**5.6: Current Client Conflicts of Interest**

*I’ll never leave him down though I might mess around. It's only ‘cause I need some affection. So I creep, yeah, just creepin’ on. On the down low, ‘cept nobody is supposed to know. So I creep yeah, ‘cause he doesn't know what I do, and no attention goes to show.*[[1]](#footnote-0)

Attorneys have fiduciary duties of care, loyalty, impartiality, and confidentiality to both the clients they intend to represent and the quasi-clients they do not. Sometimes, it’s unclear whether a conflict of interest implicates the duty of care or the duty of loyalty.

Typically, attorneys have more than one client at a time. Whenever they contemplate forming a new attorney-client relationship, they must determine whether it would create a conflict of interest with one of their existing clients. And they must always be attentive to the possibility that conflicts of interest will arise between different clients.

In case a conflict of interest exists with respect to a new client, or arises with respect to an existing client, attorneys must obtain informed consent from all of their clients affected by the conflict, or withdraw from representation.

[***Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 (NY App. Div. 2004)**](https://scholar.google.com/scholar_case?case=12718048957552490854)

**Summary:** Weil, Gotshal & Manges represented Fashion Boutique in an action against Fendi, but also represented Prada, which acquired Fendi. When Weil filed an action against Fashion Boutique for unpaid legal fees, Fashion Boutique counterclaimed against Weil for malpractice and breach of fiduciary duty, because it failed to investigate or introduce relevant testimony. The trial court dismissed the malpractice claims, but not the fiduciary duty claims. The appellate court reversed, reinstating the malpractice claim and dismissing the fiduciary duty claim as redundant.

This action for $2.7 million in unpaid legal fees arose out of the representation, commencing in 1993, of counterclaim plaintiff Fashion Boutique of Short Hills, Inc. and its principals by counterclaim defendant law firm and two of its partners. Fashion Boutique alleges that, while representing it against Fendi in an action in federal court, Prada, which had acquired a controlling interest in Fendi in October 1999, retained the law firm. The federal action was based on alleged disparaging remarks by Fendi, a competing Fifth Avenue boutique, and its parent Fendi, which led to the destruction of Fashion Boutique’s retail business, thereby violating the Lanham Act and New York State law prohibiting product disparagement. The law firm represented Fashion Boutique through extensive pretrial discovery, a summary judgment motion resulting in the dismissal of the Lanham Act claim and a July 2000 jury trial, which resulted in the award of $35,000 in compensatory damages and $75,000 in punitive damages in favor of Fashion Boutique. Earlier, in March 2000, the Fendi defendants had made a settlement offer of $1.4 million, which, although recommended by the law firm, was rejected by Fashion Boutique. The law firm was granted leave to withdraw in September 2000. In December 2002, the United States Court of Appeals for the Second Circuit affirmed the dismissal of the Lanham Act claim.

The law firm thereafter commenced this action for unpaid legal fees; Fashion Boutique answered and asserted counterclaims for legal malpractice and breach of fiduciary duty, seeking $15,555,537 in damages, based on two principal allegations. It alleged that the two law firm partners “disregarded their fiduciary obligation and breached their duty of undivided loyalty to Fashion Boutique” by agreeing in late 1999 to represent Prada and thereby creating an “irresolvable conflict of interest.” It also alleges that, as a result of this conflict, the law firm did not use adequately the testimony of a witness, Caroline Clarke, a former Fendi officer, who, it is claimed, could supply “critical elements” of proof relevant to the dismissed Lanham Act claim. According to Fashion Boutique, Ms. Clarke, in an October 6, 1999 e-mail, told one of the defendant law firm partners that she could testify about hundreds of incidents in which Fendi employees made disparaging remarks about Fashion Boutique and that she knew of a “continued policy of disparagement” against Fashion Boutique. In a prior February 1994 deposition, Ms. Clarke denied personal knowledge of any Fendi policy to disparage the quality of Fashion Boutique merchandise. Notwithstanding, Fashion Boutique claimed that the law firm failed to appreciate the significance of the “new evidence” contained in the e-mail and to use Ms. Clarke’s testimony more effectively to reinstate the Lanham Act claim and prove the remaining claims at trial. Fashion Boutique also alleged that the law firm failed to alert the trial judge to claimed threats against Ms. Clarke at the time of trial and that, because of its divided loyalty, in the face of these threats, the law firm, in effect, abandoned her as a witness; that after the dismissal of the Lanham Act claim, it improvidently advised Fashion Boutique to agree to a stipulated judgment and take an immediate appeal; and that it failed to conduct adequate cross-examination of Fendi witnesses and to submit certain financial records to the jury on the punitive damages issue.

The law firm moved to dismiss the counterclaims, arguing that no conflict of interest exists since the product disparagement action is completely unrelated to the trademark enforcement issues in certain “gray goods” litigation in which the law firm was advising Prada. The law firm also argued that, even if a conflict of interest case had been properly pleaded, Fashion Boutique cannot establish the element of loss causation. The motion court granted the motion in part and denied it in part, dismissing the second counterclaim for legal malpractice but sustaining the first counterclaim for breach of fiduciary duty. In so ruling, the motion court rejected the probative value of Clarke’s October 1999 e-mail, the focal point of Fashion Boutique’s counterclaims, finding, “Nothing in the E-mail would have altered the federal courts’ conclusion, upon which dismissal of the Lanham Act claim was based, that Fendi's actions did not constitute ‘advertising or promotion’ within the meaning of the Lanham Act.” Similarly, as to Fashion Boutique's common-law product disparagement claims, the motion court found that the documentary evidence “refutes Fashion Boutique’s contention that, but for the counterclaim-defendants’ failure to properly utilize Clarke as a witness, Fashion Boutique would have obtained a substantially greater award of damages on its claims under New York State law.” The court also rejected the claim that “Clarke was unable to testify fully and freely at trial, because Fendi was subjecting her to an alleged campaign of threats and intimidation.” The court noted that the federal trial court examined Clarke at a hearing outside the jury’s presence to consider the effect of the purported threats on her testimony, at the conclusion of which the court concluded: “I have listened to a very distraught woman who has addressed subjects which are irrelevant to this lawsuit.” The motion court rejected each of the criticisms of the way in which the law firm conducted the trial, finding that they constitute “simply dissatisfaction with strategic choices.” Despite this finding, the court sustained the breach of fiduciary duty counterclaim, holding that even if the law firm may not have had an actual conflict of interest it might not have been “sensitive to forces that might operate upon it subtly in a manner likely to diminish the quality of its work.” The same documentary evidence that refuted legal malpractice, the court held, “does not utterly refute” the allegations that the law firm’s “failure to make better use of Clarke’s testimony, and delay in advising the federal trial court of the purported campaign of intimidation against Clarke until after she had already given her trial testimony, substantially contributed to the failure to achieve a better result in the Fendi action.” We reverse.

Fashion Boutique’s theory of liability, common to both the legal malpractice and breach of fiduciary duty counterclaims, is that during the latter part of the law firm’s representation of Fashion it labored under a conflict of interest that was at such an extent that it compromised the law firm’s level of advocacy and contributed to a trial outcome less favorable than would otherwise have been achieved. In dismissing the legal malpractice counterclaim, the motion court reviewed a record consisting of 17 different exhibits, ranging from pleadings to transcripts of arguments to testimony, both at trial and in depositions, as well as an e-mail, on the basis of which it made factual findings in support of its decision. The testimonial portion of that submission, alone, ran to more than 700 pages. Such a review, culminating in factual findings, would be most unusual even if this motion had been converted, which it was not, to one for summary judgment. The law firm argued that the 500 pages of exhibits constituted documentary evidence. In opposing the motion, Fashion Boutique relied on the detailed factual allegations of its counterclaims and whether reasonable inferences could be drawn therefrom. A court is obliged to accept the complaint’s factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining “only whether the facts as alleged fit within any cognizable legal theory. Dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” The motion court clearly departed from this standard. Disregarding the allegations of the counterclaims and the possible inferences to be drawn therefrom, it reviewed evidence, including deposition and trial testimony and a three-page e-mail narrative, described by its author, Ms. Clarke, as an “overview” of the areas of interest as to which she could offer testimony, and made factual findings. In considering such evidence, the court went far beyond what the Legislature intended. The submissions here are of a type that “do not meet the requirement of conclusively establishing the defense as a matter of law.” For instance, the motion court disregarded the fact that Ms. Clarke’s e-mail was only an overview of her testimony and viewed it as the whole of her testimony. Nor did the court take into account the many ways Ms. Clarke indicated she could testify with personal knowledge about Fendi’s campaign of disparagement. On this record, we find that the legal malpractice counterclaim’s allegation that but for the law firm’s failure, due to its debilitating conflict of interest, to make proper use of Ms. Clarke’s testimony, the Fashion Boutique case against Fendi would have had a more favorable result, was not conclusively controverted. Thus, the legal malpractice counterclaim should be reinstated.

As to the claim for breach of fiduciary duty, we have consistently held that such a claim, premised on the same facts and seeking the identical relief sought in the legal malpractice cause of action, is redundant and should be dismissed.

We take this occasion to note that the court erred in holding that the “but for” standard of causation, applicable to a legal malpractice claim, does not apply to the claim for breach of fiduciary duty. Instead, it applied the less rigorous “substantial factor” causative standard. We have never differentiated between the standard of causation requested for a claim of legal malpractice and one for breach of fiduciary duty in the context of attorney liability. The claims are coextensive. Under New York law, to establish the elements of proximate cause and actual damages, where the injury is the value of the claim lost, the client must meet the “case within a case” requirement, demonstrating that “but for” the attorney’s conduct the client would have prevailed in the underlying matter or would not have sustained any ascertainable damages. The cases relied upon by Fashion Boutique did not involve a former client’s breach of fiduciary claim against his attorneys, but rather a typical commercial dispute as to the fiduciary obligation owed by a lawyer to his former partners when departing to join another firm.

**Questions:**

1. Why did Fashion Boutique think Weil committed malpractice? Why did Fashion Boutique think Weil breached its fiduciary duty?
2. How did the trial court analyze those claims? Why did the appellate court reverse?
3. What is the difference between a malpractice claim and a breach of fiduciary duty claim? Are they redundant? Which kind of claim did Fashion Boutique have, if either?

**Prospective Informed Consent**

Obtaining a client’s informed consent to a conflict of interest after it arises can be difficult. After all, it may not be in the client’s interest to consent to the conflict. Accordingly, many lawyers ask new clients to provide informed consent to conflicts that may arise in the course of representation.

Should clients be able to provide informed consent to potential future conflicts? When should prospective consent be permitted? Are there circumstances in which it should not be permitted? How should courts determine whether prospective consent was sufficiently informed to be effective?

[**Model Rule 1.7, Comment [22]**](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/)

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

[***Visa USA, Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100 (N.D. Ca. 2003)**](https://scholar.google.com/scholar_case?case=11129918722249089297)

**Summary:** Heller Ehrman White & McAuliffe represented Visa. First Data asked Heller to represent it in a patent infringement action, and Heller agreed, if First Data consented to Heller’s representation of Visa in any future disputes. Soon afterward, Visa sued First Data, represented by Heller. First Data filed a motion to disqualify Heller. The court denied the motion because First Data knowingly consented to the conflict and Heller protected First Data’s confidentiality.

HAMILTON, District Judge.

Plaintiff Visa sued defendant First Data in April 2002 for trademark infringement, dilution, and various breach of contract claims. First Data has contracted with Visa to process financial transactions on Visa’s behalf. First Data has recently launched a new business initiative, which will allow First Data to bypass Visa’s regulations on the processing of certain Visa-related transactions. Visa claims these private arrangements violate its contractual and trademark rights.

Visa is represented in this matter by the law firm of Heller Ehrman White & McAuliffe’s San Francisco office. In March 2001, before this lawsuit was filed, First Data was sued in an unrelated patent infringement action currently pending in the District of Delaware. First Data sought to retain Heller’s Silicon Valley office as counsel in the Delaware action. After running a conflicts check, Heller informed First Data that it had a long-standing relationship with Visa. While Heller did not see any conflicts between the two parties at that time, Heller could not represent First Data in the patent infringement case unless First Data agreed to permit Heller to represent Visa in any future disputes, “including litigation,” that might arise between First Data and Visa. First Data consented to those terms, which were memorialized in an engagement letter between Heller and First Data. The relevant portion of the letter states:

Our engagement by you is also understood as entailing your consent to our representation of our other present or future clients in “transactions,” including litigation in which we have not been engaged to represent you and in which you have other counsel, and in which one of our other clients would be adverse to you in matters unrelated to those that we are handling for you. In this regard, we discussed Heller’s past and on-going representation of Visa in matters which are not currently adverse to First Data. Moreover, as we discussed, we are not aware of any current adversity between Visa and First Data. Given the nature of our relationship with Visa, however, we discussed the need for the firm to preserve its ability to represent Visa on matters which may arise in the future including matters adverse to First Data, provided that we would only undertake such representation of Visa under circumstances in which we do not possess confidential information of yours relating to the transaction, and we would staff such a project with one or more attorneys who are not engaged in your representation. In such circumstances, the attorneys in the two matters would be subject to an ethical wall, screening them from communicating with each other regarding their respective engagements. We understand that you do consent to our representation of Visa and our other clients under those circumstances.

After First Data agreed to the waiver, Visa also agreed to Heller’s dual representation.

A few months later, in July 2001, First Data publicly announced its intention to launch its new private arrangement plan, and in the beginning of 2002, First Data officially notified Visa. Visa then sued First Data. First Data in response threatened antitrust counterclaims against Visa, and then began settlement discussions. Almost four months after the complaint was filed, and shortly after settlement talks broke down, First Data informed Visa in August 2002 that it intended to move to disqualify Heller as counsel for Visa in this matter.

First Data claims that when it signed the waiver letter, it was not adequately informed of the possibility that its patent counsel could sue it for millions of dollars in damages and raise claims disparaging First Data and attacking the very core of its business. First Data contends that under the California Rules of Professional Conduct, Heller at a minimum was required to reaffirm First Data’s prospective consent when the actual conflict between Visa and First Data arose. First Data has also indicated that it believes that Heller’s patent lawyers have access to confidential information from First Data that Visa could use against First Data in this action.

Heller and Visa argue that First Data was fully informed about the situation and agreed to allow Heller to represent Visa in future litigation against First Data. Heller and Visa argue that the California Rules of Professional Conduct and other ethical rules expressly permit prospective written consent to a conflict waiver, and that no rules require Heller to obtain a second consent to continue in their representation of Visa. Heller also indicates that it has put an ethical wall in place that adequately protects First Data's confidential information.

DISCUSSION

A. Motion to Disqualify Counsel—Legal Standards

The Northern District of California has adopted the California Rules of Professional Conduct, and attorneys practicing in this court are required to adhere to those standards, as articulated in the rules and any court decisions interpreting them. The right to disqualify counsel is within the discretion of the trial court as an exercise of its inherent powers.

Motions to disqualify counsel are strongly disfavored. Thus, such requests “should be subjected to particularly strict judicial scrutiny.”

In reviewing a motion to disqualify counsel, the district court must make “a reasoned judgment and comply with the legal principles and policies appropriate to the particular matter at issue.” The district court is permitted to resolve disputed factual issues in deciding a motion for disqualification and must make findings supported by substantial evidence.

B. Simultaneous Representation of Adverse Clients and Written Waivers

1. Conflict Waiver Letters

First Data claims that Heller has violated Cal. Rule of Prof. Conduct 3-310(C)(3), which states:

A member of the California State Bar shall not, without the informed written consent of each client:

(3) represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

First Data argues that this rule automatically disqualifies Heller from representing both Visa and First Data, even though First Data’s patent litigation is unrelated to this action.

When evaluating whether a law firm may concurrently represent two clients, even on unrelated matters, it is presumed that the duty of loyalty has been breached and counsel is automatically disqualified. But, as Visa and Heller note, the presumption may be rebutted and a law firm may nonetheless simultaneously represent two adverse clients if full disclosure of the situation is made to both clients and both agree in writing to waive the conflict. Here, it is undisputed that Heller and First Data executed a conflict waiver letter. Thus, Heller is not automatically disqualified from representing both Visa and First Data.

2. Prospective Waivers

First Data next argues that Heller’s use of a prospective waiver, which purported to waive all future conflicts between Visa and First Data, was improper without, at minimum, a second disclosure and waiver once the situation between Visa and First Data ripened into an actual conflict. Visa and Heller argue that the prospective waiver signed by First Data was proper and fully informed, and thus no second waiver was required.

An advance waiver of potential future conflicts, such as the one executed by First Data and Heller, is permitted under California law, even if the waiver does not specifically state the exact nature of the future conflict. The only inquiry that need be made is whether the waiver was fully informed. In some circumstances, a second waiver will be warranted, but only if the attorney believes that the first waiver was insufficiently informed. There is no case law requiring a second disclosure in all circumstances for an advance waiver to be valid.

3. Fully Informed Waiver

A second waiver by First Data in a nonrelated litigation would only be required if the waiver letter insufficiently disclosed the nature of the conflict that subsequently arose between Visa and First Data. Thus, to prevail on this motion, First Data must show that it was not fully informed about the consequences of its conflicts waiver when it signed the waiver letter. To show full disclosure, Heller must demonstrate that it “communicated information reasonably sufficient to permit the client to appreciate the significance of the matter in question.”

An evaluation of whether full disclosure was made and the client made an informed waiver “is obviously a fact-specific inquiry.” Factors that may be examined include the breadth of the waiver, the temporal scope of the waiver (whether it waived a current conflict or whether it was intended to waive all conflicts in the future), the quality of the conflicts discussion between the attorney and the client, the specificity of the waiver, the nature of the actual conflict (whether the attorney sought to represent both clients in the same dispute or in unrelated disputes), the sophistication of the client, and the interests of justice. In evaluating all these factors, there is substantial evidence showing that Heller made a full and reasonable disclosure to First Data and First Data knowingly waived any conflicts concerning Heller's ongoing representation of Visa.

a. Heller Fully Disclosed the Conflict to First Data.

Most significantly, the waiver letter itself demonstrates that Heller fully explained to First Data the nature of the conflict waiver at issue. When First Data first approached Heller to represent it in the patent litigation, Heller explained to First Data that, even though there were no present conflicts between Visa and First Data, there was a significant risk of future adversity because Visa and First Data were major competitors in the processing side of the credit card business. Heller thus informed First Data that it would not be able to take the matter unless First Data would waive any conflicts that might arise out of Heller's ongoing work for Visa in matters up to and including possible future litigation. This understanding was confirmed in the written waiver letter.

Our engagement by you is also understood as entailing your consent to our representation of our other present or future clients in “transactions,” including litigation in which we have not been engaged to represent you and in which you have other counsel, and in which one of our other clients would be adverse to you in matters unrelated to those that we are handling for you. In this regard, we discussed Heller’s past and on-going representation of Visa U.S.A. and Visa International in matters which are not currently adverse to First Data. Moreover, as we discussed, we are not aware of any current adversity between Visa and First Data. Given the nature of our relationship with Visa, however, we discussed the need for the firm to preserve its ability to represent Visa on matters which may arise in the future including matters adverse to First Data, provided that we would only undertake such representation of Visa under circumstances in which we do not possess confidential information of yours relating to the transaction.

The letter identifies the adverse client, Visa, and discloses as fully as possible the nature of any potential conflict that could arise between the two parties. The letter also clearly states that the waiver contemplates Heller’s representation of Visa against First Data in matters “including litigation.” First Data was given ample information concerning the conflict in question that it was asked to waive, reviewed this information, and then agreed to the waiver. First Data has failed to demonstrate that it was not fully and reasonably informed when it signed the waiver letter.

The cases where law firms have been disqualified for insufficient disclosures involve situations much more egregious than the facts presented here. For instance, in *Image*, Kodak successfully disqualified Coudert Brothers, Image’s attorneys, from representing Image in that action because Coudert had also represented Kodak in unrelated corporate matters. Kodak produced evidence that Coudert had deliberately misrepresented the scope of their representation of Image to Kodak by downplaying their actual conflict. Specifically, Coudert failed to mention to Kodak’s business people that they would be arguing against Kodak before the U.S. Supreme Court in a landmark antitrust case that had been litigated for six years. They also failed to disclose any of this information to Kodak’s in-house counsel, and failed to obtain a written consent. After weighing these factors, the court determined that this could not constitute full disclosure and ordered Coudert disqualified.

Here, in contrast, Heller notified First Data’s director of intellectual property and division general counsel of the potential for a future conflict, fully discussed the nature of that conflict, and informed First Data that Heller would be unable to represent First Data unless the conflict was waived. The facts and law do not support a finding that First Data was not given sufficient information to understand the scope of its waiver.

b. Knowing Consent

There is also substantial evidence in the record that First Data was aware of this potential conflict with Visa and Heller when it signed the waiver letter, and thus First Data knowingly waived that conflict in order to have Heller to represent it in the patent litigation. First Data in its Answer stated that it had been contemplating its new private arrangement initiative and had given preliminary notice to Visa about it “as early as 1999.” In 2000, First Data had also indicated that Visa’s business plans concerning private arrangements raised antitrust concerns for the payment-card industry in amicus papers and motions to intervene in the Department of Justice antitrust litigation against Visa.

First Data does not deny that it first began contemplating this arrangement in 1999 or that it foresaw antitrust concerns in 2000 over Visa’s position on private arrangements. Instead, First Data argues that it did not realize that Heller would represent Visa in those matters and had assumed that Heller would, at most, represent Visa against First Data on incidental matters such as implementation and enforcement of payment processor rules. First Data admits that it is “unlikely” that such matters would result in litigation with Visa.

This is not credible. Heller informed First Data that it represented Visa in large-scale commercial litigation, and that due to the nature of the potential conflicts between the two parties, Heller would not be able to represent First Data at all without a broad prospective waiver. First Data had also submitted briefs in high-profile antitrust litigation in which Heller was representing Visa, and where First Data had threatened Visa with further antitrust claims. First Data knew that Heller was Visa's counsel on major matters that could potentially involve First Data. Given this information, First Data could not have believed that Heller would be uninvolved in any major litigation that could potentially arise between Visa and First Data, or that Visa would have restricted itself to hiring Heller solely for relatively minor regulatory disputes between the two parties.

First Data contended on reply and at the hearing that even if it did know in 2001 when it signed the waiver letter that Visa and First Data could potentially be involved in high-stakes litigation over First Data’s private arrangement initiative, First Data had no duty to recognize that conflict on its own. First Data argues that it was instead Visa and Heller’s duty to inform First Data of these risks, citing *State Farm*. In *State Farm*, though, the law firm in question had made no disclosure to the junior client, and then argued that because the two clients were aware of the conflict when the junior client hired the law firm, they had implicitly consented to a conflict waiver. The court found that the attorneys were still required to disclose the conflict and obtain explicit consent from the clients in that circumstance. *State Farm* requires only that the attorneys disclose conflicts to clients. Here, those requirements were met when Heller disclosed the existence of the potential Visa conflict before forming an attorney-client relationship with First Data and obtained a written conflict waiver agreement. No case law allows First Data to ignore its own additional knowledge concerning the nature of the potential conflict when deciding whether to waive.

c. First Data is a Sophisticated User of Legal Services

In determining whether First Data gave informed consent in the waiver letter, the court may also properly consider First Data’s level of experience with legal services.

First Data is a Fortune 500 company with over $6 billion in annual revenues. It is a knowledgeable and sophisticated user of legal services. It has a legal department of about fifty attorneys and routinely hires top-tier national law firms such as Bingham McCutchen, Heller, and Sidley Austin to handle its complex corporate transactions and litigation matters. First Data can and should be expected to understand the full extent of what it waived when it signed Heller’s explicit waiver letter.

C. Ethical Walls

It is undisputed that Heller immediately put an intra-firm ethical wall in place when Visa sued First Data, which barred contact between the Heller attorneys representing First Data and the Heller attorneys representing Visa. First Data argues that the institution of an ethical wall is insufficient to repair Heller’s breach of its duty of loyalty, and that Heller has breached its duty of confidentiality to First Data by its dual representation of Visa and First Data.

Heller conceded at oral argument that if it had breached its duty of loyalty to First Data through its dual representation of Visa and First Data, an ethical wall would not be sufficient to cure the breach. But Heller did not breach its duty of loyalty to First Data by agreeing to represent Visa in this matter after receiving a valid prospective conflict waiver from First Data. Heller thus is not claiming that the ethical wall is necessary to protect Heller’s duty of loyalty to First Data.

Rather, Heller instituted the ethical wall to protect Heller’s duty of confidentiality to its client First Data. First Data states that it has shared information concerning its finances and its general business plan to its patent lawyers, and argues that such information is presumed imputed to all Heller attorneys. Heller can rebut that presumption by “showing that effective screening procedures were implemented to prevent the passing of information between the tainted lawyers and other members of the firm.” Because First Data makes no showing in its papers beyond the presumption of shared confidentiality in support of its allegations, and because Heller has demonstrated that it immediately put an ethical wall in place as soon as Heller was retained as Visa’s counsel in this action, there has been no breach of the duty of confidentiality here.

**Questions:**

1. Why did First Data think that Heller had a conflict of interest? Why did the court disagree?
2. Should a client be able to consent to being sued by their attorney?
3. How did Heller avoid creating a conflict of interest? How did the duty of loyalty and the duty of confidentiality create different problems?

**Conflicts of Law**

When courts decide whether a conflict of interest exists and how to evaluate it, they must also decide what law to apply. For state courts, the choice of law question is relatively easy. They must apply the state law governing lawyers, although they may refer to federal law and general principles in interpreting the state law.

But for federal courts, the choice of law question is more complicated. They are necessarily reviewing the actions of attorneys who are members of a state bar and subject to state rules. But they also have their own bar and may consider national rules and principles.

Accordingly, federal courts must decide whether to apply state or national law in determining whether a conflict of interest exists, and how to evaluate any conflicts of interest they find.

[***In re Dresser Industries, Inc.*, 972 F. 2d 540 (5th Cir. 1992)**](https://scholar.google.com/scholar_case?case=6210339699203941849)

**Summary:** Susman Godfrey represented Dresser Industries in several actions, but also represented the plaintiffs in the *Drill Bits* class action, and informed Dresser of a potential conflict. Dresser declined to seek new counsel, but moved to disqualify Susman Godfrey when it became a defendant in *Drill Bits*. The district court denied the motion, based on Texas law, but the circuit court reversed, based on the Model Rules.

E. GRADY JOLLY, Circuit Judge:

In this petition for a writ of mandamus, we determine whether a law firm may sue its own client, which it concurrently represents in other matters. In a word, no; and most certainly not here, where the motivation appears only to be the law firm’s self-interest.[[2]](#footnote-1) We therefore grant the writ, directing the district judge to disqualify counsel.

I

The material facts are undisputed. This petition arises from a consolidated class action antitrust suit brought against manufacturers of oil well drill bits.

Dresser Industries, Inc., is now a defendant in *Drill Bits*, charged — by its own lawyers — with conspiring to fix the prices of drill bits and with fraudulently concealing its conduct. Stephen D. Susman, with his firm, Susman Godfrey, is lead counsel for the plaintiff’s committee. As lead counsel, Susman signed the amended complaint that levied these charges against Dresser, his firm’s own client.

Susman Godfrey concurrently represents Dresser in two pending lawsuits. *CPS International, Inc. v. Dresser Industries, Inc.*, is the third suit brought by CPS International, a company that claims Dresser forced it out of the compressor market in Saudi Arabia. CPS International initially sued Dresser for antitrust violations and tortious interference with a contract. The antitrust claim has been dismissed, but the tort claim is scheduled for trial. Susman Godfrey has represented Dresser throughout these actions, which commenced in 1985. During its defense of Dresser, Susman Godfrey lawyers have had relatively unfettered access to data concerning Dresser’s management, organization, finances, and accounting practices. Susman Godfrey’s lawyers have engaged in privileged communications with Dresser’s in-house counsel and officers in choosing antitrust defenses and other litigation strategies. Susman Godfrey has also, since 1990, represented Dresser in *Cullen Center, Inc. v. W.R. Gray Co.*, a case involving asbestos in a Dresser building, which is now set for trial in Texas state court.

On October 24 and November 24, 1991, Susman Godfrey lawyers wrote Dresser informing it that Stephen Susman chaired the plaintiffs’ committee in *Drill Bits*, that Dresser might be made a *Drill Bits* defendant, and that, if Dresser replaced Susman Godfrey, the firm would assist in the transition to new counsel. Dresser chose not to dismiss Susman Godfrey in CPS and Cullen Center.

Dresser was joined as a defendant in *Drill Bits* on December 2, 1991. Dresser moved to disqualify Susman as plaintiffs’ counsel on December 13. Both Dresser and Susman Godfrey submitted affidavits and depositions to the district court, which, after a hearing, issued a detailed opinion denying the motion.

The district court noted that Southern District local rule 4B provides that the code of professional responsibility for lawyers practicing in that district is the Code of Responsibility of the State Bar of Texas. Although the court further noted that other district courts look to other codes in deciding motions to disqualify, nevertheless, it concluded that “Dresser's motion to disqualify Susman Godfrey is governed wholly by the Texas Disciplinary Rules of Professional Conduct.” The court then focused on Texas Disciplinary Rule 1.06, which provides:

(b) Except to the extent permitted in paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm’s responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure.

The district court described the *Drill Bits* complaint as a civil antitrust case, thus somewhat softening Dresser’s description of it as an action for fraud or criminal conduct. The court held, “as a matter of law, that there exists no relationship, legal or factual, between the Cullen Center case and the *Drill Bits* litigation,” and that no similarity between *Drill Bits* and the CPS suits was material. The court concluded that “Godfrey's representation of the plaintiffs in the Drill Bits litigation does not reasonably appear to be or become adversely limited by Susman Godfrey’s responsibilities to Dresser in the CPS and Cullen Center cases,” and accordingly denied the motion to disqualify. Finally, the court denied permissive interlocutory appeal.

II

In evaluating a motion to disqualify, we interpret the controlling ethical norms governing professional conduct as we would any other source of law. When the facts are undisputed, district courts enjoy no particular advantage over appellate courts in formulating ethical rules to govern motions to disqualify. Thus, in the event an appropriate standard for disqualification is based on a state's disciplinary rules, a court of appeals should consider the district court's interpretation of the state disciplinary rules as an interpretation of law, subject essentially to *de novo* consideration.

III

The district court clearly erred in holding that its local rules, and thus the Texas rules, which it adopted, are the “sole” authority governing a motion to disqualify. Motions to disqualify are substantive motions affecting the rights of the parties and are determined by applying standards developed under federal law.

The district court's authority to promulgate local rules is derived from 28 U.S.C. § 2071, which allows the courts only to adopt “rules for the conduct of their business.” Thus, although the district court should determine rules for the conduct of attorneys for the purpose of identifying conduct subject to sanctions, its local rules alone cannot regulate the parties’ rights to counsel of their choice.

IV

We apply specific tests to motions to disqualify counsel in circumstances governed by statute or the Constitution. When presented with a motion to disqualify counsel in a more generic civil case, however, we consider the motion governed by the ethical rules announced by the national profession in the light of the public interest and the litigants’ rights. Our source for the standards of the profession has been the canons of ethics developed by the American Bar Association. We have applied particularly the requirement of canon 5 that a lawyer exercise “independent professional judgment on behalf of the client” and the admonition of canon 9 that lawyers should “avoid even the appearance of impropriety.”

Our most far-reaching application of the national standards of attorney conduct to an attorney’s obligation to avoid conflicts of interest is *Woods v. Covington County Bank*. We held in *Woods* that standards such as the ABA canons are useful guides but are not controlling in adjudicating such motions. The considerations we relied upon in *Woods* were whether a conflict has (1) the appearance of impropriety in general, or (2) a possibility that a specific impropriety will occur, and (3) the likelihood of public suspicion from the impropriety outweighs any social interests which will be served by the lawyer's continued participation in the case.

We applied the *Woods* standard to a conflict that arose when an attorney brought a suit against a former client in *Brennan's Inc. v. Brennan's Restaurant, Inc*. In *Brennan’s*, the plaintiffs moved to have the court disqualify the attorney for the defendants because, prior to the litigation, the attorney had jointly represented both parties. We affirmed the disqualification of the attorney, holding that an attorney could not sue a former client in a matter substantially related to the representation of a former client. Similarly, in *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, we held that the court should bar an attorney from suing the co-defendant of a former client if the co-defendants and their attorneys exchanged information.

In *Woods*, *Wilson Abraham*, and *Brennan’s*, we applied national norms of attorney conduct to a conflict arising after the attorney's prior representation had been concluded. Now, however, we are confronted with our first case arising out of concurrent representation, in which the attorney sues a client whom he represents on another pending matter. We thus consider the problem of concurrent representation under our framework in Woods as tailored to apply to the facts arising from concurrent representation.

We turn, then, to the current national standards of legal ethics to first consider whether this dual representation amounts to impropriety. Neither the ABA Model Rules of Professional Conduct nor the Code of Professional Responsibility allows an attorney to bring a suit against a client without its consent. This position is also taken by the American Law Institute in its drafts of the Restatement of the Law Governing Lawyers.

Unquestionably, the national standards of attorney conduct forbid a lawyer from bringing a suit against a current client without the consent of both clients. Susman’s conduct violates all of these standards — unless excused or justified under exceptional circumstances not present here.

Exceptional circumstances may sometimes mean that what is ordinarily a clear impropriety will not, always and inevitably, determine a conflicts case. Within the framework we announced in *Woods*, Susman, for example, might have been able to continue his dual representation if he could have shown some social interest to be served by his representation that would outweigh the public perception of his impropriety.[[3]](#footnote-2) Susman, however, can present no such reason. There is no suggestion that other lawyers could not ably perform his offices for the plaintiffs, nor is there any basis for a suggestion of any societal or professional interest to be served. This fact suggests a rule of thumb for use in future motions for disqualification based on concurrent representation: However a lawyer's motives may be clothed, if the sole reason for suing his own client is the lawyer's self-interest, disqualification should be granted.

V

We find, therefore, that Dresser's right to the grant of its motion to disqualify counsel is clear and indisputable. We further find that the district court clearly and indisputably abused its discretion in failing to grant the motion. We have thus granted the petition and have issued the writ of mandamus, directing the United States District Court for the Southern District of Texas to enter an order disqualifying Stephen D. Susman and Susman Godfrey from continuing as counsel to the plaintiffs.

**Questions:**

1. Why did the circuit court think a conflict of interest existed? Why did the court think Dresser did not or could not provide consent?
2. Should the court have applied the Texas rule or the model rule?

1. TLC, *Creep*, CrazySexyCool (1994). [↑](#footnote-ref-0)
2. “*Bits* was going to be a case that was going to be active, big, protracted, the first price fixing case that's come along in Houston in a long time. I had made somewhat of a reputation in that area, and I guess it's kind of painful not to be able to play in the game anymore.” Deposition of Stephen D. Susman. [↑](#footnote-ref-1)
3. We found above that the Texas rules of discipline do not control a motion to disqualify in federal court. We are mindful, however, that the Texas rules’ allowance of some concurrent representation is based, in part, on a concern that concurrent representation may be necessary either to prevent a large company, such as Dresser, from monopolizing the lawyers of an area or to assure that certain classes of unpopular clients receive representation. Although we do not now reach the matter, our consideration of social benefit to offset the appearance of impropriety might allow such a representation if the balance clearly and unequivocally favored allowing such representation to further the ends of justice.

   We believe, moreover, that the Texas rules are drawn to allow concurrent representation as the exception and not the rule. Even if the Texas rules had applied, no special circumstances being present here, Texas rule 1.06’s prohibition of representation of potentially adverse interests would have barred the representation. [↑](#footnote-ref-2)