

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

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MILWAUKEE COUNTY, EMPLOYEE'S  
RETIREMENT SYSTEM OF THE COUNTY  
OF MILWAUKEE, and, PENSION BOARD,  
EMPLOYEE'S RETIREMENT SYSTEM OF  
THE COUNTY OF MILWAUKEE,

Plaintiffs,

vs.

MERCER HUMAN RESOURCES  
CONSULTING, INC. f/k/a WILLIAM M.  
MERCER, INCORPORATED,

Defendant.

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**Civil No. 06-8-0372**

**MEMORANDUM OF LAW IN  
SUPPORT OF MOTION FOR  
DECLARATORY RULING**

Defendant Mercer Human Resources Consulting, Inc. (“Mercer”) respectfully asks this Court to issue a ruling declaring that its long-time professional liability counsel Quarles & Brady LLP does not have a disqualifying conflict of interest and may continue to represent Mercer in this lawsuit.

Mercer brings this motion because Milwaukee County (“the County”) has contended that Quarles & Brady should be disqualified from representing Mercer in this lawsuit because of what the County alleges is a conflict of interest stemming from Quarles’s representation of the County as bond counsel. Under recognized legal principles applicable to the representation of government entities, no such conflict exists. The government entity Quarles represents as bond counsel is functionally distinct from the government entities which are adverse to Mercer in this lawsuit. Quarles & Brady’s representation of the County as bond counsel is unrelated to its representation of Mercer as professional liability counsel in this lawsuit, no confidential

information relating to either representation has been shared by anyone at Quarles, and Quarles' representation of Mercer will not adversely affect its work for the County as bond counsel.

Moreover, the equities weigh in favor of allowing Mercer to retain its counsel and against disqualifying Quarles. Quarles & Brady has represented Mercer in the pension matters that this lawsuit is based upon since 2002, with the full knowledge and cooperation of the County. Quarles' experience, expertise and intimate knowledge of Mercer, and the facts and issues involved in these pension matters, is highly important to Mercer's defense of this lawsuit. Under these circumstances, this Court should not vindicate the County's strategy to deprive Mercer of its choice of counsel.

### STATEMENT OF FACTS

#### A. **Quarles's long-standing representation of Mercer as professional liability counsel.**

Mercer is a consulting firm that provides employee benefits, compensation, actuarial and financial services.<sup>1</sup> Quarles & Brady attorney Eric Van Vugt has represented Mercer for over twenty-five years, and has tried numerous cases for Mercer.<sup>2</sup> When Mr. Van Vugt joined Quarles & Brady in October of 1991, he brought Mercer with him as a client.<sup>3</sup> Since 1991, Quarles & Brady has represented Mercer in a variety of professional liability and other matters across the country, and Quarles has defended the majority of Mercer's cases involving alleged actuarial malpractice.<sup>4</sup> As a result of their work for Mercer, Mr. Van Vugt and the other Quarles

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<sup>1</sup> See Affidavit of Ziporah Janowski (hereinafter "Janowski Affidavit") at ¶ 1.

<sup>2</sup> See Affidavit of Eric Van Vugt (hereinafter "Van Vugt Affidavit") at ¶ 3.

<sup>3</sup> See *id.* at ¶ 3.

<sup>4</sup> See *id.* at ¶ 3; Janowski Affidavit at ¶ 2

& Brady lawyers with whom he works have extensive familiarity with Mercer and with the issues involved in actuarial malpractice litigation.<sup>5</sup>

In 2002, Quarles & Brady began representing Mercer in matters relating to the pension benefit improvement plan (“the pension matters”).<sup>6</sup> Specifically, Quarles & Brady represented Mercer in response to requests by state and federal officials that Mercer actuaries give testimony concerning cases against certain public officials.<sup>7</sup> In connection with those matters, Quarles & Brady worked cooperatively with counsel for the Pension Board, including Corporation Counsel William Domina and the firm of Reinhart Boerner Van Deuren s.c.<sup>8</sup> Quarles & Brady appeared at various proceedings and hearings on behalf of Mercer, with County entities represented by their own counsel.<sup>9</sup>

In 2004, Quarles & Brady represented Mercer with respect to a pending class action by county employees against Milwaukee County defendants.<sup>10</sup> In connection with this matter, Quarles & Brady again worked cooperatively with counsel for the Milwaukee County defendants.<sup>11</sup> Milwaukee County corporation counsel William Domina was aware that Quarles & Brady was Mercer’s professional liability counsel.<sup>12</sup>

Quarles’ services for Mercer in connection with these matters have been extensive.<sup>13</sup> Mercer has expended both money and time in getting the Quarles team familiar with the complex issues and facts related to the Milwaukee County pension fund.<sup>14</sup>

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<sup>5</sup> See Van Vugt Affidavit at ¶ 3; Janowski Affidavit at ¶ 2.

<sup>6</sup> See Van Vugt Affidavit at ¶ 5.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

<sup>10</sup> See *id.* at ¶ 6.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See Ziporah Affidavit at ¶ 3.

<sup>14</sup> See *id.*

**B. Quarles's representation of Milwaukee County as bond counsel in unrelated matters.**

Quarles & Brady has also represented Milwaukee County as bond counsel for many years. Quarles' role as bond counsel is to give advice and representation in connection with issuance of tax-exempt municipal bonds by the County, to finance its operations.<sup>15</sup> For numerous years, Brian Lanser has been the primary Quarles attorney representing Milwaukee County in bond work.<sup>16</sup> As bond counsel, Mr. Lanser works primarily with Steve Agostini, Fiscal and Budget Administrator for the County; Pam Bryant, Capital Finance Manager; and William Domina, the County's corporation counsel.<sup>17</sup>

Quarles' municipal finance attorneys have not had any involvement with matters directly relating to the County's pension plan or the pension board.<sup>18</sup> Pension liabilities are among the disclosures contained in offering documents for the County's annual tax-exempt bond financings and Quarles acts as bond counsel for those financings, but those disclosures are matters of public record.<sup>19</sup> Otherwise, the only involvement Quarles' municipal finance attorneys have had with respect to County pension matters have been in connection with advice concerning a proposed pension obligation bond financing and related legislative initiatives.<sup>20</sup> This work began in August of 2004, well after Mr. Van Vugt and his team were representing Mercer in the pension matters with the knowledge of the County.<sup>21</sup>

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<sup>15</sup> See Affidavit of Brian Lanser (hereinafter "Lanser Affidavit") at ¶ 2.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at ¶ 3.

<sup>19</sup> See *id.* at ¶ 3b.

<sup>20</sup> See *id.* at ¶ 3a. A referendum on the financing proposal in April of 2005 was unsuccessful and the financing never occurred. *Id.*

<sup>21</sup> See *id.*

**C. This lawsuit.**

On January 21, 2005, an article in the Milwaukee Journal Sentinel suggested that Milwaukee County was considering legal action against Mercer related to the pension matters.<sup>22</sup> In response to this article, Mr. Van Vugt had a conversation with Mr. Domina on January 25, 2005.<sup>23</sup> In that conversation, Mr. Van Vugt reminded Mr. Domina that Quarles & Brady had been representing Mercer in connection with various matters, including the state and federal investigations and the purported class action, stemming from the pension benefit improvement plan, and he discussed with Mr. Domina the fact that Milwaukee County's possible litigation against Mercer might be said to raise a conflict of interest issue because of Quarles & Brady's work as bond counsel for Milwaukee County.<sup>24</sup>

Mr. Domina responded that he had no objection to Quarles & Brady's continued representation of Mercer in the pension matters, and that he agreed to waive any conflict of interest.<sup>25</sup> Mr. Domina indicated that if the County brought litigation against Mercer, litigation counsel may wish to revisit the conflict issue, but that he personally had no objection to the firm's representation of Mercer in litigation brought by the County.<sup>26</sup> Mr. Domina also stated that he had done research on various Mercer cases, and knew that Quarles & Brady represented Mercer in actuary malpractice trials across the country.<sup>27</sup>

The next day, Mr. Van Vugt sent Mr. Domina a letter confirming the January 25 conversation, and asked him to countersign the letter to confirm the understanding as to Quarles

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<sup>22</sup> See Van Vugt Affidavit at ¶ 7.

<sup>23</sup> See *id.* at ¶ 8.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *id.*

<sup>27</sup> See *id.*

and Brady's representation of Mercer.<sup>28</sup> Mr. Domina signed and returned the letter, with a handwritten note stating "Waiver effective only until court litigation, if any."<sup>29</sup>

On March 29, 2006, Milwaukee County, the Employee's Retirement System of the County of Milwaukee, and the Pension Board, Employee's Retirement System of the County of Milwaukee brought this lawsuit against Mercer. A few minutes after the lawsuit was filed, Mr. Domina hand-delivered to Mr. Van Vugt a letter of that same date.<sup>30</sup> Mr. Domina's March 29, 2006 letter stated that the service and filing of the lawsuit made the County and Mercer directly adverse to each other, and as a result Quarles & Brady's continued representation of Mercer constituted a conflict of interest.<sup>31</sup> Mr. Domina's letter further stated that the County did not believe that the conflict was waivable, and that even if it were waivable, the County would not waive the conflict to allow Quarles & Brady to appear on behalf of Mercer in the lawsuit.<sup>32</sup> Mr. Domina's March 29, 2006 letter was the first indication that Quarles & Brady ever received that the County would challenge Quarles's representation of Mercer in the pension litigation.<sup>33</sup>

**D. Preservation of confidences.**

Neither Mr. Van Vugt nor anyone with whom he works on the pension matters for Mercer has ever discussed any confidential information with anyone working on bond matters for Milwaukee County,<sup>34</sup> and neither Mr. Lanser nor anyone with whom he works on bond matters for the County has ever discussed any confidential information with Mr. Van Vugt or anyone on his team.<sup>35</sup> Mercer is aware of the bond work done for Milwaukee County by other

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<sup>28</sup> See *id.* at ¶ 9.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.* at ¶ 11.

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> See *id.* at ¶ 10.

<sup>35</sup> See Lanser Affidavit at ¶¶ 4-5.

lawyers at Quarles, and has no problem with Quarles continuing to do that work with the understanding that no confidential information will be shared relative to this litigation.<sup>36</sup>

Both Mr. Van Vugt and Mr. Lanser believe that they can continue to zealously and effectively represent their respective clients, and that the continuing representation by Quarles of Milwaukee County with respect to bond work, and the representation by Quarles of Mercer in this lawsuit, would not impair the firm's ability to do so.<sup>37</sup> Both groups would continue to remain walled off from any confidential information concerning the other representation.<sup>38</sup>

Michael Ostermeyer, a commercial real estate lawyer at Quarles, has served as a Trustee of the Milwaukee County Pension Board since February, 2004.<sup>39</sup> Mr. Ostermeyer does not do any legal work for the Pension Board, and is not compensated for his services.<sup>40</sup> Since becoming a Trustee, Mr. Ostermeyer has insulated himself from any Board discussion about claims or potential claims against Mercer, and he has not participated or been present for any Board discussions about the claims or potential claims against Mercer.<sup>41</sup> Mr. Ostermeyer has had no conversations with Mr. Van Vugt or anyone on his team about Mercer or the pension matters.<sup>42</sup> Mr. Domina has been aware of Mr. Ostermeyer's service as Trustee, and has been aware that he has been screened off from all of the Board's discussions about the claims against Mercer.<sup>43</sup>

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<sup>36</sup> See Janowski Affidavit at ¶ 4.

<sup>37</sup> See Van Vugt Affidavit at ¶ 12; Lanser Affidavit at ¶ 7.

<sup>38</sup> See *id.*

<sup>39</sup> See Affidavit of Michael Ostermeyer (hereinafter "Ostermeyer Affidavit") at ¶ 3.

<sup>40</sup> See *id.* at ¶¶ 3, 5.

<sup>41</sup> See *id.* at ¶ 7.

<sup>42</sup> See *id.* at ¶ 8.

<sup>43</sup> See *id.* at ¶ 9.

## ARGUMENT

### I. Applicable Law

This Court applies federal law, specifically the Model Rules of Professional Conduct as promulgated by the American Bar Association, to determine whether a conflict of interest exists and requires disqualification of an attorney. *See Nelson v. Green Builders, Inc.*, 823 F. Supp. 1439, 1443 (E.D. Wisc. 1993) (“Ethical questions before the Court are governed by both precedent and the precepts of the Model Rules of Professional Conduct promulgated by the American Bar Association”); *Powell v. Adams*, 763 F. Supp. 406, 407 (E.D. Wisc. 1991) (resolving question of whether alleged conflict of interest required disqualification by applying federal law rather than Rules of the Supreme Court of Wisconsin); *Marketti v. Fitzsimmons*, 373 F. Supp. 637, 639 (W.D. Wisc. 1974) (same).<sup>44</sup>

### II. There Is No Conflict Of Interest Because The Government Entity Quarles Represents As Bond Counsel Is Functionally Different From The Government Entities Which Are Adverse To Mercer In This Lawsuit.

Rule 1.7 of the Model Rules of Professional Conduct (“MRPC”) sets forth the rule for conflicts of interest for current clients. Rule 1.7 provides:

(a) Except as provided in paragraph (b), 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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<sup>44</sup> As the court in *Powell* noted, these standards are not dissimilar to the standards under the Wisconsin rules. *See Powell*, 763 F. Supp. at 407.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.<sup>45</sup>

Unique issues are presented when the client is a government entity. *See Brown & Williamson Tobacco Corp. v. Pataki*, 152 F. Supp. 2d 276, 282 (2<sup>nd</sup> Cir. 2001) (“[A]scertaining who the client really is can be a complex affair when a government entity is involved.”). The American Bar Association has addressed the question of government entity conflicts of interests, in Formal Opinion 97-405 (April 19, 1997).<sup>46</sup>

Opinion 97-405 applies a functional analysis to determine the identity of a government client for conflict of interest purposes, looking to factors such as how the government entities are defined and funded, whether the government entities are unrelated in form and function, whether the entities are fiscally and otherwise independent of one another, and whether the organizational

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<sup>45</sup> Wisconsin SCR 20:1.7 provides:

(a) 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.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents in writing after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

<sup>46</sup> A copy of the ABA opinion is attached.

and decision-making structure of the two entities are separate. Under this analysis, if the government entities are functionally different, they are not the same client for conflict purposes, and a lawyer may represent the government entity while at the same time her firm is representing a private client against another component part of the same government without seeking the clients' consent under MRPC 1.7. *See* Opinion 97-405; *Brown & Williamson Tobacco Corp.*, 152 F. Supp. 2d at 278, 284 (citing Opinion 97-405 and finding that law firm that represented various state interests regarding State's social welfare programs not disqualified from representing tobacco company in lawsuit against state).<sup>47</sup>

Here, there is no MRPC 1.7 conflict because the government entities bringing this lawsuit are functionally distinct from the government entity Quarles represents as bond counsel. The plaintiffs in this lawsuit are Milwaukee County, the Employee's Retirement System of the County of Milwaukee ("MCERS") and the Pension Board, Employee's Retirement System of the County of Milwaukee ("Pension Board"). According to the complaint, the MCERS is a defined benefit plan that administers pension benefits payable to County employees.<sup>48</sup> The Pension Board administers and operates the MCERS.<sup>49</sup> The complaint defines MCERS and the Pension Board collectively as the Pension Fund.<sup>50</sup> The MCERS and the Pension Board fall under the County's human resources functions.<sup>51</sup> Quarles does not represent the MCERS or the Pension

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<sup>47</sup> *See also State of Minnesota v. Philip Morris, Inc.*, Second Judicial District, Ramsey County, No. C1-94-8565 (Nov. 29, 1994) (denying motion to disqualify law firms from representing tobacco companies in lawsuit based on their concurrent representation of the state); *Aerojet Properties, Inc. v. State of New York*, 530 N.Y.S. 2d 624 (1988) (lawyer could simultaneously represent claimant in action against state for unpaid rent and state in personal injury matter). A copy of the decision in *State of Minnesota v. Philip Morris, Inc.* is attached.

<sup>48</sup> Complaint at ¶ 2.

<sup>49</sup> *Id.* at ¶ 3.

<sup>50</sup> *Id.* at ¶ 4.

<sup>51</sup> *E.g.*, <http://www.county.milwaukee.gov/display/router.asp?docid=7716> (last visited on Apr. 18, 2006) (stating that Milwaukee County's Department of Human Resources will maintain the County's pension programs).

Board as legal counsel; those entities are regularly represented by other firms.<sup>52</sup> In contrast, the bond work is part of the County's treasury function. Thus, because the government entity involved in the bond work is "unrelated in form and function" to the government entities which have brought this lawsuit, there is no 1.7 conflict and Quarles may continue to represent Mercer in this lawsuit. *See* Opinion 97-405.

Moreover, neither Quarles' representation of Mercer nor the County is "materially limited" under MRPC 1.7(b) by Quarles' responsibilities to the other client. *See* Opinion 97-405. The pension matters at issue in this lawsuit are unrelated to the bond work performed for the County. Mr. Van Vugt and Mr. Lanser can continue to zealously and effectively represent their respective clients, and the continuing representation by Quarles of the County with respect to bond work, and the representation by Quarles of Mercer in this lawsuit, would not impair the firm's ability to do so. No confidential information pertaining to either representation has been or will be shared. Thus, Quarles & Brady's representation of Mercer in this lawsuit is fully consistent with its duties of loyalty and confidentiality to the County, and does not constrain in any way its ability to zealously represent the County as bond counsel. *See Brown & Williamson*, 152 F. Supp. 2d at 289 (denying disqualification and finding "no risk of a lack of vigor" in representations "or that confidential information will be used to the disadvantage of the State."); *Aerojet Properties, Inc.*, 530 N.Y.S. 2d at 41 (noting "that there is absolutely no substantive nexus between the two lawsuits," nor "any real potential for disclosure of confidential information, notwithstanding the Bureau's involvement in each lawsuit.").

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<sup>52</sup> Ostermeyer Affidavit at ¶ 6.

**III. Even If There Were A Conflict, Disqualification Is Not Warranted.**

Even if there were a conflict here, Quarles & Brady should not be disqualified as Mercer's counsel. As this court has recognized numerous times, disqualification is a drastic and extreme remedy that should be used sparingly. *E.g., Powell*, 763 F. Supp. at 407 (“Disqualification is a drastic measure which courts should hesitate to impose except when absolutely necessary.”) (internal quotations and citations omitted). Thus:

Although disqualifying counsel protects one attorney-client relationship, it destroys another by denying a party its chosen representation. . . . [Disqualification] may thus create both psychological hardship, by requiring an opponent to obtain and trust different counsel, and financial hardship, by requiring an opponent to incur additional fees while new counsel becomes familiar with the litigation.

*Nelson*, 823 F. Supp. at 1444. *See also Wolf, Block, Schorr & Solis-Cohen v. Navon*, 2006 U.S. Dist. LEXIS 9859 at \*4-5 (Civ. No. 05-6038, E.D. Pa. Mar. 9, 2006) (“extreme” remedy disqualification is “disfavored” in part because “disqualification robs one’s adversary of her choice of counsel . . .”); *Rohm and Haas Co. v. Amer. Cyanamid Co.*, 187 F. Supp 2d 221, 227 (D.N.J. 2001) (“It is well settled that because motions to disqualify can have such drastic consequences, courts disfavor such motions and grant them only ‘when absolutely necessary.’”) (citing cases); *Brown & Williamson*, 152 F. Supp. 2d at 289 (recognizing prejudice that would result from disqualification of law firm that had represented client for 40 years and had knowledge of client’s sales program at issue in lawsuit, witnesses and legal issues).

Moreover, courts are hesitant to disqualify counsel for technical violations of the rules because disqualification motions can be used abusively. *See Nelson*, 823 F. Supp. at 1444 (“Motions to disqualify counsel, moreover, should be resolved with extreme caution because they may be used abusively as a litigation tactic . . . .”); *Wolf, Block, Schorr & Solis-Cohen*, 2006

U.S. Dist. LEXIS 9859 at \*4 (disqualification disfavored “because of the risk [] that one could subvert the ethical rules in an attempt to use them as a procedural weapon.”).

Disqualification would be particularly inappropriate here. Quarles has a long-standing client relationship with Mercer, and has extensive familiarity and experience with Mercer. Importantly, Quarles & Brady has represented Mercer on the pension matters at issue in this lawsuit since 2002, with the full knowledge of the County, and has developed extensive knowledge of the facts and issues involved in this lawsuit. Yet the County waited until March of 2006, and the very day this lawsuit was filed, to object to Quarles’ representation of Mercer.<sup>53</sup> *See Kafka v. Truck Ins. Exchange*, 19 F.3d 383, 386 (7<sup>th</sup> Cir. 1994) (finding attorney disqualification argument waived because “A motion to disqualify should be made with reasonable promptness after a party discovers the facts which lead to the motion.”); *Brown & Williamson*, 152 F. Supp. 2d at 290-291 (finding tactical maneuvering in State’s filing of disqualification motion where State never moved to disqualify law firm in any other case and had notice of representation but failed to file motion until after it commenced expedited proceedings).

Furthermore, depriving Mercer of its choice of counsel under these circumstances would cause Mercer unwarranted delay, inconvenience and expense. *See SWS Financial Fund v. Salomon Bros., Inc.*, 790 F. Supp. 1392, 1394, 1403 (N.D. Ill. 1992) (refusing to disqualify attorney even though representation violated Rule 1.7 of Rules of Professional Conduct for the Northern District of Illinois because “[t]here is no danger in this case that Schiff’s advocacy of Hickey will be less than fully zealous, the trial would not be tainted by Schiff’s continued

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<sup>53</sup> Corporation counsel for the County did indicate in a conversation on January 25, 2005 that retained counsel for the County might revisit the conflict issue in the event of litigation against Mercer, but said he personally had no objection to Quarles’ representation of Mercer. *See Van Vugt Affidavit, Ex. A.*

representation of Hickey, the subject of the litigation is not substantially related to the work Schiff has done for Salomon, and disqualification would simply not be the appropriate remedy.”). Thus, even if the Court were to find a technical violation of MRPC 1.7, disqualification is inappropriate because it would be unduly prejudicial to Mercer, depriving it of its long-standing choice of counsel who has accumulated extensive knowledge and expertise in the pension matters for over four years, all with the knowledge of the County.

### CONCLUSION

For the foregoing reasons, Mercer respectfully requests that this Court rule that Mercer’s counsel Quarles & Brady does not have a conflict of interest and may continue to represent Mercer in this lawsuit.

Dated this 19<sup>th</sup> day of April, 2006.

/s/

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Eric J. Van Vugt  
State Bar No. 1017336  
Paul D. Bauer  
State Bar No. 1029658  
Attorneys for Defendant  
QUARLES & BRADY LLP  
411 East Wisconsin Avenue  
Milwaukee, WI 53202-4497  
(414) 277-5625 – phone  
(414) 978-8625 – facsimile  
[ejv@quarles.com](mailto:ejv@quarles.com)  
[pdb@quarles.com](mailto:pdb@quarles.com)

FAEGRE & BENSON LLP  
James A. O’Neal  
MN Bar No. 8248X  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-3901  
(612) 766-7000 – phone  
**Special Counsel for Defendant, Relating  
Only to Issue of Potential Disqualification of  
Counsel**

