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# PROFESSIONAL RESPONSIBILITY

AN OPEN-SOURCE CASEBOOK

ELON UNIVERSITY SCHOOL OF LAW  
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*Every lawyer carries within him the debris of a poet.*

§ Gustave Flaubert, *Madame Bovary*



## Part I

# The Attorney-Client Relationship





# Chapter 1

## Creating an Attorney-Client Relationship

*The rest of life pales in significance, I'm looking for somebody with whom to dance.  
With whom to dance? With whom to dance? I'm looking for somebody with whom to dance.*

— The Magnetic Fields, *With Whom to Dance?*, *Get Lost* (1995)

### 1. Clients & “Quasi-Clients”

Ideally, the formation of an attorney-client relationship involves formalities like an engagement letter, a retainer agreement, and the payment of attorney’s fees. But none of those formalities are necessary. An attorney-client relationship may be formed whenever a person asks an attorney for legal advice and the attorney provides it, so long as a reasonable person could believe that an attorney-client relationship existed.

I will refer to people an attorney intends to represent as “clients,” and people an attorney does not intend to represent as “quasi-clients.” An attorney has an “express attorney-client relationship” with clients and an “implied attorney-client relationship” with quasi-clients. But express and implied attorney-client relationships impose many of the same duties on an attorney.

#### Restatement (Third) of the Law Governing Lawyers, § 14

A relationship of client and lawyer arises when:

- (1) a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either
  - (a) the lawyer manifests to the person consent to do so; or
  - (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

- (2) a tribunal with power to do so appoints the lawyer to provide the services.

## 2. The Duties of an Attorney

Attorneys owe certain legal duties to their clients and quasi-clients, whether they have an express attorney-client relationship or an implied attorney-client relationship. Those duties are reflected in the Model Rules of Professional Conduct.

### Duty of Care

Attorneys have a duty to act with due diligence in pursuit of their client's interests. Model Rule 1.1.

### Duty of Loyalty

Attorneys may not represent any party with an interest adverse to any of their clients, and must refrain from self-dealing. Model Rules 1.7 & 1.8.

### Duty of Impartiality

Attorneys must provide their clients with all of the information their clients need in order to make informed decisions. Model Rule 1.4. Attorneys must also "exercise independent professional judgment and render candid advice." Model Rule 2.1.

### Duty of Confidentiality

Attorneys must maintain in confidence all information obtained while representing their clients, and may not use any confidential client information in a way that could harm that client. Model Rule 1.6.

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**Togstad v. Vesely, Otto, Miller and Keefe**

291 N.W.2d 686 (Minn. 1980)

*Summary:* John Togstad was paralyzed after surgery. His wife Joan Togstad met with attorney Jere Miller and asked him whether they had a viable medical malpractice action. Miller stated that he did not think his firm was interested, but he would consult with his partners. He did not charge Togstad or agree to represent her. He also did not inform her that he lacked experience in the area, encourage her to consult with another attorney, or warn her about the statute of limitations on medical malpractice actions.

After the statute of limitations expired, the Togstads filed a legal malpractice action. The jury found that an attorney-client relationship existed and that Miller was negligent, and awarded damages to the Togstads. The Minnesota Supreme Court affirmed, holding that an attorney-client relationship existed because Miller provided legal advice and his advice was negligent.

This is an appeal by the defendants from a judgment of the Hennepin County District Court involving an action for legal malpractice. The jury found that the defendant attorney Jerre Miller was negligent and that, as a direct result of such negligence, plaintiff John Togstad sustained damages in the amount of \$610,500 and his wife, plaintiff Joan Togstad, in the amount of \$39,000. Defendants (Miller and his law firm) appeal to this court from the denial of their motion for judgment notwithstanding the verdict or, alternatively, for a new trial. We affirm.

In August 1971, John Togstad began to experience severe headaches and on August 16, 1971, was admitted to Methodist Hospital where tests disclosed that the headaches were caused by a large aneurysm on the left internal carotid artery. The attending physician, Dr. Paul Blake, a neurological surgeon, treated the problem by applying a Selverstone clamp to the left common carotid artery. The clamp was surgically implanted on August 27, 1971, in Togstad's neck to allow the gradual closure of the artery over a period of days.

The treatment was designed to eventually cut off the blood supply through the artery and thus relieve the pressure on the aneurism, allowing the aneurism to heal. It was anticipated that other arteries, as well as the brain's collateral or cross-arterial system would supply the required blood to the portion of the brain which would ordinarily have

been provided by the left carotid artery. The greatest risk associated with this procedure is that the patient may become paralyzed if the brain does not receive an adequate flow of blood. In the event the supply of blood becomes so low as to endanger the health of the patient, the adjustable clamp can be opened to establish the proper blood circulation.

In the early morning hours of August 29, 1971, a nurse observed that Togstad was unable to speak or move. At the time, the clamp was one-half (50%) closed. Upon discovering Togstad's condition, the nurse called a resident physician, who did not adjust the clamp. Dr. Blake was also immediately informed of Togstad's condition and arrived about an hour later, at which time he opened the clamp. Togstad is now severely paralyzed in his right arm and leg, and is unable to speak.

Plaintiffs' expert, Dr. Ward Woods, testified that Togstad's paralysis and loss of speech was due to a lack of blood supply to his brain. Dr. Woods stated that the inadequate blood flow resulted from the clamp being 50% closed and that the negligence of Dr. Blake and the hospital precluded the clamp's being opened in time to avoid permanent brain damage. Specifically, Dr. Woods claimed that Dr. Blake and the hospital were negligent for (1) failing to place the patient in the intensive care unit or to have a special nurse conduct certain neurological tests every half-hour; (2) failing to write adequate orders; (3) failing to open the clamp immediately upon discovering that the patient was unable to speak; and (4) the absence of personnel capable of opening the clamp.

Dr. Blake and defendants' expert witness, Dr. Shelly Chou, testified that Togstad's condition was caused by blood clots going up the carotid artery to the brain. They both alleged that the blood clots were not a result of the Selverstone clamp procedure. In addition, they stated that the clamp must be about 90% closed before there will be a slowing of the blood supply through the carotid artery to the brain. Thus, according to Drs. Blake and Chou, when the clamp is 50% closed there is no effect on the blood flow to the brain.

About 14 months after her husband's hospitalization began, plaintiff Joan Togstad met with attorney Jerre Miller regarding her husband's condition. Neither she nor her husband was personally acquainted with Miller or his law firm prior to that time. John Togstad's former work supervisor, Ted Bucholz, made the appointment and accompanied Mrs. Togstad to Miller's office. Bucholz was present when Mrs. Togstad and Miller discussed the case.

Mrs. Togstad had become suspicious of the circumstances surrounding

her husband's tragic condition due to the conduct and statements of the hospital nurses shortly after the paralysis occurred. One nurse told Mrs. Togstad that she had checked Mr. Togstad at 2 a. m. and he was fine; that when she returned at 3 a. m., by mistake, to give him someone else's medication, he was unable to move or speak; and that if she hadn't accidentally entered the room no one would have discovered his condition until morning. Mrs. Togstad also noticed that the other nurses were upset and crying, and that Mr. Togstad's condition was a topic of conversation.

Mrs. Togstad testified that she told Miller "everything that happened at the hospital," including the nurses' statements and conduct which had raised a question in her mind. She stated that she "believed" she had told Miller "about the procedure and what was undertaken, what was done, and what happened." She brought no records with her. Miller took notes and asked questions during the meeting, which lasted 45 minutes to an hour. At its conclusion, according to Mrs. Togstad, Miller said that "he did not think we had a legal case, however, he was going to discuss this with his partner." She understood that if Miller changed his mind after talking to his partner, he would call her. Mrs. Togstad "gave it" a few days and, since she did not hear from Miller, decided "that they had come to the conclusion that there wasn't a case." No fee arrangements were discussed, no medical authorizations were requested, nor was Mrs. Togstad billed for the interview.

Mrs. Togstad denied that Miller had told her his firm did not have expertise in the medical malpractice field, urged her to see another attorney, or related to her that the statute of limitations for medical malpractice actions was two years. She did not consult another attorney until one year after she talked to Miller. Mrs. Togstad indicated that she did not confer with another attorney earlier because of her reliance on Miller's "legal advice" that they "did not have a case."

On cross-examination, Mrs. Togstad was asked whether she went to Miller's office "to see if he would take the case of her husband." She replied, "Well, I guess it was to go for legal advice, what to do, where shall we go from here? That is what we went for." Again in response to defense counsel's questions, Mrs. Togstad testified as follows:

Q And it was clear to you, was it not, that what was taking place was a preliminary discussion between a prospective client and lawyer as to whether or not they wanted to enter into an attorney-client relationship?

A I am not sure how to answer that. It was for legal advice as to what to do.

Q And Mr. Miller was discussing with you your problem and indicating whether he, as a lawyer, wished to take the case, isn't that true?

A Yes.

On re-direct examination, Mrs. Togstad acknowledged that when she left Miller's office she understood that she had been given a "qualified, quality legal opinion that she and her husband did not have a malpractice case."

Miller's testimony was different in some respects from that of Mrs. Togstad. Like Mrs. Togstad, Miller testified that Mr. Bucholz arranged and was present at the meeting, which lasted about 45 minutes. According to Miller, Mrs. Togstad described the hospital incident, including the conduct of the nurses. He asked her questions, to which she responded. Miller testified that "the only thing I told her after we had pretty much finished the conversation was that there was nothing related in her factual circumstances that told me that she had a case that our firm would be interested in undertaking."

Miller also claimed he related to Mrs. Togstad "that because of the grievous nature of the injuries sustained by her husband, that this was only my opinion and she was encouraged to ask another attorney if she wished for another opinion" and "she ought to do so promptly." He testified that he informed Mrs. Togstad that his firm "was not engaged as experts" in the area of medical malpractice, and that they associated with the Charles Hvass firm in cases of that nature. Miller stated that at the end of the conference he told Mrs. Togstad that he would consult with Charles Hvass and if Hvass's opinion differed from his, Miller would so inform her. Miller recollected that he called Hvass a "couple days" later and discussed the case with him. It was Miller's impression that Hvass thought there was no liability for malpractice in the case. Consequently, Miller did not communicate with Mrs. Togstad further.

On cross-examination, Miller testified as follows:

Q Now, so there is no misunderstanding, and I am reading from your deposition, you understood that she was consulting with you as a lawyer, isn't that correct?

A That's correct.

Q That she was seeking legal advice from a professional attorney licensed to practice in this state and in this community?

A I think you and I did have another interpretation or use of the term "Advice." She was there to see whether or not she had a case and whether the firm would accept it.

Q We have two aspects; number one, your legal opinion concerning liability of a case for malpractice; number two, whether there was or wasn't liability, whether you would accept it, your firm, two separate elements, right?

A I would say so.

Q Were you asked on page 6 in the deposition, folio 14, "And you understood that she was seeking legal advice at the time that she was in your office, that is correct also, isn't it?" And did you give this answer, "I don't want to engage in semantics with you, but my impression was that she and Mr. Bucholz were asking my opinion after having related the incident that I referred to." The next question,

“Your legal opinion?” Your answer, “Yes.” Were those questions asked and were they given?

MR. COLLINS: Objection to this, Your Honor. It is not impeachment.

THE COURT: Overruled.

THE WITNESS: Yes, I gave those answers. Certainly, she was seeking my opinion as an attorney in the sense of whether or not there was a case that the firm would be interested in undertaking.

Kenneth Green, a Minneapolis attorney, was called as an expert by plaintiffs. He stated that in rendering legal advice regarding a claim of medical malpractice, the “minimum” an attorney should do would be to request medical authorizations from the client, review the hospital records, and consult with an expert in the field. John McNulty, a Minneapolis attorney, and Charles Hvass testified as experts on behalf of the defendants. McNulty stated that when an attorney is consulted as to whether he will take a case, the lawyer’s only responsibility in refusing it is to so inform the party. He testified, however, that when a lawyer is asked his legal opinion on the merits of a medical malpractice claim, community standards require that the attorney check hospital records and consult with an expert before rendering his opinion.

Hvass stated that he had no recollection of Miller’s calling him in October 1972 relative to the Togstad matter. He testified that:

A When a person comes in to me about a medical malpractice action, based upon what the individual has told me, I have to make a decision as to whether or not there probably is or probably is not, based upon that information, medical malpractice. And if, in my judgment, based upon what the client has told me, there is not medical malpractice, I will so inform the client.

Hvass stated, however, that he would never render a “categorical” opinion. In addition, Hvass acknowledged that if he were consulted for a “legal opinion” regarding medical malpractice and 14 months had expired since the incident in question, “ordinary care and diligence” would require him to inform the party of the two-year statute of limitations applicable to that type of action.

This case was submitted to the jury by way of a special verdict form. The jury found that Dr. Blake and the hospital were negligent and that Dr. Blake’s negligence (but not the hospital’s) was a direct cause of the injuries sustained by John Togstad; that there was an attorney-client contractual relationship between Mrs. Togstad and Miller; that Miller was negligent in rendering advice regarding the possible claims of Mr. and Mrs. Togstad; that, but for Miller’s negligence, plaintiffs would have been successful in the prosecution of a legal action against Dr. Blake; and that neither Mr. nor Mrs. Togstad was negligent in

pursuing their claims against Dr. Blake. The jury awarded damages to Mr. Togstad of \$610,500 and to Mrs. Togstad of \$39,000.

In a legal malpractice action of the type involved here, four elements must be shown: (1) that an attorney-client relationship existed; (2) that defendant acted negligently or in breach of contract; (3) that such acts were the proximate cause of the plaintiffs' damages; (4) that but for defendant's conduct the plaintiffs would have been successful in the prosecution of their medical malpractice claim.

We believe it is unnecessary to decide whether a tort or contract theory is preferable for resolving the attorney-client relationship question raised by this appeal. The tort and contract analyses are very similar in a case such as the instant one, and we conclude that under either theory the evidence shows that a lawyer-client relationship is present here. The thrust of Mrs. Togstad's testimony is that she went to Miller for legal advice, was told there wasn't a case, and relied upon this advice in failing to pursue the claim for medical malpractice. In addition, according to Mrs. Togstad, Miller did not qualify his legal opinion by urging her to seek advice from another attorney, nor did Miller inform her that he lacked expertise in the medical malpractice area. Assuming this testimony is true, we believe a jury could properly find that Mrs. Togstad sought and received legal advice from Miller under circumstances which made it reasonably foreseeable to Miller that Mrs. Togstad would be injured if the advice were negligently given. Thus, under either a tort or contract analysis, there is sufficient evidence in the record to support the existence of an attorney-client relationship.

Defendants argue that even if an attorney-client relationship was established the evidence fails to show that Miller acted negligently in assessing the merits of the Togstads' case. They appear to contend that, at most, Miller was guilty of an error in judgment which does not give rise to legal malpractice. However, this case does not involve a mere error of judgment. The gist of plaintiffs' claim is that Miller failed to perform the minimal research that an ordinarily prudent attorney would do before rendering legal advice in a case of this nature.

There is also sufficient evidence in the record establishing that, but for Miller's negligence, plaintiffs would have been successful in prosecuting their medical malpractice claim. Dr. Woods, in no uncertain terms, concluded that Mr. Togstad's injuries were caused by the medical malpractice of Dr. Blake. Defendants' expert testimony to the contrary was obviously not believed by the jury. Thus, the jury reasonably found that had plaintiff's medical malpractice action been properly brought, plaintiffs would have recovered.



Based on the foregoing, we hold that the jury's findings are adequately supported by the record. Accordingly we uphold the trial court's denial of defendants' motion for judgment notwithstanding the jury verdict.

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### Questions

1. What was the basis for the Togstads' claim that Miller's actions formed an attorney-client relationship? How did Miller respond?
2. Why did the court hold that an attorney-client relationship existed between Miller and the Togstads? Do you think it was right?
3. What could Miller have done differently to avoid creating an attorney-client relationship?
4. Why did the court hold that Miller was liable for negligence? Do you think it was right?
5. How should Miller have responded in order to avoid liability for negligence?

## 3. Representation of an Organization

When an attorney represents an entity, the attorney's client is the entity not the entity's employees. In other words, when an attorney represents a corporation, limited liability company, partnership, or unincorporated association, the attorney's client is the *organization, not the employees of the organization*.

Or to put it another way, the attorney has an attorney-client relationship with the organization, but does not necessarily have an attorney-client relationship with the employees of the organization. Specifically, the attorney has a duty to represent the organization, even when its interests diverge from the interests of its employees.

However, an attorney representing an organization must ensure that the employees of the organization understand that the attorney only represents the organization, and not its employees. In other words, the employees must understand that the organization's attorney is not their attorney, and that the organization's attorney has professional duties only to the organization. This can be difficult to explain, especially when employees identify their interests with those of the organization. But attorneys for organizations must clarify their legal relationship

to the employees of those organizations, in order to avoid creating an attorney-client relationship.

### Model Rule 1.13: Organization as Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
- (c) Except as provided in paragraph (d), if
  - (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
  - (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
- (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

- (f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

### Questions

1. Why did Clark object to Hogan & Hartson representing Ferranti in its action against him? Why did the court dismiss Clark's objections?
2. Clark was an attorney and general counsel for Ferranti. Would the court have reached the same conclusion if Clark were not an attorney?
3. Should Ferranti be able to use confidential information provided to Hogan & Hartson by Clark?
4. What should Clark have done differently?

## Prospective Clients

People and organizations do not always choose to form an attorney-client relationship immediately. Sometimes, they consider forming an attorney-client relationship with multiple attorneys or firms before choosing one.

A "prospective client" is a person or organization that discusses the possibility of forming an attorney-client relationship with an attorney or firm. If an attorney or firm learns confidential information from a prospective client, the attorney or firm may be precluded from representing other parties in the same matter, if those other parties' interests are adverse to those of the prospective client.

Accordingly, attorneys should try to prevent prospective clients from disclosing confidential information, in order to avoid disqualification

from representing adverse parties. And attorneys must determine whether potential clients have disclosed any confidential information, because it creates a duty of confidentiality.

### Model Rule 1.18: Client-Lawyer Relationship

- (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
- (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
- (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
  - (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
  - (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
    - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
    - (ii) written notice is promptly given to the prospective client.

### Restatement (Third) of the Law Governing Lawyers, § 15

- (1) When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must:
  - (a) not subsequently use or disclose confidential information

learned in the consultation, except to the extent permitted with respect to confidential information of a client or former client as stated in §§ 61-67;

(b) protect the person's property in the lawyer's custody as stated in §§ 44- 46; and

(c) use reasonable care to the extent the lawyer provides the person legal services.

(2) A lawyer subject to Subsection (1) may not represent a client whose interests are materially adverse to those of a former prospective client in the same or a substantially related matter when the lawyer or another lawyer whose disqualification is imputed to the lawyer under §§ 123 and 124 has received from the prospective client confidential information that could be significantly harmful to the prospective client in the matter, except that such a representation is permissible if:

(a) (i) any personally prohibited lawyer takes reasonable steps to avoid exposure to confidential information other than information appropriate to determine whether to represent the prospective client, and (ii) such lawyer is screened as stated in § 124(2)(b) and (c); or

(b) both the affected client and the prospective client give informed consent to the representation under the limitations and conditions provided in § 122.

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**Clark Capital Management Group, Inc. v. Annuity Investors Life Ins. Co.**

149 F.Supp.2d 193 ({} E.D. Pa. 2001)

*Summary:* Clark filed a trademark infringement action against Annuity. Clark was represented by Woodcock Washburn Kurtz Mackiewicz & Norris LLP and Annuity was represented by Donald E. Frechette of Edwards & Angell LLP. Frechette contacted Thomas S. Biemer of Dilworth Paxson LLP as potential co-counsel. Frechette provided information about the action, and Biemer told Frechette that he would have to run a conflicts check. Frechette never formally retained Biemer. Eventually, Clark retained Stephen L. Friedman of Dilworth, and Annuity objected, because it was a former client of Dilworth in the same matter. The court held that Dilworth could represent Clark, but required Biemer to be screened from the action.

Defendant Annuity Investors Life Insurance Co. moves for the disqualification of Stephen L. Friedman and the firm Dilworth Paxson LLP as co-counsel for plaintiff Clark Capital Management Group. Friedman has submitted an opposition to this motion. I will deny the motion for disqualification.

**I. Factual Background**

On April 14, 2000, Clark Capital filed a complaint against Annuity alleging trademark infringement. Attorneys with the firm of Woodcock Washburn Kurtz Mackiewicz & Norris LLP have represented Clark Capital from day one of this case. In the fall of 2000, Annuity retained Donald E. Frechette with the firm of Edwards & Angell LLP.

Acting on Annuity's behalf, in the Fall of 2000, Frechette contacted by telephone Thomas S. Biemer, a partner at Dilworth, to inquire into Biemer's interest and availability to be retained as co-counsel for Annuity in the present action. Frechette submitted two sworn affidavits describing this communication. Frechette asserts in his first sworn affidavit that he spoke with Biemer by telephone on three occasions. He states that they first spoke on October 26, 2000 for approximately ten minutes. Frechette asserts that, during this conversation, he discussed with Biemer "the background facts of this case, the capabilities of opposing counsel, Mr. Biemer's firm's experience and familiarity with opposing counsel and the trial judge, the nature of Annuity's defenses, the relative merits of each party's case, and potential weaknesses in

plaintiff's case." Frechette further states that he described how the case had been handled to date.

According to Frechette, he again spoke with Biemer by telephone on November 6, 2000, for approximately ten to fifteen minutes. He states that, in this conversation, Frechette provided Biemer with additional information relating to specific aspects of the case and Annuity's view of the strengths and weaknesses of these aspects. Frechette also recalls that they discussed one legal theory that might be employed in Annuity's defense. Frechette asserts that he spoke with Biemer for a third time on November 6, 2000, for three to four minutes about a matter of procedure and timing. Finally, Frechette asserts that he believed that any confidential information about the case, disclosed to Biemer during these several conversations, would be kept confidential.

Biemer submitted a sworn affidavit in response to Frechette's affidavit. Biemer states that he recalls the first two conversations described in Frechette's affidavit, but not the third conversation. Biemer agrees that the two attorneys discussed the nature of the case, plaintiff's counsel, and the court. He asserts, however, that he has no recollection that any confidential information was disclosed by Frechette. Biemer recalls only that Frechette informed him that Annuity was claiming the "usual affirmative defenses," which had already been pled and of public record. Biemer states in his affidavit that he has no recollection of any discussion of Annuity's perception of strengths and weaknesses in the case or of possible defense strategy.

On June 12, 2001, when contacted by the court during a conference in this case in which Annuity first raised an objection to Friedman's participation in the case, Biemer stated over the telephone:

I don't recall, specifically, discussing the merits of the case, other than that it involved something that was named Navigator, it was a trademark case. I don't remember specifically discussing any affirmative defenses, but it's possible we did, I just don't recall, it was a while ago.

In addition, Biemer's affidavit states that he told Frechette during the first conversation that, before Dilworth could agree to represent Annuity, he would have to run a conflict check. Biemer avers that it was not until the second conversation that Frechette asked Biemer to run a conflict check, "if Dilworth was interested in serving as local counsel." Biemer also states that Frechette asked him to send Frechette any relevant information materials about Dilworth. Following the November 6, 2000 telephone conversation, Biemer had no further communications with Frechette about this case, and an offer of retention was never made.

Frechette's second affidavit was submitted in response to Biemer's affidavit. In this affidavit, Frechette asserts that the issue of a conflict search was not discussed during the telephone conversations. He states that Biemer mentioned a conflict check for the first time in a letter dated November 7, 2000. Frechette further states:

I certainly assumed that Attorney Biemer would not undertake a matter without performing a conflict check and, accordingly, felt no need to specifically inquire as to the matter further.

Annuity never retained Dilworth. On June 11, 2001, Friedman, a Dilworth attorney, entered an appearance on behalf of Clark Capital.

## II. Discussion

Annuity asserts that these several telephone conversations between Frechette and Biemer rose to the level of an attorney-client relationship between Annuity and Biemer, such that Friedman is in violation of the Rules of Professional Conduct. This District has adopted the Pennsylvania Rules of Professional Conduct. These Rules provide that:

A lawyer who has formerly represented a client in a matter shall not thereafter:  
(a) Represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation.

### *Rule of Professional Conduct 1.9.*

This prohibition disqualifies the lawyer's entire firm.

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so. Annuity argues that, because Frechette's telephone conversations with Biemer rose to the level of an attorney-client relationship, Annuity is a "former client" of Dilworth and, therefore, Friedman may not now represent the opposing party in this same matter.

To determine whether Friedman is in violation of these ethical rules, I must decide whether Annuity is a "former client" of Dilworth. In other words, did there previously exist an attorney-client relationship between Annuity and Dilworth. "An attorney-client relationship is one of agency and arises only when the parties have given their consent, either express or implied, to its formation." Both parties agree that no formal attorney-client relationship existed between Annuity and Dilworth. "Where no express relationship exists, the intent to create



an attorney-client relationship can be implied from the conduct of the parties.” The issue is whether an implied attorney-client relationship arose during the course of the several telephone conversations between Frechette and Biemer. Annuity asserts that an implied attorney-client relationship between Annuity and Biemer arose because, acting on Annuity’s behalf, Frechette: (1) disclosed confidential information to Biemer, (2) with a reasonable belief that Biemer was acting in the capacity of attorney for Annuity throughout the course of the communication.

Based on the facts presented, I find that the several brief telephone conversations between Frechette and Biemer did not give rise to an implied attorney-client relationship between Annuity and Dilworth. Frechette asserts in his first sworn affidavit that he disclosed to Biemer confidential information related to Annuity’s defenses and legal theories of the case. Biemer admits that it is possible such disclosures were made. However, Biemer contends that he has no recollection of disclosure of any confidential information.

Setting aside for the moment the question of whether confidential information was in fact disclosed, it is clear from the facts presented that Frechette could not have held a reasonable belief that Biemer was acting as an attorney for Annuity during the course of the communication. Frechette initiated the communication with Biemer to inquire into Biemer’s interest and availability to be retained as co-counsel for Annuity in the present action. At no time during the communication did Frechette offer to retain Biemer as co-counsel and at no time during the communication did Biemer consent to representation of Annuity. To the contrary, it was evident from Frechette’s request that Biemer send informational materials about the firm, that Frechette had not yet decided whether to retain Biemer as co-counsel. Frechette was reserving the right to make a decision after learning more about the firm.

Furthermore, it is evident that Frechette never conceived that Biemer was acting as Annuity’s attorney during the communication, because Biemer had not yet run a conflict check. Frechette contests Biemer’s assertion that Biemer raised the need to run a conflict check before consenting to representation during the telephone conversations. However, even if Biemer did not raise the need to run a conflict check, Frechette, equally knowledgeable of the ethical rules, was well aware that Biemer would not consent to representation of Annuity before running a conflict check. Frechette explicitly stated in his second sworn affidavit:

I certainly assumed that Attorney Biemer would not undertake a matter without performing a conflict check and, accordingly, felt no need to specifically inquire as to the matter further.

When Frechette first contacted Biemer on October 26, 2000, the telephone conversation during which Frechette asserts that he first disclosed confidential information to Biemer, Frechette could not have reasonably assumed that Biemer had already run a conflict check. By Frechette's own admission, therefore, it was unreasonable for Frechette to assume during that conversation that Biemer had consented to representation of Annuity. The duty to maintain confidences does not arise absent an attorney-client relationship. It follows that Frechette unreasonably assumed that Biemer would maintain the confidentiality of any information Frechette disclosed, despite Frechette's awareness that no attorney-client relationship had been established. Annuity is not a former client of Biemer and neither Friedman nor Dilworth are in violation of Pennsylvania Rule of Professional Conduct 1.9.

I must still address the concern that confidential information about the case may have been disclosed by Frechette, which potentially could be used to the detriment of Annuity if Friedman is permitted to serve as counsel to Clark Capital. "One of the inherent powers of the federal court is the admission and discipline of attorneys practicing before it." Therefore, when there is a risk that the underlying litigation may be tainted by participation of counsel, the court has the power to fashion an appropriate remedy.

In the event that confidential information was disclosed, I find that disqualification of Dilworth is an inappropriate remedy under the facts of this case, but rather that screening Biemer from the case will appropriately balance the interests of all parties. Biemer asserts that he has no recollection that any confidential information was disclosed to him about this case. Therefore, even if he did receive confidential information about the case, Biemer is not capable of relaying anything of substance to other Dilworth attorneys. Biemer also asserts in his affidavit that he has been screened from the matter from the moment Clark Capital contacted the firm. He states:

On approximately June 7, 2001, I learned that Dilworth was contacted by Clark Capital and asked to enter its appearance as counsel for Clark Capital. When I learned this, I relayed to one of the heads of Dilworth's litigation department, James Rogers, Esquire, the substance of my conversations with Mr. Frechette as outlined in this Affidavit. While we agreed that there was no conflict given the limited nature of these conversations, in an abundance of caution, it was decided that I would not be involved in any respect with this case and would not have any contact regarding the substance of the case with anyone working on the case for Dilworth. With the exception of my participation in the Conference Call before the Court on June 11, 2001 and the preparation of this Affidavit, I have not had

any involvement in this case. Friedman substantiated Biemer's assertion on the record at the June 12, 2001 conference in this matter, stating that Biemer will have nothing to do with this case and that Friedman has had no conversations with Biemer about the case other than to inform Friedman of the brief communication between Biemer and Frechette.

I am not persuaded by Annuity's argument that disqualification of Dilworth is necessary to protect against the "mere appearance of an impropriety" and to maintain the integrity of the legal profession. While the ethical rules are designed, in part, to encourage attorney-client candor, attorneys that have already been retained in a matter and who are well versed in the perimeters of the attorney-client relationship, should be encouraged to take care with their client's confidences in the course of preliminary inquiries with potential co-counsel in another firm. Such inquiries should not form the basis for disqualification of an entire firm in situations, such as this, where it was clear to both parties that an attorney-client relationship was never established. Allowing Friedman to be retained by Clark Capital in this matter requires effective screening of only a single attorney out of approximately 100 attorneys at Dilworth. In light of this, the fact that Annuity is not a former client of Dilworth, and the minimal likelihood that Dilworth's involvement in this case would taint the pending litigation, I will deny Annuity's motion to disqualify Friedman and Dilworth. I will require that Dilworth continue to screen Biemer from any involvement in this case.

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### Questions

1. What was the basis for Annuity's objection to Dilworth's representation of Clark?
2. If Frechette provided confidential information to Biemer, is screening him from the action a sufficient remedy?
3. Why shouldn't the court disqualify Dilworth from representing Clark in this action?

### References

*Bates v. State Bar of Ariz.*, 433 US 350 (U.S. 1977).

*Birbrower, Montalbano, Condon & Frank v. Superior Ct.*, 17 Cal. 4th 119 (Cal. 1998).

*Clark Capital Management v. Annuity Investors Life Ins. Co.*, 149 F. Supp. 2d 193 (E.D. Pa. 2001).

*Matter of Cooperman*, 633 NE 2d 1069 (N.Y. 1994).

*Matter of Giuliani*, 197 AD 3d 1 (N.Y. 2021).

*Nix v. Whiteside*, 475 US 157 (U.S. 1986).

*Shapero v. Kentucky Bar Assn.*, 486 US 466 (U.S. 1988).

*Togstad v. Vesely, Otto, Miller & Keefe*, 291 NW 2d 686 (Minn. 1980).

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