

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MILWAUKEE COUNTY
901 North 9th Street
Milwaukee, Wisconsin 53233-1425,

Case No. 2:06 cv-00372-CNC

EMPLOYEE'S RETIREMENT SYSTEM OF THE
COUNTY OF MILWAUKEE, and
PENSION BOARD, EMPLOYEE'S
RETIREMENT SYSTEM OF THE COUNTY OF
MILWAUKEE,
901 North 9th Street, Rm 210
Milwaukee, Wisconsin 53233-1425

Hon. Charles N. Clevert, Jr.

Plaintiffs,

vs.

MERCER HUMAN RESOURCE CONSULTING,
INC. f/k/a WILLIAM M. MERCER,
INCORPORATED,
1209 Orange Street
Wilmington, Delaware 19801

Defendant.

**PLAINTIFFS' RESPONSE TO QUARLES & BRADY LLP'S
MOTION FOR DECLARATORY RULING**

INTRODUCTION

Overwhelming undisputed evidence requires that Quarles & Brady ("Q&B") -- current bond counsel for Milwaukee County -- be immediately disqualified from representing Mercer against Milwaukee County in this matter:

- The factual declaration of Milwaukee County Corporation Counsel William J. Domina ("Domina") explains that Q&B has since 1995 been the bond counsel for the County. Domina Declaration ("Domina Decl.") attached hereto as **Exhibit 1**.

- The factual evidence that Q&B's access to confidential information related to its role as County bond counsel squarely overlaps the County's evidence in this case that Mercer caused that distress.
- The unqualified conclusion of the leading "legal conflicts" scholar in America -- Professor Charles Wolfram of Cornell Law School -- is that Q&B has an absolutely clear conflict of interest in this case. (Wolfram Declaration ("Wolfram Decl.") attached hereto as **Exhibit 2**.)
- The case law solidly supports Professor Wolfram's strong conclusion.

But in this case, the Q&B conflict is even worse. Q&B as bond counsel is the "voice" of the County before the financial world in raising funds through bonds. Domina Decl. ¶ 21. For example, the recent S-1 filing by Milwaukee County shows the strong relationship between the County's financial needs and the pension obligations caused by the year 2000 benefits package at the heart of this lawsuit:

Within the next five years (2007-2011) expenditures driven by employee benefits (health insurance, pension contributions and OPEB) are projected to escalate at a rate that exceeds revenue growth . . . An actuarial review in October 2005 by Milliman, Inc. stated that the "recommended" future pension contribution could be \$50,000,000.00 or more. The projected contribution for 2007 is \$50,000,000.00 or a \$23,000,000.00 increase.

Domina Decl., ¶ 16, Ex. D.

Q&B will irreparably harm the County by being bond counsel, obtaining confidential information on the relationship of the pension fund problems to the financial problems, while representing the very actuarial firm that utterly failed to warn the County of the problem. It hurts the County both in the lawsuit and in its efforts to deal with its financial needs through the bond market.

To quote the five conclusions by Professor Charles Wolfram in his declaration:

- Milwaukee County clearly is, and Q&B's representation of Milwaukee County in extensive and ongoing bond and bond-related matters while at the same time appearing in this litigation to represent Mercer "directly adverse" to Milwaukee County constitutes an impermissible concurrent-representation conflict under Rule 1.7(a)(1).
- Q&B is proceeding against Milwaukee County in a matter that has significant factual overlap with Q&B's bond-related work for the County and as to which Q&B has presumably obtained extensive confidential information. Given that "related" character of the two matters, considerations of confidentiality as well as loyalty require Q&B's disqualification.
- Milwaukee County explicitly limited its January 2005 written consent to Q&B's work for Mercer in earlier stages of this matter. The County's consent expired by its express terms on its filing of the present litigation. That now-expired consent does not in any way excuse or justify Q&B's present conflicted representation of Mercer. In any event, the stakes involved in the present adverse proceeding between Milwaukee County and Q&B's client Mercer make it highly questionable whether the underlying conflicts of interest would be consentable.
- Q&B's quite tentative attempt to resolve its confidentiality problems through a kind of "screen" within the firm inadequately responded to its conflict problems.
- Q&B is independently barred from proceeding here as Mercer's counsel because its partner, Michael J. Ostermeyer ("Ostermeyer"), presently serves in a fiduciary capacity as a Trustee of Plaintiff Pension Board.
- There are no unique and compelling "equities" justifying Q&B's request for

extraordinary permission from this Court to ignore the normally-applicable rules of conflicts in order to represent Mercer.

SUMMARY OF ARGUMENT

Milwaukee County is a Q&B client. Q&B seeks to be adverse to Milwaukee County in this lawsuit. Ethics rule 1.7 is simple: A law firm cannot be adverse to a client without consent. Here, Milwaukee County has not consented to Q&B being adverse to Milwaukee County. Therefore, Q&B has a conflict of interest. The remedy is disqualification of Q&B from this lawsuit.

Q&B argues that a subunit of Milwaukee County is the actual Q&B client, not Milwaukee County itself. Q&B is wrong. Q&B represents Milwaukee County.

Q&B also argues that it would be inequitable if Q&B is not allowed to be adverse to Milwaukee County. Q&B's disqualification is not inequitable. Milwaukee County advised Q&B over one year ago that Milwaukee County would not waive a litigation conflict. Milwaukee reconfirmed that point to Q&B thereafter. Q&B thus acted at its own peril.

Milwaukee County's refusal to consent to allowing Q&B to be adverse is not idle. Q&B are Milwaukee County's bond counsel. Q&B has opined about Milwaukee County's finances and provided legal advice regarding ways in which Milwaukee County could address some of the financial damage caused by the pension benefits. Put differently, Q&B is actively engaged in the mitigation of Milwaukee County's damages claim and now wants to be adverse to Milwaukee County regarding that claim.

UNDISPUTED MATERIAL FACTS

For the past ten years, Q&B has served as bond counsel for Milwaukee County. Domina Decl. ¶¶ 3, 4, 7, Exs. A, B & C. This relationship is described in Q&B's "Proposal for Providing

Bond Counsel Service to Milwaukee, County, Wisconsin (“Proposal”). *Id.*, ¶ 3, Ex. A. In 1995, Milwaukee County executed an engagement letter establishing the relationship between Q&B and Milwaukee County. *Id.*, ¶ 4, Ex. B. Milwaukee County itself, not a political subdivision, is a Q&B client. *Id.*, ¶ 5.

As the Proposal states, Q&B promised to abide by the rules of professional conduct as adopted by the Wisconsin Supreme Court and if a conflict arose Q&B would not take on adverse representation without Milwaukee County’s consent. Domina Decl. ¶ 6, Ex. A, p.2. Q&B recently affirmed its representation of Milwaukee County through the current “Agreement for Bond Counsel Services” (“Agreement”). *Id.*, ¶ 7, Ex. C.

In Q&B’s bond work for Milwaukee County, Domina has been and is currently the chief legal contact for Q&B. Domina Decl. ¶ 9. Domina is actively involved in Q&B’s bond work on a regular basis. *Id.* Domina’s primary contact on these bonding issues and issues regarding the financial status of Milwaukee County is Q&B attorney Brian Lanser. *Id.*, ¶ 10.

In its role as Milwaukee County’s bond counsel, Q&B has had extensive and confidential communications with Milwaukee County concerning Milwaukee County’s financial condition and its efforts to mitigate the problems created by the conduct of Mercer. Domina Decl. ¶ 11. These mitigation efforts are summarized in the County’s Official Statement, connected with Milwaukee County bond issues. *Id.*, ¶ 12.

Q&B also represents and advises Milwaukee County regarding Milwaukee County’s Official Statements. Domina Decl. ¶ 13. The County’s Official Statement is a publicly disclosed document that the County is required to provide when it issues bonds. *Id.*, ¶ 14.

In its Official Statement, Milwaukee County is required to make financial disclosures, including disclosures regarding the financial health of its pension fund. *Id.*, ¶ 15.

Most recently, Q&B represented Milwaukee County concerning Milwaukee County's 2006 Official Statement. Domina Decl. ¶ 16, Ex. D. In preparing Milwaukee County's 2006 Official statement, Q&B examined the overall financial health of Milwaukee County, including its pension fund. *Id.*, ¶ 17. Pursuant to its representation, Q&B was intimately involved with Milwaukee County's public filings and financial affairs, including the effect of Milwaukee County's under-funded pension fund would have on bonds issued by Milwaukee County. *Id.*, ¶ 18.

Q&B reviewed and substantially re-wrote the disclosure of Milwaukee County's financial status contained in Milwaukee County's Official Statement in order to provide full public disclosure of Milwaukee County's financial health and all impediments to bond repayment, including the unfunded pension obligations. Domina Decl. ¶ 19. Beyond what is disclosed in the public filings, Q&B possesses confidential information that lead to the drafting of that Official Statement, giving advice on how to word, mitigate and address the now under-funded pension fund. *Id.*, ¶ 20. In essence, Q&B authored the Official Statement and became Milwaukee County's voice to the financial world regarding Milwaukee County's response to the pension fund crisis Mercer created through the Official Statement, disclosing the financial status of the County. *Id.*, ¶ 21.

Q&B also provided legal advice to Milwaukee County regarding the potential use of Pension Obligation Bonds to address and remedy the poor financial health of the County's pension fund. Domina Decl. ¶ 22. Specifically, starting in the summer of 2004, Q&B attorney Brian Lanser examined the issue of how Milwaukee County could use Pension Obligation Bonds to remedy some of the damage caused by Mercer. *Id.*, ¶ 23, Ex. E. Q&B's advice was provided

to both the County Executive Administration and the County Board of Supervisors in separate meetings and included the development of a public referendum on Pension Obligation Bonds. *Id.*

Mercer is also a client of Q&B. *Quarles & Brady's Brief in Support of Motion for Declaratory Ruling* at 1-3 (hereinafter "Br. at ___"); Domina Decl. ¶ 24. Q&B has represented Mercer in connection with several matters, including the Ethics Board investigation, investigations by the State Attorney General and U.S. Attorney, and the Bilda class action cases. Domina Decl. ¶ 25; Br. at 3. Domina has been Q&B's chief legal contact for these matters and has worked extensively with Q&B's litigation department, including Eric J. Van Vugt. Domina Decl. ¶ 26.

When the prospect first arose a year ago that the County might file suit against Mercer, Q&B (through Eric J. Van Vugt) approached Domina on January 25, 2005, with an oral request for a conflict waiver. Domina Decl. ¶ 27. During that conversation with Mr. Van Vugt, Domina and Mr. Van Vugt discussed the fact that Q&B's concurrent representation of Milwaukee County and Mercer could create a conflict if Milwaukee County sued Mercer and that Domina wanted to reserve the right to review any conflicts after he completed his analysis of claims in this matter. *Id.*, ¶ 28. Mr. Van Vugt sought a very broad waiver of consent from Milwaukee County, the effect of which would have allowed Q&B to maintain its representation of Mercer if any litigation should arise, while at the same time remaining as Milwaukee County's bond counsel and representative on other financial matters. *Id.*, ¶ 29.

However, Milwaukee County informed Mr. Van Vugt that it would waive the conflict, but only on the express condition that such a waiver would be limited to pre-litigation work done by Q&B. Domina Decl. ¶ 30. Domina and Mr. Van Vugt agreed to revisit the conflict again if the litigation against Mercer materialized. *Id.*, ¶ 31.

On January 26, 2005, Domina received a letter from Mr. Van Vugt, confirming their conversation on January 25, 2006. Domina Decl. ¶ 32. On January 28, 2005, Domina counter-signed the letter with an express condition that the County's consent was "effective only until court litigation, if any." *Id.*, ¶ 33, Ex. F.

Domina has been the County Official to which Q&B has carried on its pre-suit correspondence concerning the production of documents. Domina Decl. ¶ 34, Exs. G & H. In addition, immediately prior to filing this suit Domina was and remains the primary representative of Milwaukee County in correspondence with Q&B about the present conflict with Q&B. *Id.*, ¶ 35.

On March 29, 2006, prior to filing the lawsuit against Mercer, Domina advised Q&B that because of Q&B's work for Milwaukee County both directly and indirectly related to Milwaukee County's pension fund, Q&B could not represent Mercer in a lawsuit by Milwaukee County because of a conflict under SCR 20:1.7. Domina Decl. ¶ 36, Ex. I. Domina also advised Q&B that such conflict would not be one that could be waived and that even assuming the conflict was waivable, Milwaukee County would refuse to waive it. *Id.*, ¶ 37.

On March 31, 2006, Domina received a letter from Q&B stating that its concurrent representation of Milwaukee County and Mercer in this litigation posed a conflict under S.C.R. 20:1.7. Domina Decl. ¶ 38, Ex. J. In that letter, Q&B disagreed that the acknowledged conflict could not be waived and threatened to withdraw as Milwaukee County's bond counsel in an effort to resolve Q&B's conflict of interest. *Id.*, ¶ 39.

On April 4, 2006, Domina sent a letter to Q&B explaining that Q&B's service as Milwaukee County's bond counsel gave Q&B an "intimate knowledge of Milwaukee County's financial condition and the impacts on that condition caused by [Mercer]." Domina Decl. ¶ 40,

Ex. K. In that same letter, Domina recounted a conversation with Q&B litigation partner Paul Bauer in which Bauer's statements to Domina raised serious questions about Q&B's loyalty to Milwaukee County. *Id.*, ¶ 41. As reflected in Plaintiffs' original Complaint, however, the County has uncovered strong evidence that Mercer is the cause of these troubles and such evidence was in the hands of Q&B. *Id.*

Such knowledge and Q&B's statement to Domina gave Milwaukee County grave concern over Q&B litigating on behalf of Mercer against Milwaukee County in that it revealed that Q&B did not have Milwaukee County's best interest at heart but rather that Q&B intended to use the confidential information, which Q&B learned from Milwaukee County, against Milwaukee County in litigation against Mercer. Domina Decl. ¶ 42. It was clear to Domina that Q&B and Mercer would defend such lawsuit by characterizing the suit as an attempt by Milwaukee County to blame budget problems on Mercer; Q&B's statements caused Domina to realize that Q&B could use its intimate inside knowledge of Milwaukee County's financial condition and budget issues as a defensive weapon against Milwaukee County in a lawsuit against Mercer. *Id.*, ¶ 43.

Q&B then changed its course. On April 14, 2006, Domina received a letter from Q&B stating that it now believed that no conflict existed in the current lawsuit and that Q&B did not require and would not seek a waiver from Milwaukee County. Domina Decl. ¶ 44, Ex. L. This dramatic departure from Q&B's prior representations to Milwaukee County purportedly are based on Q&B's opinion that "a law firm may represent a government entity on one matter and at the same time represent a private client who is adverse to that government entity or another entity of that government on an unrelated matter." Domina Decl. Ex. L..

In response, Milwaukee County sent a letter to Q&B explaining that Q&B's new assertion that Q&B did not need to obtain Milwaukee County's consent was "ill-founded and wrong." Domina Decl. ¶ 45, Ex. M.

Domina has been the primary point of contact involved in the analysis of claims, the search for and retention of counsel to pursue all claims, and for all aspects of the current litigation against Mercer. Domina Decl. ¶ 46. Domina's involvement with this litigation will be direct and extensive, and not merely as a matter of title or formality but something that he has been intimately involved with over the past three years. *Id.*, ¶ 47. Such a conflict is against Milwaukee County's understanding and expectations of the attorney-client relationship that Q&B established with Milwaukee County over 10 years ago. *Id.*, ¶ 48.

Q&B's representation of Milwaukee County as bond counsel, as counsel representing Milwaukee County on Milwaukee County's Official Statements, and with respect to pension obligation bonds are precisely the reasons Milwaukee County refused to consent unconditionally and continues to refuse to consent to the current conflict. Domina Decl. ¶ 49. The confidential information provided to Q&B directly relates to injury and damages issues in this lawsuit and are directly related to the factual allegations in Plaintiffs' Complaint. *Id.*, ¶ 50. Q&B has confidential information regarding the County's pension fund and now has the potential to use such information. *Id.*, ¶ 51.

On March 29, 2006, Milwaukee County sued Mercer for, among other things, actuarial malpractice and fraud concerning actuarial advice provided and representations made by Mercer to Milwaukee County. *Milwaukee County et al v. Mercer Human Res. Consulting Inc.*, No. 2:06-cv-00372 (E.D. Wis. filed March 29, 2006). On April 19, 2006, Q&B filed an answer in this case on behalf of Mercer.

ARGUMENT

I. Q&B HAS BREACHED ITS ETHICAL OBLIGATION TO MILWAUKEE COUNTY.

A. Q&B Cannot be Adverse to Milwaukee County Because Milwaukee County is a Client of Q&B.

Attorneys who practice in this district are bound by the Wisconsin Rules of Professional Conduct. Local Rule 83.10(a).¹ The Wisconsin Rules of Professional Conduct prohibit lawyers from representing clients adversely to another client:

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents in writing after consultation.

Wisconsin SCR Ch. 20:1.7(a). Rule 1.7 is violated whenever an attorney represents two adverse parties and does not obtain written consent from both. *In the Matter of Disciplinary Proceedings Against Zablocki*, 247 Wis.2d 994, 997, 635 N.W.2d 288, 290 (Wis. 2001); *Steveon v. Rose K*, 196 Wis.2d 171, 178, 537 N.W.2d 142, 145 (Wis. Ct. App. 1995). The rule is simple: “the test for determining whether a conflict exists is whether the attorney has undertaken representation which is adverse to the interests of a present client.” *Steveon*, 196 Wis.2d at 178.

Rule 1.7 is “founded on the principle that a client is owed his counsel’s ‘undivided loyalty’ as his ‘advocate and champion.’” *Florida Ins. Guar. Assoc., Inc. v. Carey Canada, Inc.*,

¹ L.R. 83.10(a) states in relevant part:

[t]he standards of conduct of the members of the bar of this Court, of government attorneys admitted to practice before this Court must be those prescribed by the Rule of Professional Conduct for Attorneys, SCR:20:1.1-8.5, as such may be adopted from time to time by the Supreme Court of Wisconsin and except as such may be modified by this Court.

L.R. 83.10(a). See *Callas v. Pappas*, 907 F. Supp. 1257, 1259-60 (E.D. Wis. 1995) (noting that generally ethical issues are governed by federal law; however, the local rules of the Eastern District of Wisconsin provide that attorneys are bound by the Wisconsin standards of conduct and that the ethical codes of Wisconsin and the Seventh Circuit are based on the A.B.A. Model Rules of Professional Conduct. Thus, the standards applicable to disqualification motions are “essentially identical”); *Lyman v. St. Jude Medical S.C., Inc.*, No. 05-C-122, 2006 WL 801022, *5 (E.D. Wis. March 29, 2006) (discussing the seemingly contradictory case law within this district on whether the court should look only to federal or state ethical rules and discerning that a combination of both should be utilized).

749 F. Supp. 255, 258-59 (S.D. Fla. 1990) (citations omitted). As the comment to Rule 1.7 explains,

An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. . . . As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.

Wisconsin SCR Ch. 20:1.7(a) cmt. ¶¶ 1-2.

Q&B violated Rule 1.7 by concurrently representing Mercer against Milwaukee County.

1. Milwaukee County is a Client of Q&B.

Q&B tries to obscure this simple matter by claiming that it is unclear whether Milwaukee County is actually Q&B's client. Q&B argues that the "government entity" Q&B represents, Milwaukee County, is "functionally different" from the government entity that is adverse to Mercer in this case, Milwaukee County. Br. at 8. Not only is Q&B wrong in its analysis, it mistakes "functionally different" governmental entities for "functionally different" *work* that Q&B performs for the same entity. Q&B is wrong. Q&B represents Milwaukee County.

Q&B is aware that it represents Milwaukee County and has for many years. Domina Decl. ¶¶ 3, 4, Exs. A & B. The engagement letter filed herewith between Q&B and Milwaukee County explains in detail that Q&B represents Milwaukee County. *Id.* Q&B recently reaffirmed its representation of Milwaukee County. *Id.*, ¶ 7, Ex. C. Upon learning that Milwaukee County was considering legal action against Mercer, Q&B attorney Eric J. Van Vugt, by letter dated January 26, 2005, represented to William J. Domina, Milwaukee County Corporation Counsel, that such legal action "raises a potential conflict of interest *because of our ongoing work as bond counsel for Milwaukee County . . .*" *Id.*, ¶¶ 32-33, Ex. F.

When Milwaukee County advised Q&B that it neither could nor would waive such a conflict, Q&B again affirmed its representation of Milwaukee County: “As an initial matter, I can tell you that we have conferred with outside ethics counsel and confirmed that any *conflict of interest because of our concurrent representation of Milwaukee County and Mercer* is, indeed, waivable under SCR 20:1.7.” Domina Decl. ¶ 38, Ex. J.

Q&B now claims that Q&B cannot identify Milwaukee County as a client. “Ascertaining who the client really is can be a complex affair when a government entity is involved.” Br. at 9. In certain circumstances, a lawyer may represent one subunit of a governmental entity against another. Br. at 10. The ABA Opinion relied on by Q&B offers the example and proposition that a lawyer who represents a school district on employment issues may concurrently represent a land developer against the county’s zoning board. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 97-405 (1997) (“ABA Op. 97-405”). Those subunits are functionally distinct. *Id.* at 4-5. That is not the case here.

Q&B mistakes separate entities for a single entity’s separate functions. Q&B claims it represents Milwaukee County in its “treasury function” while MCERS and the Pension Board “fall under” Milwaukee County’s “human resources functions.” Br. at 11. First, Q&B has failed to explain how or why the narrow exception for functionally distinct entities should be expanded to include a single entity performing different functions. Second, Q&B fails even to address Milwaukee County as a plaintiff in this case, focusing only on the Pension Board and MCERS. *See generally* Q&B Brief. At bottom, Q&B represents Milwaukee County on bond issues and now seeks to be adverse to Milwaukee County in this lawsuit. Milwaukee County, however, is not functionally distinct from Milwaukee County and Q&B’s representation of both parties is ethically impermissible.

2. The authority cited by Q&B fails to support its arguments.

Q&B relies chiefly on ABA Opinion 97-405 to support its argument that there is no conflict of interest in its representation of current clients who are directly adverse. ABA Op. 97-405. The very first sentence of this Opinion however, seals Q&B's fate:

A lawyer who is engaged to represent a government entity, whether on a full-time or part-time basis, may not agree simultaneously to represent a private party against her own government client, absent the informed consent of both clients.

Id. at 1. Furthermore, the applicability of Rule 1.7(a) and the need to obtain consent from both clients “seem fairly clear where the government entity involved in both representations is indisputably the same.” *Id.* at 3. The “factual analysis” and the factors mentioned in Q&B's Brief on pages 9 and 10 apply only when there is no written agreement and there is a question as to the identity of the government client. *Id.* at 1, 8. Here, Q&B represents Milwaukee County; this fact is memorialized in writing. Domina Decl., ¶¶ 3, 4, 7, Exs. A, B & C.

Even assuming there was some question as to the identity of the client, the ABA Opinion provides two examples to clarify its point. Q&B's conflict is analogous to scenario “2,” in which the ABA finds an unwaivable conflict of interest. Scenario 2 involves a lawyer who is asked by the County Counsel to defend the County Health Department against a group of citizens alleging a mishandling of an immunization program. *Id.* at 2. At the same time, one of the lawyer's partners is retained to represent individuals bringing an action against the County Sheriff's Office, alleging police brutality. *Id.* In deciding whether the two county entities are the same client, the Opinion reasons that such may be established if there is a chance that the lawyer representing the County Health Department anticipates working with the same lawyers (*i.e.*, both actions involve County Counsel) that her partner would be opposing in the unrelated matter. *Id.* at 3. The ABA Opinion also placed importance on whether the “issues involved in either

representation [are] of such county-wide importance.” *Id.* The Opinion concludes that there is a direct conflict of interests in this situation and, absent the consent from both parties, the lawyer is precluded from such a dual representation for and against the County. *Id.* at 5.

Here, Q&B admits that as bond counsel it works primarily with Domina, the County’s corporation counsel. Br. at 4. Likewise, Mr. Domina was the primary point of contact in the analysis of claims, the search for and retention of counsel to pursue all claims, and for all aspects of the current litigation against Mercer. Domina Decl., ¶ 46. Indeed, Mr. Domina has corresponded several times with Attorney Van Vugt, lead counsel for Mercer. *Id.*, ¶¶ 26-41, 44-45, Exs. F, G, H, I, J, K, M & N. The issues presented in this case have obvious county-wide importance. Thus, Q&B’s current representation of Milwaukee County as bond counsel and the defendant in this case presents a direct conflict and Q&B must be disqualified.

The situation presented in *Brown & Williamson Tobacco Corp. v. Pataki* is inapposite from this case. 152 F.Supp.2d 276 (S.D.N.Y. 2001). First and foremost, the court in this case was applying the New York Code of Professional Responsibility, which is not based on the ABA Model Rules and does not contain a rule analogous to Rule 1.7. Even still, in *Brown*, the question centered on the identity of the client – whether the firm represented the various state agencies or the state as a whole. *Id.* at 282. In moving to disqualify the firm, the defendant alleged that the various agency representations had led to the State as a whole becoming the client of the firm. *Id.* at 283-84. The court held that an attorney-client relationship existed only between the firm and the different agencies it directly represented. *Id.* at 287. No such relationship existed between the firm and the State as a whole. *Id.* Thus, the action did not present a conflict of current clients. *Id.* at 289.

Again, there is no mystery or complexity in defining the client here. There is a contract between Milwaukee County and Q&B. There is no doubt that an attorney-client relationship exists between them. Accordingly, under the Wisconsin Rules of Professional Conduct 1.7(a) and the ABA Model Rules of Professional Conduct 1.7(a), Q&B may not represent another client whose interests are adverse to Milwaukee County, absent consent from both parties.

The two other cases cited by Q&B in footnote 47 are also inapplicable and distinguishable. In the *State of Minnesota v. Philip Morris, Inc.*, Second Judicial District, Ramsey County, No. C1-94-8565 (Nov. 29, 1994), the court, without explanation or analysis, held that a firm may be adverse to a government entity it represented presumably because the firm had ceased to work for the entity and had no plans to in the future. This situation is clearly inapplicable because Q&B has made known it intends to continue in its representation of Milwaukee County. (Letter April 14, 2006.)²

In *Aerojet Properties, Inc. v. State of New York*, 138 A.D.2d 39 (N.Y. 1988), again applying the New York Code of Professional Responsibility as opposed to rules based on the ABA Model Rules, the court did not find a conflict of interest because the action had been pending for over four years and the second, potentially conflicting representation of the state began after the initial Court of Claims action. The current conflict became official the day this litigation was filed; it is not a subsequent representation that “popped up” years into the litigation. This action is in its infancy, Mercer will not be unduly prejudiced, and disqualification is proper.

² Moreover, *Phillip Morris* is a trial court opinion from Minnesota state court. Therefore, it is not binding on this Court and is a weak form of persuasive authority. See also *Santacroce v. Neff*, 134 F. Supp. 2d 366, 370 (D.N.J. 2001) (“Although a party may have become a former client soon after the complaint against him was filed, the relevant date for determining status as a present or former client is the date on which the complaint was filed.”)

C. Q&B's representation of both Mercer and Milwaukee County is Materially Limited.

Even if the Court adopts Q&B's new rule that a lawyer can be adverse to a governmental entity client so long as the lawyer represents that entity in performing different governmental functions, Q&B still must be disqualified from this case.³ As discussed in the ABA Opinion, even absent a conflict under Rule 1.7(a), a lawyer is prohibited from dual representation under Rule 1.7(b) because of a "substantial likelihood that the lawyer's representation . . . may be 'materially limited' under Rule 1.7(b) by each lawyer's responsibilities to the other's client." *See* ABA Opinion 97-405, pp. 5-7. Here, Q&B faces a material limitation and therefore must be disqualified.

Q&B argues that the issues in this lawsuit are unrelated to the bond work Q&B performs for Milwaukee County and that no confidential information pertaining to either representation has been or will be shared. Br. at 11. As explained in detail above, Q&B is flat wrong when it claims that the issues in this lawsuit are unrelated to the bond work Q&B performs.

Contrary to Q&B's assertion, Milwaukee County has shared confidences with Q&B that directly pertain to this lawsuit. Q&B has been given intimate confidential knowledge of the financial status of Milwaukee's pension fund. Q&B has advised Domina and Milwaukee County on how to mitigate Milwaukee County's damages arising from Mercer's conduct. This knowledge and advice is protected by the attorney-client privilege and by the broader rule 1.6(a); Q&B's representation of Mercer in this action puts those confidences at risk.⁴ Q&B's promises that it has not revealed those confidences (Br. at 6-7) do not adequately protect the undivided

³ As discussed above, in certain circumstances, a lawyer may represent one subunit of a governmental entity against another when those subunits are functionally distinct. ABA Op. 97-405. That is not the case here.

⁴ *See Berg v. Marine Trust Co.*, 141 Wis. 2d 878, 891 n5. (Wis. App. 1987) (stating that there even absent proof that no confidential information has been exchanged, it is presumed that a client will disclose confidences to his or her attorney and therefore, the taint of disloyalty remains).

loyalty owed to Milwaukee County.

II. THE APPROPRIATE SANCTION IS DISQUALIFICATION

While disqualification may be considered a “drastic remedy,” “doubts regarding the existence of a conflict of interests should be resolved in favor of disqualification.” *Lyman*, 2006 WL 801022 at * 4. The interest sought to be protected by Rule 1.7(a) is one of undivided loyalty.

When the duty of loyalty is violated, the appropriate remedies are disqualification and, eventually, disgorgement of fees and payment of amounts sufficient to make the former client whole.⁵ See *Lemelson v. Apple Computer, Inc.*, 28 U.S.P.Q.2d 1412, 1418-19 (D. Nev. 1993) (holding that, because the interest to be protected by the concurrent representation rule is one of undivided loyalty, a *per se* disqualification rule should be applied when the rule is breached). In *Metro-Goldwyn-Meyer v. Trancinda Corp.*, 36 Cal.App.4th 1832 (Cal. App. 1995), the court explained why disqualification should result when the duty of loyalty is violated:

A client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter *wholly unrelated* to this one . . . cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship. All technicalities aside, few if any clients would be willing to suffer the prospect of their attorney continuing to represent them under such circumstances. . . . It is for that reason, and not out of concerns rooted in the obligation of client confidentiality, that courts and ethical codes alike prohibit an attorney from simultaneously representing two client adversaries, even where the substance of the representations are unrelated.

Id. at 1840 (emphasis in the original, internal citations omitted).

There is a simple, bright-line rule in Wisconsin for violation of Rule 1.7: disqualification. In *Steveon v. Rose K*, the Wisconsin Court of Appeals ordered disqualification where the attorney’s representation would be adverse to the interests of a present client. 196 Wis.2d at 180-

⁵ The Court need not resolve in connection with this motion Q&B’s obligation to disgorge its fees and compensate Milwaukee County for the costs of completing any work Q&B leaves unfinished and other damages the County might suffer.

81. In *Marten Trans. Ltd. v. Hartford Specialty Co.*, the Wisconsin Court of Appeals stated that there are just two relevant questions in determining disqualification: (1) whether an attorney-client relationship existed between a party and the law firm; and (2) whether the law firm was directly adverse to that party. 180 Wis.2d 285, 289, 297-98, 509 N.W.2d 106, 108, 111. (Wis. Ct. App. 1993), *rev'd on other grounds*, 194 Wis.2d 1, 533 N.W.2d 452 (Wis. 1995). Under such circumstances, disqualification is the appropriate remedy. *Id.* at 297-98.⁶

Because this litigation has just begun, Mercer will not be prejudiced by Q&B's disqualification. Any prejudice Mercer might suffer is outweighed by the benefit of ensuring that the impropriety will not taint these proceedings. *See Berg*, 141 Wis.2d at 890 (stating that "[p]ublic trust is essential the healthy functioning of the legal system . . . lawyers should avoid even the appearance of professional impropriety"). Moreover, Q&B's disqualification is not inequitable. Milwaukee County advised Q&B over one year ago that Milwaukee County would not waive a litigation conflict. Milwaukee reconfirmed that point to Q&B thereafter. Q&B thus acted at its own peril.

Finally, Milwaukee County's refusal to consent to allowing Q&B to be adverse is not idle. Over one year ago, in January of 2005, Milwaukee County gave Q&B an expressly conditioned waiver that expired the day this lawsuit was filed. As Professor Wolfram states:

[t]he condition confronted Mercer [and Q&B] with the need to assess the risk that its investment in funding Q&B's legal work prior to possible litigation might need to be duplicated to some extent if new counsel had to be retained for ensuing litigation. That risk was patent, and presumably Mercer was well-advised in making its calculated decision to face he need to incur duplicate legal fees if it proceeded on

⁶ Authority from other jurisdictions overwhelmingly supports disqualification. In situations analogous to this case, federal and state courts have consistently disqualified attorneys for violating the concurrent representation ethical standard. *Neff*, 134 F. Supp.2d at 366; *Mindscape, Inc. v. Media Depot, Inc.*, 973 F. Supp. 1130, 1132 (N.D. Cal. 1997); *Int'l Longshoremen's Assoc., Local Union 1332 v. Int'l Longshoremen's Assoc.*, 909 F. Supp. 287, 292-93 (E.D. Pa. 1995); *Harrison v. Fisons Corp.*, 819 F. Supp.1039, 1040-41 (M.D. Fla. 1993); *Lemelson*, 28 U.S.P.Q.2d at 1418-19; and *Truck Ins. Exch. v. Fireman's Fund Ins. Co.*, 6 Cal.App.4th 1050, 1055-58 (Cal. App. 1992). The same result should follow here.

the hope that litigation would not ensue. There is nothing in this situation that was not foreseen or at least not readily foreseeable. Milwaukee County has sued Mercer, and the County's consent is now of no effect.

Wolfram Decl. ¶ 11.

Thus, the situation remains, Q&B is Milwaukee County's bond counsel. Again, Q&B has examined Milwaukee County's finances and provided legal advice regarding ways in which Milwaukee County could mitigate some of the financial damage caused by the pension benefits. Such advice includes what and how items should be disclosed in the Official Statement and the possibility of mitigating damages through the issuance of Pension Obligation Bonds. Therefore, the confidential information provided to Q&B directly relates to injury and damages issues in this lawsuit and are directly related to the factual allegations in Plaintiffs' Complaint. Put differently, Q&B is actively engaged in the mitigation of Milwaukee County's damages claim and now wants to be adverse to Milwaukee County regarding that claim.

III. THE ENTIRE FIRM OF Q&B MUST BE DISQUALIFIED.

That the individual lawyers at Q&B who have represented Milwaukee County are not the same individual lawyers who are now defending Mercer against a suit by Milwaukee County gives no extra rights to the law firm under Rule 1.7. If one lawyer in a firm is prohibited from acting adversely to Milwaukee County, all are.⁷

Wisconsin Supreme Court Rule 20:1.10(a) states that:

While lawyers are associated in a firm, none of them shall knowingly represent when any one of them practicing alone will be prohibited from doing so by rule 1.7, 1.8(c), 1.9 or 2.2.

⁷ Even if Q&B has maintained a screening mechanism to ensure that the information obtained in the previous representation of the defendants is not used to the disadvantage of the defendants in this case, this is not enough to avoid imputed disqualification. *See Berg*, 141 Wis. 2d at 886, n3 ("It is irrelevant whether he [the attorney] actually obtained such information and used it against his former client, or whether . . . different people in the firm handled the two matters and scrupulously avoided discussing them.")

Q&B's defense of this action is plainly an ethical violation with respect to its client Milwaukee County. In light of the imputed disqualification rule, Q&B must be disqualified as counsel for Mercer because Q&B has obtained substantial information from Milwaukee County.

CONCLUSION

This is a very important case for Milwaukee County – financially and otherwise. It is totally inappropriate for Q&B – bond counsel for the County – to represent Mercer, when large numbers of other firms could easily represent Mercer instead. For the foregoing reasons, Milwaukee County respectfully requests that the Court disqualify Q&B from acting as counsel for plaintiff in this case.

Dated this 10th day of May, 2006.

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