

REPORT ON ENGAGEMENT LETTERS IN TRANSACTIONAL PRACTICE

Professionalism Project Report to the Corporate & Banking Law Section

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INTRODUCTION

In 1995, the Corporate & Banking Law Section of the State Bar of Georgia (the "Section") initiated an ethics and professionalism project to focus on issues of special importance to corporate practitioners, including possible changes in the Georgia Standards of Professional Conduct. Since then the Professionalism Project has proceeded under the leadership of co-chairs Elliott Goldstein and Walter Grant, with the assistance of a committee of experienced corporate practitioners from around the state (the "Committee").¹

At the heart of lawyer professionalism is the ethical conduct of lawyers in their relationships with clients. Absent a sound professional relationship between lawyer and client, all other facets of professionalism--such as the professionalism among lawyers or between the lawyer and the court--lose importance.

Because lawyer-client relationships should begin and proceed with a clear understanding of the responsibilities and expectations of both the lawyer and the client, the Committee decided that its first priority would be to develop a bank of suggested engagement letter provisions for use in transactional practice. The following report is the product of that effort. The report both encourages the use of engagement letters by transactional lawyers and suggests language appropriate for the component provisions of a thorough engagement letter.²

¹ The other members of the Committee are Robert W. Beynart, Susan Cahoon, George L. Cohen, John J. Dalton, F.T. Davis, Jr., Steven E. Fox, Walter M. Grant, Thomas R. McNeill, Jonathan D. Sprague, J. Edward Sprouse, Jeffrey B. Stewart, M. Robert Thornton, and John K. Train, III. D. Christopher Wells of the Mercer Law School is Reporter. In August 1995, Walter Grant assumed the co-chairmanship in place of Lawrence Klamon, who had resigned following his appointment as President and CEO of Fuqua Enterprises, Inc.

² The provisions and commentary assume in general the applicability of current Georgia law and State Bar standards. Some attention is given to other sources of ethical norms.

The American Bar Association's Section of Business Law reports that in recent years engagement letters have been used with greater frequency in establishing lawyer-client relationships.³ Several national projects and commercial publications⁴ have recently undertaken to recommend engagement letters, or at least agreements in principle, as vehicles for avoiding common misunderstandings between lawyers and their clients and between lawyers and their Bars.⁵ The Committee's suggestions and commentary draw in part upon ideas and analyses articulated in those endeavors.

As commentators point out, some practitioners believe that engagement letters impose an unnecessary formality and cost upon the lawyer-client relationship.⁶ Such lawyers prefer to use engagement letters only where required, such as to meet an ethical or statutory requirement for a written fee arrangement. Other practitioners, especially transactional lawyers, acknowledge the real costs of drafting and negotiating engagement letters but take a longer view in assessing their benefits. They see engagement letters as an opportunity to clarify the terms of the professional representation, with concomitant advantages for both the client and the lawyer as the representation begins, proceeds and eventually concludes. Taking the time to draft and discuss an engagement letter provides an opportunity to identify and anticipate less apparent potential problems in the representation. Approached with sensitivity to client concerns, such letters have the potential for not only documenting but also solidifying the professional relationship. Engagement letters also provide counsel with an opportunity to delimit the representation to avoid conflicts with other clients, whether former, current or future.

³"Engagement, Disengagement and Declination: Law Firm Policies on Documenting the Attorney-Client Relationship," ABA Section of Business Law Committee on Law Firms at 2-3 (draft 3/25/94).

⁴ E.g., "1996/97 Model Terms of Engagement" (American Lawyer Media, New York, 1996); "A Model Engagement Letter Proposed by the Corporate Counsel Section of the New York Bar Association," ACCA Docket (Spring 1994).

⁵ E.g., "Conflicts of Interest Issues," 50 Business Lawyer 1381 (August 1995), prepared by the ABA Section of Business Law Task Force on Conflicts of Interest. This article also discusses participation in "beauty contests" and suggests procedures for clarifying the understanding of the lawyer and prospective client in such situations.

⁶ One potential "cost" of integrating the agreement in a writing is the effect on the statute of limitations. In Georgia, an action arising from breach of a duty imposed by an oral (parol) contract or one only partly reduced to a writing must ordinarily be brought within four years of the breach. Ga. Code Ann. Section 9-3-25 (formerly Code 1933, Section 3-706); *Plumlee v. Davis*, 221 Ga. App. 848, 852-53 (1996). In contrast, in such an action arising from a written contract, including written contracts for legal services, the statute of limitations may extend to six years. Ga. Code Ann. Section 9-3-24 (formerly Code 1933, Section 3-705). See *Buchanan v. Huson*, 39 Ga. App. 734, 148 S.E. 345 (1929). These limitations can be shortened within reason by the contract itself. *Rabey Elec. Co. V. Housing Auth.*, 190 Ga. App. 89, 378 S.E.2d 169 (1989).

Engagement letters vary greatly in length and complexity. The simplest do little more than identify the firm and client and memorialize the fee arrangement. More thorough engagement letters go beyond that to define the scope and purpose of the representation, describe the obligations of the client and lawyer, establish the bases for future withdrawal or termination of representation, and inform the client of current or potential conflicts of interest. A disproportionate amount of this report addresses this final issue, and for good reasons: conflicts of interest raise very knotty problems; current and potential conflicts must be disclosed to clients; and in such disclosure, the engagement letter becomes a necessary predicate for informed client waivers of such conflicts.

This report comprises three sections. Section I contains a suggested outline for a thorough engagement letter and an example of a complete engagement letter. The purpose of this “sample” engagement letter is to orient the reader to the core elements of a transactional engagement letter and to provide a concrete example of how the various elements fit together into a coherent whole. Section II focuses on each of the constituent elements of a thorough engagement letter and suggests alternative provisions, with very brief commentary. The alternatives suggested by no means exhaust the possibilities. Section III explores the law and ethical concerns pertinent to each of the elements of the letter, with a more detailed discussion of the problems each provision is designed to address. By organizing each of the three sections under a consistent menu of topics, the Committee hopes that the reader will be able to locate pertinent provisions and commentary with relative ease.

In working with the issues addressed in this report, the Committee identified a few areas in which the Georgia Code of Professional Responsibility and Standards might be amended to improve clarity and application to modern practice. Appended to this report are the Committee’s suggested amendments.

I. THE BASIC ENGAGEMENT LETTER

As already noted, engagement letters vary from the simple and straightforward to the extremely detailed and complex. The “sample” engagement letter set forth below falls in the middle of that spectrum. The sample letter includes provisions, as most engagement letters should, that seek to clarify the following seven categories of information:

1. Acceptance of Engagement
2. Identification of the Client
 - a. Corporation, partnership, individual, etc.
 - b. Disclaimer of representation of affiliated parties
3. Identification of the Matter
 - a. Description of work to be done
 - b. Limitations on engagement (e.g., duration)
4. Scope of the Engagement
 - a. Legal services to be provided by lawyer
 - b. Legal services to be provided by others
 - c. Responsibility of lawyer for review of opinions and work product of other providers of legal services
5. Fees and Billing
 - a. Basis for billing fees (e.g., hourly rate; blended rate; contingent fee; reduced hourly rate and contingent fee; fixed fee based upon task; premium billing based upon results)
 - b. Retainer and refreshers
 - c. Expenses (which charged to client; time of payment; mark-ups)
6. Conflicts of Interest
 - a. In general
 - b. With former client
 - c. Representing an organization; multiple clients
 - d. Imputed conflicts
7. Termination of Engagement

**SAMPLE ENGAGEMENT LETTER
(REAL ESTATE DEVELOPMENT PROJECT)**

HYPOTHETICAL

Lawyer is a partner in a firm in Savannah, Georgia. Paul P. Promoter is a client of Lawyer's Firm; most recently his matters have been handled by Lawyer. Promoter has been developing real estate for several years, beginning with residential properties and then doing extensive work in small shopping centers. Promoter uses his wholly-owned corporation, Development, Inc. ("Development"), as his business vehicle.

Promoter has come to Lawyer and explained that he has put together options on several contiguous parcels near the Savannah River. Developer intends to assemble those parcels into a single unit, build a multi-use development, including hotel space, retail space, and resort-type homes, and ultimately sell the lot, in parcels or as a whole, for an astronomical profit. Promoter tells Lawyer that he wants the Firm to do his legal work during the life of this project, and he wants Lawyer to take the lead in doing that work.

After consultation with his partners, Lawyer and the Firm are eager to take on the engagement. The proposed development is a quantum leap for Promoter, and if successful the Firm can expect numerous lucrative engagements on Promoter's future projects. Similarly, while the Firm has handled many development projects in the past, the size and scope of Promoter's planned project would put Firm in the "big leagues" of real estate development. Nonetheless, Lawyer is aware of other representations which may create conflicts of interest affecting the project. For example, one of Promoter's potential construction lenders is a sometime client of the Firm, and Lawyer recalls that one of the real estate parcels involved was the subject of some bitter estate litigation conducted by one of Lawyer's partners. Further, if Promoter is successful in involving local investors in the project, it is likely that some of the limited partners in the proposed limited partnerships will be connected with the Firm in some way.

Because of the scope and somewhat unusual nature of the representation, Lawyer decides it would be best to send Promoter a formal engagement letter. That letter follows.

Dear Paul:

[1. Acceptance of Engagement]⁷

We appreciate your selection of Ascot, Breedlove and Cohan (the "Firm") to perform legal services for you in connection with the proposed SeaPoplar project (the "Project"), as set out below. This letter will confirm the terms of our engagement as orally agreed upon at our conference on [date].

[2. Identification of the Client]

Our clients in this transaction will be you, Paul P. Promoter, individually, and your wholly-owned corporation, Development, Inc. ("Development"). It is anticipated that one or more limited partnerships will be formed in connection with the purchase, development, and/or operation of the Project, and that Development will act as general partner in those partnerships. In that event, the Firm will act as counsel to the limited partnerships.⁸ The Firm has not been engaged to, and expressly does not agree to, represent any other person or party in connection with the Project. Specifically, the Firm will not represent the limited partners of any partnerships formed as anticipated. You have agreed that the Firm may confirm in writing to any other participant in the Project that the Firm does not represent that participant.

[3. Identification of the Matter]

The matter on which we have been engaged involves the assembly, development, and ultimate sale of what you have termed the SeaPoplar Project. You have advised us that you hold options on several contiguous parcels of land on the Savannah River some miles downstream from the city, and that you intend to assemble those parcels as a single unit and build a multi-use development, including hotel, retail, and residential space. You intend to use Development as your business vehicle in this Project and expect Development to be general partner of any limited partnerships which are formed with respect to the Project. You anticipate that build-out of the hotel and retail space will be accomplished by December 31, 1997, and that completion of the residential infrastructure will be accomplished by June 30, 1998. It is your intention ultimately to sell all portions of the Project to third parties not connected with you.

[4. Scope of the Engagement]

⁷ The bracketed headings would not ordinarily be included in a client engagement letter and are included only to orient the reader. The following section will elaborate on each of these categories and, in most cases, provide alternative provisions.

⁸ In including this provision in the engagement letter, counsel must consider the potential conflicts of interest that exist between the corporate general partner and the limited partners and limited partnership. At the point the limited partnerships come into existence, counsel should inform the entities of the potential conflicts and seek their consent to the representation.

We will provide all legal services directly relating to the purchase, development, and operation of the Project. Without limitation, we expect those services to include the drafting of appropriate legal documents to create the limited partnerships you expect to form; the drafting of legal documents, examinations of title, closing of real estate purchase transactions, and obtaining appropriate land use approvals from involved regulatory agencies with respect to development and operation of the property; drafting construction and related documents with respect to development of the property; drafting appropriate documents with respect to financing of the purchase and development of the property; drafting appropriate documents with respect to the operation of the property upon completion; drafting appropriate documents with respect to the ultimate sale of the Project, or portions of it; negotiations with other parties with respect to all of the above functions; and advising with you and Development with respect to these matters. Notwithstanding the above the Firm has not been engaged to provide any services with respect to environmental matters which may impact upon any phase of the Project. We understand that you will obtain other counsel to advise you and to take such action as is necessary with respect to any environmental matters, including negotiating with the appropriate regulatory agencies and obtaining environmental permits necessary for the Project. Of course, we will cooperate with such counsel towards furtherance of the overall development of the Project, but we will not be responsible for any legal matters relating to environmental concerns.

[5. Fees and Billing]

The Firm will charge fees for its services based upon the regular hourly rates of the lawyers and support personnel working on this matter. It is anticipated that the undersigned will be the partner in charge of the matter; my current hourly rate is \$200 per hour. It is expected that John Jones and May Smith, partners in the Firm, will spend considerable time on this matter; their hourly rates are \$175 per hour. It is also anticipated that Ann Page, a younger partner, will be involved in the Project, and her rate is \$150 per hour. We anticipate that at least three associate attorneys will work on this matter frequently, but we have not yet identified those associate attorneys. The hourly rates for our associates range from \$80 per hour to \$125 per hour. We will utilize our paralegal assistants in the matter, and expect at least one such assistant to be regularly engaged on this file. Our paralegal time is charged at \$65 per hour. These hourly rates may change during the life of this Project, and your billings will reflect such changes. Finally, we reserve the right to add or substitute personnel on this matter as we see fit. The hourly rates of our other partners who may work on the Project currently range from \$140 to \$225 per hour.

We will also bill you for out-of-pocket expenses advanced to your account. We routinely make disbursements on client accounts for telephone bills, copying expenses, courier charges, travel expenses, overnight express deliveries, facsimile transmissions, local travel mileage, and the like. All of these expenses will be charged to your file at our cost, with the exception of copying expenses. We assess a 20% surcharge on our in-house copying services to cover otherwise unrecoverable overhead costs. Out-of-office copying expenses are billed to you at our cost. We will obtain your permission before incurring any expense item in excess of \$500. Further, we will obtain your permission before retaining outside experts, consultants, or other support personnel or facilities whose fees are expected to exceed \$1,000. You agree that you and/or Development

are directly responsible for the fees of any outside experts, consultants, or other support personnel or facilities and will pay those fees directly to the outside party upon our request.

Our statements for fees and expenses will be rendered to you monthly and will be due upon receipt. Any statement which is not paid within 45 days of its date will be considered past due. Past due billings will accrue interest at the rate of 1/2% per month until paid. As you know, we expect this engagement to be quite intensive on our part, and you can expect substantial periodic legal bills from us. It is important that you budget for the payment of these bills. Nonpayment of our statements could give rise to the Firm's withdrawal from your representation.

[6. Conflicts of Interest]

We understand that Megabank is a potential lender on the SeaPoplar project. We have advised you that we represent Megabank from time to time in connection with loans for other construction and development projects, and we have discussed with you the possible conflict that may arise during our representation of you in connection with loans from Megabank as contemplated by this engagement letter. You have consented to both representations. This letter, therefore, confirms our disclosure and discussions with you of our existing representation of Megabank and your consent to our continuing that representation while assuming our representation of you in connection with loans from Megabank as outlined in this letter. For your information, we are asking Megabank to execute a letter confirming its consent to our representation of you as described in this letter. Megabank is represented by separate counsel, who will advise Megabank on the issue of its consent.

In addition, we have advised you that this firm formerly represented a party in litigation concerning one of the real estate parcels involved in your current development plans. That representation has concluded, but under some circumstances we may have to seek the consent of that former client to continue our current representation of you. We judge that eventuality to be remote, and this letter confirms our disclosure and discussions with you of that potential conflict of interest and your consent to our representation of you as outlined in this letter.

Finally, if you are successful in involving local investors in the project, it is likely that some of the limited partners in the proposed limited partnerships will be current or former clients of the firm. Because such cases can create conflicts of interest and because there may exist potential conflicts between the general partner and limited partners, we shall seek consent of all parties to our continued representation as outlined in this letter.

[7. Termination of Engagement]

It is anticipated that our engagement will remain in effect until the Project is substantially completed. We understand that the Project will be substantially completed when the hotel phase has in place an operating hotel, when the retail space is physically complete, and at least one major tenant is physically on-site, and when the streets, utilities and other infrastructure of the residential development are in place and the last building lot is ready for construction. It is anticipated that all of this activity will be accomplished by June 30, 1998. Our engagement will

terminate on that date, or on such earlier date on which the Project has been substantially completed. Further, in the event the Project becomes inactive, or for any reason the Firm performs no substantive legal services for you for a period of one year, our engagement shall be deemed terminated.

Of course, you have the right to discharge the Firm at any time and for any reason. In the event we are discharged before the Project is substantially completed, we would expect you to retain other counsel to provide legal services through its completion. In that event, we will cooperate with you and your other counsel to effect as smooth a transition of legal services as possible. You will, however, be responsible for whatever out-of-pocket expenses the Firm incurs in making that transition, specifically including the costs related to the duplication of files and file materials and the physical transfer of the same to your new counsel, as well as for the time expended by the Firm to effect that transfer. In the event of premature termination at your request, all of our outstanding statements for fees and services will be immediately due and payable, and any subsequent statement we render for services related to the transfer of your representation will be due and payable upon your receipt of the same.

There are circumstances in which the Firm may feel compelled to withdraw from your representation prior to the substantial completion of the Project, such as the development of an irreconcilable conflict of interest between you and some other client of the Firm, or your failure to pay our fee and expense statements when due, to name two possibilities. In the event the Firm withdraws from the representation prior to the substantial completion of the Project, the Firm again will make every effort to make transition of your legal business to a successor law firm as smooth as possible. In that circumstance, the Firm will assume responsibility for its out-of-pocket costs relating to the duplication and physical transfer of your files and outstanding materials, and the Firm will waive its time charges relating to that transfer. Again, the Firm's outstanding statements for fees and disbursements will be immediately due and payable upon the Firm's withdrawal from your representation or upon the rendering of a final statement.

If you agree with these terms of our engagement, we would appreciate your signing and dating the enclosed copy of this letter in the space below and returning it to us. We will need a signed engagement letter before we can commit the substantial resources this matter will require. Of course, if you have any questions or comments whatsoever, we would welcome an opportunity to discuss your concerns with you.

Paul, we are flattered and delighted that you have selected the Firm to represent you in this exciting venture, and we look forward to its ultimate successful conclusion.

Very truly yours,

Lawyer For Firm

Agreed to:

Paul P. Promoter, Individually

Development, Inc., by its President,
Paul P. Promoter

II. SAMPLE ENGAGEMENT LETTER--ALTERNATIVE PROVISIONS

The Sample Engagement Letter (Real Estate Development) set forth in Section I includes provisions in each of the seven categories of information recommended for inclusion in a thorough engagement letter. The following suggestions are in most cases alternatives to those set forth in the sample letter. Where noted, a few of the Sample Engagement Letter provisions are repeated for ease of reference.

1. Acceptance of Engagement

[Opening Paragraph Stating Execution Requirement]

We appreciate your selection of Ascot, Breed and Cohan (the “Firm”) to perform legal services for you as set out below. This letter confirms the terms of our engagement. If you agree with these terms, please sign and date the enclosed copy of this letter and return it to us. We will need a signed engagement letter before we can commit the substantial resources this matter will require. Of course, if you have any questions or comments whatsoever, we would welcome an opportunity to discuss your concerns with you.

Although the Committee recommends formal execution of the engagement letter, for all the reasons that it would recommend execution of any written contract, it recognizes that some lawyers may occasionally eschew execution in favor of the client’s passive confirmation of an oral agreement. In that case, the following paragraph would be appropriate:

[Passive Acknowledgment of Engagement Terms]

We appreciate your selection of Ascot, Breed and Cohan (the “Firm”) to perform legal services for you as set out below. This letter confirms the terms of our representation as agreed to orally on [date]. You need do nothing further to confirm our representation of you in this matter. If you believe that this letter misstates the agreed-upon terms of our representation, please advise us in writing no later than [date].

2. Identification of the Client

The sample engagement letter assumes a long-term engagement in a project that will involve numerous other parties besides the client, including lenders, investors, contractors, trades persons, *et al.* It is important that the engagement letter state specifically who the client(s) will be so that the lawyer’s responsibilities and loyalties are established at the outset.

Lawyers may represent a single, clearly identifiable client or, on occasion, several clients simultaneously. In either case, given the possibility of potential conflicts with those or other

current clients or with former clients, and of potential confusion of loyalties, counsel must be attentive to clarity in client identification. Additional language may be necessary to make clear who the client is and who the client is not. Some suggestions are as follows:

[Single Client -- Corporation]

Our client in this engagement will be Company, Inc., and those of its wholly-owned subsidiaries for whom we actually perform services. We have not been retained to provide legal services to or for any of Company, Inc.'s, shareholders, officers, directors, employees, or any other natural person, or for any of its other affiliates.

[Single Client -- Association]

Our client in this engagement will be the Association. By accepting this representation of the Association, we are not thereby undertaking to serve as counsel for its individual members. Unless we otherwise represent a company that is a member of the Association, or receive confidential information belonging to a member company in the course of our representation of the Association, it is agreed that the Firm remains free to represent other parties on the other side of other transactions from, or having an interest adverse to, such member company.

Sometimes the fiscal realities of a transaction require that a single Firm represent multiple clients, regardless of the potential hazards of such practice. In that event, it is particularly important that the engagement letters being sent to those multiple clients deal with the conflicts of interest that may arise. The following language attempts to make disclosure of those issues:

[Multiple Clients]

The representation of more than one party (commonly referred to as a "joint representation") presents special ethical considerations for a lawyer. These considerations are discussed in greater detail below. A joint representation provides certain cost advantages, or savings, over the costs that would otherwise be incurred--where each party retains separate counsel. The Code of Professional Responsibility for Lawyers, as adopted in Georgia, permits the joint representation of multiple clients when the law firm can represent the interests of each client adequately and when each client knowingly consents to that representation.

There is a potential that conflicts of interest could arise among you with respect to the subject matter of our representation. Based upon the information available to us at this time, however, we are not aware of any actual conflicts among you. We ask that you please call our attention immediately to any matter that you may become aware of that you believe might suggest an actual conflict of interest.

There does not now appear to be any sufficient strategic reason for separate representation. If you become aware of any strategic or other considerations that, in your opinion, might be of such magnitude as to prevent us from continuing jointly to represent you (or any of you), we ask that you promptly call such matters to our attention.

In an ordinary attorney-client relationship, information given to the lawyer by the client in confidence as part of the representation may be considered privileged information--that is, the lawyer may not disclose that information to any third party without the client's consent. The attorney-client privilege also exists in the context of a joint representation, at least with respect to third parties. That is to say, the privilege extends to protect the confidences of the entire group from unauthorized disclosure to any person who is not a member of the group. In the context of a joint representation, however, the attorney-client privilege does not permit the lawyer to keep confidences or secrets of any member of the group from any other member of the group. In other words, information that any one of you provides to us in connection with this representation will be available to all of you.

If circumstances arise during the course of this matter that require or make it desirable that any of you obtain separate legal representation in this matter, our firm would be free to continue to represent the remaining members of the client group in this matter. By signing this engagement letter and accepting our joint representation, you agree that, should it become necessary or desirable for any of you to retain other counsel, you will not seek to disqualify the Firm from continuing to represent the remaining members of the group for whom we have acted as counsel.

3. Identification of the Matter

[Generic Development Project]

You have engaged this firm to represent you in a matter involving [describe matter]. You have advised us that you intend to develop [describe business development contemplated and goals]. You intend to use [development company] as your business vehicle in [project name] and expect [development company] to be general partner of any limited partnerships which are formed with respect to the project. We will assist in the formation of both the development company and the limited partnerships and represent them once formed. You expect to complete the project by [date]. It is your intention ultimately to sell all portions of the project to third parties not connected with you.

4. Scope of the Engagement

[Single Client -- Transactional Representation]

At this time we have been retained by the Company only in the described matter. To the extent there are future requests for legal services with respect to this matter, services will be governed by this engagement letter unless otherwise mutually agreed. In the event our engagement is expanded to cover other matters, the expanded engagement will be in writing. We understand that the Company relies or may rely on its general counsel in this matter and other outside law firms in other matters; accordingly, our services and responsibilities are limited to the specific matters for which you request our services.

We understand that the scope and nature of our engagement is limited to representing the Company in negotiating the acquisition from [A Corporation] of the assets of [B Corporation], including, without limitation, the preparation and closing of an asset purchase agreement, covenants not to compete, loan and security agreements and such other documents as may be advisable in order to consummate the purchase of the assets. We understand that the Company has retained or will retain other counsel to handle the state, local and federal tax consequences of this transaction, and that we have no responsibility with respect to these matters. We will, of course, work with the Company's other counsel with respect to such matters, but we assume no responsibility in that regard.

At other times, a heavy user of legal services may retain the Firm to perform regular ongoing services for a geographic location or practice specialty. The following language may be appropriate in such a case:

[Single Client--Regular Representation]

We understand that the scope of our engagement is limited to serving as regular legal counsel for Company on all matters within Georgia, with the understanding, however, that we will perform such services only to the extent that the Company directs specific assignments to us for attention. We understand that assignments may be directed to us by you, by the Board of Directors, or by one or more persons designated to us by you or the Board. At this time, we have been specifically engaged to [describe specific engagement].

[Single Client--Special Representation]

We understand that the scope of our engagement is limited to serving as counsel on environmental matters and to advise you and to take such action as is necessary with respect to any environmental matters relating to the project, including negotiating with the appropriate regulatory agencies and obtaining environmental permits necessary for the Project. We will cooperate with, and take action only as directed or approved by, your general counsel.

5. Fees and Billing

From the myriad fee agreements appropriate to a transactional representation, the following are illustrative of the breadth of possibilities.

[Hourly Rate--Sample 1]

Our hourly rates are established for each attorney and legal assistant depending upon the nature and length of his or her experience and particular skills, and are reviewed and revised periodically, generally annually. Our current billing rates for partners range from \$150 to \$225 per hour. The rates for those partners who are expected to work on this matter are as follows: [List partners and rates]

We reserve the right to call upon other attorneys in our Firm, including partners, counsel, and associates, to assist or advise us on your matters when appropriate. Our rates for associates and counsel currently range from \$85 to \$140 per hour. Rates for individual associates who we believe at this time are likely to work on your matter are as follows: [List associates and rates]

[Hourly Rate--Sample 2]

Our fee will be based on hourly rates for the lawyers, paralegals, and case clerks who render services. I have enclosed for your information a schedule of the current hourly rates for those we now expect will be working on this matter, although others may become involved. Hourly rates are reviewed and adjusted from time to time and any changes will be applied prospectively.

It may be appropriate to expand upon the phrase that fees are "based on our hourly rates" by explaining the factors effecting variations. Some suggested language in that regard follows:

[Variation from Hourly Rate]

The amount of our fees actually charged may be adjusted on the basis of a number of factors that we consider in the determination of our fees, including achieving an extraordinary result on your behalf through our efforts, unusual efficiencies or expertise which result in a special advantage to you, a requirement by you that we give a legal opinion to a third party on your behalf, unusually short deadlines for performance, time-saving use of our Firm's resources, including existing research, analysis, data compilations, or stored document formats, periods of sustained intensive activity by our professionals beyond that which is customary, and required priority dedication of the Firm's resources to the denial of other clients. Application of any or all of these factors may mandate a deviation from strict application of our hourly rates.

In some cases, the Firm may wish to provide for a "result factor" in case there is an extraordinarily good result for the Client. Some language to that effect may include the following:

[Result Factor--Sample 1]

Because of time constraints, and the novelty and difficulty of the problems presented by this matter, we have with your approval reserved the right to ask for additional compensation over and above the hourly charges depending upon the results we achieve.

[Result Factor-- Sample 2]

We have discussed with you the fact that our representation in the matter described above may achieve results which are not adequately measured by the time expended by us. If and when such a result is achieved, you and we will discuss in good faith and make every effort to agree upon an additional fee reflective of the results achieved.

The following are suggestions for documenting fee arrangements other than an hourly rate schedule.

[Fixed Fee]

In accordance with our discussion our Firm's fees for legal services rendered in connection with the SeaPoplar matter will be \$1.5 million, and you will be responsible for payment of charges for related expenses or services as described below.

[Estimated Fees Within a Range]

We estimate that our legal fees for services rendered in connection with the SeaPoplar transaction will fall in the range of \$1.0 million to \$1.75 million. Please understand that this is an estimate only and is based upon the information available to us at this time and our past experience in similar transactions. Any number of unforeseen variables, complicating factors or uncooperative parties could result in higher fees.

[Contingent fee, nonlitigation]

We have agreed to undertake this representation on a contingent-fee basis. Our fees for legal services will be contingent upon and will not be payable until the closing of the transaction identified above, as it may be restructured by the parties, subject to the "break-up fee exception" described below. If the transaction does not close as described or restructured, no fee will be due. However, payment to the Firm of charges and expenses advanced to your account are not contingent and will be payable by you whether or not the transaction ultimately closes.

(Note: Use of this paragraph will require the lawyer to consider carefully the description of the scope of the engagement included in the engagement letter.)

We will render our statements for legal services based upon the hours expended at the hourly rates normally charged by the involved personnel for the type of work rendered. As compensation for the financial risk of undertaking the engagement on a contingent-fee basis, our statements for legal fees will include an additional amount equal to 50% of our fee computed on the hourly basis described above. There will be no such premium applied to our statements for expenses and disbursements, which will be sent to you monthly and will be due upon receipt. The total of (a) our fee for legal services rendered, (b) out-of-pocket expenses and disbursements which have not previously been paid, and (c) an amount estimated to compensate for anticipated legal services to be performed after the closing of the transaction (calculated without any contingency premium), shall be paid in full at the closing of the transaction.

If the transaction is not consummated and the Company receives a fee or other payment from a third party or any of its current or future owners (whether or not such fee or payment is denominated a "break-up fee," a "bust-up fee," a "reimbursement of expenses," or by other words of similar import), then the total amount of our legal fee calculated without any contingency premium, together with the total amount of out-of-pocket expenses and disbursements that have not previously been paid, shall be due in full when such fee or payment is received by the Company.

Due to the contingent-fee basis upon which we are undertaking this engagement, we reserve the right at any time to reevaluate the reasonableness of continuing to work on the transaction and to withdraw from the representation, upon reasonable notice, if we conclude that it is not reasonable to expect that the transaction can be successfully concluded. In the event we should withdraw for this reason, of course, you would owe us none of our contingent fee, but would pay all charges for out-of-pocket expenses and disbursements that had not previously been paid.

You have the right to terminate our engagement at any time and we have the right to terminate our engagement in certain circumstances. In the event you terminate our engagement, you will be responsible only for out-of-pocket expenses and disbursements that have not previously been paid; provided, however, that in the event you terminate our engagement and if the transaction is ultimately consummated in substantially the form proposed at this time, you will pay us for all legal services performed prior to the termination, including the 50% contingency premium described above.

Sometimes firms will ask for a retainer.⁹ See generally Sammons, "Legal Ethics," 46 Mercer L. Rev. 305, 310-321 (1994); Brickman & Cunningham, "Nonrefundable Retainers: A Response to Critics of the Absolute Ban," 64 Cincinnati L. Rev. 11 (1995).¹⁰ Some variations on retainer arrangements follow.

[Retainer--Sample 1]

We anticipate that a very substantial amount of legal work will be necessary, even at the early stage of this project, and we will be making a very substantial investment of our resources. Accordingly, if you agree to the terms of this engagement letter and request us to go forward with this project, we request a retainer in the amount of \$25,000. We will apply this amount against payment of our fees and credit such amounts on our billing statements. In the event our fees and other charges exceed the retainer, we will bill you for the excess. You agree that we will have the right to request additional retainers from time to time based on our estimates of future work to be performed.

[Retainer--Sample 2]

It is our practice in new representations to estimate the amount of work that is likely to be performed from the time that we are retained to the end of our first or second billing period, and to ask that such amount be deposited with us as a retainer at the outset of the representation. In your case, we request a retainer of \$25,000. Such retainer is held to secure the payment of fees and expenses owed us. Such retainer will be fully refundable if unused at the conclusion of the representation, subject to full payment of our statements. We may apply the retainer to pay any outstanding unpaid fees and expenses without further authorization from you. If any part of the retainer is applied to the payment of outstanding statements, we expect that the retainer will promptly be replenished by you to its original full amount within the next succeeding billing period.

⁹ The term "retainer" usually refers to the fee paid to ensure a lawyer's availability. The ethical propriety and legality of nonrefundable retainers are problematic. A number of jurisdictions have held them unethical and unenforceable.

¹⁰ Georgia Standard 23 requires return of "unearned" advance fees which are not technically "retainers," at least when the lawyer withdraws from employment. See generally, Sammons, "Legal Ethics," 46 Mercer L. Rev. 305, 310-321 (1994); Brickman & Cunningham, "Nonrefundable Retainers: A Response to Critics of the Absolute Cincinnati L. Rev. 11 (1995).

[Retainer--Sample 3]

You have agreed to forward to us immediately \$25,000 as an advance fee deposit. We will apply the deposit against our statements as the statements are rendered to you, and you will replenish the deposit to the \$25,000 level whenever our statements indicate that the deposit balance has dropped below \$10,000. We will send to you any unapplied amount of the deposit at the conclusion of this engagement.

[Retainer--Sample 4]

You have agreed to provide a retainer of \$25,000. This retainer is not to be applied against our monthly statements, which are payable upon receipt. Rather, the retainer will be held until this engagement has been completed, and then will be applied to the payment of any outstanding statements. At the conclusion of our engagement, we will return to you any unapplied amount from the retainer.

[Retainer--Nonrefundable]¹¹

You have agreed to pay us a nonrefundable retainer of \$25,000 in exchange for our agreement to enter into this engagement as described in this letter. This retainer is due before the Firm will commit any substantial resources to the Project. The retainer is nonrefundable and will be kept by the Firm regardless of the ultimate outcome of the Project.

6. Conflicts of Interest

Lawyer-client conflicts of interest tend to fall into several categories, among them current conflicts, former-client conflicts, organizational representation conflicts and imputed conflicts. This section suggests provisions to address each of those types of conflicts of interest, especially when the conflicts are amenable to client consent.

[Current Conflicts--Sample 1]

We have advised you that we currently represent [other client] in connection with [describe existing relationship with other client, within bounds of confidentiality rules], and we have discussed with you the possible conflicts that may arise during our representation as contemplated by this engagement letter. You have consented to both representations. This letter, therefore, confirms our disclosure and discussions with you of our existing representation of [other client]

¹¹ See note 9, supra, regarding refundable retainers. Where a nonrefundable advance payment is actually a fee for evaluation of the matter and its potential problems, it is preferable to denominate it as such, rather than as a “retainer.”

and your consent to our continuing that representation while assuming our representation of you as outlined in this letter. For your information, we are asking [other client] to execute a letter confirming its consent to our representation of you as described in this letter.

[Current Conflicts--Sample 2]

We have advised you that one of the partners of this firm currently represents [other client] in connection with [describe existing relationship with other client, within bounds of confidentiality rules], and we have discussed with you the possible conflicts that may arise during our representation as contemplated by this engagement letter. That partner is not and will not be involved in any way in this firm's representation of you or have access to confidential information about you. We understand that you have consented to both representations. This letter, therefore, confirms our disclosure and discussions with you of our existing representation of [other client] and your consent to our continuing that representation while assuming our representation of you as outlined in this letter. For your information, we are asking [other client] to execute a letter confirming its consent to our representation of you as described in this letter.

(The previous provision may be supplemented by a representation that the firm will employ a "Chinese wall" or similar techniques to secure the confidential information.)

[Current Conflicts--Sample 3]

We have advised you [Client A] that we have from time to time represented [Bank B] in loan closings. Notwithstanding their and your consent to our representation of you and [Bank B] in the closing of any loans to be made by [Bank B] in this transaction, should a disagreement arise between the two of you, we will be disqualified from representing either of you and you will be required to retain other counsel to protect your interest. We have by separate letter so notified [Bank B].

A former client's representation may raise a conflict with a prospective [hereafter current] client's matter. Because many current clients at some point become former clients, some lawyers may commence representations with an engagement letter that anticipates the post-representation period. In this regard, the following provision in the original engagement letter may be useful:¹²

[Prospective Conflict Admonition]

As we discussed, you are aware that this law firm represents many other clients. It is possible that after the conclusion of our current representation of you, a current or future client of ours may be involved in a transaction with you or have a dispute with you. In such cases where the other client's matter is not substantially related to our current representation of you, professional standards allow this firm to proceed with the new representation without additional consultation with you. In contrast, in such cases where the future client's matter is substantially related to our current representation of you, this law firm must obtain your consent before proceeding to represent the other client in that matter.¹³ Absent further agreement, our current representation of you shall be deemed to have ended no later than the point when we have performed no legal services for you in connection with this representation for a period of one year. In no event will our representation of another client involve the use, to your disadvantage, of your confidential information that we have obtained as a result of representing you.

Because organizational representations present a variety of forms and situations, the Committee recommends consideration of any of the following that may be pertinent to the lawyer's representation.

¹² Useful, perhaps, but it is not necessarily palatable. Because this may raise some question of lawyer loyalty to the new client at the very outset of the representation, some lawyers may find it distasteful to employ.

¹³ The follow-up request for consent might take the following form:

As we have discussed, on [date] this law firm and you executed an engagement letter related to [brief description of former matter], which representation has since concluded. That engagement letter acknowledged the possibility that this firm might someday be requested by another client to represent it in a matter substantially related to the [former matter]. In fact, this firm has been asked to represent another client in the following matter: [brief description]. We have determined that this new matter is substantially related to our former representation of you. Therefore, we have sought your consent to this new representation, and you have agreed. As we have indicated before, in no event will our representation of any other client involve the use, without your consent, of your confidential information that we obtained as a result of representing you.

[Disclosure of Multiple Representation]¹⁴

The representation of more than one party (commonly referred to as "joint representation") presents special ethical considerations for a lawyer. These considerations are discussed in greater detail below. Joint representation provides certain cost advantages, or savings, over the cost that would otherwise be incurred when each party retains separate counsel. The Code of Professional Responsibility for Lawyers, as adopted in Georgia, permits the joint representation of multiple clients when the law firm can represent the interests of each client adequately and when each client knowingly consents to that representation.

There is a potential that conflicts of interest could arise among you with respect to the subject matter of our representation. Based upon the information available to us at this time, however, we are not aware of any actual conflicts among you. We ask that you please call to our attention immediately any matter that you become aware of that you believe might suggest an actual conflict of interest.

There does not now appear to be any sufficient strategic reason for separate representation. If you become aware of any strategic or other considerations that, in your opinion, might be of such magnitude as to prevent us from continuing jointly to represent you (or any of you), we ask that you promptly call such matters to our attention.

In an ordinary attorney-client relationship, information given to the lawyer by the client in confidence as part of the representation may be considered privileged information--that is, the lawyer may not disclose that information to any third person without the client's consent. The attorney-client privilege also exists in the context of a joint representation, but there is one added factor of note: The privilege extends only to protect the confidences of the entire group from disclosure to any person who is not a member of the group. It does not permit the lawyer to keep the confidences or secrets of one member from other members of the group. In other words, information that any of our clients provide to us in connection with this representation will be available to all of our clients in this matter.

If circumstances arise during the course of this matter that require or make it desirable that any of you obtain separate legal representation in this matter, our firm would be free to continue to represent the remaining members of the client group in this matter. By signing this engagement letter and accepting our joint representation, you agree that, should it become necessary or desirable for any of you to retain other counsel, you will not seek to disqualify our firm from

¹⁴ This provision is the same as that set forth above in Subsection 2, Identification of the Client, supra, as "Multiple Clients." It is repeated here for ease of reference.

continuing to represent the remaining members of the group for whom we have acted as counsel.

[Association]

You understand and agree that, so long as our firm's representation of you is limited to the matter in which we represent the group of which you are a member, our firm will be free to represent other parties on the other side of transactions with you or having an interest adverse to you if those matters are not substantially related to the representation of the group and do not involve information which is confidential to you and was disclosed to us in connection with our representation of the group.

[Simultaneous Representation of Partnership and of Individual Partner]

We have been asked to represent [General Partnership] in [describe current representation].

As you know, we represented [Partner 1] in its negotiation and execution of an Agreement of General Partnership with [Partner 2]. In addition, we have represented and are currently representing [Partner 1] in several other significant, unrelated matters.

Under the standards of our practice, lawyers may represent multiple clients if it is obvious to them that they can adequately represent the interest of each and if each consents to the representation after disclosure of the possible effect of such representation on the exercise of the attorney's independent professional judgment on behalf of each. The scope of engagement which you have requested of our firm at this time consists of [describe] and is not directly related to the earlier formation of [General Partnership]. In view of the commonality of interests of the partners and [General Partnership], our ongoing representation of [Partner 1] in separate significant matters should not influence our ability to utilize independent judgment on behalf of [General Partnership] or on behalf of [Partner 1] in the unrelated matters.

As a result of our representation of [General Partnership], unless the facts and circumstances at that time indicate otherwise, we may not be able to represent either [General Partnership] or [Partner 1] and [Partner 2] in any dispute between them, or in the enforcement of any rights or obligations among those parties under the Agreement of General Partnership. In that event, other counsel may be necessary for each party involved in such dispute or the enforcement of such rights or obligations.

To accept this engagement, we must have your consent and acknowledgment of this letter. We appreciate your request to represent [General Partnership] in the [current representation].

[Preparation of Shareholder Agreement]

In all likelihood, our representation of the Company will include preparation of a shareholders agreement. In this regard, we wish to emphasize that the Firm will be representing the Company, and not its shareholders. Interests of some shareholders may differ, or be adverse to, the interests of other shareholders or the Company. For instance, certain provisions of the shareholders agreement may provide an advantage to the holder of many shares and may be disadvantageous to the holder of fewer shares. Each shareholder should consider whether the shareholder should retain separate counsel to review the agreement.

As noted above, some lawyers may decide to broach the matter of potential conflicts at the outset of the representation by seeking a waiver from the client in the engagement letter. In the following provision, the lawyer confirms a client's prospective consent to the lawyer's representing other, adverse clients in matters outside the scope of and unrelated to an environmental representation.

[Possible Future Conflict with Client of Firm]¹⁵

Our engagement is limited to advice and action with respect to environmental considerations in your proposed development. We will not represent you in any matters outside the scope of the engagement. It is possible that during the time we are representing you, another client of ours may have a dispute with you. In order to distinguish those instances in which you consent to our representing such other client from those instances in which you do not consent, you have agreed, as a condition to our undertaking this engagement, that during the period of this engagement we will not be precluded from representing clients who may have interests adverse to yours, so long as (1) such adverse matter is not substantially related to our work for you and (2) our representation of the other client does not involve the use, without your consent, of your confidential information we have obtained as a result of representing you.

[Law Firms as Co-counsel]

We have informed you that our law firm has affiliated with [Firm B] for the purposes of a representation unrelated to our representation of you. [Describe representation to extent possible without compromising confidences.] As you

¹⁵ See discussions in Section III, 2 and 6.A. (Reporter's Notes--Conflicts of Interest, In General), *infra*, regarding potential ethical problems in representing a client adverse to one with whom there has been a continuing professional relationship. Also, see discussion in Section II.6.C., *infra*, regarding problems that may arise in establishing a valid prospective waiver. In deciding whether to include this provision in an engagement letter, counsel must weigh the costs of uncertainty, of potential ineffectiveness, and of possibly negative client reaction against the benefits that the client and the lawyer may derive from this admonition and the possibility of enforceable waiver.

know, [Firm B] represents [other client] in the matter for which we represent you. Because the representation for which this firm and Firm B are affiliated is not related in any way and because it will not involve the transmission or use of any confidential information about you or about our representation of you, you have consented to our affiliation with Firm B for this limited purpose.

[Double Imputation]

We have informed you that a [partner, associate] in this firm was formerly associated with another law firm that had represented [Company A] in [describe other client's matter to extent possible, within bounds of confidentiality], which interests are now perceived to be adverse to yours. When associated with the former firm, that lawyer had no professional or personal involvement with [Company A], nor does that lawyer have any professional or personal involvement in our current representation of you. Nonetheless, under the ethical rules governing lawyers, this situation may be deemed a conflict of interest. We understand that you have consented to both representations.

This letter, therefore, confirms our disclosure and discussions with you of our existing representation and your consent to our representation of you as outlined in this letter. For your information, we are asking [Company A] to execute a letter confirming its consent to our representation of you as described in this letter.

Especially in situations where a client may perceive a potential conflict or has waived a current conflict, counsel may wish to reassure the client that its confidences and proprietary information will be kept protected from unnecessary or harmful disclosure. The following provision seeks to reassure the client by describing the typical elements of a “Chinese wall.”¹⁶

[Assurances Regarding Protection and Nontransmittal of Confidential Information]

Our firm has implemented procedures that seek to ensure that confidential information will not be shared in any manner potentially detrimental to you. We have prohibited the transmittal of confidential information to [lawyer]; secured your files in locked file cabinets accessible only by lawyers assigned specifically to this matter; prohibited access to your files and prohibited discussion of your matter beyond those lawyers assigned specifically to it; ensured that [lawyer; firm] will not share in professional fees generated by this representation; and instructed professional and clerical staff to keep files and other confidential information secure from access by unauthorized persons.

7. Termination of Engagement

¹⁶ For discussion of so-called “Chinese walls,” see Section III.6.F.3, *infra*.

[General Termination Provision]

We expect our engagement will remain in effect until [describe completion of matter or representation] [include expected completion date, if useful]. Our engagement will terminate on that [point] [date, or such earlier date on which the matter will be completed].

[Automatic Termination--Inactivity]

In the event the matter or representation becomes inactive, or for any reason the Firm performs no substantive legal services for you for a period of one year, our engagement shall be deemed terminated.¹⁷

[Termination by Discharge]¹⁸

Of course, you have the right to discharge the Firm at any time and for any reason. In the event we are discharged before the representation is completed, we would expect you to retain other counsel to provide legal services through its completion. In that event, we will cooperate with you and your other counsel to effect as smooth a transition of legal services as possible. You will, however, be responsible for whatever out-of-pocket expenses the Firm incurs in making that transition, specifically including the costs related to the duplication of files and file materials and the physical transfer of the same to your new counsel, as well as the time expended by the Firm to effect that transfer. In the event of premature termination at your request, all of our outstanding statements for fees and services will be immediately due and payable, and any subsequent statement we render for services related to the transfer of your representation will be due and payable upon your receipt of the same.

¹⁷ See commentary and citations accompanying note 60, infra.

¹⁸ This provision is identical to a termination provision set forth in the Sample Engagement Letter, Part I, supra, and is repeated for ease of reference.

[Termination by Withdrawal]¹⁹

There are circumstances in which the Firm may feel compelled to withdraw from this representation prior to its substantial completion, such as the development of an irreconcilable conflict of interest between you and some other client of the Firm; or your failure to pay our fee and expense statements when due, to name two possibilities. In the event the Firm withdraws from the representation prior to the substantial completion of the representation, the Firm again will make every effort to make transition of your legal business to a successor law firm as smooth as possible. In that circumstance, the Firm will assume responsibility for its out-of-pocket costs relating to the duplication and physical transfer of your files and outstanding materials, and will waive its time charges relating to that transfer. Again, the Firm's outstanding statements for fees and disbursements will be immediately due and payable upon the Firm's withdrawal from your representation or upon the rendering of a final statement.

¹⁹ Id.

III. REPORTER'S NOTES AND ADDITIONAL COMMENTARY

1. Acceptance of Engagement

As with many contracts, a thorough engagement letter may be prepared to memorialize the terms of an oral agreement already reached between the parties. In the alternative, the parties may assume that there will be no binding obligation prior to the execution of the written engagement letter and that execution will be a condition precedent to the commencement of representation. In either case, counsel should make the understanding clear at the oral discussion stage and in the engagement letter. For example, the opening paragraph (or closing, as the sample letter does) may require that the client execute the engagement letter as a condition of commencing the representation. Lack of clarity on this point may result in a serious misunderstanding and perhaps in litigation.

Alternatively, counsel may wish to avoid further formalities by providing that the client only "passively acknowledge" the representation terms. In other words, the letter would contemplate no execution or further communication of acceptance by the client. Such an engagement letter would do no more than memorialize an agreement already reached. That approach potentially suffers the evidentiary drawbacks that any unexecuted writing does which purports to memorialize (or constitute) a contract. It makes it easier for either party to deny agreement if a dispute arises. An opening paragraph of an engagement letter contemplating a passive acknowledgment by the client could, of course, be slightly modified and executed at the closing.

2. Identification of the Client

Identification of the client and determination as to whether the lawyer has other clients whose interests may conflict with those of the client will require judgments as to the time periods during which previous engagements continued and as to whether an organization, entity, or persons associated with it are or were a client. Courts may deem an intermittent or even former client to be a current one. For example, in *IBM v. Levin*, 579 F.2d 271 (3d. Cir. 1978), a law firm filed suit against IBM in an antitrust action at a time when it had a pattern of being retained by IBM in unrelated labor matters, both before and after the unrelated antitrust suit was filed. The labor representations suggested a continuous relationship, so despite no current "specific assignment," the law firm was disqualified on the eve of trial.

The Georgia Supreme Court decision of *Crawford W. Long Memorial Hospital of Emory University v. Yerby*, 258 Ga. 720, 373 S.E.2d 749 (1988), may have taken the concept of current client to another level. In that case, a lawyer was engaged to represent the plaintiff in an action against a hospital. The plaintiff's cause of action had arisen (but had not yet come to the attention of the hospital or the lawyer) at a time when that lawyer was representing the hospital on matters of the same general sort--medical malpractice. The lawyer was disqualified on the basis of "the appearance of impropriety." In essence, it was found to be unseemly for the lawyer to have sued

a former client, at least where the matter had arisen when the former client was clearly a "current" one.

Although *Yerby* does not speak directly to the definition of an "existing" client, it does seem that the "appearance of impropriety" standards suggest a broad interpretation of "client."

Representation of partnerships, corporations, and other business associations requires special care in the identification of the client and of those who are authorized to speak for the client. Lawyers must discern the organizational element or person who lawfully speaks for the corporation (or other association) and thus embodies the entity. For example, in *Financial General Bankshares v. Metzger*, 523 F. Supp. 744 (D.D.C. 1981), the court emphasized that lawyers representing the corporate entity must look to current management for direction and articulation of the corporate interests.

In transactional matters, the engagement may require organization of new entities, which may also become clients. For example, in the Sample Engagement Letter set forth in Section I above, the initial clients included an individual client, Promoter, and that client's wholly-owned corporation, Development. In addition, the engagement letter anticipated that counsel would represent future entities created to effectuate the development, particularly limited partnerships. When representing such investment or development vehicles, counsel should make clear the line between its representation of Promoter and his entities, on the one hand, and its nonrepresentation of other participants, such as investors in the future limited partnerships. Quite often claims of malpractice are based upon a claimed understanding by investors that counsel for the promoter were representing the investors as well.

Note that the Sample Engagement Letter states that the law firm has the client's permission to send nonrepresentation letters to such third parties. Clients sometimes balk at this suggestion, fearing it will "chill" the relationship with third parties. It is important that the lawyer send such nonrepresentation letters, however, and here the lawyer has the client's consent. Having obtained that permission, the lawyer and the firm should make it a point to send such letters, not only to obvious recipients like investors, but also to some nonobvious recipients such as lender banks. Many times lawyers do not send nonrepresentation letters to other parties who are represented by counsel; the better practice is to do so anyway. Further, the careful lawyer will periodically review his or her file to see that nonrepresentation letters are sent to other third parties as they become involved in the deal as it progresses.

3. Identification of the Matter

If the lawyer or firm represents a client in only one matter at a time, keeping track of those matters and avoiding commingling is easy. On the other hand, if the lawyer or firm represents a client simultaneously in more than one matter, it becomes both an accounting and professional necessity to keep the matters separated.

Identifying and describing the matter also has implications for assessing conflicts of interest. For example, it is important to be able to determine whether a particular matter is either

ongoing or closed. It is also important to identify matters sufficiently to make judgments about potential conflicts and substantial relationships with other matters the firm may be undertaking.

4. Scope of the Engagement

On a project as long-lived and complicated as the one assumed in the Sample Engagement Letter in Section I above, it is impossible to describe, in detail, at the outset all of the legal services which will be provided. As a consequence, the Sample Engagement Letter describes the work to be done in very general terms. An important part of the lawyer's description of the engagement is the statement of what the lawyer will not do.²⁰ While most large law firms describe themselves as "full service" organizations, it is foolhardy and unethical to undertake the representation of a client in a matter in which the firm is not competent, and in some areas of the law anyone who is not an expert may be judged incompetent.²¹ In the sample matter, the firm has excluded environmental services from those to be performed for the clients for very good reasons. It knows that some of the parcels to be developed are wetlands subject to specific federal regulation. It further knows that the firm's acknowledged environmental expert recently departed the firm and the firm is currently without a resident expert in this area. It follows that there may be other matters in which the client would have to enlist outside expertise, and if those areas are obvious at the onset, they should be excluded as well.

The sample representation assumes a "one-person, one-lawyer (or firm)" relationship. Many times lawyers are called upon to represent national corporations or other entities which mete out legal work on a transactional basis and which have numerous attorneys, inside and outside. In those cases, it is even more important that the matter be defined adequately and separated from the client's other work and the responsibility of other lawyers.

²⁰ For example, Section 4 of the Sample Engagement Letter excludes services with respect to environmental matters.

²¹ See Georgia Standard 43; Ethical Consideration 6-3; and Directory Rule 6-101.

5. Fees and Billing²²

Historically, most "engagement letters" generated by lawyers have included little more than statements of how the client was to be billed. The subject of fees and billing remains an important component of any engagement letter. In the sample engagement letter, the lawyer adopted the traditional hourly-rate approach to billing. In addition, as a matter of good business, the letter advised the client which lawyers and support staff will be working on the matter, to the extent that could be known, and the hourly rates that the client will be paying for each of those persons' chargeable time. It is equally important to document that those hourly rates may change, and that the participating personnel may vary. The lawyer's policy on disbursements must also be described. Because recent bar opinions have tended to discourage "marking up" out-of-pocket disbursements, the sample letter assumes that the client will be advised if any expenses will be marked up before being billed to it. Finally, it is quite important to tell the client in writing that if he does not pay the lawyer's bills on time, the lawyer has the right to withdraw. That right is specifically recognized by the Georgia Code of Professional Responsibility,²³ and it should be stated in the initial agreement.

There are myriad fee arrangements that may be reached between a lawyer and client. The sample letter assumes a standard hourly fee arrangement. The alternatives are legion, as suggested by the several alternatives set forth in Section II above.

Lawyers' fee contracts are constrained by additional contractual and ethical principles. As the Restatement indicates, the ethical principles address the reasonableness of fees, the lawful methods for determining fees, inappropriate financial and business arrangements between lawyers and clients, and the forfeiture of fees for violations of professional duty.²⁴

In drafting engagement letters for transactional matters, lawyers will be concerned most about the first principle, that fees should be "reasonable."²⁵ Most jurisdictions suggest that

²² Legislatures, courts and bar associations acknowledge the business reality that lawyers deserve compensation for their services. That acknowledgment, however, often comes with the admonition that the profession must provide legal services to those without the ability to pay a customary fee. See, e.g., Georgia EC 2-16. (The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.)

²³ Directory Rule 2-110(C)(1)(f).

²⁴ See generally Restatement (Third) of the Law Governing Lawyers (Proposed Final Draft No. 1, March 29, 1996)[the "Restatement"], 156-243.

²⁵ E.g., "A lawyer may not charge a fee that is greater than is reasonable in the circumstances" Restatement Section 46.

"reasonableness" derives from the consideration of several factors, only one of which is the time and labor involved.²⁶ Among other factors to be considered are: the difficulty of the matter; the customary fees in the region or for similar matters; the experience of the lawyer; and whether acceptance of the representation will likely preclude other employment.

In most respects, lawyers' fees may be negotiated as in any business contract. As with other contracts, unconscionable terms will be unenforceable. Determination of "unconscionable" fee arrangements or terms and lawyer overreaching may vary according to the relative sophistication levels of the lawyer and client.²⁷ Lawyers should also remember that the existence of their fiduciary duties will likely result in more severe scrutiny of fee agreements.

Ethical norms may also require lawyers to inform clients, perhaps in writing, how their fees will be determined. This information should come at the outset of the representation.²⁸

Reporter's Notes--Fees and Billing

Pertinent Georgia Rules and Standards include the following:

a. Reasonableness of Fees

Georgia's Directory Rule DR 2-106 prohibits charging excessive (unreasonable) fees and lists the factors to be considered in determining reasonableness:

DR 2-106. Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

²⁶ See, e.g., Rule 1.5 of the ABA Model Rules of Professional Conduct, which lists eight categories of factors to be considered in determining the reasonableness of a legal fee. Georgia's Directory Rule 2-106 agrees substantially with the factors set out in Rule 1.5.

²⁷ The fees and billing alternatives suggested here, as other suggested provisions, assume a reasonably sophisticated business client.

²⁸ See, e.g., Restatement Section 50.

- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

Georgia Standard 31 is substantially similar.²⁹ *Standard 31.* (a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(b) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

© A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) subject to the requirements of Standard 22(b), acquire a lien granted by law to secure his fee or expenses;
- (2) contract with a client for a reasonable contingent fee in a civil matter.

(d) Except as prohibited by paragraph (a) of this Standard or by other law, a lawyer may accept a retainer or enter an agreement for compensation for services rendered or to be rendered in an action, claim or proceeding, whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof.

(1) Such a contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, whether litigation and other expenses are to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

(2) Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the following:

(i) the outcome of the matter; and

(ii) If there is a recovery:

(aa) the remittance to the client;

(bb) the method of its determination;

(cc) the amount of the attorney fee, and

(dd) if the attorney's fee is divided with another lawyer who is not a partner in or an associate of the lawyer's firm or law office, the amount of fee received by each and the manner in which the division is determined.

A violation of this standard may be punished by a public reprimand.³⁰ *Standard 31.*

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

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(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

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(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(c) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

Georgia's Ethical Considerations elaborate on the requirement of reasonableness:

EC 2-17

The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC 2-18

The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. It is a commendable and long-standing tradition of the bar that special consideration

(1) subject to the requirements of Standard 22(b), acquire a lien granted by law to secure his fee or expenses;

(2) contract with a client for a reasonable contingent fee in a civil matter.

(d) Except as prohibited by paragraph (a) of this Standard or by other law, a lawyer may accept a retainer or enter an agreement for compensation for services rendered or to be rendered in an action, claim or proceeding, whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof.

(1) Such a contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, whether litigation and other expenses are to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

(2) Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the following:

(i) the outcome of the matter; and

(ii) if there is a recovery:

(aa) the remittance to the client;

(bb) the method of its determination;

(cc) the amount of the attorney fee; and

(dd) if the attorney's fee is divided with another lawyer who is not a partner in or an associate of the lawyer's firm or law office, the amount of fee received by each and the manner in which the division is determined.

A violation of this standard may be punished by a public reprimand.

is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

b. Disclosure of Fee Arrangement in Writing

Georgia Ethical Consideration 2-19 exhorts lawyers to reduce their fee agreements to writing and to explain the arrangement fully:

EC 2-19

As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

c. Financial Arrangements between Lawyers and Clients

Occasionally, lawyers and clients will agree that the “fee” for representation will involve a financial interest in the client’s business. With respect to representation in litigation, such arrangements are largely outlawed.³² The lawyer should always be aware that, because of the relationship of trust existing between lawyer and client, the courts will generally scrutinize carefully the lawyer’s fee agreement:

All transactions between an attorney and his client are closely scrutinized by the courts, and an attorney’s duty in the circumstances is a much higher duty than is required in ordinary business dealings where the parties traded at arm’s length.

Arey v. Davis, 233 Ga. 951, 955-56 (1975).

³² See Georgia Standard 31, set forth in note 28, supra.

There is great potential for financial conflict of interest when lawyers' fee arrangements incorporate a financial interest in the client's business. At least when lawyers determine that their professional judgment may be affected, Georgia Standard 30 requires written consent of the client:

Standard 30.

Except with the written consent or written notice to his client after full disclosure a lawyer shall not accept or continue employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests. A violation of this standard may be punished by disbarment.

Apparently, if in such arrangements lawyers believe that there will be no effect on their professional judgment, they must still obtain client consent, but not in writing.

Standard 33.

A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client unless the client has consented after full disclosure. A violation of this standard may be punished by a public reprimand.

A fee arrangement involving publication rights is precluded by another Standard:

Standard 34.

Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment. A violation of this standard may be punished by a public reprimand.

6. Conflicts of Interest³³

A. In General

The prohibition of lawyer-client conflicts of interest derives from several concerns fundamental to the practice of law.³⁴ First, the prohibition seeks to preserve undivided loyalty. All clients should have the right to services from lawyers they can trust to exercise professional, independent judgment.³⁵ Lawyers should not accept representation if the interest of another client might be placed above that of the prospective client.

Second, the prohibition seeks to foster zealous representation within ethical bounds. Effective representation may be compromised when the lawyer's independence is tempered, even subconsciously, by personal or professional allegiances to interests other than the client's.

Third, the prohibition seeks to preserve the client's right to the protection of the other client's confidences by the lawyer.³⁶ Use of such information for the personal advantage of the lawyer or other clients violates the lawyer's duty of undivided loyalty. Similarly, the inability to use information that may assist one client because the lawyer has an obligation to others violates the lawyer's duty of zealous representation. Fourth, prohibiting conflicting representations fosters and clarifies good professional relationships between lawyers and clients and between lawyers and other lawyers.³⁷

The benefits derived from the prohibition of conflicts may come at some cost to the clients being protected. For example, to the extent that avoiding a conflict requires that several clients engaged in a single enterprise hire multiple lawyers, the total legal expenses of the group may increase substantially. To the extent that regular counsel, familiar with the affairs of the client, must yield representation to another lawyer, the client may suffer additional "start-up" costs

³³ Much of this commentary draws upon the scholarship and thoughtful analysis of Chapter 8, Conflicts of Interest, of the Restatement.

³⁴ Variations of these rationales are stated in Restatement Section 201 and in "Recognizing and Resolving Conflicts of Interest, Multiple Representations and Successive Representations in the Corporate Practice" at pp. 01-2 to 01-3 (Corporate & Banking Law Institute, October 1989, ICLE). See generally, 1 G. Hazard & W. Hodes, *The Law of Lawyering*, 217-22 (2d. ed. 1990).

³⁵ See Canon 5.

³⁶ See Canon 4.

³⁷ With respect to litigation matters, it also must be said that prohibiting conflicts assists the processes of negotiation and dispute resolution by avoiding other ethical problems that may occur in the submission of proof.

occasioned by the new lawyer's need to spend billable time becoming familiar with the client and the matter. Whether or not the requirement of engaging different counsel results in increased fees, it can certainly frustrate client expectations regarding the efficiency of the representation.

Lawyers and clients may seek to avoid unnecessary client expense or apparent conflicts by seeking and obtaining client consent. This course of action may lead to other problems. Because such consent must be informed, lawyers may feel obligated to inform clients of facts that other clients may prefer to keep completely confidential, such as the reason the other client consulted or retained the lawyer. The lawyer must first obtain the client's consent to divulge that information. In the lawyer's attempt to obtain another client's consent to the representation, the client may still have preferred, if given the choice, complete confidentiality.

In transactional representations, the client is often a business entity with one or more affiliate organizations, as corporate parent or subsidiary. Because conflicts, both litigation and transactional, can arise between affiliates, lawyers will need not only to identify the client to be currently represented but also to recognize possible current- and former-client conflict issues inherent in the representation.³⁸

Reporter's Notes--Conflicts of Interest, In General

Standard 35 is the principal Georgia rule prohibiting representation involving a conflict of interest between current clients:

Standard 35.

A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under Standard 37 [client consent, etc.]. A violation of this standard may be punishable by disbarment.

In protecting against possible conflicts, courts are solicitous of client interests and the integrity of the Bar. Courts will err on the side of finding a conflict: "[D]oubts as to the existence of an asserted conflict of interest should be resolved in favor of disqualification" (*IBM Corp. V. Levin*, 579 F.2d 271, 283 (3d Cir. 1978)). The IBM case is typical. There, the court disqualified a law firm representing plaintiffs in an antitrust matter against IBM because the firm was also representing IBM in unrelated labor matters, even though no confidential information had been used to IBM's detriment. The potential for use of confidential information and the necessity of avoiding the appearance of impropriety were held to be sufficient to justify disqualification.

Most conflict-of-interest issues arise in cases involving litigation-based conflicts. Nonetheless, transactional lawyers should heed their tenor and rationale even though they may distinguish their facts. Because a transaction in which there are conflicts of interest may be

³⁸ See Section III.6.D., *infra*, regarding former client conflicts, and Section III.6.E., *infra*, regarding other affiliate conflict problems.

followed by litigation about the effect of the transaction, lawyers should consider each potential conflict as though it has arisen or will arise in a litigation context. Courts seem generally loath to countenance any conflicts that potentially may give the appearance of disloyalty or use of client information. Because those concerns may arise in conflicts involving a transactional representation and a conflicting litigation matter, counsel should predict equally conservative decisions. See, e.g., *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977).

On the other hand, when the specialized services of a lawyer or firm are desired by a client who has fully consented to the conflicted representation, the representation may withstand challenge. For example, in *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193 (N.D. Ohio), *aff'd mem.*, 573 F.2d 1310 (6th Cir. 1977), *cert. denied*, 435 U.S. 996 (1978), a large firm that had intermittently served as bond counsel to the City of Cleveland withstood disqualification from defending a company against an antitrust action brought by that city. The firm had warned the city of the potential conflict before the bond engagement, and the city had undertaken not to raise future conflicts. The court did make special note that the bond representation had not been litigious and distinguished the situations of serving as general counsel and serving as limited, special counsel, as in the case before it. The court held that the presumption of disclosure of confidences was a rebuttable one, and that the firm had adequately rebutted the presumption. See also *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339 (9th Cir. 1981).

Because a core concern of conflicts prohibition is preservation of client confidences, Georgia Standard 28 is pertinent:

Standard 28.

A lawyer may not reveal the confidence and secrets of a client.

- (a) Except when permitted under Standard 28(b) below, a lawyer shall not knowingly:
 - (1) use a confidence or secret of his client to the disadvantage of his client;
 - (2) use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after a full disclosure.
- (b) A lawyer may reveal:
 - (1) confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them;
 - (2) confidences or secrets when permitted under the disciplinary rules or required by law or court order;
 - (3) the intention of his client to commit a crime and the information necessary to prevent the crime;
 - (4) confidences or secrets necessary to establish or collect his fee or defend himself or his employees or associates against an accusation of wrongful conduct.

(c) "Confidence" refers to information protected by the attorney-client privilege under an applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.

A violation of this standard may be punished by disbarment.

B. Client Consent to Conflicts of Interest

Most conflicts of interest may be waived by clients who give their informed consent to the conflict inherent in the representation. Of course, where a conflict exists, clients may preclude representation by withholding their consent. To obtain informed consent, the lawyer must advise the client of the important ways in which the client's own interests may be affected. The content of that advice will vary with the nature of the conflict and the sophistication of the client. For example, the Restatement suggests that "disclosure of the general nature and scope of the work being performed for each client" is usually a sufficient predicate for informed consent to a conflict that would arise from a representation unrelated to an existing client's matter. On the other hand, where the potential implications of a conflict are more serious, lawyers must consider making more detailed disclosure, such as the following:

- the interests of the other client(s) giving rise to the conflict;
- contingent, optional, and tactical considerations and alternative courses of action that would be foreclosed or made less readily available by the conflict;
- the effect upon the client's confidential information of the representation or the process of obtaining other clients' consent;
- the restricted or otherwise altered nature of the representation that would result if all relevant parties consent as compared to the nature of separate representation;
- any material reservations that a disinterested lawyer might harbor about the arrangement if such a lawyer were representing only the client being advised; and
- the consequences and effects of a future withdrawal of consent of any client, including, if relevant, the fact that the lawyer would withdraw from representing all clients.³⁹

Not all conflicts are amenable to client waiver. Those include direct conflicts between litigants; conflicts when one or more clients lack the legal capacity to give consent (including some governmental entities); and conflicts when adequate representation (perhaps as judged by the lawyer involved) is unlikely.

³⁹ Restatement at 26. See C. Wolfram, Modern Ethics Section 7.24, at 345-46 (1986).

Reporter's Notes--Client Consent to Conflicts of Interest

To some degree, all domestic codes of legal ethics provide for client consent to conflicts of interest. In Georgia, Standard 37 provides:

Standard 37.

In the situations covered by Standards 35 and 36 [current or proffered conflicting representations], a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each. A violation of this standard may be punished by disbarment.⁴⁰

Standard 37 is a restatement of Georgia Directory Rule 5-105(D), which is itself a duplicate of Disciplinary Rule 5-105(D) of the ABA Code of Professional Responsibility (1980). It should be noted that representation may ethically proceed in the face of a problematic conflict only when

(1) it is "obvious" that the lawyer can adequately represent both clients' interests⁴¹ and (2) both clients consent.

The expectation that lawyers will inform clients about conflicts of interest is not new to ethical practice:

An attorney is bound to disclose to his client every adverse retainer, which may affect the discretion of the latter. When a client employs an attorney, he has the right to presume, if the latter be silent on the point, that he has no engagements, which interfere in any degree, with his exclusive devotion to the cause confided to him; that he has no interest which may betray his judgment or endanger his fidelity.

Williams v. Reed, 29 F.Cas. 1386, 1390 (C.C. Me. 1824). Nor is the expectation ignored by modern courts: "[F]ull and effective disclosure of all the relevant facts [regarding the conflict] must be made and brought home to the prospective client" (*IBM Corp. v. Levin*, 579 F.2d 271, 282 (3d Cir. 1978).

C. Prospective Waivers of Conflicts of Interest

⁴⁰ See also **Standard 33**: "A lawyer shall not enter into a business transaction with a client if they have therein differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client unless the client has consented after full disclosure. A violation of this standard may be punished by a public reprimand."

⁴¹ The newer ABA Model Rule 1.7(b) provides that the lawyer must "reasonably believe" that the representation will not be adversely affected.

Lawyers may seek and obtain prospective waivers--client "consent" to conflicts that may arise in the future. Although the effectiveness of prospective waivers cannot be accurately predicted, prospective waivers have been upheld in some cases.

Reporter's Notes--Prospective Waivers of Conflicts

Especially when considering a limited, *ad hoc* representation, the lawyer may seek a prospective waiver by asking the client to "consent" to conflicts that may arise in the future. Although the effectiveness of such a waiver will depend greatly on the particular facts of the conflict and the circumstances surrounding the giving of consent, such waivers have been upheld on occasion.⁴²

In *Unified Sewerage v. Jelco, Inc.*, 646 F.2d 1339 (9th Cir. 1981), the court upheld what might be called a "prospective" waiver in a contract litigation context. Jelco was the prime contractor engaged in a project between Jelco and, among others, two subcontractors, Teeples and Ace. A dispute with Ace arose out the contract, and Jelco asked the Kobin law firm to represent it. Kobin informed Jelco that it was already representing Teeples against Jelco in an "embryonic" dispute arising out of the same general contract. Jelco decided to engage Kobin anyway, giving the firm what may be seen as a prospective waiver to a conflict of interest that Kobin's Teeples representation might involve. The Teeples representation eventually resulted in a suit against Jelco, but upon reconsideration, Jelco insisted that Kobin continue to represent it against Ace. At that point the Kobin law firm was representing a plaintiff, Teeples, suing Jelco and also was representing Jelco, as plaintiff, suing Ace. Both matters arose out of disputes over the same project. Later, Jelco dismissed Kobin in the Ace litigation and sought to have Kobin disqualified from representing Teeples against it. Both the trial court and the Ninth Circuit concluded that the Kobin firm should not be disqualified. Reasoning from DR-105 as the pertinent ethical rule, the courts concluded that the client's choice of counsel overrode the interests of Jelco in that it had given a prospective waiver when the conflict was only a "potential" one.

Two facts about this case deserve emphasis. First, the courts viewed the Ace and Teeples matters as "unrelated," so there was no question of a simultaneous representation in "substantially related" matters. More important for prospective waiver analysis is the fact that Jelco was clearly informed of the precise nature of the possible conflict. It did not have to speculate about the identity of the "other" client or its relationship to the other, conflicting matter before it gave its waiver. In short, the waiver was not a general one; it pertained to identifiable parties and matters.

Other cases support the proposition that prospective waivers are enforceable when the nature of the potential conflict is identifiable. See, e.g., *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F. Supp. 193 (N.D. Ohio), *aff'd mem.*, 573 F.2d. 1310 (6th Cir. 1977), *cert.*

⁴² See generally "Prospective Waiver of the Right to Disqualify Counsel for Conflicts of Mich.L.Rev. 1074 (1981); and "The Client's Right of Consent to Potential Conflicts of Interest, 11 Capital L.Rev. 625 (1982).

denied, 435 U.S. 996 (1978). Where the potential conflict ripens to be materially different, courts appear likely to grant a client's motion to disqualify. For example, in *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978), a client's waiver of a lawyer's conflict with one client did not bar a client motion to disqualify the lawyer in a matter involving a different client and more substantial claims, and where there was greater concern for client confidentiality.

When lawyers seek an open-ended or general waiver of potential conflicts,⁴³ the wisdom, enforceability, and practicality of the prospective waivers are questionable. If the client consent must be informed, then the former client should have adequate information about the risks and advantages of the proposed adverse representation to which he has consented (see, e.g., ALI Restatement Section 202). An open-ended prospective waiver provision would be predicated upon nothing more than a speculative, future adverse representation. It would seem impossible for lawyers to provide information about future matters adequate for the client to give an informed consent. Lawyers can only speculate about the risks and advantages of a future matter. Unless it is a very unusual circumstance, lawyers would have difficulty foreseeing precisely the ultimate scope of the first representation (or the magnitude of the client confidences to which they may be privy). Lawyers would have even more difficulty predicting the nature and scope of speculative, future adverse representation. A lawyer's inability to make accurate predictions would doom the effectiveness of any waiver obtained.

As a practical matter, many lawyers would be uncomfortable requesting an open-ended, prospective waiver from new clients. To do so risks immediate deterioration of the client's confidence in (the perception of loyalty of) the lawyer. Few clients would appreciate their lawyers beginning a representation with the message, "Please give me permission to represent clients in the future who will have interests adverse to yours." Even if the client is not offended, it will often have little incentive to agree to such a request and will, therefore, withhold permission. The lawyer who perceives the likelihood of refusal is less likely to make the initial request. Beyond lawyer and client discomfort may be a third practical and legal question: Will the lawyer or firm need to advise the client to consult a lawyer to advise independently on the issue of prospective waivers?

As suggested above, the exceptional cases are those in which a particular, potentially conflicted lawyer (or firm) has been retained because of special expertise or a special situation, and the lawyer informs the client of the specific nature of the potential conflict and identifies the parties potentially involved.

The latter principle may stretch a bit further. For example, in a transactional context, a law firm may have done repeated loan closings for a banking client. Assuming that the loan closings involve discrete, identifiable confidences (or none at all), the law firm might seek to obtain from such a client, perhaps even in the middle of a series of repeated representations, informed consent to represent other clients in closing loans from the bank. Even in this situation, at least one problem remains: it may still be too early in the day for the lawyer to be able to describe adequately to the former client the risks and advantages of the speculative adverse

⁴³ See text accompanying note 14, supra for a sample provision that conditions current representation on the client's prospective waiver of conflicts.

representation, and that if the transaction becomes the subject of litigation, the lawyer will be conflicted as to both parties.

D. Conflicts of Interest with Former Clients

Law firms may consider several types of lawyer-client agreements to address conflict-of-interest problems that may arise from former client representation. The principal differences among these relates to the timing of the agreement.

At the point when the firm concludes that a new matter will be "substantially related"⁴⁴ to the representation of a former client, then it must seek the former client's written consent. As discussed above, some firms may seek a prospective waiver of conflicts at the outset of the original representation, an approach with legal and practical limitations.⁴⁵

A prospective waiver may also be sought from former clients in a "disengagement" (termination) letter. This approach has at least two potential advantages. First, it may allow the law firm to describe adequately, for purposes of client consent, the nature of the just concluded representation and the existence of client confidences. Second, it may also eliminate some of the psychological impediments to requesting waiver. That is, the lawyer and the client may have less of a concern about loyalty perceptions. Nonetheless, there still seems to be little incentive for the client to accede to the request. Also, even if the client were willing, the lawyer may still be unable to describe specifically the risks and advantages of the future, and still speculative, adverse representation. That may preclude informed consent.

Perhaps some representation situations will allow for prospective waivers. One example is a law firm that has done loan closings for a banking client. Assuming that the loan closings involve discrete, identifiable confidences (or none at all), the law firm may be able to obtain from such a client, at the end of all such representations (or perhaps even in the middle of a series of repeated representations), informed consent to represent other clients in related adverse matters. That is, the lawyer may obtain a waiver from the (now) former client to represent "any" adverse party, even in a matter directly related to the specific loans in question. Even if the client is cooperative at this stage, at least one problem remains: it may still be too early in the day for the lawyer to be able to describe adequately to the former client the risks and advantages of the speculative adverse representation. Before requesting such a waiver, therefore, lawyers should reflect on whether they themselves would recommend that their current clients execute such waivers, were they to be requested.

Some lawyers may seek client consent to former-client conflicts through a current engagement letter provision. This is the classic case to which Standard 69 (and ALI Restatement Section 213) speaks. Here, the matter for which the lawyer was engaged has concluded, and the client is truly a "former client." In addition, the lawyer has determined the new, adverse matter to

⁴⁴ See Section III.D.2., infra, for discussion of this phrase.

⁴⁵ See Section III.C., supra, for discussion of those limitations.

be "substantially related" to the former representation or to involve potentially the adverse use of former client confidences. As noted above, before accepting the new matter, the lawyer must obtain the informed consent of the former client (Standard 69) and perhaps that of the prospective client also (ALI Restatement Sections 213 and 202).

As noted above, a primary concern is whether lawyers will be able adequately to inform the clients of the potential consequences of the adverse representation. To resolve consent questions in favor of disqualification suggests that lawyers will have to meet a high standard to establish informed consent. Also, as indicated above, Restatement Section 202 requires that informed consent be based upon the client's having adequate information about the risks and advantages of such representation. The rule seems to assume that predicting the future is not only required but possible; how specific the predictions must be is problematic.

Such risks and advantages will vary considerably from case to case. Providing clients with an enumeration of such potential problems, such as the use of or inability to use confidences and the availability or nonavailability of the lawyer to the client in the future, may suffice. If so, a thorough engagement letter might provide a checklist of risk and reward categories. The letter should define the scope of the past representation, and although the nature of the prospective representation may not be perfectly definable, the letter should also identify predicted boundaries.

Reporter's Notes--Conflicts of Interest with Former Client

Georgia Standard of Professional Conduct 69 provides the following:

Standard 69.

A lawyer shall not represent a client whose interests are adverse to the interests of a former client of the lawyer in any matter substantially related to the matter in which the lawyer represented the former client unless he has obtained written consent of the former client after full disclosure. The term "client" as used in this Standard shall not include a public agency or public officer or employee when represented by a lawyer who is a full time public official. This provision shall apply retroactively. A violation of this standard may be punished by disbarment.

Three elements of Standard 69 deserve emphasis. First, its prohibition arises only when the former and the current client's interests are "adverse." Determination of "adversity" proceeds as with current conflicts. Second, and most problematic, the prohibition arises only when the former client's and the current client's matter are "substantially related." Although this phrase is commonly employed with respect to former client conflicts, determining when matters are substantially related under Standard 69 may involve such fine distinctions that prudent counsel will tend to err on the side of an expansive definition. This observation heightens the importance of the final point: to avoid Standard 69's prohibition, and to err on the side of caution, counsel must obtain written consent of the former client. Such consent avoids the conflict, at least in theory. Interestingly, Standard 69 does not require counsel to obtain consent of the current

(prospective) client to a representation that is adverse to a former client. In that way Standard 69 and Georgia law depart from widely accepted ethical norms. For example, ALI Restatement Sections 202 and 213, in addressing former client conflicts, require consent of both the former and the new client. Again, prudent counsel may well obtain the current client's written consent to the conflict, if only to alert the current client to the issue and to obtain the current client's permission to reveal the request for representation to the former client.

1. Rationale for Standard 69

The Restatement describes several policies that underlie rules similar to Standard 69. First, a lawyer's duties to a former client do not end with the termination of representation; for example, lawyers must preserve former clients' confidences. Without the prohibition of Standard 69 and its cautionary effect, lawyers might see some incentive to advance current clients' causes at the expense of the former clients. Second, when representing clients, lawyers should perceive no incentive to curtail their duties so as to benefit future clients in representations against their current clients. Third, the inclusion of limitations on the prohibition--especially the "substantially related" element--avoid perpetual servitude of the lawyer to the former client. The Standard, after all, does allow the lawyer to represent later clients in substantially-related matters adverse to the former, as long as the former consents.

The Restatement mentions a fourth policy: the lawyer's obligations to the former client may limit the lawyer's ability to represent the current client adequately. That policy underlies the Restatement's requirement that the lawyer in conflict seek the consent of both the former and the current client. Although Standard 69 does not require obtaining consent of the current client, there are good reasons to do so. As noted above, for ethical reasons, prudent lawyers may want to seek permission from the current (prospective) clients to disclose the request for representation; and they may want to apprise the current client about the potential constraints that the conflict may place upon the new representation. For client relations reasons, lawyers may also see a benefit from disclosing such conflicts to their current clients.

2. "Substantially Related" Matters ⁴⁶

Much ink has been spilled on the interpretation of the phrase "substantially related" when defining a problematic former client conflict. The phrase is generally attributed to Judge Weinfeld in his opinion in *T.C. Theater Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953). The broad scope of this prohibition derives historically from the general prohibition against lawyers switching sides in a legal proceeding.⁴⁷

Several points are clear, however. The burden to establish the substantial relationship of the matters at issue falls upon the party seeking the lawyer's disqualification. E.g., *Barton v. Peterson*, 707 F. Supp 520, 522 (N.D. Ga. 1988). Nonetheless, all doubts are to be resolved in favor of disqualification. E.g., *Dodson v. Floyd*, 529 F. Supp. 1056, 1061 (N.D.Ga. 1981).

What constitutes "substantially related" matters is not so clear; courts are exhorted to engage in a "painstaking analysis of the facts [that looks beyond] mere facial similarities . . . to focus on the precise nature of the subject matters presented in the two representations" (*Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 646 F.2d 1020, 1029, 1031 (5th Cir.), cert. denied 454 U.S. 895 (1981)). Courts in the many jurisdictions that employ the substantial relationship standard have developed varying tests. Some require that there be "common legal issues"; others, "common factual issues." Those adopting the former approach have tended to disqualify only where the substantial relationship between the representations is patently clear.

Georgia's interpretation of substantial relationship combines these two tests with an admonition for flexibility. A substantial relationship may be proved by showing any of three things: (1) "the same operative facts"; (2) "a sufficient similarity of issues"; or (3) "the attorney's exposure in a prior representation to business methods and practices of his former client which fall short of information privileged under the attorney-client privilege." *Avnet, Inc. v. OEC Corp.*, 498 F. Supp 818, 820 (N.D. Ga. 1980).

A fourth possibility exists for demonstrating a substantial relationship sufficient for disqualification. In *Crawford Long Hospital of Emory University v. Yerby*, the court disqualified a lawyer who had previously defended medical malpractice cases for the hospital from later representing a plaintiff against the hospital because, unbeknownst to the lawyer at the time of the earlier representation, the facts arose leading to the later representation. 258 Ga. 720, 373 S.E. 2d 749 (1988). In that case, though neither the facts nor the issues were related (except perhaps

⁴⁶ The Georgia Corporate & Banking Law Institute has sponsored several programs devoted in part to identifying and resolving conflicts of interest. Much of this description derives from the Institute's 1989 program, "Recognizing and Resolving Conflicts of Interest, Multiple Representations and Successive Representations" (ICLE 1989), including the cases and analysis on the subject of substantial relationships between client matters. Participants in the 1989 Institute include two members of the current Committee, Robert M. Thornton and John J. Dalton.

⁴⁷ Restatement at 722, citing Canon 6 of the 1908 ABA Canons of Professional Ethics.

taxonomically), there existed a sufficient temporal commonality and client relationship to create a potential appearance of impropriety.

Where a substantial relationship is found between the representations, there arises an irrebuttable presumption that confidential information has been conveyed to the lawyer in the former representation. Not all jurisdictions recognize the irrebuttability of the presumption, but the majority of jurisdictions do, and this is the rule in Georgia. Invoking this presumption avoids the problem of former clients being called upon to divulge the very confidences they may wish to maintain in order to establish the conflict that will then allow the court to protect them. See *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1341, 1347 (5th Cir. 1981); *Summerlin v. Johnson*, 176 Ga. App. 336, 337, 335 S.E.2d 879, 880 (1985).

E. Conflict of Interest in Representing an Organization or Multiple Parties Organizing a Business Entity

This section addresses two related sets of conflict-of-interest problems: those associated with representing more than one party in a business transaction and those associated with representing a business organization itself. The representation of more than one party in a business organization (commonly referred to as "joint representation") presents special ethical considerations for a lawyer. Because of representational efficiencies, including savings over the cost that would otherwise be incurred when each party retains separate counsel, the several clients will often encourage a lawyer or firm to undertake a joint representation. As noted above in Section III.6.A. (Conflicts in General), The Code of Professional Responsibility for Lawyers, as adopted in Georgia, permits this where the law firm can represent the interests of each client adequately and where each client knowingly consents to the joint representation.

The rationales for regulating representation of multiple parties in a nonlitigation, transactional context are largely the same as those already discussed above with regard to conflicts of interest in general: loyalty to client(s); vigorous representation; and protection of confidences.⁴⁸ Joint, transactional representations tend to fall into two categories: those in which the lawyer represents multiple clients with common, nonconflicting interests at the outset; and those in which the lawyer represents multiple clients with adverse interests at the outset.⁴⁹

When a lawyer represents multiple clients that do not have current or potential adversity, as a technical matter there is no conflict of interest and no need for client consent.⁵⁰ Only when

⁴⁸ Restatement at 684.

⁴⁹ Restatement at 683.

⁵⁰ See Georgia Standards 35, 36 and 37. Those Standards essentially reiterate Georgia Ethical Considerations 5-16 ("[B]efore a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent.") and 5-19 ("A lawyer may represent several clients

the lawyer judges there to be adverse effects upon a client from the joint representation does Georgia law require the lawyer to obtain client consents to the joint representation. Because most such representations raise the specter of potential conflict and adverse effects, which trigger the need for client consent to the representation, and because client contractual consent is a prerequisite for engaging the lawyer in the first instance, prudent counsel will inform the clients of the delicacy of the multiple representation and identify potential conflicts of interest and adverse consequences in all cases, not just those where an adversity is perceived.

Where the lawyer represents clients with current, known differences that require resolution in the representation, the lawyer must first ascertain that he or she would be able to represent each client adequately if each was to give consent. If that threshold determination is positive, the lawyer must then seek each client's consent to the joint representation. As noted, predicted fee savings and other efficiencies provide incentives to the clients for giving consent. (Obviously, a lawyer should respect any client's decision to seek other counsel, either for the representation at hand or for the decision to consent to the conflict.) Once multilateral consent is received, the lawyer carries the burden of assisting the various clients to reach accord, without imposing his or her own views or prosecuting one client's interests to the detriment of another's. In representing business organizations, lawyers must be mindful that organizations usually comprise several, often competing, interests. Lawyers must take care to identify the clients they have been engaged to represent. If a client is a business entity, lawyers must remember that under normal circumstances they represent only the entity, not the principals, employees or other organizational constituents. As with ordinary joint representations, lawyers may ethically represent both the business entity and other constituents where their interests are not adverse or where the lawyer determines that both clients can be adequately represented and the clients consent.

Representing an organization with affiliates presents the potential problem of conflicts that arise because of prior or current representation of an affiliate. Such conflicts are sometimes predictable; others arise unexpectedly from corporate restructuring, mergers, and spin-offs. At least in the former situation, of crucial importance in avoiding ethical problems in this context is to begin the representation by clearly identifying the organizational entity or entities that the lawyer will represent.⁵¹ In the latter case, where affiliate relationships arise unexpectedly, the lawyer's sensitivity to client relations will often either cause the lawyer to steer clear of the new conflict or, when the affiliates desire otherwise, to obtain their consent to the representation. Georgia

whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds a contrary belief and withdraw from representation of that client.”)

⁵¹ See ABA Formal Opinion 95-390: Conflicts of Interest in the Corporate Family Context, ABA Standing Committee on Ethics and Professional Responsibility (January 25, 1995), for elaboration on the problem of affiliate conflicts. Much of this commentary draws from this Formal Opinion.

Standard 35 governs whether the latter course of action is ethical; it precludes representation where “the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client.”

Reporter’s Notes--Organizational Representation

As noted above, Georgia Standards 35,⁵² 36, and 37⁵³ govern multiple or joint representations, including such representations in a transactional context. Other Georgia Canons of Ethics pertain as well, including:

EC 5-15

If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation On the other hand, there are many instances in which the lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subject to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

DR 5-105

Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A)&(B) A lawyer shall decline proffered employment [or "not continue multiple employment"] if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by [A and B], a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

⁵² Set forth at Section III.6.A., supra.

⁵³ Set forth at Section III.6.B., supra.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his firm may accept or continue such employment.

1. Joint Representation

Joint representation of clients who seek to form a business organization may be either without conflict or amenable to client consent. For example, in *De La Maria v. Powell, Goldstein, Frazer & Murphy*, (N.D. Ga., Civ. Action No. C83-852A 1985), the law firm had introduced two clients and assisted them in forming a corporation without informing one of the clients about the firm's business dealings and experience with the other client. When the issue of conflict was raised at trial, the judge instructed the jury that potential conflicts always exist in such cases, but that clients may waive even actual conflicts where fully informed. In *Atwood v. Sipple*, 182 Ga. App. 831, 357 S.E.2d 273, *cert. denied*, 108 S.Ct. 330 (1987), it was assumed that it was not an ethical violation for the same lawyer to represent both parties to a joint venture agreement and then to represent one in litigation arising out of the agreement, at least with respect to use of "privileged information." The court noted that the clients, who had all met with the lawyer in the formation process, should not expect their discussions to be privileged, as between one another.

The ethical rulings from other jurisdictions on questions of joint transactional representations are somewhat inconsistent. *See, e.g.*, ABA Informal Opinions Nos. 472 (1961) and 518 (1962) (attorneys may represent both the buyer and the seller in the same transaction and multiple parties in drafting a contract setting forth the future arrangement of the parties); Connecticut Informal Opinion 82-12 (Feb 11, 1983) (disapproved lawyer's representing both parties to a real estate transaction); and New Jersey Opinion N. 463 (Dec. 11, 1980) (even with consent of client, lawyer may not represent the buyer/mortgagor in transaction where he had also originated the mortgage financing with the mortgage broker on a referral fee basis).

2. The Corporate Client

In the corporate (or business organization) context, lawyers must take care to identify which organizational element lawfully speaks for the corporation (or organization) and thus embodies the

entity. Corporate counsel must take care to maintain allegiance with the appropriate organizational element.⁵⁴ In this regard, Georgia Ethical Consideration 5-18 provides that:

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to the stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.⁵⁵

On the issue of joint representation of a business entity and its employee, *In re Grand Jury Proceedings*, 1979-2 Trade Cas. (CCH) Par.62,856 (N.D. Ga. 1979) held that where there is no actual conflict and the employee, after being advised of the possible dangers of representation by company counsel, had clearly waived any potential conflict, the lawyer may represent both the company and its employee.

Lawyers must exercise care when, as counsel to a corporation, they consult with a director, officer, or employee of that corporation who may have a position legally adverse to that of the corporation. At a minimum in such cases, counsel to the corporation should identify the engagement as being solely on behalf of the corporation and should alert other persons to the fact that statements made will, at most, be subject only to the corporation's attorney-client privilege, which may be later waived by the corporation.

F. Imputation of Conflicts of Interests

⁵⁴ Jurisdictions may disagree about the appropriate allegiance for corporate counsel when intracorporate conflicts arise. For example, in *Financial General Bankshares v. Metzger*, 523 F. Supp. 744 (D.D.C. 1981), the court emphasized that corporate lawyers represent the entity interests articulated by current management and that corporate counsel violate their ethical duties to the corporate client if they participate in clandestine meetings with dissident board members or an outside group attempting to take control of corporation. The court observed that where serious allegations are made against current corporate officers and directors, corporate counsel usually represent the officers and directors, and the corporation retains independent counsel. Accord, *Messing v. F.D.I., Inc.*, 439 F. Supp. 776 (D.N.J. 1977) (where serious allegations of securities fraud are leveled against officers and directors, corporation should be represented by independent counsel, not inside counsel).

These cases do not necessarily comport with the Committee's views or with Georgia Ethical Consideration 5-18.

⁵⁵ There is no specific Georgia Directory Rule or Standard to enforce this. However, if the differing interest includes adverse impact, then Georgia Standard 35 precludes representation.

Lawyers may be precluded from representing a client in a matter adverse to a party who has a relationship with partners or associates of the lawyer that would disqualify them from representing the client. Disqualification results from the imputation to the lawyer of the disqualification of the partners or associates. In theory, as in cases of a lawyer who is directly conflicted, the conflict may be waived by the consent of both parties.

Conflicts may be imputed in the following circumstances:

1. An existing representation of a client whose interests are adverse to the interests of the proposed client.
2. A future conflict which may arise should a client whose work is done by another partner or associate have a controversy with the proposed client.
3. A co-counsel relationship with a law firm whose client has a controversy with the proposed client.
4. The presence in the firm of a partner or associate formerly with a firm which represented a party whose interests are adverse to that of the proposed client.

In some cases a lawyer may request a waiver of conflicts which may arise in the future because of the possibility that another client may in the future have a controversy with the proposed client.

While consent will permit representation without fear of disqualification, the consent may not prevent adverse consequences. In the course of the representation a disagreement between the parties may rub off on the lawyer resulting in no further employment by either party.

If a lawyer believes there is no danger of adverse consequences, he may decide to cure the disqualification by securing a written consent of all parties. The problems in drafting consents in cases involving former client conflicts and organizational conflicts provide a guide to drafting suggested engagement letter provisions waiving imputed conflicts. Before deciding to ask for a waiver, the lawyer should consider whether the prospective client, presented with an engagement letter waiving an imputed conflict, may decide that the better course is not to employ the lawyer. If the lawyer feels that the representation could be accepted, the conflict waived and the engagement carried out in a manner satisfactory to the client, the imputed conflict must be disclosed and an appropriate waiver secured.

A waiver of an imputed conflict of interest should cover the following points:

A description of the conflict of interest of the lawyer whose conflict is imputed to the lawyer or firm seeking the waiver;

A description of the affiliation of the conflicted lawyer with the lawyer or firm;

The reasons why the lawyer believes that the conflict presents no real danger to the client, such as the conflicted lawyer's lack of knowledge of the affairs or confidences of the former client, the termination of all connections between the conflicted lawyer and his former firm, and assurance that measures will be taken to avoid disclosure of confidences to the conflicted lawyer, such as denying access by the conflicted lawyer to the client's files and embargoing discussions with the conflicted lawyer of the client matter by others in the firm.⁵⁶

Several rationales are cited for imputing conflicts to affiliated lawyers, including the partners and associates of a law firm.⁵⁷ First, affiliated lawyers share a common interest in each other's personal, professional and financial welfare. Fees paid to one partner usually benefit the other lawyers in the firm, either directly through fee-sharing arrangements or indirectly through contributing to firm overhead. This "all for one and one for all" relationship suggests that if one lawyer in a firm has an incentive to breach a duty or to favor one client over another, another lawyer in the firm may perceive the same incentive.

Second, affiliated lawyers usually have access to files and other confidential information about each other's clients. Even if that would not ordinarily be the case in a particular firm, clients may assume or even encourage file-sharing and consultation within firms or with other firms. Such confidential information about one client may be useful to another client with a contrary interest. Therefore, access to files and information creates some incentive, however unethical, for a lawyer to advance the interests of one firm client by injuring those of another.

Third is the concern about an appropriate remedy if the prophylactic effect of an imputed conflicts rule were unavailable. Clients who fear or suffer breach of confidence or other disloyalty by the primary lawyer may have only inadequate methods of protecting against or proving disloyalty by the affiliated lawyer. In the first place, it is difficult for clients to penetrate the processes of the law firm to discover the problem. But even if the client discovers the breach, establishing it before a bar tribunal or in court might require revealing the very confidences the client had hoped to keep secret.

These rationales do not suggest that a lawyer's very personal conflicts require imputation to partners and associates. For example, if one firm client wants to sue a commercial business in which a firm partner owns a 20% interest, that partner should not represent the firm's client in the action against the business in which he has an interest, at least absent informed consent, because

⁵⁶ Georgia courts have not expressly authorized screening measures colloquially referred to as "Chinese Walls" or a "Cone of Silence" as a cure for imputed or former client conflicts when there is not informed consent. Nonetheless, implementation of such measures in connection with the waiver of an imputed or former client conflict may reassure the client and be helpful in the event of a dispute as to whether confidences have been divulged.

⁵⁷ Restatement Section 203, at 589-590.

of the direct personal conflict. But at least the ALI Restatement's imputation rules would not necessarily attribute this personal conflict to another partner or associate in the firm.

The alternative provisions suggested in Part II assume the potential desirability of seeking client consent to a prohibited conflict of interest. As in other conflict situations, before a law firm (or lawyer) decides to employ any such provisions, it should have considered carefully their timing and practicality. At the commencement of a representation, seeking a prospective waiver of imputed conflicts, even if legally viable, alerts the new client to the possibility that representations of other clients may occasionally be adverse to the new client. As a legal matter, as with all prospective waivers, it might be extremely difficult to describe the unknown, potentially imputable conflict adequately to support informed consent. The practicality of such prospective waivers is also suspect. Many firms would be concerned about risking immediate deterioration of client confidence in (perception of loyalty of) the lawyer. They could predict that the client would not trust a firm that expresses an immediate desire to represent other, theoretically adverse clients. Admittedly, the imputation conflicts have an advantage over the direct "former-client" conflicts, in that imputed conflicts are by their nature derivative and indirect. For that reason, the "double imputation" conflict,⁵⁸ which is doubly derivative, may be perceived by reasonable clients as sufficiently ephemeral to warrant little, if any, concern. The former-client, imputed conflict, where a current lawyer in the firm used to represent the adverse client, may also adequately be removed from direct conflict so as to yield client comfort.

But the real question here may be whether the former client will consent. Given the lack of incentives for former clients to consent to the conflicts when they arise, law firms making lateral hires may consider having new lawyers bring with them prospective waivers not only from all former clients but also from all (or key) clients of the former firm. That may be unrealistic for reasons related both to efficacy and to client relations.

Reporter's Notes - Imputation of Conflicts of Interest

These notes are divided into two sections: ordinary imputation of conflicts of interest and so-called "double" imputation of conflicts.

⁵⁸ See Section III, 6.F.2., *infra*, for a discussion of the potential problem of "double imputation" conflicts of interest.

1. Ordinary Imputation

a. Georgia Law

Georgia Standard 38 provides:

Standard 38.

If a lawyer is required to decline employment or to withdraw from employment under Standards 35, 36, or 37 [conflicts of interest], no partner or associate of his or his firm may accept or continue such employment

Standards 35 and 36 refer to conflicts of interest that arise because a lawyer's independent professional judgment may be compromised because of multiple representations. Standard 37 allows multiple representation "if it is obvious that he can adequately represent the interests of each [client] and if each [client] consents to the representation"

Note that Standard 38 comprehends expressly affiliations of the lawyer beyond the partners and associate lawyers of a firm, apparently including lawyers and firms acting as co-counsel on a matter. Nor does Standard 38 itself provide for any imputation-removal or curing procedures. Standard 38, and its underlying Standards 35, 36, and 37, are reiterations of DR-5-105:

DR 5-105

Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situation covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his firm may accept or continue such employment.

The phrase "under DR 5-105" is unique to the Georgia Code, and does not appear in the old ABA Model Code. Both the Georgia Court of Appeals, in *National Media Services, Inc. v. Thorp*, 207 Ga. App. 70 (1993), and the U.S. District Court for the Northern District of Georgia, in *Dodson v. Floyd*, 529 F. Supp. 1056 (N.D. Ga. 1981), have recognized that distinction. Both cases held that Georgia DR 5-105(D) is not grounds for disqualification of a new partner of Lawyer A because DR 5-105 deals only with present conflicts of interest, while past conflicts are dealt with by Standard 69, which refers only to the individual lawyer in question. *National Media Services* at 71; *Dodson* at 1065. As a consequence, having no specific Code rules dealing with attribution in a lateral movement context, courts applying the Georgia Code necessarily go to general principles under Canon 4, "A lawyer should preserve the confidences and secrets of a client," and Canon 9, "A lawyer should avoid even the appearance of professional impropriety." As a practical matter, the courts apply subjective judgments on an *ad hoc* basis.⁵⁹ As suggested above, because imputed conflicts often arise out of former-client situations translated into current conflict, the issues and rationales for resolution are often quite the same.

In re Corrugated Container Anti-Trust Litigation, 659 F.2d 1341 (5th Cir. 1981), is illustrative. The Chadwick law firm had represented Kraft Foods Division for some 43 years. Kraft was its biggest and best client, and over the years the firm provided a wide panoply of legal advice and services to Kraft, including antitrust advice. A series of antitrust cases were filed against the corrugated paperboard industry, among which was an action brought by Kraft (through other counsel) against Corrugated Container of America ("CCA") among others. Chadwick was representing CCA in some related antitrust litigation, and appeared on behalf of CCA in the Kraft matter. Attempts to "work the matter out" between Chadwick and Kraft failed, and Kraft moved to disqualify Chadwick. The trial court did so, and the Fifth Circuit affirmed.

The Fifth Circuit rejected any notion that the current lawyers of Chadwick did not possess adverse confidential information. Chadwick had argued that the partners who had provided antitrust advice to Kraft had long since departed from Chadwick and were no longer members of the firm. The court was more impressed by the long and intimate relationship between Chadwick and Kraft, and stated "among partners and regarding a long-time substantial client, this single imputation rule (of possession of material information) cannot be rebutted" (at 1347). Thus, the court held that all of the partners of Chadwick were presumed to know whatever "the firm," or any of its constituent parts, knew about this large and substantial client. Further, the court held that the presumption was irrebuttable (at 1347). Finally, the court noted that the strictures of Canon 9 are not amenable to waiver by a client because of the public policy interests inherent in the Canon (at 1349).

⁵⁹ At least one court, however, has adopted a rule of disqualification, assuming double imputation under the old Model Code/Canons structure. *State ex. rel. FirstTier Bank N.A. v. Buckley*, 503 N.W.2d 838 (Neb. 1993).

The Georgia Court of Appeals has also held that if a substantial relationship exists between a matter previously handled by a lawyer and a subsequent matter adverse to the original client, then an irrebuttable presumption arises that the attorney has confidential information material to the second matter, and is disqualified from pursuing that matter adverse to his original client. *Summerlin v. Johnson*, 176 Ga. App. 336 (1985). To the same effect is *Dodson v. Floyd*, 529 F. Supp. 1056 (N.D. Ga. 1981), the Dodson court noting further that the Fifth Circuit (Dodson being a pre-Circuit Division case) followed the "substantial relationship" test, under which the presumption of material adverse knowledge is irrebuttable.

In *Summerlin*, a two-man law firm was prosecuting an automobile accident plaintiff's case against defendant. Among the other allegations of negligence was driving under the influence. Prior to forming the partnership with Lawyer B, Lawyer A had represented defendant in defending a criminal DUI charge. In the present civil case, Lawyer B was taking the lead as trial counsel for the plaintiff. The Court of Appeals held that the law firm was disqualified from representing the plaintiff because Lawyer A was presumed to have material information adverse to defendant as a result of the previous representation. The court noted that the presumption was irrebuttable, and consequently Lawyer A clearly could not represent plaintiff. The court then stated, without explanation, that Lawyer A's partner, Lawyer B, likewise could not represent the plaintiff, and the firm was disqualified.

A similar result was reached in *Love v. State*, 202 Ga. App. 889 (1992). There, Defendant was being represented by a law firm. Lawyer joined the law firm as an associate after a stint as an assistant district attorney, during which tenure he represented the State in the hearing which bound Defendant over for trial. On motion by the State, the law firm was disqualified from representing Defendant because the new lawyer had previously had "substantial responsibility" in prosecuting Defendant's case. See DR 9-101(B).

While some may question the intellectual foundations of *Summerlin* and *Love* (*Summerlin* depends upon the strictures of DR 5-105(D), which clearly applies to imputations arising out of current, not prior representations, and *Love* speaks to the imputation issue not at all), they remain authority for the proposition that a new lawyer's knowledge is imputed to his new firm. Exactly the converse has been found in cases not involving law firms, but rather less structured arrangements. In *National Media Services, Inc. v. Thorp*, 207 Ga. App. 70 (1993), a space-sharing arrangement between lawyers was not sufficient to impute knowledge from one to another. Also, in *Dodson v. Floyd*, 529 F. Supp. 1056 (N.D. Ga. 1981), the court declined to disqualify trial co-counsel, even after finding an individual trial counsel to be disqualified.

b. ALI Restatement

Restatement Section 203, the closest analogue to Georgia Standard 38, specifies problematic associations beyond those of partner and associate. "Affiliated" means associated through a(n):

1. law partnership, professional corporation, sole proprietorship or similar association (would include LLC, LLP, professional associations);

2. employer organization (e.g., in-house counsel to corporation; associate of law firm);
3. shared office space arrangement where confidentiality of client information is not assured;
4. an "of counsel" relationship;
5. legal consultantship.

The ALI commentary notes that peripherally involved lawyers, such as associates, who have little communication with firm clients have been excluded by some judicial opinions. (P.58) The ALI Restatement provides useful examples of imputation problems and their resolutions. Among them are these paraphrased examples:

--Law Firm A and Law Firm B associate for purposes of serving as patent and litigation counsel to Client who wishes to sue Opponent for patent infringement. Law Firm A had represented Opponent in earlier stage of same proceeding. If A affiliates with B, then A's conflict will be imputed to B, precluding both from representing Client. (With respect to other matters in which the firms do not affiliate, no imputation is warranted.)

--Castor Corporation's general counsel, A, represents it in a negotiation with its subsidiary, Pollux Corp., represented by its general counsel, B. Because A participates in the review of B's work and advancement, B may not represent Pollux, because of the conflict with A and Castor. B's conflict is also imputed to A because of the interrelationship of legal offices.

As noted already, potentially imputed conflicts may be removed by obtaining client consent, under Georgia Standard 37, to multiple-client conflicts covered by Standards 35 and 36, so long as it is obvious that the lawyer can adequately represent the interests of both clients.⁶⁰ Standards 35-37 refer to "a lawyer," and Standard 38 does not expressly provide for the mechanism for curing imputation of Section 35 or 36 conflicts that involve affiliated lawyers. It may be presumed that because the Standards allow client consent to direct conflicts that Georgia courts would read the Standards to allow consent to indirect, imputed conflicts also under similar conditions. A clearer rule would be preferable. For example, ALI Restatement provides expressly that even where a client may not consent to the direct conflict, the client may give consent to avoid the imputation of the conflict and may condition the consent in any way.⁶¹ Restatement Section 204 details the circumstances under which imputed conflicts are cured.

⁶⁰ See Section III.6.B, supra, for discussion of curing conflicts of interest through client consent.

⁶¹ Restatement at 607.

2. Double Imputation

Double imputation of a conflict arises when a lawyer at Firm 1 suffers ordinary imputation (has imputed to her the "representation" of all Firm 1 clients) and then joins Firm 2, bringing with her all the Firm 1 imputed conflicts and passing them to all her new associates at Firm 2.

a. Georgia Law

The Georgia Code of Professional Responsibility and Standards of Professional Conduct do not address this question directly. Standard 38 speaks to the disqualification of partners or associates of disqualified lawyers, but only in the present representation sense. Consequently, courts applying the Georgia Standards typically revert to the relevant Canons, particularly Canon 4 having to do with preserving the confidences of a client, and Canon 9, having to do with appearances of impropriety. Given the scope of protection afforded to clients under these Canons, it is possible, if not probable, that a court applying the Georgia Code could find double imputation of conflicts in the typical lateral movement situation.⁶² This conclusion is tentative, founded largely on extrapolations from cases interpreting Standard 38 or similar rules having to do with ordinary imputation and its rationales.

Although the Supreme Court of Georgia has not spoken directly to the issue of double imputation, it has danced around the edges in two cases. *Crawford W. Long Memorial Hospital v. Yerby*, supra, involved only an issue of single attribution, not the question of whether a new partner's conflict or knowledge is attributed to all lawyers in his new firm, since the lawyer in question left a law firm to enter solo practice. *Yerby* is nonetheless interesting for, as discussed above, it held that the lawyer in question was disqualified from prosecuting a plaintiff's case against a hospital because he had, over previous years, defended several malpractice cases against the hospital, and thus acquired a working knowledge of the "general subject matter" involved in malpractice claims per se. The Supreme Court then disqualified the lawyer. Its holding was based on Canon 9 and a "substantial relationship" analysis.

It is interesting to speculate about *Yerby* had the lawyer joined a law firm instead of going solo and a partner of the new law firm had attempted to prosecute the plaintiff's case against the hospital. Under those circumstances the Supreme Court might well have disqualified the lawyer's new partners and associates, regardless of the absence of any explicit ethical code or standard. That result might obtain if the Supreme Court focused on upholding the two fundamental requisites of an attorney's representation: loyalty to the client and preservation of client secrets. Discussions of attribution of knowledge explicitly address only half of that duality, but inevitably both fiduciary issues are involved in any resolution. In *Yerby*, for example, the reference to the

⁶² The ABA Model Rules and the Georgia Code are substantially different in their treatment of double imputation. The Model Rules provide a mechanism for eliminating the double imputation problem, and hence facilitate the movement of lawyers lacking actual knowledge of a client's affairs from one law firm to another. Although the Georgia Standards contain no specific provisions relating to double imputation, it should be noted that Standard 69 will disqualify lawyers who can be said to have personally represented the former client.

lawyer's general knowledge of the hospital's inner workings could just as easily have been replaced by a holding based upon the appearance of impropriety of a long-term defense lawyer suddenly changing hats and suing his old client.⁶³

The Georgia Supreme Court seems to find "status" conflicts less troubling and seems disinclined to double impute knowledge based solely upon the status of the attorney in question. In *Blumenfeld v. Borenstein*, 247 Ga. 406 (1981), the Supreme Court held that no imputation of knowledge arises from a marital relationship between lawyers in opposing law firms. It was undisputed that no confidential information had passed between the spouses, and it was significant that one of the married lawyers practiced in an area totally unrelated to litigation and the matter involved in the lawsuit. The trial court had disqualified counsel based upon the Canon 9 dictate that "a lawyer should avoid even the appearance of professional impropriety." The Supreme Court reversed.

The Court first defined the issue:

We find that the court disqualified the law firm solely on the basis of Mr. McClure's marital status. We further find that per se disqualification based on marital status is neither mandated nor justified by the Code of Professional Responsibility. Having decided that disqualification of Mr. McClure would not have been justified under the circumstances of this case, we need not reach the question whether if disqualified he could have been so isolated as to obviate the necessity for disqualification of his law firm.

The Court added:

Basic fairness will not permit the disqualification of an attorney because of wrongdoing imputed to the attorney by reason of his status when as a matter of fact no wrongdoing exists.

Absent a showing that special circumstances exist which prevent the adequate representation of the client, disqualification based solely on marital status is not justified (at 408).

⁶³ The concurring opinion in *Yerby* made it clear that the disqualification would not have taken place if the lawyer's representation had involved an area entirely disconnected from the operational functions of the hospital, such as tax work or pension and profit-sharing. Thus, at least to the two concurring Justices, the question is knowledge gained, actually or presumptively.

Finally, the Court went on to state the factors by which it will judge disqualification motions:

It is perhaps helpful to view the issue of an attorney disqualification as a continuum. At one end of the scale where disqualification is always justified and indeed mandated, even when balanced against a client's right to an attorney of choice, is the appearance of impropriety coupled with a conflict of interest or jeopardy to a client's confidences. In these instances, it is clear that the disqualification is necessary for the protection of the client. Somewhere in the middle of the continuum is the appearance of impropriety based upon conduct on the part of the attorney. As discussed above, this generally has been found insufficient to outweigh the client's interest in counsel of choice. This is probably so because absent danger to the client, the nebulous interest of the public at large in the propriety of the Bar is not weighty enough to justify disqualification. Finally, at the opposite end of the continuum is the appearance of impropriety based not on the conduct but on status alone. This is an insufficient ground for qualification (at 409-410).⁶⁴

b. ABA Standards, etc.

Other courts applying the ABA Model Code to double-imputation cases have reached varying results. In *Solow v. W.R. Grace Co.*, 632 N.E. 2d 437 (N.Y. 1994), the court engaged in an extended balancing of hardships analysis, and ended-up taking a "common sense" approach based upon the realities of modern, big-firm practice. It refused to disqualify a lawyer and his new law firm where the lawyer's role in his prior firm had nothing to do with the issues in litigation between the respective clients, or the day-to-day affairs of his old law firm's client. In short, the court simply declined to impute the old firm's knowledge to the individual lawyer, much less double-impute that knowledge to his entire new law firm. On the other hand, the Supreme Court of Nebraska has adopted a strict, per se approach to double-imputation situations, and automatically disqualifies a laterally-transferring lawyer's new firm if the lawyer's new firm is handling litigation matters materially adverse to a client of the old firm. *State ex. rel. FirstTier Bank, N.A. v. Buckley*, 503 N.W.2d 838 (1993). Other cases which have refused to double-impute knowledge so as to disqualify attorneys or law firms under the old ABA Model Code include: *Silver Chrysler-Plymouth Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975), overruled on other grounds, *Armstrong v. McAlpin*, 625 F.2d 433 (1980), vacated, 449 U.S. 1106 (1981); *Ex-Parte America's First Credit Union*, 519 So.2d 1325 (Ala. 1988); *Gas A Tron v. Union Oil Company*, 534 F.2d 1322 (9th Cir. 1976).

⁶⁴ Accord, *Jones v. Jones*, 258 Ga. 353 (1988). But see *Stephens v. Stephens*, 249 Ga. 700 (1982) (fact that trial judge's son was associate of firm appearing but not involved in the litigation before the judge, enough to disqualify firm because of potential perception of partiality by lawmen).

c. Conclusion

It may be assumed that a Georgia court applying the Georgia Code and Standards could, and probably would, disqualify a law firm in a situation which is intuitively offensive. While of necessity the test of offensiveness is a sliding scale, it is clear that the higher the degree of relationship between the client and the firm, in length of time, closeness of association, and breadth of representation, and the greater the degree of personal involvement by the lawyer in question, the more likely it is that a disqualification of that lawyer, and his new law firm, will result. On the other hand, in ordinary lateral movement situations, where the laterally transferring lawyer has had absolutely no connection with the representation in question, and obviously has no knowledge of it other than what might be imputed in a present association context, the Georgia Supreme Court is less likely to find that such a move is offensive to ethical common sense, and to find disqualification warranted.

This common-sense approach may be exemplified by the result reached by the Georgia Court of Appeals in *National Media Services, Inc. v. Thorp*, 207 Ga. App. 70 (1993). There, Lawyer had previously represented the defendant Corporation in debt collection efforts. Lawyer brought an action against Corporation for commissions allegedly owed the Plaintiff. Corporation moved to disqualify Lawyer on the grounds that his debt collection efforts involved matters that were substantially related to the present suit to collect commissions, citing *Crawford W. Long Memorial Hospital v. Yerby*, 258 Ga. 720 (1988), as authority. The trial court and the Court of Appeals disagreed. The appellate court noted that there was no substantial relationship between the former representation and the current lawsuit, notwithstanding that Lawyer "may have gained general knowledge concerning (defendant's) business operations." The court referred not at all to any presumptions of knowledge, stating instead that "there was no evidence that (Corporation's) confidences or secrets had been or would be disclosed . . ."

Corporation also argued that Lawyer had an office-sharing arrangement with Corporation's former general counsel and argued that since the former general counsel certainly could not bring an action against Corporation, his suite-mate could not either. Again, that argument was rejected, the Court of Appeals pointing out the difference between Disciplinary Standard 69, relating to prior representations, and DR 5-105, relating to present representations, and imputations of knowledge under the two. The court stated that "There is no evidence that (Corporation's) former general counsel has or will disclose confidences or secrets . . . to (Corporation's) present counsel." Again, the court made no reference whatsoever to presumptions of knowledge or the irrebuttability of it. Whatever the expressed rationale used by the Court of Appeals, its decision may be viewed as based upon its subjective judgment that it was unlikely that Lawyer's previous relationship with Corporation generated any confidential information, and was equally unlikely that Lawyer's suite-mate (who was not his partner or associate) would share any confidential information. Irrebuttable presumptions did not affect the Court's opinion, perhaps because the situation simply was not very extreme.

Still, much uncertainty exists. The best way to eliminate the present subjective determinations is to revise the Georgia Code and Standards to do away with irrebuttable presumptions of knowledge, perhaps by incorporating language similar to that of ABA Model

Rules 1.9 and 1.10, and the underlying Rules relating to conflicts. The State Bar has been reluctant to adopt the Model Rules in whole or in part, but some narrower revision of the Code may be acceptable. The following amendment to Standard 69 is recommended (underlined portion):

Standard 69

(a) A lawyer shall not represent ~~a client~~ anyone whose interests are adverse to the interests of a former client of the lawyer in any matter substantially related to the matter in which the lawyer represented the former client unless he has obtained written consent of the former client after full disclosure.

(b) Should a lawyer formerly associated with a firm join another firm, the lawyer, the partners and the associates of the second firm shall not represent anyone whose interests are adverse to the interests of a client of the lawyer's former firm in any matter substantially related to a matter in which the former firm represented the client, unless written consent of the client of the former firm has been received after full disclosure, or unless the lawyer can clearly demonstrate a lack of firm's personal knowledge of any confidences or secrets of the former firm's client which are substantially related to the matter in question.

(c) The term "client" as used in this Standard shall not include a public agency or public officer or employee when represented by a lawyer who is a full-time public official.

(d) The term "full disclosure" as used in this Standard includes disclosure of all material facts and the reasonably predictable implications of the proposed representation.

This provision shall apply retroactively. A violation of this Standard may be punished by disbarment.

Failing such Code revision, a decision of the Georgia Supreme Court repealing or modifying the current irrebuttable presumptions of knowledge will be necessary. Notwithstanding the writer's opinion, finding volunteers for such a test case might be difficult.

3. The "Chinese Wall"

The "Chinese wall" is sometimes suggested as a method for insulating a conflicted lawyer from others in the firm so as to prevent the transmission of confidences that are at the heart of conflicts problems. There is little reason to believe that Georgia courts, state or federal, would accept this as a curative for a conflict. Although the *Blumenfeld v. Borenstein* court, as quoted above, alluded, without tipping its hand, to the possibility of isolating the problematic conflict arising from a marital relationship, that case can clearly be read as limited to status relationship situations, not those of professional fiduciaries with financial ties. Because Georgia courts are

likely to fall back on the principles of Canons 4 and 9 in addressing this issue, *Mallard v. M/V "Germundo,"* 530 F. Supp. 725 (S.D. Fla. 1982) is instructive. In that case, all relevant persons in the law firm swore that the conflicted lawyer had been effectively "Chinese-walled" out of the underlying litigation, and even opposing counsel agreed that the lawyer would not share his information. The trial court was not impressed, and deciding the case under ABA Canons 4 and 9, disqualified the law firm because the presence of a conflicted lawyer in the firm gave an appearance of impropriety. Cf. *Cromley v. Lockport Board of Ed.*, 17 F. 3d 1059 (7th Cir. 1994), in which the Court allowed a "Chinese wall" around a lawyer who had been the ex-client's trial lawyer at his old firm.

This is not to say that a "Chinese wall" may not still have its uses. It may give clients additional confidence in the security of their confidential information. It may also protect against breaches of confidentiality and motions to disqualify for such breaches. After all, Georgia Standard 29 requires that the lawyer use reasonable care to prevent employees, associates, and others from disclosing or using confidences.

7. Termination of Engagement

Legal representation in transactional matters may terminate in any of several ways.⁶⁵ It is not the purpose of this report to provide an exegesis of the alternative termination possibilities, with their many permutations and varying legal and practical consequences. It is important, though, for lawyers to remember as they draft the engagement letter that a clear understanding of the intended termination event, as with other contractual terms and definitions, should benefit both the client and the lawyer.

The alternative termination provisions set out in Section II.6. above, suggest also that the engagement letter can, and perhaps should, describe potential termination events that may occur instead of the one predicted and preferred at the outset. It is possible, for example, that the client will wish to replace counsel, proceed without counsel, terminate the deal, be unable to afford continued representation, or discern a conflict. It is also possible that the lawyer will seek to withdraw because of conflict, lack of needed expertise, lack of client cooperation, failure to be compensated, etc. Because these possibilities are common to most representations, the engagement letter provides the opportunity to identify and agree upon the mechanisms for accomplishing such terminations.

A third concern is the ambiguity created by lack of activity in a current or ongoing representation. When a lawyer or firm sees considerable time pass without being asked to perform additional services there can be uncertainty about whether the legal relationship still exists. The client, for example, may assume that the representation continues until formal notice of termination occurs. Counsel, on the other hand, may assume and act otherwise, perhaps even

⁶⁵ With respect to termination issues, especially as they relate to engagement letters, see generally "Engagement, Termination and Declination: Law Firm Policies on Documenting the Attorney-Client Relationship," ABA Section of Business Law Committee on Law Firms (August 1994); and "Conflicts of Interest Issues," 50 Bus. Law. 1381, 1385-87 (The Task Force on Conflicts of Interest of the ABA Section of Business Law, August 1995).

take on another matter that precludes continuing representation. This report agrees with the proposal by the Task Force on Conflicts of Interest of the ABA Section of Business Law to adopt a presumption that one year of inactivity or “lack of meaningful contact” terminates the lawyer client relationship.⁶⁶ Lawyers are urged to state this presumption in the engagement letter when appropriate. When termination does occur, whether by event or lapse of time, the lawyer should provide written notice to the client.

Reporter’s Notes--Termination

Two Georgia Standards specifically address withdrawal as it may apply to transactional representations:

Standard 22.

Withdrawal in general:

(a) if permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(b) in any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules.

A violation of this standard may be punished by a public reprimand.

Standard 23.

A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned. A violation of this standard may be punished by a public reprimand.

In addition, Ethical Consideration 2-32 and Directory Rule 2-110 elaborate on withdrawal procedures and constraints.

⁶⁶ Id., “Conflicts of Interest,” at 1386.

APPENDIX A

RECOMMENDED CHANGES IN GEORGIA'S ETHICAL STANDARDS AND CONSIDERATIONS

The Committee recommends the following changes in Georgia's Ethical Standards and Considerations:

Georgia Standard 69

Because of the frequency and multiplicity of lawyers changing their firm affiliation, and the problems caused by the irrebuttable presumption of knowledge by a lawyer of the confidences and secrets of all clients of his former firm, and the imputation of his knowledge to all lawyers associated with his present firm, the Committee recommends two changes in Georgia Standard 69. The changes preserve the general rule, which provides that if the lawyer is disqualified because of his previous affiliation, all lawyers in the present firm are disqualified, and which provides an exception when the lawyer is not privy to any confidences or secrets of his former firm. The first change adds language that eliminates the irrebuttable presumption of knowledge of the former client's confidences by a lawyer with a former-client conflict and allows the lawyer to rebut the possession of such knowledge. The second change adds to Standard 69 a definition of the "full disclosure" required as a predicate for client consent. Specifically, the Committee recommends the following amendments to Standard 69 (underlined portions):

Standard 69.

_____ (a) A lawyer shall not represent ~~a client~~ anyone whose interests are adverse to the interests of a former client of the lawyer in any matter substantially related to the matter in which the lawyer represented the former client unless he has obtained written consent of the former client after full disclosure.

_____ (b) Should a lawyer formerly associated with a firm join another firm, the lawyer, the partners and the associates of the second firm shall not represent anyone whose interests are adverse to the interests of a client of the lawyer's former firm in any matter substantially related to a matter in which the former firm represented the client, unless written consent of the client of the former firm has been received after full disclosure, or unless the lawyer can clearly demonstrate a lack of personal knowledge of any confidences or secrets of the former firm's client which are substantially related to the matter in question.

(c) The term "client" as used in this Standard shall not include a public agency or public officer or employee when represented by a lawyer who is a full-time public official.

(d) The term "full disclosure" as used in this Standard includes disclosure of all material facts and the reasonably predictable implications of the proposed representation.

This provision shall apply retroactively. A violation of this Standard may be punished by disbarment.

Ethical Consideration 2-34

By its report, the Committee clearly encourages the use of engagement letters in transactional practice whenever possible. The Committee does not, however, believe that lawyers have an ethical obligation to use engagement letters in every situation. Nor does the Committee believe that lawyers who use engagement letters have an ethical obligation to advise their clients to consult separate counsel before executing an engagement letter. Rather, the Committee believes that adoption of the following new Ethical Consideration would provide appropriate encouragement to members of the Bar:

EC 2-34

A lawyer should use a formal engagement letter whenever possible. Well-drawn engagement letters define the nature and scope of the representation, advise the client of the lawyer's expected activity, and memorialize the fee arrangement between the lawyer and the client. Engagement letters tend to promote communication between lawyer and client and to reduce misunderstandings regarding the representation. Engagement letters can be especially important when the engagement involves actual or potential conflicts of interest, and even more so when the client is called upon to waive a conflict of interest. An engagement letter should inform the client of the existence of a current or potential conflict of interest and of the known and reasonably predictable effect upon the client of the conflict, and should provide the client a basis upon which to make an informed decision about the representation, conflict, and waiver. Although engagement letters should be thorough and may be lengthy, a lawyer has no ethical obligation to advise the client to seek other counsel with respect to the terms and conditions of the engagement letter.

The practical alternatives to a thorough engagement letter are an oral agreement or a simplistic engagement letter. In most cases, neither is preferable to a thorough engagement letter. A well-drawn engagement letter should be more intelligible to and protective of a client than either an oral agreement or a simplistic written agreement. An oral agreement and a simplistic contract by their nature may leave material terms unarticulated. Undiscussed, unknown, and speculative terms cannot improve genuine intelligibility and clarity.

Nonetheless, the Committee wondered whether the lawyer's superior legal sophistication may be--or be seen by the client as--an opportunity to take unfair advantage. With respect to these concerns, it must be noted that the substance and process of the engagement letter are constrained by legal and ethical rules and are protected by an overarching fiduciary obligation running from the lawyer to the client. Lawyers who overreach risk ethical penalties and legal sanction. An engagement letter can protect a client by making unfair advantage a matter of

written record. For these reasons at least, clients should be better protected by the use of a thorough engagement letter than by its avoidance.

Second, as to the clients' perceptions, to the extent that engagement letters become standard practice among firms of high reputation and competence, they should become well accepted by clients and closely associated with professionalism and exemplary ethics. As lawyers use and refine them, clients should come to see them as devices to protect client interests, not as instruments of obfuscation or sharp practice.

APPENDIX B

ENGAGEMENT LETTERS IN TRANSACTIONAL PRACTICE

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