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CERCLA the Wagons, Our Attorney Just Switched Sides and Now Fights for Apache: GTE North, Inc. v. Apache Products Company

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CERCLA THE WAGONS, OUR ATTORNEY JUST SWITCHED SIDES AND NOW FIGHTS FOR APACHE: 
GTE NORTH, INC. v. APACHE PRODUCTS COMPANY

I. INTRODUCTION

The legal system operates under an established system of rules. Certain ethical obligations govern attorneys' conduct as they deal with clients and adverse parties.1 The obligations governing attorneys' conduct can be statutory or regulatory, procedural or evidentiary, and also can be found in rules that govern professional conduct.2 The Model Rules of Professional Conduct are intended to help attorneys avoid ethical conflicts.3 In the event that an attorney violates an ethical obligation, a client may seek aid from the courts.4

Law firms or attorneys specializing in environmental practice need to be especially cautious to avoid the appearance of impropriety.5 One type of representation involving the need for heightened

1. Stephen Gillers & Roy D. Simon, Jr., Regulation of Lawyers, Statutes and Standards 7 (1996). An attorney acting as an advocate must "zealously [assert] the client's position under the rules of the adversary system." Id. at 6-7. In the role of negotiator, however, an attorney's responsibilities are different. As a negotiator, the attorney "seeks a result advantageous to the client but consistent with requirements of honest dealing with others." Id. at 7. In addition, an attorney "should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." Id.

2. See id. at xi; see also Roy D. Simon, Jr. & Murray L. Schwartz, Lawyers and the Legal Profession, Cases and Materials (3d ed. 1994) (discussing issues about lawyers and clients in terms of secrecy, adversary system, conflicts of interest).

3. See Model Rules of Professional Conduct (1996). The American Bar Association approves these rules which various jurisdictions can adopt. Gillers & Simon, supra note 1, at 9. The Rules of Professional Conduct "are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies." Id. at 10.

4. See LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 253 (7th Cir. 1983) (affirming district court's order disqualifying law firm because attorney previously worked for adverse party); GTE North, Inc. v. Apache Prods. Co., 914 F. Supp. 1575, 1581 (N.D. Ill. 1996) (disqualifying attorney and law firm from representing client whose interests were adverse to former client). But see Gillers & Simon, supra note 1, at 11 (stating violation of ethical rules neither gives rise to cause of action nor creates assumption that legal duty has been breached).

5. See Patrick E. Donovan, Comment, Serving Multiple Masters: Confronting the Conflicting Interests that Arise in Superfund Disputes, 17 B.C. Envtl. Aff. L. Rev. 371, 372 (1990). Firms specializing in environmental law are "more likely to undertake multiple representations, due to the size of a typical environmental proceeding

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caution includes the representation of multiple defendants in an action brought by the federal government pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund). Another scenario which requires caution involves the sharing of information among "Potentially Responsible Parties" (PRPs). This is so because parties who initially have an interest in sharing information may later have divergent interests as liability is assessed and apportioned.

In GTE North, Inc. v. Apache Products Co., the United States District Court for the Northern District of Illinois addressed the limitations that the Rules of Professional Conduct for the Northern District of Illinois impose on an attorney in a Superfund action. Specifically, the district court determined that an attorney who represented the relatively small number of firms capable of handling these type[s] of [suits]." Id.; see e.g., United States v. Conservation Chem. Co., 106 F.R.D. 210, 218 (W.D. Mo. 1985) (noting complexity of lawsuit involving over 250 defendants in Superfund action).

6. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-75 (1994)) (identifying parties that can be held liable under CERCLA). CERCLA aids in the protection of the environment and in the clean-up of hazardous waste sites by imposing "strict and joint and several liability on owners, operators, generators and transporters of hazardous substances." William J. Holmes, The Evolution of the Trust: A Creative Solution to the Trustee Liability Under CERCLA, 6 VILL. ENVTL. L.J. 1, 2 (1995). Passed in 1980, CERCLA allows EPA to initiate a clean-up of contaminated waste sites and further authorizes EPA to recover the cost of the clean-up from those parties responsible for creating the environmental hazards. See id. at 5. Further, CERCLA liability is strict and "is imposed on responsible parties without regard to fault or negligence." Id. at 6. Consequently, those parties who have been held liable for the entire cost of clean-up have the right to sue other responsible parties for contribution. See id. It is likely that attorneys representing PRPs in the same action will "encounter conflicting or adverse interests among clients." Donovan, supra note 5, at 372.

7. See Donovan, supra note 5, at 386. Potentially Responsible Parties (PRPs) may avoid the imposition of joint and several liability by demonstrating that "the greater share of liability belongs to other parties" and thus, the PRP may "reduce its share of clean-up costs and shift those costs to its co-defendants." Id. Consequently, those defendants who try to show that damages should be apportioned "create a conflict of interest [among those] parties retaining joint counsel." Id. at 387.

8. See id. at 387. The policies of EPA regarding settlement of Superfund actions "increase[ ] the likelihood that parties will become polarized during Superfund negotiations." Id. Although an attorney may initially represent multiple PRPs, "[g]iven the obvious benefits of avoiding duplication of effort and having a unity of purpose in negotiating the most efficient cleanup plan with the government . . .", concerns regarding conflicts of interest may arise. The TASK FORCE ON CONFLICTS OF INTERESTS, Conflict of Interest Issues, 50 BUS. LAW. 1381, 1422 (1995).

10. See id. at 1577-81.
presented one client during the investigative stage of a Superfund case was prohibited from representing another party in an ensuing contribution suit, even though the former client was not a party in the contribution action and consented to the attorney’s subsequent representation. The district court applied the Rules of Professional Conduct for the Northern District of Illinois in order to disqualify the attorney and his law firm.

This Note will discuss the Rules of Professional Conduct and their effect on environmental lawyers who represent PRPs in Superfund actions. Part II presents the facts of GTE North. Then, part III examines the Rules of Professional Conduct and the legal context in which these rules have been applied. Subsequently, part IV discusses the holding and reasoning of the District Court for the Northern District of Illinois in GTE North. Next, Part V critically analyzes the decision of the district court in light of precedent. Finally, Part VI concludes with a discussion of the impact of the district court’s opinion on attorneys and their clients in Superfund actions.

II. FACTS

On January 19, 1989, the federal government filed suit in the Northern District of Illinois against seven defendants, seeking to recover costs incurred in the clean-up of the Belvidere Municipal

11. See id. at 1581. The district court also determined that because the attorney, Jon S. Faletto, could not represent the party in the contribution suit, the law firm at which he was employed could not represent the party either. See id.
12. See id. at 1579-81. Rule 1.9 of the Rules of Professional Conduct for the Northern District of Illinois, entitled “Conflict of Interest: Former Client,” states in pertinent part as follows: “[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... unless the former client consents after disclosure.” ILLINOIS RULES OF PROFESSIONAL CONDUCT, 1.9(a) (West 1996).
   Rule 1.10(a), entitled “Imputed Disqualification; General Rule” states as follows: “[n]o lawyer... shall represent a client when the lawyer knows... that another lawyer associated with that firm would be prohibited from doing so...” ILLINOIS RULES OF PROFESSIONAL CONDUCT, 1.10(a) (West 1993).
13. For a discussion of the facts of GTE North, see infra notes 18-38 and accompanying text.
14. For a discussion of the relevant case precedent involving the Rules of Professional Conduct, see infra notes 39-82 and accompanying text.
15. For a discussion of the holding and reasoning of the District Court for the Northern District of Illinois in GTE North, see infra notes 83-108 and accompanying text.
16. For an analysis of the court’s opinion in GTE North, see infra notes 109-37 and accompanying text.
17. For a discussion of the impact of the decision of the court in GTE North, see infra notes 138-47 and accompanying text.
Landfill. Pursuant to CERCLA section 107, the defendants were given notice of their PRP status. Five of these companies joined together and formed the Appleton Road Committee. The members of the committee then executed a cost sharing agreement (Appleton Agreement). In order to protect the parties, the Appleton Agreement contained a provision entitled “Covenant Not to Sue.”

18. See GTE North, Inc. v. Apache Prods. Co., 914 F. Supp. at 1575, 1577 (N.D. Ill. 1996); United States v. GTE North, Inc., No. 90-C-20302 at *1 (N.D. Ill. 1990). The Belvidere Municipal Landfill is located in Boone County, Illinois and occupies 19.3 acres of a 139 acre site. ENVIRONMENTAL PROTECTION AGENCY, FEDERAL ENVIRONMENTAL SUPERFUND, RECORDS OF DECISIONS 1 (1988). The landfill is adjacent to the Kishwaukee River and was owned by the City of Belvidere from 1989 to 1973. See id. at 2. Originally, the landfill was used for domestic garbage. See id. In 1965, Belvidere obtained a modified permit which allowed for the disposal of up to fifty-two tons of domestic garbage, landscape wastes and demolition material per day. See id.

Six years after the permit was granted, the operator of the landfill disclosed that 100 tons of garbage were being deposited at the site daily. See id. Of the 100 tons, 35 tons came from residential sources, 30 tons came from industrial sources, and 35 tons came from commercial sources. See id. The Illinois Environmental Protection Agency closed the landfill in 1973 after determining that hazardous wastes had been deposited at the site over a period of several years. See id. In 1982, EPA placed the Belvidere Landfill on the National Priorities List of Hazardous Waste Sites. See id. at 4-5. The cost to clean up the site totaled $5,900,000 and requires an additional annual cost of $271,000 to continue monitoring and maintaining the site. See id. at 2.

19. See Memorandum of Law in Support of GTE North, Inc.'s Motion to Disqualify at 1-2, GTE North, Inc. v. Apache Prods. Co., 914 F. Supp. 1575 (N.D. Ill. 1996) (No. 95-C-50197). CERCLA section 107 provides, in pertinent part, as follows:

(1) the owner and operator of a vessel or facility [or] ... (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, ... shall be liable for —

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe .... CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) (1994).

20. See GTE North, 914 F. Supp. at 1577.

21. See id. The members of the Committee “executed a joint remedial cost sharing agreement” which was called the “Appleton Agreement.” Id. The agreement’s purpose was to ensure compliance with the consent decree; allocate response costs among members; identify additional PRPs; and provide a means to pursue cost recovery against additional PRPs. See Memorandum of Law in Support of GTE North, Inc.’s Motion to Disqualify, Exhibit A at 4, GTE North (No. 95-C-50197).

22. See id. at Exhibit A at 25. The “Covenant Not to Sue” stated that each member “agree[s] and covenant[s] ... not to sue or take civil action against any Member ... or to seek recovery of monies ... for the performance of the actions required by the Consent Decree, or against any Additional PRP who has settled [with the committee].” Id.
Appleton Road Committee’s members could pursue “Cost Recovery Action[s]” against other PRPs. In order to prevent members of the Appleton Road Committee from revealing confidential information, the Appleton Agreement also contained confidentiality provisions which were intended to prevent disclosure by not only the members to the agreement but also by their respective attorneys. The Appleton Agreement had the effect of resolving “all

23. See id. at 2. The Cost Recovery Action provisions governed the manner in which the members of the Appleton Road Committee could cooperatively pursue contribution claims against other PRPs. The provision stated in part as follows:

[t]he cost recovery action will be prosecuted in the name of each Member who chooses to join in the action. Each such Member may serve on the Cost Recovery Committee. The Cost Recovery Committee will direct the course of the litigation and will determine whether to accept settlement from Additional PRPs and whether to distribute funds arising from the action. The Cost Recovery Committee will act by majority vote...

Id. at 3.

24. See Memorandum of Law in Support of GTE North, Inc.’s Motion to Disqualify, Exhibit A at 21-23, GTE North, (No. 95-C-50197). The “Confidentiality and Use of Information” section was intended to govern the use of shared information, the need to preserve attorney-client privilege and the confidentiality of shared information. See id. at Exhibit A at 21.

The “Shared Information” section provided that “the Members may elect to disclose or transmit to each other such information as each Member deems appropriate for the sole and limited purpose of this Agreement.” Id. This paragraph further provided that “[n]o claim of work product privilege or other privilege shall be waived by reason of participation... in th[e] Agreement.” Id.

The Appleton Agreement also contained provisions governing the “Confidentiality of Shared Information.” Id. This section provided that:

[e]ach Member agrees that all shared information received from any other Member or its counsel pursuant to this Agreement shall be held in strict confidence by the receiving Member and by all persons to whom such confidential information is revealed by the receiving Member, and that such information shall be used only in connection with asserting any common claims or defenses and conducting such other activities that are necessary and proper to carry out the purposes of this Agreement . . . .”

Id.

The agreement further provided that:

[s]hared information that is exchanged in written or in document form and is intended to be kept confidential may, but need not, be marked “Confidential” or with a similar legend. If such information becomes the subject of an administrative or judicial order requiring disclosure of such information by a Member or the Committee, the Member of the Committee may satisfy its confidentiality obligation hereunder by notifying the Member of the Committee that generated the information and by giving such Member or the Committee an opportunity to protect the confidentiality of the information.

Id. at Exhibit A at 22.

As a result of the confidentiality requirements, Members incurred a responsibility to:

take all necessary and appropriate measures to ensure that any person who is granted access to any shared information, who participates in work or common projects, or who otherwise assists any counsel in connection with the performance of this Agreement, is familiar with the terms of this
liability and allocation issues [between] the members of the Appleton [Road] Committee."  

In 1989, the District Court for the Northern District of Illinois issued an order that approved a final consent decree between the federal government and the members of the Appleton Road Committee. In October 1990, the United States filed an action against GTE North, Inc. (GTE North) to recover costs incurred in the clean-up of the Belvidere Municipal Landfill which had not been recovered from the Appleton group. The federal government and GTE North later settled this lawsuit in January 1993. 

Additionally, in 1993, the members of the Appleton Road Committee entered into a second agreement (Investigation Agreement) to share the cost of investigating other PRPs who had not participated in reimbursing the federal government for expenses incurred in the clean-up of the Belvidere Municipal Landfill. The agreement and complies with such terms as they relate to the duties of such person . . . .

Id.

The intent of the confidentiality provisions was "to protect from disclosure all information and documents shared among any Members to the greatest extent permitted by law, regardless of whether the sharing occurred before execution of this Agreement and regardless of whether the writing or document is marked 'Confidential.'" Id. Further, the Member's obligations to keep information confidential were to "remain in full force and effect, without regard to whether their other obligations hereunder are terminated in any way." Id. at Exhibit A at 23. Members were not, however, required to share information if a member believed that sharing information would reveal "trade secrets, patents, copyrights or information or materials protected by intellectual property rights." Id.

25. See GTE North, 914 F. Supp. at 1577.

26. See United States v. GTE North, Inc., No. 90-C-20302 at *2 (N.D. Ill. 1990). A final consent decree is an order entered by the court whereby the defendants agree to pay for the damages at the clean-up cite. See supra, at *2 n.21. Pursuant to the consent decree, the Members of the Appleton Road Committee agreed to pay a portion of the costs that the government incurred in the clean-up of the Belvidere Municipal Landfill Site. See id.

27. See id.

28. See id. The terms of the settlement agreement provided that GTE North would reimburse the government $575,000 for costs incurred in the Belvidere Landfill clean-up. See id. Prior to a settlement agreement, GTE North entered into an agreement with the members of the Appleton Road Agreement who had previously settled with the government, whereby GTE North agreed to participate in the clean-up under the original consent decree in exchange for a promise by the Investigation Committee not to pursue a cost recovery action against GTE North. See id. GTE North was also permitted to join the "Investigation Agreement." Id. For a full discussion of the Investigation Agreement, see infra note 29 and accompanying text.

29. See GTE North, 914 F. Supp. at 1578. The Investigation Agreement "implemented a joint investigation of additional PRPs who had not participated in the clean up of the landfill." Id. In addition, the "Investigation Agreement" established the "Cost Recovery Committee." See id. Finally, the agreement contained confidentiality provisions similar in form and content to the provisions in the Ap-
parties who signed the Investigation Agreement, also referred to as
the Cost Recovery Committee, retained the law firm of Hinshaw &
Culbertson who had also served as GTE North's counsel.30 Chrysler
Corporation (Chrysler) was a member of both the Appleton Road
Committee and the Cost Recovery Committee and was represented
by Jon S. Faletto of the law firm of Howard & Howard.31 As counsel
for Chrysler, Mr. Faletto was present during strategy discussions
pertaining to cost recovery against certain defendants, including
Dean Foods.32

At the conclusion of the investigation, Chrysler notified each
member of the Cost Recovery Committee that it would not pursue
any contribution actions against any other PRPs.33 In addition,
Chrysler assigned their rights of indemnity and contribution to the
remaining members of the Cost Recovery Committee.34 Each of
the remaining members of the Cost Recovery Committee also as-
signed their rights to sue in contribution to GTE North, who filed
suit in the District Court for the Northern District of Illinois against
Apache Products Company, Belvidere Daily Republican Company,
Dean Foods Company, Manley Motor Sales Company and The Pills-
bury Company.35
In the contribution suit GTE North brought, Jon S. Faletto of Howard & Howard represented Dean Foods. Subsequently, on August 30, 1995, GTE North filed a motion to disqualify Jon S. Faletto and the law firm of Howard & Howard in the District Court for the Northern District of Illinois. In granting GTE North’s motion, the court disqualified both Mr. Faletto and his firm.

III. BACKGROUND

A. Relevant Provisions of CERCLA

CERCLA imposes strict liability for the clean-up of hazardous sites on four categories of PRPs. In the event that enough evi-
dence exists for EPA to determine potential liability for the clean-up, EPA notifies PRPs that they may be potentially liable. The purpose behind EPA’s notification process is to facilitate settlement.

The EPA may initially contact only a few PRPs. Those PRPs who are contacted may have to bear the brunt of the response costs associated with the clean-up of the hazardous site. Those PRPs who decide to settle with the federal government may then rectify the inequitable results by bringing a contribution suit against additional parties who should be held responsible for the costs associated with the clean-up. Thus, CERCLA attempts to provide for the clean-up of hazardous sites while using the common law rules of joint and several liability to apportion liability.

ment, State, municipality, commission, political subdivision of a State, or any interstate body.” Id. § 101(21), 42 U.S.C. § 9601(21).

40. See EPA Interim Guidance on Notice Letters, Negotiations and Information Exchange, 53 Fed. Reg. 5,298, 5,300-01 (1988). The notification process begins when EPA sends a letter to each PRP. See id. Among the information contained in the letter is information concerning clean-up costs and the addresses of other PRPs. See id. at 5,302.

41. See id. at 5,298. EPA may choose to send a special notice letter which may lead to a settlement offer between the PRPs and the federal government. See id. at 5,299. If EPA receives a settlement offer that it believes was made in good faith, EPA will suspend commencement of proceedings for an additional 60 days. See id. After EPA sends out the special notice letter, PRPs have to retain counsel, contact other PRPs, and perhaps join together to investigate liability. See id. It is during the investigative phase that PRPs may retain joint counsel and develop common defenses. See Donovan, supra note 5, at 385.

42. See Donovan, supra note 5, at 385-86. As part of its strategy to encourage settlements, EPA often targets and notifies only a portion of the PRPs. See id.

43. See id. at 385. The courts have: consistently applied joint and several liability to CERCLA cases despite . . . Congress’ exclusion of [such a] provision in the statute. Courts reasoned that Congress intended flexible common law principles of liability allocation to apply in Superfund proceedings. Additional support for the imposition of joint and several liability in Superfund cases stems from the fact that hazardous waste problems have a national significance and implicate federal interests, thereby calling for the application of federal common law. Therefore, the federal common law of joint and several liability applies, and the burden of proving that damages are divisible and capable of apportionment falls upon the defendant.

Id.

44. See CERCLA § 113(f), 42 U.S.C. § 9613(f). CERCLA permits suits in contribution. See id. There are two situations where a party may bring a contribution suit to recover its costs. See Donovan, supra note 5, at 385. “The first situation occurs when a party voluntarily cleans up a site prior to governmental action and seeks recovery under CERCLA section 107(a)(4)(B).” Id. at 385-86. The second situation “occurs when a party is targeted as a PRP and attempts to limit it potential liability by impleading . . . other parties under CERCLA section 113(f).” Id.

45. For a discussion of the methods used to apportion liability, see supra notes 42-45 and accompanying text. See also City of Phila. v. Stepan Chem. Co., 544 F.
B. Relevant Rules of Professional Conduct

The Rules of Professional Conduct are intended to guide attorneys as they engage in the practice of law. The courts may be called upon to interpret these rules to help attorneys avoid conflicts of interest and to assure fairness to each party. Specifically, Rule 1.9 of the Illinois Rules of Professional Conduct prohibits an attorney from representing a client whose interests are materially adverse to the interests of a former client. Illinois Rules of Professional Conduct Rule 1.10 "gives effect to the principles of loyalty" by causing the disqualification of an entire firm if an attorney in that firm would be prohibited from representing a client in a specific action.

46. For a discussion regarding the purposes of the Rules of Professional Conduct, see supra notes 1-3, and infra notes 47-49, 52, 78-82 and accompanying text.

47. See e.g., United States v. O'Malley, 786 F.2d 786, 788 (7th Cir. 1986) (affirming disqualification of defendant's attorney in criminal case based on attorney's previous representation of prosecution's witness); Whiting Corp. v. White Mach. Corp., 567 F.2d 713, 713-14 (7th Cir. 1977) (affirming order that directed plaintiff's counsel to refrain from representation that related to subject matter of litigation); Cannon v. United States Acoustics Corp., 398 F. Supp. 209, 227-28 (N.D. Ill. 1975), rev'd in part, 532 F.2d 1118 (9th Cir. 1986) (disqualifying plaintiff's attorney who had 12 year professional relationship with defendant).

48. See ILLINOIS RULES OF PROFESSIONAL CONDUCT FOR THE NORTHERN DISTRICT OF ILLINOIS, Rule 1.9 cmt. (1996). Rule 1.9(a), entitled "Conflict of Interest: Former Client" provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which the person's interests are materially adverse to the interests of the former client unless the client consents after disclosure." Id.

Rule 1.9(c) further provides as follows:

A lawyer who has formerly represented a client in a matter . . . shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require . . . or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Id.

Rule 1.6 permits an attorney to reveal information relating to the representation of a client to prevent the client from committing an act which would result in "imminent death or substantial bodily harm" or to help the attorney "establish a defense to a criminal charge or civil claim" brought by the client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996). Another rule that allows an attorney to disclose information is Rule 3.3 which permits an attorney to reveal information to prevent the commission of fraud to the tribunal. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1996).

49. See ILLINOIS RULES OF PROFESSIONAL CONDUCT, Rule 1.10 cmt. (1996). Rule 1.10, entitled "Imputed Disqualification: General Rule" provides that "[a] lawyer associated with a firm shall represent a client when the lawyer knows or
C. Judicial Disqualification of an Attorney

In the event a party raises an ethical question in the federal courts, the district courts may exercise "discretionary authority to disqualify counsel."\textsuperscript{50} A motion to disqualify is based upon a single principle: "lawyer[s] must maintain the confidentiality of information relating to the representation of a client."\textsuperscript{51} In hearing a mo-
reasonably should know that another lawyer associated with that firm would be permitted from doing so by Rules 1.7, 1.8(c) or 1.9 . . . ." Rule 1.10(a).

Rule 1.7 prohibits an attorney from representing a client whose interests are materially adverse to the interests of another current client, unless the attorney believes the representation will not affect the attorney's relationship with the first client and the first client consents after consultation. See Model Rules of Professional Conduct, Rule 1.7 (1996). Rule 1.8(c) prohibits an attorney from preparing an instrument that gives a gift to the attorney or any of his relatives. See Model Rules of Professional Conduct, Rule 1.8(c) (1996). For a full discussion of the prohibition of representations imposed by Rule 1.9, see supra note 48 and accompanying text.

50. See e.g., Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 722 (7th Cir. 1982) (recognizing district courts may disqualify an attorney but warning discretion should be exercised with extreme caution); Nelson v. Green Builders, Inc., 823 F. Supp. 1439, 1443-44 (E.D. Wis. 1993) (recognizing authority of district court to disqualify attorney to protect attorney-client privilege).

In Freeman, the United States Court of Appeals for the Seventh Circuit reviewed the decision of the District Court for the Northern District of Illinois. See Freeman, 689 F.2d at 716. Freeman, represented by the firm of Dressler, Goldsmith, Shore, Sutker & Milnamow, Ltd., brought suit against Chicago Musical Instrument Co. (CMI) for patent infringement. See id. CMI was represented by Fitch, Even, Tabin, Flannery & Welsh, who employed a former associate with the firm representing Freeman. See id. at 717. CMI's firm filed a motion in the district court requesting that the Fitch firm be permitted to continue in the litigation. See id. The district court disqualified the firm representing CMI, stating that continued representation "would result in [the] appearance of impropriety." Id. In reviewing the disqualification, the Seventh Circuit recognized that disqualification during litigation: separates a client from their chosen counsel and has the potential to damage the reputation of the disqualified firm, as such, disqualification is immediately reviewable. See id. at 719.

Consequently, the Seventh Circuit remanded the issue of disqualification to the district court. See id. at 724. Further, the Seventh Circuit stated that "[i]f the subject matter of the former representation is not substantially related to [that of] the present representation . . . [there is no ethical violation]." Id. at 722. Moreover, the Seventh Circuit stated that the district court needed to show that the associate in the firm which represented CMI must have had actual knowledge in order to warrant disqualification. See id. at 723; see also Julius Denenberg & Jeffrey R. Learned, Multiple Party Representation, Conflicts of Interest, and Disqualification: Problems and Solutions, 27 TORT & INS. L.J. 497 (1992) (stating motions to disqualify are discretionary and recognizing that decisions to disqualify not likely to be overturned).

51. Nelson, 823 F. Supp. at 1444. In Nelson, three partners filed suit against several businesses, one of which was Green Builders, Inc., a former partner in a business venture with the three plaintiffs. See id. at 1441. The defendants were represented by a firm which employed an attorney who had previously performed some legal work for plaintiff Misco in respect to the partnership. See id. at 1442. Plaintiff Misco then moved to have the defendant's firm disqualified. See id. Consequently, the United States District Court for the Eastern District of Wisconsin
tion to disqualify, the court must apply the Rules of Professional Conduct applicable to the specific jurisdiction.\(^5^2\) In *Westinghouse Electric v. Kerr-McGee Corp.*,\(^5^3\) the United States Court of Appeals for the Seventh Circuit determined that disqualification is appropriate when ethical obligations of preserving confidential communications are at issue.\(^5^4\) In *Analytica, Inc. v. NPD Research, Inc.*,\(^5^5\) the Seventh Circuit further stated that an implied attorney-client relationship may be found if the moving party can demonstrate that

entered an order disqualifying defendant's attorney. See *id* at 1452. In entering the order to disqualify, the *Nelson* court recognized that disqualification may protect one attorney-client relationship, while necessarily destroying another. See *id* at 1444.

\(^5^2\) Healy v. Axlerod Constr. Co., 155 F.R.D. 615 (N.D. Ill. 1994) (granting defendants' motion to disqualify former attorney who subsequently represented adverse party because confidences were revealed even though attorney acted for limited purpose). The *Healy* court stated:

> [o]ne of the inherent powers of any federal court is the admission and supervision of attorneys practicing before it. The courts have a vital interest in protecting the integrity of their judgments, maintaining public confidence in the integrity of the bar, eliminating conflicts of interest, and protecting confidential communications between attorneys and their clients. To protect these vital interests, a district court has the inherent power to disqualify an attorney from representing a particular client. Disqualification is a drastic measure, however, because it deprives one of the litigants of their choice of counsel.

*Id.* at 619; see also Cole v. Ruidoso Mun. Sch., 43 F.3d 1373, 1384 (10th Cir. 1994) (stating attorneys appearing before courts are bound by local rules including Rules of Professional Conduct); English Feedlot Inc. v. Norden Lab., Inc., 833 F. Supp. 1498, 1506 (D. Colo. 1993) (applying Colorado Rules of Professional Conduct to disqualify attorney who previously represented one party then represented opponent in later proceedings).

\(^5^3\) 580 F.2d 1311 (7th Cir. 1978).

\(^5^4\) See *id* at 1318. In *Westinghouse*, the Seventh Circuit addressed two issues: first, whether an attorney-client relationship is created by the submission of confidential information by a person to an attorney whom that person believes represents them, and second, whether the size of a law firm can serve to isolate a firm from ethical considerations. See *id* at 1312. Westinghouse, represented by Kirkland & Ellis, filed suit against 29 defendants in an antitrust action. See *id* at 1313. Kirkland simultaneously represented the defendants for the purpose of analyzing the antitrust aspects of a congressional proposal and the effects that legislation would have on the defendants. See *id*.

The Seventh Circuit recognized the existence of an implied attorney-client relationship in the situation when a person consults with an attorney in a preliminary matter, even though no formal representation occurs. See *id* at 1318. The existence of an implied attorney-client relationship "hinges upon the client's belief that [the client] is consulting a lawyer in that capacity and has manifested an intention to seek professional legal advice." *Id.* at 1319. The Seventh Circuit concluded that Westinghouse's interests were diminished because they switched representation in the antitrust action. See *id* at 1321-22. Nevertheless, Westinghouse was given the option to discharge Kirkland as its attorney or dismiss several of the defendants. See *id*.

\(^5^5\) 708 F.2d 1263 (7th Cir. 1983).
confidential information was submitted to a lawyer with a reasonable belief that the lawyer was acting as the party's attorney.56

Disqualification is warranted when an attorney represents “a party in a matter in which the adverse party is that lawyer’s former client, if the subject matter of the two representations is ‘substantially related.’”57 In LaSalle National Bank v. County of Lake,58 the Seventh Circuit stated that the “substantial relationship test” may also be satisfied if confidential information relevant to the second representation could have been revealed in the first representation.59 If the court finds that a “substantial relationship” exists, it can further presume that the attorney has received confidential in-

56. See id. at 1269. John Malec, a partner of NPD, retained the law firm of Schwartz & Freeman to aid in the transfer of stock to himself, for which NPD paid the legal expenses. See id. at 1265. Later, Malec sold his stock in NPD back to his partners. See id. Soon thereafter, Malec’s wife formed Analytica to compete with NPD. See id. Analytica then retained Schwartz & Freeman to address their concerns that NPD was engaging in anti-competitive behavior. See id. Analytica later engaged another firm as trial counsel. Id. Analytica filed suit, and NPD moved to have Analytica’s counsel disqualified. See id. at 1266.

The district court disqualified both law firms and ordered that NPD be reimbursed for the cost of litigation, a decision which was later appealed. See id. The Seventh Circuit dismissed the appeal pertaining to disqualification and upheld the imposition of attorneys’ fees, finding that Schwartz & Freeman had switched sides in a matter related to their previous representation. See id. at 1270; see also DCA Foods Indus., Inc. v. Tasty Foods, Inc., 626 F. Supp. 54 (W.D. Wis. 1985) (denying motion to disqualify because moving party had not met burden of proof showing confidential information had been shared).

57. Analytica, 708 F.2d at 1266.
58. 708 F.2d 252 (7th Cir. 1983).
59. See id. at 255. In LaSalle, a bank retained the services of Rudnick & Wolfe, who employed a former attorney for the county. See id. at 253. Rudnick & Wolfe filed suit on behalf of the bank against the county. See id. at 254. The county moved to have the firm disqualified when it learned that Rudnick and Wolfe hired their former attorney. See id. The Seventh Circuit applied a three-prong test to determine if a substantial relationship existed. See id. at 255. The test required the court to consider the following: 1) the scope of prior representation; 2) whether confidential information could have been given to the attorney in the first representation; and 3) the relevance of the information to the instant case. See id. at 255-56. The Seventh Circuit found that the district court did not abuse its discretion in determining that the subject matter was within the scope of the attorney’s representation, that it was reasonable to infer confidential information had been given to the county’s former attorney, and that the information was relevant to the instant case. See id. at 256-57. Further, the Seventh Circuit determined that the district court did not abuse its discretion by disqualifying the firm that represented the bank, because the firm had not taken the necessary measures to isolate the county’s former attorney from the instant case. See id. at 259; see also Schiesse v. Stephens, 717 F.2d 417 (7th Cir. 1983) (affirming disqualification because firm for plaintiff failed to demonstrate that steps were taken to isolate former defendant’s attorney from involvement in case); Denenberg & Learned, supra note 50, at 502 (discussing Seventh Circuit’s three-prong test, as used in LaSalle, to determine existence of substantial relationship).
formation. Moreover, as long as the court finds a substantial relationship between the two representations, actual receipt and usage of information by an attorney against a former client need not occur.

Under certain circumstances, an attorney may be prohibited from sharing information obtained from his client with another party whose interests are the same as the attorney's actual client. Further, disqualification is a remedy that ensures confidentiality.

60. See Cromley v. Board of Educ. of Lockport High Sch. Dist. 205, 17 F.3d 1059, 1065 (7th Cir. 1994) (recognizing that attorney may overcome presumption of receiving confidential information if he has created "Chinese wall" to isolate attorney from information relevant to current case).

61. See Novo Terapeutisk Lab. A/S v. Baxter Travenol Labs., Inc., 607 F.2d 186 (7th Cir. 1979). In Novo, a defendant in a patent infringement case retained the services of an attorney who formerly worked for the firm which represented the plaintiff. See id. at 194. The defendant previously retained the services of the plaintiff's firm and filed a motion to disqualify the plaintiff's firm. See id. at 195. The United States District Court for the District of South Carolina denied the motion to disqualify. See id. The Seventh Circuit found that the district court improperly applied the substantial relationship test. See id. The court further found that defendant's attorney, while working for the firm representing the plaintiff, failed to show that he had access to confidential information regarding the patent work. See id. at 197. This failure, the court reasoned, was a limited way by which the presumption of shared confidences could be rebutted. See id.

62. Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250 (5th Cir. 1977). In Armco, the district court denied a motion to disqualify Stephen Susman, an attorney who previously represented Whitlow Steel in an antitrust action in Texas. See id. at 251. Susman was present during discussions of confidential information between Whitlow Steel and the other defendants, including Armco Steel, Ceco and Laclede. See id. Those meetings included the sharing of information which was aimed at "develop[ing] a cooperative defense." Id.

At the same time, Susman represented a plaintiff in a similar antitrust action against Armco, Ceco and Laclede. See id. The defendants in the later lawsuit filed a motion to disqualify Susman based on his access to confidential information. See id. at 252. The district court denied the motion to disqualify and the defendants appealed. See id. at 251. The appellate court stated:

when information is exchanged between various co-defendants and their attorneys that this exchange is not made for the purpose of allowing unlimited publication and use, but rather, the exchange is made for the limited purpose of assisting in their common cause. In such a situation, an attorney who is the recipient of such information breaches his fiduciary duty if he later, in his representation of another client, is able to use this information to the detriment of one of the co-defendants. Id. at 253.

The court concluded by stating the following:

[.]Just as an attorney would not be allowed to proceed against his former client in a cause of action substantially related to the matters in which he previously represented that client, an attorney should also not be allowed to proceed against a co-defendant of a former client wherein the subject matter of the present controversy is substantially related . . . ."

Id. The Fifth Circuit remanded the case, because the district court had not determined whether any confidential information had been given to Susman. See id.; see also Rio Hondo Implement Co. v. Euresti, 903 S.W.2d 128 (Tex. Ct. App. 1995) (holding disqualification of former co-counsel requires proof that confidential in-
and encourages full disclosure. Moreover, the courts use disqualification to foster a sense of trust between clients and attorneys.

In *Panduit Corp. v. All States Plastic Manufacturing Co.*, the United States Court of Appeals for the Federal Circuit cautioned against arbitrary usage of disqualification. However, the authority to disqualify an attorney is discretionary. In response, the party

formation was shared and such information is substantially related to current representation).


64. *See Hughes*, 565 F. Supp. at 666. The Model Rules of Professional Conduct contemplate the necessity of assuring trust between attorney and client. *See United States v. O'Malley*, 786 F.2d 786 (7th Cir. 1986). In *O'Malley*, the attorney for a criminal defendant was disqualified after the prosecution revealed that their key witness was a former client of the defense attorney. *See id.* at 789. On appeal, the Seventh Circuit reasoned that disqualification in criminal cases is different than in civil cases, primarily because criminal defendants have a Sixth Amendment right to counsel which would be affected by disqualification. *See id.*

The appellate court stated “[d]isqualification motions should be granted where the attorney . . . is potentially in a position to use privileged information obtained during prior representation. . . .” *Id.* at 790. In *O'Malley*, it was not the attorney's former client who asserted the attorney-client privilege, but rather the adverse party who sought disqualification. *See id.* at 791. Nevertheless, the court still upheld the disqualification. *See id.*

65. 744 F.2d 1564 (Fed. Cir. 1984).

66. *See id.* In *Panduit*, the Federal Circuit reviewed an order of the United States District Court for the Northern District of Illinois that disqualified attorney Robert Conte and his firm Laff, Whitesel, Conte & Saret, who represented the defendant in a patent infringement case. *See id.* at 1567. In 1981, the firm representing the defendant, All States, merged with Conte, who was associated with the plaintiff's law firm from 1965 to 1975. *See id.* at 1568. Conte's former firm represented the defendant in foreign patent work which was not considered to involve the use of confidential information. *See id.* After Panduit objected, Conte's involvement with the litigation ended. *See id.* at 1569.

The district court determined that Conte's association was substantially related, but concluded that actual knowledge would be presumed unless All States could show that Conte had no actual knowledge. *See id.* In an affidavit, Conte stated that he did not remember ever receiving confidences. *See id.* at 1570. Furthermore, the partners in his firm swore under oath that Conte never shared Panduit's confidences. *See id.* Despite specific findings that Conte had no current knowledge and that he did not share his knowledge with his new firm, the district court disqualified Conte and his firm. *See id.* The court found that the possibility that confidential information could be revealed warranted disqualification in this case. *See id.* at 1571. The appellate court reversed the order disqualifying the law firm of Laff, Whitesel, Conte & Saret. *See id.* at 1581; *see also* Whiting Corp. v. White Mach. Corp., 567 F.2d 713 (7th Cir. 1977) (affirming district court's decision denying motion to disqualify law firm because past representation for patent work not substantially related to current litigation involving payment of taxes).

67. *See e.g.*, Freeman v. Chicago Musical Instrument Co., 689 F.2d 715, 722 (7th Cir. 1982) (recognizing district courts may disqualify an attorney but warning
moving for disqualification must first show that sufficient cause exists to justify disqualification.68 The party opposing disqualification generally argues that disqualification would be too drastic a measure under limited circumstances.69

The negative effects of disqualification are two-fold.70 First and most obvious, disqualification separates the client from her counsel of choice.71 Second, the disqualified attorney or law firm may suffer harm.72 The harm the law firm suffers also occurs in two ways: first, the firm loses a client, and second, disqualification may diminish the law firm's reputation.73

Similarly, in *Freeman v. Chicago Musical Instrument Co.*,74 the Seventh Circuit stated that a motion to disqualify must be reviewed with caution, for the motion can be used as a harassment technique.75 Despite the need for caution, the moving party has "several presumptions working in [their] favor"76 once the movant has discretion should be exercised with extreme caution); Nelson v. Green Builders, Inc., 823 F. Supp. 1439, 1443-44 (E.D. Wis. 1993) (recognizing authority of district court to disqualify attorney to protect attorney-client privilege).

68. See Evans v. Artek Sys. Corp., 715 F.2d 788 (2d Cir. 1983) (remanding to district court with instructions to hold evidentiary hearing to determine whether moving party met heavy burden of proof).

69. See *Freeman*, 689 F.2d at 719. By separating a client from her chosen counsel, disqualification disrupts litigation. See id. Additionally, disqualification may have an adverse effect on the reputation of the lawyer who is disqualified. See id. Finally, the *Freeman* court concluded that disqualification is "a drastic measure which courts should hesitate to impose except when absolutely necessary." *Id.* at 721. For a discussion of the facts in *Freeman*, see *supra* note 50 and accompanying text.

70. See Denenberg & Learned, *supra* note 50, at 512 (discussing effects of disqualification on client and attorney).

71. See *id.* The client feels the immediate effects of disqualification, because litigation may be disrupted "until new counsel can be obtained and brought up to speed; this can be very troublesome in complicated cases and is often a very expensive proposition." *Id.*

72. See *id.* at 513. Denenberg and Learned argue that "[c]lients are not the only group hurt by expansive use of the disqualification device." *Id.*

73. See *id.* Law firms state that additional harm comes to the law firm "for it has lost a client (at least for one case), and, more importantly, its reputation has been damaged." *Id.*

74. 689 F.2d 715, 722 (7th Cir. 1982).

75. *Freeman*, 689 F.2d at 722. In *Freeman*, the Seventh Circuit stated "[w]e do not mean to infer that motions to disqualify counsel may not be legitimate, for there obviously are situations where they are both legitimate and necessary; nonetheless, such motions should be viewed with extreme caution for they can be misused as techniques of harassment." *Id.* For a discussion of the facts in *Freeman*, see *supra* note 50 and accompanying text.

76. *Panduit Corp. v. All States Plastic Mfg., Co.*, 744 F.2d 1564, 1577 (Fed. Cir. 1984). The "substantial relationship" test favors the movant in that there is a presumption that the attorney has received confidential information based on the past relationship. See *id.* This presumption will only be overcome if the non-mov-
met the "burden of proving facts required for disqualification . . .".\footnote{77}

The purpose of many of the Rules of Professional Conduct is to protect any confidences that a client might share with her attorney during the course of representation.\footnote{78} One such rule provides that an attorney shall not reveal any information regarding the representation of a client, unless the client gives prior consent.\footnote{79} Another rule prohibits an attorney from concurrently representing clients who have adverse interests.\footnote{80} The Rules of Professional Conduct further prohibit an attorney from representing a client if the representation could jeopardize a former client's confidences.\footnote{81} In the event that an attorney is disqualified in the representation of a client, that disqualification may be imputed to the entire firm.\footnote{82}

IV. NARRATIVE ANALYSIS

In \textit{GTE North, Inc. v. Apache Prods., Inc.},\footnote{83} the United States District Court for the Northern District of Illinois reviewed the merits of the case.
of a motion to disqualify an attorney in a cost-recovery action.\textsuperscript{84} The court determined that the circumstances of the case were sufficient to warrant disqualification of both the attorney and the firm representing Dean Foods.\textsuperscript{85} The court began its analysis of the motion to disqualify by discussing GTE North's contentions supporting the motion.\textsuperscript{86} GTE North cited the confidentiality provisions of both the Appleton and the Investigation Agreements to support its motion to disqualify.\textsuperscript{87} In turn, Dean Foods opposed the disqualification motion by stating that GTE North could not have had a "reasonable belief that Faletto was acting as GTE [North]'s attorney."\textsuperscript{88}

\begin{footnotesize}
84. See id. at 1577. For a full discussion of the facts in GTE North, see supra notes 18-38 and accompanying text.

GTE North filed suit against Apache Products Company, Belvidere Daily Republican Company, Dean Foods Company, Manley Motor Sales Company and The Pillsbury Company. See id. The cost recovery action was filed pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). See id. For a discussion of pertinent CERCLA provisions, see supra notes 39-45 and accompanying text.

GTE North filed a motion to disqualify the attorney that filed an appearance on behalf of Dean Foods, a defendant in the cost recovery action. See id. at 1578. The motion was based on Illinois Rules of Professional Conduct 1.9 (1996). See id. For a more thorough discussion of Rule 1.9, see supra notes 12 and 48 and accompanying text. GTE North's motion also included a request to disqualify the attorney's firm, Howard & Howard. See GTE North, 914 F. Supp. at 1578. The motion to disqualify Howard and Howard was based on Illinois Rules of Professional Conduct, Rule 1.10 See id. at 1581. For a full discussion of Rule 1.10, see supra notes 12 and 49 and accompanying text.

85. See GTE North, 914 F. Supp. at 1581. The district court stated "GTE [North]'s motion to disqualify Jon S. Faletto and the firm of Howard & Howard as counsel for Dean Foods is granted." Id.

86. See id. at 1578. GTE North contended that the attorney for Dean Foods owed GTE North "a fiduciary duty to maintain the confidences disclosed during the [joint] investigation . . . ." Id. GTE North further stated that the "implied attorney-client relationship arose from the peculiar relationship between the members of the Cost Recovery Committee . . . ." Id. Finally, GTE alternatively contended that "fundamental fairness bars Faletto and Howard & Howard from representing Dean Foods . . . ." Id.

87. See id. at 1578. The district court stated that "GTE relies on the confidentiality provisions in both the Appleton and Investigation Agreements and the fact that confidential information and legal strategy was freely communicated between all of the Cost Recovery Committee members and their attorneys." Id. For a discussion of the confidentiality provisions in the Appleton and Investigation Agreements, see supra note 24 and accompanying text.

88. See GTE North, 914 F. Supp. at 1578. The attorney for Dean Foods contended that if GTE was attempting to create an implied attorney-client relationship, it must show "that [GTE] supplied information with the reasonable belief that Faletto was acting as GTE's attorney." Id. Dean Foods further contended that any such belief was "unreasonable in light of the fact that GTE [North had been] represented by its [own] counsel [during the investigation period]." Id. Moreover, Dean Foods stated that in order to prevail on a fundamental fairness argument, GTE needed to demonstrate "a pre-existing attorney-client relationship with Faletto . . . ." Id.
\end{footnotesize}
In *GTE North*, the district court followed the precedent that the Seventh Circuit established in *Freeman* and the Northern District of Illinois laid out in *Healy*. In its motion, GTE North applied the Model Rules of Professional Conduct, Rules 1.9 and 1.10, which are identical to the Illinois Rules of Professional Conduct. Thus, the district court determined that it would apply federal case law and the Illinois Rules of Professional Conduct to GTE North’s motion to disqualify.

The court then addressed the question of “whether some sort of fiduciary relationship arose between [GTE North and the attorney for Dean Foods] that would make GTE [North] a ‘former client’ for purposes of disqualification . . . .” Relying upon the Seventh Circuit’s opinion in *Westinghouse*, the district court identified several ways by which an implied attorney-client relationship can be formed. Specifically, the court determined that the example involving an exchange of information among defendants was

89. *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982) (stating ethical questions in federal courts governed by federal case law). For a discussion of *Freeman*, see *supra* notes 50 and 69 and accompanying text.


91. See *GTE North*, 914 F. Supp. at 1579.

92. See id. at 1578. For the textual language of the pertinent Illinois Rules of Professional Conduct, see *supra* notes 48-49 and accompanying text.

93. See *GTE North*, 914 F. Supp. at 1578. The district court did not need to address the “substantial relationship test,” because Dean Foods did not argue that the matters were not substantially related, nor did Dean Foods argue that the parties were not adverse. See id. Similarly, GTE North did “not contend that an express-client relationship existed” but rather argued the existence of “an implied attorney-client relationship.” *Id.* If there was a dispute over the substantial relationship test, the court would have had to apply the Seventh Circuit’s test as defined and applied in *LaSalle*. See id. at 1579. The *LaSalle* test requires a three step inquiry: (1) reconstructing the scope of the prior representation; (2) ascertaining whether information was given with the expectation of representation; and (3) whether the given information could be relevant to the current representation. See *id.* For a discussion of the facts in *LaSalle*, see *supra* note 59 and accompanying text.


95. See *GTE North*, 914 F. Supp. at 1579. In *Westinghouse*, the Seventh Circuit recognized five exceptions that could give rise to the existence of an implied attorney-client relationship. See *Westinghouse*, 580 F.2d at 1319.
relevant. 96 Further, the court recognized that a "fiduciary relationship may result because of the . . . circumstances under which confidential information is divulged." 97

Next, the district court determined there was an actual exchange of information. 98 The court stated that there could be no presumption that confidential information was exchanged because such a presumption only applies in an express attorney-client relationship. 99 Because there could be no such presumption, the court turned to the party's briefs to determine whether an exchange had occurred between GTE North and Chrysler's counsel. 100 The district court determined that Dean Foods' attorney failed to dispute the assertion that confidential information had been received. 101 The failure to challenge such an assertion, the court reasoned, is dispositive of the fact that confidential information has been shared. 102 The court pointed to both the Appleton and Investigation Agreements as evidence of the members intent that shared in-

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96. GTE North, 914 F. Supp. at 1579. The Seventh Circuit stated that an implied attorney-client relationship occurs in the following situation:

[w]hen information is exchanged between co-defendants and their attorneys . . . an attorney who is the recipient of such information breaches his fiduciary duty if he later, in his representation of another client, is able to use this information to the detriment of one of the co-defendants, even though that co-defendant is not the one which he [initially] represented . . .

Westinghouse, 580 F.2d at 1319.

97. See GTE North, 914 F. Supp. at 1580 (quoting Westinghouse, 580 F.2d at 1320).

98. See id. at 1580. The district court stated that in the event that there was "no direct or express attorney-client relationship, [the substantial relationship test] requires a showing that the attorney in question was privy to confidential information." Id. at 1580 (citing Rio Hondo Implement Co. v. Euresti, 903 S.W.2d 128, 132 (Tex. Ct. App. 1995)). For a discussion of the holding of Rio Hondo, see supra note 62 and accompanying text.

99. See GTE North, 914 F. Supp. at 1580. The district court stated that "a presumption that confidential information was exchanged is in error, as the presumption exists only where there is an express attorney-client relationship and the [two] matters are substantially related." Id.

100. See id. at 1580. This determination was "based on the undisputed facts contained in the parties' memorandums." Id. Further, the court stated that the existence of confidentiality agreements, by themselves, does not prove that confidential information was actually exchanged. See id.

101. See id. at 1581. The court stated that "pursuant to their agreement . . . the investigation results [were disseminated] to each member's respective counsel, including Faletto." Id. at 1580-81. The court continued, stating "it is undisputed that counsel for each member, including Faletto, jointly discussed the investigation results, strategy, and legal merit of proceeding against additional PRPs, including Dean Foods." Id. at 1581.

102. See id. at 1581. The district court stated: "[t]hese undisputed facts alone support a finding that confidential information was exchanged between the co-plaintiffs and their respective counsel." Id. at 1581.
formation would remain confidential.103 As a result, the district court held that Mr. Faletto’s continued representation of Dean Foods would be a violation of Rule 1.9, and as such, he should be disqualified from representing Dean Foods.104

Finally, the district court addressed whether disqualification of the law firm of Howard & Howard would be proper under Rule 1.10.105 Imputed disqualification was not applicable, for Mr. Faletto “[a]t all times relevant . . . ha[d] been a member [of] Howard & Howard . . . .”106 Because Howard & Howard changed sides in this Superfund action, the presumption that the firm obtained shared confidences was declared irrebuttable.107 The court thus concluded that Rule 1.10 should preclude the entire firm of Howard & Howard from representing Dean Foods in the contribution case brought by GTE North.108

V. CRITICAL ANALYSIS

The District Court for the Northern District of Illinois correctly decided that the attorney for Dean Foods entered into an implied attorney-client relationship with GTE North.109 In addition, the court properly determined that GTE North disseminated information with the belief that the information would not be used against

103. See id. For a discussion of the language of the Appleton and Investigation Agreements, see supra notes 21-25, 29 and accompanying text. GTE North disclosed the information to Chrysler and its attorney “with the expectation that [the information] would not be disclosed to the targets of the investigation.” GTE North, 914 F. Supp. at 1581. Confidentiality also led GTE North to conclude that any disclosure of information and participation in discussions would prohibit Faletto from “reappearing on the opposite side of the same litigation.” Id.

104. See GTE North, 914 F. Supp. at 1581.

105. Id. For the textual language of the Illinois Rules of Professional Conduct, Rule 1.10(a) (1996), see supra note 49 and accompanying text.

106. GTE North, 914 F. Supp. at 1581; see also Cromley v. Board of Educ. of Lockport, 17 F.3d 1059, 1064 (7th Cir. 1994) (recognizing exception to imputed disqualification when attorney switches sides but not when entire firm switches sides).

107. Accord Cromley, 17 F.3d at 1065 n.3. See also Denenberg & Learned, supra note 50, at 514 (recognizing existence of irrebuttable presumptions and discussing circumstances when presumption is irrebuttable).

108. See GTE North, 914 F. Supp. at 1581. The court summarized its decision by stating “GTE’s motion to disqualify Jon S. Faletto and the firm of Howard & Howard as counsel for Dean Foods is granted.” Id.

them at a later date. Finally, the court appropriately found the existence of a fiduciary relationship.

A. Implied Relationship

As Westinghouse decision recognized, an implied attorney-client relationship can be created if "information is exchanged between co-defendants and their attorneys." Once an attorney receives confidential information he has a fiduciary duty to the client who shared the information. The Fifth Circuit has also recognized that a fiduciary duty may arise with the sharing of confidences between defendants. In Abraham, the Fifth Circuit stated that joint defenses cause the counsel of one defendant to be the counsel for each of the defendants "in order to shield mutually shared confidences." Consequently, the District Court for the Northern District of Illinois properly found that an implied attorney-client relationship existed between GTE North and Jon S. Faletto.

B. Actual Information and Reasonable Belief

Furthermore, the district court correctly found that GTE North shared information with the belief that the information would not be used against them at a later date. In Westinghouse, the Seventh Circuit required that information which a party intends to remain confidential must be communicated within the scope, and

110. See GTE North, 914 F. Supp. at 1580-81. GTE North disseminated confidential information pursuant to the language of the agreement. See id. at 1581. These agreements contained confidentiality statements upon which GTE could reasonably rely. See id.

111. See id. In cases that involve a motion to disqualify an attorney, the court normally conducts an evidentiary hearing or reviews the facts contained in sworn affidavits to determine whether confidential information was exchanged. See id. at 1580. However, in this case, the court determined that the unchallenged statements of facts in the parties' briefs were sufficient to conclude that confidential information was disclosed. See id.

112. Westinghouse, 580 F.2d at 1318.

113. See id. This fiduciary duty requires the recipient of the information to protect the information in a manner that would protect the interests of the party that made the disclosure. See id. Furthermore, the person to whom the information was disclosed must also guard the information so that it is not used to the detriment of the person who shared the information. See id.


115. Id. at 253. The Armco court stated that "[t]he defendants persuasively argue that in a joint defense ... the counsel of each defendant is, in effect, the counsel of all for the purposes of invoking the attorney-client privilege ... ." Id. The Fifth Circuit further stated that an attorney breaches his fiduciary duty if that information is used at a later date to the detriment of one of the co-defendants. See id.
for the purpose, of representation. In other words, the client must reasonably believe that any information communicated was for the purpose of representation and that the information would remain confidential. Therefore, the GTE North court properly rejected the presumption that there was an exchange of confidential information. Instead, the district court had to determine whether confidential information had actually been exchanged.

Although this determination would normally have been done in a hearing or a review of the evidence, it is within the discretion of the court to determine whether confidences were disclosed through a review of the parties' briefs. Furthermore, the Seventh Circuit has stated that conducting a factual inquiry is not always practical to determine if confidences were revealed. Consequently, the district court properly determined that confidential information was actually disclosed.

C. Additional Precedent Supporting GTE North's Motion to Disqualify

Despite reaching a correct result, the United States District Court for the Northern District of Illinois by no means exhausted the available precedent that would have supported GTE North's

116. See Westinghouse, 580 F.2d at 1320. The Seventh Circuit recognized that a "professional relationship does not arise where one consults an attorney in a capacity other than as an attorney." Id.

117. See id. at 1320-21. An implied relationship "hinges upon the client's [reasonable] belief that he is consulting a lawyer in that capacity . . . ." Id. at 1319 (quoting MCCORMICK ON EVIDENCE 179 (2d ed. 1972)). The court stated that the defendants "each entertained a reasonable belief that it was submitting confidential information . . . upon a representation that the firm was acting in the undivided interest of each company." Id. at 1321.

118. See also Wilson, 559 F.2d at 253. The Fifth Circuit stated that when there is no direct attorney-client relationship, there can be no presumption that confidential information was exchanged. See id. The determination as to whether information was exchanged depends specifically on the findings of the trial court. See id.


120. See id.

121. See Westinghouse, 580 F.2d at 1319. The court stated that "conducting a factual inquiry in every case into whether confidences had actually been revealed would not [always] be . . . satisfactory." Analytica, Inc. v. NPD Research, Inc., 708 F.2d 1263, 1269 (7th Cir. 1983). The difficulty in determining whether confidences have been shared arises, because the only witnesses to any information disclosure that had been disclosed would be the attorneys. See id. For a discussion of the facts of Analytica, see supra note 56 and accompanying text.

122. For a discussion of the holding of the GTE North court, see supra notes 89-108 and accompanying text.
motion to disqualify. One such case that supports disqualification is International Paper Co. v. Lloyd Manufacturing. The decision in International Paper demonstrates that an attorney may rebut the presumption that confidential information has been disclosed. In GTE North, however, Mr. Faletto did not attempt to rebut the presumption, and without a challenge to the presumption, disqualification is not improper.

Another case that supports disqualification is Trinity Ambulance Services v. G & L Ambulance Services. In Trinity, the United States District Court for the District of Connecticut granted a motion to disqualify after one of the original plaintiffs switched over to the defendants' side. The court applied the "reasonable expectation

123. See id. at 134. He stated that "Wildman did not have actual knowledge of relevant confidences and secrets." Id.

124. In International Paper, the district court denied a disqualification motion. See id. at 127. International Paper brought suit against Lloyd Manufacturing alleging that Lloyd's product was not safe for its intended purpose. See id. In turn, Lloyd filed a third party complaint against Velsicol Chemical Company and Harwick Chemical Company. See id. Lloyd claimed that it relied on the warranties of the manufacturer (Velsicol) and the distributor (Harwick) when establishing the warranties for its product. See id. Consequently, Lloyd claimed that Velsicol and Harwick should be liable for any damages assessed against Lloyd. See id.

Subsequently, Harwick brought a cross-claim against Velsicol. See id. Velsicol then moved to have the firm representing Harwick (the firm of Wildman, Harrold, Allen & Dixon) disqualified, because the firm previously represented an employee and agent of Velsicol in a criminal matter. See id. at 128. Velsicol claimed that it had standing to object to the Wildman firm representing Harwick because Velsicol paid the employee's legal bill in the criminal suit. See id.

Ultimately, the district court denied the motion after reconstructing the scope of the representation and found that Velsicol could not have reasonably believed that the Wildman firm represented the company's interests in the criminal matter. See id. Such a conclusion was supported by the testimony of Harwick's attorney. See id. at 134. He stated that "Wildman did not have actual knowledge of . . . relevant confidences and secrets." Id.

125. See id. In addition, the Wildman firm's representation of Velsicol's employee and of Harwick are not substantially related. GTE North, Inc.'s Reply in Support of its Motion to Disqualify Attorney Jon S. Faletto and the Law Firm of Howard & Howard Attorneys, P.C. at 4, GTE North, Inc. v. Apache Prods. Co., 914 F. Supp. 1575 (N.D. Ill. 1996) (No. 95-C-50197). GTE North further pointed out that International Paper was distinguishable in so far as there were no written agreements between co-defendants and Wildman did not switch sides in the same action. See id.

126. For a discussion of the means by which the presumption of a confidential information disclosure may be rebutted, see supra note 76 and accompanying text.


128. See id. at 1285. Trinity joined Aetna Ambulance and Professional Ambulance in suing the city of Hartford for violations of antitrust laws. See id. at 1281. Disqualification was premised on the contention that the attorney for Professional Ambulance had access to confidential information during the initial stages of the lawsuit and up until the time that Professional Ambulance switched sides in the
of confidentiality test” and determined that it is not reasonable to assume that confidential information given to a co-party’s attorney would be withheld from the co-party. However, it is reasonable to assume that revealed information would not be given to an adverse party for use against the revealing party. As in Trinity, GTE North revealed information to Mr. Faletto with the reasonable belief that the information would remain confidential. Just as Trinity was found to have a reasonable belief that the disclosed information would remain confidential, GTE North’s belief that the information would remain confidential was reasonable.

Finally, the district court did not abuse its discretion by relying on the undisputed facts of the parties’ briefs to conclude that confidential information was actually shared. This decision is policy-based. It furthers the intent of the parties that entered into the Appleton and Investigation Agreements by enforcing the confidentiality provisions of both agreements. If the court had not granted the disqualification motion, the confidentiality provisions

antitrust suit. See id. Prior to realignment, Professional Ambulance and the other plaintiffs “jointly retained an expert witness to assist in the prosecution of their antitrust claims.” Id. Consequently, Professional Ambulance possessed the results of that report after the realignment and was familiar with the weaknesses of the plaintiffs’ case. See id. In addressing the “substantial relationship test,” the district court stated that the matters are “not only substantially related, they are the same.” Id. at 1284.

129. See id. at 1285.
130. See id.
132. See Trinity, 578 F. Supp. at 1285 (determining what constitutes reasonable belief regarding confidentiality).
133. See GTE North, 914 F. Supp. at 1579-81. The court stated that the attorney for Dean Foods did not challenge GTE’s assertions “that the matters [were] the same or substantially related.” Id. at 1579. Rather, the district court further determined that an implied attorney-client relationship existed. See id. at 1581. Where there is a subsequent adverse representation, it is presumed that: (1) protected information was obtained, and (2) that that information was shared. See Denenberg & Learned, supra note 50, at 514. These presumptions are normally rebuttable unless an entire firm has “switched sides.” Cromley v. Board of Educ. of Lockport, 17 F.3d 1059, 1064 (7th Cir. 1994) (recognizing exception to imputed disqualification when attorney switches sides but not when entire firm switches sides).
134. For a discussion of the policy reasons for disqualification, see supra notes 119-13 and accompanying text.
135. GTE North, 914 F. Supp. at 1581. The district court stated that “[t]he confidentiality provisions contained in both the Appleton Agreement and the Investigation Agreement clearly establish an intent that the shared information
of the agreements would have been rendered meaningless. Without confidentiality provisions, PRPs could withhold information, thus decreasing the likelihood of settlement.

VI. IMPACT

By granting the motion to disqualify both the attorney and the firm representing Dean Foods, the district court rendered an opinion that is consistent with the Rules of Professional Conduct for the Northern District of Illinois. Consequently, the district court's position will further the policies of EPA to encourage settlement in Superfund actions.

Additionally, the court's holding in *GTE North* furthers the purposes of the Rules of Professional Conduct. The two goals behind the Rules of Professional Conduct are simple. The first goal seeks to encourage full disclosure while the second seeks to maintain loyalty between a client and their respective counsel. The district court's opinion furthers these two goals, in the context of the facts presented, while being careful not to extend an implied attorney-client relationship past those exceptions noted by the Seventh Circuit in *Westinghouse*. Since the decision of *GTE North*, the district court has determined that their opinion in *GTE North* is consistent with the Rules of Professional Conduct.

would remain confidential and would remain protected under the attorney-client privilege." *Id.*

136. *See Littell, supra* note 30, at 252 (stating confidentiality problems associated with PRPs may be avoided if parties with same or similar interests agree prior to representation as to manner in which counsel will use confidential information).


139. For a discussion of EPA's policies which are intended to encourage settlement between the federal government and PRPs, see *supra* notes 39-45 and accompanying text.


141. *See id.* The *Hughes* court stated that "by ensuring confidentiality, the Canons foster an atmosphere of trust and encourage clients to fully disclose information to their attorneys." *Id.*

142. *See id.* The *Hughes* court stated that "the conflict of interest provisions preserve ... integrity." *Id.*

143. For a discussion of the facts and holding of *Westinghouse*, see *supra* notes 53-54 and 94-97 and accompanying text.
sistent with the Seventh Circuit's three-prong "substantial relationship test."144

The Rules of Professional Conduct should be applied to enforce confidentiality provisions of agreements between PRPs.145 The District Court for the Northern District of Illinois's opinion is consistent with the language of the private agreement which reflected the explicit intent of the members of the committee.146 Finally, the district court's application of the Rules of Professional Conduct is consistent with precedent established in the Northern District of Illinois, the Seventh Circuit and other jurisdictions.147

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145. See Denenberg & Learned, supra note 50, at 511-12 (recognizing courts as well as bar associations have ability to police attorney misconduct). Despite the inherent power of bar associations to police misconduct, however, some courts view it as "their duty to guarantee that attorneys adhere to the ethical guidelines promulgated by the federal, state and local bar." Id. at 512. Accordingly, courts adopting such a view will "resolve any doubts as to the existence of a conflict in favor of disqualification." Id.

146. For a discussion of the language of the agreement which sought to bind the attorneys to confidentiality, see supra notes 21-25 and accompanying text.

147. For a discussion of the legal context in which the Rules of Professional Conduct have been applied in the Northern District of Illinois, see supra notes 46-82 and accompanying text.