

**TUESDAY AFTERNOON  
JULY 24, 2007**

**California  
Bar  
Examination**

**Performance Test A  
INSTRUCTIONS AND FILE**

**CARTER v. RESTON HEALTH**

**FILE**

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**CARTER v. RESTON HEALTH**

**INSTRUCTIONS**

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

**COLUMBIA SUPERIOR COURT  
DARBY COUNTY**

**MEMORANDUM**

**TO:** Applicant  
**FROM:** Judge Melissa Grant  
**DATE:** July 24, 2007  
**RE:** **Carter v. Reston Health**

The litigation in Carter v. Reston Health involves claims by Roseanne Carter, an indigent health care patient, that Reston Health engaged in discriminatory and predatory billing practices adversely affecting her and others similarly situated.

I have just concluded a hearing on a motion by counsel for Reston Health to disqualify the attorneys for Roseanne Carter because of a conflict of interest.

I conducted the hearing by receiving written declarations in support and opposition and by examining Mallory Jergens in camera. Ms. Jergens is the attorney whose status is alleged to have created the conflict. I believe Ms. Jergens was truthful in her statements to me and that she has not made any disclosure to National Center for Health Care (NCHC) of confidential information relating to Reston Health.

I haven't yet decided how to rule on the motion. Please prepare an objective memorandum that analyzes the legal and factual issues raised by the motion to disqualify plaintiff's law firm, NCHC. After objectively analyzing each issue, your memorandum should conclude with a recommendation as to how I should rule.

Malcolm Richardson  
Suzanne Feldman  
National Center for Health Care  
100 Placer Street, Suite 300  
Rincon, COL 83013  
Telephone: (111)557-7887

Attorneys for Plaintiff Roseanne Carter

**SUPERIOR COURT OF THE STATE OF COLUMBIA**

**COUNTY OF DARBY**

ROSEANNE CARTER, and all those  
similarly situated,

Plaintiff,

vs.

RESTON HEALTH, a Columbia corporation,  
Contract Defendant.  
of

Case No. C06-030355MG

**COMPLAINT - CLASS  
ACTION**

Causes of Action:

- Count One: Third Party  
Breach  
of Contract
- Count Two: Breach of
- Count Three: Breach of Duty
- Count Four: Breach of  
Good Faith and  
Fair Dealing
- Count Five: Breach of  
Charitable Trust
- Count Six: Violation of the  
Columbia Unfair  
Competition Act
- Count Seven: Violation of the  
Consumers  
Legal  
Remedies Act
- Count Seven: Unjust  
Enrichment

\* \* \*

10. Defendant Reston Health is a private, not-for-profit corporation incorporated in Columbia. Reston owns and operates more than 20 hospitals in Columbia, including Perkins Memorial Hospital. Reston has failed to comply with these obligations.

17. Reston also engages in discriminatory pricing practices which have a significant detrimental impact on the very population Reston has obligated itself to assist.

\* \* \*

25. Reston gives private insurance companies and governmental third party payers like Medicare and Medicaid significant discounts. It charges its uninsured patients 100% of the "full sticker price."

\* \* \*

NATIONAL CENTER FOR HEALTH CARE

By:

*Malcolm Richardson*

Malcolm Richardson  
Attorneys for Plaintiff

Hugo Brenner  
Austen, James & Eliot, LLP  
1 Jeremiah Plaza  
Fort Meade, COL 83020  
Telephone: (111) 430-8500  
Attorneys for Defendant Reston Health

defendant Reston is, as a matter of law, imputed to all members of the NCHC law firm, which must therefore be disqualified.

Dated: May 14, 2007

Respectfully submitted,  
AUSTEN, JAMES & ELIOT, LLP

**SUPERIOR COURT OF THE STATE OF COLUMBIA**  
**COUNTY OF DARBY**

ROSEANNE CARTER, and all those similarly situated,  
Plaintiff,

Case No. C06-030355MG

**DEFENDANT'S MOTION TO DISQUALIFY PLAINTIFF'S ATTORNEYS**

vs.

RESTON HEALTH, a Columbia corporation,  
Defendant.

By: *Hugo Brenner*

Hugo Brenner, Esq.  
Attorneys for Defendants

\_\_\_\_\_/

Defendant Reston Health ("Reston") hereby moves the court for disqualification of the National Center for Health Care ("NCHC") from this legal proceeding. This motion is based upon the following facts, more fully set forth in the Declaration of Hugo Brenner, which is attached and by this reference incorporated herein:

1. Mallory Jergens, an attorney now employed by NCHC, was formerly employed by Coburn, Bronson & McQueen, a law firm that formerly represented defendant Reston.
2. During the period of her employment at Coburn, Bronson & McQueen, Ms. Jergens engaged in legal work on behalf of Reston that is identical to the matters at issue in this litigation.
3. Ms. Jergens acquired confidential information relating to defendant Reston, creating a direct conflict of interest. The confidential information relating to

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Attorneys for Defendant Reston Health

**SUPERIOR COURT OF THE STATE OF COLUMBIA**  
**COUNTY OF DARBY**

ROSEANNE CARTER, and all those similarly  
situated,

Plaintiff,

vs.

RESTON HEALTH, a Columbia corporation,  
Defendant.

Case No. C06-030355MG

**DECLARATION OF HUGO  
BRENNER IN SUPPORT OF  
DEFENDANT'S MOTION TO  
DISQUALIFY PLAINTIFF'S  
ATTORNEYS**

I, Hugo Brenner, declare as follows:

1. I am the managing partner of the law firm of Austen, James and Eliot, LLP.
2. Our firm has been retained by Reston Health (Reston) to represent it in this action.
3. We learned from Reston that it had previously received representation from the law firm of Coburn, Bronson & McQueen (Coburn). One of the associates attended law school with attorney Mallory Jergens, and knew that she had worked at Coburn and now works at Plaintiff counsel's firm, National Center for Health Care (NCHC).
4. The essence of the complaint filed by Plaintiff Roseanne Carter ("Carter") is that Reston failed to fulfill its legal and contractual obligations to provide indigent medical services to her and a class of persons similarly situated.

5. The essence of a research memorandum written and presented to Reston by Ms. Jergens during her tenure at Coburn is Reston's legal and contractual obligations as a charitable institution to provide medical services to indigents. The memorandum advises Reston on how to meet and limit its obligations. The allegations of the complaint filed in this action relate directly to many of the issues that Ms. Jergens opined on in her research memorandum.

6. NCHC asserts that there is no other counsel available to represent Carter in this litigation. This is not true. I have personally contacted the managing partners of five prominent firms in the County of Darby who have reputations for providing significant amounts of pro bono services. Each of these firms indicated that it would have seriously considered helping Carter with regard to her collection dispute with Reston. Since the firms we contacted are willing to represent Carter on a pro bono basis, there is no cost concern present.

7. A review of the complaint in this case shows that NCHC is not particularly expert in the causes of action presented. The claims are based in contract, constructive trust, and tax law. None of these are areas in which NCHC has particular expertise which couldn't be available from any private firm.

8. Reston will suffer prejudice if NCHC is permitted to continue representing Carter inasmuch as Reston can never be assured that client confidential material has not been and will not be passed on from Ms. Jergens to other staff at NCHC.

9. NCHC is a small firm consisting of no more than 10 lawyers, of whom Ms. Jergens is a supervising attorney. In such a small office, it is impossible to create an effective ethical screen.

10. We are bringing this motion as soon as reasonably possible after learning of the facts. Reston was served with the complaint in this matter on approximately February 23, 2007. We learned of Ms. Jergens' conflict approximately March 23, 2007. We conducted an investigation of the facts, and brought this motion promptly upon completing our investigation.

11. Neither Reston nor my firm are motivated by anything except the interests of Reston in ensuring the continued confidentiality of attorney-client privileged information.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct. Executed on June 22, 2007, in Fort Meade, Columbia.

*Hugo Brenner*

Hugo Brenner

Malcolm Richardson  
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Telephone: (111) 557-7887

Attorneys for Plaintiff Roseanne Carter

**SUPERIOR COURT OF THE STATE OF COLUMBIA  
COUNTY OF DARBY**

ROSEANNE CARTER, and all those similarly  
situated,

Plaintiff,

vs.

RESTON HEALTH, a Columbia corporation,

Defendant.

Case No. C06-030355MG

**DECLARATION OF MALCOLM  
RICHARDSON IN  
OPPOSITION TO  
DEFENDANT'S MOTION TO  
DISQUALIFY  
ATTORNEYS**

I, Malcolm Richardson, declare as follows:

1. I have personal knowledge of the statements contained in this declaration. If called to testify, I would attest to the truth of these statements.
2. I am the current Executive Director of the National Center for Health Care (NCHC). I have served in this capacity for the past 15 years.
3. NCHC is a nationally recognized, not-for-profit public interest law firm specializing in policy and advocacy on behalf of low income clients in the health care area. NCHC derives 50% of its funding from foundation grants, 25% from private donations, and 25% from attorneys' fees awards. Our current \$2 million annual budget supports the work of 15 advocacy staff, including 10 attorneys with over 100 years of health care-related legal experience among them. We have filed over 30 state and nationwide class actions in the past 15 years. Defendants have included the federal government, various state and local governmental agencies, and several private health care providers.

4. Mallory Jergens was hired by NCHC about three years ago. As required by our hiring policy, Ms. Jergens furnished a list of the clients for whom she provided legal services while an associate at Coburn, Bronson & McQueen. This client list was added to our office's conflict database which contains a searchable listing of all NCHC's past and current clients, opposing parties, law firms, and former client lists.

5. Roseanne Carter, the plaintiff in this action, contacted NCHC approximately six months ago. We ran a conflict check after determining who the potential opposing party or parties might be. This conflict check revealed that Reston Health, the defendant in this case, was a former client of Mallory Jergens. When this was brought to my attention, I issued the memorandum attached hereto as Exhibit 1, which by this reference is incorporated herein. I have confirmed that all of the steps in the memorandum have been carried out, and have been maintained to date.

6. This case is a class action involving a defendant with \$4.4 billion in assets that earned more than half a billion dollars in the past two years alone. Reston is a Columbia-based health care provider that operates more than 20 hospitals throughout Columbia.

7. Taking on a class action such as this litigation is a major undertaking for any firm. This dispute is not just about a collection action for \$2,400 against Ms. Carter.

8. Our firm has made numerous inquiries with prominent private law firms throughout the state. We have been unable to find co-counsel, much less any firm to represent Ms. Carter. In addition, while Hugo Brenner, Counsel for Reston, is correct that the causes of action sound in areas of the law in which NCHC has no extraordinary expertise, the overarching area of the law that is at the heart of this litigation is health care for the indigent. We are the unquestioned preeminent national law firm in this area of the law. Ms. Carter evidently sought us out to represent her because of our reputation.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct. Executed on July 10, 2007, in Rincon, Columbia.

*Malcolm Richardson*

Malcolm Richardson

## National Center for Health Care

### MEMORANDUM

**To:** All Staff  
**From:** Malcolm Richardson  
**Date:** January 24, 2007  
**Re:** Roseanne Carter Ethical Screen

It is essential that the following be instituted immediately and that all legal and clerical staff abide by these provisions for the foreseeable future. Our office has been retained by Roseanne Carter to explore potential courses of action against Reston Health related to health care Ms. Carter received as a patient of a Reston Health hospital. Ms. Carter will probably be the named plaintiff in a class action we are considering filing against Reston Health. Mallory Jergens used to work for a firm, Coburn, Bronson & McQueen, which formerly represented Reston Health. In order to avoid any potential claim of a conflict of interest, Ms. Jergens must be screened from any access to or participation in this case. Therefore:

1. When reception staff receives a call related to this case, the call should be transferred to the appropriate staff member. The staff member who receives the call should ensure that Ms. Jergens is not in his/her office when taking the call.
2. All files related to this case shall be stored in a separate, locked file cabinet, and only staff directly working on the case, including assigned support

#### EXHIBIT 1

staff, shall have keys to this cabinet. A sign-in and sign-out log shall be maintained, and all persons removing or replacing files in the locked cabinet

3. shall sign and date the log. No staff shall give access to this cabinet to Ms. Jergens, and Ms. Jergens shall not seek access to the cabinet.
3. Staff must ensure that any files and internal work product related to this case shall be kept in the dedicated locked file cabinet except when in use. When in use, care should be taken to not leave the files or other materials in public areas of the office such as the library. When materials are temporarily being kept in an office, they should be in closed files, with any written materials not in plain view. Ms. Jergens will not seek access to any files or materials related to this case.
4. A password-protected computer filing system will be maintained for the computer files related to this case. Only staff directly involved in the case will have access to the password. Ms. Jergens shall refrain from seeking access to the computer files related to this case.
5. Staff shall not engage in conversations or discussions regarding this case in public areas of the office, such as the library, unless the doors are closed and Ms. Jergens is not present. Ms. Jergens will not engage in conversations with other staff regarding Reston Health matters. Ms. Jergens will not supervise any staff regarding this case.

**HEARING TRANSCRIPT OF IN CAMERA TESTIMONY OF MALLORY JERGENS**

**Judge Melissa Grant:** In the matter of Roseanne Carter versus Reston Health, we are now on the record. This is an in camera proceeding with attorney Mallory Jergens present. Let the record reflect that other than court personnel and Ms. Jergens, no other parties are present. Ms. Jergens, you understand that you are under oath, don't you?

**Mallory Jergens:** Yes, I understand, your honor.

**Q:** Ms. Jergens, please describe your legal career.

**A:** After graduating from law school eight years ago, I went to work as an associate for Coburn, Bronson and McQueen. I worked there for five years. I did exclusively transactional work while I was there, and specialized in health care law. In 2004, I went to work for the National Center for Health Care. It is a private, not-for-profit law firm doing both litigation and policy work on behalf of low income people in health-care related issues, including Medicare and Medicaid.

**Q:** While you were at Coburn, did you do any work for Reston Health?

**A:** Yes, Reston had been a client of the firm for several years before I worked at Coburn, and I was assigned to work for the partner who oversaw the firm's work on behalf of Reston.

**Q:** Please describe the specific work you did on behalf of Reston.

**A:** For the first couple of years, I just reviewed various contracts between the various Reston hospitals and various vendors, as well as between the hospitals and various entities, such as counties, the feds, and HMOs on the provision of health care.

**Q:** Did you meet with the client at all during these first couple of years?

**A:** No, I analyzed the contracts, made various suggestions, and then passed on these comments to the partner who would meet or speak with the various hospital administrators.

**Q:** I gather that the nature of your work on behalf of Reston changed at some point?

**A:** Yes, your honor. I was gradually given more responsibility. One specific project that I recall involved an extensive memorandum advising Reston on its obligations

as a charitable not-for-profit in terms of its obligation to provide indigent medical services in order to preserve its not-for-profit status under federal and state tax laws. I remember that this project took me at least a month to complete.

**Q:** Do you know what happened to your memo?

**A:** Yes, I gave it to the CEO of Reston. I also made a presentation to Reston's Board of Trustees highlighting the conclusions of my research.

**Q:** Did you advise the Reston Board to take specific actions as a result of your research?

**A:** Yes, I did, your honor. Would you like for me to go into detail?

**Q:** I'm trying to avoid the disclosure of confidential attorney-client communications, so please don't. Can you recall any other specific assignments you had regarding Reston?

**A:** No, I don't, your honor. I continued to review contracts. I also re-drafted a number of contracts. I also conducted research as requested, but I honestly don't recall any other specific assignments.

**Q:** Throughout your five years at Coburn, what percentage of your time was devoted to work for Reston?

**A:** I would say that it averaged about 10%, your honor, but that's really a guess.

**Q:** Okay, please tell me about your work at the National Center for Health Care.

**A:** I started working for NCHC about three years ago. I was hired to head the Indigent Health Care Project.

**Q:** What does that project do?

**A:** We are concerned with litigation and legislative proposals to improve the medical care for the poor and working poor.

**Q:** Could that include hospitals' services to the uninsured, such as are at issue in this case?

**A:** Yes. This case is being handled by one of the Project's attorneys.

**Q:** How many attorneys are in the Project?

**A:** Two of us.

**Q:** Are you both in the same office?

**A:** Our offices are adjacent.

**Q:** Do you supervise any of the work on this case?

**A:** No. None. But on all other matters I supervise the other Project attorney.

**Q:** When you were hired, were you asked about your work at Coburn?

**A:** Of course. I think that my experiences made me particularly valuable. The Executive Director, Malcolm Richardson, also had me obtain a client list - a list of all the clients on whose behalf I'd performed work while I was at Coburn. Mr. Richardson made it clear that this list would be incorporated into NCHC's database for conflicts checks.

**Q:** What's your understanding of how the conflict system at NCHC works?

**A:** I don't know the specifics, but I know that before we undertake representation of a client, a conflict check is run. If a potential conflict comes up, it is brought to the attention of Mr. Richardson, who takes appropriate action.

**Q:** Do you know what happened when this case against Reston first arose?

**A:** Yes. Mr. Richardson sat down with me and said that we were considering filing a case against Reston. He then went over the provisions of the memo he was going to circulate that explained how I was to be screened from the case. He also told me that I must observe the terms of that memo scrupulously. I think the memo is attached to his declaration filed in this proceeding.

**Q:** So what do you know about this litigation?

**A:** I don't know, except from what I've read in the newspapers. It concerns the billing practices of Reston as it relates to uninsured patients. That's all I know.

**Q:** As far as you know, have all of the procedures in the memo been carried out?

**A:** I don't know for sure. All I know is that I have not had any conversations with anyone at NCHC about this case since that initial conversation with Malcolm Richardson. No one in the office has approached me about the case. I have not heard any conversations about the case, even inadvertently.

**Q:** Ms. Jergens, did you take any research files or other work product with you from Coburn to NCHC?

**A:** No, but I did take general research files with me. That is permitted under Coburn's policies. However, I retained no work product, meaning any work

specifically related to a particular client. This work could not be removed from Coburn.

**Q:** At NCHC have you had any conversations about the law involved in hospitals' obligations to uninsured patients?

**A:** Yes, I have. But I have only discussed the law generally. I was never asked about and never disclosed any specific information about Reston.

**Q:** Thank you, Ms. Jergens. That's all I have. The hearing is closed.

END OF TRANSCRIPT

**TUESDAY AFTERNOON  
JULY 24, 2007**

**California  
Bar  
Examination**

**Performance Test A  
LIBRARY**

**CARTER v. RESTON HEALTH**

**LIBRARY**

**Hoglund v. Forsyth** (United States Court of Appeals, 15<sup>th</sup> Circuit, 2001)..... 2

**City and County of Ames v. Mambo Solutions, Inc.** (United States  
Court of Appeals, 15<sup>th</sup> Circuit, 2004)..... 8

**HOGLUND v. FORSYTH**

United States Court of Appeals (15th Circuit, 2001)

James Forsyth, the plaintiff in the underlying case, *Forsyth v. County of Putnam*, is represented by attorney Stephen Younger and the law firm of Younger, Younger & Reichmann. Joseph Reichmann is a retired United States Magistrate Judge who, five years ago, presided over settlement negotiations in *Thomas v. County of Putnam*.

*Forsyth* and *Thomas* are police brutality cases, arising out of different incidents separated in time by several years. They are related only in the sense that the County of Putnam and one of its deputy sheriffs, Scott Hogle, are defendants in both cases.

Defendants moved to disqualify the Younger firm on the ground that, during the settlement negotiations in *Thomas*, Reichmann met with defense counsel ex parte and therefore had access to confidential information pertaining to the County of Putnam and Deputy Sheriff Hogle. Younger did not contest the disqualification of Reichmann but proffered the following evidence: Reichmann joined the Younger firm as a partner on November 1, 1999, and has had no involvement in the *Forsyth* case. Moreover, a week before Reichmann joined the firm, Stephen Younger removed all of the files pertaining to the case to his home and instructed the firm's only other lawyer, partner Marion Younger, not to discuss the case with Reichmann. Reichmann himself submitted a declaration stating that he had no recollection of the settlement discussions in *Thomas*, and that he does not recall having received any confidential information from defendants' lawyer in that case. Reichmann, moreover, explained that "as a magistrate judge from 1980 to 1996, it was my long-standing, regular, and continuing practice in conducting settlement conferences (1) not to go into the merits of actions, (2) not to request or receive either confidential or strategic information from counsel, and (3) to discuss only monetary matters." Reichmann Declaration at page 2.

For their part, defendants submitted the declaration of Richard Kemalyan, defense counsel in *Thomas*, who stated as follows: "I do not have a specific recollection of the details of what communications were made between declarant and Magistrate Judge Reichmann outside the presence of plaintiff's counsel. I am sure that in the normal course of the Settlement Conference, I did have private and confidential communications with Magistrate Judge Reichmann. I cannot recall the details of those communications." Kemalyan Declaration at page 1.

The district court denied the motion to disqualify the Younger firm, finding no evidence that Reichmann received confidential information during the settlement negotiations in *Thomas*. The court also found that the wall of confidentiality erected to shield Reichmann from the Youngers was adequate to protect the interests of the defendants. Defendants brought this petition for a writ of mandamus seeking reversal of the district court's order and disqualification of the Younger firm.

Until recently, the practice of judicial officers returning to law firms was rare, and the relevant authorities are sparse. The case law draws a distinction between situations where a judicial officer acted merely as an adjudicator and those where he acted as a mediator or settlement judge.

A judge who has participated in mediation or settlement efforts becomes a confidant of the parties, on a par with the parties' own lawyers. Under those circumstances, the judge will be conclusively presumed to have received client confidences in the course of the mediation, and his later participation in the case will be governed by the same rule that governs lawyers: He may not participate in the case and neither may his law firm.

The district court erred by inquiring whether confidential information actually passed from the parties to the mediator. As this case demonstrates, memories as to what transpired during these off-the-record proceedings are likely to be dim, making the fact-finding process highly perilous. More importantly, allowing an inquiry into what

transpired during settlement negotiations will surely chill the candor of the parties in speaking to the mediator. Suffice it to say that the mediation process inherently leads to the disclosure of confidential information, as Reichmann's declaration confirms. While Reichmann claims not to have requested or accepted confidential information during settlement negotiations, he admits that he did discuss "monetary matters." Information as to a party's bottom-line settlement position, or the degree of flexibility in settling a particular case, is itself a significant piece of information that the opposing party would love to have. In litigation, as in life, monetary matters *are* confidential matters.

Reichmann presided as settlement judge over a case other than the present one. Presuming that Reichmann learned confidential information as settlement judge in *Thomas*, it doesn't follow that any of that information pertains to *Forsyth*. When the two cases involve different parties and/or different incidents, disqualification of the former judge and his law firm is appropriate only if the two cases are "substantially factually related." The "substantially factually related" standard entails significant overlap of facts between the two cases. This standard also applies when an attorney is disqualified from representing a client because the attorney previously represented a party adverse to the client in a related case.

The "substantially factually related" standard provides that if there is a *reasonable probability* that confidences were disclosed in an earlier representation which could be used against the client in a later, adverse representation, a substantial relation between the two cases is presumed. To determine whether *Thomas* and *Forsyth* are sufficiently related, we must decide whether "there is a reasonable probability" that the confidences we presume were disclosed during the settlement discussions in *Thomas* would be useful to the plaintiff in *Forsyth*. This inquiry calls for a careful comparison between the factual circumstances and legal theories of the two cases. We cannot, on the record before us, determine whether *Forsyth* and *Thomas* are substantially related.

Yet we need not leave this matter unresolved and open for future dispute, which would further delay resolution of the underlying litigation. We will *assume* the two cases are substantially related, so Reichmann is presumed to have learned confidential information in *Thomas* that is relevant to *Forsyth*. This, in turn, will give rise to the further presumption that he shared those confidences with the Younger firm. If this latter presumption is irrebuttable, "the firm as a whole is disqualified whether or not its other members were actually exposed to the information" Reichmann learned from the earlier case.

Because we apply state law in determining matters of disqualification, we must follow the reasoned view of the state supreme court when it has spoken on the issue. For a long time, the Columbia Supreme Court was silent as to whether the presumption of shared confidences is rebuttable, leaving the question to the state's intermediate appellate courts. The Columbia courts of appeal developed a general rule that the presumption is not rebuttable.

But the Columbia Supreme Court has recently cast doubt on this approach. In *Dep't of Corps. v. SpeeDee Oil Change Sys., Inc.* (2001), an attorney represented one party while the firm where he was former counsel represented an adverse party to the *same* litigation. *SpeeDee Oil* presented a situation on all fours with appellate case law holding that the presumption of shared confidences is irrebuttable. The Supreme Court, nevertheless, held that it "need not consider whether an attorney can rebut a presumption of shared confidences, and avoid disqualification, by establishing that the firm imposed effective screening procedures," because the firm had failed to set up an effective screen. Observing that federal decisions have taken "a more lenient approach to conflicts disqualification than prevails in Columbia," the Court left open the possibility that screening can rebut the presumption of shared confidences within the firm. We read *SpeeDee Oil* as sending a signal that the Columbia Supreme Court may well adopt a more flexible approach to vicarious disqualification.

*SpeeDee Oil* was the kind of case most likely to give rise to automatic disqualification because the same firm represented adverse parties in the same litigation. The Columbia Supreme Court recognized that "discrete, successive conflicting representations in substantially related matters" - as are presented in our case - may pose less of a threat to the attorney-client relationship. Magistrate Judge Reichmann joined the Younger firm years after presiding over the *Thomas* settlement negotiations, and the Younger firm does not seek to represent a party to the *Thomas* litigation. The current case, though we assume it to be related, involves largely different facts. These circumstances create an even more compelling case than *SpeeDee Oil*, where the court nonetheless refused to hold that the presumption is irrebuttable.

The vicarious disqualification of an entire firm can work harsh and unjust results, particularly in today's legal world where lawyers change associations more freely than in the past. A rule that automatically disqualifies a firm in all cases substantially related to the tainted lawyer's former representation could work a serious hardship for the lawyer, the firm and the firm's clients. An automatic disqualification rule understandably would make firms more reluctant to hire mid-career lawyers, who would find themselves cast adrift, and clients would find their choice of counsel substantially diminished, particularly in specialized areas of law. Such a rule also raises the specter of abuse: A motion to disqualify a law firm can be a powerful litigation tactic to deny an opposing party's counsel of choice. This is a case in point: Forsyth's counsel, Stephen Younger, has a formidable reputation as a plaintiffs' advocate in police misconduct cases; defendants in such cases may find it advantageous to remove him as an opponent.

Several of our sister circuits have held that a firm can rebut the presumption of shared confidences when it seeks to represent a party in a case substantially related to one in which a new member of the firm has participated. Although not adopted in Columbia, the ABA Model Rules of Professional Conduct also recognize that the increased mobility of lawyers between firms calls for a less rigorous application of the disqualification rules.

We would nevertheless accept the costs of automatic disqualification, if it were the only way to ensure that lawyers honor their duties of confidentiality and loyalty. But it is not. A client's confidences can also be kept inviolate by adopting measures to quarantine the tainted lawyer. An ethical wall, when implemented in a timely and effective way, can rebut the presumption that a lawyer has contaminated the entire firm. The ABA Model Rules explicitly approve the use of screening procedures to avoid vicarious disqualification where a former judicial officer or government lawyer has joined the firm. Here, Stephen Younger removed all files concerning the *Forsyth* case from the law office before Reichmann joined the firm; all attorneys were instructed not to discuss the case with Reichmann. The district court found "ample evidence of appropriate screening measures: all members of the firm have declared that they have not discussed the pending case and that Reichmann does not have access to the case file." We agree that the measures taken by the Younger firm adequately protect any legitimate interests of the defendants.

The changing realities of law practice call for a more functional approach to disqualification than in the past. In resolving this case, we take our cue from the Columbia Supreme Court's recent indication that it may be inclined to follow the path taken by other federal courts. We hold that the vicarious disqualification of a firm does not automatically follow the personal disqualification of a former settlement judge, where the settlement negotiations are substantially related (but not identical) to the current representation. Screening mechanisms that are both timely and effective, as the Younger firm erected here, will rebut the presumption that the former judge disclosed confidences to other members of the firm. Because the district court here found that the ethical wall adopted by the Younger firm was being scrupulously enforced and there is no reasonable possibility that confidential information will leak to Younger from Reichmann, or vice versa, we find no basis on which to disqualify the Younger firm from serving as counsel for plaintiff *Forsyth*.

Petition for writ of mandamus DENIED.

**CITY AND COUNTY OF AMES v. MAMBO SOLUTIONS, INC.**

United States Court of Appeals (15th Circuit, 2004)

Dennis Hammond (Hammond), now the City Attorney of Ames, represented Mambo Solutions, Inc. (Mambo), while in private practice, in a matter that was substantially related to this case. Thus, there is a conclusive presumption that Hammond had access to confidential information in the course of the earlier representation that is relevant to the current litigation and his disqualification is mandatory. We must decide whether his disqualification automatically extends to the entire City of Ames City Attorney's Office (Office) or simply requires that the Office effectively screen Hammond from any participation in this case. We hold that the presumption that Hammond will share the confidences of his former client with others in the Office is rebuttable by establishing the existence of an effective ethical screen. We remand to the trial court for a determination on the effectiveness of the ethical screen.

**FACTUAL AND PROCEDURAL BACKGROUND**

In September 2000, Hammond was still in private practice. Mambo retained Hammond and his firm to represent it in a range of business matters, including dealings with the City of Ames (City) and an ongoing dispute with the City's Department of Building Inspections.

In November 2001, Hammond was elected Ames City Attorney and shortly thereafter left private practice.

In September 2001, under Hammond's predecessor, the Ames City Attorney's Office (Office) began an investigation that turned up evidence that Marcus Armstrong, the head of the City's Department of Building Inspections, had authorized prepayments on a city contract with Government Computer Sales, Inc. (GCSI) in violation of City law, and that GCSI had failed to fulfill the contract.

In February 2003, the City sued GCSI, Armstrong, and others, alleging that GCSI paid Armstrong kickbacks through various fictitious business entities in order to have him select GCSI for the contract and authorize illegal prepayments.

In March 2003, further investigation uncovered evidence of payments by Mambo, another City contractor, to Armstrong's fictitious business entities, and in April 2003 the City added Mambo as a defendant in the GCSI lawsuit.

One month later, Mambo moved to disqualify Hammond and the entire City Attorney's Office due to Hammond's previous representation of Mambo in matters substantially related to the current lawsuit. The City Attorney's Office responded that it had instituted an ethical screen immediately upon discovering Mambo's alleged involvement in the kickback scheme. All responsibilities for decisions concerning the matter were passed from Hammond to his chief deputy, Jesse Smith, and Hammond had no further involvement in the case. It also argued that Hammond's prior representation of Mambo was not substantially related to the current litigation, and that disqualification was therefore unnecessary.

The trial court granted the motion to disqualify Hammond and the City Attorney's Office. Critically important to our analysis are the trial court findings that Hammond had personally represented Mambo, that he had obtained confidential information from Mambo, and that the subject of the prior representation was substantially related to the current lawsuit. The trial court held that as a matter of law disqualification of both Hammond and the City Attorney's Office was required.

A conflict of interest may arise from an attorney's successive representation of clients with adverse interests. With successive representation of adversaries, the chief fiduciary value jeopardized is that of client *confidentiality*. The former client's expectation of confidentiality must be preserved to ensure the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper

defense. The attorney must maintain those confidences inviolate and preserve them at every peril to himself or herself. Because of this duty, an attorney in actual possession of material containing confidential information from a former client may not represent an adverse party without the former client's consent.

A trial court may disqualify a party's counsel to enforce these ethical standards. A trial court's authority to disqualify an attorney derives from the power inherent in every court to control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.

In deciding a motion to disqualify, however, the court must balance the interests of a client in preserving its confidences with the interests of disqualified counsel's client. These interests included a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility.

In successive representation cases, the "substantially factually related" standard mediates between these competing interests. Absent a substantial factual relationship between the subjects of the two representations, the current client's choice of counsel will be honored and the motion to disqualify must be denied. However, if a substantial factual relationship between the subjects of the prior and the current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is *presumed* and disqualification of the attorney's representation of the second client is mandatory. This mandatory rule applies unless the court finds that other countervailing factors exist, such as tactical abuse underlying the disqualification motion.

#### VICARIOUS DISQUALIFICATION

In addition, the general rule is that disqualification extends from the affected attorney to her entire firm. The presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney's disqualification vicariously to the attorney's entire firm. (*SpeeDee Oil*). Vicarious disqualification is required "to assure the preservation of [the client's] confidences and the integrity of the judicial process." (*Id.*).

The Rules of Professional Conduct of the State Bar of Columbia do not address the vicarious disqualification of an entire law firm when a member of that firm has a former client conflict. For this reason, the vicarious disqualification rules have essentially been shaped by judicial decisions.

The appellate courts' current rule that rigidly applies vicarious disqualification in certain contexts was developed decades ago. The realities of a modern law practice compel a more flexible approach. Lawyers are increasingly mobile, and mid-career shifts are common. Gone are the days when attorneys typically stay with one organization throughout their entire careers. Law firm mergers, dissolutions and acquisitions of other firms' practice groups occur with regularity. International mega-firms have been formed, with offices in numerous countries, containing lawyers who are unlikely to meet, let alone discuss confidential matters, even if they share a common language. In this context, the automatic disqualification of the law firm may result in harsh consequences for the lawyer and the firm, without any compelling reason. Further, the firm's clients are likely to find their counsel of choice limited, particularly in specialized areas of the law. The rule that the presumption of shared confidences is conclusive also creates a substantial potential for abuse. A motion to disqualify is an effective litigation tactic depriving an opposing party of its counsel of choice, and, possibly, driving up its legal fees significantly. This is particularly true in a situation where a client and the challenged law firm have a long-term relationship.

None of these problems detracts from the primacy of preserving "public trust in the scrupulous administration of justice and the integrity of the bar." (*SpeeDee Oil*). But, the disqualification of the conflicted lawyer's current firm is not the sole means to preserve these important values. (*Hoglund*). A client's confidences can be maintained by isolating the lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate *under the circumstances* to protect information that the isolated lawyer is obligated to protect. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances.

To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel. In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Vesting the trial court with the discretion to approve a screen when the head of a public law office is disqualified will permit an evaluation of all relevant circumstances. It is, of course, significant that the conflicted attorney has office-wide supervisory responsibilities, or helps in the formulation of office policy or plays a major role in the hiring, firing and promotion of subordinates. But, in evaluating the effectiveness of

any screen imposed, other factors should come into play. For example, the size of the office should be considered, at least to the extent it affects the number of levels of supervision, and, therefore, the ease with which another supervisor can replace the conflicted office head in the current case. Further, the trial court should consider whether the attorneys actually handling the case, and the office files they utilize, are in the same physical location as the disqualified head of the office.

In a motion to disqualify the current law firm because of an attorney's former client conflict, the presumption that the law firm is disqualified should be rebuttable by evidence that the conflicted attorney has been effectively screened.

Remanded.

#### DISSENTING OPINION BY JUSTICE JONES

I respectfully dissent. The majority's decision reaches far beyond the narrow issues presented. In one fell swoop, this Court precipitously overturns a host of decisions made by careful deliberations by appellate courts over many years and presumes to predict how the Columbia Supreme Court will decide its own rules.

The Court ignores the holding of *SpeeDee Oil*: "The presumption that an attorney has access to privileged and confidential matters relevant to a subsequent representation extends the attorney's disqualification vicariously to the attorney's entire firm. . . . Vicarious disqualification is required to assure the preservation of the client's confidences and the integrity of the judicial process." It is not for this court to depart from this holding. We are not called upon to decide whether an ethical screen or some other lesser prophylactic measure might suffice.

I would affirm.