

Did You Ever Have to Make Up Your Mind? Choosing the Ethical Path

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Program Materials

1. PowerPoint Presentation

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Trial Run: Which of the following categories best fits you?

- (A) Private Company or Firm**
- (B) Public Company or Firm**
- (C) Government**
- (D) Other**

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Libel and Litigation Allegations

Mandelbaum v. Arseneault, 2017 N.J. Super. Unpub. LEXIS 2456; 2017 WL 4287837

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Libel and Litigation Allegations

- **Mark Mandelbaum is the son of Vikings minority owner David Mandelbaum. Jack Arseneault is the divorce lawyer for Mandelbaum's wife.**
- **Mandelbaum's wife alleged he grabbed her and shoved her down the stairs. These allegations were contained in a Restraining Order application and a criminal complaint against Mandelbaum.**
- **Mandelbaum's wife later admitted to three persons that he did not push her down the stairs and did not lay a hand on her. Arseneault acknowledged the wife's recanting of the assault in an email to Mandelbaum's counsel.**

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The Saga Continues

- **When Mandelbaum moved to dismiss the divorce petition, Arseneault opposed the motion by including a certification in which the wife resurrected her assault allegations.**
- **Arseneault then threatened “a public undressing” if Mandelbaum did not accede to certain settlement demands and later sent a copy to the Wall Street Journal which resulted in a number of media outlets reporting the wife had been pushed down the stairs.**

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Mandelbaum Sues Arseneault

- **Mandelbaum then brings suit against Arseneault alleging five causes of action, including libel.**
- **The trial court grants Arseneault motion to dismiss all five causes of action.**
- **With respect to the libel claim the court found no “fault” on Arseneault’s behalf citing his reliance upon the assault allegations in the criminal complaint.**
- **Mandelbaum appeals.**

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Question 1: How Does the Appellate Court Rule on the Libel Claim?

- (A) Affirms the dismissal because the statements published were taken exclusively from filed legal pleadings and the litigation privilege or immunity applies.**
- (B) Affirms the dismissal because no evidence of Arseneault's malice.**
- (C) Reverses the dismissal because the information sent to the Wall Street Journal included only the assault allegations and did not reference the wife's recanting of the allegations.**
- (D) Reverses the dismissal because Arseneault violated Ethics Rule 3.6 which regulates public statements by lawyers about pending litigation.**

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Correct Answer (C)

(C) Reverses the dismissal because the information sent to the Wall Street Journal included only the assault allegations and did not reference the wife's recanting of the allegations.

- Because this is a review of a Motion to Dismiss, all of the allegations in Mandelbaum's complaint are deemed true, including that Arseneault knew the domestic abuse allegations were false when he sent the lawsuit to the Wall Street Journal.**
- The Appellate Court rejected the lower court's finding that Rule 3.6 allowed Arseneault to publish the statements in filed legal pleadings unless he knew or had reason to know the statements were false.**

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Joint Representation and Privilege

Newsome v. Lawson, 2017 BL 443249, D. Del., No. 14-842-RGA-MPT, 12/12/17

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Joint Representation and Privilege

The Liquidating Trustee brought an action against the lawyers for the debtor, Mahalo USA, which was a wholly owned subsidiary Mahalo Energy Ltd. The lawyers had jointly represented both entities in various matters.

The Trustee made a discovery request seeking all information possessed by the law firm concerning the debtor/subsidiary, Mahalo USA. Lawyers objected arguing that attorney-client privilege with Parent did not authorize the subsidiary to have access to Parent's privileged information.

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The Magistrate Agrees with the Lawyers

- The Magistrate rejected the Trustee's argument that the subsidiary, as a joint client, was entitled to access to the information because the subsidiary was a joint client and under *Teleglobe*, there is no privilege because the *adverse litigation exception between joint clients* applies.
- The Magistrate found that the *adverse litigation* exception did not apply because *Teleglobe* involved a lawsuit by one joint client against the other, not a claim by one joint client against the lawyer for the joint clients.
- The trustee appeals.

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Question 2: How Does the Court Rule?

- (A) Reverses Magistrate-finding adverse litigation exception does apply and subsidiary is entitled to all privileged information regarding the parent.
- (B) Reverses Magistrate-finding the adverse exception applies but remands for a determination of matters in which parties were jointly represented.
- (C) Affirms Magistrate because applying the adverse litigation exception would allow litigants to sue third parties (law firm) to gain access to privileged information not otherwise accessible.
- (D) Affirms Magistrate and rules that because Trustee did not make Parent a party, it cannot access Parent's privileged information.

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Correct Answer (B)

(B) Reverses Magistrate-finding the adverse exception applies but remands for a determination of matters in which parties were jointly represented.

- Joint clients have access to all information imparted to the lawyer representing the joint clients in the matter.
- Trustee was entitled to privileged information, but only that which pertained to matters in which parties were “jointly represented” by law firm.
- Court rejected unauthorized access to nonparty’s privileged information finding that otherwise the law firm could manipulate the representation in favor of one of the joint clients.

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Internal Investigations: Disclosure to the Government

(SEC v. Herrera, 2017 BL 435181, S.D. Fla., No. 17-20301-CIV-LENARD/GOODMAN, 12/5/17). (SEC v. Herrera, 2017 BL 435181, S.D. Fla., No. 17-20301-CIV-LENARD/GOODMAN, 12/5/17)

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Internal Investigations: Disclosure to the Government

- **General Cable Corporation (GCC) retained Morgan Lewis (ML) to conduct an investigation into accounting irregularities in its Brazil operations.**
- **ML disclosed certain documents to the SEC in its investigation of GCC and also provided “oral downloads” of interviews with 12 witnesses.**
- **ML and GCC disclosed all of the investigation materials including the interview notes of all witnesses to Deloitte, GCC’s auditor.**
- **GCC later entered into a consent order with the SEC, after which the SEC brought an action against GCC’s CEO and CFO of its Brazilian operations.**

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The SEC then Sues GCC’s CEO & CFO

- **In the SEC lawsuit, defense counsel serves ML with a subpoena seeking access to the interview notes of all of the witnesses. ML objects asserting work-product protection.**
- **Defense counsel argues that work-product was waived by disclosure to the SEC and disclosure to Deloitte.**
- **ML objects arguing (1) that disclosure to auditors does not waive work product protection; and (2) the notes of the 12 witness interviews were not provided to the SEC (only oral summaries) and therefore work product protection was not waived by the disclosure.**

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Question 3: How Does the Court Rule?

- (A) Work product protection waived as to the notes of the 12 witnesses that were “orally downloaded” to the SEC.
- (B) Work product waived as to notes of all witness interviews because they were disclosed to auditors.
- (C) Work product not waived because disclosure to auditors does not waive protection and disclosure to the SEC was compelled.
- (D) Work product not waived because ML’s client was not a party to the proceeding.

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Correct Answer (A)

- (A) Work product protection waived as to the notes of the 12 witnesses that were “orally downloaded” to the SEC.*
- Courts finds disclosure to SEC was disclosure to an adversary.
 - Court rejects distinction between documents delivered to SEC and those orally disclosed.
 - Court agrees with majority view of courts that disclosure to auditors does not waive protection because of their common interest and rejects argument that Deloitte was also an adversary because Deloitte was also on the SEC’s radar and entered into a tolling agreement with SEC.

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Disqualification Motions

Village of Tinley Park v. Connolly, 2018 BL 55211, N.D. Ill.,
No. 17 C 3271, 2/15/18

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Disqualification Motions

- The Village of Tinley Park was represented for a number of years by Attorney Murphey.
- During this time, the Village was sued by the DOJ and a developer in a Fair Housing Lawsuit.
- After the DOJ filed suit, the Mayor had a 20 minute call with Murphey about the suits. Murphey advised the Mayor about how DOJ handles such lawsuits and recommended the Village settle quickly. Murphey subsequently sent the Village a sample consent decree to show the Village what a settlement would look like.
- Murphey later sent emails asking whether the Village had settled and commented on related news articles.

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Murphey has a new client

- **Five months later, the Village commenced its own suit against a former Employee alleging she breached her fiduciary duty by pushing a zoning change through the Village Board that was at issue in the Fair Housing Lawsuit.**
- **Murphey representing the former Employee filed a motion to dismiss and asked to have the matter reassigned to the Judge presiding over the pending Fair Housing Lawsuit.**
- **Three months later, the Village brought a motion to disqualify Murphey based upon his prior “representation” regarding the per Fair Housing Lawsuit.**

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Rule 1.9 Former Client Conflicts

RULE 1.9: DUTIES TO FORMER CLIENTS

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

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm 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 these Rules would permit or require with respect to a client, or when the information has become generally known.

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Question 4: How Does the Court Rule?

- (A) Disqualification denied. Murphey was never retained for the DOJ suit, never paid any fees, and never appeared in the suit.
- (B) Disqualification denied. The suit against the former Employee was not substantially related to the DOJ lawsuit because it involves different parties and different issues.
- (C) Disqualification granted. The lawsuit against the former Employee is substantially related to the DOJ lawsuit and Murphey did represent the Village regarding the DOJ suit.
- (D) Disqualification granted because Murphey requested the suit be assigned to the same judge.

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Correct Answer (C)

(C) Disqualification granted. The lawsuit against the former Employee is substantially related to the DOJ lawsuit and Murphey did represent the Village regarding the DOJ suit.

- The court found that the Village reasonably believed an attorney-client relationship existed because Murphey gave legal advice (quickly settle) and it is unlikely he would have given this advice without receiving confidential information.
- The court also found the suits were substantially related because the “core issues” were the same (i.e., the Village code amendments and whether they were legitimate or discriminatory).

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Withdrawal and Conflicts of Interest

Altova GmbH v. Syncro Soft SRL, 2018 BL 266205, D. Mass., No. 17-11642-PBS, 7/26/18.

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Withdrawal and Conflicts of Interest

- The Sunstein firm began representing Syncro Soft in 2004 involving an infringement claim relating to Syncro's Oxygen software.
- In 2009, Sunstein assisted Syncro with a trade dress dispute over Oxygen brought by Altova, which was resolved. Thereafter, Sunstein represented Syncro in its ongoing US trademark registrations.
- In 2011, Sunstein began representing Altova in an unrelated infringement claim against a third party. The firm continued to represent both Syncro and Altova without incident until 2017.

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Big & Small Revenue Clients Fight

- In 2017, Altova asked Sunstein to bring an infringement claim against Syncro's Oxygen software. At the time, Sunstein was only doing periodic trademark maintenance work for Syncro.
- Sunstein wrote Syncro in June 2017 indicating that it needed to withdraw because another existing client wanted Sunstein to represent the client in a matter adverse to Syncro.
- Syncro responded that it was not aware of any such conflict and expressed concern about the legal issues.
- Sunstein set up an internal ethics wall and then filed the Altova infringement action against Syncro.

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Rule 1.7: Conflict of interest: Current clients

[Unless both clients consent] a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

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

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Question 5: How Does the Court Rule on Syncro's Disqualification Motion?

- (A) Motion denied. The trademark work Sunstein was doing for Syncro was not related to the trademark work.
- (B) Motion denied. Syncro was not a current client by the time Sunstein filed the infringement action and the infringement action was not substantially related to the prior work for Syncro.
- (C) Motion granted. Massachusetts recognizes the "hot potato doctrine" and Sunstein violated the doctrine.
- (D) Motion granted. Sunstein violated its duty of loyalty under Rule 1.7 by failing to disclose the conflict to Syncro and obtain consent to the Altova suit.

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Correct Answer (D)

(D) Motion granted. Sunstein violated its duty of loyalty under Rule 1.7 by failing to disclose the conflict to Syncro and obtain consent to the Altova suit.

- In a prior case the MA Supreme declined to adopt the hot potato doctrine and instead found the duty of loyalty under Rule 1.7 prevents dropping a current client to change its status to a former client, thereby applying a less stringent conflict of interest standard.
- When Sunstein began representing Altova, a conflict with Syncro was foreseeable due to the prior dispute over Syncro's Oxygen software.

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Common Interest Doctrine

***Regents of the Univ. of Cal. v. Affymetrix, Inc.*, 2018 BL 217477, S.D. Cal., 3:17-cv-1394-H-NLS, 6/19/18**

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Common Interest Doctrine

- **Affymetrix was sued by U of Cal (UC) for patent infringement. UC obtained via a third party subpoena an internal email and attachment directed to Affymetrix's house counsel. The email was also copied to a scientist at AAT.**
- **At the time the email was sent, Affymetrix and AAT were negotiating a License and Supply Agreement but no agreement had been executed.**
- **The email was inadvertently disclosed by AAT and was clawed back by Affymetrix.**
- **UC brought a motion asserting that privilege was waived because the AAT scientist who was not an Affymetrix employee was copied on the email string.**

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Question 6: How Does the Court Rule?

- (A) Privilege not waived. Affymetrix and AAT had a common interest because of the ongoing License and Supply Agreement negotiations.
- (B) Privilege not waived because the AAT scientist was a “necessary communicating agent” for Affymetrix with regard to the License and Supply Agreement .
- (C) Privilege waived because the AAT scientist did not fall within the “control group” of AAT and therefore no privilege.
- (D) Privilege waived because there was no common interest between Affymetrix and AAT because AAT was not represented by counsel in the License and Supply Agreement.

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Correct Answer (D)

(D) Privilege waived because there was no common interest between Affymetrix and AAT because AAT was not represented by counsel in the License and Supply Agreement.

- The court found that in prior cases where 9th Circuit courts found that common interest existed, both parties were represented by separate counsel.
- The court distinguished this case from a prior case involving UC and Eli Lilly which found common interest because in the Lilly case: (1) the license agreement had been executed, (2) the parties were actively involved in prosecuting the patent, and (3) lawyers for Lilly and UC were involved.

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Former Employees and Company Documents

Sanchez v. Maquet Getinge Grp., 2018 BL 182268, N.J. Super. Ct. App. Div., A-4994-15T4, unpublished 5/23/18

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Former Employees and Company Documents

- **Sanchez was a Chief Compliance Officer for Maquet Pharma. After 18 months in this position, Sanchez was terminated. Sanchez then brought a whistleblower claim against Maquet.**
- **During discovery, Maquet sought production of all confidential and proprietary documents that Sanchez had taken from the company while he was employed.**
- **After obtaining these records, Maquet moved to suppress use of the documents arguing that either they were proprietary and covered by Sanchez's nondisclosure employment agreement or that they were communications with counsel and protected by attorney-client privilege.**

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Maquet also Moves to Disqualify Sanchez's Lawyer

- Maquet also asks the court to disqualify Sanchez's lawyer and the law firm representing Sanchez in his whistleblower claim.
- Sanchez alleged that privilege was waived because of testimony by Maquet's house counsel in an arbitration hearing.
- The trial court ordered Sanchez to return all of the proprietary documents and privileged communications. Sanchez's counsel and his entire law firm were also disqualified from representing Sanchez in the matter.
- Sanchez and his law firm appeals.

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Rule 4.4 (b): Respect for Rights of Third Persons

- A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent **shall not read** the document or information or, if he or she has begun to do so, **shall stop reading it**. The lawyer shall (1) promptly notify the sender (2) **return the document to the sender and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible**.
- Courts often use this rule when documents that were purloined by employees given them to their lawyer.

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Question 7: How Does the Court Rule?

- (A) Trial Court's rulings to return all documents and disqualify Sanchez's counsel and law firm affirmed.
- (B) Trial Court's ruling to return all documents affirmed, but the decision to disqualify Sanchez's counsel and law firm reversed.
- (C) Trial Court's ruling to return documents and disqualify Sanchez's counsel affirmed, but reversed as to disqualification of the law firm.
- (D) Trial Court's rulings are all reversed.

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Correct Answer (A)

(A) Trial Court's rulings to return all documents and disqualify Sanchez's counsel and law firm affirmed.

- Sanchez's counsel violated New Jersey Ethics Rule 4.4 which requires prompt notification upon receipt of privileged material.
- Material was clearly privileged and Sanchez's counsel did not notify Maquet until 9 months after receiving the documents from Sanchez.
- New Jersey Rule 4.4 is more stringent than most states because it prohibits the lawyer from reading the privileged documents and requires return of the document.

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The factors used to determine whether an employee can use documents retained from employment

- How the employee came into possession of the documents (e.g., authorized or unauthorized).
- What did employee do with document? Sharing it with lawyer to prosecute a claim militates in favor of employee.
- Nature and content of document. Strong proprietary or privileged nature favors employer.
- Is there a clearly identified company policy on confidentiality or privacy?
- Will use or disclosure be unduly disruptive to the employer's business?
- Is the document the "smoking gun?"

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The Final but Most Important Factor

- The court should evaluate *how its decision in the particular case bears . . . the broad remedial purposes* the Legislature has advanced through our laws against discrimination.
- Before being fired, Sanchez told a VP that he had compiled company documents in a "burn file" which he "intended to use to f*** the company" if it fired him.
- Court weighed the need to keep company information privileged v. the prejudice to Sanchez having to get a new law firm and found the equities weighed in favor of disqualification.

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Privilege Documents for Foreign Litigation

Kiobel v. Cravath, Swain & Moore, LLP, 2d Cir., 17-424-CV, 7/10/18

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Privilege Documents for Foreign Litigation

- **Kiobel initially sued Royal Dutch Shell in NY federal court alleging Shell was committing human rights violations in Nigeria.**
- **Before the NY Court eventually determined that no jurisdiction existed, Kiobel obtained Shell documents in discovery that were subject to a confidentiality order requiring return of the documents to the owners at the conclusion of litigation.**
- **Years later Kiobel brought a similar claim against Shell in the Netherlands. Kiobel commenced an action against Shell's NY lawyers under 28 USC 1782 seeking the discovery documents from the prior NY case. Shell's lawyers object.**

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The Parties Arguments

- Shell's lawyers argue that the NY court lacks jurisdiction because of the prior decision. Shell also claims that Kiobel should get the documents via discovery in the Netherlands proceeding.
- Kiobel contends that she needs the documents because the evidentiary standard in the Netherlands is much higher to sustain filing suit.
- The trial court rules in favor of Kiobel finding that it has jurisdiction under 28 USC 1782 and orders Shell's lawyers to produce the documents provided by Shell in the prior NY litigation.
- Shell's lawyers appeal.

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Question 8: How Does the Court Rule?

- (A) Trial court affirmed on both jurisdiction and ordering of production of the Shell documents.
- (B) Trial court affirmed on jurisdiction but reversed on compelling production of the Shell documents.
- (C) Trial court reversed on the jurisdiction issue because Shell is a foreign company making the production of documents moot.
- (D) Trial court affirmed on the jurisdiction issue, but remanded the document production issue back to the trial court for determination as to whether privilege was waived as to the documents produced by Shell in the prior litigation.

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Correct Answer (B)

(B) Trial court affirmed on jurisdiction but reversed on compelling production of the Shell documents.

- Appellate court rejected argument that Shell, a foreign entity was the real party and not Shell's NY lawyers.
- However, it found that deciding the confidentiality of Shells documents without Shell's participation made the case exceptional.
- The importance of court protective orders and the need for lawyers to retain documents related to foreign clients for their own protection, weighed in favor of reversing the order compelling Shell's lawyers to turn over their Shell documents.

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The End

Thank you for attending

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