**5.3: Resolving Conflicts of Interest**

*I saw the future in a dream last night. Somebody’s gonna get hurt, somebody’s gonna get hurt. I hope it’s not me, but I suspect it’s going to have to be.*[[1]](#footnote-0)

While conflicts of interest implicate the duty of loyalty, they do not necessarily preclude representation or require withdrawal from representation. Some conflicts of interest cannot be resolved. For example, an attorney cannot represent both the plaintiff and the defendant in an action, and typically cannot represent any parties with actual or potential claims against each other. But many conflicts of interest can be resolved, if the attorney can represent the client without breaching the duty of loyalty, and the client provides informed consent to representation despite the conflict.

**Waiver of Conflicts of Interest**

In order to resolve a conflict of interest problem, attorneys should apply the four-step process outlined in [Model Rule 1.7, comment [2]](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/comment_on_rule_1_7/):

| 1. clearly identify the client or clients; |
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| 1. determine whether a conflict of interest exists; |
| 1. decide whether the representation may be undertaken despite the existence of a conflict, *i.e.*, whether the conflict is consentable; and |
| 1. if so, consult with the clients affected and obtain their informed consent, confirmed in writing. |

This process provides a framework for identifying, evaluating, and resolving conflicts of interest. Essentially, it requires an attorney to ask:

1) whether an attorney-client relationship exists;

2) whether the attorney’s legal duties to a client conflict with the interests of the attorney, another current or former client, or a third-party to whom the lawyer owes a legal duty;

3) whether representation is legally permissible and practically possible under the circumstances; and

4) whether the client is adequately informed of the nature and potential consequences of the conflict, and has consented to representation in writing, despite the conflict.

However, each of those steps requires an exercise of judgment on the part of the attorney.

**Identifying Clients**

A “client” is any party with whom an attorney has an attorney-client relationship of any kind. The conflict of interest rules apply to both clients and quasi-clients. As a consequence, a party may be a client for the purpose of the conflict of interest rules even if the attorney did not intend to form an attorney-client relationship.

***For example***, a party that disclosed confidential information to an attorney in the course of seeking representation may be a client for the purpose of the conflict of interest rules, even if the party never hired the attorney. The agents or employees of a client organization may be clients, if they reasonably believe the attorney has agreed to represent them personally or have provided confidential information pertaining to their own circumstances. And a subsidiary of a client organization may also be a client, if the attorney effectively represents the subsidiary as well as the parent.

**Identifying Conflicts of Interest**

A “conflict of interest” exists if an attorney’s fiduciary duties to a client conflict with the interests of the attorney, another current or former client, or a third-party to whom the attorney owes a legal duty. In other words, if the interests of the attorney, another current or former client, or third-party could provide an incentive for the attorney not to observe those legal duties to the client, then a conflict of interest exists. If the attorney could benefit from putting another interest ahead of the client’s interests, providing less than candid and impartial advice, or using confidential information provided by the client, then a conflict of interest exists, whether or not the attorney ever has or would violate the fiduciary duties of loyalty, impartiality, and confidentiality.

Notably, a conflict of interest does not require actual harm to the client, only potential harm. There is no such thing as a “potential conflict of interest.” A conflict of interest exists as soon as the potential for harm is created, whether or not the harm ever materializes. The risk of harm to the client’s interests creates the conflict of interest, so the question is not whether a conflict exists, but how serious a conflict it presents. In some cases, the risk of harm may be too small to create a meaningful conflict, or an attorney’s legal duties may themselves prevent the conflict from arising. But the conflict still exists, it simply is not a material conflict that requires an attorney to decline or withdraw from representation.

The paradigmatic conflict of interest exists when an attorney represents directly adverse parties, or one client litigating a claim against another. Notably, a conflict of interest exists whenever clients are directly adverse in any action, even if the attorney represents neither client in that action. Of course, co-defendants and co-plaintiffs may be directly adverse, because cross-claims and third-party claims create direct adversity. And potential claims may also create direct adversity, even if they are never filed. Accordingly, attorneys should be wary whenever they represent clients on the opposite sides of any transaction. Any potential adversity may create a conflict of interest.

Of course, a conflict of interest may exist without direct adversity. If an attorney represents two clients with opposing interests, it may “materially limit” the attorney’s ability to represent both clients, because it may create an incentive for the attorney to compromise those interests. If dual representation could affect the attorney’s decisions, then a conflict of interest exists.

Conflicts of interest can arise unexpectedly, as a client’s interests may change over time. Accordingly, a conflicts analysis can never be a “one and done” practice. Attorneys must always be vigilant to identify and resolve conflicts of interest whenever they arise.

However, a conflict of interest may or may not be material. A conflict of interest is material if it creates a substantial risk of providing an incentive for an attorney to violate a fiduciary duty to a client. Implicitly, a conflict of interest is not material if it does not create such a risk. Attorneys must obtain the informed consent of their client in order to resolve a material conflict of interest. But attorneys need not obtain informed consent in order to resolve an immaterial conflict of interest, because no actual conflict exists. Of course, it can be difficult to determine whether a conflict is material, and immaterial conflicts have an unfortunate tendency to become material.

**Waivable Conflicts of Interest**

If a material conflict of interest exists, then the attorney must determine whether it is waivable. Some conflicts are waivable, but others are not. Specifically, a conflict is waivable only if it does not make representation prohibited or impossible under the circumstances. For example, some attorneys, typically former government employees, are prohibited by law from representing certain clients, so that is a conflict of interest that cannot be waived. Likewise, courts have uniformly held that attorneys cannot represent parties to an action with claims against each other, so that is also a conflict of interest that cannot be waived. However, many courts have held that attorneys can represent directly adverse clients, if the attorney does not represent both clients in the same matter and both clients provide informed consent, so that is a conflict of interest that may be waived.

**Informed Consent**

If a waivable conflict of interest exists, then the attorney must obtain informed consent to the conflict from the client or clients. For example, if an attorney’s interests conflict with a client’s interests, then the attorney must obtain informed consent from the client. If a client’s interests conflict with another client’s interests, then the attorney must obtain informed consent from both clients. And if a client’s interests conflict with a third party’s interests, then the attorney must obtain informed consent from the client.

Sometimes, obtaining informed consent is easy. For example, a formal conflict of interest may not create a real conflict of interest, and the client may readily consent. Indeed, some clients may even see some formal conflicts of interest as advantages, rather than liabilities. One person’s “conflict of interest” may be another person’s “investment in the outcome.”

But other times, obtaining informed consent may be difficult or impossible. A former client may well resent their former attorney representing an adversary and withhold consent. And a quasi-client may be even more likely to harbor misgivings. In those circumstances, even a relatively trivial conflict of interest may become an insuperable barrier to representation.

| [**Rule 1.7: Conflict of Interest: Current Clients**](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/) |
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| 1. Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:    1. the representation of one client will be directly adverse to another client; or    2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. 2. Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:    1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;    2. the representation is not prohibited by law;    3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and    4. each affected client gives informed consent, confirmed in writing. |

| **Restatement (Third) of the Law Governing Lawyers § 122: Client Consent to a Conflict of Interest** |
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| 1. A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client. 2. Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:    1. the representation is prohibited by law;    2. one client will assert a claim against the other in the same litigation; or    3. in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients. |

**Obtaining Informed Consent to a Conflict of Interest**

An attorney may represent a client despite a conflict of interest only if the attorney obtains informed consent to the conflict from the client, ideally in writing. In order to obtain informed consent, the attorney must provide the client with adequate disclosure of the conflict. Specifically, the attorney must disclose any and all competing interests that could create a conflict. And the attorney must explain the nature of every conflict and how they could affect the attorney’s representation of the client, including the attorney’s fiduciary duties of loyalty, impartiality, and confidentiality. In addition, attorneys should, and often must, obtain informed consent to any conflicts before commencing representation, and typically cannot obtain valid informed consent to potential future conflicts when terminating representation.

| **Restatement (Third) of the Law Governing Lawyers § 122(c)(i): The Requirement of Informed Consent—Adequate Information** |
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| Informed consent requires that each affected client be aware of the material respects in which the representation could have adverse effects on the interests of that client. The information required depends on the nature of the conflict and the nature of the risks of the conflicted representation. The client must be aware of information reasonably adequate to make an informed decision.  Information relevant to particular kinds of conflicts is considered in several of the Sections hereafter. In a multiple-client situation, the information normally should address the interests of the lawyer and other client 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 of the representation or the process of obtaining other clients' informed consent upon confidential information of the client; any material reservations that a disinterested lawyer might reasonably 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 by any client, including, if relevant, the fact that the lawyer would withdraw from representing all clients. Where the conflict arises solely because a proposed representation will be adverse to an existing client in an unrelated matter, knowledge of the general nature and scope of the work being performed for each client normally suffices to enable the clients to decide whether or not to consent.  When the consent relates to a former-client conflict, it is necessary that the former client be aware that the consent will allow the former lawyer to proceed adversely to the former client. Beyond that, the former client must have adequate information about the implications (if not readily apparent) of the adverse representation, the fact that the lawyer possesses the former client's confidential information, the measures that the former lawyer might undertake to protect against unwarranted disclosures, and the right of the former client to refuse consent. The former client will often be independently represented by counsel. If so, communication with the former client ordinarily must be through successor counsel.  The lawyer is responsible for assuring that each client has the necessary information. A lawyer who does not personally inform the client assumes the risk that the client is inadequately informed and that the consent is invalid. A lawyer's failure to inform the clients might also bear on the motives and good faith of the lawyer. On the other hand, clients differ as to their sophistication and experience, and situations differ in terms of their complexity and the subtlety of the conflicts presented. The requirements of this Section are satisfied if the client already knows the necessary information or learns it from other sources. A client independently represented—for example by inside legal counsel or by other outside counsel—will need less information about the consequences of a conflict but nevertheless may have need of information adequate to reveal its scope and severity. When several lawyers represent the same client, responsibility to make disclosure and obtain informed consent may be delegated to one or more of the lawyers who appears reasonably capable of providing adequate information.  Disclosing information about one client or prospective client to another is precluded if information necessary to be conveyed is confidential. The affected clients may consent to disclosure, but it also might be possible for the lawyer to explain the nature of undisclosed information in a manner that nonetheless provides an adequate basis for informed consent. If means of adequate disclosure are unavailable, consent to the conflict may not be obtained.  The requirement of consent generally requires an affirmative response by each client. Ambiguities in a client's purported expression of consent should be construed against the lawyer seeking the protection of the consent. In general, a lawyer may not assume consent from a client's silent acquiescence. However, consent may be inferred from active participation in a representation by a client who has reasonably adequate information about the material risks of the representation after a lawyer's request for consent. Even in the absence of consent, a tribunal applying remedies such as disqualification will apply concepts of estoppel and waiver when an objecting party has either induced reasonable reliance on the absence of objection or delayed an unreasonable period of time in making objection.  Effective client consent to one conflict is not necessarily effective with respect to other conflicts or other matters. A client's informed consent to simultaneous representation of another client in the same matter despite a conflict of interest does not constitute consent to the lawyer's later representation of the other client in a manner that would violate the former-client conflict rule. |

| **CHECK YOUR KNOWLEDGE:** |
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| 1. Marlee and Bob are neighbors. Marlee and Bob approach their Homeowners Association (“HOA”) to ask about putting a fence up on the property line. The HOA denies the request citing a covenant restricting this. Both Marlee and Bob approach you about representing them in an action against the HOA. Conflict? |

| [***NuStar Farms, LLC v. Zylstra*, 880 N.W.2d 478 (Iowa 2016)**](https://scholar.google.com/scholar_case?case=1028562501184438949) |
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| **Summary:** Between 2002 and 2014, attorney Larry Stoller represented Robert and Marcia Zylstra in several different matters. In 2007, Stoller and the Zylstras discussed a manure easement agreement with NuStar Farms. In 2014, Stoller began representing NuStar, which had a dispute with the Zylstras over a deed. Soon afterward, Stoller ended his representation of the Zylstras and filed an action against them for NuStar. The Zylstras retained attorney John Sandy, who filed a motion to disqualify Stoller. The trial court denied the motion, but the Iowa Supreme Court reversed, holding that Stoller had a conflict of interest and the Zylstras did not consent. |

In this interlocutory appeal, we are asked to decide whether an attorney should be disqualified from representing one party in a lawsuit, either because his representation of the two parties was concurrent or because he had previously represented the opposing party in a similar matter. The district court concluded that the attorney need not be disqualified. For the reasons stated below, we conclude that the district court did not abuse its discretion in concluding that the prior attorney-client relationship failed the "substantial relationship" test. However, we conclude that the attorney did have a concurrent conflict of interest. Therefore, we find the district court abused its discretion in not disqualifying the attorney.

Background Facts and Proceedings.

Attorney Larry Stoller began representing Robert and Marcia Zylstra in 2002. Stoller represented them in a number of legal matters between 2002 and 2014, including financial issues, business acquisitions, and real estate transactions. Although the Zylstras were represented by Stoller on a number of occasions, they also used the services of other attorneys throughout this time period. At issue for the purposes of this case are a meeting in January 2007 and a small claims case ending in 2014.

On January 24, 2007, Robert met with Stoller to discuss estate planning and manure easement agreements. At the time of the meeting, the Zylstras were shareholders in Sibley Dairy, LLP. During this meeting, Robert showed Stoller a multipage document containing multiple manure easement agreements that the Zylstras intended to enter into with NuStar Farms, LLC. The parties disagree as to the extent of Stoller's involvement during this meeting regarding the manure easement agreements. Stoller asserts that he only briefly glanced at the easement agreements and then advised Robert that he should seek the advice of another attorney. Although Stoller acknowledges he made notations on the first page of the document, he argues that the notations do not indicate he read the entirety of the multipage manure easement agreements. Robert asserts that he asked Stoller to review the manure easement agreements and provide advice. Robert further alleges that Stoller examined the agreements during the meeting and advised him to go ahead and complete and sign them.

The record reflects that Stoller made notations on the documents. However, Stoller claims the notations were made at Robert's request to help Robert remember what to discuss with one of the attorneys that Stoller suggested Robert contact. Both parties agree that Stoller suggested Robert find an attorney with more experience in the area of manure easements. Stoller sent a follow-up email to Robert with two attorney references who he thought could assist the Zylstras with the easements. The email also confirmed that Robert asked Stoller to look at the easements and that Stoller "briefly looked at them." Further, Stoller wrote, "The changes you were talking about should be run by the other attorney and I suggest that if approved they be included in the easements. I would also think that some permit would be necessary." The record also reflects that during this conference they discussed estate planning matters. This is confirmed in the follow-up email and Stoller's office notes of the conference. Stoller billed the Zylstras for 1.20 hours and described the meeting as, "Conference with Robert on manure easement; review easements and agreement." There is nothing in the record to indicate that Stoller represented the Zylstras when they executed the manure easement agreements with NuStar or that he had any further involvement in the sale of Sibley Dairy.

Stoller continued to represent the Zylstras in a number of other legal matters between 2007 and 2014. In December 2013, Stoller began representing the Zylstras in a small claims matter. The case was submitted to the small claims court on February 10, 2014, but the court did not issue its ruling until May 30. Stoller began representing NuStar in early May in an action regarding loan covenants. Also in early May, Stoller began contacting the Zylstras on behalf of NuStar. At least part of these contacts involved the Zylstras' failure to provide NuStar with a deed to property involving ingress. Stoller acknowledges that he contacted Robert about the Zylstras’ need to sign the deed. On May 13, Stoller sent the Zylstras an email that stated it was the third time he had contacted them about the deed to ingress property sold by the Zylstras to NuStar. Stoller wrote in the email,

I must now put you on formal notice that if the signed deed is not received by my office by the close of business on Wednesday, May 14, 2014, that I will need to pursue the appropriate remedies for specific performance and damages on behalf of Nustar.

Stoller also wrote in his email, "I have tried to remain neutral in those matters and advised both parties that I could represent neither."

In this same email, Stoller informed the Zylstras that he would no longer be representing them in any future matters. Robert acknowledges that he understood the May 13 email as a severance of the attorney-client relationship. Stoller emailed the Zylstras again on May 14, expressing disappointment that the Zylstras were not going to sign the deed. Stoller also reminded Robert of his prior financial situation and how Stoller had helped him in the past.

By May 15, the Zylstras had retained John Sandy to represent them in their dealings with NuStar. In Sandy's correspondence to Stoller that same day, he alerted Stoller that the Zylstras found his representation of NuStar to be a conflict of interest based on his prior legal representation and counsel provided to the Zylstras. Sandy specifically requested that Stoller cease further representation of NuStar when those interests conflicted with the Zylstras.

On June 5, Stoller sent the Zylstras a letter notifying them of the judge's ruling in the small claims case and informing them that he believed the decision was appealable. Stoller further notified the Zylstras of their rights to appeal and the deadlines associated with such an appeal. Stoller wrote he would be willing to file an appeal on their behalf and included information about his retainer and billing rate. Stoller also advised the Zylstras that if they chose to have another attorney represent them on the appeal he would release their file to that attorney.

On July 9, Stoller filed a multicount petition on behalf of NuStar against the Zylstras. The petition alleged the Zylstras agreed to sell NuStar a parcel in farmland in 2008, but they failed to tender the requisite deed. One count of the petition also alleged the Zylstras did not abide by certain terms contained in the manure easement agreements. In response, the Zylstras filed a preanswer motion to dismiss based on statute of limitations grounds. They also filed a motion seeking to disqualify Stoller as the attorney for NuStar based on a conflict of interest.

On August 8, the district court held a hearing, and the parties argued both the motion to dismiss and the motion to disqualify Stoller. On October 14, the district court denied both motions. On November 10, the Zylstras filed an application for interlocutory appeal seeking review of the district court's denial of their motion to disqualify Stoller. We granted the application for interlocutory appeal on December 5.

Analysis

The right of a party to choose his or her own attorney is important, but it must be balanced against the need to maintain "the highest ethical standards" that will preserve the public's trust in the bar and in the integrity of the court system. A court must necessarily balance these two competing interests when determining whether to disqualify an attorney. In doing so, the court “must also be vigilant to thwart any misuse of a motion to disqualify for strategic reasons.” When we evaluate motions to disqualify an attorney, we use our Iowa Rules of Professional Conduct as the starting point.

Rule 32:1.7 covers concurrent conflicts of interest and states in pertinent part,

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person by a personal interest of the lawyer.

The rule goes on to state that a lawyer may continue with the representation of a client if certain stipulations are met, one of which is that each client gives informed, written consent.

The Zylstras allege that Stoller's representation of NuStar was a concurrent conflict of interest with his representation of them. They argue that he began the action on behalf of NuStar in early May, while knowing that the representation would be adverse to the Zylstras because it involved a deed between the two parties. Further, Stoller began contacting the Zylstras on behalf of NuStar before the May 13 email officially terminating his attorney-client relationship with the Zylstras on the small claims case. Stoller responds that there was no concurrent conflict of interest because he did not file the action on behalf of NuStar against the Zylstras until after the May 13 email terminating the attorney-client relationship. In the alternative, the Zylstras argue that Stoller's June 5 email indicates that he was continuing to represent them in the small claims matter until the court issued its ruling. Even thereafter, Stoller advised the Zylstras there was a basis to appeal the judgment, the time for perfecting such an appeal, and his willingness to continue representing them in the appeal. Stoller contends that it was his duty to inform the Zylstras, as his former clients, of the outcome of the small claims hearing and the time limits for appeal. He further contends that, although he said he would be willing to represent the Zylstras on the appeal, he was also recommending they find alternate representation and thus was only informing them of their options if they chose to go forward with an appeal.

Before we turn to an analysis of whether a concurrent conflict of interest exists, we must address two questions: when the attorney-client relationship between the Zylstras and Stoller ended, and when the attorney-client relationship between NuStar and Stoller began. The first question we may dispose of easily. Generally, a lawyer's representation of a client extends until the time period for motions or appeals expires in a civil action. However, both the attorney and the client may terminate the relationship prior to this natural ending. Both Stoller and the Zylstras agree that the attorney-client relationship was terminated with the May 13 email. Further, while Stoller did offer to represent the Zylstras on the appeal, the Zylstras did not actually appeal the small claims case and did not solicit Stoller's services on any other legal matters. We find that the attorney-client relationship between Stoller and the Zylstras ended with the May 13 email.

The next question we must address is when the attorney-client relationship between Stoller and NuStar began. The attorney-client relationship is governed by general contract principles. It may be either express, such as when representation is based on a written agreement, or implied by the conduct of the parties. There are three elements that must be met to find that an attorney-client relationship has been established:

(1) a person sought advice or assistance from an attorney, (2) the advice or assistance sought pertained to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agreed to give or actually gave the desired advice or assistance.

The relationship between Stoller and NuStar clearly meets this test. NuStar sought advice from Stoller at least beginning in early May about the action that required a deed from the Zylstras. The advice they sought from Stoller pertained to matters within his professional ability. Stoller has practiced law for a number of years and across a number of areas. Last, Stoller both agreed to give and actually gave NuStar advice and assistance. On NuStar's behalf, Stoller began contacting the Zylstras regarding the deed that NuStar was demanding. We find that the attorney-client relationship between NuStar and Stoller began, at the latest, in early May. This is also confirmed by Stoller's correspondence with the Zylstras on May 13 in which he asserts that it was the third time he had contacted them in regard to the deed. We now turn to a discussion of whether this attorney-client relationship involved a concurrent conflict of interest that violates rule 32:1.7.

There are two ways for a concurrent conflict of interest to exist under rule 32:1.7. The first is if “the representation of one client will be directly adverse to another client.” The second is if “there is a significant risk that the representation will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person.” We may find a concurrent conflict of interest under either situation.

We have acknowledged that rule 32:1.7(a) “applies where directly adverse representation will take place, as when one current client is about to file suit against another current client.” The comments to the rule expand on what a “directly adverse” action may be:

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.

Stoller acknowledged in a letter to the Iowa Supreme Court Attorney Disciplinary Board that he began the representation of NuStar in early May and that the Zylstras were aware of his representation of NuStar. It is unclear from the record at what point Stoller realized the action would include the deed that NuStar wanted the Zylstras to sign. However, by the time Stoller sent the May 13 email, he was already contemplating taking action against the Zylstras on behalf of NuStar. The email stated,

I must now put you on formal notice that if the signed deed is not received by my office by the close of business on Wednesday, May 14, 2014, that I will need to pursue the appropriate remedies for specific performance and damages on behalf of Nustar.

In this email, Stoller clearly demonstrates the intent to pursue a future, adverse action against the Zylstras on behalf of NuStar. Although Stoller terminated the attorney-client relationship with the Zylstras in the same email, the intent to pursue legal action unless the Zylstras complied with NuStar's request to sign the deed arose before the email was sent — which is precisely why the demand or “formal notice” language is included. We find that Stoller's representation of NuStar was a directly adverse concurrent conflict of interest. Because Stoller did not properly obtain consent from the Zylstras to represent NuStar, his actions fall squarely within the guidance of the comments that “absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.” Thus, we find Stoller should be disqualified from representing NuStar in the action against the Zylstras. Because the district court applied the law in error, we find that it abused its discretion in concluding that Stoller should not be disqualified.

Rule 32:1.9(a) — Duties to Former Clients

Stoller argues that, even though there was a concurrent conflict of interest in the past, the conflict no longer exists because he severed the attorney-client relationship, and therefore he can continue to represent NuStar in the current action against the Zylstras. Rule 32:1.9(a) concerns a lawyer's duties to former clients. In pertinent part, it provides,

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

The comments expand on what makes a matter “substantially related” for purposes of the rule. A matter is substantially related if it involves the same transaction or legal dispute. If there is “a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter,” then the matter is substantially related.

We consider three factors when we determine whether a substantial relationship exists:

(1) the nature and scope of the prior representation; (2) the nature of the present lawsuit; and (3) whether the client might have disclosed a confidence to his or her attorney in the prior representation which could be relevant to the present action.

Under the first factor, we must consider the scope — if any — of Stoller's representation of the Zylstras in regard to the manure easement agreements. There is no question that Stoller and Robert met to discuss the agreements and that Stoller was aware the Zylstras intended to enter into the agreements with NuStar. During the meeting, Robert showed Stoller the easement agreements. Stoller acknowledges that he looked at the first page and made some notations, though he contends the notations were made at Robert's request so Robert would know what he needed to discuss with another attorney. Stoller further claims that he did not read the entirety of the agreements. During the meeting, Stoller advised Robert to find another attorney to help him with the agreements because it was not an area of the law Stoller was familiar with. He gave Robert the names of two attorneys to contact.

Stoller sent an email to Robert following the meeting that summarized their discussion about the easement agreements. The email stated that Robert asked Stoller to look at the easements and that he “briefly looked at them.” Stoller also wrote, “The changes you were talking about should be run by the other attorney and I suggest that if approved they be included in the easements. I would also think that some permit would be necessary.” This reflects at least some level of advice given to Robert by Stoller. However, this is in stark contrast to our previous cases where we have found an attorney was extensively involved in prior representation.

In *Doe*, we found an attorney was highly involved in a client's prior representation when he had met with the clients, had telephone conversations with the clients, appeared as their attorney, and signed pleadings on their behalf. In *Marks*, we found that the attorney violated rule 32:1.9(a) when he represented a client in a foreclosure action and later represented his own wife in the sale of property to that same former client. We found that the attorney's representation of the client and his wife were substantially related because he had obtained information about the client's property during the foreclosure action. In comparison to our prior cases, we cannot say that the scope of Stoller's representation of the Zylstras regarding the manure easement agreements was in any way significant.

The second factor we consider is the nature of the present lawsuit between the Zylstras and NuStar. In the original petition that Stoller filed on behalf of NuStar, he included six counts. All of the counts except one deal with a real estate contract between NuStar and the Zylstras. Stoller did not participate in the real estate contract on behalf of the Zylstras. Count IV alleges a breach of the manure easement agreements between NuStar and the Zylstras. Although the majority of the counts do not relate to the manure easement agreements that Stoller had knowledge of, at least one part of the current lawsuit does relate to the prior scope of Stoller's representation.

The final factor we consider is “whether the client might have disclosed a confidence to his or her attorney in the prior representation which could be relevant to the present action.” The meeting between Robert and Stoller to discuss the manure easement agreements was brief. The parties only superficially discussed the substance of the agreements and Stoller specifically suggested that Robert seek other competent agricultural law counsel to review the agreements before signing them. The email from Stoller does note that the two discussed whether permits were required or whether Robert should change anything in the agreements. However, nothing from this meeting indicates that Robert disclosed anything in confidence about the agreements to Stoller that would affect the current lawsuit between the Zylstras and NuStar.

We do not find that a substantial relationship exists sufficient to disqualify Stoller under rule 32:1.9(a). We therefore find that the district court did not abuse its discretion in holding that Stoller could not be disqualified under the substantial relationship test.

Conclusion

We find that the district court did not abuse its discretion in concluding that any prior relationship between Stoller and Zylstra in regard to the manure easement agreements failed the substantial relationship test. However, we find that Stoller did have a concurrent conflict of interest. Therefore, we conclude that the district court abused its discretion in not disqualifying Stoller from representing NuStar in the action. On remand, the district court should enter an order disqualifying Stoller from further representation of NuStar in this lawsuit.

| **CHECK YOUR KNOWLEDGE:** |
| --- |
| 1. Why did the court hold that a conflict of interest prevented Stoller from representing NuStar in this action? Do you think that a substantial conflict of interest existed? 2. Why didn’t the Zylstras want Stoller to represent NuStar in the action against them? |

1. The Mountain Goats, *Black Pear Tree* (2008). [↑](#footnote-ref-0)