its interpretation that the plaintiff in that case was attempting to “evade the at-will doctrine,” the District Court in *Nelson* concluded that:

[O]ne can reasonably predict the Delaware Supreme Court would not distinguish between an at-will employment contract and an employment contract for a term of years where the defendant is a supervisor who tortiously interferes with the employee’s contract. The gravamen of the tort is interference with the employment contract irrespective of the term of that contract.⁴⁹

The District Court therefore rejected the defendant’s argument (and the holding in *Park*) that at-will status by itself would preclude a claim for tortious interference with contract.

Turning to whether a supervisor could be liable to a former employee for his tortious interference, the District Court in *Nelson* concluded that the question in this scenario would have to turn on whether that employee had acted beyond the scope of his employment in order to state a claim for tortious interference of his own contract under Section 766A.⁵⁰ The court found that there was a material question of fact on this point which precluded summary judgment for that claim.⁵¹

Accordingly, the District Court’s analysis of this issue and its ultimate recognition of a tortious interference with an at-will contract claim suggest that the success of bringing such a claim may depend on the circumstances under which it is brought, making the analysis more nuanced than any of the aforementioned state court cases have concluded.

IV RECONCILING THE CASES: TORTIOUS INTERFERENCE WITH AN AT-WILL EMPLOYMENT CONTRACT

One could argue that, prior to *Great American*, there was a distinct split between the Delaware state courts and the Delaware District Court as to when a cause of action for tortious interference with an at-will employee’s contract may be brought under Delaware law. *Great American*, however, attempts to resolve any confusion over the issue. The cases summarized above demonstrate that such claims have been brought by both former employees and former employers.

47. *Id.* (quoting RESTATEMENT (SECOND) TORTS § 766 cmt. g). This comment is quoted and discussed *infra*.

48. *Id.* (quoting W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 994-96 (5th ed. 1984)). This passage is quoted and discussed *infra*.

49. *Id.* at 262.

50. *Id.* at 263.

51. The District Court revisited the issue in *Anderson v. Wachovia Mortgage Corp.*, 497 F. Supp. 2d 572 (D. Del. 2007). To the extent it was applicable, the court in *Anderson* disagreed with *Nelson*’s analysis of Section 766A, noting that the Third Circuit Court of Appeals in *Gemini Physical Therapy & Rehabilitation, Inc. v. State Farm Mutual Automobile Insurance Co.*, 40 F.3d 63 (3d Cir. 1994), had addressed this very issue in distinguishing Sections 766 and 766A and predicting that the Pennsylvania Supreme Court would not recognize Section 766A as a valid cause of action. Adopting that analysis, the court in *Anderson* speculated that the Delaware Supreme Court would also not recognize Section 766A. *Anderson*, 497 F. Supp. 2d at 583-84.

Only the latter appears to fall within the purview of Section 766 of the Restatement and should be recognized as a viable cause of action. *Great American* appears to confirm this conclusion.

The distinction can best be understood by comparing Sections 766 and 766A of the *Restatement*, which “focus on different targets of interfering conduct.”⁵² Section 766 “states the rule for the actor’s intentional interference with a third person’s performance of his existing contract with the plaintiff.”⁵³ Under this section, “the plaintiff’s interest in obtaining performance of the contract is interfered with directly.”⁵⁴ Section 766A, however, “is concerned only with the actor’s intentional interference with the plaintiff’s performance of his own contract, either by preventing that performance or making it more expensive or burdensome.”⁵⁵ “[T]he interference is indirect, in that the plaintiff is unable to obtain performance of the contract by the third person because he has been prevented from performing his part of the contract and thus from assuring himself of receiving the performance by the third person.”⁵⁶ As summarized by the Third Circuit Court of Appeals in *Windsor Securities Inc. v. Hartford Life Insurance Co.*:⁵⁷

Section 766 addresses disruptions caused by an act directed not at the plaintiff, but at a third person: the defendant causes the promisor to breach its contract with the plaintiff. Section 766A addresses disruptions caused by an act directed at the plaintiff: the defendant prevents or impedes the plaintiff’s own performance.⁵⁸

Put another way, the appropriate section that applies depends on the plaintiff. In both cases, there is a contract between A (promisor) and B (promisee). Where a third party defendant C has induced A to breach the contract or otherwise prevented B from performing his part of the contract with A, Section 766A provides B with a cause of action against that third party (“Scenario 1”). Where a third party defendant C has induced B to breach the contract thereby directly interfering with the contract between A and B, Section 766 provides A with a cause of action against that third party (“Scenario 2”). Thus, if B is the plaintiff, Section 766A sets forth the appropriate tort. If A is the plaintiff, Section 766 does.

The commentary to Section 766 supports this distinction and explains why the cause of action fails when brought by an employee against his former supervisors or even a third party interferer fails to state a claim, but may succeed when brought by the former employer against that employee’s new employer. Comment g expressly provides that a cause of action for tortious interference with an at-will contract is subsumed within the tort of interference with contract:

g. Contracts terminable at will. A similar situation exists with a contract that, by its terms or otherwise, permits the third person to terminate the agreement at will. Until he has so terminated it, the contract is valid and subsisting, and the defendant may not improperly interfere with it. The fact that the contract is terminable at will, however, is to be taken into account in determining the damages that the plaintiff has suffered by reason of its breach. (See § 774A).

52. *Windsor Sec.*, 986 F.2d at 660.

53. RESTATEMENT (SECOND) TORTS § 766A cmt. a.

54. *Id.* at § 766A cmt. c.

55. *Id.* at § 766A cmt. a.

56. *Id.* at § 766A cmt. c.

57. 986 F.2d 655 (3d Cir. 1993).

58. *Id.* at 660.

One's interest in a contract terminable at will is primarily an interest in future relations between the parties, and he has no legal assurance of them. For this reason, an interference with this interest is closely analogous to interference with prospective contractual relations. (See § 766B). If the defendant was a competitor regarding the business involved in this contract, his interference with this contract may not be improper. (See § 768, especially Comment *i*).⁵⁹

The Delaware District Court's application of this passage from *Prosser and Keeton on the Law of Torts* in *Nelson* reinforces this point:

Virtually any type of contract is sufficient as the foundation of an action for procuring its breach ... There is some authority to the contrary effect as to contracts which the promissor may terminate at will, on the theory that there is really nothing involved but an option on his part to perform or not. However, eminent legal writers to the contrary notwithstanding, the overwhelming majority of the cases have held that interference with employment or other contracts terminable at will is actionable, since until it is terminated the contract is a subsisting relation, of value to the plaintiff, and presumably to continue in effect.⁶⁰

When viewed through this lens, it becomes clear that *Rizzo*, *LeBlanc*, *Park*, and *Nelson* all fall within Scenario 1 because the plaintiffs (B) were former employees suing defendants (C) who had allegedly induced their former employers (A) to end their employment. As the causes of action for tortious interference with contract (and particularly tortious interference with an at-will contract) were brought under Section 766 in those cases (save *Nelson*), those courts correctly held that the plaintiffs had failed to state a claim under that section as a matter of law. On the other hand, the plaintiff in *Triton* was the former employer (A) and not the employee (B), so it would seem that Scenario 2 — not Scenario 1 — was applicable. *Great American* provides a far more obvious Scenario 2 case.

A. Scenario 1: Where The Cause Of Action For The Tort Should Fail To State A Claim: When Brought By A Former Employee

As the above Scenario 1 cases indicate, claims for tortious interference with an at-will employment contract are sometimes brought by a discharged employee against a third party (not his employer) for alleged interference with his or her former employment. It is unlikely that a former employee plaintiff would ever be able to state a claim for tortious interference with an at-will employment contract, and a court confronting this issue should hold that the claim fails as a matter of law.

At the threshold of this analysis, the plaintiff-employee would have to be a discharged employee (*i.e.*, fired) because if he resigned, there would be no breach (or the resignation would be a complete defense) and the claim would fail as a matter of law.⁶¹ Under this reasoning, the plaintiff's resignation in *Rizzo* would have provided an independent basis

59. RESTATEMENT (SECOND) OF TORTS § 766 cmt. g. See also generally *Empire Fin. Servs., Inc. v. Bank of N.Y.*, 900 A.2d 92, 98 (Del. 2006) (suggesting that such conduct involving an at-will contract may be more properly analyzed as tortious interference with a prospective contractual relationship).

60. *Nelson*, 949 F. Supp. at 261 (quoting W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 994-96 (5th ed. 1984)).

61. See *supra* note 8 and accompanying text; see also *Haney v. Laub*, 312 A.2d 330, 332 (Del. Super. Ct. 1973) ("A hiring for an indeterminate period is a hiring at will and, consequently, is terminable at the will of either party with or without cause."). A discussion of other causes of action a plaintiff in this situation may have is beyond the scope of this article.

for the court's dismissal of the tortious interference with contract claim without having to address the at-will employment doctrine issue. Indeed, the plaintiff's resignation in *Nelson* (that is, the failure of pleading a breach of contract) precluded a claim under Section 766 and led to the court to instead analyze the case under Section 766A. Second, the claim would fail as a matter of law against the former employer regardless of whether he or she was fired or resigned because the defendant employer would be a party to the contract, and ordinarily a tortious interference claim will not lie against a party to a contract (the appropriate claim, if any, being one for breach of the contract).⁶²

Because the employer would be a party to the contract, a tortious interference claim against the former employee's supervisor would also fail under agency doctrine, unless the agent was acting beyond the scope of his employment. Arguably, this idea was explored and the premise implicitly accepted by the District Court in *Nelson*, albeit in the context of Section 766A.⁶³ Likewise, this "beyond the scope of employment" argument probably would have been the only basis upon which the plaintiff would have been able to seek relief against his supervisors in *Park*, although that avenue was not raised in that case.⁶⁴

The question remains whether a cause of action for tortious interference with an at-will contract could be brought by an employee against his former supervisor who allegedly acted beyond the scope of his employment or against a third party, as in *Leblanc*. The commentary to Sections 766 and 766A of the *Restatement* suggest that the answer is no, at least under Section 766. Rather, the employee would probably only have a cause of action under Section 766A.⁶⁵ This conclusion is consistent with Scenario 1, as the plaintiff (B) would still be the former employee seeking damages against the third party (C) based on his at-will contract with his former employer (A). In sum, a plaintiff bringing a Scenario 1 action and raising a claim for tortious interference with his at-will employment contract under Section 766 would fail to state a claim as a matter of law.

B. Scenario 2: Where The Cause Of Action For The Tort May State A Claim: When Brought By The Former Employer Against The Former Employee's New Employer

Scenario 2 represents the only possible situation where tortious interference with an at-will employment contract may be brought — by the employee's former employer against the new employer. The fact pattern in *Triton* illustrates the circumstances where this claim could be brought, despite *Triton's* application of the aforementioned state Scenario 1 cases in dismissing the claim. As previously explained, the plaintiff in *Triton* was the former employer who brought claims related to fiduciary duty, fraud, tortious interference and trade secrets against the former employee and his new employer. With regard to the plaintiff employer's claim that the current employer had tortiously interfered with its former employee's at-will contract, the Court of Chancery, citing *Leblanc* and *Rizzo*, noted that because the employee was an at-will employee, the plaintiff employer could not prove tortious interference with that employment relationship.⁶⁶

62. See *supra* note 10 and accompanying text.

63. *Nelson*, 949 F. Supp. at 263. Although not in the 766A context, the Court of Chancery has relied on the factual allegations in *Nelson* in determining whether a complaint had alleged sufficient facts to support an inference that defendants had acted outside the scope of their employment for purposes of a tortious interference with contract claim. See *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 885-86 (Del. Ch. 2009).

64. See *Park*, 1992 WL 714968, at *1-2. Although encompassed within a workers' compensation claim, the Delaware Supreme Court has recently explored a "course of employment" test with regard to a claim involving horseplay by co-worker defendants. See *Grabowski v. Mangler*, 956 A.2d 1217 (Del. 2008); see also *supra* note 55.

65. See *supra* note 51.

66. *Triton*, 2009 WL 1387115, at *17.

The distinction between Scenarios 1 and 2 demonstrates the difference between the plaintiff employees in those cases compared to the plaintiff employer in *Triton*. Thus, the applicability of *Leblanc* and its progeny in *Triton* may have been misplaced. The relationship in *Triton* is a Scenario 2 relationship: The third party defendant C induced former employee B to breach the contract thereby directly interfering with the contract between the plaintiff employer (A) and the former employee (B). Through this lens, Section 766 should have provided the plaintiff former employer with a cause of action against the defendant new employer. Thus, the Court of Chancery's juxtaposition of the Scenario 1 cases to the situation in *Triton* may have incorrectly short-circuited the claim.

In *Great American*, the new employer argued that the former employer could not bring a claim for tortious interference with an at-will contract pursuant to *Triton*. The court in *Great American* rejected this argument by focusing on the fact that the employee in *Triton* lacked a valid employment contract.⁶⁷ In doing so, the court effectively recasts *Triton* as a Scenario 1 case, allowing it to recognize implicitly that a tortious interference claim in a Scenario 2 case is cognizable. Put another way, by changing the focus to the employee's contract rather than on who brought the claim, the court in *Great American* was able to reach a conclusion entirely consistent with the reasoning in the *Restatement*: "[C]laims for tortious interference with contract apply just as readily to an 'at-will' employee who has executed a valid employment contract as they do to an employee contractually obligated to remain with a company for a specified period of time."⁶⁸

The first reported tortious interference decision in the history of common law, *Lumley v. Gye*,⁶⁹ also supports reaching this conclusion. *Lumley* involved "a singer under contract to sing at the plaintiff's theatre," who "was induced by the defendant, who operated a rival theatre, to break her contract with the plaintiff in order to sign for the defendant."⁷⁰ Although that former employee was under contract, the situation facing an employer prematurely losing a former employee is directly on-point. As the commentary to Section 766 provides, until the employer or employee has terminated the at-will employment contract, "the contract is valid and subsisting, and the defendant may not improperly interfere with it."⁷¹ In other words, until the contract is terminated, it "is a subsisting relation, of value to the plaintiff, and presumably [would] continue in effect."⁷² Thus, because the employer has an expectation that the employment will continue indefinitely, the sudden departure of an employee may be actionable under a tortious interference (Section 766) theory. Indeed, "[t]he gravamen of the tort [of interference with contract] is interference with the employment contract irrespective of the term of that contract."⁷³

The circumstances, however, should dictate whether bringing this specific cause of action would be viable and worth involving the courts. As the commentary indicates, "[t]he fact that the contract is terminable at will ... is to be taken into account in determining the damages that the plaintiff has suffered by reason of its breach."⁷⁴ Thus, if the court

67. *Great American*, 2010 WL 338219, at *10.

68. *Id.*

69. *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853).

70. RESTATEMENT (SECOND) TORTS § 766A cmt. c (citing *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749 (1853)).

71. *Id.* at § 766 cmt. g.

72. *Nelson*, 949 F. Supp. at 261 (quoting W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 129, at 994-96 (5th ed. 1984)).

73. *Nelson*, 949 F. Supp. at 262.

74. RESTATEMENT (SECOND) OF TORTS § 766 cmt. g.

were to recognize this cause of action as brought by a plaintiff-employer against the former employee's new employer, damages probably must be alleged in order to state the claim and proven in order to survive a motion for summary judgment. For example, an employer who has entrusted an employee with specific tasks or trade secrets may, over time, become increasingly valuable to that employer. The risk of a new employer (and likely a competitor) surreptitiously courting that employee will probably increase. If the new employer is successful in causing the employee to terminate the current at-will relationship, the former employer may likely wish to pursue a tortious interference with contract claim. As discussed herein, the courts should recognize this cause of action as a Scenario 2 situation, leaving the former employer to confront and overcome the issue of damages.

The case law suggests that one way an employer may want to protect itself prospectively from these issues is by putting the employment contract in writing, even if the employment remains at-will, although the case law never explains why an oral contract should not be enforceable in this situation in the same manner as other situations. Regardless, the success of the "written agreement" argument is likely to be highly factual, and will hinge legally on distinguishing a Scenario 2 case from a Scenario 1 case. Applying the applicable commentary to the *Restatement* as discussed in this article may be another way of strengthening the legal arguments for such a claim.

V. CONCLUSION

Particularly when a former employer faces a situation where its employee has been lost to a competitor, claims for tortious interference with an at-will employment contract present nuanced analyses of the employer-employee relationship. Section 766 of the *Restatement* recognizes a cause of action for tortious interference with an at-will employment contract. The adoption of this commentary by the Delaware District Court suggests that the lines drawn by the Delaware state courts are not as distinct as the analysis in these cases makes them. *Great American* implies that a claim for tortious interference with an at-will employment contract may be viable under appropriate circumstances paralleling a Scenario 2 fact pattern. That is, the only circumstance where the courts should recognize a cause of action for tortious interference with an at-will contract is when it is brought by a former employer against the former employee's new employer. Such an outcome would be consistent with the *Restatement*. Accordingly, Delaware law should recognize a claim for tortious interference with an at-will employment contract as a viable cause of action only when it is brought by a former employer against the former employee's new employer.⁷⁵

75. After this article went to press, the Delaware Supreme Court issued *ASDI, Inc. v. Beard Research, Inc.*, Nos. 296, 301, 308, 2010, ___A.3d ___, 2010 WL 4751770 (Del. Nov. 23, 2010). In affirming the Court of Chancery's underlying decisions, the Supreme Court appears to endorse the proposition posed by this article, that tortious interference with an at-will contract may create an actionable claim. *See id.* at *1 ("Conduct amounting to tortious interference has been found actionable even where the third party is lawfully entitled to terminate a contract 'at will.'") (citing cases); *see also id.* at *2 ("[T]he focus of the claim is on the defendant's wrongful conduct that induces the termination of the contract, irrespective of whether the termination is lawful.") (citations omitted).

ENGAGING WITH THE REALITIES OF THE CORPORATE FAMILY

Kristen Salvatore DePalma and Emily V. Burton*

INTRODUCTION

An attorney owes his or her client a duty of undivided loyalty. When that client is a corporation, the question arises whether the firm owes a duty of loyalty to every member of that corporation's family and whether such a duty would be in any way shapeable by the attorney. Given the myriad of affiliate relationships and the ongoing developments in corporate structures, full attribution of every attorney-client relationship to every member of a corporate family would create serious difficulties for any large firm representing multiple corporate clients.

Thankfully, different factors winnow down conflict situations to those in which the law firm's representation raises genuine ethical concerns. Part I of this article discusses Comment 34 to Rule 1.7 of the Delaware Lawyers' Rules of Professional Conduct (the "Rules"), which clarifies the situations wherein affiliates of a corporate client must also be considered a client for conflict purposes.¹ Part II describes the ways in which advance waivers may permit attorneys to negotiate the scope of representation with a prospective client prior to litigation, as well as exceptions to the "hot potato" rule, which permits an attorney to terminate his representation of a client when the conflict is not attributable to the attorney's actions.

I. UNDER COMMENT 34 TO RULE 1.7, REPRESENTATION OF ONE MEMBER OF A CORPORATE FAMILY WILL NOT NECESSARILY CONFLICT THE ATTORNEY OUT OF REPRESENTATION ADVERSE TO OTHER MEMBERS OF THE CORPORATE FAMILY

The Rules provide somewhat limited guidance regarding when an attorney or firm that undisputedly has an attorney-client relationship with one entity, the client, also has an attorney-client relationship with an affiliate of that client. Rule 1.7(a), governing concurrent conflicts of interest, states:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.²

* Ms. DePalma and Ms. Burton are attorneys at Young, Conaway, Stargatt & Taylor, LLP in Wilmington, Delaware. The authors would like to thank Alexander D. Thaler for his time and helpful comments on this article.

1. Delaware has adopted Rule 1.7, and its Comments, of the American Bar Association ("ABA") Model Rules of Professional Conduct ("Model Rules").

2. DEL. PROF. COND. R. 1.7(a).

Rule 1.7 is clarified by Comment 34, which states:

A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a).³ Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.⁴

“[W]hether a lawyer represents a corporate affiliate of his client, for purposes of Rule 1.7, depends not upon any clear-cut *per se* rule but rather upon the particular circumstances[.]”⁵

While few courts have explicitly interpreted Comment 34 since its adoption,⁶ its meaning can be inferred from related sources. The ABA Reporter's Explanation of Changes for Comment 34 notes:

The language is largely drawn from the conclusions of ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 95-390, although the Commission believes that there will be more situations in which the lawyer will be prohibited from undertaking representation than may have been reflected in that opinion.⁷

Furthermore, Formal Opinion 95-390 itself explicitly drew on preexisting case law.⁸ Therefore, Comment 34 may be interpreted in light of both Formal Opinion 95-390 and prior case law. Although Delaware's case law on the topic is limited, authority from other jurisdictions that have adopted ABA Model Rule of Professional Conduct (“Model Rule”) 1.7 and Comment 34 provides the best indication of a Delaware court's ruling.⁹

3. Rule 1.13(a) provides: “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” DEL. PROF. COND. R. 1.13(a).

4. DEL. PROF. COND. R. 1.7(a) cmt. 34.

5. *Avocent Redmond Corp. v. Rose Elecs.*, 491 F. Supp. 2d 1000, 1006 (W.D. Wash. 2007) (quoting ABA Formal Ethics Opinion 95-390 (Jan. 25, 1995) (hereinafter “Formal Op. 95-390”)).

6. Comment 34 was promulgated by the ABA in 2002 and adopted by Delaware on July 1, 2003. It has also been adopted by Arizona, Arkansas, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. See ABA chart listing jurisdictions that adopted Rule 1.7, Comment 34 as of October 28, 2009, at http://www.abanet.org/cpr/pic/1_7_34.pdf. Alaska, the District of Columbia, and New York have adopted modified versions of Comment 34. *Id.* See also Charles W. Wolfram, “*Ethics 2000 And Conflicts Of Interest: The More Things Change ...*” 70 TENN. L. REV. 27, 49 (Fall 2002) (addressing the promulgation of Comment 34, noting an absence of clarity).

7. ABA Comm'n on Evaluation of the Model Rules of Prof. Conduct, Report 401 to the ABA House of Delegates, at 73 (Aug. 6, 2001), at <http://www.abanet.org/cpr/e2k/e2k-rule17rem.html>.

8. See, e.g., Formal Op. 95-390, *supra* note 5, at 1001:264 (citing *Teradyne Inc. v. Hewlett-Packard Co.*, No. C-91-0344 MHP ENE, 1991 U.S. Dist. LEXIS 8363 (N.D. Cal. June 6, 1991); *Hartford Accident & Indem. Co. v. RJR Nabisco, Inc.*, 721 F. Supp. 534, 540 (S.D.N.Y. 1989)).

9. See, e.g., *Jones v. State*, 745 A.2d 856, 868 (Del. 1999); *United Water Del., Inc. v. PSC*, 723 A.2d 1172, 1176 (Del. 1999).

A. “A Lawyer Who Represents A Corporation Or Other Organization Does Not, By Virtue Of That Representation, Necessarily Represent Any Constituent Or Affiliated Organization, Such As A Parent Or Subsidiary”¹⁰

The first sentence in Comment 34 states, “A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary.”¹¹ Prior to the enactment of Comment 34, a few courts held that suing an affiliate was equivalent to suing the client for conflict of interest purposes.¹² In contrast, the majority of courts, as well as Formal Opinion 95-390, adopted a fact-intensive, weighing approach to the question.¹³ The opening sentence of Comment 34 clearly establishes the weighing approach as the governing rule of interpretation in jurisdictions that have adopted the Model Rules.¹⁴ Furthermore, Comment 34’s recognition of a legal distinction between members of a corporate family while tempering the effect of that distinction is consistent with other areas of corporate law.¹⁵ Therefore, a court considering the issue as a matter of first impression should find no *per se* conflict where an attorney undertook representation adverse to an affiliate.

B. “The Lawyer For An Organization Is Not Barred From Accepting Representation Adverse To An Affiliate In An Unrelated Matter”¹⁶

The courts’ struggle to establish principled guidelines for when an attorney may undertake representation adverse to an affiliate predates both Comment 34 and Formal Opinion 95-390. The protection of client confidences concerning the larger corporate family has consistently been a key concern in evaluating this question.¹⁷ In order to protect client

10. DEL. PROF. COND. R. 1.7 cmt. 34.

11. *Id.*

12. *See* Carlyle Towers Condo. Ass’n v. Crossland Sav., FSB, 944 F. Supp. 341, 346 (D.N.J. 1996) (citing *Teradyne*, 1991 U.S. Dist. LEXIS 8363, at *6-7; *Stratagem Dev. Corp. v. Heron Int’l N.V.*, 756 F. Supp. 789, 793 (S.D.N.Y. 1991); *Hartford Accident*, 721 F. Supp. at 540) (holding that under New Jersey law, suing an affiliate is the same as suing a client for conflict purposes).

13. *See, e.g.*, *Westerly Capital, LLC v. Windmill Mgmt., LLC*, CV086000954S, 2008 Conn. Super. LEXIS 2826, at *6-8 (Conn. Super. Ct. Oct. 30, 2008) (noting that Connecticut had adopted the substantial relationship test as a prerequisite to disqualification where an attorney undertakes representation adverse to an affiliate); *Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC*, 663 N.Y.S.2d 499 (N.Y. Sup. Ct. 1997) (denying motion to disqualify under New York law).

14. Formal Op. 95-390, *supra* note 5, at 1001:258 (“A lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client....”).

15. *See, e.g.*, *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1040 (Del. Ch. 2006) (adopting a moderate approach to claims that a parent civilly conspired with its subsidiary on the grounds that the law must at once “recogni[ze] the presumptively separate legal dignities of parent and subsidiary” while also being responsive to the day to day interactions of related entities).

16. DEL. PROF. COND. R. 1.7 cmt. 34.

17. *See, e.g.*, *Pennwalt Corp. v. Plough*, 85 F.R.D. 264, 270 (D. Del. 1980) (granting motion to disqualify based on the “substantial relationship test,” applying the Model Code of Professional Conduct, the predecessor to the Model Rules).

confidences in representation adverse to an affiliate, courts applied the substantial relationship test, borrowed from the “former client” analysis.¹⁸

In *Pennwalt Corp. v. Plough, Inc.*,¹⁹ the United States District Court of Delaware applied the substantial relationship test when considering whether attorneys should be disqualified where, while representing the client in an antitrust matter, they brought suit against its affiliate for false advertising.²⁰

The ... rule for disqualification where there is concurrent dual representation of sister corporations cannot be accepted for the simple factual reason that [the law firm] has never represented [the sister] or [the parent corporation].... Similarly, [the law firm’s] claim that the ethicality of its position is unsailable because it never represented [either affiliate] is overly broad. Representation under the Code has been prohibited in varied circumstances even though the attorney-client relationship never existed.²¹

The court then applied the substantial relationship test because, “[w]hile the case *sub judice* is not a ‘prior representation’ case, there would be no hesitation to find [the law firm] disqualified if that firm could not pass the widely adopted ‘substantial relationship’ test analogized to concurrent representation of sister corporations[.]”²² “[T]he determination of whether there is a substantial relationship ... involves a realistic appraisal of the possibility that confidences had been disclosed in the one matter which will be harmful to the client in the other.”²³

The court observed that the substantial relationship test is not the only criteria to be considered:

In assessing whether this threat exists in circumstances such as those presented here, the court properly may [also] examine the relationship between the sister corporations. The object of this inquiry is not to determine whether [the affiliate] can be affixed with the label “client.” Rather, it is to gauge the degree, if any, to which [the firm]’s representation [in either case] may be influenced by a regard for the alternate client’s welfare.²⁴

The court noted that until the corporations were organized into the same division, shared the same legal department, and reported to the same executive, there was not a conflict under Canon 5 of the New York Code of Professional

18. See *Morrison Knudsen Corp. v. Hancock*, 69 Cal. App. 4th 223, 233 (Cal. Ct. App. 1999) (quoting *H. F. Ahmanson & Co. v. Salomon Bros.*, 229 Cal. App. 3d 1445, 1455 (Cal. Ct. App. 1991)) (granting motion to disqualify upon finding that multiple cases alleging negligent engineering were substantially related); *Pennwalt*, 85 F.R.D. at 270; *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746, 749 (2d Cir. N.Y. 1981) (applying substantial relationship test where attorneys undertook representation adverse to members of an association represented by the attorneys). See *contra* *Discotrade Ltd. v. Wyeth-Ayerst Int’l*, 200 F. Supp. 2d 355, 360 (S.D.N.Y. 2002) (limiting *Glueck* to the association context without addressing subsequent case law applying *Glueck* in the corporate affiliate context). See also DEL. PROF. COND. R. 1.9 cmt. 3 (defining “substantially related” for the purposes of Rule 1.9).

19. 85 F.R.D. 264 (D. Del. 1980).

20. Although *Pennwalt* applied the Model Code of Professional Responsibility, rather than the Model Rules, it continues to be cited as an authority in this area, and its approach has been adopted by cases interpreting the Model Rules. See, e.g., *Westerly*, 2008 Conn. Super. LEXIS 2826, at *5 (adopting *Pennwalt* approach while applying Model Rule 1.7).

21. *Pennwalt*, 85 F.R.D. at 268.

22. *Id.* at 270.

23. *Id.*

24. *Id.* at 271-72.

Responsibility.²⁵ But the court added, “It is difficult to perceive how there could be free, unfettered communications between [the firm] and [its client] after the merger of headquarters [when] a small staff of in-house attorneys located at the same physical site and under the active supervision of one attorney are handling both ... matters.”²⁶

In *Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC*,²⁷ the Supreme Court of New York considered a motion to disqualify attorneys based on their firm’s concurrent representation of the opposing party’s subsidiary.²⁸ The court “reject[ed], *ab initio*, the theory ... that the two corporations should be treated as one entity for conflicts purposes since no evidence ha[d] been submitted to demonstrate that the ‘[d]omination [of the parent over the subsidiary is] so complete, [the] interference so obtrusive’ as to rebut the presumption that they are separate and distinct legal entities,”²⁹ even though “they share common legal and accounting departments and have some officers in common.”³⁰ Instead, the court held that “[t]he thorny question of attorney disqualification requires a response sensitive to each of the substantial interests implicated in the controversy.”³¹ Therefore, the court applied the substantial relationship test.³² The court wrote:

In deciding the question of whether the “possibility of disclosure” exists, two factors are relevant: (1) The nature of the law firm ... insofar as it sheds light upon whether confidential information about the client would have been shared among the members of the firm ... [and] (2) The type of legal work done for the client insofar as it may have put the firm in the position of acquiring confidential information that could be used in an adversarial manner.³³

Ultimately, the court denied the motion to disqualify because

the legal work done for defendant’s subsidiary was of a highly specialized nature and had absolutely nothing in common with the subject matter of the present controversy. Moreover, ... the work for the subsidiary was accomplished by a geographically isolated member of the firm.³⁴

This approach has been applied by a court following Comment 34. In *Westerly Capital, LLC v. Windmill Management, LLC*,³⁵ a firm undertook representation adverse to the supermajority owner of two LLCs represented by the firm.³⁶ The Superior Court of Connecticut held that, in that context,

25. *Id.* at 272.

26. *Id.* at 273.

27. 663 N.Y.S.2d 499 (N.Y. Sup. Ct. 1997).

28. *Id.* at 500.

29. *Id.* (modification in quoted text in the original).

30. *Id.* at 500 n.1.

31. *Id.* at 500.

32. *Id.* at 501.

33. *Id.* (internal citations omitted).

34. *Id.*

35. CV086000954S, 2008 Conn. Super. LEXIS 2826 (Conn. Super. Ct. Oct. 30, 2008).

36. *Id.* at *5 (applying CONN. R. PROF. CONDUCT 1.7(a), which mirrors Model Rule 1.7(a) and incorporates Comment 34).

the Second Circuit imposed a “substantial relationship test” to the effect that whenever a lawsuit is sufficiently related to the matters which the representation of the [client] covers so as to create a realistic risk that one of the parties will not be represented with vigor, or that unfair advantage will be taken of another party, there should be disqualification. The Second Circuit’s concern was focused on whether a trial might be tainted or the free flow of information from a client to the law firm be inhibited.³⁷

The court denied the motion to disqualify because “there [wa]s no evidence that [the attorney] obtained or had access to any confidential information of [the affiliate] held by [the client], and little possibility he would have such access in the future.”³⁸ Therefore, ownership, even accompanied by a degree of control, is insufficient by itself to support disqualification under this rationale.³⁹

The court in *Westerly* does not mention Comment 34 in its analysis or rationalize its application of case law interpreting the Model Code of Professional Conduct when applying the Model Rules. Nonetheless, the substantial relationship test appears to be incorporated into Comment 34, both because the word “unrelated” was already freighted with meaning when the ABA knowingly used it, and because Formal Opinion 95-390, which formed the basis for Comment 34, cited *Pennwalt* when describing the limitations on representation adverse to an affiliate.⁴⁰ Therefore, under Rule 1.7, an attorney would likely be conflicted out of representation adverse to an affiliate where the matter is substantially related to the attorney’s work for the client.

C. “[When] The Circumstances Are Such That The Affiliate Should Also Be Considered A Client Of The Lawyer”⁴¹

While Comment 34 itself is rather elliptical as to what circumstances would require the affiliate to be also considered a client of the lawyer, Formal Opinion 95-390 addressed the question at length.⁴² It began with the proposition that the answer depends on the particular facts and circumstances of the case, evaluated through the prism of the rules governing formation of an attorney-client relationship with a single client: “A client-lawyer relationship does not . . . require an explicit agreement, let alone a written letter of engagement: it may come into being as a result of reasonable expectations and a failure of the lawyer to dispel those expectations.”⁴³ “Thus, the nature of the lawyer’s dealings with [affiliates] may be such that they have become clients as well.”⁴⁴ Or, “the lawyer’s relationship with the [affiliate] may lead the affiliate

37. *Id.* at *6-8.

38. *Id.* at *9.

39. *See id.*; *Whiting Corp. v. White Machinery Corp.*, 567 F.2d 713, 715-16 (7th Cir. 1977) (client’s 20% ownership interest of defendant and client’s officers’ service on defendant’s board did not create a conflict of interest disqualifying attorney from representing plaintiff).

40. Formal Op. 95-390, *supra* note 5, at 1001:263.

41. DEL. PROF. COND. R. 1.7 cmt. 34.

42. Formal Op. 95-390, *supra* note 5, at 1001:264.

43. *Id.* at 1001:263 (subsequently quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 (Tent. Draft No. 5, 1992)).

44. *Id.* at 1001:264.

reasonably to believe that it is a client of the lawyer.”⁴⁵ Furthermore, “[a] client-lawyer relationship with the affiliate may also arise because the affiliate imparted confidential information to the lawyer with the expectation that the lawyer would use it in representing the affiliate.”⁴⁶ “Finally, the relationship of the [client] to its affiliate may be such that the lawyer is required to regard the affiliate as his client.”⁴⁷ “[S]ome of the key facts applicable to the analysis include (1) whether the [client] and the [affiliate] share a common legal department and management duties, (2) whether the lawyer’s work for [the client] benefits [the affiliate], or (3) whether the lawyer’s work for the [client] involves collecting confidential information.”⁴⁸ From a broad perspective, “the principal focus should be the practical consequences of the attorney’s relationship with the corporate family. If that relationship may give the attorney a significant practical advantage in a case against an affiliate, then the attorney can be disqualified from taking the case.”⁴⁹ These scenarios are discussed in more detail below.

1. An Affiliate Becomes Entitled To Be Treated As A Client Where “The Nature Of The Lawyer’s Dealings With [The Affiliate Are] Such That [It Has] Become A Client”⁵⁰

An affiliate may become a client when the lawyer performs legal services for the affiliate, possibly in the course of performing legal services for the client.⁵¹ In *Hartford Accident & Indemnification Co. v. RJR Nabisco, Inc.*,⁵² the United States District Court for the Southern District of New York

[c]onclude[d] that [the affiliate], through its subsidiary [the client], was [also] a client ... [where] the parent attached considerable importance to the product liability litigation against its subsidiary and, accordingly, supervised the subsidiary’s litigation. [One attorney’s affidavit stated,] “I have, for the most part, received assignments requesting legal representation from an officer or attorney of [the affiliate] even though the services were to be performed for [the client].” ... If the parent and subsidiary were in

45. *Id.*

46. *Id.*

47. *Id.* at 1001:265.

48. *Honeywell Int’l Inc. v. Philips Lumileds Lighting Co.*, Case No. 2:07-CV-463-CE, 2009 U.S. Dist. LEXIS 12496 (E.D. Tex. Jan. 6, 2009) (granting motion to disqualify under Model Rule 1.7 cmt. 34). California courts, which have not adopted the Model Rule, are directed to consider similar factors: “(1) whether the attorney received ‘confidential information’ from one entity ‘substantially related to the present claim against’ the other; (2) whether control of the two entities’ legal affairs overlap; (3) whether the two entities have overlaps in other areas, such as operations, personnel, or insurance coverage.” *iSmart Int’l Ltd. v. I-Docsecure, LLC*, No. C 04-03114 RMW, 2006 U.S. Dist. LEXIS 77323, at *11 (N.D. Cal. Oct. 12, 2006).

49. *iSmart*, 2006 U.S. Dist. LEXIS 77323, at *12 (quoting *Morrison Knudsen Corp. v. Hancock*, 69 Cal. App. 4th 223, 253 (Cal. Ct. App. 1999)) (although *iSmart* addressed California law, this observation was based in part on Formal Op. 95-390 and is accurate when applied to case law interpreting the Model Rule and Comment 34).

50. Formal Op. 95-390, *supra* note 5, at 1001:264.

51. *See, e.g.*, *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 644 F. Supp. 2d 333, 334-35 (S.D.N.Y. 2009) (although engagement letter stated that only parent corporation was a client, a subsidiary became a client when lawyers performed legal services for the subsidiary at the parent’s request).

52. 721 F. Supp. 534 (S.D.N.Y. 1989).

fact distinct and separate entities for representation purposes, then there would have been no need for the parent's general counsel to have retained this supervisory role.⁵³

Despite concluding that the affiliate had become a client as a result of its participation in the litigation, the court denied the motion to disqualify on the grounds that the relationship had terminated when the firm terminated its relationship with the attorney representing the subsidiary.⁵⁴

Control of litigation is only one possible factor supporting disqualification under this section. For example, one court noted the attorneys' use of the affiliate's name when describing their client, ultimately granting the motion to disqualify the firm.⁵⁵ Another court noted that the firm's work had benefited the affiliate.⁵⁶ In contrast, a court denied a motion to disqualify, where a firm filed a patent listing a company's CEO as the first inventor and failed to complete assignment of the patent to the client company, on the grounds that even though the work benefited the CEO, he could not have believed himself to be the firm's client because of the engagement letter.⁵⁷ Therefore, to the extent possible, interaction with affiliates should be minimized, and the relationship's scope should be clarified to limit conflicts on this basis.

2. An Affiliate Becomes Entitled To Be Treated As A Client Where “The Lawyer’s Relationship With The Affiliate ... Lead[s] The Affiliate Reasonably To Believe That It Is A Client Of The Lawyer”⁵⁸

As is true generally, an attorney-client relationship can be formed where an affiliate reasonably believes that it is the attorney's client and the attorney fails to take steps to dispel that belief.⁵⁹ In *Avocent Redmond Corp. v. Rose Electronics*,⁶⁰ the United States District Court for the Western District of Washington noted that “[d]etermining the existence of an attorney-client relationship is a fact-based inquiry.”⁶¹ “The existence of the relationship ‘turns largely on the client’s subjective belief that it exists. The client’s subjective belief, however, does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney’s words or actions.’”⁶² The attorneys in that case as-

53. *Id.* at 540 (applying a cross section of federal case law).

54. *Id.* at 541.

55. *Jones v. Rabanco, Ltd.*, No. C03-3195P, 2006 U.S. Dist. LEXIS 53766, at *12 (W.D. Wash. Aug. 3, 2006) (granting motion to disqualify under Washington law, one month prior to Washington's adoption of Comment 34: “Additionally, many of the internal memos of attorneys ... who worked on the LRI matter referred to Rabanco as if it were their client.”) (cited in *Avocent*, 491 F. Supp. 2d at 1008 (applying Model Rule 1.7)).

56. *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*, 09 CV 2857 (JSP), 2009 U.S. Dist. LEXIS 65226, at *1-2 (S.D.N.Y. July 27, 2009) (applying New York law, which has not adopted Model Rule 1.7, Comment 34 verbatim).

57. *Synergy Tech & Design, Inc. v. Terry*, No. C 06-02073 JSW, 2007 U.S. Dist. LEXIS 34463, at *25-26 (N.D. Cal. May 2, 2007) (applying Washington law, which follows the Model Rule).

58. Formal Op. 95-390, *supra* note 5, at 1001:264.

59. *See, e.g., Teradyne, Inc. v. Hewlett-Packard, Co.*, 20 U.S.P.Q. 2d (BNA) 1143, 1144-45 (N.D. Cal. 1991).

60. 491 F. Supp. 2d 1000 (W.D. Wash. 2007).

61. *Id.* at 1003 (applying Model Rule 1.7).

62. *Id.* (quoting *Bohn v. Cody*, 832 P.2d 71 (1992)).

served that although they had represented a sister corporation of the plaintiff, OSA Technologies, Inc. (“OSA”), they had never represented the plaintiff itself, Avocent Redmond Corp. (“Redmond”).⁶³ The court began its analysis with the engagement letter because “[t]he engagement agreement is the basic contract with the client and its terms are accorded substantial weight in determining the scope of the relationship.”⁶⁴

The agreement in *Avocent* stated: “I am writing to confirm that this firm has been engaged to represent OSA Technologies, Inc., a wholly owned subsidiary of Avocent Corporation, and its affiliates (‘you’ or the ‘Company’), in connection with its general corporate matters...”⁶⁵ The court stated, “In the first sentence of this agreement, the client is expressly identified as ‘*OSA Technologies, Inc.*, a wholly owned subsidiary of Avocent Corporation, *and its affiliates.*’ Further confirming this client identity, is the agreement’s client-signature line, which states: SO AGREED. *OSA Technologies, Inc.*, a wholly owned subsidiary of Avocent Corporation, *and it’s [sic] affiliates.*”⁶⁶ “Therefore, by agreeing to represent ‘OSA ... and its affiliates,’ [the firm] represented Redmond.”⁶⁷ Thus, because Redmond’s belief that the firm represented it was reasonable, the court found Redmond to be a client under Comment 34.⁶⁸ In theory, any conduct traditionally creating a reasonable belief of an attorney-client relationship would create an attorney-client relationship under this rationale.⁶⁹

3. An Affiliate Becomes Entitled To Be Treated As A Client Where “The Affiliate Imparted Confidential Information To The Lawyer With The Expectation That The Lawyer Would Use It In Representing The Affiliate”⁷⁰

The classic case in which an affiliate became a client by way of imparting confidential information to a lawyer with the expectation that the lawyer would use the information in representing the affiliate is *Westinghouse Electric Corp. v. Kerr-McGee Corp.*,⁷¹ which was cited in Formal Opinion 95-390.⁷² In *Westinghouse*, Kirkland, Ellis & Rowe (“Kirkland”) was hired by Westinghouse Electric Corporation (“Westinghouse”) to bring claims that 17 of its long-term supply contracts had become commercially impractical as a result of antitrust violations by companies involved in the uranium industry.⁷³ Contemporaneously, the American Petroleum Institute (“API”) hired Kirkland to prepare a report for Congress

63. *Id.* at 1002-03.

64. *Id.* at 1004 (quoting a docket entry).

65. *Id.*

66. *Id.* (emphasis in original).

67. *Id.*

68. *Id.* at 1006.

69. See Formal Op. 95-390, *supra* note 5, at 1001:263.

70. *Id.* at 1001:264.

71. 580 F.2d 1311 (7th Cir. Ill. 1978).

72. Formal Op. 95-390, *supra* note 5, at 1001:264 (citing *Westinghouse* as an example of a situation in which an affiliate might become a client by conveying confidential information).

73. *Westinghouse*, 580 F.2d at 1313.

demonstrating the absence of antitrust concerns raised by cross-ownership of alternative energy sources, including uranium.⁷⁴ To prepare the report, Kirkland sent

59 API member companies a survey questionnaire seeking data to be used ... in connection with its engagement by API. In the introductory memorandum to the questionnaire, [Kirkland] advised the 59 companies that [it] had “ascertained that certain types of data pertinent to the pending anti-diversification legislation are not now publicly available” and the API “would appreciate your help in providing this information to Kirkland ...” The memorandum included the following:

“Kirkland, Ellis & Rowe is acting as an independent special counsel for API, and will hold any company information in strict confidence, not to be disclosed to any other company, or even to API, except in aggregated or such other form as will preclude identifying the source company with its data.”⁷⁵

Several of the companies providing data and interviews to Kirkland in connection with the report were parties to Westinghouse’s litigation and moved to disqualify Kirkland from that litigation on the grounds that Kirkland represented them in the API efforts.⁷⁶

The United States Court of Appeals for the Seventh Circuit noted, “The professional relationship for purposes of the privilege for attorney-client communications ‘hinges upon the client’s belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.’”⁷⁷ By affidavit, one movant testified that he “was given to believe that the Kirkland firm was representing both API and Gulf;’ ... and Getty’s vice president stated that in submitting data to Kirkland he ‘acted upon the belief and expectation that such submission was made in order to enable [Kirkland] to render legal service to Getty in furtherance of Getty’s interests.’”⁷⁸ Because “Gulf, Kerr-McGee and Getty each entertained a reasonable belief that it was submitting confidential information ... to a law firm which had solicited the information upon a representation that the firm was acting in the undivided interest of each company,” the court found that an attorney-client relationship had developed and disqualified Kirkland.⁷⁹

Although inquiry into whether disqualification is proper because the attorneys represent the client in a related matter is facially similar to inquiry into whether the affiliate has become a client as a result of disclosing confidential information, the inquiries address separate concerns. The former inquiry, under the substantial relationship test, asks whether, in the course of the firm’s interactions with the client, the firm may have acquired confidential information concerning the affiliate that is relevant to the lawsuit against the affiliate and that the client expected would be kept confidential.⁸⁰ Disqualification is proper in that context to protect the firm’s relationship with the client. In contrast, the latter rule addresses

74. *Id.*

75. *Id.* at 1313-14 (emphasis in original, modifications to quoted material in original).

76. *Id.* at 1312.

77. *Id.* at 1319.

78. *Id.* at 1320 (modifications in nested quotations in original).

79. *Id.* at 1321.

80. *Westerly*, 2008 Conn. Super. LEXIS 2826, at *6-8.

the reasonable expectations of the affiliate.⁸¹ Disqualification in that context is necessary because a second attorney-client relationship has developed and is subject to the full protection afforded by Rule 1.7.

*Lamson & Sessions Co. v. Munding*⁸² demonstrates the distinction between the standards. In *Lamson*, Lamson & Sessions Co. (“Lamson”) sued its former subsidiary, YSD Industries, Inc. (“YSD”).⁸³ Jones Day was Lamson’s customary outside counsel and had served in that capacity while Lamson owned YSD. Since YSD’s spinoff, Jones Day had performed one limited project for YSD⁸⁴ and investigated YSD’s financial situation for Lamson.⁸⁵ The United States District Court for the Northern District of Ohio first held that Jones Day’s representation of YSD did not result in a conflict under the former client rules.⁸⁶ It then noted that, “[w]hile the affidavit alleges that [YSD was] involved with attorneys from Jones Day at various other times during the past twenty years, it is clear from the affidavit that at all other times Jones Day was acting as counsel for Lamson not YSD; thus, any information gained in those dealings was not confidential information gained in an attorney-client relationship with YSD.”⁸⁷ Therefore, the court denied the motion to disqualify, despite the relevance of the information YSD provided to Jones Day in connection with Jones Day’s investigation on behalf of Lamson.⁸⁸ The fact that Jones Day was representing Lamson in the litigation against YSD likely played an unstated role in the court’s analysis. Nonetheless, it is clear that this inquiry turns not only on the possession of relevant information, but on the source of that information and the context in which it was acquired.

4. An Affiliate Becomes Entitled To Be Treated As A Client Where “The Relationship Of The [Client] To Its Affiliate [Is] Such That The Lawyer Is Required To Regard The Affiliate As His Client”⁸⁹

The final criteria upon which an affiliate may be considered a client under Comment 34 to the Model Rules is the overlap in personnel and operations between the client and its affiliate.⁹⁰ Any overlap in the legal departments is

81. *Westinghouse*, 580 F.2d at 1321.

82. Case No. 4:08CV1226, 2009 U.S. Dist. LEXIS 37197 (N.D. Ohio May 1, 2009) (denying motion to disqualify).

83. *Id.* at *3.

84. *Id.* at *4-5 (“Cognizant of the ongoing relationship between its longtime client, Lamson, and YSD, Jones Day drafted and obtained ... an engagement letter that limited the scope of the representation to the consequences of the demutualization, clarified that YSD alone was the client, attempted to waive potential future conflicts between YSD and Lamson as clients, and stated that the representation could only be expanded with Jones Day’s consent.”).

85. *Id.* at *18 n.4.

86. *Id.* at *16.

87. *Id.*

88. *Id.* at *19.

89. Formal Op. 95-390, *supra* note 5, at 1001:265.

90. *See* Commonwealth Land Title Ins. Co. v. St. Johns Bank & Trust Co., No. 4:08-CV-1433 CAS, 2009 U.S. Dist. LEXIS 87151, at *20 (E.D. Mo. Sept. 22, 2009) (granting motion to disqualify based on overlap in personnel in case governed by Comment 34). *See also* JPMorgan Chase Bank *ex rel.* Mahonia Ltd. v. Liberty Mut. Ins. Co., 189 F. Supp. 2d 20, 23 (S.D.N.Y. 2002) (applying New York law: “[I]t is wholly artificial to separate [the affiliate] and [the client] for purposes of analyzing [the firm]’s responsibilities in this context. Just from the fact that [the client] accounts for more than 90% of [the affiliate]’s business and that [the affiliate] and [the client] share identical corporate headquarters, an identical board, and an identical general counsel, ... it is obvious that the two share a wealth of common interests adversely impacted by the lawsuit in question.”).

particularly problematic, not only because it suggests a close relationship under this test, but because it also obfuscates the bounds of the representation and is more likely to result in shared information, and because the “identity of process” of a single legal department addressing matters broadens the class of “substantially related” matters.⁹¹

For example, in *Honeywell Int’l Inc. v. Philips Lumileds Lighting Co.*,⁹² Phillips Lumileds Lighting Co. (“Phillips Lumileds”) moved to disqualify counsel for Honeywell International, Inc. (“Honeywell”) on the grounds that the attorneys concurrently represented its parent, Phillips Electronics North American Corporation (“PENAC”), in numerous matters.⁹³ The United States District Court for the Eastern District of Texas reasoned that “[u]nder Model Rule 1.7, Phillips Lumileds must establish two things: (1) that it is a current client of PHJW, counsel for Honeywell; and (2) that PHJW’s representation of Honeywell is directly adverse to it.”⁹⁴ The court further stated:

Here, it is undisputed that (1) Philips Lumileds and the other Philips affiliates share a common legal department, Philips IP&S; (2) Philips and Philips Lumileds share common management, computer networks, and marketing designs; and (3) PHJW currently represents PENAC. As indicated above, Philips IP&S directs intellectual property litigation and licensing strategy for Philips subsidiaries worldwide, including Philips Lumileds. Additionally, ... PHJW has had broad access to confidential information of various Philips entities, based on its representations of various Philips entities.⁹⁵

Furthermore, “both the Philips Lumileds’ website and marketing materials feature the Philips logo. The PENAC website also features the Philips logo. Considering all the facts, the court is persuaded that Philips Lumileds should be considered a current client of PHJW.”⁹⁶

Therefore, to avoid a disqualification on the grounds that an affiliate has become a client or is entitled to be treated as such, law firms should: (1) limit their interaction with affiliates that they do not intend to represent; (2) clarify the scope of their representation when dealing with both clients and affiliates, (3) avoid collecting confidential information from affiliates, and (4) carefully weigh the risk that a court will find an affiliate to be a client if its operations and personnel overlap substantially with those of the client.

91. See *Commonwealth Land Title Ins.*, 2009 U.S. Dist. LEXIS 87151, at *20 (noting that an “identity of process” in a legal department’s defense of class action caused class action lawsuits addressing different vehicle malfunctions to be substantially related “regardless of the nature of the component involved”).

92. Case No. 2:07-CV-463-CE, 2009 U.S. Dist. LEXIS 12496 (E.D. Tex. Jan. 6, 2009).

93. *Id.* at *3.

94. *Id.* at *5-6.

95. *Id.* at *7-8.

96. *Id.* at *8.

D. “There Is An Understanding Between The Lawyer And The Organizational Client That The Lawyer Will Avoid Representation Adverse To The Client’s Affiliates”⁹⁷

The fourth clause in Comment 34 to the Model Rules provides that an attorney may not undertake representation adverse to an affiliate if “there is an understanding between the lawyer and the [client] that the lawyer will avoid representation adverse to the client’s affiliates.” This understanding can be either implicit or it may be stated in the engagement letter.⁹⁸

In *Commonwealth Land Title Insurance Co. v. St. Johns Bank & Trust Co.*,⁹⁹ the United States District Court for the Eastern District of Missouri granted a motion to disqualify because it found that the client had an “expectation and understanding that its outside counsel [would] avoid representation adverse to [its] affiliates unless a waiver [was] previously obtained.”¹⁰⁰ St. Johns Bank & Trust Co. (“St. Johns”) hired the law firm of Polsinelli Shalton Flanigan & Suelthaus PC (the “Polsinelli firm”) to bring an action against Commonwealth Land Title Ins. Co. (“Commonwealth”).¹⁰¹ Although initially the Polsinelli firm had never represented Commonwealth or any of its affiliates, four months later the Polsinelli firm merged with Shughart Thomson & Kilroy, PC (the “Shughart firm”), which had represented Commonwealth and its related companies for many years and “[con]currently represent[ed] (1) one of Commonwealth’s sister companies in an unrelated suit, and (2) insured policyholders of Commonwealth’s sister companies in two unrelated suits.”¹⁰² “Commonwealth argue[d] that [the firm]’s representation of St. Johns [was] a concurrent conflict prohibited under [Model Rule 1.7,] but St. Johns argue[d] that the representation is permitted under ... [Comment 34] to the rule.”¹⁰³ The court first determined that “[i]f a concurrent conflict exists, it does not matter that the ... lawyers in this case did not previously represent Commonwealth.”¹⁰⁴

The court then concluded:

In the instant case, [the firm]’s concurrent representation of St. Johns in this action and Commonwealth’s sister companies and their insureds in unrelated actions presents a conflict of interest. The conflict is based on the circumstances of Fidelity’s [(Commonwealth’s parent)] centralized oversight of litigation involving its affiliate companies according to a common set of established procedures and practices which apply to all litigation concerning the affiliated companies and their policyholders, Fidelity’s retention of hands-on authority with respect to matters such as settlement, and its expectation and understanding that its outside counsel will avoid representation adverse to Fidelity’s affiliates

97. DEL. PROF. COND. R. 1.7 cmt. 34.

98. See, e.g., *Commonwealth Land Title Ins.*, 2009 U.S. Dist. LEXIS 87151, at *15 (implicit understanding); *Avocent*, 491 F. Supp. 2d at 1004 (understanding based on engagement letter).

99. No. 4:08-CV-1433 CAS, 2009 U.S. Dist. LEXIS 87151 (E.D. Mo. Sept. 22, 2009) (applying Missouri Supreme Court Rule 4-1.7, which mirrors Model Rule 1.7 and includes Comment 34).

100. *Id.* at *15 (applying Missouri Supreme Court Rule 4-1.7, which mirrors Model Rule 1.7 and includes Comment 34).

101. *Id.* at *3.

102. *Id.*

103. *Id.*

104. *Id.*

unless a waiver is previously obtained. These circumstances establish that Fidelity, Commonwealth, and its sister companies should all be considered clients . . . , and are owed a duty of loyalty Because Commonwealth refuses to consent to the concurrent representation, [the firm] must be disqualified from representing St. Johns in this matter.¹⁰⁵

This issue differs from the discussion in the preceding section because this inquiry focuses on the client's reasonable expectations concerning the scope of the relationship, whereas the previous section discussed the possibility that the affiliate should be considered a client due to the affiliate's reasonable expectations. Based on *Commonwealth* and *Avocent*, it appears as though any problems created by this rationale can be addressed through an engagement letter informing the client that the firm may undertake representation adverse to any affiliates.

E. “The Lawyer’s Obligations To Either The Organizational Client Or The New Client Are Likely To Limit Materially The Lawyer’s Representation Of The Other Client”¹⁰⁶

Comment 34 to the Model Rules ends with a prohibition on representations in which “the lawyer’s obligations to either the organizational client or the new client are likely to limit materially the lawyer’s representation of the other client.” This restates the general proposition contained in Rule 1.7(a) that “[a] concurrent conflict of interest exists if: . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, . . . or a third person” Absent from this constraint is any consideration for the impact of the new attorney-client relationship on the lawyer’s interactions with the Affiliate. That absence underlines the thrust of Comment 34, which is that an affiliate is not a client solely by virtue of its status as an affiliate of the client. On the other hand, this definition of a concurrent conflict of interest explicitly recognizes that even where the affiliate is not a client of the lawyer, the lawyer may in practice limit his or her representation of the new client as a result of the affiliate’s relationship with the pre-existing client. As one commentator has observed, “it seems that courts will find representation adverse to a corporate affiliate objectionable in at least two paradigm situations—one involving impermissible disloyalty and the other involving a substantial level of understandable discomfort on the part of the entity client.”¹⁰⁷

*CFTC v. Eustace*¹⁰⁸ demonstrates such a material limitation of the lawyer’s responsibility to the client in this context. *CFTC* did “not fit precisely under either Rule 1.7 or bankruptcy doctrine.”¹⁰⁹ A court-appointed equity receiver “failed to disclose prior client relationships with various UBS entities knowing that another UBS entity, UBS Fund Services (Cayman) Limited (‘UBS Cayman’), participated in various aspects of the transactions underlying [the] cases,” which were a valuable asset of the estate.¹¹⁰ The equity receiver had not named UBS Cayman as a defendant when bringing suit.¹¹¹

105. *Id.* at *14-15.

106. DEL. PROF. COND. R. 1.7 cmt. 34.

107. Charles W. Wolfram, *Ethics 2000 and Conflicts of Interest: The More Things Change . . .* 70 TENN. L. REV. 27, 52 (Fall 2002).

108. C.A. Nos. 05-2973 & 06-1944, 2007 U.S. Dist. LEXIS 33137 (E.D. Pa. May 3, 2007).

109. *Id.* at *21.

110. *Id.* at *1.

111. *Id.* at *5.

Nonetheless, “UBS Cayman [was] mentioned throughout the Complaint, and its role in the overall business transaction was, according to the Complaint, a significant one. The complaint paint[ed] UBS Cayman as one of the victims of the wrongdoing by Man[, the defendant].”¹¹² The potential conflict was brought to the court’s attention after a deposition of UBS Cayman employees suggested that they had been negligent in the challenged transactions.¹¹³

The receiver argued that under Rule 1.7, Comment 34, his firm was not barred from bringing suit against UBS because “the UBS entities they represent and those entities which are involved in this litigation are separate legal entities, and there is no reason they should be treated as the same client. Moreover, according to the Receiver ... there was no expectation by UBS Financial Services that [the Receiver] would avoid representations adverse to UBS Cayman.”¹¹⁴

The court wrote:

If this dispute was merely an issue of whether a law firm could accept a representation adverse to a corporate affiliate of an entity when the firm has an ongoing client relationship with another unrelated affiliate of that entity, the court would [have] readily [found] that ... the Receiver’s arguments were correct and that no disabling conflict existed.¹¹⁵

Nonetheless, the United States District Court for the Eastern District of Pennsylvania granted the motion to disqualify partially on the grounds that if the receiver tried the case, the receiver might, “because of allegiances to other UBS entities ... frame[] questions and arguments to the jury in such a way as to encourage the jury to impose liability only as to Man and to prejudice Man’s third-party claim against UBS Cayman.”¹¹⁶ That result could lead to reversal on appeal.¹¹⁷ The situation of this case in the bankruptcy context is helpful because, typically, the new client would not have required court intervention to discharge its own counsel.

Viewed as a whole, Comment 34 is a flexible rule that respects the expectations and practical constraints of the lawyers and entities it governs. Comment 34 protects client confidences by applying the substantial relationship test where the client may have imparted to the attorney confidential information concerning its affiliate.¹¹⁸ The Comment recognizes that an attorney-client relationship with a client may expand to encompass a relationship with an affiliate or can give an affiliate a reasonable basis to believe that such a relationship has formed.¹¹⁹ It also respects the client’s reasonable expecta-

112. *Id.*

113. *Id.* at *9.

114. *Id.* at *15-17.

115. *Id.* at *18-19.

116. *Id.* at *35.

117. *Id.*

118. *Westerly*, 2008 Conn. Super. LEXIS 2826, at *5 (denying motion to disqualify where matters were not substantially related).

119. *See, e.g., Hartford Accident*, 721 F. Supp. at 540 (granting motion to disqualify where attorneys formed attorney-client relationship with affiliate in the course of representing client).

tions concerning the relationship between its affiliate and its attorney.¹²⁰ Finally, Comment 34 reiterates the more general rule that an attorney must give each client his or her undivided loyalty, absent a waiver.¹²¹

F. This Standard Notably Omits Any Mention Of Disqualification Based On Adversity

Comment 34 to the Model Rule does not mention adversity, whether direct or indirect, as grounds for disqualification. This is a marked deviation from other authorities that have addressed the issue.¹²² For example, disqualification based on direct adversity was the second issue discussed in Formal Opinion 95-390.¹²³ Furthermore, some courts, even those applying Comment 34, have granted motions to disqualify on the grounds that the representation against the affiliate was adverse to the client.¹²⁴ Finally, the *Restatement (Third) of the Law Governing Lawyers* (the “Restatement”) includes two comments directing that attorneys be disqualified if representation adverse to the affiliate is derivatively adverse to the client.¹²⁵ Comment 34’s omission of any mention of adversity

prompted a dissent by Larry Fox, a member of the Commission [and] a member of the Standing Committee on Ethics and Professional Responsibility.... Fox argued that the ethics opinion has been criticized by the corporate community because of the view that any loss within a corporate family injures, and therefore is directly adverse to, the enterprise as whole. Fox also voiced his concern that although large, sophisticated clients have figured out how to protect themselves from such adverse representation, smaller, less sophisticated enterprises would be disadvantaged by this exception to the rules of loyalty. The motion to delete failed.¹²⁶

Although Formal Opinion 95-390 included direct adversity as one of its three grounds for disqualification of an attorney undertaking representation adverse to an affiliate, Formal Opinion 95-390 defined direct adversity very narrowly.¹²⁷ Formal Opinion 95-390 reasoned that direct adversity under Rule 1.7(b) is not present where the client is derivatively harmed by the lawsuit, such as where a lawsuit against a subsidiary reduces its value to its parent, the client.¹²⁸ This interpretation of “direct” was based both on the distinction between “direct” and “indirect” established under Rules 1.7(a) and (b) and on the difficulty of drawing a line elsewhere.¹²⁹ Because Formal Opinion 95-390 held that derivative

120. See *Commonwealth Land Title Ins.*, 2009 U.S. Dist. LEXIS 87151, at *15 (granting motion to disqualify where, among other things, client expected that attorneys would not undertake representation adverse to its affiliates).

121. See *CFTC*, 2007 U.S. Dist. LEXIS 33137, at *21 (disqualifying where representation of trust possibly limited by loyalty to other client).

122. See Formal Op. 95-390, *supra* note 5, at 1001:261; RESTATEMENT OF THE LAW GOVERNING LAWYERS § 121 cmt.d (hereinafter “RESTATEMENT”); *Cliffs Sales Co. v. Am. S.S. Co.*, Case No. 1:07-CV-485, 2007 U.S. Dist. LEXIS 74342 (N.D. Ohio Oct. 4, 2007).

123. Formal Op. 95-390, *supra* note 5, at 1001:261.

124. See, e.g., *Cliffs Sales*, 2007 U.S. Dist. LEXIS 74342 (applying OHIO PROF. COND. R. 1.7, which mirrors Model Rule 1.7 and includes Comment 34, to grant a motion to disqualify where the affiliate was responsible for 80% of the client’s income).

125. RESTATEMENT, *supra* note 122 § 121 cmt.d.

126. Carl A. Pierce, *Ethics 2000 and the Transactional Practitioner*, 3 Transactions 7, at 15-16 (Spring/Summer 2002).

127. Formal Op. 95-390, *supra* note 5, at 1001:266.

128. *Id.* at 1001:265-66.

129. *Id.* at 1001:266-67.

adversity should not result in disqualification, and because direct adversity is always grounds for disqualification under Rule 1.7(a)(1), Formal Opinion 95-390 effectively limited disqualification based on adversity to those cases where disqualification would be proper whether the opposing party was an affiliate or not.

Courts considering disqualification have at times denied motions to disqualify based on indirect adversity. In *Cliffs Sales Co. v. American Steamship Co.*,¹³⁰ Cliffs Sales Co. (“Cliffs”) moved to disqualify defendant’s counsel on the grounds that the firm had previously represented Cleveland-Cliffs, Inc. (“CCI”), Cliffs’ parent corporation, and was retained by CCI in a different matter during the initial two months of the litigation. Although the firm typically limited its representation to the intentional client through an engagement letter, it had failed to obtain such a letter in its most recent representation of CCI.¹³¹ Therefore, the United States District Court for the Northern District of Ohio considered whether the lawsuit against the affiliate was also directly adverse to its parent, the client.¹³²

Logically any parent of a wholly owned subsidiary could argue that an action against the subsidiary, especially one involving millions of dollars, is necessarily adverse to the parent, making Rule 1.7 a *per se* prohibition against concurrent representation of a parent corporation and another client in opposition to the parent’s subsidiary, even in an unrelated matter....

A more reasoned interpretation of Rule 1.7 does not require a finding of a *per se* conflict of interest when a law firm accepts representation ... against the subsidiary of a current corporate client. [An affiliate] is not a client of the firm just by virtue of the fact that it is wholly owned by the law firm’s [client]. Instead, Rule 1.7 requires the court to examine the facts of each situation to determine if the representation is actually adverse to the [client] thus creating a conflict of interest.

In this case Cliffs generates ... about 80% of CCI’s total revenue. Cliffs and CCI share a unity of personnel and location. The lawsuit currently before the court concerns a dispute over millions of dollars of overcharges for shipments of iron ore to Mittal Steel, CCI’s largest customer, representing 45% of CCI’s North American pellet sales, as well as the question of whether [the defendant] is obligated to make winter deliveries of iron ore to Mittal Steel. While the Plaintiff in this lawsuit is Cliffs, nevertheless, CCI, the parent, was obliged by SEC rules to disclose this litigation as material in its most recent Form 10-K filed in May 2007. Based upon these facts, this litigation is ... adverse to CCI. Consequently, the court finds that [the firm]’s representation of [the defendant] in this lawsuit while CCI was a client was a conflict of interest and a violation of Rule 1.7(a)(1).¹³³

Despite finding a violation of Rule 1.7, the court denied the motion to disqualify on the grounds that no further harm or prejudice would occur because the firm’s unrelated representation of CCI had concluded two months into the litigation.¹³⁴

Section 121, comment *d* of the Restatement presents two illustrations discussing whether representation adverse to an affiliate should be considered adverse to the client. Illustration 6 of that Comment explains:

130. Case No. 1:07-CV-485, 2007 U.S. Dist. LEXIS 74342 (N.D. Ohio Oct. 4, 2007) (denying motion to disqualify based on Model Rule 1.7(a)(1) where the adversity was derivative, but finding violation of Rule 1.7).

131. *Id.* at *5 (effect of the engagement letter is discussed in greater detail *infra*).

132. *Id.* at *11.

133. *Id.* at *11-13.

134. *Id.* at *16.

Lawyer represents Corporation A in local real-estate transactions. Lawyer has been asked to represent Plaintiff in a products liability action against Corporation B claiming substantial damages. Corporation B is a wholly owned subsidiary of Corporation A; any judgment obtained against Corporation B will have a material adverse impact on the value of Corporation B's assets and on the value of the assets of Corporation A. Just as Lawyer could not file suit against Corporation A on behalf of another client, even in a matter unrelated to the subject of Lawyer's representation of Corporation A, Lawyer may not represent Plaintiff in the suit against Corporation B without the consent of both Plaintiff and Corporation A under the limitations provided in §122.¹³⁵

Illustration 7 of that Comment demonstrates that the ALI's position does not ignore corporate formalities entirely:

The same facts as in Illustration 6, except that Corporation B is not a subsidiary of Corporation A. Instead 51% of the stock of Corporation A and 60% of the stock of Corporation B are owned by X Corporation. The remainder of the stock in both Corporation A and Corporation B is held by the public. Lawyer does not represent X corporation. The circumstances are such that an adverse judgment against Corporation B will have no material adverse impact on the financial position of Corporation A. No conflict of interest is presented; Lawyer may represent Plaintiff in the suit against Corporation B.¹³⁶

In light of the pre-existing authorities addressing adversity when the Comment was written, the omission of the subject in Comment 34 to the Model Rules is best seen as a rejection of the principle that litigation against an affiliate presents a unique obstacle for adversity purposes. Because Comment 34 included the explicit requirement that "the lawyer's obligations to either the organizational client or the new client are [not] likely to limit materially the lawyer's representation of the other client," which is the subject of Rule 1.7(a)(2), the omission of an adversity limitation should be read as a rejection of any special adversity standard in the context of affiliates, rather than a reliance on the more general provisions of Rule 1.7(a)(1) to incorporate those standards into the Rule.

This approach, which has been adopted by at least one court,¹³⁷ leaves open the possibility that an attorney will be disqualified when the representation directly affects a client, but permits the attorney to sue subsidiaries of a client when that is not the case.¹³⁸ In *iSmart International Ltd. v. I-Docsecure, LLC*,¹³⁹ the United States District Court for the Northern District of California noted an overlap in ownership between a client and the affiliate that the attorneys had undertaken to sue.¹⁴⁰ Nonetheless, the court denied the motion to disqualify on the grounds that the proper inquiry was

135. RESTATEMENT, *supra* note 122 § 121, at 251-52.

136. *Id.*, cmt. d, illus. 7, at 252.

137. *iSmart*, 2006 U.S. Dist. LEXIS 77323, at *13-14.

138. See, e.g., *Avacus Partners, L.P. v. Brian, C.A. No. 11001, 1990 Del. Ch. LEXIS 31, at *7-8 (Del. Ch. Mar. 9, 1990)* (disqualifying the firm that took the litigation position that a fairness opinion prepared by an investment bank was unreliable when the firm represented that investment bank in unrelated matters because that position rendered the representation directly adverse to the investment bank client).

139. No. C 04-03114 RMW, 2006 U.S. Dist. LEXIS 77323 (N.D. Cal. Oct. 12, 2006).

140. *Id.* at *13-14.

whether the representation of the client gave the attorney any “significant practical advantage” in litigating against the affiliate; the financial impact on the client did not play a role in that analysis.¹⁴¹ The approach of both *iSmart* and Formal Opinion 95-390 is therefore consistent with Comment 34’s permissive opening sentences because the alternate position would effectively create a *per se* prohibition of suing the subsidiary of a client.¹⁴²

G. Although Comment 34 Prevents Disqualification Based Solely On The Corporate Relationships Of A Different Client, It Does Not Eliminate The Possibility Entirely

Comment 34 to the Model Rules creates a system under which a firm is not disqualified from undertaking representation adverse to an affiliate solely on the basis of the affiliate’s relationship to a client, with the caveat that the facts of the situation may be such that disqualification may be proper.¹⁴³ As the foregoing analysis has demonstrated, courts examine many different factors when assessing whether disqualification is proper in a particular case. The outcome of that analysis can vary dramatically from case to case. Therefore, as a result of the potentially spiraling scope of representation in the corporate context, it becomes important for attorneys to be aware of other tools for managing the scope of a particular representation of a client.

II. ADVANCE WAIVERS PROVIDE THE BEST SOLUTION TO THE PROBLEM OF AFFILIATES UNEXPECTEDLY BEING DECLARED CLIENTS

As the above analysis demonstrates, even when courts apply Comment 34’s limitations to attorney-client relationships in corporate families, unexpected and unintended relationships arise.¹⁴⁴ Those relationships can persist for years after the legal work has been completed.¹⁴⁵ It may be tempting in that situation to effect the intended scope of representation by sending a letter to the conflicting affiliate, terminating the unexpected and unintended relationship.¹⁴⁶ If successful,

141. *Id.*

142. “A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* DEL. PROF. COND. R. 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless...” DEL. PROF. COND. R. 1.7 cmt. 34.

143. DEL. PROF. COND. R. 1.7 cmt. 34.

144. *See, e.g., Cliffs Sales*, 2007 U.S. Dist. LEXIS 74342 (N.D. Ohio Oct. 4, 2007).

145. Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 329 n.162 (2000). Note that “[s]ome decisions tolerate relatively long periods of inactivity and find nonetheless that a client remains a current client, subjecting the lawyer to the stricter concurrent-representation rules of conflict.” RESTATEMENT, *supra* note 122 § 132 cmt.c (citing *Shearing v. Allergan, Inc.*, CV-S-93-866-DWH (LRL), 1994 U.S. Dist. LEXIS 21680 (D. Nev. Apr. 4, 1994) (law firm that had served client for 13 years and had not formally ended relationship was concurrently representing client, despite fact that client had not engaged firm for more than one year)).

146. *See Truck Ins. Exch. v. Fireman’s Fund Ins. Co.*, 6 Cal. App. 4th 1050, 1057 (Cal. Ct. App. 1992) (“[M]ay the automatic disqualification rule applicable to concurrent representation be avoided by unilaterally converting a present client into a former client prior to hearing on the motion for disqualification? We answer [the] question in the negative and hold, consistent with all applicable authority, that a law firm that knowingly undertakes adverse concurrent representation may not avoid disqualification by withdrawing

that termination would convert the unexpected current client into a former client so that Rule 1.9¹⁴⁷ would apply to the conflict analysis instead of Rule 1.7.¹⁴⁸ Under Rule 1.7, an attorney may not undertake representation adverse to any current client; under Rule 1.9, however, the representation is only prohibited if the matters are substantially related.¹⁴⁹ When all of the legal work involved in a representation is performed for a related entity, the substantial relationship test provides substantial protection from an otherwise disqualifying conflict of interest.

However, under the “hot potato” rule, a law firm is not ordinarily permitted to discharge a client for the purpose of eliminating a conflict where it desires to accept the representation of another (perhaps more lucrative) client.¹⁵⁰ The rationale behind the “hot potato” rule is that a law firm owes its client a duty of undivided loyalty.¹⁵¹ Furthermore, even if the law permitted an attorney to drop an unwanted client, business considerations may prevent the post hoc adjustment of an attorney’s relationships with affiliates should the firm intend to continue the representation of the client.

continued from page 151

from the representation of the less favored client before hearing.” (citing *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1345 n.4 (9th Cir. 1981); *Picker Int’l*, 670 F. Supp. at 1366; *Margulies v. Upchurch*, 696 P.2d 1195 (Utah 1985); and *Ransburg Corp. v. Champion Spark Plug Co.*, 648 F. Supp. 1040, 1043 (N.D. Ill. 1986)). *See also* *Flatt v. Superior Court*, 885 P.2d 950, 957 (Cal. 1995) (“So inviolate is the duty of loyalty to an existing client that not even by withdrawing from the relationship can an attorney evade it.”); *Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, 96 Cal. App. 4th 1017, 1037 (Cal. Ct. App. 2002) (“[A] lawyer may not avoid breaching the duty of loyalty which the concurrent representation rule is designed to avoid by unilaterally converting a present client into a former client. In fact, such conversion may itself be a breach of loyalty.”). *But see* *Hybrid Kinetic Auto. Holdings, Inc. v. Hybrid Kinetic Auto. Corp.*, Cause No. 3:09CV00035-MPM-DAS, 2009 U.S. Dist. LEXIS 52322, at *12-13 (N.D. Miss. June 18, 2009) (where a law firm undertook representation adverse to a current client and dropped the current client part way through the litigation, court considered the firm’s representation in the new matter under Rule 1.9, not Rule 1.7, for conflict of interest purposes).

147. Model Rule 1.9(a) provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Model Rule 1.9(a).

148. *See* *El Camino Res., LTD. v. Huntington Nat’l Bank*, 623 F. Supp. 2d 863, 878 (W.D. Mich. 2007); Patrick J. Johnston, *Amended Rule of Professional Conduct 1.11: Long-Standing Controversy, Imperfect Remedy and New Questions*, 11 WIDENER J. PUB. L. 83, 124 n.63 (2002).

149. “In determining whether a ‘substantial relationship’ exists between the two representations, three questions are to be considered: (a) What is the nature and scope of the prior representation at issue; (b) what is the nature of the present lawsuit against the former client; and (c) in the course of the prior representation, might the client have disclosed to his attorney confidences which could be relevant to the present action.” *Barcher v. Shipman*, No. 398, 1993, 1994 Del. LEXIS 274, at *4 (Del. Sept. 15, 1994).

150. *See, e.g.*, *Unanue v. Unanue*, C.A. No. 204-N, 2004 Del. Ch. LEXIS 37, at *16 (Del. Ch. Mar. 25, 2004) (“The ‘hot potato’ rule is generally invoked when an attorney drops a small client in order to represent a larger client.”); *Pennwalt Corp. v. Plough, Inc.*, 85 F.R.D. 264, 268-69 (D. Del. 1980) (stating that counsel may not eliminate a conflict “merely by choosing to represent the more favored client and withdrawing its representation of the other”); ABA/BNA *LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT*, 51:117-18 (2009) (hereinafter “*LAWYERS’ MANUAL*”) (“The weight of authority holds, however, that once the lawyer finds themselves representing clients with adverse interests, they generally may not drop one client in order to represent the other, preferred client. In other words, a lawyer or firm may not drop a current client like a ‘hot potato’ in order to turn the client into a former client as a means of curing the simultaneous representation of adverse interests.” (citing *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449, 453 (S.D.N.Y. 2000) and *Int’l Longshoremen’s Ass’n, Local Union 1332 v. Int’l Longshoremen’s Ass’n*, 909 F. Supp. 287, 293 (E.D. Pa. 1995))); *RESTATEMENT, supra* note 122 § 132 cmt. c (“If a lawyer is approached by a prospective client seeking representation in a matter adverse to an existing client, the present-client conflict may not be transformed into a former-client conflict by the lawyer’s withdrawal from the representation of the existing client. A premature withdrawal violates the lawyer’s obligation of loyalty of the existing client and can constitute a breach of the client-lawyer contract of employment.”).

151. *Picker Int’l, Inc. v. Varian Assocs., Inc.*, 670 F. Supp. 1363, 1366 (N.D. Ohio 1987), *aff’d*, 869 F.2d 578 (Fed. Cir. 1989).

The best response to a morass of corporate affiliations is an engagement letter clearly delineating the scope of representation in accordance with Rule 1.2. Such a letter should not only establish the intended tasks, but, as described below, also should delineate the intended client, specify the situations in which the firm would be disqualified, and establish the intended expiration of the attorney-client relationship, perhaps to the point of modifying the “hot potato” rule itself. As with any advance waiver, the client must provide informed consent to the limitations to the scope of representation; however, when dealing with conflicts implicating Comment 34, that process should be eased by the relative sophistication of large corporate clients and the presence of in-house counsel providing independent legal advice.

Finally, should efforts to obtain an advance waiver fail, if the waivers were not obtained from the proper parties, or if the formation of the attorney-client relationship did not give the attorney the opportunity to obtain proper waivers, there are a limited number of circumstances under which the “hot potato” rule has been waived. These exceptions, discussed in more detail at the end of this article, have not been applied broadly or consistently by courts. Moreover, when used, these exceptions are more likely to damage a relationship with the client than would have been the case had the scope of the relationship been established at the start; thus, they should be viewed as a life raft rather than a row boat.

A. The Power Of Advance Waivers

Advance waivers have been frequently discussed in terms of their ability to waive conflicts of interest generally. Under Rule 1.2(c), advance waivers may be used to restrict any aspect of the scope of the representation so long as the limitation “is reasonable under the circumstances and the client gives informed consent.” While the comments to Rule 1.2 do not directly discuss limiting the scope of the relationship by specifying the client, or by redefining, as opposed to waiving, conflicts of interest, by implication Rule 1.2 permits those types of limitations.¹⁵²

1. The Delaware Lawyers’ Rules Of Professional Conduct Lay The Groundwork For Flexibly Defining The Attorney-Client Relationship

a. Rule 1.2: The Scope Of Representation

Rule 1.2 governs the “Scope of Representation,” providing, in pertinent part: “(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”¹⁵³ The comments to Rule 1.2 state that “this Rule affords the lawyer and client substantial latitude to limit the representation, [so long as] the limitation [is] reasonable under the circumstances.”¹⁵⁴ The comments to Rule 1.2 neither narrow that broad grant of leeway nor clarify what might constitute a reasonable limitation. Comment 6 to Rule 1.2 simply states:

The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation.¹⁵⁵

152. DEL. PROF. COND. R. 1.2.

153. *Id.* at 1.2(c).

154. *Id.* at 1.2(c) cmt. 7.

155. *Id.* at cmt. 6.

Nonetheless, Formal Opinion 95-390, discussed *supra*, although technically addressing Rule 1.7, not Rule 1.2, expressly advocates limiting the attorney-client relationship prior to representation through the use of an engagement letter: “Clearly the best solution to the problems that may arise by reason of clients’ corporate affiliations is to have a clear understanding between lawyer and client, at the very start of the representation, as to which entity or entities in the corporate family are to be the lawyer’s clients, or are to be so treated for conflicts purposes.”¹⁵⁶ Therefore, the limitation of representation to the intended client is not only permitted, but encouraged.

b. Rule 1.7: Conflicts With Current Clients

Rule 1.2 must be interpreted in light of Rule 1.7 when constraining or defining the attorney-client relationship in order to limit conflicts. Rule 1.7 provides, in part, that a lawyer may undertake the representation of a client, notwithstanding a concurrent conflict of interest, if the client gives informed consent, confirmed in writing.¹⁵⁷ Comment 22 to Rule 1.7 specifically addresses prospective waivers:

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

156. ABA Formal Op. 390-90, *supra* note 5, at 1001:259.

157. Delaware Professional Conduct Rule 1.7, provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

While Comment 22 provides general direction regarding the requirements of a valid prospective waiver, significant questions remain. For example, Comment 22 does not discuss the scope of consultation with the client required for the consent to be informed consent. In fact, the wording of Comment 22 suggests that consultation may not be required when a client has independent knowledge of the material risks that the waiver entails,¹⁵⁸ although the informed consent requirement of Rule 1.7 appears to incorporate a duty to consult because Rule 1.0(e) defines informed consent as a process that includes consultation.¹⁵⁹ Viewed at a more nuanced level, no Rule directly addresses whether a written waiver alone can constitute sufficient consultation.

Also noteworthy is Comment 22's suggestion that a more comprehensive explanation of the types of conflicts that might arise and the adverse consequences of those representations increases the likelihood that a client's consent will be informed.¹⁶⁰ While encouraging a comprehensive explanation of conflicts, Comment 22 omits any explanation of what is meant by "types of conflicts" or "adverse consequences." It also fails to provide guidance regarding the critical question of whether a waiver must identify those parties that the lawyer may at some later time wish to represent. On a more general note, Comment 22 provides no guidance regarding the proper balance between the express desire for comprehensive specificity and the inevitable risk that highly specific waiver descriptions will become less effective at conveying the scope of the representation and may lead to arbitrary results when a broad waiver is sought.

Finally, Comment 22 suggests that when a prospective waiver is sought from an experienced user of legal services, a lesser degree of disclosure is required, but the interplay between the amount of disclosure and the sophistication of the client is not clear. For example, when consent is sought from an experienced user of legal services, is counsel required to disclose the types of conflicts that may arise or is it sufficient to disclose only the adverse consequences of a future representation? And, is the advice of in-house counsel weighed differently than that of outside counsel when factored into the equation?

Thus, although Comment 22 outlines general principles bearing on the validity of an advance waiver, it does not provide the sort of detailed guidance that would aid counsel in drafting an effective engagement letter. Therefore, this article turns to case law to address the question of how to stipulate which entities will become clients and what other limitations to possible conflicts of interest might be effective if included in an engagement letter.

2. Some Courts Have Held That A Properly Drafted Engagement Letter Permits A Limitation As To The Client

The first and most important, in this context, use of advance waivers is as a tool to limit the "client" in the attorney-client relationship to the intended client. Law firms may limit the scope of their representation by defining which affiliates in a corporate structure are represented and which are not.¹⁶¹ Defining the scope of representation by specifying

158. DEL. PROF. COND. R. 1.2 cmt. 22 ("The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.")

159. Delaware Professional Conduct Rule 1.7 requires informed consent, which Rule 1.0(e) defines as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." DEL. PROF. COND. R. 1.0(e).

160. DEL. PROF. COND. R. 1.2 cmt. 22.

161. See Ass'n of the Bar of the City of New York Comm. on Prof'l & Judicial Ethics, Formal Op. 2005-05 (hereinafter "New York City Ethics Op. 2005-05"); KBA Bench & Bar, *What Do Hot Potato Clients Have in Common With Thrust Upon Clients? One Heck of a Conflict of Interest Dilemma* (May 2006), Vol. 70, No. 3, at 5, at http://www.lmick.com/_resources/documents/bench_and_bar/2006_bench_and_bar_may.pdf (hereinafter "KBA Bench & Bar"); *Advance Waiver of Conflicts*, *supra* note 145, at 314; Lara E. Romansic, *Stand by Your Client?: Opinion 95-390 and Conflicts of Interest in Corporate Families*, 11 GEO. J. LEGAL ETHICS 307, 311 n.119 (1998).

the client in this manner has a number of advantages over a straightforward request for a traditional conflict waiver in the context of a corporate family. First, when the client is undefined, the firm runs the risk that an affiliate will be found to be a client but the conflict waiver will not function because the affiliate was not a party to the waiver.¹⁶² Second, while there is neither statutory authority nor case law on the topic of when it might be impermissible to obtain a limitation as to the client, under Rule 1.7, once an affiliate is a client, some conflicts are unwaivable.¹⁶³ Third, if the representation is properly defined, then the substantial relationship test will not apply later when an affiliate has been spun off and still claims a fiduciary duty under Rule 1.9.¹⁶⁴ Finally, employing a definition of the client being represented, rather than solely a waiver of possible future conflicts, has the added benefit of more accurately defining the relationship with the client. In order to prevent the representation from escaping the limitations of the engagement, a law firm can also specify that any new business requires a new agreement of engagement; however, because relationships can form unintentionally, the utility of such letters is limited.¹⁶⁵ Some courts have held that a properly drafted engagement letter precludes a finding that an affiliate was also a client for the purposes of conflict of interest analysis.¹⁶⁶ In practice, a court's willingness to respect such waivers varies dramatically based on the facts of the situation, as shown in the following examples.

a. Some Courts Permit Limitation By Engagement Letter

In *Synergy Tech & Design, Inc. v. Terry*,¹⁶⁷ a law firm's engagement letter provided: "Our representation is limited to Synergy Tech & Design Inc. d/b/a Road Armor, and does not extend to any directors, officers, employees, consultants, or other affiliates. The scope of representation is limited to intellectual property matters."¹⁶⁸ When Synergy's CEO was later terminated and the CEO moved to disqualify the law firm on the grounds that the law firm had also represented him, the United States District Court for the Northern District of California found that the law firm's engagement letter "clearly set[] out the limitation of the engagement to intellectual property matters and explicitly describe[d] the scope of the representation to Synergy as a corporate entity and not to its directors and officers."¹⁶⁹

Cliffs Sales, discussed *supra*, demonstrates the dangers of representation creep and the possible problems resulting when a law firm employs limited term engagement letters to set contractual limitations as to client, but fails to consistently obtain a new letter each time the intentional engagement is extended.¹⁷⁰ There, an affiliate moved to disqualify opposing

162. See, e.g., *Honeywell*, 2009 U.S. Dist. LEXIS 12496, at *9.

163. See DEL. PROF. COND. R. 1.7(a).

164. See *Whiting*, 567 F.2d at 715-16 (affirming denial of motion to disqualify where client owned 20% of defendant's stock and its officers served on defendant's board).

165. See New York City Ethics Op. 2005-05; KBA Bench & Bar, *supra* note 161, at 5.

166. See, e.g., *Cliffs Sales*, 2007 U.S. Dist. LEXIS 74342, at *5. Cf. *Pamlab, L.L.C. v. Hi-Tech. Pharmacal Co., C.A. No. 08-cv-00967-REB-BNB*, 2009 U.S. Dist. LEXIS 3528, at *12-13 (D. Colo. Jan. 9, 2009) (holding that engagement letter specifying that firm, not individual attorneys represented client dictated terms of representation for conflict of interest purposes when attorney working on the case left firm and sought to undertake adverse representation).

167. No. C 06-02073 JSW, 2007 U.S. Dist. LEXIS 34463 (N.D. Cal. May 2, 2007).

168. *Id.* at *5.

169. *Id.* at *24.

170. See *Cliffs Sales*, 2007 U.S. Dist. LEXIS 74342.

counsel on the grounds that the representation of the client encompassed representation of the affiliate.¹⁷¹ The United States District Court for the Northern District of Ohio noted that had the firm obtained its typical engagement letter, the court would not have analyzed the possibility that representation adverse to the affiliate created a conflict of interest.¹⁷² The firm's typical engagement letter provided:

You should understand, however, that in those matters where we are representing a corporation or other legal entity, our attorney-client relationship is with that specific corporation or legal entity and not with its individual officers, directors, executives, employees, shareholders, partners, or other persons in similar positions, or with its parent, subsidiary, or affiliated corporations or persons. In such cases, our professional duties are owed only to the corporation or legal entity that we have agreed to represent, and you will not assert a conflict because we represent other persons, corporations, or entities that are adverse to any of such related persons, corporations, or other legal entities.¹⁷³

Although the firm was not disqualified, the court found that the representation was a conflict of interest and a clear violation of Rule 1.7.¹⁷⁴ Thus, it is clear that courts do look to and apply the terms of engagement letters when evaluating motions to disqualify; however, a pattern of applying client limitations is insufficient prevention if there is ever a lapse in those limitations, because in that context the affiliate will not have waived the conflict.

b. Some Courts Appear To Ignore Limitations On The Scope Of Representation In An Engagement Letter

In contrast, some courts interpret engagement letters seeking to limit the scope of representation under Rule 1.2 only in the context of conflict waivers under Rule 1.7. If considered in that manner, engagement letters attempting to define the entity represented have not prevented disqualification either because they fail to meet the requirements of Rule 1.7 as to the affiliate or because the affiliate's consent was never obtained.¹⁷⁵ In *McKesson Information Solutions, LLC v. Duane Morris, LLP*,¹⁷⁶ the Superior Court of Georgia considered a motion to disqualify Duane Morris, LLP ("Duane Morris") from representing parties adverse to McKesson Information Solutions, LLC ("MIS") in an arbitration proceeding.¹⁷⁷ "The ... engagement letter [in the bankruptcy matter] attempt[ed] to distinguish between McKesson Corporation's entities and contain[ed] a waiver of future conflicts."¹⁷⁸ The portion limiting Duane Morris' representation read:

171. *Id.* at *5.

172. *Id.*

173. *Id.*

174. *Id.* at *13.

175. *Id.* at *5

176. No. 2006-CV-121110 (Ga. Super. Ct. Nov. 8, 2006) (on file with authors).

177. Judge Thelma Wyatt Cummings Moore decided *McKesson* and was the Chairwoman of the ABA Judge's Advisory Committee on Ethics. Michael J. DiLernia, *Advance Waivers of Conflicts of Interest in Large Law Firm Practice*, 22 GEO. J. LEGAL ETHICS 97, 100 (Winter 2009) (discussing the contemporaneous controversy surrounding *McKesson*).

178. *Id.*

This will also confirm that unless we reach an explicit understanding to the contrary, we are being engaged by and will represent McKesson Medication Management LLC and McKesson Automation, and not any parent, subsidiary or affiliated entities of McKesson Medication Management LLC and McKesson Automation, and that we are not being engaged to represent any officers, directors, members, partners, shareholders or employees of McKesson Medication Management LLC and McKesson Automation.¹⁷⁹

Although the court referenced the engagement letter when discussing the facts of the case, the court did not perform a scope of representation analysis despite the fact that the engagement letter explicitly stated that Duane Morris was “engaged by and will represent McKesson Medication Management LLC and McKesson Automation, and not any parent, subsidiary or affiliated entities.”¹⁸⁰ Rather, on the basis of the overlap in personnel and operations, the court concluded that “[the affiliates] are separate and distinct legal entities for contract and liability purposes. However, they are a single entity for purposes of conflict of interest analysis.”¹⁸¹

The court later discussed whether the conflict of interest, rather than the entire representation of any of the affiliates, had been waived by the engagement letter, holding that the McKesson Engagement Letter did not satisfy Rule 1.7(b) “because it is not a knowing waiver that identifies the specific adverse clients and details of adverse representation.... Defendant’s engagement letter does not refer to any particular parties or circumstances under which adverse representation would be undertaken.”¹⁸² Therefore, “[the affiliates] could not have reasonably anticipated that Defendant would actually consider representation ... where the adverse party is attacking McKesson ... accusing it of fraudulent conduct.”¹⁸³

This approach has been followed in more recent cases. In *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.*,¹⁸⁴ the United States District Court for the Southern District of New York denied a motion to compel arbitration, finding that Blank Rome, the movant’s attorneys, had a conflict of interest due to prior representation of Johnson & Johnson (“J&J”), the parent corporation of BabyCenter, L.L.C. (“BabyCenter”), the non-movant.¹⁸⁵ Blank Rome had attempted to prevent this disqualification by including the following provision in its initial engagement letter with J&J:

Unless agreed to in writing or we specifically undertake such additional representation at your request, we represent only the client named in the engagement letter [*i.e.*, J&J], and not its affiliates, subsidiaries, partners, joint venturers, employees, directors, officers, shareholders, members, owners, agencies, departments, or divisions. If our engagement is limited to a specific matter or transaction, and we are not engaged to represent you in other matters, our attorney-client relationship will terminate upon the

179. McKesson Engagement Letter, dated May 30, 2006 (on file with authors) (hereinafter “McKesson Engagement Letter”).

180. *Id.*

181. *Id.* at 5.

182. *McKesson*, No. 2006-CV-121110, at 11 (citing *Worldspan, L.P., v. The Sabre Group Holdings, Inc.*, 5 F. Supp. 2d 1356 (N.D. Ga. 1998)).

183. *Id.*

184. 644 F. Supp. 2d 333 (S.D.N.Y. 2009).

185. *Id.* at 334 (applying New York law, which has not adopted Model Rule 1.7 cmt. 34 verbatim).

completion of our services with respect to such matter or transaction whether or not we send you a letter to confirm the termination of our representation.

Despite contractually limiting its representation to J&J via the engagement letter, Blank Rome periodically provide[d] legal advice relating to J&J's subsidiaries and affiliates on specific matters or transactions.... "[m]ost of the work Blank Rome performed pursuant to the Engagement Agreement was for J&J's operating companies rather than for J&J itself." ... "One such representation was of BabyCenter." ... [However,] at no time did Blank Rome provide any advice to BabyCenter in connection with its agreement with GSI, nor did [Blank Rome] have access to any privileged information relating to that agreement or the parties' course of dealings.¹⁸⁶

The court held that the engagement letter was ineffective in the face of Blank Rome's work for BabyCenter¹⁸⁷ and then found that the letter failed to waive the resulting conflict of interest. After reaching those conclusions, the court appears to have held that the engagement letter was irrelevant to the analysis of whether BabyCenter should be considered a client of Blank Rome:

GSI reads the Engagement Agreement rather more broadly than its language justifies. In particular, it may not fairly be read to limit Blank Rome's duty of loyalty to J&J's subsidiaries that it undertakes to represent nor to authorize Blank Rome to sue those companies at the same time it is representing them.... Moreover, the Engagement Agreement itself contains prospective waivers of certain conflicts, thus indicating (at least implicitly) that Blank Rome was aware of the potential conflict of interest that would be posed by its representation of interests adverse to J&J and its subsidiaries.¹⁸⁸

In short, notwithstanding the scope of representation set forth in the Engagement Agreement, the court is satisfied that the relationship between BabyCenter and J&J is sufficiently "close as to deem them a single entity for conflict of interest purposes."¹⁸⁹

The court's willingness in *BabyCenter* to set aside the engagement letter between Blank Rome and J&J can be attributed to a number of factors that mitigate the broader impact of the case. First, *BabyCenter* was decided under New

186. *Id.* at 335 (quoting declarations) (third modification in original).

187. *Id.* ("The Engagement Agreement also noted that Blank Rome had reviewed its then-current engagements, and found a conflict requiring J&J's waiver: its representation of Kimberly-Clark Corporation in patent litigation against J&J affiliate McNeil PPC.... Aside from this 'specifically defined category of matters ... for Kimberly-Clark,' Blank Rome did not seek, nor did it receive, any prospective waiver from J&J for any other future conflict.").

188. *Id.* at 336. The court goes on to write:

Although technically BabyCenter is a wholly owned subsidiary of J&J, ... as a practical matter it is part and parcel of J&J. Among other things, BabyCenter shares accounting, audit, cash management, employee benefits, finance, human resources, information technology, insurance, payroll, and travels service and systems with J&J.... Of particular relevance here, BabyCenter ... relies on J&J's Law Department for legal services ... Further, the agreement ... that is the subject of the underlying arbitration was negotiated by an attorney in J&J's Law Department ... Indeed, it is undisputed that members of J&J's Law Department have been involved in this action on behalf of BabyCenter since the parties' dispute arose in October 2008, ... and Blank Rome ... has dealt with J&J attorneys during the pendency of this action.... Further, since BabyCenter is a wholly owned subsidiary, its liabilities directly impact [J&J].

Id. at 336-37.

189. *Id.* (internal citations omitted) (quoting *Stratagem Dev. Corp. v. Heron Int'l N.V.*, 756 F. Supp. 789, 792 (S.D.N.Y. 1991)).

York Law, which has historically been more willing to adopt a bright-line rule that affiliates should be treated as clients than are jurisdictions that have adopted the Model Rules verbatim.¹⁹⁰ Second, although the court did not discuss Blank Rome's work for BabyCenter while finding BabyCenter to be a client of Blank Rome, the fact that Blank Rome had done work for BabyCenter while the engagement letter was in place likely played a role in the outcome.¹⁹¹ Therefore, *BabyCenter* demonstrates some possible pitfalls when using an engagement letter to limit representation, but it is not necessarily a representative approach.

c. The Entity Whose Consent Is Required For An Effective Limitation Of The Scope Of Representation Turns On Whether A Limitation As To Scope Is Sought Under Rule 1.2 Or Whether An Advance Conflict Waiver Is Sought Under Rule 1.7

Limiting the scope of representation under Rule 1.2 requires the consent of the intended client.¹⁹² Whereas, once the court determines that the affiliate deserves to be treated as a client, the affiliate's informed consent is required for an advance waiver under Rule 1.7.¹⁹³ The distinction can be explained by the fact that "as a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification."¹⁹⁴ Thus, before the court determines that the affiliate is also a client, the affiliate's consensual waiver is unnecessary; after the court determines an affiliate is also a client, its consent becomes relevant.

When a court analyzes whether an affiliate is or should be treated as a client, the client's, not the affiliate's, consent is required because, under current case law, the affiliate has no legal right to be included in the relationship.¹⁹⁵ In *Whiting Corp. v. White Machinery Corp.*,¹⁹⁶ White Machinery Corp. ("White") moved to disqualify counsel for the plaintiff because the firm also represented a client that was a corporation owning 20 percent of White's stock and controlling two seats on White's board.¹⁹⁷ White argued that "its interests will be prejudiced by the continued dual representation."¹⁹⁸ Despite reciting that argument, the court's analysis did not weigh possible prejudice to White. Instead, the United States Court of Appeals for the Seventh Circuit pointed out that the stockholder client and the plaintiff client had been informed of the

190. See, e.g., *Stratagem*, 756 F. Supp. at 793 (impact by litigation on the client's bottom line required disqualification); compare Formal Op. 390-95, 1001:267 (derivative adversity, such as an indirect impact on the client's bottom line, should not result in disqualification); *Pennwalt*, 85 F.R.D. at 270 (relationship between client and affiliate is not the proper inquiry).

191. *BabyCenter*, 644 F. Supp. 2d at 335.

192. See *Whiting*, 567 F.2d at 715-16 (affirming denial of motion to disqualify where client owned 20% of defendant's stock and its officers served on defendant's board).

193. See *Honeywell*, 2009 U.S. Dist. LEXIS 12496, at *7-8.

194. *Concat LP v. Unilever, PLC*, 350 F. Supp. 2d 796, 818 (N.D. Cal. 2004) (quoting *Kasza v. Browner*, 133 F.3d 1159, 1171 (9th Cir. 1998) (quoting *United States v. Rogers*, 9 F.3d 1025, 1031 (2d Cir. 1993) (quoting, in turn, *In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 88 (5th Cir. 1976))).

195. See *Whiting*, 567 F.2d at 715.

196. 567 F.2d 713 (7th Cir. Ill. 1977).

197. *Id.* at 715-16.

198. *Id.*

situation and neither objected to the firm's dual representation.¹⁹⁹ Because both clients consented to the representation, the court denied the motion to disqualify without additional discussion of the interests of White.²⁰⁰ Nevertheless, "because of the sensitivity of this matter and in order to take all appropriate prophylactic measures to avoid a development of the possibility of a conflict and in order to preclude the impression of any impropriety whatsoever, the ... firm is directed to disassociate and refrain from representing and/or advising [the Client] in connection with any proceedings related to [the products involved in the litigation] during the pending litigation."²⁰¹ *Whiting* is useful for two propositions. First, it demonstrates that in a conflict of interest analysis the pertinent focus will be on the interests of the client, not the interests of the affiliate. Second, the case demonstrates that a client's decision to waive a conflict will be binding on the affiliate. That second proposition forms the basis for any limitation of representation through engagement letters.

In contrast, once courts determine that an affiliate should be treated as a client, only the affiliate may waive the conflict.²⁰² For example, in *Honeywell*, discussed *supra*, the United States District Court for the Eastern District of Texas found that an affiliate was also a client because of the overlap in operations between the client and the affiliate.²⁰³ The court then went on to consider the possibility that the conflict had been waived.²⁰⁴ The court stated: "Here, there is no indication that [the affiliate] gave its consent to [the firm]; in fact, [the affiliate] denies such consent. In situations such as this one, where the 'problem has been created by modern corporations, the onus is squarely on the lawyer to anticipate and resolve conflicts of interest involving corporate affiliates.'"²⁰⁵ Thus, the court found the attorney to be disqualified.²⁰⁶

Avocent, discussed *supra*, demonstrates an even more problematic possibility. There the United States District Court for the Western District of Washington first determined that the engagement letter did not preclude representation of the affiliate. The court then considered whether the conflict was waived under the engagement letter and found that "even if this prospective waiver applied to the issues in this case, only [the client] agreed to waive prospective conflicts. Given that defendants construe this letter as a representation of [the client] only, the agreement cannot also be construed by defendants as a waiver by [the affiliates]."²⁰⁷ Thus, the firm was whipsawed by a finding that, on the one hand, it had not limited the scope of representation, and, on the other hand, its argument on that topic precluded reading the engagement letter to apply to the affiliate. Given authority such as *Honeywell* and *Avocent*, which look to the affiliate's waiver of conflict, it may be worth sending affiliates a non-engagement letter, while also obtaining their consent to future conflicts where practicable as a "belt and suspenders" measure.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Avocent*, 491 F. Supp. 2d at 1006.

203. *Honeywell*, 2009 U.S. Dist. LEXIS 12496, at *7-8.

204. *Id.* at *9.

205. *Id.* (quoting *In re Dresser Indus., Inc.*, 972 F.2d 540, 545 (5th Cir. 1992)).

206. *Id.*

207. *Avocent*, 491 F. Supp. 2d at 1006.

3. Some Commentators Have Suggested That Advance Waivers Can Permit Early Termination Of The Attorney-Client Relationship, In Addition To Preventing Its Development

While the “hot potato” rule prohibits mercenarily terminating attorney-client relationships, several secondary sources have suggested alternatives, in the form of advance waivers, which would address the same concerns.²⁰⁸ Advocates of advance waivers argue that absent the ability to obtain such waivers, law firms may refuse to undertake representation of a prospective client because of fear that by doing so it could expose the firm’s more established (and presumably more lucrative) clients to the loss of their counsel.²⁰⁹

Professor Richard W. Painter, a legal ethics scholar,²¹⁰ has identified several prophylactic measures that law firms could use as an alternative to attempting to terminate a client-relationship in violation of the “hot potato” rule through the use of advance waivers in engagement letters.²¹¹ These measures, relying on Rule 1.2(c)’s permission to limit the scope of a client’s representation, are discussed below.²¹²

a. Engagement Letters May Define What Is And Is Not A Substantially Related Matter

The simplest solution to the problem of a client relationship being analyzed under Rule 1.7 rather than Rule 1.9 is to terminate the relationship. But the “hot potato” rule prohibits that solution. The next most sweeping solution is to

208. See KBA Bench & Bar, *supra* note 161, at 3 (noting that “[s]ome lawyers try to anticipate the [‘hot potato’] problem by getting an advance waiver for possible future conflicts in a letter of engagement”); Henry M. Kelln, *Dropping the Hot Potato: Resuscitating the Permissive Withdrawal Rules in the Model Rules of Professional Conduct*, 42 (Mar. 20, 2006), bepress Legal Series, at <http://law.bepress.com/expresso/eps/1164> (hereinafter “*Dropping the Hot Potato*”) (“[T]he efficacy of the [‘hot potato’] rule is limited under the fact that the prohibition is ‘contracted around’ via advance waiver agreements offered by large law firms.”); Edward C. Brewer, *The Ethics of Internal Investigations in Kentucky and Ohio*, 27 N. KY. L. REV. 721, 791 (2000) (“[a]n ‘advance waiver’ is in part an effort to avoid the ‘hot potato’ rule”); John A. Edginton, *Managing Lawyers’ Risks at the Millennium*, 73 TUL. L. REV. 1987, 2039 n.104 (1999) (finding that the “hot potato” rule “is another risk that can possibly be addressed by advance waivers if a conflict can at all be anticipated, such as mergers or purchases of businesses”); Brian J. Redding, *The Conflicts Jungle in Modern Litigation*, in THE LITIGATION MANUAL: SPECIAL PROBLEMS AND APPEALS 560-71 (John G. Koeltl & John S. Kiernan eds., 1999) (suggesting that a possible solution to avoid the “hot potato” problem is for law firms to include waiver language in engagement letters in advance of adverse representation on matters unrelated to the firm’s current representation); Mass. Bar Ass’n Comm. on Prof’l Ethics Op. 92-3 (Sept. 22, 1992) (finding that some lawyers were using advance consents in order to avoid the “hot potato” situation).

209. See Nathan M. Crystal, *Enforceability of General Advance Waivers of Conflicts of Interest*, 38 ST. MARY’S L.J. 859, 881 (2007) (citing Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship - A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 1004 (2001)). See also *Kennecott Copper Corp. v. Curtiss-Wright Corp.*, No. 78 Civ. 1295, slip op. at 6-7 (S.D.N.Y. Apr. 11, 1978) (“Quite clearly, Skadden, Arps, a burgeoning law firm, was unwilling to close its doors to future clients by risking disqualification in its field of specialty merely because Curtiss-Wright [a “one shot client”] might set its sights on some company which happened to be a client of Skadden, Arps.”) (upholding advance waiver).

210. Professor Richard W. Painter was the former chief ethics lawyer for former President George W. Bush, has been active in law reform efforts aimed at improving ethics of corporate managers and lawyers, is active in the Professional Responsibility Section of the ABA, is a co-author of *PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER* (2d ed. 2001), and has written many other books, articles and essays concerning ethics. See Richard W. Painter’s Faculty Profile, <http://www.law.umn.edu/facultyprofiles/painterr.html>.

211. *Advance Waiver of Conflicts*, *supra* note 145, at 313.

212. *Id.*; *LAWYERS’ MANUAL*, *supra* note 150, at 51:119-20. See also Rule 1.2(c) (quote).

contract in the engagement letter to effectively apply Rule 1.7 rather than Rule 1.9. A law firm and its client could agree *ex-ante* that the substantial relationship test applies to current client conflicts.²¹³ As previously discussed, the substantial relationship standard is a prerequisite to demonstrating former client conflicts, but is not a prerequisite when analyzing conflicts between current clients.

“Retainer agreements could [also] address ... what is or is not a ‘substantially related matter’ and when a subsequent representation should be allowed to proceed, even though two matters are substantially related.”²¹⁴ For instance, a law firm and its client could specify in the retainer agreement:

- (a) that a subsequent matter will not be substantially related to a matter worked on by the lawyer unless confidential information is imparted to the lawyer in the first matter that could be used adversely to the client in the second matter;
- (b) that transactions entered into by the client within a certain time frame are/are not substantially related to a matter worked on by the lawyer;
- (c) that certain categories of transactions are/are not substantially related to a matter worked on by the lawyer;
- (d) that certain categories of transactions engaged in by a subsidiary or affiliated entity of the client are/are not “substantially related” to a transaction of the client;
- (e) circumstances in which the lawyer is/is not free to attack her own work; and
- (f) circumstances in which “playbook” arguments [i.e., where a former client claims that a lawyer learned of information of very general nature – such as strategies for negotiating transactions, launching hostile takeovers, or settling litigation] would/would not be waived.²¹⁵

b. Engagement Letters May Define What Is An Adverse Interest

In addition to or in lieu of contracting to apply a substantial relationship test, a law firm and its client could also agree *ex ante* what is and is not an “adverse interest.”²¹⁶ Examples of such definitions include the following:

- (a) an economic competitor of the first client does/does not have interests that are adverse to the first client;
- (b) a potentially adverse interest is/is not an adverse interest;

213. *Advance Waiver of Conflicts*, *supra* note 145, at 317-19. *See also id.* at 321 (citing *Interstate Props. v. Pyramid*, 547 F. Supp. 178 (S.D.N.Y. 1982) and *Fisons Corp. v. Atochem N. Am., Inc.*, No. 90 Civ. 1080 (JMC), 1990 U.S. Dist. LEXIS 15284 (S.D. Cal. Nov. 14, 1990) as examples of where courts essentially based their enforcement of advance waivers to a concurrent conflict on their findings that the matters were not substantially related).

214. *Advance Waiver of Conflicts*, *supra* note 145, at 319.

215. *Id.* at 319-20.

216. *Id.* at 316.

- (c) a certain category of legal work, such as negotiating on the opposite side of a transaction from a client, is/is not representation of an adverse interest; and
- (d) a positional conflict [i.e., where a lawyer advocates on behalf of one client a legal argument that is inconsistent with an argument advanced on behalf of another client] is/is not an adverse interest.²¹⁷

c. Engagement Letters May Define The Duration Of The Representation

Finally, a law firm could define whether the representation is ongoing.²¹⁸ Professor Painter stated, with respect to limiting the duration of representation:

A lawyer and client presumably could *contract around the hot potato rule* by agreeing ex-ante that the representation shall have a defined duration or that the lawyer may resign at will from representing the client. Alternatively, the lawyer and client could agree that the lawyer may resign if the client later refuses to give consent to the lawyer's representation of another client with an adverse interest in an *unrelated* matter.²¹⁹

Delaware courts will likely disfavor any contractual agreement between a law firm and a current client where the current client agreed in advance of a conflict that the law firm could simply drop the current client in order to represent another preferred client with an adverse interest in a *related* matter.²²⁰ Professor Painter has explained that "information learned in an unrelated representation is generally of limited value and the client is furthermore still protected by separate prohibitions on disclosure or adverse use of client information."²²¹

B. How Much Information Is Required For A Client To Give The Informed Consent Necessary To Agree To Any Of These Limitations?

"At the heart of any conflict waiver analysis is the question of whether the client provided informed consent."²²² Advance waivers will be ineffective in the absence of truly informed consent,²²³ and attorneys have the burden of proving

217. *Id.* at 316-17.

218. *See* New York City Ethics Op. 2005-05; KBA Bench & Bar, *supra* note 161, at 5.

219. *Advance Waiver of Conflicts*, *supra* note 145, at 322 (emphasis added; no citations provided).

220. *See* D.C. Bar Ass'n Legal Ethics Comm., Op. 309, at 1 (2001) (finding that advance waivers are not valid, even if reviewed by independent counsel, "where the two matters at issue are substantially related to one another"); *Advance Waiver of Conflicts*, *supra* note 145, at 303 (noting that the court in *Interstate Props.*, 547 F. Supp. 178, implicitly acknowledged a limit to *ex ante* contracting in not approving a waiver where the law firm had represented the client in a matter substantially related to the present litigation).

221. *Advance Waiver of Conflicts*, *supra* note 145, at 321 (citing Model Rules 1.6 & 1.8(b)).

222. Irvin M. Freilich & Meghan O. Murray Robertson, *Advance Waivers Of Conflicts - Real Or Theoretical?*, METROPOLITAN CORPORATE COUNSEL (Oct. 2008), at 47, available at <http://www.metrocorp counsel.com/pdf/2008/October/47.pdf>. *See also* DEL. PROF. COND. R. 1.7 cmt. 22 ("The effectiveness of [advance] waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.").

223. *Century Indem. Co. v. Congoleum Corp.*, 426 F.3d 675, 691 (3d Cir. 2005). *See, e.g.*, *Worldspan L.P. v. Sabre Group Holdings Inc.*, 5 F. Supp. 2d 1356, 1360 (N.D. Ga. 1998) (disqualifying law firm from representing new client in tort matter directly

full disclosure and of establishing the fact and scope of consent.²²⁴ “Informed consent” is defined in Rule 1.0(e) as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”²²⁵ “[T]he requirement of informed consent is more likely to be met if the prospective waiver is specific about the types of matters and parties covered, and if the client is relatively sophisticated,²²⁶ and the client has an opportunity to seek advice of other counsel before agreeing to the waiver.”²²⁷

Law firms should be as specific as possible with respect to the types of possible future adverse representations, the types of matters that might present conflicts, and at least the class of potentially conflicted clients.²²⁸ “Such clarity in the ex-ante waiver is critical to accomplishing what the waiver was intended to accomplish: avoidance of ex-post litigation over disqualification.”²²⁹ Comment 22 to Rule 1.7 states: “If the consent is general and open-ended, then the consent ordinarily

continued from page 164

adverse to existing client in tax matters, despite firm’s claim that existing client prospectively waived future conflicts through standing consent in engagement letter six years earlier, because conducting litigation against an existing client was a matter so serious that any agreement purporting to grant standing consent must clearly and specifically identify that possibility); *In re Suard Barge Servs., Inc.*, C.A. 96-3185, 1997 U.S. Dist. LEXIS 12364, at *15-16 (E.D. La. Aug. 14, 1997) (holding that a valid waiver must “disclose the nature of the actual or potential conflict” and that no waiver existed because the client “believed at that time that no conflict existed, so [the lawyer] did not explain the conflict in the requisite detail”); *Schwartz v. Indus. Valley Title Ins. Co.*, C.A. No. 96-5677, 1997 U.S. Dist. LEXIS 8176, at *15-16 (E.D. Pa. June 4, 1997) (finding that a 1993 prospective conflict waiver in a related but separate suit was ineffective to waive a conflict in connection with an action beginning three years later because the lawyer failed to inform the client that there could be future adverse litigation) (internal quotation omitted).

224. *El Camino*, 2007 U.S. Dist. LEXIS 67813, at *43. See also *Glidden Co. v. Jandernoa*, 173 F.R.D. 459, 480 (W.D. Mich. 1997) (“The law imposes certain obligations upon ... attorneys who seek to advance conflicting interests. They have the duty to make full disclosure and obtain clear and informed consent. If the transaction thereafter goes sour, theirs is the burden of proving full disclosure and the fact and scope of consent. This burden is not met by arguing that the party to whom the duty was owed had constructive knowledge of the conflict. Such a position would shift the burden from the fiduciary to the party to whom the duty is owed. To satisfy the burden of full disclosure, it is not sufficient that both parties be informed of the fact that a lawyer is undertaking to represent both of them. Rather, there must be a disclosure of risks in such detail that the person can understand the reasons why it may be desirable to withhold consent.”).

225. DEL. PROF. COND. R. 1.0(e). See also RESTATEMENT § 122 (stating that informed consent requires “that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client”); Nathan M. Crystal, *Enforceability of General Advance Waivers of Conflicts of Interest*, 38 ST. MARY’S L.J. 859, 885 (2007) (“Informed consent normally requires explanation of the advantages, disadvantages, and alternatives available to the client from whom the waiver is sought.” (citing Model Rule 1.0 cmt. 6 & RESTATEMENT, *supra* note 122 § 122 cmt. c(i))).

226. “According to the Restatement, courts should not be looking at a client’s education and business in a vacuum, but instead should be considering whether the client has experience dealing with questions of conflict and has had the opportunity to ‘receive independent legal advice about the consent.’” Irvn M. Freilich & Meghan O. Murray, *Advance Waivers of Conflicts – Real or Theoretical?*, METROPOLITAN CORPORATE COUNSEL (Oct. 1, 2008), at 47, available at <http://www.rfbclaw.com/upload/103108084655MCC%20Article%20-%2010-08%20-%20IMF%20and%20MOM.pdf> (quoting RESTATEMENT, *supra* note 122 § 122 cmt. d).

227. LAWYERS’ MANUAL, *supra* note 150, at 51:119. See also *Visa U.S.A., Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1106 (N.D. Cal. 2003) (“An evaluation of whether full disclosure was made and the client made an informed waiver ‘is obviously a fact-specific inquiry.’ ... Factors that may be examined include the breadth of the waiver, the temporal scope of the waiver (whether it waived a current conflict or whether it was intended to waive all conflicts in the future), the quality of the conflicts discussion between the attorney and the client, the specificity of the waiver, the nature of the actual conflict (whether the attorney sought to represent both clients in the same dispute or in unrelated disputes), the sophistication of the client, and the interests of justice.”).

228. N.Y. City Eth. Op. 2004-02.

229. *Advance Waiver of Conflicts*, *supra* note 145, at 326.

will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved.”²³⁰ If clients are experienced consumers of legal services who are reasonably informed and independently counseled, general and open-ended consent is more likely to be effective.²³¹

In addition to the black and white issue of enforceability, the grey area issue of business relationships also plays a role whenever the attorneys’ objective is to perform work for the entities in the future. Thus, not only enforceability, but the long-term feasibility of future relationships turns on a solid understanding and genuine agreement to the terms of the waiver.

In *Celgene Corp. v. KV Pharmaceutical Co.*,²³² a patent dispute involving methylphenidate, defendant’s counsel, Buchanan Ingersoll & Rooney PC (“Buchanan”), concurrently represented plaintiff Celgene in two separate matters involving securities and thalidomide.²³³ Buchanan had obtained prospective waivers in both the securities²³⁴ and thalidomide²³⁵

230. DEL. PROF. COND. R. 1.7 cmt. 22. Courts take a fairly critical view of such “blanket” future waivers. See LAWYERS’ MANUAL, *supra* note 150, at 51:219 (citing *Fl. Ins. Guaranty Ass’n, Inc. v. Carey Canada*, 749 F. Supp. 255, 260 (S.D. Fla. 1990) and *Univ. of Rochester v. G.D. Searle & Co.*, 00-CV-6161L(B), 2000 U.S. Dist. LEXIS 19030, at *32-33 (W.D.N.Y. Dec. 11, 2000)).

231. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 05-436 (2005). See also RESTATEMENT, *supra* note 122 § 122 cmt. d (“A client’s open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses a sophistication in the matter in question and had had the opportunity to receive independent legal advice about the consent.”); DEL. PROF. COND. R. 1.7 cmt. 22 (“[I]f the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such [general and open-ended] consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.”); Angela R. Elbert, *Switch Hitting? Ethical Implications of Advance Conflict Waivers*, ABA 2007 Annual Meeting, at 7, (Aug. 11, 2007) (acknowledging a trend toward allowing more “open-ended” advance consents from sophisticated and independently represented clients); NYCLA Ethics Op. No. 724 (Jan. 28, 1998) (blanket waiver may be permissible, “depending on the client’s sophistication, its familiarity with the law firm’s [multidisciplinary] practice, and the reasonable expectations of the parties at the time consent is obtained”). See, e.g., *St. Barnabas Hosp. v. N.Y. City Health & Hosp. Corp.*, 7 A.D.3d 83, 93, 97 (N.Y. App. Div. 2004) (where a hospital was a sophisticated, institutional client and had full knowledge of the law firm’s representation of another hospital regarding similar issues, court held that plaintiff’s informed consent was adequate to defeat any appearance of impropriety created by the waiver’s failure to include litigation as a possible conflict); *Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc.*, 142 F. Supp. 2d 579, 582-83 (D. Del. 2001) (finding attorney “sufficiently explained the conflict in order to obtain a prospective waiver” and client was sophisticated); *Laborers Local 1298 Annuity Fund v. Grass (In re Rite Aid Corp. Sec. Litig.)*, 139 F. Supp. 2d 649, 653, 659-60 (E.D. Pa. 2001) (relying on § 132 of the RESTATEMENT, court found that a CEO gave informed consent to an advance waiver even though he alleged that he never had the opportunity to speak with outside counsel and never received a copy of the engagement letter); *Zador Corp. v. Kwan*, 31 Cal. App. 4th 1285 (Cal. Ct. App. 1995) (allowing law firm to continue to represent long-time client over protest of another client who was sophisticated and aware of the longtime relationship and had been advised to look for independent counsel before approving the joint representation); *Fisons*, 1990 U.S. Dist. LEXIS 15284, at *15-16 (finding that a prospective waiver should be enforced when adequate disclosure was made to a sophisticated client even though the disclosure did not include the exact nature of the future dispute). *But see Celgene Corp. v. KV Pharm. Co.*, C.A. No. 07-4819 (SDW), 2008 U.S. Dist. LEXIS 58735, at *23, *31-32 (D.N.J. July 28, 2008) (finding that a law firm failed to demonstrate that it obtained a sophisticated client’s “truly informed consent” where the retention agreement proposed a future course of conduct that was very open-ended and vague).

232. C.A. No. 07-4819 (SDW), 2008 U.S. Dist. LEXIS 58735 (D.N.J. July 28, 2008).

233. *Id.* at *2.

234. The securities litigation waiver provided:

Recognizing and addressing conflicts of interest is a continuing issue for attorneys and clients. We have implemented policies and procedures to identify actual and potential conflicts at the outset of each engagement. From time to time we may be asked to represent someone whose interests may differ from the interests of the Company. We are accepting this engagement with the Company’s understanding and express consent that our representation of the Company will not preclude us from accepting an engagement from a new or existing client, including litigation or

representations.²³⁶ The United States District Court for the District of New Jersey, ruling on plaintiff Celgene's motion to disqualify Buchanan as counsel for defendant KV, first observed that Buchanan's representation of KV constituted a concurrent conflict of interest under Rule 1.7(a) of the New Jersey Rules of Professional Conduct.²³⁷ Noting that the parties had framed the issue as one of contractual interpretation of the "substantially related" language in the securities and thalidomide waivers, the court held that the relevant legal issue was, rather, whether Celgene had given informed consent, confirmed in writing, after full disclosure and consultation.²³⁸ The court further noted that it must look beyond the waiver to determine whether informed consent was given.²³⁹

Looking to the text of the waivers, the court found that neither waiver manifested informed consent within the meaning of Rule 1.0(e) because: (1) the course of conduct proposed was vague and open-ended, (2) adequate information regarding the risks of the proposed course of conduct was lacking, and (3) an explanation of reasonably available alternatives to the course of conduct was lacking.²⁴⁰ The court found unpersuasive the fact that one of the waivers was executed by in-house counsel for Celgene, explaining that because consent in this case was not informed, the provisions in Comment 22 and ABA Formal Opinion 05-436 (accordng weight to the fact that a waiver transaction was negotiated by outside counsel) did not apply to validate the waiver.²⁴¹

continued from page 166

other matters that may involve the Company. However, we will not accept an engagement that is directly adverse to the Company or any of its subsidiaries if either: (1) it would be substantially related to the subject matter of our representation of the Company or representation of Anthrogenesis Corp.; or (2) would impair the confidentiality of proprietary, sensitive or otherwise confidential communications made to us by the Company or Anthrogenesis Corp.

Id. at *4.

235. The thalidomide litigation waiver provided:

From time to time we may be asked to represent someone whose interests may differ from the interests of the Company. The firm is accepting this engagement with the Company's understanding and express consent that our representation of the Company will not preclude us from accepting an engagement that is adverse to the Company or its interests, including litigation. However, we will not accept an engagement that is directly adverse to the Company or any of its subsidiaries if either: (1) it would be substantially related to the subject matter of our representation of the Company; or (2) would impair the confidentiality of proprietary, sensitive or otherwise confidential communications made to us by the Company.

Id. at *5.

236. *Celgene*, 2008 U.S. Dist. LEXIS 58735, at *2-5.

237. *Id.* at *8. Rule 1.7 of the New Jersey Rules of Professional Conduct requires, in addition to the requirements of Model Rule 1.7, that "full disclosure and consultation" precede a client's proffer of informed consent.

238. *Celgene*, 2008 U.S. Dist. LEXIS 58735, at *11.

239. It is unclear, however, whether this statement reflects the law regarding prospective waivers generally or the requirement of full disclosure and consultation set forth in the New Jersey Rules of Professional Conduct.

240. *Celgene*, 2008 U.S. Dist. LEXIS 58735, at *22-23.

241. *Id.* at *26-27. Specifically, the court noted:

[Formal Op. 05-436] merely acknowledges that a consent that is informed but general is likely to be valid if the client was represented by independent counsel in the waiver transaction. In the instant case, this court finds no evidence that the consent was informed, and so the fact that Celgene spoke through in-house patent counsel ... does not have the weight contemplated in Opinion 05-436.

Id. at *27.

continued on page 168

Turning its attention to evidence outside of the waivers, the court observed that Buchanan did not consult with Celgene regarding the waiver and did not disclose anything regarding conflicts of interest prior to obtaining Celgene's consent. It then held that Celgene's sophistication did not excuse Buchanan from obtaining informed consent, implying that Buchanan was obligated to provide disclosure and consultation.²⁴²

The court next examined Buchanan's argument that the KV representation was not substantially related, as that phrase is used in the securities and thalidomide waivers, to the Celgene representation, and that Buchanan's KV representation therefore falls within the scope of conduct that Celgene consented to. Restating its earlier holding that the motion to disqualify does not depend upon contract construction, but rather upon interpretation of the Rules of Professional Responsibility, the court noted that even if the contract issue was dispositive, the representations at issue were substantially related. The court based this conclusion on the premise that the phrase "substantially related" was ambiguous, and under New Jersey contract law principles, ambiguities are construed against the drafter.²⁴³

There are several principles to keep in mind in this context. First, a general waiver may be invalidated notwithstanding the fact that a sophisticated party is represented by counsel in the waiver transaction. Second, courts may examine evidence outside of the waiver in determining whether consent was informed.²⁴⁴ Third, if there is a concurrent conflict of interest, the requirements of Rule 1.7(b) must be met, and those requirements cannot be circumvented by contract. Redefinition efforts such as those in previously described *Celgene* cannot sidestep such analysis.

C. Are Limitations On The Scope Of Representation Or Advance Waivers Reconcilable?

Even if a law firm employs the above-mentioned techniques in specifying the scope of representation, a client always has the right to revoke an advance waiver.²⁴⁵ Whether the revocation will be effective as to a matter that the firm has undertaken depends on a number of factors.²⁴⁶ Comment 21 to Rule 1.7 states that these factors include "the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations

continued from page 167

This conclusion is questionable, however, because the natural reading of Comment 22 and Formal Op. 05-436 is that when a client is represented by counsel in a waiver transaction, the fact of the representation weighs in favor of a finding that the client gave informed consent, notwithstanding the fact that the waiver is general. The court here concludes that because the waiver was general, the client did not give informed consent, implying that the fact that the client was represented by counsel does not affect the determination of whether the consent was informed. Thus, rather than weighing the generality of the waiver against the fact of representation, the court makes its conclusion solely on grounds of generality. This approach is difficult to square with the clear language of Comment 22.

242. It is again worth noting that Rule 1.7 of the New Jersey Rules of Professional conduct explicitly requires full disclosure and consultation, unlike the Delaware version of the rule. Query whether, in light of Rule 1.0(e), the consultation and disclosure requirements of New Jersey Rule 1.7 are redundant.

243. *Celgene*, 2008 U.S. Dist. LEXIS 58735, at *35-40.

244. *Id.*

245. See DEL. PROF. COND. R. 1.7 cmt. 21 (explaining a client's right to revoke a waiver).

246. *Id.*

of the other client and whether material detriment²⁴⁷ to the other clients or the lawyer would result.”²⁴⁸ Illustration 7 of § 122 of the Restatement provides the following relevant example:

Client A, who consulted Lawyer about a tax question, gave informed advance consent to Lawyer’s representing any of Lawyer’s other clients against Client A in matters unrelated to Client A’s tax question. Client B, who had not theretofore been a client of Lawyer, wishes to retain Lawyer to file suit against Client A for personal injuries suffered in an automobile accident. After Lawyer informs Client B of the nature of Lawyer’s work for Client A, and the nature and risks presented by any conflict that might be produced, Client B consents to the conflict of interest. After Lawyer has undertaken substantial work in preparation of Client B’s case, Client A seeks to withdraw the advance consent for reasons not justified by the conduct of Lawyer or Client B. Even though Client A was Lawyer’s client before Client B was a client, the material detriment to both Lawyer and Client B would render Client A’s attempt to withdraw consent ineffective.²⁴⁹

This illustration is instructive for the principle that if there has been substantial reliance by the law firm on the advance waiver and revocation of the waiver would result in material detriment to other clients or the law firm, the likelihood that revocation will be effective as to a matter that the law firm has already undertaken is substantially diminished.

D. Exceptions To The “Hot Potato” Rule

Although the “hot potato” rule normally prevents a law firm from prematurely ending a suddenly undesirable attorney-client relationship, as explained below the rule is not inflexible. Some courts have applied a “tempered approach” to effect a just result, while other courts have carved out exceptions to the “hot potato” rule that may allow a law firm to drop one client in favor of another when a conflict arises as the result of a client’s unilateral acts or through factors not within the law firm’s control. These exceptions have been labeled as the “thrust upon” rule and the “accommodation client” rule.

1. The “Tempered” Approach

A recent case discussing the “hot potato” rule has stated that “courts should not be overly eager to substitute a clever phrase for thorough legal analysis.”²⁵⁰ In *Metropolitan Life Insurance Co. v. Guardian Life Insurance Co. of America*,²⁵¹

247. Material detriment may occur, for example, when (i) the other client and the lawyer already have invested time, money, and effort in the representation, (ii) the other client already has disclosed confidential information and developed a relationship of trust and confidence with the lawyer, or (iii) a client relying on the consent might reasonably have elected to forgo opportunities to take other action. RESTATEMENT, *supra* note 122 § 122 cmt. f.

248. DEL. PROF. COND. R. 1.7 cmt. 21.

249. RESTATEMENT, *supra* note 122 § 122 illus. 7. See also *Unified Sewerage Agency*, 646 F.2d at 1346 (refusing to disqualify a law firm when the former client tried to revoke a prior consent that the present client and the law firm had relied upon in creating the lawyer-client relationship); *Fisons*, 1990 U.S. Dist. LEXIS 15284 (relying on *Unified Sewerage* as authority for the proposition that reliance on the consent estopped the client from revoking the consent at a later time).

250. *Metro. Life Ins. Co. v. Guardian Life Ins. Co. of Am.*, No. 06 C 5812, 2009 U.S. Dist. LEXIS 42475, at *13-14 (N.D. Ill. May 18, 2009). See also 1 GEOFFREY C. HAZZARD, JR. & WILLIAM HODES, *THE LAW OF LAWYERING*, § 20.10 (3d ed. Supp. 2005-1) (criticizing a strict approach to the “hot potato” rule that applies the rule whenever a lawyer drops a client for the purpose of suing that client on behalf of someone else, finding that it “is inconsistent with the permissive withdrawal scheme of Model Rule 1.16(b) and RESTATEMENT, *supra* note 122 § 32(3), for ... those provisions permit a lawyer to cease representation – assuming no harm to the client – for no reason or because the lawyer is bored or overworked or because more lucrative work presents itself”).

251. No. 06 C 5812, 2009 U.S. Dist. LEXIS 42475 (N.D. Ill. May 18, 2009).

the United States District Court for the Northern District of Illinois questioned whether the “hot potato” rule applies in situations where “a lawyer’s representation is sporadic, non-litigious, and unrelated to the issues involved in the newer case.”²⁵² That case involved a dispute between two insurance companies where the plaintiff insurer moved to disqualify the law firm representing the defendant insurer because the defendant’s law firm had previously represented the plaintiff and the law firm had never formally terminated its representation of the plaintiff until the defendant entered the picture.²⁵³ Although the court found a technical violation of the “hot potato” rule, it held that the violation did not require disqualification because the plaintiff failed to show that it would suffer any harm if the law firm represented the defendant.²⁵⁴ The law firm’s previous non-litigation work for the plaintiff was wholly unrelated to the plaintiff’s current action against the defendant.²⁵⁵ The law firm’s conduct was neither “nefarious [n]or underhanded,”²⁵⁶ and disqualifying the law firm “would only delay the movement of [the] case, increase the parties’ costs and deprive [the defendant] of its choice of counsel.”²⁵⁷ “The [c]ourt [would] not furnish such a result, despite any ethical violations that may have occurred.”²⁵⁸

Another example of a court applying a “tempered approach” to effect a just result is *Air Products & Chemicals, Inc. v. Airgas, Inc.*²⁵⁹ In that case, industrial gas producer Airgas, Inc. (“Airgas”) filed suit against Cravath, Swaine & Moore LLP (“Cravath”) over the law firm’s role as legal adviser to rival Air Products & Chemical, Inc. (“Air Products”) on that company’s \$5.1 billion bid for Airgas.²⁶⁰ Airgas argued that Cravath terminated its attorney-client relationship with the company after nearly a decade in order to represent Air Products, a 40-year client, in the transaction.²⁶¹ Airgas also claimed that Cravath was working on financing deals with Airgas during the same time it was advising Air Products in the deal that was the subject of the litigation.²⁶²

The Delaware Court of Chancery found that no basis existed to disqualify Cravath from representing Air Products in the pending litigation and thus denied Airgas’s motion to disqualify Cravath.²⁶³ The court noted that motions to disqualify opposing counsel require a high burden of proof that the disqualification is really necessary to prevent real

252. *Id.* at *13.

253. *Id.* at *1-2, *9. The case did not involve an engagement letter permitting withdrawal.

254. *Id.* at *14-15.

255. *Id.* at *15.

256. *Id.* at *8.

257. *Id.* at *15-16.

258. *Id.* at *16.

259. C.A. No. 5249-CC, 2010 Del. Ch. LEXIS 35 (Del. Ch. Mar. 5, 2010) (“*Airgas II*”).

260. *Id.* at *4; Press Release, Air Products & Chemicals, Inc., *Air Products Offers to Acquire Airgas for \$60.00 Per Share in Cash* (Feb. 5, 2010), at <http://www.airproducts.com/PressRoom/CompanyNews/Archived/2010/05Feb2010.htm>.

261. *Airgas, Inc. v. Cravath, Swaine & Moore LLP*, C.A. No. 10-612, 2010 U.S. Dist. LEXIS 15120, at *2 (E.D. Pa. Feb. 22, 2010) (“*Airgas I*”).

262. *Id.* at *3.

263. *Airgas II*, 2010 Del. Ch. LEXIS 35, at *6.

harm to the movant client.²⁶⁴ “Airgas ... [had] not demonstrated even simply persuasively, let alone clearly and convincingly, that it would be disadvantaged by the presence of its former counsel as advocate for its opponent, Air Products.”²⁶⁵ Cravath’s work for Airgas was limited in scope and nature.²⁶⁶ Moreover, even if Cravath had access to information that might be relevant in the current proceeding, it declared that it did not intend to use such information and had erected an “ethical wall” between those members of the firm who worked with Airgas and those working with Air Products.²⁶⁷ The court reasoned that, “[g]iven the absence of any credible threat of prejudice to Airgas from Cravath’s continued participation in this lawsuit, I think the threat of harm to Air Products from disqualification far outweighs the threat of harm to Airgas from a failure to disqualify.”²⁶⁸

Therefore, although the “hot potato” rule generally prohibits mercenarily terminating an attorney-client relationship, there is support for a more case-specific application of the rule that would permit attorneys to end representation in order to avoid conflicts where it would not be unjust to the terminated client for the attorney to do so.

2. The “Thrust Upon” Exception

The “thrust upon” exception typically applies when a conflict results from client merger activity or additional parties join a lawsuit.²⁶⁹ Comment 5 to Model Rule 1.7 provides authority for the “thrust upon” exception. It states, in relevant part:

Unforeseeable developments, such as changes in corporate and other organizational affiliations ... might create conflicts in the midst of a representation[.] Depending on the circumstances, the lawyer

264. *Id.* at *7-8. Specifically, the court stated:

Before this Court may enter the Draconian order of disqualification, a moving party seeking that drastic relief must come forward with clear and convincing evidence establishing a violation of the Delaware Rules of Professional Conduct so extreme that it calls into question the fairness or the efficiency of the administration of justice.... [E]ven when a violation of the ethical rules has, in fact, occurred, it need not automatically result in disqualification. And, more recently, in the Dow Chemical case, I refused to disqualify counsel when there was no showing that counsel’s participation as an advocate unfairly benefited its present client, in that instance Rohm & Haas, or unfairly prejudiced its former client, the Dow Chemical Company, even though the representation of the two clients may have overlapped.

Id.

265. *Id.* at *8.

266. *Id.* at *9.

267. *Id.*

268. *Id.* at *10.

269. LAWYERS’ MANUAL, *supra* note 150, at 51:118. *See, e.g.*, Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264, 268-69 (D. Del. 1980) (denying motion to disqualify, in part because the purported conflict had been “thrust upon” the law firm by the merger activities of the company that sought to disqualify the law firm); Bd. of Regents of the Univ. of Nebraska v. BASF Corp., 4:04CV3356, 2006 U.S. Dist. LEXIS 58255, at *31-32 (D. Neb. Aug. 17, 2006) (discussing the “thrust upon” exception and denying motion to disqualify because of an “unforeseeable development”). *But see, e.g.*, United States v. Nabisco, Inc., CV-86-3277, 1987 U.S. Dist. LEXIS 16795, at *19-21 (E.D.N.Y. July 10, 1987) (E.D.N.Y.1987) (granting motion to disqualify despite the fortuity that the conflict was produced by the client’s merger into the opposing party).

may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients[.]²⁷⁰

In order for a conflict to be considered “thrust upon” the lawyer, the Bar of the City of New York has stated that four elements must exist:

1) [the conflict must] not exist at the time either representation commenced, but arose only during the ongoing representation of both clients, where 2) the conflict was not reasonably foreseeable at the outset of the representation, 3) the conflict arose through no fault of the lawyer, and 4) the conflict is of a type that is capable of being waived . . . , but one of the clients will not consent to the dual representation.²⁷¹

“Many courts have found that the duty of loyalty concerns underpinning the ‘hot potato’ rule are not present in the ‘thrust upon’ situation where the lawyer has not instigated the conflict or deliberately sought to abandon a client.”²⁷² Consequently, several courts have applied a flexible approach to the “thrust upon” situations that focuses on balancing the interests of all affected parties, rather than mechanically applying the “hot potato” rule to prevent a lawyer from withdrawing from one client in order to continue representing the other.²⁷³

One well-known example where a court has applied such an approach is *Ex parte AmSouth Bank N.A.*,²⁷⁴ “where the conflict was created by a mid-suit change in the configuration of the parties.”²⁷⁵ In that case, a law firm represented AmSouth Bank N.A. (“Am South”) in various transactional matters.²⁷⁶ The law firm was later retained by Drummond Co. (“Drummond”) to defend a stockholder suit challenging a merger with Alabama By-Products Corporation (“ABC”).²⁷⁷ AmSouth, as trustee for trusts owning stock in ABC, also sued Drummond over the merger.²⁷⁸ When the law firm realized that a direct adversity conflict had been thrust upon it, the law firm sought the consent of both AmSouth and Drummond

270. DEL. R. PROF. COND. 1.7 cmt. 5. *See also* RESTATEMENT, *supra* note 122 § 132 cmt. j (“A lawyer may withdraw in order to continue an adverse representation against a theretofore existing client when the matter giving rise to the conflict and requiring withdrawal comes about through initiative of the clients. An example is a client’s acquisition of an interest in an enterprise against which the lawyer is proceeding on behalf of another client.”).

271. NYC Ethics Op. 2005-05, *supra* note 161.

272. *Id.*

273. *See, e.g.*, *Eastman Kodak Co. v. Sony Corp.*, 04-CV-6095, 04-CV-6098, 2004 U.S. Dist. LEXIS 29883, at *27-28 (W.D.N.Y. 2004) (holding that “the ‘flexible approach’ provides a far more practical framework to disqualification issues generated by mergers and acquisitions than the rigid ‘hot potato’ rule,” but balancing the interests in favor of disqualification).

274. 589 So.2d 715 (Ala. 1991).

275. THE LAW OF LAWYERING, *supra* note 250, § 11.21.

276. *Ex parte AmSouth Bank*, 589 So.2d at 716.

277. *Id.*

278. *Id.* at 716-17.

to waive the conflict.²⁷⁹ When AmSouth refused, the law firm withdrew from its representation of AmSouth.²⁸⁰ The Supreme Court of Alabama refused to disqualify the law firm from continuing to represent Drummond, finding that the law firm did not play a role originally in creating the conflict.²⁸¹ Moreover, Drummond would be prejudiced by the law firm's disqualification in the stockholder suit more than AmSouth would be prejudiced by the loss of the law firm's services in its routine transactional matters.²⁸² The court followed a "common sense" approach and found that the law firm may avoid disqualification by "moving swiftly to withdraw from its representation" to minimize prejudice to each client concerned.²⁸³

A court also applied a flexible approach to the resolution of a "thrust upon" conflict in *Gould Inc. v. Misui Mining & Smelting Co.*²⁸⁴ In that case, a law firm represented Gould, Inc. ("Gould") in a patent infringement suit against Pechiney.²⁸⁵ At the same time, the law firm represented IG Technologies ("IGT") in various matters.²⁸⁶ Soon thereafter, a conflict arose when Pechiney acquired IGT.²⁸⁷ The law firm never attempted to obtain Pechiney's consent to the law firm's continuing representation of both IGT and Gould, and the law firm refused a request that it withdraw as counsel for Gould.²⁸⁸ The United States District Court for the Northern District of Ohio held that concurrent representation of the two parties would be considered inappropriate and determined that the law firm had committed ethical violations.²⁸⁹

The court then considered the following factors in determining whether disqualification was required: prejudice to the moving party, receipt of confidential information as a result of prior representation, the cost of retaining new counsel (in terms of both time and money), the delay to the litigation caused by requiring plaintiff to obtain new counsel, the complexity of the issues in the case, the time it would take new counsel to acquaint themselves with the facts and issues, and the fact that the conflict was created by merger after the case was commenced, not by any affirmative act of counsel.²⁹⁰ The court ultimately found that disqualification was not warranted, but emphasized that "the conflict must not be allowed to endure."²⁹¹ The court thus allowed the law firm to discontinue representation of either Gould or IGT.²⁹²

279. *Id.* at 717.

280. *Id.*

281. *Id.* at 719, 722.

282. *Id.* at 719.

283. *Id.* at 719, 722.

284. 738 F. Supp. 1121 (N.D. Ohio 1990).

285. *Id.* at 1122.

286. *Id.* at 1123.

287. *Id.*

288. *Id.*

289. *Id.* at 1125-26.

290. *Id.* at 1126-27.

291. *Id.* at 1127.

292. *Id.* The court did, however, report the law firm's ethical violation to the state disciplinary counsel. *Id.*

The court rationalized its decision by indicating that it did not see how “the rules of ethics will be furthered by forcing [the law firm] to withdraw as counsel ... due to a conflict that it did not create[.]”²⁹³

3. The “Accommodation Client” Exception

Courts permit withdrawal from some relationships on the grounds that the relationship was not entitled to the primary duty of loyalty. Thus, some courts have held that a lawyer may withdraw from representation to cure a conflict involving an “accommodation client” under certain circumstances.²⁹⁴ An accommodation client relationship is formed when, with the informed consent of each client as provided in Section 122 of the Restatement, a lawyer undertakes representation of another client as an accommodation to the lawyer’s regular client, typically for a limited purpose and in order to avoid duplication of services and the consequent higher fees.²⁹⁵ Comment i to Section 132 of the Restatement provides that circumstances warranting the lawyer’s continued representation of the regular client when adverse interests later develop between the clients include “that the lawyer has represented the regular client for a long period of time before undertaking representation of the other client, that the representation was to be of limited scope and duration, and that the lawyer was not expected to keep confidential from the regular client any information provided to the lawyer by the other client.”²⁹⁶

Illustration 9 of Section 132 of the Restatement provides the following relevant example of the “accommodation client” exception:

Law Firm has represented Financial Corporation for many years as outside general counsel. Financial Corporation, represented by Law Firm, and Client Two, represented by separate counsel, entered into an agreement to operate a business. A shareholder derivative suit was later filed against both Financial Corporation and Client Two on a claim related to the agreement. Client Two by this point had become hard-pressed financially. Financial Corporation and Client Two had potential claims against each other arising out of the transaction but did not assert them so as to present a united front to the plaintiffs in the shareholder suit. Although separately represented in the shareholder derivative action, Financial Corporation and Client Two exchanged information in that action for the common purpose of defending against it ... During pretrial, Law Firm, with the informed consent of Financial Corporation and Client Two, filed motions in the action in behalf of both Financial Corporation and Client Two. Later, Client Two filed for bankruptcy, and the Trustee in bankruptcy brought suit against Financial Corporation, seeking to recover damages based on the same underlying agreement. Notwithstanding Trustee’s objection ..., Law Firm may withdraw from representing Client Two in the derivative action

293. *Id.* See also *Installation Software Techs., v. Wise Solutions*, No. 03 C 4502, 2004 U.S. Dist. LEXIS 3388, at *10-11 (N.D. Ill. Mar. 2, 2004) (applying a flexible approach to the resolution of a conflict arising out a corporate acquisition, balancing several factors including (i) prejudice, (ii) cost, (iii) the complexity of the case, and (iv) the origin of the conflict, *but* finding that the law firm should be disqualified).

294. See *LAWYERS’ MANUAL*, *supra* note 150, at 51:118 (“If adversity develops between a lawyer’s regular client and another client that the lawyer undertook to represent as an ‘accommodation’ to the lawyer’s regular client, ‘circumstances might warrant the inference that the ‘accommodation’ client understood and impliedly consented to the lawyer’s continuing to represent the regular client in the matter.”) (quoting *RESTATEMENT*, *supra* note 122 § 132 cmt. i).

295. THOMAS D. MORGAN, *Lawyer Law: Comparing the ABA Model Rules of Professional Conduct with the ALI Restatement (Third) of the Law Governing Lawyers* (ABA Ctr. for Prof’l Responsibility, 2005), at 525.

296. *RESTATEMENT*, *supra* note 122 § 132 cmt. i.

and represent Financial Corporation in defending against Trustee's suit. Circumstances warrant the inference that Client Two understood that Law Firm would continue to represent Financial Corporation in any such action.²⁹⁷

The most often cited case supporting an "accommodation client" theory is *Allegaert v. Perot*.²⁹⁸ In *Allegaert*, a bankruptcy trustee of duPont Walston, Inc. ("Walston"), a brokerage firm, moved to disqualify the two law firms who represented some of the defendants in a preference action brought by the trustee.²⁹⁹ The preference action arose out of Walston's joint venture realignment with another failing brokerage, duPont Glore Forgan ("DGF").³⁰⁰ The law firms had represented DGF and other interested parties in the joint venture realignment and had thereafter represented Walston in a derivative action, which all parties conceded was substantially similar to the current lawsuit.³⁰¹ The bankruptcy trustee based his disqualification motion on the law firms' representation of Walston in the derivative action.³⁰²

The trial court declined to disqualify the law firms in an analysis under Canon 4 of the New York Code of Professional Responsibility (which provides that "a lawyer should preserve the confidences and secrets of a client"), and the Second Circuit Court of Appeals affirmed.³⁰³ The appellate court noted that an attorney may be disqualified pursuant to Canon 4 if he has accepted employment adverse to the interests of a former client on a matter substantially related to the prior litigation.³⁰⁴ The appellate court stated:

Once the substantial relationship is established, the court need not inquire whether the attorney in fact received confidential information, because the receipt of such information will be presumed. However, ... before a substantial relationship can be implicated it must be shown that the attorney was in a position where he could have received information which his former client might reasonably have assumed the attorney would withhold from his present client.³⁰⁵

"Because Walston necessarily knew that information given to [the law firms] would certainly be conveyed to their primary clients [*i.e.*, DGF and its Affiliates], in view of the realignment agreement," the court reasoned that "the substantial relationship test [was] inapposite."³⁰⁶ Walston reasonably could not have believed that any information that it gave to the law firms in the course of the derivative action would be withheld from the regular clients.³⁰⁷ Moreover, Walston always had another law firm as its own counsel.³⁰⁸

297. *Id.*, illus. 9.

298. 565 F.2d 246 (2d Cir. 1977).

299. *Id.* at *248-49.

300. *Id.*

301. *Id.* at *248-49.

302. *Id.* at *248.

303. *Id.* at *251.

304. *Id.* at *250.

305. *Id.* (emphasis in original) (internal citation omitted).

306. *Id.*

307. *Id.*

308. *Id.* Other cases following the *Allegaert* approach include: *Skidmore v. Warburg Dillon Read*, 99 Civ. 10525 (NRB),

A relatively recent case from the Third Circuit that adopts the *Allegaert* approach is *In re Rite Aid Corp. Securities Litigation v. Grass*.³⁰⁹ In *Rite Aid*, a law firm represented a company and its former CEO in securities class litigation.³¹⁰ The law firm memorialized its representation in an engagement letter to the company's general counsel, which explained that while there did not appear to be a conflict of interest that would prevent the law firm from representing both the company and its CEO, it was possible that such a conflict might arise in the future.³¹¹ Should that occur, it was "understood" that the CEO would retain separate counsel and that the law firm would continue to represent Rite Aid.³¹²

When it later became evident that the CEO had breached his fiduciary duty to the corporation, the law firm withdrew from its representation of the CEO.³¹³ The United States District Court for the Eastern District of Pennsylvania found that Rule 1.9, rather than the more stringent Rule 1.7, applied and that the representation did not warrant disqualification because the CEO was simply an "accommodation client" and the corporation was clearly the "primary client."³¹⁴ "In other words, the law firm's representation of the CEO was by virtue of the concurrent representation of the corporation and existed for the sake of lowering attorney costs."³¹⁵ The court relied on Comment i to Section 132 of the Restatement, which explains that in situations that arise between the "primary client" and the "accommodation client," the accommodation client "impliedly consent[s] to the lawyer's continuing to represent the regular client in the matter."³¹⁶

Factors other than the "accommodation client" concept also warranted the court's conclusion. Because the CEO did not object to the law firm's representation of the company for approximately one year and was represented by sophisticated counsel the entire time, the CEO's delay constituted a waiver.³¹⁷ Moreover, the engagement letter made it clear that in the event of the conflict, the law firm would cease representation of the CEO and continue to represent the company.³¹⁸

continued from page 175

2001 U.S. Dist. LEXIS 6101 (S.D.N.Y. May 11, 2001); *Host Marriott Corp. v. Fast Food Operators, Inc.*, 891 F. Supp. 1002, 1006-08 (D. N.J. 1995); *Kempner v. Oppenheimer & Co.*, 662 F. Supp. 1271, 1276-78 (S.D.N.Y. 1987); *Am. Special Risk Ins. Co. v. Delta Am. Re Ins. Co.*, 634 F. Supp. 112, 120-21 (S.D.N.Y. 1986); *C.A.M. v. E.B. Marks Music, Inc.*, 558 F. Supp. 57, 59 (S.D.N.Y. 1983); *Anderson v. Pryor*, 537 F. Supp. 890, 895-96 (W.D. Mo. 1982).

309. 139 F. Supp. 2d 649 (E.D. Pa. 2001).

310. *Id.* at 652.

311. *Id.* at 652-53.

312. *Id.* at 653.

313. *Id.* at 654.

314. *Id.* at 658, 660.

315. *Dropping the Hot Potato*, *supra* note 208, at 31 (citing *Rite Aid*, 139 F. Supp. 2d at 658).

316. *Rite Aid*, 139 F. Supp. 2d at 658. In some cases, courts have rejected the "accommodation client" concept. *See, e.g., Universal City Studios*, 98 F. Supp. 2d at 453-56 (rejecting law firm's argument that it represented a particular corporation only as an accommodation to the parent corporation, who was the firm's long-standing client, and denying the law firm permission to withdraw and sue the former client in an unrelated matter); *Ins. Co. of N. Am. v. Westergren*, 794 S.W.2d 812, 814-15 (Tex. Ct. App. 1990) (where lawyer argued that he could represent a contractor in litigation against a surety even though the lawyer had earlier represented the surety in substantially related matters in which the contractor was also a party pursuant to the accommodation client concept and the surety did not pay his fees, and "at no time did [the attorney] receive confidential information from or give advice to [the surety]," court concluded the attorney shared an attorney client relationship with the surety and rejected the accommodation client argument).

317. 139 F. Supp. 2d at 654, 661-62.

318. *Id.* at 660.

III. CONCLUSION

The ever-changing developments in corporate structures due to mergers, spin-offs, purchases and sales of corporations have resulted in the very real potential for conflicts of interest in corporate families. While a law firm may be tempted to simply drop a corporate affiliate when a conflict of interest arises in order to represent a more desirable corporate family member, such a reaction is prohibited under the “hot-potato” doctrine. Advance waivers thus present a practical approach by which law firms can control the risk of disqualification resulting from corporate family conflicts. Because advance waivers will be ineffective in the absence of truly informed consent, law firms should ensure that a client waiver is reviewed by independent counsel and that the client is sufficiently informed of the advantages, disadvantages and alternatives available to the client from whom the waiver is sought. Even where an advance waiver is lacking, however, some courts have carved out exceptions to the “hot potato” doctrine that allow a law firm to withdraw from representing one client in favor of another client where a conflict was “thrust upon” a law firm or where a law firm undertakes representation of another client as an “accommodation” to the law firm’s regular client.

ETHICAL RISKS ARISING FROM LAWYERS' USE OF (AND REFUSAL TO USE) SOCIAL MEDIA

Margaret M. DiBianca*

I. SOCIAL MEDIA IN THE LEGAL PROFESSION

The number of lawyers and law firms participating in social media is, and has been, on the rise.¹ According to the American Bar Association (“ABA”), in 2010, 56 percent of lawyers surveyed reported that they maintain a presence in an online community or social network, such as Facebook, LinkedIn, LawLink, or Legal OnRamp.² This is a 30 percent increase from the number of legal professionals who participated in social networking in 2009 and a 250 percent increase from 2008.³ As the number of legal professionals using social media continues to increase, so, too, does the number of stories of lawyers’ misuse of social media.

In August 2010, the Conference of Court Public Information Officers published the results of its year-long study on the impact of new technology, including social media, on the courts and legal system (the “CCPIO Report”).⁴ The CCPIO Report defines social media as “highly interactive, multimedia, websites and programs that allow individuals to form into communities and share information, knowledge and experiences more quickly and effectively than ever before.”⁵ The universe of social-media tools can be classified into several types, three of which (social-networking sites, blogs, and microblogs) are relevant to the topics discussed in this article.

The first type of social media relevant to this discussion, online social networking, is also the most popular.⁶ As described by one court, social-networking sites “serve as an online newsletter or as a personal journal — where an

* Margaret (Molly) DiBianca is an attorney with the law firm Young Conaway Stargatt & Taylor, LLP, and is the author of the Delaware Employment Law Blog.

1. See, e.g., Posting of Kevin O’Keefe, *State of the AmLaw 200 Blogosphere: March, 2010*, REAL LAWYERS HAVE BLOGS, (Mar. 11, 2010), available at <http://kevin.lexblog.com/2010/03/articles/large-law/state-of-the-amlaw-200-blogosphere-march-2010/> (reporting that the number of AmLaw-ranked law firms with blogs increased by 147 percent — from 39 to 297 — between 2007 and 2010).

2. ABA, 2010 LEGAL TECHNOLOGY SURVEY REPORT, Vol. IV, Web & Commc’n Tech., at 23-24 (2010).

3. *Id.*

4. Conference of Court Public Info. Officers, New Media Comm., *New Media and the Courts: The Current Status & a Look at the Future* (Aug. 26, 2010) at <http://www.ccpio.org> (hereinafter, the “CCPIO Report”).

5. *Id.*

6. In June 2010, the Nielsen Company reported that social networking was the most popular online activity. See Nielsen Company, *What Americans Do Online: Social Media & Games Dominate*, NIELSENWIRE.COM, (Aug. 2, 2010), at http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/. In March 2010, Facebook was ranked as the most-often visited website, beating out Google, for an entire week. See, e.g., Ian Paul, *It’s Official: Facebook Rules the Web*, PC WORLD, (Mar. 16, 2010), at http://www.pcworld.com/article/191635/its_official_facebook_rules_the_web.html.

individual can post concerns, ideas, opinions, etc. — and it can contain links to web sites or can use images or video.”⁷ Content uploaded by a user is stored in the user’s “profile.”⁸ The user designates other users as “friends,” who are able to then view the user’s profile and leave comments.⁹ Various levels of privacy settings can be applied to a user’s profile.¹⁰ One state law defines a social-networking site as having three unique characteristics:

Social networking web site means a web page ... (a) that enables users or subscribers to create, display, and maintain a profile or Internet domain containing biographical data, personal information, photos, or other types of media, (b) that can be searched, viewed, or accessed by other users ... with or without the creator’s permission, consent, invitation, or authorization, and (c) that may permit some form of communication, such as direct comment on the profile page, instant messaging, or email, between the creator of the profile, and users who have viewed or accessed the creator’s profile.¹¹

Currently, the most popular social-networking site for personal use is Facebook.¹² MySpace was once the most popular site and still is a powerful player.¹³ LinkedIn is the most popular online social network for professional use, linking more than seventy million professionals to develop business opportunities, collaborate, and share job opportunities.¹⁴ Compared to Facebook, a user’s LinkedIn profile is more like an online resume and less like a high school yearbook.¹⁵

Blogs are the third type of social media discussed in this article. Blogs have become so pervasive in the legal profession that they have been awarded their own name: blawgs.¹⁶ There are blawgs on practically every legal topic

7. *Ind. Newspapers, Inc. v. Brodie*, 966 A.2d 432, 434 (Md. 2009).

8. *See Set Up a Profile*, FACEBOOK.COM, at http://www.facebook.com/help/?guide=set_up_profile.

9. *See Find Your Friends*, FACEBOOK.COM, at http://www.facebook.com/help/?guide=find_friends.

10. *See Privacy Help Center*, FACEBOOK.COM, at <http://www.facebook.com/help/?topic=privacy>.

11. NEB. REV. STAT. § 29–40001.01(9) (2010). *See also Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 845-46 (W.D. Tex. 2007) (“The idea of online social networking is that members will use their online profiles to become part of an online community of people with common interests.”).

12. <http://www.facebook.com>. As of July 2010, there were 500 million Facebook users. *See Posting of Adam Ostrow, It’s Official: Facebook Passes 500 Million Users*, MASHABLE.COM, (July 21, 2010), at <http://mashable.com/2010/07/21/facebook-500-million-2/>.

13. <http://www.myspace.com>. *See also* Brian Kane, *Balancing Anonymity, Popularity, & Micro-Celebrity: The Crossroads of Social Networking & Privacy*, 20 ALB. L.J. SCI. & TECH. 327, 334-35 (2010) (describing the shift in popularity between the two sites).

14. *See Posting of Leena Rao, LinkedIn Tops 70 Million Users; Includes Over One Million Company Profiles*, TECHCRUNCH.COM, (June 20, 2010), at <http://techcrunch.com/2010/06/20/linkedin-tops-70-million-users-includes-over-one-million-company-profiles/>.

15. <http://www.linkedin.com>; <http://press.linkedin.com/about>.

16. Brian A. Craddock, *A Blawg Odyssey: Exploring How the Legal Community Is Using Blogs and How Blogs Are Changing the Legal Community*, 60 MERCER L. REV. 1353, 1355 (2009). Delaware lawyers have been slower to embrace blawgs. In January 2010, there were fewer than ten Delaware legal blogs written by Delaware lawyers. *See Margaret M. DiBianca, Del. Lawyers Who Blog*, DEL. LAWYER, Winter 2009/2010, at 24.

imaginable.¹⁷ Even AmLaw-ranked law firms have joined the online discussion.¹⁸ Blogs are updated frequently with narrative posts and commentary displayed in reverse-chronological order.¹⁹

Microblogs are the final type of social media discussed in this article. Microblogging is “a form of multimedia blogging that allows users to send and follow brief text updates.”²⁰ Twitter is the leading microblogging platform.²¹ Users send messages (“tweets”) consisting of up to 140 characters.²² Almost all messages on Twitter are public but users limit whose posts they see by “following” only the users who they find interesting.²³ Thus, when a user signs in to his Twitter account, he sees only the tweets of those users that he has chosen to follow.²⁴

All types of social media share a common, defining characteristic — user-generated content.²⁵ Blogs, Facebook profiles, and tweets are all created by individual users and published to a potentially unlimited number of other users. With a simple click of the computer mouse, users can share information that, perhaps, ought not to be shared. As one court explained, “the act of posting information on a social networking site, without the poster limiting access to that information, makes whatever is posted available to the world at large.”²⁶ The “user-to-user” nature of social media²⁷ has transformed the way the internet is used, resulting in “a migration from the static, unidirectional, mass communication tools of the 1990s to a concept of the Web as highly interactive, dynamic and community-oriented — a migration from Web 1.0 to Web 2.0.”²⁸

17. See *Blawg Directory*, ABA J., at <http://www.abajournal.com/blawgs> (“A comprehensive directory of continually updated law blogs.”).

18. See, e.g., O’Keefe, *supra*, note 1.

19. See Aaron Blank, Comment, *On the Precipe of E-Discovery: Can Litigants Obtain Employee Social Networking Web Site Information Through Employers?*, 18 COMM’LAW CONSP’CTUS 487, 489 (2010); Adrienne E. Carter, *Blogger Beware: Ethical Considerations for Legal Blogs*, 14 RICH. J.L. & TECH. 5 (2007).

20. CCPIO Report, *supra*, note 4, at 38.

21. Michelle McGiboney, *Twitter’s Tweet Smell of Success*, NIELSEN WIRE, (Mar. 18, 2009), at http://blog.nielsen.com/nielsenwire/online_mobile/twitters-tweet-smell-of-success.

22. Daniel Havivi, *Metered-Usage Billing & the Broadband Internet Fairness Act*, 11 N.C. J.L. & TECH. ON. 214, 229 n.100 (2010).

23. TIM O’REILLY & SARAH MILSTEIN, THE TWITTER BOOK 25 (2009).

24. *Id.* See Posting by Chloe Albanesius, *Mobile Apps Helps Boost Twitter Membership to 145M*, PC MAG.COM, (Sept. 3, 2010), at <http://www.pcmag.com/article2/0,2817,2368704,00.asp>.

25. Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, & Scholarship*, J. COMPUTER-MEDIATED COMM’N, at 5 (2007), available at <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>.

26. *Ind. Newspapers*, 966 A.2d at 438 n.3.

27. Evan E. North, Comment & Note, *Facebook Isn’t Your Space Anymore: Discovery of Social Networking Websites*, 58 KAN. L. REV. 1279, 1288 (2010).

28. *Id.*

This transformation has attracted the attention of a significant number of legal professionals, who have embraced social media for personal and professional purposes. It has also caused many legal professionals to become warier than ever of the potential dangers of the Internet, resulting, in part, from a fear of the unknown.²⁹ As discussed in part II of this article, though, ignorance is not bliss when it comes to attorneys' familiarity with — and even use of — social media. Instead, a lawyer's ethical duties may actually require him to become familiar with, if not make use of, social media. Part III addresses some of the risks facing lawyers who do engage in social media. Thus, the purpose of this article is to encourage lawyers to take an active interest in social media and to understand its potential effect on their practices, while not losing sight of the potential ethical risks.

II. THE ETHICAL RISKS OF SOCIAL-MEDIA IGNORANCE

Although social media is being used by more lawyers than ever before,³⁰ many legal professionals refuse to engage in social media at all.³¹ Some believe that social media offers no benefit to their particular practice.³² Others are wary of the risks associated with any new technology.³³ Naysayers and late adopters alike may be equally surprised to learn that ignoring social media altogether may constitute a violation of their ethical obligations.

A The Duty of Competence

Rule 1.1 of the Delaware Rules of Professional Conduct (the "Rules") requires lawyers to be competent in their representation of clients.³⁴ Ethical competence requires a lawyer to possess the "legal knowledge, skill and preparedness reasonably necessary for the representation."³⁵ Comment 6 to Rule 1.1 instructs that lawyers "should keep abreast of changes in the law and its practice."³⁶ Thus, the duty of competence includes a duty to stay current in not only the substantive area of law in which one practices, but in the procedural and technical aspects as well.³⁷

29. See CCPIO Report, *supra*, note 4, at 70 (reporting that privacy was reason most often cited (75 percent) by respondents who do not use social-networking sites; ethical concerns was the second most cited reason (47 percent)).

30. See, e.g., O'Keefe, *supra*, note 1.

31. See In re: B. Carlton Terry, Jr., No. 08-234, at ¶ 3 (N.C. Judicial Standards Comm'n, Apr. 1, 2009), available at <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf> (during a conversation with the defendant's attorney and the presiding judge about Facebook, the plaintiff's lawyer stated that she did not know what "Facebook" was, and did not have time for it).

32. See CCPIO Report, *supra*, note 4, at 70 ("limited usefulness" was the most often cited reason for not using a new technology).

33. See Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril & the Promise*, 49 DUKE L.J. 147, 150 (1998) (discussing lawyers' aversion to new technology).

34. DEL. PROF. COND. R. 1.1.

35. *Id.*

36. *Id.* at cmt. 6.

37. ABA Comm. on Ethics & Prof'l Responsibility, *Ethical Issues in Lawyer-to-Lawyer Consultation*, Formal Op. 98-411, n.1 (1998) (noting that the ethical issues are the same in the substantive and procedural contexts).

On the most basic level, the duty of competence requires a lawyer to be knowledgeable about the substantive law in the area in which he practices.³⁸ At least one court has found that the issuance of a friend request via a social-networking site constituted a “contact” in violation of a temporary restraining order.³⁹ Thus, for family-law practitioners and criminal-defense attorneys who represent clients subject to no-contact orders, the duty of competency may require them to warn their clients of the potential dangers of social-networking sites.⁴⁰

There are other scenarios that would similarly require a basic understanding of social media. For example, the American Academy of Matrimonial Lawyers reports that 66 percent of divorce attorneys use Facebook as their primary source for online evidence.⁴¹ Based on this statistic, can a family-law practitioner be truly competent if he ignores social media and lacks even a basic understanding of what Facebook actually is? Perhaps the competency standard is not yet this high. But, if the use of social media continues to increase as predicted, it may be possible that, soon, a basic awareness of social media will be necessary for the competent practice of law.

B The Duty of Diligence

If the competency standard requires attorneys to be at least familiar with social media, the duty of diligence may require a more hands-on understanding of the specific social-media applications. Comment 1 to Rule 1.3 provides that a lawyer should act “with zeal in advocacy upon the client’s behalf.”⁴² If the diligent attorney must be zealous in pursuing a matter on his client’s behalf, it seems possible that more than familiarity may be required — actual *use* of social media may be necessary.

Take, for example, the divorce scenario discussed above. In this example, the duty of diligence as applied to social media may trigger several obligations. Initially, during the lawyer’s intake interview of the potential client, the duty of diligence may require him to ask her about her social-networking activities. Does she, for example, have a Facebook profile? If so, does it contain any disparaging comments about her spouse?

Best business practices, as well as the duty of diligence, may require the lawyer to at least view the potential client’s Facebook profile if she has one. Or, if the profile has been restricted with optional privacy settings, the duty of diligence may require the lawyer to send the client a friend request that, once accepted, will give the lawyer access to the client’s profile. The lawyer may be able to use Facebook to effectively screen clients — declining to represent any individual who is less than forthcoming with facts or who tells a story in person different than the one she tells online.⁴³

38. See, e.g., *Burton v. Mottolese*, 835 A.2d 998 (Conn. 2003) (affirming disbarment where attorney demonstrated lack of competence with respect to substantive and procedural issues).

39. See *People v. Fernino*, 851 N.Y.S.2d 339 (N.Y. Crim. Ct. 2008).

40. See *In re Goldstein*, 990 A.2d 404, 408 (Del. 2010) (finding that lawyer failed to “provide competent representation because he failed to discover or explain to his client” that the client’s conduct was unlawful).

41. Am. Acad. of Matrimonial Lawyers, *Big Surge in Social Networking Evidence Says Survey of Nation’s Top Divorce Lawyers*, (Feb. 10, 2010), at <http://www.aaml.org/go/about-the-academy/press/press-releases/big-surge-in-social-networking-evidence-says-survey-of-nations-top-divorce-lawyers/>.

42. DEL. PROF. COND. R. 1.3, cmt. 1.

43. See *Mann v. Dep’t of Family & Protective Servs.*, No. 01-08-01004, 2009 Tex. App. LEXIS 7326, at *4 (Tex. Ct. App. Sept. 17, 2009) (concluding that petitioner-mother had endangered her child based, in part, on photos from her MySpace profile, which showed her drinking; the mother was not of legal drinking age).

The duty of diligence extends far beyond the initial intake interview. If more than half of divorce attorneys say that Facebook is their best source for online evidence, then failure to utilize the site as part of informal discovery may constitute a failure to perform due diligence. A divorce attorney who ignores Facebook and other social-networking sites as a source of possible evidence could be compared to a prosecutor who fails to conduct a criminal background check on a defendant's key alibi witness.⁴⁴ Both may be in violation of Rule 1.3.⁴⁵

Once the lawyer confirms that the client's profile does not contain any potentially harmful content and agrees to take on the representation, additional steps may be required to fulfill the duty of diligence. For example, does the duty of diligence require the lawyer to warn his client against posting potentially damaging content for the duration of the litigation? If it is assumed that the diligent opposing counsel is almost certain to search online for information about his adversary's client, it seems to follow that the lawyer should advise his client not to post information or pictures that could negatively impact her case. And, taking the idea a step further, it could be argued that the duty of diligence also requires a lawyer to monitor the Internet for information that is potentially adverse to his client's position throughout the course of the litigation.⁴⁶

C. The Duty to Preserve Evidence

But the ethical quandaries do not stop there. Suppose the lawyer discovers that his client's Facebook page does, in fact, contain several unsavory images or comments that would likely decrease the value of her claims. The lawyer's reaction may be to instruct the client to remove the offensive or harmful content or, even, to delete her Facebook account. Rule 3.4(a), however, prohibits the lawyer from making this recommendation.

Rule 3.4(a) prohibits a lawyer from unlawfully altering or destroying evidence and from assisting others in doing so.⁴⁷ Lawyers have an ethical duty to preserve electronically stored information, which includes social-networking profiles. In Delaware, an "affirmative duty to preserve evidence attaches upon the discovery of facts and circumstances that would

44. See generally *Lawrence v. Armontrout*, 900 F.2d 127, 129-30 (8th Cir. 1990) ("Trial counsel's admitted failure to attempt to find and interview [potential alibi witnesses] falls short of the diligence that a reasonably competent attorney would exercise under similar circumstances.").

45. See, e.g., *Partee v. United Recovery Group*, No. CV 09-9180, 2010 U.S. Dist. LEXIS 54025, at *6 (C.D. Cal. May 3, 2010) (granting motion to dismiss based, in part, on evidence submitted by the defendant from the plaintiff's MySpace page, which stated that she worked in Utah, as evidence that she also lived in Utah); *Zamecnik v. Indian Prairie Sch. Dist. No. 204 Bd. of Educ.*, No. 07-C-1586, 2010 U.S. Dist. LEXIS 42748, at *17 (N.D. Ill. Apr. 29, 2010) (noting the number of persons joining a Facebook page as evidence); *United States v. Gagnon*, No. 10-52-B-W, 2010 U.S. Dist. LEXIS 40392, at *9 (D. Me. Apr. 23, 2010) (noting that the defendant's son "as evidenced by the Facebook page submitted into evidence, apparently harbors considerable animus toward [a witness]").

46. Such a scenario is not difficult to imagine. See, e.g., *Vesna Jaksic, Litigation Clues Are Found on Facebook*, NAT'L L.J., Oct. 15, 2007, at 1 (describing divorce case that was negatively impacted when it was revealed that petitioning husband had described himself as "single and looking" on his MySpace page). Similar outcomes have been reported in the custody context, as well. See, e.g., *J.N. v. D.R.*, No. CN07-01654, 2008 Del. Fam. Ct. LEXIS 62, at *17 (Del. Fam. Ct. Jan. 29, 2008) (considering as evidence pictures introduced by father of mother with alcohol, which mother acknowledged, had been obtained from either her or her friend's MySpace profile); *In re T.T.*, 228 S.W.3d 312, 322-23 (Tex. Ct. App. 2007) (in case involving termination of parental rights, the court considered the father's statement that he did not want children, posted on his MySpace profile).

47. DEL. PROF. COND. R. 3.4(a) ("A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.").

lead to a conclusion that litigation is imminent or should otherwise be expected.⁴⁸ Thus, the duty to preserve evidence “may arise before any litigation has been commenced.”⁴⁹

Accordingly, a lawyer has an affirmative duty to ensure the preservation of a client’s social-network profile if the profile contains information or content relevant to the dispute.⁵⁰ A lawyer who instructs a client to *delete* her social-networking account or to remove content from it is likely guilty of spoliation of evidence, which could result in significant sanctions.⁵¹ In Delaware, an adverse inference may be drawn if the court determines that a party acted “intentionally or recklessly in failing to preserve the evidence.”⁵²

The better alternative is to have the client set her profile page as “private” using the various privacy settings provided by the application. The opposing party will not have direct access to the contents of her page but could request the evidence through formal discovery channels.⁵³ That is, of course, if the opposing counsel is diligent.

D. The Duty to Supervise

The duties of competence and diligence extend beyond a lawyer’s own actions. Any lawyer with supervisory authority will be responsible for the unethical acts of the lawyers and nonlawyers he supervises. These duties are set forth in Rules 5.1 and 5.3.⁵⁴

1. Other Lawyers

Rule 5.1(a) requires a firm’s managing partners to make reasonable efforts to ensure that all lawyers comply with their ethical duties.⁵⁵ Rule 5.1(b) requires a lawyer with supervisory duties to make reasonable efforts to ensure that

48. *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 550 (Del. 2006).

49. *Triton Construction Co., Inc. v. E. Shore Elec. Servs., Inc.*, C.A. No. 3290-VCP, 2009 WL 1387115, at *8 (Del. Ch. May 18, 2009), *aff’d*, 988 A.2d 938 (Del. 2010).

50. *See EEOC v. Simply Storage Mgmt., LLC*, No. 09-1223-WTL-DML, 2010 U.S. Dist. LEXIS 52766 (S.D. Ind. May 11, 2010) (granting the defendant’s motion to compel production of claimants’ social-networking profiles, and ordering EEOC to “err in favor of production.”).

51. *See Micron Tech., Inc. v. Rambus, Inc.*, 255 F.R.D. 135 (D. Del. Jan. 9, 2009) (imposing harsh penalties against a defendant, who destroyed relevant documents after litigation had become reasonably foreseeable but before litigation commenced); *TR Investors, LLC v. Genger*, C.A. No. 3994, 2009 Del. Ch. LEXIS 203 (Del. Ch. Dec. 9, 2009) (ordering sanctions where a party deleted ESI, which constituted spoliation and contempt), *clarified by* 2010 Del. Ch. LEXIS 19 (Del. Ch. Feb. 3, 2010).

52. *Id.*

53. *See, e.g., Simply Storage Mgmt.*, 2010 U.S. Dist. LEXIS 52766 (requiring claimants to produce their entire social-networking profiles in response to the defendant’s discovery request). *See also Ledbetter v. Wal-Mart Stores, Inc.*, No. 06-1958, 2009 U.S. Dist. LEXIS 126859 (D. Colo. Apr. 21, 2009) (denying the plaintiff’s motion for a protective order with respect to discovery of information on her social-networking profiles marked as private); *Mackelprang v. Fidelity Nat’l Title Agency of Nev., Inc.*, No. 06-00788-JCM-GWF, 2007 U.S. LEXIS 2379 (D. Nev. Jan. 9, 2007) (ordering the plaintiff to produce private Facebook messages if they related to her claims or damages); *Beye v. Horizon Blue Cross Blue Shield*, 568 F. Supp. 2d 556 (D.N.J. 2006) (ordering the plaintiffs to produce any writings that related to their eating disorders, including entries on Web sites, such as Facebook or MySpace).

54. DEL. PROF. COND. R. 5.1, 5.3.

55. *Id.* at 5.1(a).

any lawyer reporting to him similarly complies with all ethical duties.⁵⁶ Thus, the duty to supervise, as set forth in Rule 5.1, requires more than a “do-no-harm” approach. A lawyer with supervisory responsibilities must take affirmative steps to ensure that the lawyers and nonlawyers below him in the reporting structure are aware of and in compliance with the rules of professional conduct to the same extent the lawyer himself must comply.

Rule 5.1(a) has one particularly notable result when applied in the context of social media.⁵⁷ Specifically, Rule 5.1(a) seems to require that a law firm, through its managing partners, take affirmative steps to educate its lawyers about the ethical use of social media.⁵⁸ Additionally, the rule may require that a law firm take the affirmative step of adopting and implementing an effective policy or set of guidelines to address the use of social media by its lawyers.⁵⁹

Comment 2 to the ABA Model Rule 5.1 supports this conclusion.⁶⁰ The comment states that Rule 5.1(a) “requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules[.]”⁶¹ Just as firms warn their lawyers about the latest fraud schemes being perpetrated via the Internet, so too should they educate their lawyers about the dangers of careless use of social media.

2. Nonlawyer Staff

Rule 5.3(b) holds a lawyer responsible for any unethical conduct of his nonlawyer staff.⁶² Therefore, just as Rule 5.1 requires a firm to educate its lawyers about social media, so, too, would Rule 5.3 require a lawyer to educate his nonlawyer staff.⁶³ It may be difficult to imagine that lawyers have an ethical duty to provide social-media training to paraprofessional and administrative staff when so many lawyers have no knowledge in this area themselves. But this is no defense to a disciplinary action. So, it seems necessary for lawyers to get up to speed quickly, despite how daunting or unfamiliar social media may appear.

The Pennsylvania Ethics Committee addressed a lawyer’s ethical obligations in the context of a nonlawyer staff member’s use of social-networking sites for informal discovery.⁶⁴ The committee concluded that it would be unethical

56. *Id.* at 5.1(b).

57. *Id.* at 5.1(a).

58. *Id.*

59. *Id.* at 5.3(b). See Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 117 (2009). According to one survey, approximately 25 percent of Delaware law firms have a written social-media policy in place. Margaret M. DiBianca, *By the Numbers: Tech. Use by Del. Lawyers*, DEL. LAWYER, Winter 2009/2010, at 27.

60. MODEL PROF. COND. R. 5.1, cmt. 2.

61. *Id.*

62. DEL. PROF. COND. R. 5.3(b).

63. See *id.*

64. Phila. Bar Ass’n, Op. 2009-02 (Mar. 2009) (construing PA. MODEL RULES OF PROF’L CONDUCT R. 4.1, 5.3, 8.4), available at http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf.

for a lawyer to instruct (or permit) a non-attorney staff to send a friend request to a nonparty witness for the purpose of accessing information on the witness's Facebook profile.⁶⁵ Unless the staff member expressly disclosed his identity, his affiliation with the supervising attorney, and the purpose of his friend request, the staff member would be engaged in impermissible deception in violation of Rule 8.4.⁶⁶ In turn, pursuant to Rule 5.3, the supervising attorney would be responsible for the staff member's conduct.⁶⁷

The committee's opinion is in accord with Delaware requirements for nonlawyer staff's contact with witnesses.⁶⁸ Delaware law requires that, when attempting to contact a witness, a lawyer's agent properly disclose the purpose of his contact and his affiliation with the lawyer.⁶⁹ Failure to comply with the "*Monsanto* requirements" of an interview by a lawyer's agent constitutes a violation of Rules 4.2 and 4.3 by the lawyer.⁷⁰ Thus, the committee's opinion merely extends the *Monsanto* duty of disclosure into the virtual world.

In addition to Rules 4.2 and 4.3, the committee's opinion implicates several other rules of professional conduct. For example, if the nonlawyer personnel had suggested the friend-request idea to the supervising attorney, Rule 1.1 seems to require that attorney have at least a basic understanding of the concept before responding to the suggestion.⁷¹ Further, Rule 1.3 seems to suggest that the diligent attorney would ask the nonparty witness about her social-networking use during her deposition and issue additional information via formal discovery requests where appropriate.⁷² Finally, Rule 5.3 seems to require that the attorney take affirmative steps to educate his nonlawyer staff about the committee's rulings and to ensure that they comply with the decision.⁷³

III THE RISKS OF SOCIAL-MEDIA PARTICIPATION

A. Confidentiality-Related Risks

Preserving the confidentiality of attorney-client communications is at the very heart of our ethical duties;⁷⁴ yet, stories of breached confidences continue to make headlines.⁷⁵ Rule 1.6 requires lawyers to maintain the confidentiality of

65. *Id.*

66. *Id.*

67. DEL. PROF. COND. R. 5.3(b).

68. *See Monsanto Co. v. Aetna Casualty & Surety Co.*, 593 A.2d 1013 (Del. Super. Ct. 1990).

69. *Id.* at 1016.

70. *Id.*

71. *See* DEL. PROF. COND. R. 1.1.

72. *See id.* at 1.3.

73. *See In re Otlowski*, 976 A.2d 172 (Del. 2009) (finding that the respondent violated Rule 5.3 by failing to have "reasonable safeguards in place" to prevent ethical violations and, by failing to "supervise his employee(s) generally with respect to compliance with the Rules").

74. *See, e.g.*, Daniel R. Fischel, *Lawyers & Confidentiality*, 65 U. CHI. L. REV. 1, 3-9 (1998) (explaining the important role of confidentiality to the attorney-client relationship).

75. *See* Debra Cassens Weiss, *Ethics Officials Seeing More Cases from Lawyers' Online Foibles*, ABA J., (May 11, 2010), at http://www.abajournal.com/news/article/ethics_officials_seeing_more_cases_from_lawyers_online_foibles/.

information “relating to the representation of a client” unless the client authorizes the disclosure, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure would qualify for one of several exceptions.⁷⁶ Comment 16 provides that lawyers “must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”⁷⁷

1. By Blog Post

There are numerous stories of confidentiality breaches by way of attorney blog post. This is not surprising; blogging is, after all, a form of storytelling. The narrative style of a blog makes it very easy for the unwary attorney to share too much.

One of the most widely publicized stories involving a lawyer’s disclosure of confidential client information via blog post is that of Kristine Ann Peshek.⁷⁸ Peshek, a former Illinois assistant public defender, was charged with violating several ethical rules, including Rule 1.6, for information she posted on her blog.⁷⁹ In her posts, she regularly referred to clients by first name, nickname, or jail identification number, and described in detail the clients’ cases, personal lives, and drug use, among other private and potentially detrimental or embarrassing information.⁸⁰ Although she made some meager attempts to cloak the identity of her clients, other information in the posts made the clients easily identifiable.⁸¹

2. By Less Innocuous Acts

Some might say that Ms. Peshek exercised poor judgment when she chose to write and publish such seemingly obvious confidential information about her clients. But what about confidentiality issues in other, nonnarrative forms of social media where disclosure seems more like an inadvertent oversight and less like a conscious decision? There are several scenarios wherein conduct far less offensive than Ms. Peshek’s could result in the inadvertent disclosure of confidential client information.

76. DEL. PROF. COND. R. 1.6(a). Exceptions are set forth in Rule 1.6(b):

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services; (3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services; (4) to secure legal advice about the lawyer’s compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or (6) to comply with other law or a court order.

DEL. PROF. COND. R. 1.6(b).

77. *Id.* at cmt. 16.

78. *See, e.g.*, Debra Cassens Weiss, *Blogging Assistant PD Accused of Revealing Secrets of Little-Disguised Clients*, ABA J. (Sept. 10, 2009), at http://www.abajournal.com/news/article/blogging_assistant_pd_accused_of_revealing_secrets_of_little-disguised_clie/.

79. *In re Peshek*, Comm’n No. 09 CH 89 (Aug. 25, 2009), *available at* <https://www.iardc.org/09CH0089CM.html>.

80. *Id.*

81. *Id.*

Take, for example, the social-networking site, LinkedIn, which is geared towards professionals, including attorneys.⁸² Users “connect” with other users, who are then added to each other’s “network.” Once connected, users can view all of the connections in each other’s networks. For example, if Lawyer X connects with Client A, Client A will be able to view all of the users in Lawyer X’s network. Thus, every connection in a user’s network will be able to view who is in the user’s online Rolodex, which could lead to the inadvertent disclosure of an attorney-client relationship.⁸³ The same risk exists in the context of friend lists in a user’s Facebook profile.⁸⁴

A similar risk arises from social-networking applications that utilize geotagging. Geotagging “tags” information and pictures with GPS coordinates.⁸⁵ Foursquare is a popular location-based, social-networking service that utilizes geotagging.⁸⁶ As explained on its website, “Foursquare lets users ‘check in’ to a place when they’re there, tell friends where they are and track the history of where they’ve been and who they’ve been there with.”⁸⁷

Each time a user announces his location, he is awarded points.⁸⁸ Businesses register with Foursquare and award promotional discounts and prizes to the users with the most visits.⁸⁹ For example, a user can announce to his friends that he is currently at the local coffee shop by accessing the Foursquare application through his mobile phone.

Foursquare is not the only social-networking application that utilizes geotagging.⁹⁰ Twitter users can include their location when they post a tweet using the “Tweet Your Location” feature.⁹¹ And Facebook announced Facebook Places in August 2010.⁹²

82. See <http://www.Linkedin.com>; [LinkIn.com *What Is Linked In?*](http://learn.linkedin.com/what-is-linkedin/), at <http://learn.linkedin.com/what-is-linkedin/> (describing the site as the “world’s largest professional network”); [LinkedIn.com, *User Guide for Attorneys*](http://learn.linkedin.com/attorneys/), at <http://learn.linkedin.com/attorneys/> (one of nine user guides in LinkedIn’s Learning Center).

83. See DEL. PROF. COND. R. 1.6, cmt. 4 (prohibiting a lawyer from revealing information if there is a “reasonable likelihood that the listener will be able to ascertain the identity of the client”).

84. See Bennett, *supra*, note 59, at 119 (“Simply making a list of contacts public on a networking site, for example, could disclose a confidential relationship.”).

85. See Josh Blackman, *Omniveillance, Google, Privacy In Public, & the Right to Your Digital Identity: A Tort for Recording & Disseminating an Individual’s Image Over the Internet*, 49 SANTA CLARA L. REV. 313, 332 (2009) (describing the geotagging feature on the Apple iPhone 3G, which “automatically records the latitude and longitude coordinates where a photograph is taken”).

86. See <http://foursquare.com>.

87. See <http://foursquare.com/about>.

88. See Posting of Jason Kincaid, *Foursquare Starts to Enforce the Rules, Cracks Down on Fake Check-Ins*, TECHCRUNCH, (Apr. 7, 2010), at <http://techcrunch.com/2010/04/07/foursquare-starts-to-enforce-the-rules-cracks-down-on-fake-check-ins/>.

89. See *Foursquare for Your Business*, at <http://foursquare.com/businesses/>.

90. For a detailed discussion of the ways in which geotagging and related technologies are being used see Mark Burdon, *Privacy Invasive Geo-Mashups: Privacy 2.0 & the Limits of First Generation Info. Privacy Laws*, 2010 U. ILL. J.L. TECH. & POL’Y 1 (2010).

91. See Twitter Help Center, *Twitter Places and How to Use Them*, at <http://support.twitter.com/groups/31-twitter-basics/topics/111-features/articles/194473-twitter-places-and-how-to-use-them>.

92. See Posting of Jolie O’Dell, *A Field Guide to Using Facebook Places*, MASHABLE.COM, (Aug. 19, 2010), at <http://mashable.com/2010/08/19/facebook-places-guide/>.

An example may illustrate the potential ethical issues arising from a lawyer's use of location-based, social-media applications. Consider again the divorce attorney, who, coincidentally, is very successful and is well-known in the local community. He is contacted by a prominent politician, who tells him that she intends to file for divorce, which she expects will be a surprise to her spouse.

The lawyer agrees to meet with the politician to discuss her case. Because of her high-profile stature, she cautions the lawyer not to disclose their meeting, lest her plans be revealed. The lawyer suggests an out-of-the-way restaurant where they are not likely to be recognized. The meeting goes well and she retains the lawyer to represent her in the divorce.

On his walk back to his car, the lawyer tweets, "Had a great meeting with new client. Life is good." The lawyer has just recently started to use Twitter as a business-development tool and already has several hundred followers. Because he has enabled the "Tweet Your Location" feature in his Twitter account, his update includes his exact coordinates at the time of his post.⁹³

As luck would have it, the waiter from the out-of-the-way restaurant takes a break after the lawyer and client leave and has logged into Twitter from his iPhone. The waiter, who makes it a point to follow local businesspeople, including the lawyer, on Twitter, sees the lawyer's tweet about meeting with his "new client." The tweet, which is geotagged, appears with an address one block away from the restaurant.

The waiter quickly figures out that the "new client" is the prominent politician, Mrs. Y, and posts to his several thousand Twitter followers: "Just waited on Lawyer X, who lunched with Mrs. Y — does this mean Mrs. Y is soon to be ex-Mrs. Y and back on the dating scene??" So much for not disclosing the attorney-client relationship.

A word of caution to those readers who are quick to blame the lawyer in the example above — similar disclosures can occur without any action by the lawyer at all. Facebook Places enables users to "check in" to a location (i.e., the out-of-the-way restaurant). It also enables users to "tag" their friends and check them in, as well. So, in the example above, assume that the lawyer got a call from his son, a college student, during lunch. The son had come home for a surprise visit but had forgotten his key. The lawyer tells his son to stop by the restaurant and pick up the lawyer's key.

The son is at the restaurant for just a moment but, being a devoted Facebook user, he "checks in" to the restaurant via Facebook Places, which he accesses via his mobile phone. He checks in his father, as well. All of the son's Facebook friends now know where the lawyer had lunch, thereby reducing, if not eliminating, the secrecy the lawyer took great pains to ensure.

B. Litigation-Related Risks

1. Improper Trial Publicity

Rule 3.6(a) prohibits attorneys from making extrajudicial statements that have a "substantial risk of materially prejudicing a legal proceeding."⁹⁴ Rule 3.6(c) provides an exception to the prohibition against trial publicity by permitting an attorney to "protect a client from the substantial undue prejudicial effect of recent publicity" initiated by a third party.⁹⁵ Thus, if a third party's blog post or comment is adversely prejudicial to the lawyer's client, the carve-out could

93. See Twitter Help Center, *About the Tweet Your Location Feature*, at <http://support.twitter.com/forums/10711/entries/78525-geotagging-on-twitter>.

94. DEL. PROF. COND. R. 3.6(a).

95. *Id.* at 3.6(c).

allow the attorney to respond defensively with a rebuttal post or comment of his own— but only if a reasonable lawyer would believe that a mitigating response is required.⁹⁶ Given the free market of ideas that the internet creates, it may be difficult to argue that a response by the lawyer is, in fact, “required.”

The story of Florida Assistant State Prosecutor Brandon White serves as an example of how a lawyer may violate the prohibition against trial publicity.⁹⁷ At the end of a “trial from hell,” in which he was second chair for the State, White posted about the case on his Facebook page.⁹⁸ His post was written as a parody of the theme song from *Gilligan's Island* and described his own performance during the trial as “totally awesome.”⁹⁹

At the time White posted the update, the jury had completed deliberations but had not returned its verdict, so the risk that the post would “materially prejudice” the outcome of the case was not significant.¹⁰⁰ But, unless White actually knew that deliberations had concluded, his post would seem to violate the prohibition against trial publicity.¹⁰¹

96. See *id.* at 3.6(a) (prohibiting a lawyer from making an extrajudicial statement that the lawyer knows or reasonably knows “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter”).

97. See Posting of Kashmir Hill, *Lawyer of the Day: Brandon White Stranded in Gilligan's Trial*, ABOVE THE LAW, (Apr. 22, 2010), at <http://abovethelaw.com/2010/04/lawyer-of-the-day-brandon-white/>.

98. White's co-prosecutor, Robyn Stone, commented on White's Facebook update: “Hahahah – Brandon and I are in the trial from hell – it is just unbelievable – Brandon has been awesome – Brandon I love your poem...” TC PALM, Apr. 21, 2010, at [http://www.tcpalm.com/news/2010/apr/21/read-assistant-state-attorney-brandon-whites-faceb/\(re-posting White's Facebook post and Stone's comment thereto\)](http://www.tcpalm.com/news/2010/apr/21/read-assistant-state-attorney-brandon-whites-faceb/(re-posting%20White's%20Facebook%20post%20and%20Stone's%20comment%20thereto)).

99. *Id.* The lyrical post in full:

Just sit right back and you'll hear a tale, a tale of a fateful trial,
That started from this court in St. Lucie County.
The lead prosecutor was a good woman, the 2nd chair was totally awesome,
Six jurors were ready for trial that day for a four hour trial, a *four hour trial*.

The trial started easy enough but then became rough.
The judge and jury confused,
If not for the courage of the fearless prosecutors,
The trial would be lost, *the trial would be lost*.

The trial started Tuesday, continued til Wednesday
And then Thursday, with Robyn and Brandon too,
The weasel face
The gang banger defendant
The Judge, clerk, and Ritzline
Here in St. Lucie.

So this is the tale of the trial
it's going on here for a long, long time,
The prosecutors will have to make the best of things,
It's an uphill climb.

The New Guy and Robyn
Will do their very best,
To make sure justice is served
In the hornets nest.

No rules of evidence or professionalism,
Not a single ounce of integrity
Like My Cousin Vinny,
No ethics involved, no ethics involved.

100. See Melissa E. Holsman, *Facebook Poem Gets Prosecutor in Hot Water*, SUN SENTINEL, Apr. 22, 2010, available at http://articles.sun-sentinel.com/2010-04-22/news/fl-facebook-poem-ada-20100422_1_jurors-trial-facebook.

101. The judge in the case declared a mistrial for reasons unrelated to White's post. See *id.*

White's boss, Chief Assistant State Attorney Tom Bakkedahl, was not troubled by the post, and described it as "harmless joking among family and friends who believed it would remain private."¹⁰² Bakkedahl did emphasize that the conduct was not a behavior that his office would encourage and afforded a social-media "training moment" for lawyers in the state's attorney's office.¹⁰³

Rule 5.1 supports the need to educate other lawyers about the hasty nature of White's post.¹⁰⁴ But a paralegal could publish information about the case on his or her Facebook profile just as easily as a lawyer.¹⁰⁵ Thus, Rule 5.3 suggests that the training should be extended to the office's nonlawyer staff, as well.¹⁰⁶

The story of attorney Frank R. Wilson demonstrates that trial-publicity concerns are not limited to the parties' lawyers.¹⁰⁷ Wilson was impaneled on a jury in a criminal burglary trial.¹⁰⁸ Despite the court's instruction not to discuss the case in writing or orally, Wilson posted an entry on his blog that identified the crimes, the first name of the defendant, and the name of the judge, whom he described as "a stern, attentive woman with thin red hair and long, spidery fingers that as a grandkid you probably wouldn't want snapped at you."¹⁰⁹ As a result of his posts, the judgment was vacated and remanded for a new trial.¹¹⁰

Judges, too, have fallen prey to the lure of social media as a medium for discussing the matters pending before them.¹¹¹ In Pennsylvania, for example, a special-education hearing officer who posted about the matters before her was removed from her position.¹¹² And a criminal-court judge in New York was transferred allegedly in part because of his

102. *Id.*

103. *Id.*

104. See Douglas R. Richmond, *Prof'l Responsibilities of Law Firm Assocs.*, 45 BRANDEIS L.J. 199, 204 (2007) (contending that firms should provide firm in-house training for associates on professional-responsibility issues, particularly on "ethical problems that associates are likely to encounter").

105. See, e.g., *Ex-paralegal: Heiress gave a lot to lawyer*, UPI, Aug. 28, 2010, at http://www.upi.com/Top_News/US/2010/08/28/Ex-paralegal-Heiress-gave-a-lot-to-lawyer/UPI-65821283011861/ (former paralegal revealed confidential information about her former employer-lawyer and his clients to the New York Post).

106. See *In re Otlowski*, 976 A.2d 172 (Del. 2009).

107. See Posting of Mike Frisch, *Lawyer-Juror-Blogger Sanctioned in Cal.*, LEGAL PROFESSORS BLOG, (Aug. 3, 2009), at http://lawprofessors.typepad.com/legal_profession/2009/08/lawyerjurorblogger-sanctioned-in-california.html.

108. See Discipline Summary, CAL. B.J., at http://members.calbar.ca.gov/search/member_detail.aspx?x=185591.

109. See CAL. B. J., (Aug. 2009), available at <http://archive.calbar.ca.gov/%5CArchive.aspx?articleId=96182&categoryId=96044&month=8&year=009#s10>. His post also stated, "Nowhere do I recall the jury instructions mandating I can't post comments in my blog about the trial. (Ha. Sorry, will do.) So, being careful to not prejudice the rights of the defendant — a stout, unhappy man by the first name of Donald" *Id.*

110. See Disciplinary Summary, *supra*, note 108.

111. DEL. JUDGES' CODE OF JUDICIAL CONDUCT 2.10(a) (2008), *Judicial Statements on Pending and Impending Cases*, provides that a judge "should abstain from public comment on the merits of a pending or impending proceeding in any court" and, as stated in the comment to the rule, "particular care should be taken" where the public comment involves a case from the judge's own court.

112. *Stengle v. Office of Dispute Resolution*, 631 F. Supp. 2d 564 (M.D. Pa. 2009).

social-networking activities.¹¹³ He was reported to have updated his Facebook status while on the bench and to have posted a picture he took of his crowded courtroom.¹¹⁴

In one particularly troubling case, an Ohio common pleas judge was alleged to have posted more than eighty comments on a local newspaper's website using a pseudonym.¹¹⁵ The pseudonym was created using the judge's name and e-mail address and the comments were posted from a computer in the judge's chambers.¹¹⁶ Many of the comments discussed cases that were being tried before her. And, many of the comments were about a high-profile murder trial over which she was presiding.¹¹⁷ The Ohio Supreme Court removed her from the case after she refused to recuse herself.¹¹⁸

2. Improper *Ex Parte* Communications

Rule 3.5 prohibits a lawyer from seeking to "influence a judge, juror, or prospective juror or other official" by unlawful means.¹¹⁹ The inferences that others may draw from online connections led the Florida Judicial Ethics Advisory Committee to issue an opinion banning state judges from becoming "friends" (as in "Facebook friend"), with lawyers who may appear before them.¹²⁰ According to the Committee, by extending or accepting friend requests with lawyers, judges would be conveying or permitting others to convey the impression that the lawyer holds a position of special influence.¹²¹

South Carolina, on the other hand, has taken an opposite position, permitting judges to participate in social networking and recognizing such participation as a way to promote the public's understanding of the judiciary.¹²² New York takes a middle-of-the-road approach, giving judges the option to participate in social networks, provided the judge

113. John M. Annese, *Staten Island Criminal Court Judge to Be Transferred to Manhattan After Facebook Postings, Sources Say*, STATEN ISLAND ADVANCE, Oct. 15, 2009, available at http://www.silive.com/news/index.ssf/2009/10/criminal_court_judge_to_be_tra.html.

114. *Id.*

115. *In re Peshek*, Comm'n No. 09 CH 89, (Aug. 25, 2009), available at <https://www.iardc.org/09CH0089CM.html>.

116. *Id.*

117. Pam Smith, *Judge Reprimands Temp Prosecutor for Personal Blog*, Law.com (Apr. 28, 2006), available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1146139204085>.

118. *Judge removed from Ohio serial killing cases*, CNN.COM, (Apr. 23, 2010), at <http://www.cnn.com/2010/CRIME/04/23/ohio.bodies/?hpt=Sbin>.

119. DEL. PROF. COND. R. 3.5.

120. *See Fla. JAEC Op. 2009-20* (Nov. 17, 2009).

121. *Id.*

122. *See S.C. Judicial Dep't, Op. 08-176* (Jan. 29, 2009).

exercises “an appropriate degree of discretion” and stays current on the technology.¹²³ And Kentucky permits judges to participate in online social networking but offers strong words of caution about the potential dangers of such participation.¹²⁴

There are several stories that demonstrate the ethical issues relating to judges’ participation in social media.¹²⁵ For example, a Texas judge reportedly requires every juvenile who appears before her to friend her on Facebook or MySpace.¹²⁶ If the minor’s status updates reveal involvement in illegal activities, he is summoned to court for a compliance hearing.¹²⁷ This “extra-courtroom monitoring” was lauded by some and questioned by others as possibly unconstitutional.¹²⁸

Although the judge has not been subjected to disciplinary charges for her unusual use of social media, other judges have faced serious consequences for their online activities. One North Carolina judge was issued a public reprimand for engaging in *ex parte* communications, through Facebook, with one of the attorneys in a case pending before him.¹²⁹ And a superior court judge in Georgia resigned just days after his relationship with a woman who was a defendant in a matter pending before his court became public.¹³⁰ The relationship had developed and was documented via Facebook.¹³¹

123. See N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176 (Jan. 29, 2009). See also Am. to Code of Ethics for Members of the Judiciary (Malta) (Feb. 8, 2010) (“Since propriety, and the appearance of propriety, are essential to the performance of all the activities of a judge, membership of ‘social networking internet sites’ is incompatible with judicial office.”), available at <http://judiciarymalta.gov.mt/code>.

124. Ethics Comm’n of Ky. Judiciary, *Judges’ Membership on Internet-Based Social Networking Sites*, Ky. Judicial Ethics Op. JE-119 (Jan. 20, 2010), available at <http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf> (“participation in social networking sites is permissible, but [] the judge or justice should be extremely cautious that such participation does not otherwise result in violations of the Code of Judicial Conduct”) (emphasis in original).

125. See Ken Strutin, *Social Networking Pitfalls for Judges, Attorneys*, N.Y. L.J. (Mar. 17, 2010). Another, less common scenario occurred in August 2010, and involved North Carolina Judge Beth Dixon. Judge Dixon had created a “fan page” on Facebook as part of her re-election campaign. Residents of Salisbury, North Carolina protested the judge when she convicted a defendant who was arrested after she used her mobile phone to record video of a police offer as he arrested another citizen. See Shelley Smith, *Citizens Protest Against City, Hunter*, SALISBURY POST, Aug. 25, 2010, available at <http://www.salisburypost.com/News/082510-Protesting-Salisbury-qcd>. A blogger picked up the story and encouraged his readers to “share [their] feelings” with the judge on her Facebook page, stating that the judge had “failed” and “must not be reelected.” See Post of Carlos Miller, *N.C. judge who convicted woman for videotaping cop faces reelection*, PHOTOGRAPHY IS NOT A CRIME: IT’S A FIRST AM. RIGHT BLOG, (Aug. 30, 2010), at <http://carlosmiller.com/2010/08/30/n-c-judge-who-convicted-woman-for-videotaping-cops-faces-election/> (including an oversized headshot of the judge in his post). Apparently, the blogger’s call to arms was effective. The judge’s Facebook page was deluged with negative comments and, soon thereafter, deleted by the judge. See Post of Carlos Miller, *N.C. judge Beth Dixon learns hard lesson in social media*, PHOTOGRAPHY IS NOT A CRIME: IT’S A FIRST AM. RIGHT BLOG, (Sept. 1, 2010), at <http://carlosmiller.com/2010/09/01/north-carolina-judge-learns-hard-lesson-in-social-media/>.

126. Dahlia Lithwick & Graham Vyse, *Tweet Justice: Should judges be using social media?*, SLATE.COM, Apr. 30, 2010, at <http://www.slate.com/id/2252544>.

127. *Id.*

128. See Miriam Rozen, *Social Networks Help Judges Do Their Duty*, TEX. LAWYER, Aug. 25, 2009, available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202433293771> (reporting that the judge admitted that “a handful of defense lawyers have objected to her monitoring, ... suggesting she is violating their right to free speech”); Ky. Op., *supra*, note 124 (questioning whether a judge’s active monitoring of offenders under his jurisdiction via social-networking sites would be appropriate under the state’s judicial code of conduct and whether “such conduct raises separation of powers concerns”); see also *In re Baker*, 74 P.3d 1077 (Or. 2003) (censuring a judge who witnesses alleged probation violation, ordered the offender into court, and then presided over a probation-violation hearing).

129. *In re: B. Carlton Terry, Jr.*, *supra*, note 31.

130. Debra Cassens Weiss, *Ga. Judge Resigns After Questions Raised About Facebook Contacts*, ABA J., Jan. 7, 2010, at http://www.abajournal.com/news/article/ga._judge_resigns_after_questions_raised_about_facebook_contacts/.

131. *Id.*

Another example involved a Florida judge, who was accused of having an inappropriate relationship with a prosecutor.¹³² According to the complaint filed by the Florida's Judicial Qualifications Commission, the judge and lawyer exchanged an average of 9.35 communications per day over the course of approximately five months.¹³³ At the time, the prosecutor was trying a capital-murder case before the judge.¹³⁴ The defendant in the case, who had been found guilty and sentenced to death, was awarded a new trial in light of the allegations and the judge resigned prior to appearing before the state agency.¹³⁵

C. Integrity-Related Risks

1. Honesty

"Candor to any tribunal must be the hallmark of lawyer conduct."¹³⁶ The general prohibition against dishonesty is set forth in Rule 8.4, which instructs lawyers to avoid "dishonesty, fraud, deceit or misrepresentation" in all facets of their professional and personal lives.¹³⁷ Similarly, Rule 4.1 prohibits the making of a "false statement of material fact or law" in the course of representing a client.¹³⁸ And Rule 3.3 requires the exercise candor in the specific context of litigation and related proceedings.¹³⁹ Furthermore, Rule 4.1(b) prohibits a lawyer from knowingly "fail[ing] to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."¹⁴⁰

New York personal injury attorney and popular blogger Eric Turkewitz executed an April Fool's prank that has drawn fire from some ethics commentators.¹⁴¹ On April 1, 2010, he posted on his blog that he had accepted a position as

132. See Tonya Alanez, *Broward judge accused of inappropriate relationship with prosecutor*, SUN SENTINEL, Mar. 4, 2010, available at http://articles.sun-sentinel.com/2010-03-04/news/fl-judge-gardiner-investigated-20100303_1_gardiner-judicial-qualifications-commission-state-judicial-watchdog-agency.

133. *Id.*

134. *Id.*

135. See Jon Burstein & Paula McMahon, *Embattled Broward Judge Ana Gardiner Resigns*, SUN SENTINEL, Apr. 22, 2010, available at http://articles.sun-sentinel.com/2010-04-22/news/fl-judge-gardiner-resigns-20100422_1_omar-loureiro-loureiro-trial-gardiner.

136. In re Amberly, 996 A.2d 793, 2010 Del. LEXIS 259, at *20 (Del. June 1, 2010).

137. DEL. PROF. COND. R. 8.4(c).

138. *Id.* at 4.1.

139. *Id.* at 3.3, cmt. 1 (explaining that the rule governs the conduct of a lawyer who is representing a client in the proceedings of an adjudicatory body, and all ancillary proceedings, such as depositions).

140. *Id.* at 4.1(b).

141. See New York Personal Injury Law Blog, at www.newyorkpersonalinjuryattorneyblog.com/.

the official White House blogger.¹⁴² His post spread quickly around the blogosphere, fooling several reporters, including the New York Times.¹⁴³

Not everyone appreciated the humor in his joke.¹⁴⁴ Authors of the *Ethics Alarm* blog wrote that a “web hoax” by a lawyer constitutes misconduct, regardless of the day on which the hoax is performed. Turkewitz disagreed and argued that the hoax was not connected to his representation of a client.¹⁴⁵ In a post responding to his critics, Turkewitz wrote, “if you make the April Fool’s joke an ethical violation, then so too are misrepresentations surrounding surprise parties, Santa Claus and The Tooth Fairy.”¹⁴⁶

2. Civility

Civility is the Delaware standard.¹⁴⁷ This standard is set forth in the *Principles of Professionalism for Delaware Lawyers* (the “Principles”), which are intended to “promote and foster the ideals of professional courtesy, conduct, and cooperation.”¹⁴⁸ The Principles define professional civility as conduct that “shows respect not only for the courts and colleagues, but also for all people encountered in practice.”¹⁴⁹ It requires “emotional self-control” and prohibits “scorn and superiority in words or demeanor.” Conduct by a lawyer that is “abusive, rude, or disrespectful” violates the duty of civility.

Although the duty of civility is emphasized in the Principles, it is, by no means, absent from the rules of professional conduct. For example, Rule 3.5(d) prohibits a lawyer from engaging in conduct “intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal.”¹⁵⁰ And Comment 3 to Rule 8.2 encourages lawyers to “continue traditional efforts to defend judges and courts unjustly criticized,” thus suggesting an affirmative

142. See Posting of Eric Turkewitz, *On Becoming the White House Law Blogger*, (Apr. 1, 2010), at <http://www.newyorkpersonalinjuryattorneyblog.com/2010/04/on-becoming-the-white-house-law-blogger-updated-x3.html>.

143. See Maureen O’Connor, *NYT Fooled Twice on April Fools’ Day*, GAWKER, Apr. 2, 2010, at <http://gawker.com/5507891/nyt-fooled-twice-on-april-fools-day>.

144. See Posting of Eric Turkewitz, *Welcome New Readers (Gawker, Instapundit, Right-Wing Blogosphere and others)*, (Apr. 1, 2010) (subsequently updated), at <http://www.newyorkpersonalinjuryattorneyblog.com/2010/04/welcome-new-readers-gawker-instapundit-right-wing-blogosphere-and-others-bumped-and-updated-x2.html> (listing blogs and news sources that discussed his prank).

145. See Post of Jack Marshall, *Of Interns, Heroes, and Hoaxes*, ETHICS ALARMS BLOG, (Apr. 3, 2010), at <http://ethicsalarms.com/2010/04/03/of-interns-heroes-and-hoaxes/>.

146. Debra Cassen Weiss, *Lawyer Says April Fools’ Joke Was Not an Ethics Violation*, ABA J., Apr. 6, 2010, at <http://bit.ly/bvIFcs>.

147. See, e.g., David S. Broder, *In Del. campaign for Senate, civility rules*, WASH. POST, (July 29, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/28/AR2010072804526.html>; Post by Katrina Dewey, *Del.’s Art of Judging*, HARVARD LAW SCH. FORUM ON CORPORATE GOVERNANCE & FIN. REGULATION, (July 14, 2009), at <http://blogs.law.harvard.edu/corpgov/2009/07/14/delaware%E2%80%99s-art-of-judging/#more-2555>.

148. PRINCIPLES OF PROFESSIONALISM FOR DEL. LAWYERS, (2003), available at <http://courts.delaware.gov/forms/download.aspx?id=39428>.

149. *Id.*

150. DEL. PROF. COND. R. 3.5(d).

duty to act if others violate the decorum rule, as well as a duty to refrain from engaging in conduct that would itself constitute a violation.¹⁵¹

Less-than-favorable commentary directed towards judges has been a common theme. For example, Kristine Ann Peshek was brought before the disciplinary commission not only for revealing confidential information about clients but also for making disrespectful comments about the judges before whom she frequently appeared, including describing one as “Judge Clueless.”¹⁵² Florida attorney Sean Conway was reprimanded for calling a judge an “evil, unfair witch” in a blog post, criticizing her practice of setting what he claimed to be unreasonably short time periods before trial.¹⁵³ He appealed the decision unsuccessfully to the Florida Supreme Court on constitutional grounds, arguing that his comments were protected by the First Amendment.¹⁵⁴

Social media also has been a forum for the unfortunate display of lawyers' incivility towards their adversaries. For example, Assistant State Attorney White, of the *Gilligan's Island*-themed blog post, referred to his opposing counsel as “weasel face.”¹⁵⁵ Jay Kuo was working as a temporary prosecutor through a work-exchange program when he blogged about a case, calling his opposing counsel a “chicken” for requesting a continuance. After being alerted to the posts, the presiding judge described Kuo's conduct as “juvenile, obnoxious and unprofessional.” The judge also noted that Kuo's choice of a public medium for the publication of his commentary was likely reckless due to the possibility that a post will be “distributed uncontrollably.”¹⁵⁶

3. Fairness

Rule 3.4(e) requires a lawyer to act with fairness to the opposing party and counsel in trial.¹⁵⁷ Specifically, the rule prohibits the lawyer from alluding to any matter he does not “reasonably believe is relevant or that will not be supported by admissible evidence.”¹⁵⁸ Rule 4.4(a) prohibits a lawyer from using “means that have no substantial purpose other than to embarrass, delay, or burden” in representing a client.¹⁵⁹ Thus, a lawyer may be limited in how he uses what he finds as

151. *Id.* at 8.2, cmt. 3. *See also id.* at 8.2(a) (a lawyer “shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer”).

152. *See In re Pesbeck, supra*, note 79.

153. *See* Posting of Sean Conway, *Judge Aleman's new (illegal) “One-week to prepare” policy*, JAABLOG, (Oct. 30, 2006), at <http://jaablog.jaablaw.com/2006/10/30/judge-alemans-new-illegal-oneweek-to-prepare-policy.aspx>.

154. *See* Respondent's Response to Rule to Show Cause Order in *Fla. Bar v. Conway*, No. SC08-326, (June 12, 2008), available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2008-07-12-Conway%27s%20Brief%20for%20Florida%20Supreme%20Court.pdf>.

155. *See* Posting of Margaret M. DiBianca, *Just Sit Right Back and You'll Hear a Tale ... of a Lawyer and His Facebook Page*, GOING PAPERLESS BLOG (Apr. 25, 2010), at <http://bit.ly/9Jc1ce>.

156. Pam Smith, *Judge Reprimands Temp Prosecutor for Personal Blog*, LAW.COM, Apr. 28, 2006, at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1146139204085>.

157. DEL. PROF. COND. R. 3.4(e).

158. *Id.*

159. *Id.* at 4.4(a).

the result of an online investigation. In other words, just because information may be titillating does not mean that it is relevant to the case or ethical to use.

For example, imagine a worker's-compensation claimant who alleges to have suffered an on-the-job back injury. He claims that his injury precludes him from enjoying his favorite hobby, deep-sea fishing. The lawyer for the defendant-insurer discovers a video on YouTube of the claimant at a deep-sea fishing competition, clearly as a participant, being interviewed at the start of the event. This evidence would certainly be relevant in the discovery context and one could imagine its purpose for impeachment as well.¹⁶⁰

But what if there was a second video of the same interview but posted on YouTube by a different user. The quality of the second video is quite poor and the sound is barely audible. But, at the end of the clip, the plaintiff is shown receiving a good-luck-kiss from a beautiful woman, who, it turns out, is not his wife. The lawyer shows both clips to the plaintiff at his deposition. He is clearly discomforted by the first video but becomes quite upset when he sees the second.

During pretrial preparations, the lawyer identifies the second video for inclusion as a trial exhibit. He chose the second video over the first because, despite its poor quality, he thinks it will give the plaintiff sufficient motivation to settle the case. Under these facts, the lawyer risks violating Rule 4.4(a) because the true purpose of using the video is to embarrass the plaintiff by exposing his extramarital affair.¹⁶¹

IV. CONCLUSION

All lawyers should be cautious to comply with their ethical duties in the context of social media. Even those who do not participate in social media should be knowledgeable about the potential dangers that exist. The issues are many and complex and should be expected to change and develop with time. Until the duty of competence require actual knowledge of social media, ethical best practices suggest that we familiarize ourselves with the medium at least enough to consider the issues in an educated manner.

160. See *Embry v. Indiana*, 923 N.E.2d 1, 4-5 (Ind. Ct. App. 2010) (finding that prosecution's use of witness' MySpace profile as evidence of impeachment was proper).

161. See DEL. PROF. COND. R. 4.4(a).

CRIMINAL LAW: 2009 DELAWARE SUPREME COURT DECISIONS

Michael F. McTaggart*

The Delaware Supreme Court issued forty-nine criminal law opinions in 2009. The article summarizes opinions addressing certain recurring evidentiary issues, issues of significance or first impression, and termination of sex offender registration requirements.

I. TRIAL EVIDENCE DECISIONS

A. Admission of Background Information Relayed from Dispatcher to Police Officer Was Prejudicial and Violated Defendant's Sixth Amendment Rights—*Sanabria v. State*

In *Sanabria v. State*,¹ the defendant was convicted of Burglary in the Second Degree. On appeal, the court ruled that the investigating officer's testimony about background information he received from the police dispatcher about the home's alarm, which had been offered to explain the officer's actions at the scene, was unfairly prejudicial and violated the defendant's Sixth Amendment rights under the Confrontation Clause.²

At trial, the investigating police officer testified about background information he received from the police dispatcher. The dispatcher told him a neighbor saw a man walking to the back of a home, and also that an alarm service had reported an alarm going off in the home. The officer walked to the back of the house, saw pry marks on the door, but noted the door was locked and the marks could be old. The officer returned to the front of the house. While he checked the front door, which was locked, the dispatcher told him that the alarm service noted motion in the foyer. The officer returned to the back of the house, where the door was now open. The neighbor yelled, "There he is," and the officer saw a man run across a neighboring yard. The officer could not catch the man, whom he described as Hispanic, wearing a multi-colored shirt and distressed jeans, and carrying a cloth bag. Another witness confronted Sanabria a short time later when he walked through her yard, looked through his bag and saw clothes and a zip lock bag inside. She told him to leave and called police. Police caught Sanabria a short time later, and he had a striped shirt inside a black nylon bag. There were no items reported missing from the home in question although two items had been moved on the first floor.³

On appeal, Sanabria claimed error in the trial court's decision to admit the background information from the police dispatcher about the alarm.⁴ The State had offered the dispatcher statements into evidence not for the truth of the matter asserted, but as background to explain the actions of the police officer at the scene. The court initially noted that background information can be necessary to provide the jury with a complete factual picture.⁵ The court held that when

* Mr. McTaggart is a Deputy Attorney General in the Delaware Department of Justice.

1. 974 A.2d 107 (Del. 2009).

2. *Id.* at 109-10.

3. *Id.* at 110-11.

4. *Id.* at 111.

5. *Id.* at 112 (citing *Johnson v. State*, 587 A.2d 444 (Del. 1991) (*en banc*); *New York v. Resek*, 821 N.E.2d 108, 109-110 (N.Y. 2004)).

the State seeks admission of third-party out-of-court statements as background information, not for its truth, the trial court must consider if there is an alternative way to admit the evidence.⁶ Relying on its prior decision in *Johnson v. State*,⁷ the court held that the police officer should testify that he simply acted based “upon information received.”⁸ In instances where there is no alternative to admitting the background information, it nevertheless should not be admitted if probative value of the State’s third-party evidence is substantially outweighed by the prejudice to the defendant.⁹

Applying the balancing test to *Sanabria*, the court noted that the State had presented no physical evidence that *Sanabria* had entered the house, other than the homeowner’s statement that certain items had been moved. The court noted that the homeowner’s statement was unlikely, standing alone, to be sufficient to prove that *Sanabria* entered the house. The court ruled that the dispatcher’s statements relaying the alarm company information were inadmissible as that evidence was used to prove the element of “entering a dwelling” for a burglary charge.¹⁰ The court noted, for future reference, that when the trial court does admit a third-party statement consisting of background information, there must be a limiting instruction advising the jury that the third-party statement is only admitted for the purpose of providing background information, and is not admitted for the truth of the statement.

The court also held that the admission of the background information violated the defendant’s rights under the Confrontation Clause of the Sixth Amendment because neither the alarm company representative nor the dispatcher testified.¹¹ The court stated that there was not a clear line between true background information, which is non-hearsay and only explains the conduct of the police, and hearsay statements which are testimonial and prohibited under *Crawford v. Washington*¹² without the ability to cross-examine the out-of-court declarant.¹³ The court declared that “an officer cannot relate historical aspects of the case, such as reports by others that contain inadmissible hearsay, by arguing that they are necessary to explain the information upon which the officers acted.”¹⁴ The court concluded that the admission of the evidence was not harmless as there was no other evidence at the trial proving that the defendant entered the house, and reversed the Superior Court’s judgment.¹⁵

B. *In Camera* Review of Victim’s Therapist Records—*Burns v. State*

In *Burns v. State*,¹⁶ the defendant was convicted on multiple counts of Second Degree Rape, Second Degree Unlawful Sexual Contact, and a single count of Continuous Sexual Abuse of a Child. On appeal, *Burns* challenged several

6. *Sanabria*, 974 A.2d at 112.

7. *Johnson v. State*, 587 A.2d 444 (Del. 1991) (*en banc*).

8. *Sanabria*, 974 A.2d at 113-14 (citing *Johnson*, 587 A.2d at 448; *United States v. Maher*, 454 F.3d 13, 20 (1st Cir. 2006) (quoting 2 BROUN, ET AL., MCCORMICK ON EVIDENCE § 249, at 103 (5th ed. 1999))).

9. *Sanabria*, 974 A.2d at 113-14.

10. *Id.* at 115-16 (citing DEL. CODE ANN. tit. 11, § 825).

11. *Id.* at 120.

12. 541 U.S. 36 (2004).

13. *Sanabria*, 974 A.2d at 119 (citing *United States v. Maher*, 454 F.3d 13, 23 (1st Cir. 2006)).

14. *Id.* at 120.

15. *Id.* at 120-21.

16. 968 A.2d 1012 (Del. 2009).

of the trial court's rulings including the denial of access to the victims' therapist records. The court held that Burns was entitled to an *in camera* review of the therapist records of the two complaining witnesses upon a plausible showing that the records were material and relevant.¹⁷

The police charged Burns with a number of sexual abuse charges based on the statements given by his two nieces. Burns' presence at a 2006 family gathering prompted his fourteen-year-old niece to remember instances years before when the defendant inappropriately touched her. Days later, she asked her sister if Burns ever inappropriately touched her, and he had. Once the abuse was reported, the girls were interviewed at the Children's Advocacy Center ("CAC").

Prior to trial, Burns moved to compel the production of the girls' therapist records, pursuant to Superior Court Criminal Rule 17, or for an *in camera* review of the records. Burns claimed that the therapist records would be used to impeach the two victims regarding inconsistencies between their CAC interviews and trial testimony. The Superior Court denied the request, finding that the potential inconsistencies were speculation, and citing patient-therapist privilege.¹⁸

On appeal, the Supreme Court reviewed Burns' right to the factual information in the therapist records in light of *Pennsylvania v. Ritchie*.¹⁹ In *Ritchie*, the United States Supreme Court held that a defendant was entitled to an *in camera* review of state Children and Youth Services records of his daughter, the victim.²⁰ The Delaware Supreme Court noted that while the patient's communications with a therapist are privileged, the privilege is weighed against the defendant's Confrontation Clause right to potentially relevant evidence.²¹ The court found that the reasoning of the *Ritchie* decision applied to requests by defendants for records even if not held by a state agency, and that Burns was entitled, upon a proper showing, to an *in camera* review.²²

The court then determined the necessary showing for such a review. Under Superior Court Rule 17, a defendant is required to: (1) "identify precisely the records he or she is seeking, and assert a 'compelling basis' for the request;" (2) "attempt to procure the consent of the victim for release of the records, before resorting to Rule 17;" and (3) demonstrate to the court, "with specificity, that the information he or she is seeking is relevant and material to his defense."²³ The court ruled that, under the last prong, Burns only was required to make a "plausible showing" that the records are "material and relevant."²⁴ The court declared that a more onerous standard would make it impossible for the defendant "to establish materiality and relevance with specificity."²⁵ The trial court also would be required to guard against defense fishing expeditions and could impose sanctions for abuse of the Rule 17 subpoena process.²⁶ The court ruled that Burns had met

17. *Id.* at 1025.

18. *Id.* at 1014-15, 1022-23.

19. 480 U.S. 39 (1987) (plurality opinion).

20. *Id.* at 55-61.

21. *Burns*, 968 A.2d at 1024 (citing *United States v. Nixon*, 418 U.S. 683, 702 (1974); *State v. Wood*, 2007 WL 441953, at *4 (Del. Super. Feb. 18, 2000); DEL. R. EVID. 503(b)).

22. *Burns*, 968 A.2d at 1024 n.41 (citing *Commonwealth v. Barroso*, 122 S.W.3d 554, 558-61 (Ky. 2003); *State v. Green*, 646 N.W.2d 298, 304 (Wis. 2002); *Goldsmith v. State*, 651 A.2d 866, 874-75 (Md. 1995); *State v. Cressey*, 628 A.2d 696, 703-04 (N.H. 1993); *State v. Kelly*, 545 A.2d 1048, 1056 (Conn. 1988)).

23. *Burns*, 968 A.2d at 1025 (citing *Wood*, 2007 WL 441953, at *5-6).

24. *Id.* at 1025.

25. *Id.*

26. *Id.* at 1025-26.

his burden, and remanded the issue to the trial court to conduct an *in camera* review to determine if the factual content of the victims' therapy records would have changed the outcome of the trial.²⁷

C. Evidence of Lack of Intoxication of Decedents in Fatal Crash Admissible Where Defense Claimed Victims' Dangerous Conduct Caused Collision—*Stickel v. State*

In *Stickel v. State*,²⁸ Stickel struck and killed two motorcyclists, and was tried for DUI and two counts of Vehicular Homicide in the First Degree. The court held that the trial court properly admitted toxicology reports showing that victims were not intoxicated.²⁹

To convict Stickel of first degree vehicular homicide, the State had to prove that: "(1) Stickel was driving under the influence of alcohol or drugs at the time of the accident and (2) his criminally negligent driving caused the decedents' deaths."³⁰ Stickel admitted to drinking before driving. His blood alcohol was .108.³¹ At trial, Stickel attempted to raise doubt whether his conduct caused the victim's deaths by putting the victim's behavior into question as the cause.³² The speed limit in the area of the collision was 45 mph. Witnesses testified that the decedents were traveling at speeds ranging from 45 mph to 65 to 70 mph. Witnesses also differed on whether the decedents had been drag racing prior to the fatal crash. The State introduced at trial the toxicology reports of both decedents, which showed the absence of any drugs or alcohol for both men. The defense objected to the admission of this evidence as irrelevant and lacking probative value. The trial court ruled that the toxicology reports were probative because the jury was going to focus on the conduct of the decedents before the collision.³³ Stickel was convicted of DUI and two counts of the lesser-included offenses of second degree vehicular homicide.

On appeal, the court found that the toxicology reports were admissible as relevant to an issue raised by Stickel, namely whether the decedents were speeding, drag racing, or otherwise driving their motorcycles in a dangerous manner. The toxicology reports provided evidence for the jury to weigh when considering whether the defendant's conduct or the acts of the decedents caused the accident. The court affirmed Stickel's convictions, holding that the Superior Court did not abuse its discretion in admitting the reports.³⁴

27. *Id.* (citing *Ritchie*, 480 U.S. at 58 (remand by the United States Supreme Court to trial court for *in camera* review of contested records)). In other evidentiary issues, the court ruled that it was not an abuse of discretion for the trial court to deny a mistrial after the victim's father had a courtroom outburst while testifying. *Id.* at 1017. The court also affirmed the trial court's denial of the defense request to admit the victims' CAC videotapes into evidence under DEL. CODE ANN. tit. 11, § 3507. *Id.* at 1021.

28. 975 A.2d 780 (Del. 2009).

29. *Id.* at 785.

30. *Id.* at 783.

31. *Id.* at 781.

32. *Id.* at 782-83. The trial judge had ruled that the toxicology reports "have probative worth under Rules 401 and 402" and "should be admitted"... "because they [the jury] are going to be focusing on the conduct of the [decedents] in this case...and their driving, their perceptions, their alertness." *Id.* at 782.

33. *Id.* at 781-82. At trial, three witnesses testified that they did not see the decedents engage in any racing. Two witnesses did testify that they overheard an unidentified man at the scene state that he observed the decedents drag racing and doing "wheelies." *Id.* at 781.

34. *Id.* at 785.

D. Prior Rape Conviction of Complaining Witness Was Relevant and Admissible for Defendant's Claim of Self-Defense—*Kelly v. State*

In *Kelly v. State*,³⁵ Kelly was convicted of Assault in a Detention Facility in connection with a fight with another inmate. The court held that evidence of the complaining witness's prior rape conviction was admissible and relevant to the defendant's defense that he committed the assault out of fear that he would be raped.³⁶

Defendant Kelly was serving a sentence at DCC for attempted burglary. Kelly was housed in a cell next to an inmate, Veru, who was serving a life sentence for rape. Kelly claimed that, during a recreation period, a fight broke out in the shower area and Veru grabbed the defendant's genitals and would not let go. After this initial altercation, Veru went to his cell and obtained a lock which he hid in a sock. Veru went to Kelly's cell and swung the sock near Kelly. The fight then resumed and Kelly knocked Veru to the ground and kicked him while he was down, until guards separated the two inmates. Kelly suffered little or no injuries while Veru suffered fairly serious injuries.³⁷

At trial Kelly testified that, for about two months prior to this incident, Veru had made sexual advances toward Kelly. Kelly testified that, during the incident, Veru stated, "I'm going to make you my bitch."³⁸ Kelly testified that he acted in self-defense when he struck Veru. In support of his defense, Kelly sought to offer the evidence of Veru's rape conviction. The trial court allowed the defense to admit Veru's prior felony convictions but not the description of the crimes.³⁹

On appeal, the Supreme Court noted that the facts of the fight were largely undisputed, and the jury had to decide who the aggressor was, whether Kelly believed Veru would sexually threaten him, and whether Kelly used unreasonable force.⁴⁰ For Kelly to establish a defense of justification under DEL. CODE ANN. tit. 11, § 464, he had to show that he had a subjective belief that force was necessary.⁴¹ The court reasoned that the defendant's knowledge or awareness of the victim's past acts of violence influenced the defendant's reasonable belief to use force. The court analyzed the Veru's prior conviction under *Getz*,⁴² and determined that the trial court should have admitted the evidence of Veru's prior rape conviction. The court found that the seventeen-year-old rape conviction was not too remote because Veru had been incarcerated since the conviction. The evidence was material to the defense of self-defense and, while prejudicial, had significant probative value.⁴³ The court reversed the judgment and remanded the case for a new trial.⁴⁴

35. 981 A.2d 547 (Del. 2009).

36. *Id.* at 551.

37. *Id.* at 549.

38. *Id.*

39. *Id.*

40. *Id.* at 550.

41. *Id.* (quoting DEL. CODE ANN. tit. 11, § 464).

42. *Getz v. State*, 538 A.2d 726 (Del. 1988).

43. *Kelly*, 981 A.2d at 551.

44. *Id.*

E. D.R.E. 807 Residual Hearsay Exception—*Purnell v. State*

In *Purnell v. State*,⁴⁵ Purnell was convicted of Murder in the Second Degree, Attempted Robbery in the First Degree, Conspiracy in the Second Degree, and other firearm offenses. The court found no error in the trial court's exclusion of a prior statement by a deceased witness that was made under circumstances that did not contain guarantees of trustworthiness.⁴⁶

Purnell's charges related to the fatal shooting of Tameka Giles. Two young men confronted Mrs. Giles and her husband, Ernest, on a Wilmington street, and demanded money. Mrs. Giles refused, and one of the men shot her in the back as she began to walk away.

Mr. Giles was hysterical when police interviewed him at the hospital.⁴⁷ In a second police interview a few days after the shooting, the police began to suspect Mr. Giles was involved in the murder. The police treated Mr. Giles as a person of interest. The police found that Mr. Giles had a history of domestic violence against his wife, had lied about his reason for being in the neighborhood at the time of the shooting, and had possibly stolen his wife's \$1,700 tax refund check. Mr. Giles first told police that he would not be able to identify either of the suspects unless they were dressed in the same clothing the perpetrators wore. While waiting on a photo array, police observed Mr. Giles making a number of cell phone calls. Mr. Giles then reviewed a photo array, not containing Purnell's picture, and stated that two of the pictures taken together closely resembled the offenders.

In a third interview ten days later, Mr. Giles stated that he had only seen one shooter from the side, and that suspect was wearing a hat. When shown a lineup, Mr. Giles identified a suspect who was not the defendant. Police later received information that Purnell had made incriminating statements about his involvement in the shooting, and arrested Purnell.⁴⁸

Mr. Giles died four months prior to trial. At trial, pursuant to Delaware Rule of Evidence 807 ("Rule 807"), Purnell tried unsuccessfully to admit Mr. Giles' hearsay statements, in which he failed to identify Purnell as a suspect in the photo array. The trial court ruled that the statements did not possess sufficient guarantees of trustworthiness to be admissible under Rule 807, and excluded the statements.⁴⁹

On appeal, the court reviewed the trial court's evidentiary ruling under Rule 807.⁵⁰ The court noted that Rule 807 must be narrowly construed by the trial judge so that the hearsay exception does not swallow the hearsay rule.⁵¹ The

45. 979 A.2d 1102 (Del. 2009).

46. *Id.* at 1107-08.

47. *Id.* at 1103-04.

48. *Id.* at 1104-05.

49. *Id.* at 1106.

50. The residual hearsay exception in DEL. R. EVID. 807 provides:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule, if the court determines that: (A) The statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence....

DEL. R. EVID. 807.

51. *Id.* at 1107 (citing *Cabrera v. State*, 840 A.2d 1256, 1268 (Del. 2004) (citing *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 242 (Del. 2001))).

court held that, to admit evidence under Rule 807, “[t]he Court must be satisfied that there is a guaranty of trustworthiness associated with the proffered hearsay statement that is equivalent to the guaranties of trustworthiness recognized and implicit in the other hearsay exceptions.”⁵²

The court observed that Mr. Giles’ statements were made several days after the event and after he had formed a motive to lie. Mr. Giles originally told the police he could not see the suspects, and then, after he became a person of interest, changed his version and purportedly identified one of the attackers.⁵³ The court found that there were no circumstantial guarantees of reliability implicit under Delaware Rules of Evidence 803 and 804 to support admission of Mr. Giles’ statements.⁵⁴ Purnell claimed that Mr. Giles’ hearsay statements were admissible because the police used Mr. Giles’ tentative identification to obtain a search warrant related to the suspect Mr. Giles had identified.⁵⁵ The court rejected this argument noting that the standard for the issuance of a search warrant is less than the standard for the admission of evidence at trial.⁵⁶ The court concluded that the trial judge’s ruling denying admission of the hearsay statements under Rule 807 was supported by the record.⁵⁷

Purnell also claimed that the trial court improperly denied a mistrial when one of the jurors advised the panel that he was leaving for vacation the following day, and the panel believed that the case would end with a hung jury if they did not reach a verdict that day. Upon learning this, the trial court reminded the jurors of their oath, that only the judge could declare a mistrial, and instructed the jury to consider only the evidence and not the one juror’s vacation plans. The jury returned a verdict later that day.⁵⁸ The court found no evidence in the record that the trial court’s instruction was inherently coercive.⁵⁹ The trial court did not require the jury return a verdict by a specific time or day. The court concluded that the trial court had issued a prompt instruction that was a “meaningful and practical alternative to a mistrial.”⁶⁰

F. Causal Connection Requirement under Felony Murder Statute—*Comer v. State*

In *Comer v. State*,⁶¹ Comer was charged with the death of Bakeem Mitchell, an innocent bystander killed by a ricocheted bullet in a shootout involving Comer and co-defendants Derrick Williams, Clifford Reeves, and Frank

52. *Id.* (quoting *Stigliano v. Anchor Packing Co.*, C.A. No. 05C-06-263-ASB, 2006 WL 3026168, at *1 (Del. Super. Oct. 18, 2006) (citing *Idaho v. Wright*, 497 U.S. 805, 816 (1990)); *accord* *Demby v. State*, 695 A.2d 1152, 1156-57 (Del. 1997).

53. *Id.*

54. *Id.*

55. *Id.* at 1107-08.

56. *Id.* at 1108 (citing *State v. Sisson*, 883 A.2d 868, 876 (Del. Super. 2005) (affidavit for probable cause must set forth sufficient facts “for a judicial officer to form a reasonable belief that an offense has been committed and that seizable property would be found in a particular place to support a finding of probable cause”); DEL. CODE ANN. tit. 11, §§ 2306-07).

57. *Purnell*, 979 A.2d at 1108.

58. *Id.*

59. *Id.* at 1109 (citing *Styler v. State*, 417 A.2d 948 (Del. 1980)).

60. *Purnell*, 979 A.2d at 1109.

61. 977 A.2d 334 (Del. 2009).

Johnson. The court reversed Comer's conviction, holding that the jury instructions were deficient because they permitted the defendant to be convicted of felony murder without proof that he or one of his co-defendants fired the fatal shot.⁶²

At trial, the evidence conflicted regarding who fired the fatal shot. At the time the victim was shot, witnesses observed Comer and co-defendants Reeves and Williams shooting at Johnson as Johnson drove his car the wrong way on Fifth Street. One witness testified that Comer ran and shot at Johnson's car as it passed. Other evidence indicated that Johnson shot at the defendants or shot Mitchell as part of a drive-by shooting. Comer's defense at trial was that there were two separate incidents on the street at the time of the shooting. Comer contended that he was involved only in shooting at Johnson's car, and that Johnson shot the victim. Comer was convicted on all charges except for one weapon offense.⁶³

On appeal, Comer asserted that the trial court committed error when it charged the jury that it could convict Comer of murder even if it did not find that Comer or one of his co-conspirators fired the bullet that killed the victim.⁶⁴ The court traced the history of the felony murder statute and the prior decisions interpreting the statute. In *Weick v. State*,⁶⁵ the court held that the felony murder rule required "a causal connection between the felony and the murder," and "that the killing be performed by the felon, his accomplices, or one associated with the felon in his unlawful enterprise."⁶⁶ The court noted that the "agency theory" is still the rule under the Delaware felony murder statute, even after the statute was amended in 2004.⁶⁷ Prior to 2004, the court had adopted the majority rule that more than mere coincidence of homicide and felony was necessary; the homicide must be committed "in the course of and in furtherance" of the felony.⁶⁸ The court examined the 2004 amendment to the felony murder statute and determined that it did not eliminate the agency theory. While the 2004 amendment did remove the phrase "in the course of and in furtherance of" from the statute, the court found the synopsis of the bill did not address the *Weick* dual limitations of causation and agency.⁶⁹

The court concluded that the jury instruction was incorrect because it allowed the jury to convict Comer on the felony murder count based only on his participation in the gun battle, without a determination whether any of the defendants fired the fatal shot. The trial court's instruction was contrary to the agency theory of felony murder which required the State to prove that the act of firing the fatal shot was committed by either the defendant or one with whom he acted in concert. The court ruled there was sufficient evidence to convict Comer of manslaughter, and the State could elect to retry Comer for felony murder or accept entry of judgment of a conviction on manslaughter.⁷⁰

II. TERMINATION OF SEX OFFENDER REGISTRATION REQUIREMENTS

In two cases, *Heath v. State*,⁷¹ and *State v. Fletcher*,⁷² the court addressed the effect of a pardon and expungement on a party's sex offender registration obligations. In *Fletcher*, the court ruled as a matter of first impression that a

62. *Id.* at 343.

63. *Id.* at 336-37.

64. *Id.* at 337.

65. 420 A.2d 159, 162 (Del. 1980).

66. *Id.*

67. *Id.*

68. *Comer*, 977 A.2d at 338-39 (citing *Weick*, 420 A.2d at 162; *Pennsylvania v. Redline*, 137 A.2d 472, 476 (Pa. 1958)).

69. *Comer*, 977 A.2d at 340.

70. *Id.* at 343.

71. 983 A.2d 77 (Del. 2009).

72. 974 A.2d 188 (Del. 2009).

sentenced juvenile's status as a registered sex offender did not bar expungement by the Family Court and that a juvenile with an expunged record was no longer required to continue to register as a sex offender.⁷³ In *Heath*, another case of first impression, the court ruled that a defendant's unconditional pardon permitted Heath to deregister as a sex offender.⁷⁴

In *Fletcher*, the court considered consolidated appeals by the State from Family Court orders granting expungements to juveniles who had been adjudicated delinquent of sex offenses. The State's argued that the juvenile's designation as registered sex offenders was a "material objection" under DEL. CODE ANN. tit. 10, § 1001(a), which prevented their adjudications from being expunged.⁷⁵ In reviewing the expungement statute,⁷⁶ the court found no definition for the term "material objection" sufficient to prevent an expungement application.⁷⁷ The court found that the expungement statute was not irreconcilably in conflict with the Sex Offender Designation and Registration Statutes.⁷⁸ The court noted that the expungement statute does not contain any language prohibiting application by sex offenders.⁷⁹ There is also no provision under the Sex offender registration statutes that limits the discretion of the Family Court to grant expungements for sex offenders.⁸⁰ The court declared that the two statutes were "easily harmonized" as a juvenile adjudicated delinquent of a sex offense will be required to register and be designated as a sex offender but he or she may, in the appropriate circumstances, obtain expungement of "all evidence of such adjudication."⁸¹ The court noted that the purpose of the juvenile expungement statute had not changed in Delaware for over fifty years: "[t]he underlying purpose of allowing expungement is to afford a juvenile the opportunity of starting [] life 'anew' once having reached the age of majority and otherwise having come within the compliance requirements of the [expungement] statute."⁸² The court also ruled that a juvenile who obtains an

73. *Id.* at 194-96.

74. *Heath*, 983 A.2d at 82.

75. *Fletcher*, 974 A.2d at 192.

76. DEL. CODE ANN. tit. 10, § 1001(a)(c).

77. *Id.* at 193. The court cited the expungement statute which provides in part:

(a) In any case wherein an adjudication has been entered upon the status of a child under 18 years of age and 3 years have elapsed since the date thereof and no subsequent adjudication has been entered against such child, the child or the parent or guardian may present a duly verified petition to the Court setting forth all the facts in the matter and praying for the relief provided for in this section; ...

(c) ...if no material objection is made and no reason appears to the contrary, an order may be granted directing the Clerk of the Court to expunge from the records all evidence of such adjudication, excepting adjudications involving the following crimes: Second degree murder, first degree arson, and first degree burglary, and further directing that all indicia of arrest, including fingerprints and photographs, be destroyed.

DEL. CODE ANN. tit. 10, §§ 1001(a) and (c).

78. 974 A.2d at 193-94.

79. *Id.* at 194.

80. *Id.*

81. *Id.* at 193-94 (citing DEL. CODE ANN. tit. 10, § 1001(c); DEL. CODE ANN. tit. 11, §§ 4120-21).

82. *Fletcher*, 974 A.2d at 194 (quoting *Martin v. State*, 1986 Del. Fam. Ct. LEXIS 199, *3 (Del. Fam. Ct.)).

expungement order is not required to maintain registration as a sex offender.⁸³ The court stated that an expungement by definition lifts the disabilities of the conviction and erases the legal event of conviction or adjudication.⁸⁴

In *Heath*, the defendant had pled guilty to a charge of Unlawful Sexual Contact in the Second Degree in 2000, and was obligated to register as a Tier II sex offender. Heath filed a petition for a pardon with the Delaware Board of Pardons, and the State did not object to the petition. The Governor granted an unconditional pardon. Heath then filed a petition in Superior Court requesting that he be dismissed from further sex offender registration requirements. The Superior Court denied his petition.⁸⁵

On appeal, the court first noted that the Board of Pardons had determined that Heath did not pose a threat to the public and had recommended an unconditional pardon. The Governor chose to grant Heath an unconditional pardon.⁸⁶ Both parties had agreed that the continued registration created a civil disability for the petitioner that was equivalent to the restriction of a civil right. The court ruled that the unconditional pardon extinguished the underlying purpose for the petitioner's continued sex offender registration.⁸⁷ To the extent there was any conflict between the Governor's right to pardon and the sex offender registration requirements, the court, relying on its decision in *Fletcher*, found that the General Assembly did not intend the registration statute to supersede the pardon power of the Governor to grant unconditional pardons.⁸⁸

III. OTHER SIGNIFICANT CASES

A. Right of Defendant to Contest Issue of Guilt under Sixth Amendment—*Cooke v. State*

In *Cooke v. State*,⁸⁹ the court held that the strategy of defense counsel, in arguing for a guilty but mentally ill verdict at trial when the defendant expressly opposed the strategy and claimed he was innocent of all charges, violated the proper functioning of the adversarial process and the defendant's rights under the Sixth Amendment and Due Process Clause.⁹⁰

Cooke appealed from his conviction on eleven charges including rape in the first degree, burglary in the first degree, arson in the first degree, and two counts of murder in the first degree for which he was sentenced to death. The

83. *Id.* at 196-97.

84. *Id.* at 196 (citing *People v. Frawley*, 98 Cal. Rptr. 2d 555, 559 (Cal. Ct. App. 2000); *Stephens v. Van Arsdale*, 608 P.2d 972, 983-84 (Kan. 1980)).

85. *Heath*, 983 A.2d at 79.

86. *Id.* at 80 (citing DEL. CONST. ART. VII, § 1, 2 (provision for the power of the Governor to grant pardons)).

87. *Id.* at 81.

88. *Id.* at 82 (quoting DEL. CODE ANN. tit. 11, § 4364 (“...except as otherwise provided by the Delaware Constitution, or expressly by any provision of the Delaware Code or any court rule, the granting of an unconditional pardon by the Governor shall have the effect of fully restoring all civil rights to the person pardoned.”)).

89. 977 A.2d 803 (Del. 2009).

90. *Id.* at 845-47.

offenses were the result of a series of crimes that occurred in Newark in 2005. On April 26, 2005, a victim entered her apartment to find red writing on her walls stating “We’ll be back” and “Stop messing with my men.”⁹¹ The victim provided police with a list of various items stolen from the apartment. On April 29, 2005, a second victim was awakened by a person in her bedroom shining a light. The man threatened to kill her and demanded money. The suspect obtained money and a credit card from the victim and various personal items including an iPod, and backpack. On May 1, 2005, Lindsey Bonistall, a twenty year University of Delaware student was present in her apartment when an intruder forcibly entered the premises. The intruder eventually attacked the victim by striking her on the head at least twice above her left eye and on her chin. The intruder then tied Bonistall’s hands behind her back and gagged her by tying t-shirts around her mouth. The intruder then raped and murdered the helpless victim. He later started a fire in an attempt to conceal his crimes. The intruder also wrote on the walls of the apartment in blue marker with statements including “KKK,” “More Bodies Are going to be turn in [sic] up Dead,” “We Want Are [sic] weed back,” “Give us Are [sic] drugs back” and “WHITE Power.”⁹²

The police investigation quickly led to Cooke based in part on recovery of the stolen backpack and iPod at Cooke’s residence and an identification of Cooke on a bank surveillance tape using the second victim’s credit card. Cooke also made three phone calls to the Newark 911 center in which he used a false name and tried to disguise his voice. During these calls, Cooke provided details of the crimes that were not publicly known. The police also obtained scrapings from the fingernails of Bonistall which contained the victim’s and Cooke’s DNA. Cooke was subsequently arrested on June 8, 2005, on the crimes perpetrated against the three victims. Cooke was then indicted by the grand jury on the charges including two counts of murder in the first degree and the State sought the death penalty on each murder charge.⁹³

Within three months of Cooke’s arrest, his defense counsel began to consider a defense of guilty but mentally ill. In October, 2006, defense counsel provided Cooke with a memorandum detailing that counsel and not the defendant would decide whether to pursue the guilty but mentally ill verdict. In a January 19, 2007 pretrial conference, defense counsel first informed the trial judge that the defendant did not agree with their strategy to seek a guilty but mentally ill verdict. Cooke wished to maintain his innocence on all charges. Cooke had also disclosed his disagreement with his attorneys during interviews with psychiatrists. During an interview with Dr. Turner, Cooke had admitted and denied the crimes, and also discussed his opposition to counsel’s intent to proceed with a guilty but mentally ill defense. Defense counsel also informed the trial judge of their disagreement with Cooke the day before jury selection.⁹⁴

During jury selection, the State moved to preclude defense counsel from arguing for a guilty but mentally ill verdict. During argument on this motion, Cooke stated that he needed to speak to the trial judge, but no discussion took place with the defendant at that time. The State’s motion was denied by the trial court and the State later unsuccessfully petitioned for a writ of mandamus from the Supreme Court for review of that decision. The trial proceeded while the State’s petition was before the Supreme Court.⁹⁵

During the first day of trial, after the State’s opening statement, defense counsel advised the trial court that the defendant was agitated and had wanted to address the trial judge. Defense counsel then presented an opening statement

91. *Id.* at 810.

92. *Id.* at 808-11.

93. *Id.* at 811-12.

94. *Id.* at 812-15.

95. *Id.* at 816-18.

that sought a guilty but mentally ill verdict. The trial court then adjourned to another courtroom and allowed Cooke to speak. Cooke raised concerns that his attorneys would not ask the necessary questions of witnesses. Cooke also objected to his attorneys' decision to pursue a guilty but mentally ill verdict.⁹⁶

The disagreement between Cooke and his counsel over the guilty but mentally ill strategy eventually led to a series of outbursts by Cooke during the trial, some in the presence of only the trial judge and some in the presence of the trial judge and jury. On February 6, 2007, Cooke was removed from the courtroom at the request of his counsel after a series of outbursts. After an outburst in front of the jury on February 15, 2007, Cooke was again removed from the courtroom and defense counsel moved for a mistrial. Defense sought a mistrial because Cooke had mentioned his disagreement with counsel regarding the guilty but mentally ill issue. The trial court denied the mistrial motion after finding that any prejudice from Cooke's conduct was "self-created."⁹⁷

During the defense case, Cooke continued to tell the trial court about his disagreement with the defense counsel strategy. During the testimony of Cooke's brother, the State elicited testimony about Cooke's history as a drug dealer and a prior drug conviction in New Jersey. This testimony led to another outburst by Cooke about his counsel's guilty but mentally ill defense. Cooke was physically restrained in front of the jury and was removed from the courtroom. Defense counsel also called Dr. Alvin Turner as a witness who testified in part that Cooke had told him that he murdered Bonistall. Cooke advised the trial court that he wished to testify in his defense, against the advice and wishes of defense counsel. Defense counsel obtained leave from the trial judge to allow Cook to be seated during his testimony and to simply testify in narrative form without being questioned on direct examination. Cooke began his testimony protesting his attorneys' decision to pursue a guilty but mentally ill verdict. Cooke denied he was guilty of the offenses and denied that he was mentally ill. Cooke also expressed his displeasure with the rulings of the trial judge. Cooke further advised the jury that his legs were shackled while testifying.⁹⁸

In rebuttal, the State presented evidence from Dr. Mechanick about the defendant's mental state and about home invasions committed by the defendant in New Jersey. Cooke was then allowed to testify a second time in response to the rebuttal evidence. Cooke began to testify about details of the New Jersey crimes that were not in evidence, contrary to the instructions of the trial judge, and was removed from the courtroom. The trial judge ruled that, because of his conduct, Cooke would not be permitted back in the courtroom for the remainder of the trial and would have to watch the proceedings from a television in the holding cell.⁹⁹

During closing arguments, defense counsel argued that Cooke was mentally ill and requested a guilty but mentally ill verdict. Defense counsel also argued that Cooke's disagreement with his attorneys' strategy was evidence of his mental illness. The jury returned guilty verdicts against Cooke on all charges. In the penalty phase, defense counsel argued that Cooke's mental state was a mitigating circumstance, as well as a traumatic childhood, learning disabilities, and the impact of a death sentence on Cooke's family. The jury voted unanimously to recommend death, and the trial court later issued its decision agreeing with the jury's recommendation.¹⁰⁰

96. *Id.* at 818-21.

97. *Id.* at 821-27.

98. *Id.* at 828-35.

99. *Id.* at 836-38.

100. *Id.* at 839-40.

On appeal, the Supreme Court ruled that the decision of Cooke's trial counsel to pursue a guilty but mentally ill verdict violated Cooke's Sixth Amendment rights.¹⁰¹ The court described the duty of defense counsel to "assist the defendant," and noted counsel's duty of loyalty and duty to avoid conflicts of interest.¹⁰² The court stated that the defendant has the "ultimate authority" to make the fundamental decisions in his case which include the right to plead guilty, waive a jury, testify at trial, and appeal.¹⁰³ These fundamental decisions require the defense counsel to consult with the defendant and obtain his fully-informed and publicly-acknowledged consent.¹⁰⁴ The court found that defense counsel, by pursuing a guilty but mentally ill defense against the clear wishes of the client, deprived Cooke of his right to make the fundamental decisions about his case.¹⁰⁵

The court declared that defense counsel had infringed Cooke's right to plead not guilty at his trial.¹⁰⁶ Cooke was competent to stand trial and chose to plead not guilty and contest his innocence at trial.¹⁰⁷ The court ruled that defense counsel overruled Cooke's right to plead not guilty by arguing that Cooke was guilty but mentally ill.¹⁰⁸ According to the court, the effect of counsel's decision was to deny Cooke assistance of counsel to pursue a not guilty verdict, and also, denied Cooke the right to require the State to prove its case beyond a reasonable doubt and the right to adversarial testing of the State's case.¹⁰⁹

The court also ruled that defense counsel had negated Cooke's decision to testify in his own defense.¹¹⁰ Although Cooke wanted to testify at trial, his counsel declined to call him as a witness. The trial judge called Cooke as a witness and he denied committing the charged offenses.¹¹¹ The court found defense counsel violated the defendant's right to testify at trial about his innocence when counsel introduced a confession that Cooke made to a doctor without obtaining a waiver of the psychotherapist-patient privilege.¹¹² Defense counsel also tried unsuccessfully, due to the religious privilege, to obtain testimony from Cooke's pastor about whether Cooke had admitted to the crimes.¹¹³

101. *Id.* at 841.

102. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Faretta v. California*, 422 U.S. 806, 820 (1975); DEL. LAWYERS' RULES OF PROF'L CONDUCT R. 1.4(a)(1); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS 16 cmt. c (2000)).

103. *Cooke*, 977 A.2d at 841 (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)).

104. *Id.* at 842 (citing *Florida v. Nixon*, 543 U.S. 175, 187 (2004)).

105. *Id.* at 842.

106. *Id.* at 842-43.

107. *Id.* at 842.

108. *Id.* at 842-43.

109. *Id.* at 842.

110. *Id.* at 843-44.

111. *Id.* at 844.

112. *Id.* (citing DEL. R. EVID. 503).

113. *Id.* (citing DEL. R. EVID. 505).

The court next ruled that the decisions of defense counsel deprived Cooke of the right to an impartial jury.¹¹⁴ The court noted that defense counsel chose a strategy which was in direct conflict with the decision of Cooke and led to frequent, predicted outbursts by the defendant in front of the jury.¹¹⁵ The court also concluded that Cooke's jury trial right was compromised by defense counsel asking that he be removed from the courtroom, including portions of the trial addressing the guilty but mentally ill testimony.¹¹⁶ The decision of defense counsel also affected the impartiality of the jury at the penalty phase since Cooke's convictions at the trial established a statutory aggravating circumstance as a matter of law.¹¹⁷

The court noted that the United States Supreme Court's decision in *Florida v. Nixon*,¹¹⁸ did not apply as Cooke had adamantly opposed his counsel's choice to pursue a guilty but mentally ill defense.¹¹⁹ In *Nixon*, the United States Supreme Court held that if a defendant is advised by counsel of a trial strategy and does not give "express consent," prejudice to the defendant is not presumed.¹²⁰ The *Nixon* Court ruled that "[t]he reasonableness of counsel's performance, after consultation with the defendant yields no response, must be judged in accord with the inquiry applicable to ineffective-assistance of counsel claims," that is, whether counsel's representation "fell below an objective standard of reasonableness."¹²¹ Unlike the defendant in *Nixon* who did not respond to counsel's decision to concede guilt at the trial stage of a capital case, Cooke repeatedly advised his attorneys of his complete disagreement with the strategy of pursuing a guilty but mentally ill defense.¹²²

The court next addressed Cooke's ineffective assistance of counsel claims on direct appeal since the actions of trial counsel were not in dispute and were clearly set forth in the trial record.¹²³ The court ruled that the typical ineffective assistance of counsel claim would be analyzed under the two-pronged test in *Strickland v. Washington*.¹²⁴ However, the court relied on *United States v. Cronin*,¹²⁵ a companion case to *Strickland*.¹²⁶ In *Cronin*, the United States Supreme Court ruled that a defendant did not need to prove prejudice under the *Strickland* test, as prejudice is presumed "where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."¹²⁷ Applying *Cronin*, the *Cooke* court found

114. *Id.* at 845-46.

115. *Id.* at 845.

116. *Id.*

117. *Id.* at 846.

118. 543 U.S. 175 (2004).

119. *Cooke*, 977 A.2d at 847.

120. *Id.* at 846 (quoting *Nixon*, 543 U.S. at 179).

121. *Id.* at 846-47 (quoting *Nixon*, 543 U.S. at 178).

122. *Id.* at 847.

123. *Id.* at 848.

124. 466 U.S. 668 (1984).

125. 466 U.S. 648 (1984).

126. *Cooke*, 977 A.2d at 848.

127. *Id.* at 848 (quoting *Cronin*, 466 U.S. at 659-62).

a “two-fold breakdown in the adversarial system of justice” at Cooke’s trial.¹²⁸ First, the court noted that defense counsel did not assist Cooke with his contention that he was innocent of all charges.¹²⁹ Second, the court ruled that trial counsel, by pursuing an inconsistent strategy of guilty but mentally ill, “failed to subject the prosecution’s case to meaningful adversarial testing” and undermined the “requirement that the State prove Cooke’s guilt — and his eligibility for the death penalty — beyond a reasonable doubt.”¹³⁰ The court concluded that the conduct of Cooke’s defense counsel was “inherently prejudicial, and [did] not require a separate showing of prejudice because Cooke’s counsel negated his basic trial rights.”¹³¹

The court also ruled that the trial court had an obligation to inquire into the propriety of representation provided to Cooke by his counsel.¹³² The court noted that “[w]hen defense counsel decides to concede not only guilt, but also eligibility for the death penalty over the defendant’s express objection, the trial judge has an obligation to inquire into the propriety of counsel’s representation.”¹³³ The court reversed the judgment of the Superior Court and remanded for a new trial.¹³⁴

In a dissenting opinion, Chief Justice Steele and Justice Jacobs expressed fundamental disagreement with the majority’s analysis that the ineffective assistance of counsel claim should be governed by *Cronic* and not *Strickland*.¹³⁵ The dissent stated that Cooke’s defense counsel pursued an appropriate trial strategy that upheld all of Cooke’s fundamental trial rights.¹³⁶ The dissent concluded that under *Strickland*, the conduct of the defense counsel complied with the Sixth Amendment right to effective assistance of counsel.¹³⁷ The dissent noted that in *Florida v. Nixon*,¹³⁸ the United States Supreme Court applied *Strickland*, not *Cronic*, to a review of defense counsel’s failure to obtain express consent from the

128. *Id.* at 849.

129. *Id.* at 849-50.

130. *Id.* at 850.

131. *Id.*

132. *Id.* at 850-52.

133. *Id.* at 852.

134. *Id.* at 857. In a separate issue, the court found no error in the trial court’s denial of a motion to suppress evidence seized by police during a search of Cooke’s residence. After Cooke had been identified as a suspect in the Bonistall murder, the police obtained a search warrant for Cooke’s residence. Cooke was also wanted on an outstanding arrest warrant. The search warrant authorized a search for all paperwork and information, electronic or otherwise, that would indicate Cooke’s whereabouts. During the search, the police identified several items of evidentiary value but outside the scope of the search warrant. Cooke’s girlfriend who also lived at the property was present for the search, and later accompanied the detective to the police station for questioning. She subsequently returned with the police to the residence and consented to the police taking the additional items. Those items included a pair of shoes, a composition book, a cassette tape, three disposable cameras, a Nokia cell phone, and a bicycle. The record supported the finding of the trial court that the police obtained voluntary consent from Cooke’s girlfriend for the search and seizure of the challenged items.

Id. at 853-57.

135. *Id.* at 857-58.

136. *Id.* at 858.

137. *Id.*

138. 543 U.S. 175 (2004).

defendant for a trial strategy.¹³⁹ In the dissent's view, the rule in *Cronic* was limited to cases "where counsel does nothing or next to nothing to discharge his duty to present a vigorous defense."¹⁴⁰ The dissent also concluded that trial counsel in Cooke's case satisfied the Sixth Amendment by conceding guilt as a trial tactic in the guilt phase to avoid increasing the chances of the death penalty at the penalty phase.¹⁴¹

B. Right to Missing Witness Instruction—*Hardwick v. State*

In *Hardwick v. State*,¹⁴² Hardwick was tried on 36 counts of Rape in the First Degree, two counts of Attempted Rape in the Second Degree, and two counts of Continuous Sexual Abuse of a Child, arising from charges that he had sexual relations with his minor stepdaughter and her friend. The court held that the defense was not entitled to a missing witness instruction when State did not call the defendant's nephew as a witness and where the witness was out of state and not helpful to the prosecution's case.¹⁴³

In 2004, Hardwick married, and moved in with his wife and her daughter. Hardwick's adult nephew sometimes stayed at the house as well. The State alleged that the defendant engaged in sex acts with the two girls in the home, when the girls were twelve and thirteen years old. There was inconsistent testimony about whether the defendant also sometimes engaged in group sex. Some of these encounters were alleged to have included the defendant's nephew.¹⁴⁴ In his police interview, the nephew denied that either he or Hardwick engaged in any sex acts.¹⁴⁵

At trial, the defense subpoenaed Hardwick's nephew to testify, but did not do so pursuant to DEL. CODE ANN. tit. 11, § 3523, which pertains to out-of-state witnesses. The State had not yet determined if it would charge the nephew with any sex offenses.¹⁴⁶ The nephew did not appear, and the Superior Court denied Hardwick's request for a missing witness instruction.¹⁴⁷ Hardwick was convicted on 29 counts of rape and two counts of attempted rape.¹⁴⁸

On appeal, Hardwick claimed that the missing witness instruction would have permitted him to argue that his nephew's testimony would be unfavorable to the State.¹⁴⁹ The court stated that "[a] missing witness inference is permissible

139. *Cooke*, 977 A.2d at 859.

140. *Id.* at 860 (citing *Nixon*, 543 U.S. at 189; *Bell v. Cone*, 535 U.S. 685 (2002)).

141. *Cooke*, 977 A.2d at 860-64.

142. 971 A.2d 130 (Del. 2009).

143. *Id.* at 134-35.

144. *Id.* at 131-32.

145. *Id.* at 132.

146. *Id.*

147. *Id.* at 132-33. Although the State had not charged the nephew, the trial court appointed counsel to represent him. In denying the request for a missing witness instruction, the trial judge noted concerns about the witness' Fifth Amendment rights, possible jury speculation, and the Rule 403 balancing test. *Id.* at 132.

148. *Id.* at 133.

149. *Id.* The defendant asserted that the trial judge had violated his rights to a fair trial and to effective representation as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, and the Delaware Constitution, Article I, § 7. *Id.* The Supreme Court found that Hardwick's assertion of constitutional error was made in a cursory and unsupported manner and the claims were not fully and fairly presented. *Id.* (citing *Ortiz v. State*, 869 A.2d 285, 290-91 (Del. 2005)).

only where it would be “natural” for the party to produce the witness if his testimony would be favorable.”¹⁵⁰ According to the court, it would not be natural for the State to call the defendant’s nephew since his testimony would only highlight inconsistencies in the testimony of other State witnesses. The nephew’s identity was equally known to both parties and the State, like the defense, would have needed to compel his appearance under the out of state witness procedures under DEL. CODE ANN. tit. 11, § 3523. Since it was not natural for the State to call this witness, the jury would not have improperly speculated about his failure to testify; therefore, the Superior Court did not abuse its discretion in denying Hardwick’s request for a missing witness instruction, or in denying Hardwick’s request to make a related argument to the jury.¹⁵¹

C. Sufficient Evidence for Maintaining a Vehicle Charge—*Brown v. State*

In *Brown v. State*,¹⁵² the court held that the defendant could not be convicted of Maintaining a Vehicle for Keeping Controlled Substances, when there was no evidence of “affirmative activity” to utilize the vehicle in which he was traveling as a passenger.¹⁵³

Brown was a passenger in a vehicle that had been stopped by members of the Governor’s Task Force because one of the car’s headlights was out. The car was operated by Curtis Boswell, who possessed \$1,017 in cash and was subsequently arrested for traffic and non-drug offenses. The front seat passenger was detained on a non-drug warrant from another state. Brown, who had been seated in the rear of the car, was patted down and found in possession of twenty-two bags of marijuana. At trial, Brown was convicted of Possession with Intent to Deliver Marijuana and Maintaining a Vehicle for Keeping a Controlled Substance.¹⁵⁴

Brown appealed the Superior Court’s denial of his motion for judgment of acquittal for Maintaining a Vehicle for Keeping a Controlled Substance. The Supreme Court reviewed the evidence against Brown in comparison to the earlier decision in *Priest v. State*.¹⁵⁵ In *Priest*, the court vacated Priest’s Maintaining a Vehicle conviction based on a passenger’s mere presence in a vehicle.¹⁵⁶ The court noted that *Priest* requires that the State prove “some affirmative activity . . . to utilize the vehicle to facilitate the possession, delivery, or use” of the controlled substance.¹⁵⁷ The Supreme Court found that the trial judge erred by distinguishing *Priest*.¹⁵⁸ The court noted that the Maintaining a Vehicle charge requires “more than

150. *Id.* at 133 (quoting *Wheatley v. State*, 465 A.2d 1110, 1111 (Del. 1983)). The court noted that “the missing witness inference is rooted in notions of common sense, specifically that where a party fails to call an available witness with important and relevant knowledge, it may be that he has something to fear in the witnesses’ testimony.” *Id.* (quoting *Wheatley*, 465 A.2d at 1111).

151. *Id.* at 134-35.

152. 967 A.2d 1250 (Del. 2009).

153. *Id.* at 1254-55.

154. *Id.* at 1251-52. The officers who stopped the vehicle were part of “Operation Safe Streets” which is a statewide program manned by police and probation officers to apprehend non-compliant probationers. *Id.* at 1251 n.1 (citing *Carrigan v. State*, 945 A.2d 1073, 1077 n.13 (Del. 2008)).

155. 879 A.2d 575 (Del. 2005).

156. *Id.* at 576.

157. *Id.*

158. *Brown*, 967 A.2d at 1255.

merely proving that a defendant possessed or used a controlled substance while in a vehicle.”¹⁵⁹ A review of the record did not show that Brown had exercised any control over the vehicle in order to establish the element of “keep or maintain” the vehicle. Brown was a passenger in the car who possessed marijuana but there was no evidence that he acted in concert with the driver of the car. The driver of the car was not charged with any drug offenses. There was also no evidence that Brown ever exercised any control over the operation of the car or directed its operation. The court held that the Superior Court erred as a matter of law in denying the judgment of acquittal on the Maintaining a Vehicle charge.¹⁶⁰

The court also addressed the claim regarding the sufficiency of the trial court’s instruction on Maintaining a Motor Vehicle offense.¹⁶¹ The State had indicted Brown on the charge of “Use of a Vehicle for Keeping Controlled Substances.”¹⁶² The trial judge instructed the jury that “a person is guilty of Maintaining a Vehicle when he knowingly keeps, uses, or maintains any vehicle which is resorted to by persons using, keeping or delivering controlled substances ... or which is used for keeping or delivering controlled substances.”¹⁶³

The Supreme Court found the instruction was not a correct statement of the law as the statute requires that a person “must keep or maintain a vehicle for the use of controlled substances or for the purpose of keeping or delivering controlled substances.”¹⁶⁴ The trial court’s instruction allowed for conviction based on mere use of the vehicle, which is a lower standard than keeping or maintaining a vehicle.¹⁶⁵

D. Sufficiency of Evidence to Support Carrying a Concealed Deadly Weapon and Felony Resisting Arrest—*Dickerson v. State*

In *Dickerson v. State*,¹⁶⁶ the court affirmed the defendant’s convictions of Carrying a Concealed Deadly Weapon on his own property, and for felony Resisting Arrest based on the defendant’s use of force in resisting handcuffing by the arresting trooper.¹⁶⁷

The police received a report from Dickerson’s next door neighbor that the defendant had brandished a firearm at him in connection with an ongoing dispute. The responding trooper interviewed the neighbor, and then walked down a

159. *Id.* at 1254. The court noted that *Priest* did permit the State to convict on a Maintaining a Vehicle charge based on a single instance of possession or use of a controlled substance. However, the court emphasized that the State was required to prove more than the defendant’s mere possession of drugs in a vehicle. *Id.* at 1254 (citing *Priest*, 879 A.2d at 579; DEL. CODE ANN. tit. 16, § 4755(a)(5)).

160. *Brown*, 967 A.2d at 1255.

161. *Id.* at 1255-56.

162. *Id.* at 1255.

163. *Id.*

164. *Id.* at 1256 (citing DEL. CODE ANN. tit. 16, § 4755(a)(5)).

165. *Id.*

166. 975 A.2d 791 (Del. 2009).

167. *Id.* at 796-98.

dirt road to Dickerson's home. When the trooper knocked and identified himself, Dickerson responded with profanity and initially refused to open the door. The defendant then opened the door, but refused to show his hands or state whether he had any weapons. The trooper drew his handgun and ordered Dickerson to show his hands. Instead, the defendant began to walk toward his SUV which was parked near his home. The trooper became concerned that Dickerson was attempting to obtain a weapon from the vehicle and pinned him against the vehicle. Dickerson refused to comply with police commands to "stop resisting" and "give me your hands" and he struggled with the trooper. The trooper eventually was able to handcuff the defendant and a pat down search uncovered a .38 caliber pistol hidden in Dickerson's rear pocket.¹⁶⁸

Dickerson was convicted at trial of Carrying a Concealed Deadly Weapon and felony Resisting Arrest.¹⁶⁹ On appeal, the court first reviewed Dickerson's claim that he had the right under DEL. CONST. art. I, § 20, to carry a concealed deadly weapon inside his home and could not be convicted of that charge.¹⁷⁰ The court ruled that, even assuming that the Delaware Constitution permitted the defendant to carry a concealed deadly weapon inside his trailer, the defendant was entitled to no such protection once he carried his pistol outside his home.¹⁷¹ There was no evidence to support the defendant's argument that he was compelled by the police to leave his home, even if he believed that he was under arrest when the trooper arrived at the front door.¹⁷²

The court next found sufficient evidence to support the defendant's felony conviction for resisting arrest.¹⁷³ The Resisting Arrest statute was amended in 2006 to add a new felony provision,¹⁷⁴ which requires the State to prove that the defendant "prevents or attempts to prevent an arrest by using force or violence towards a police officer attempting to effectuate an arrest."¹⁷⁵ Dickerson claimed that he did not resist arrest with "force or violence" and could not be convicted under the felony provision. The court found there was no evidence that the defendant struck or attacked the police officer,

168. *Id.* at 793.

169. *Id.*

170. *Id.* at 795.

171. *Id.* at 796. The court did not address the State's contention that *Smith v. State*, 882 A.2d 762 (TABLE), 2005 WL 2149410, at *3 (Del. Aug. 17, 2005) rejected any right to bear arms in a concealed manner. *Dickerson*, 975 A.2d at 795. *See Smith*, 2005 WL 2149410, at *3 ("[The Delaware Constitution] contains no language that entitles a person to conceal the weapon he carries. Rather, any such entitlement involves only a privilege to carry a concealed weapon—a privilege that is regulated by statute: 11 Del. C. § 1441.").

172. *Dickerson*, 975 A.2d at 796. Since the defendant had voluntarily left his trailer, the court did not address defendant's claim that under *State v. Stevens*, 833 P.2d 318, 319-20 (Or. Ct. App. 1992), a person cannot be convicted of carrying a concealed deadly weapon within one's own house. *Dickerson*, 975 A.2d at 795-96.

173. *Id.* at 798.

174. DEL. CODE ANN. tit. 11, § 1257(a).

175. The Resisting Arrest statute as amended now provides:

A person is guilty of resisting arrest with force or violence when:

The person intentionally prevents or attempts to prevent a police officer from effecting an arrest or detention of the person or another person by use of force or violence towards said police officer, or

Intentionally flees from a police officer who is effecting an arrest against them by use of force or violence towards said police officer, or

so the question was whether the defendant's actions constituted "force."¹⁷⁶ The court noted the police officer's testimony that the defendant struggled during the handcuffing and pulled his hands away from the officer who was trying to restrain him.¹⁷⁷ Under the dictionary definition of "force," the court concluded that the defendant used "strength or power" that was sufficient to establish the charge.¹⁷⁸ The court noted that the defendant used force *towards* the officer, which permitted a rational jury to convict on the felony Resisting Arrest charge.¹⁷⁹

E. Section 274 of Accomplice Liability Statute Applies to All Offenses which Can Be Divided into Degrees—*Allen v. State*

In *Allen v. State*,¹⁸⁰ the State proceeded against Allen under the theory of accomplice liability, and Allen was convicted of Robbery in the First Degree, Burglary in the Second Degree, and Aggravated Menacing. On appeal, court held that trial court erred in refusing Allen's request for a jury instruction under DEL. CODE ANN. tit. 11, § 274 on the issue of Allen's culpability as an accomplice for the aggravating fact that his co-defendant possessed a gun.¹⁸¹

The allegations against Allen arose from offenses occurring on three separate dates. In the first incident, the State alleged that Allen and co-defendants Howard and McCray robbed a bank. McCray, armed with a handgun, cut a hole in the roof of the bank, and entered the bank when it opened the next morning. Allen and Howard acted as lookouts. In the second incident, McCray climbed to the roof of a check cashing business, and entered the store the following morning when a manager arrived. Allen and the other defendant acted again as lookouts. In the third incident, McCray tried to cut open the roof of a Wal-Mart with a blow torch. Allen again acted as a lookout. McCray pulled a handgun on an employee who had observed what he was doing.¹⁸²

At trial, the State relied on an accomplice liability theory to convict Allen of Robbery in the First Degree, Burglary in the Second Degree, and Aggravated Menacing. The aggravating factor in each of the offenses was the use of a

continued from page 217

Injures or struggles with said police officer causing injury to the police officer. Resisting arrest with force or violence is a class G felony.

A person is guilty of resisting arrest when the person intentionally prevents or attempts to prevent a peace officer from effecting an arrest or detention of the person or another person or intentionally flees from a police officer.

DEL. CODE ANN. tit. 11, § 1257.

176. *Dickerson*, 975 A.2d at 798.

177. *Id.*

178. *Id.* (quoting RANDOM HOUSE UNABRIDGED DICTIONARY 748 (2d ed. 1993)).

179. *Id.*

180. 970 A.2d 203 (Del. 2009).

181. *Id.* at 213-14.

182. *Id.* at 207-09.

gun. The trial court refused Allen's request for a jury instruction under DEL. CODE ANN. tit. 11, § 274 regarding his own mental state and his accountability for the use of a gun.¹⁸³

On appeal, the court reviewed the two-step process for determining accomplice liability under DEL. CODE ANN. tit. 11, §§ 271 and 274.¹⁸⁴ Section 271 provides that a person "is guilty of an offense committed by another person if an appropriate degree of complicity in the offenses can be proved."¹⁸⁵ Section 274 provides that the degree of the offense depends on the defendant's "culpable mental state" and "accountability for an aggravating fact or circumstances."¹⁸⁶ The court noted that its prior panel decisions were inconsistent on the issue of whether Section 274 applied only where the underlying offense could be divided into degrees with different mental states for each degree.¹⁸⁷ The court decided the *Allen* case *en banc* to reconcile its prior decisions.¹⁸⁸

The court found that, under Section 274, when an offense is divided into degrees, each person is only guilty for the crime commensurate with his own mental culpability and accountability for an aggravating circumstance.¹⁸⁹ The court ruled that Allen was entitled to Section 274 instructions on the lesser-included offenses for Robbery in the First Degree, Burglary in the Second Degree, and Aggravated Menacing, because the jury was required to determine Allen's accountability of the aggravating factor for these crimes, namely, his co-defendant's gun.¹⁹⁰ The court reversed Allen's conviction, and also overruled all prior inconsistent panel decisions.¹⁹¹

183. *Id.* at 209.

184. *Id.* at 210.

185. *Id.* (citing *Chance v. State*, 685 A.2d 351, 354-56 (Del. 1996); DEL. CODE ANN. tit. 11, § 271; DEL. CRIM. CODE WITH COMMENTARY 48 (1973)).

186. *Allen*, 970 A.2d at 210 (citing *Chance*, 685 A.2d at 356-58; DEL. CODE ANN. tit. 11, § 274).

187. *Allen*, 970 A.2d at 210-11 (comparing *Herring v. State*, 805 A.2d 872 (Del. 2002) with *Johnson v. State*, No. 517, 2007, 2008 WL 1778241 (Del. Apr. 21, 2008); *Scott v. State*, No. 545, 2007, 2008 WL 4717162, at *1 (Del. Oct. 28, 2008); *Richardson v. State*, No. 630, 2007, 2007 WL 2111092 (Del. July 24, 2007); *Coleman v. State*, No. 395, 1999, 2000 WL 1840511 (Del. Dec. 4, 2000)).

188. *Allen*, 970 A.2d at 210-11.

189. *Id.* at 213-14.

190. *Id.* at 214.

191. *Id.* (citing *Johnson v. State*, No. 517, 2007, 2008 WL 1778241 (Del. Apr. 21, 2008); *Richardson v. State*, No. 630, 2007, 2007 WL 2111092 (Del. July 24, 2007); *Coleman v. State*, No. 395, 1999, 2000 WL 1840511 (Del. Dec. 4, 2000)). In addressing other issues in the case, the court found no error in the trial court's decision to limit cross-examination of codefendant Howard to crimes within the scope of DEL. R. EVID. 609. *Allen*, 970 A.2d at 215. The court did rule that the prosecutor's closing argument regarding the defendant's financial condition was improper. *Id.* at 218-19. The parties also agreed that the trial court's kidnapping instruction was deficient under *Weber v. State*, 547 A.2d 948 (Del. 1988). *Id.* at 219.

APPENDIX
DELAWARE SUPREME COURT
CRIMINAL LAW OPINIONS – 2009

Allen v. State, 970 A.2d 203, 213-14 (Del. 2009) (trial court erred in refusing defense request for jury instruction under DEL. CODE ANN. tit. 11, § 274 on the issue of the defendant's culpable mental state as an accomplice).

Banther v. State, 977 A.2d 878, 881-87 (Del. 2009) (even though Superior Court correctly did not permit State to introduce evidence that defendant had planned *in advance* with co-defendant to kill victim, in compliance with Supreme Court's mandate from an earlier appeal, the evidence did support State's theory that defendant acted as an accomplice in the killing; testimony by co-defendant was not barred by doctrine of judicial estoppel; State could convict defendant without establishing whether he or the co-defendant actually killed the victim).

Betts v. State, 983 A.2d 75 (Del. 2009) (defendant's refusal to comply with the condition of his probation that he discuss the facts of his sexual offenses during counseling sessions constituted a violation of probation even if defendant originally entered a *no contest* plea).

Bezarez v. State, 983 A.2d 946 (Del. 2009) (where defendant in murder case claimed that his gun fired accidentally twice, State properly admitted evidence that defendant fired the same gun three weeks earlier).

Binaird v. State, 967 A.2d 1256, 1260-61 (Del. 2009) (trial court did not err in limiting cross examination that became argumentative of assault victim on the issue of level of his pain).

Brown v. State, 967 A.2d 1250, 1254-55 (Del. 2009) (passenger in a vehicle could not be convicted of Maintaining a Vehicle where there was no evidence of "affirmative activity" to utilize the vehicle).

Buchanan v. State, 981 A.2d 1098, 1102 (Del. 2009) (defendant's unlawful entry into his own home in violation of a court order could not be used as the predicate offense to establish burglary).

Burns v. State, 968 A.2d 1012, 1024-25 (Del. 2009) (trial court abused discretion in refusing to conduct an *in camera* review of the therapist records of the two child victims where defendant was charged with rape and related charges).

Campbell v. State, 974 A.2d 156, 163-69 (Del. 2009) (trial judge correctly admitted testimony about future drug deal by the defendant, and admitted testimony by downstream drug purchaser who identified purchased substance as methamphetamine).

Comer v. State, 977 A.2d 334, 343 (Del. 2009) (trial court instructions were deficient in permitting the defendant to be convicted of felony murder without proof that he or one of his co-conspirators fired the fatal shot during a street gun fight).

Cooke v. State, 977 A.2d 803, 845-47 (Del. 2009) (conduct by defense counsel in arguing that defendant was “guilty but mentally ill,” which was contrary to the wishes of the defendant, violated the Sixth Amendment and the Due Process Clause).

Dabney v. State, No. 292, 2008, 2009 WL 189049, at *2 (Del. Jan. 14, 2009) (where one of defendant’s convictions was reversed on appeal, trial judge who resentenced defendant on remaining convictions after appeal did not sentence defendant with a closed mind where judge heard from both attorneys and the defendant prior to resentencing defendant to less time than original sentence).

Dejesus v. State, 977 A.2d 797, 799-800 (Del. 2009) (defendant could not challenge violation of probation sentence when he later pled guilty to drug charge that formed the basis for the violation).

Dickerson v. State, 975 A.2d 791, 796 (Del. 2009) (defendant could be convicted of Carrying a Concealed Deadly Weapon based on possession of a handgun while he was entirely on his own private property).

Drumgo v. State, 976 A.2d 121, 124 (Del. 2009) (prosecutor’s statements about defendant’s testimony were disparaging and improper, but did not warrant reversal as defense counsel did not object and the case was not close).

Gibson v. State, 981 A.2d 554, 558-59 (Del. 2009) (reasonable evidentiary basis supported trial court’s decision that defendant was competent to stand trial; jury could conclude that burglary at 7:00 p.m. in February occurred at nighttime).

Greene v. State, 966 A.2d 824, 828 (Del. 2009) (erroneous admission of defendant’s incriminating statements in violation of *Miranda* was harmless error as testimony of victim was sufficient to sustain the conviction).

Hall v. State, 981 A.2d 1106, 1111-12 (Del. 2009) (trial court properly ruled that officer had reasonable suspicion to detain defendant observed in a known drug area and engaging in conduct consistent with the sale of illegal drugs).

Hankins v. State, 976 A.2d 839, 841 (Del. 2009) (trial judge correctly instructed the jury on the elements of murder first degree, and instructed on extreme emotional distress as part of the lesser included charge of manslaughter).

Hardwick v. State, 971 A.2d 130, 134 (Del. 2009) (trial judge did not abuse discretion in refusing to give missing witness instruction requested by defense when State did not call defendant’s nephew as a witness and where the witness was out of state and not helpful to the prosecution’s case).

Harper v. State, 970 A.2d 199, 202-03 (Del. 2009) (State properly cross-examined defendant, charged with multiple counts of sex-related crimes, about an unrelated incident in which he used a false name).

Harris v. State, 965 A.2d 691 (Del. 2009) (police officer’s *de minimus* injuries suffered in scuffle with defendant did not constitute “physical injury” to support a conviction for Assault in the Second Degree).

Harris v. State, 968 A.2d 32, 37-38 (Del. 2009) (sufficient evidence supported defendant's conspiracy conviction as a lookout for robbery and attempted robbery).

Heath v. State, 983 A.2d 77 (Del. 2009) (defendant's unconditional pardon for conviction of Second Degree Unlawful Sexual Contact restored all civil rights and defendant was no longer required to register as a sexual offender).

Jackson v. State, 990 A.2d 1281, 1287-89 (Del. 2009) (trial court did not err in denying motion to sever defendant's three burglary charges where joinder was not prejudicial and probable cause existed for the defendant's arrest).

Jenkins v. State, 970 A.2d 154, 160 (Del. 2009) (police had probable cause to conduct strip search of suspect at police station who was arrested for a drug offense and whose clothing had strong smell of marijuana).

Johnson v. State, 983 A.2d 904, 917-22, 929, 931, 934-936, 938 (Del. 2009) (State could obtain by subpoena served on the prison, a copy of the defendant's letters to his girlfriend which were copied pursuant to prison policy; police officer was properly permitted to testify about details of defendant's prior rape conviction in penalty hearing; defendant's statements to his brother about the reason for entering plea were inadmissible hearsay; admission of unadjudicated prior misconduct evidence was plain, clear and convincing; defendant's prior conviction for Rape in the Fourth Degree constituted a prior conviction involving the use of force to establish an aggravating circumstance under DEL. CODE ANN. tit. 11, § 4209; death sentence was not disproportionate).

Kelly v. State, 981 A.2d 547, 550-51 (Del. 2009) (defendant who claimed that he assaulted fellow inmate who he thought was going to rape him should have been permitted to admit the prior rape conviction of the fellow inmate).

King v. State, 984 A.2d 1205 (Del. 2009) (nighttime search of probationer's home was reasonable where the probation officers utilized the factors promulgated by the department to ascertain the existence of reasonable suspicion).

Lecates v. State, 987 A.2d 413, 426 (Del. 2009) (trial judge properly found based on evidence in nonjury trial that defendant had knowledge of gun in car, had the ability to put the gun under his control, and the intent to possess the gun and constructively possessed the weapon).

Maddrey v. State, 975 A.2d 772, 778-79 (Del. 2009) (handguns found in a locked safe in defendant's bedroom, where drugs were recovered, were sufficiently accessible to sustain convictions for Possession of a Firearm During the Commission of a Felony and Possession of a Deadly Weapon by a Person Prohibited).

McNally v. State, 980 A.2d 364, 370 (Del. 2009) (State ballistics expert sufficiently testified to the principles and methodology used to reach his conclusions regarding similarity of gun casings).

Michaels v. State, 970 A.2d 223, 229, 231 (Del. 2009) (trial judge's curative instruction adequately cured any error by police officer's testimony about defendant's tear drop tattoo; defendants were not entitled to mistrial based on trial court asking prosecutor not to stand too close to testifying defendant).

Mitchell v. State, 984 A.2d 1194 (Del. 2009) (sufficient evidence supported inference that defendant possessed a gun where he made oral and written threats of violence to bank teller; prosecutor did not improperly elicit testimony about defendant's record when defendant volunteered his own conviction).

Norman v. State, 968 A.2d 27, 30-31 (Del. 2009) (police officers could not testify as lay witnesses for the purpose of identification of marijuana).

Norman v. State, 976 A.2d 843, 847 (Del. 2009) (in a capital case, State may use evidence of criminal conduct in another state to establish an aggravating circumstance under Delaware law; trial court improperly excluded evidence of defendant's lack of criminal responsibility under the law of the state where he committed the act because evidence was supportive of mitigating circumstance).

Parker v. State, 981 A.2d 551, 553-54 (Del. 2009) (trial judge erred in failing to instruct on Offensive Touching as a lesser-included offense of Robbery in the Second Degree).

Pennewell v. State, 977 A.2d 800 (Del. 2009) (defendant's act of dropping bag of marijuana to the ground did not constitute an act of concealment sufficient to support conviction for tampering with physical evidence).

Purnell v. State, 979 A.2d 1102, 1197-08 (Del. 2009) (statement of deceased witness which lacked any indicia of trustworthiness was not admissible under DEL. R. EVID. 807).

Robinson v. State, 984 A.2d 1198 (Del. 2009) (defendant's possession of a steak knife with a 4¾ inch blade was sufficient evidence to support conviction for Possession of a Deadly Weapon by a Person Prohibited).

Sanabria v. State, 974 A.2d 107, 115, 120 (Del. 2009) (police officer's testimony which repeated hearsay statements of police dispatcher unfairly prejudiced the defendant; alternatively, court held that admission of hearsay statements violated defendant's rights under the Sixth Amendment Confrontation Clause).

State v. Brower, 971 A.2d 102, 109-10 (Del. 2009) (trial court erred in ruling post-trial that it should have *sua sponte* instructed the jury on a lesser-included offense that was not requested by either party).

State v. Fletcher, 974 A.2d 188, 195-97 (Del. 2009) (Family Court may issue expungement order despite defendant's designation as a sex offender and juvenile with expunged record does not maintain status as registered sex offender).

Stickel v. State, 975 A.2d 780, 785 (Del. 2009) (trial court properly admitted toxicology reports showing that victims killed in accident caused by defendant were not intoxicated).

Torres v. State, 979 A.2d 1087, 1095-96 (Del. 2009) (trial court did not err in allowing prosecutor to question witness about possible penalty for perjury, and prosecutor did not improperly vouch for credibility of the same witness by stating the terms of the witness's plea agreement).

Weber v. State, 971 A.2d 135, 141-43 (Del. 2009) (trial court erred in declining to instruct the jury on Offensive Touching as a lesser included offense of Robbery in the First Degree).

Wehde v. State, 983 A.2d 82 (Del. 2009) (defendant was correctly sentenced as an habitual offender for fourth felony conviction on the charges of Rape in the Fourth Degree, Conspiracy in the Second Degree, and Sexual Solicitation of a Child, and his fifteen-year mandatory prison sentence was not an abuse of discretion or unconstitutional).

David Wright v. State, 980 A.2d 372, 378-79 (Del. 2009) (defendant's restraint of robbery victim was independent of the underlying robbery and sufficient to support a conviction for Second Degree Kidnapping).

Donald Wright v. State, 980 A.2d 1020, 1023-24 (Del. 2009) (defense counsel's tactical decision not to object to alleged prejudicial evidence in rape trial constituted a waiver of the right to appellate review of the issue).

Zugehoer v. State, 980 A.2d 1007, 1013-14 (Del. 2009) (defendant's multiple methods used to commit a single offense required merger of the three convictions of Home Improvement Fraud into one charge).