



LAWYER TO LAWYER MENTORING PROGRAM

WORKSHEET OO

CO-COUNSELING

Worksheet OO is intended to facilitate a discussion about co-counseling. A new lawyer and mentor may choose to co-counsel in a case, if they follow the steps below and determine such a relationship would be mutually beneficial and appropriate.

WHAT WENT WELL?

Start by sharing with each other a brief story of something that went well in your practice this week:

Share your reflection by on one of these questions: What caused the good event? What does it mean? How did you contribute? Others? How can you have more such events in the future?

ACTIVITIES FOR TODAY

Follow this checklist for determining whether to co-counsel with your mentoring partner:

- Determine whether one attorney has expertise that will further the representation and that one attorney will gain important legal skills in accordance with Tennessee Rules of Professional Conduct Rule 1.1. See especially comments 2 and 5.
- Determine whether any conflict of interest exists. See Tennessee Rules of Professional Conduct Rules 1.7 – 1.12 and 1.18. Follow the conflict of interest rules articulated in the attached materials excerpted from the Louisiana State Bar Association's *Practice Aid Guide: The Essentials of Law office Management*, (2007) and compare it to Tennessee's disciplinary rules. (See http://www.lsba.org/2007MemberServices/PracticeAidGuide/PAG_2006_update_Section_2.pdf)
- Make sure that both the new lawyer's employer and the mentor's employer are comfortable with co-counseling in this particular case.
- Discuss the scope of representation within the parameters of Tennessee Rules of Professional Conduct Rule 1.2.
- Address the malpractice insurance requirements of Tennessee Rules of Professional Conduct Rule 1.4. Disclose the amount of malpractice insurance that you carry to your mentoring partner. If a lawyer does not have malpractice insurance, the client's written acknowledgement of that fact is required pursuant to Tennessee Rules of Professional Conduct Rule 1.4.



- Discuss the division of fees between the mentor and new lawyer in Tennessee Rules of Professional Conduct Rule 1.5 with special attention to comment 7.
- After careful consideration of each of the factors listed above, determine whether co-counseling is mutually beneficial and appropriate in this particular matter.
- If upon your consideration of the factors above, you and your mentoring partner decide that co-counseling is both desirable and proper, draft a co-counseling agreement. You may consult the co-counseling agreement sample supplied with the materials for this worksheet.
- The lawyer who has already established an attorney-client relationship with the client in this matter must discuss the co-counseling agreement with him or her, carefully explaining all of the points and considerations listed above. If the client agrees to the arrangement, the client shall be presented with a written copy of the co-counseling agreement for his or her review.
- Obtain client’s informed consent to the co-counseling arrangement in writing by having the client sign the co-counseling agreement.

ACTION STEPS

End the session by discussing what action steps you can take to either improve or set yourself up for future success based on today’s discussion. Discuss how one or more of your Signature Strengths can help you achieve success in these steps.

RESOURCES

TENNESSEE RULES OF PROFESSIONAL CONDUCT

I. CLIENT-LAWYER RELATIONSHIP

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence, and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of



legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and the use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See RPC 1.2(c).

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by RPC 1.4, shall consult with the client about the means by which the client's objectives are to be accomplished. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent, preferably in writing.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.



(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.



- (d) A lawyer shall not enter into an arrangement for, charge, or collect:
- (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or the award of custodial rights, or upon the amount of alimony or support, or the value of a property division or settlement, unless the matter relates solely to the collection of arrearages in alimony or child support or the enforcement of an order dividing the marital estate and the fee arrangement is disclosed to the court; or
 - (2) a contingent fee for representing a defendant in a criminal case.
- (e) A division of a fee between lawyers who are not in the same firm may be made only if:
- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
 - (2) the client agrees to the arrangement, and the agreement is confirmed in writing; and
 - (3) the total fee is reasonable.
- (f) A fee that is nonrefundable in whole or in part shall be agreed to in a writing, signed by the client, that explains the intent of the parties as to the nature and amount of the nonrefundable fee.

Comment

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, and the agreement must be confirmed in writing. It does not require disclosure to the client of the share that each lawyer is to receive. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails the obligations stated in RPC 5.1 for purposes of the matter involved. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See RPC 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

- (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.



(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.

(c) A lawyer shall not represent more than one client in the same criminal case or juvenile delinquency proceeding, unless:

- (1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist; and
- (2) each affected client gives informed consent.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client, unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client to the lawyer or a person related to the lawyer, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift, unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of the representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and



- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
- (f) A lawyer shall not accept compensation or direction in connection with the representation of a client from one other than the client unless:
- (1) the client gives informed consent;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by RPC 1.6.
- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless:
- (1) each client is given a reasonable opportunity to seek the advice of independent legal counsel in the transaction; and
 - (2) each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
- (h) A lawyer shall not:
- (1) make an agreement prospectively limiting the lawyer's liability to a client or prospective client for malpractice; or
 - (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless the lawyer fully discloses all the terms of the agreement to the client in a manner that can reasonably be understood by the client and advises the client in writing of the desirability of seeking and gives the client a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.
- (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
 - (2) contract with a client for a reasonable contingent fee in a civil case.
- (j) [Reserved]
- (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

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, confirmed in writing.
- (b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
- (1) whose interests are materially adverse to that person; and



(2) about whom the lawyer had acquired information protected by RPCs 1.6 and 1.9(c) that is material to the matter.

(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 reveal information relating to the representation or use such information to the disadvantage of the former client unless (1) the former client gives informed consent, confirmed in writing, or (2) these Rules would permit or require the lawyer to do so with respect to a client, or (3) the information has become generally known.

RULE 1.10: IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7, 1.9 or 2.2, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by RPCs 1.6 and 1.9(c) that is material to the matter.

(c) Except with respect to paragraph (d) below, if a lawyer is personally disqualified from representing a person with interests adverse to a client of a law firm with which the lawyer was formerly associated, other lawyers currently associated in a firm with the personally disqualified lawyer may represent the person, notwithstanding paragraph (a) above, if both the personally disqualified lawyer and the lawyers who will represent the person on behalf of the firm act reasonably to:

(1) identify that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(2) determine that no lawyer representing the current client has acquired any information from the personally disqualified lawyer that is material to the current matter and is protected by RPC 1.9(c);

(3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and the other lawyers in the firm; and

(4) advise the former client in writing of the circumstances that warranted the implementation of the screening procedures required by this Rule and of the actions that have been taken to comply with this Rule.

(d) The procedures set forth in paragraph (c) may not be used to avoid imputed disqualification of the firm, if:

(1) the disqualified lawyer was substantially involved in the representation of a former client; and



(2) the lawyer's representation of the former client was in connection with an adjudicative proceeding that is directly adverse to the interests of a current client of the firm; and

(3) the proceeding between the firm's current client and the lawyer's former client is still pending at the time the lawyer changes firms.

(e) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in RPC 1.7.

(f) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by RPC 1.11.

**RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER
AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES**

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to RPC 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless both the personally disqualified lawyer and the lawyers who are representing the client in the matter act reasonably to:

(1) ascertain that the personally disqualified lawyer is prohibited from participating in the representation of the current client; and

(2) determine that no lawyer representing the client has acquired any material confidential government information relating to the matter; and

(3) promptly implement screening procedures to effectively prevent the flow of information about the matter between the personally disqualified lawyer and other lawyers in the firm; and

(4) advise the government agency in writing of the circumstances that warranted the utilization of the screening procedures required by this Rule and the actions that have been taken to comply with this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if both the personally disqualified lawyer and the lawyers who are representing the client in the matter comply with the requirements set forth in paragraph (b).



(d) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee:

(1) is subject to RPCs 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing, or under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(ii) negotiate for private employment with any person who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a staff attorney to a court or as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for private employment as permitted by RPC 1.12(b) and subject to the conditions stated in RPC 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

RULE 1.12: FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk or staff attorney to such a person or as an arbitrator, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator. A lawyer serving as a staff attorney to a court or as a law clerk to a judge or other adjudicative officer or arbitrator may negotiate for employment with a party or lawyer involved in a matter in which the lawyer is participating personally and substantially, but only after the lawyer has notified the court, judge, other adjudicative officer, or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless both the disqualified lawyer and the lawyers representing the client in the matter have complied with the requirements set forth in RPC 1.11(b)(1), (b)(2), and (b)(3) and have advised the appropriate tribunal in writing of the circumstances that warranted the utilization of the screening procedures required by this Rule and the actions that have been taken to comply with this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT



(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as RPC 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that prospective client in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter; and

(ii) written notice is promptly given to the prospective client.

(e) When no client-lawyer relationship ensues, a prospective client is entitled, upon request, to have the lawyer return all papers and property in the lawyer's possession, custody, or control that were provided by the prospective client to the lawyer in connection with consideration of the prospective client's matter.

View complete rules and comments at: <http://www.tsc.state.tn.us/rules/supreme-court/8>.

Conflicts of Interest

Conflicts of interest can pop up at any time. The best advice is to perform a preliminary conflicts check before the initial consultation with a potential client, and then another, more comprehensive, conflicts check after the initial consultation but before accepting the representation. Finally, another conflicts check should be performed each time a new party enters into the legal matter. If a conflict is found and the conflict is one that is not consentable, or is consentable, but the consent was not obtained, then the lawyer must decline the representation, or if already representing the client, withdraw from the representation. Otherwise, the lawyer may face grave consequences, including disqualification, mandatory withdrawal, disciplinary actions, reversal of proceedings, forfeiture of fees, and malpractice claims. A non-engagement letter or a disengagement letter (see pages 30 and 32) should be sent to document such declination or termination of the representation.

Types of Conflicts

Generally, conflicts of interest fall into two categories. Conflicts may arise from directly adverse representations or where the representation of a client is materially limited as a result of the lawyer's other responsibilities or interests. A directly adverse conflict arises when you are called upon to represent one client against another client. A lawyer cannot represent two opposing parties in the same litigation. Moreover, a lawyer may not act as an advocate in one matter against a client the lawyer represents or represented in some other matter. Former clients are an excellent example of this type of conflict.

Even when there is no directly adverse conflict, a conflict of interest may nevertheless exist if there is a significant risk that the lawyer's representation may be materially limited as a result of the lawyer's responsibilities to other clients, to third persons, or as a result of the lawyer's own personal interest.

- ▶ This type of conflict may arise in the context of dual or multiple representations (*i.e.*, representing a husband *and* a wife, or a buyer *and* a seller, or two or more clients forming a business entity).
- ▶ It also may arise in the context of a financial interest (*i.e.*, owning a percentage of a client's business or making an agreement to limit malpractice liability to a client).
- ▶ Further, a conflict may arise in the context of a hidden interest (*i.e.*, romantic involvement with a client). You should not have sex with your clients. Nor should you enter into any business transactions with your clients, or knowingly acquire an ownership or other pecuniary interest adverse to your clients.¹
- ▶ You should not enter into an agreement to limit your malpractice liability without first making sure that your client is represented by independent counsel.

You should closely scrutinize the circumstances of each representation to determine whether the clients have "differing interests" that may call for different attorneys representing each client. It is also your duty to reject or disengage from any representation which is going to cloud your independent professional judgment and not allow you to render objective advice.

Consentable Versus Non-Consentable Conflicts

You must independently and objectively decide whether a conflict is consentable. "When a *disinterested* lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly

¹ Most legal malpractice insurance policies exclude from coverage claims where the insured attorney has a greater than 10 percent interest in his client's business.

ask for such agreement or provide representation on the basis of the client's consent." Annotated Model Rule of Professional Conduct at p. 124 (ABA 2d ed. 1992) (emphasis added). When in doubt, the attorney should decline the adverse representation.

While clients may consent to representation notwithstanding a conflict, some conflicts are non-consentable. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client. Consentability is typically determined by considering whether the interest of the clients will be adequately protected if the clients are permitted to give their informed consent to a representation burdened by a conflict of interest. Representation is prohibited if under the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation as required by Rules of Professional Conduct 1.1 (see page 81) and 1.3 (see page 82). For this reason, conflicts where clients are aligned directly against each other in the same litigation are non-consentable. Other conflicts are non-consentable because applicable law prohibits the representation. For example, under federal criminal statutes, certain representations by a former government lawyer are prohibited, despite the informed consent of the former client.

Consentable Conflicts

Not all representations containing the types of conflicts described above have to be declined or terminated, if the potential or existing client gives informed consent. The following types of transactions can be entered into, but only with the client's informed consent:

► **Business transaction or acquiring pecuniary interest adverse to the client.**

You may not enter into a business transaction or acquire an ownership or other pecuniary interest adverse to the client unless:

1. the transaction is fair and reasonable to the client;
2. the terms are fully disclosed and given to the client in writing, in a manner clearly understood by the client;
3. the client is advised in writing well in advance of the transaction to seek advice of independent counsel; and
4. the client consents in writing.

► **Using information relating to a client's representation.**

You may not use information relating to the representation of an existing or former client to the disadvantage of the client, unless the client has been fully informed and consents to its use.

► **Compensation from another party.**

You may not accept compensation for representing a client from any person other than the client unless the client gives informed consent, or the compensation is provided by contract with a third person, such as an insurance contract or a prepaid legal service plan; there is no interference with a lawyer's independence or professional judgment or with the client-lawyer relationship; and none of the client's confidential information is revealed.

► **Multiple client settlements.**

You may not enter into an aggregate settlement of the claims of multiple clients unless each client gives informed consent in a writing signed by the client.

► **Former clients.**

If you formerly represented a client in a matter, you may not represent another person in the same or a substantially related matter if that person's interests are materially adverse to the interest of the former client, unless your former client gives informed consent, confirmed in writing.

► **Imputation of conflicts of interest.**

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 (see page 84) or 1.9 (see page 87), unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

► **Special conflicts of interest for former and current government officers and employees.**

You may not represent a private client in connection with a matter in which you participated personally and substantially as a public government officer or employee, unless the government agency gives its informed consent, confirmed in writing, to such representation. Additionally, your firm and associates may not represent this client, unless you have been screened from any participation in the matter, you are not given any part of the fee, and your former government agency is notified immediately in writing.

➤ **Former judge, arbitrator, mediator or other third-party neutral.**

You may not represent a client in connection with a matter in which you participated personally and substantially as a judge, other adjudicative office, or law clerk to such a person, or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing. Additionally, your firm may not represent this client, unless you are screened, you are not given any part of the fee, and written notice is given to the appropriate tribunal.

➤ **Organization as client.**

If an organization is your client, you may not represent any of its directors, officers, employees, members, shareholders, or other constituents unless the organization consents. If you represent an organization, you may also represent any of its directors, officers, employees, members, shareholders, or other constituents subject to the provisions of Rule 1.7 (see page 84). If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate officer of the organization.

➤ **Financial assistance to clients.**

Financial assistance to clients is allowed under certain circumstances. See Rules 1.4(c) and 1.8(e) and discussion on page 39.

Non-Consentable Conflicts

Some conflicts simply cannot be waived. Not even a very detailed consultation and a subsequent written client consent evidencing the client's desire for your representation will do. Consequently, you must not enter into certain prohibited representations and transactions with your clients. These prohibited transactions include, but are not limited to:

- Preparing an instrument giving yourself or any person related to you any substantial gift from your client, including a testamentary gift, unless you and your client are related.
- Negotiating an agreement giving yourself literary or media rights to a portrayal of the representation.
- Directly adverse representation in the same matter.
- Despite the prohibition in Rule 1.8(e) (see page 85) against providing financial assistance to clients, it is permitted under certain circumstances. (See page 39 in the Fees, Billing and Trust Accounts section.)
- Agreeing prospectively to limit your liability to a client for malpractice unless the client is independently represented in making the agreement or settle a claim or potential claim for malpractice liability with an unrepresented client or former client without first advising the client in writing that independent representation is appropriate.
- Acquiring a proprietary interest in the cause of action or subject matter of the litigation, except you may acquire a lien authorized by law to secure your fees/expenses and contract with your client for a reasonable contingent fee in a civil case.

Informed Consent

You've determined that there is a conflict and that the conflict is consentable. What do you do next? (Remember, if the conflict is non-consentable, your job is finished except for the mailing out of the non-engagement or disengagement letter.) First, you must conclude that the conflicting representation will not inure to the detriment of your client or clients. The Rules of Professional Conduct require that this decision must be made using objective, reasonable and independent standards. Second, each client must consent to the representation after being informed of the conflict. And the consent that is required is "informed consent." New Rule 1.0 Terminology paragraph "e" (see page 81) defines informed consent as the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risk of and reasonably available alternatives to the proposed course of conduct. Informed consent is voluntarily and knowingly granted after full disclosure of all relevant information that likely would influence the client's decision.² So what should be included in the client's informed consent letter?

1. The full disclosure of all relevant information transmitted in writing to the client in a manner reasonably understood by the client.
2. An acknowledgment that the client was given an opportunity in writing to seek the advice of independent counsel in consenting to the conflict.
3. The client's consent in writing.

² Schneider, Harry H. Jr., "An Invitation to Malpractice," ABA's Standing Committee on Lawyer's Professional Liability.

4. An acknowledgment that all affected clients were sent the informed consent letter.
5. If applicable, an assurance that the disqualified lawyer is being screened from any participation in the matter and will not be given any part of the fee, nor reveal any protected confidential information.

See page 31 for a sample informed consent letter.

The following Rules of Professional Conduct should be reviewed when embarking on a conflicts of interest check:

- Rule 1.7 - Conflict of Interest: Current Clients (see page 84);
- Rule 1.8 - Conflict of Interest: Current Clients: Specific Rules (see page 84);
- Rule 1.9 - Duties to Former Clients (see page 87);
- Rule 1.10 - Imputation of Conflicts of Interest: General Rule (see page 87);
- Rule 1.11 - Special Conflicts of Interest for Former and Current Government Officers and Employees (see page 87);
- Rule 1.12 - Former Judge, Arbitrator, Mediator or Other Third-Party Neutral (see page 88); and
- Rule 1.13 - Organization as Client (see page 88).

Additionally, all conflicts of interest checking systems should:

- Be integrated with other office systems;
- Provide conflicts data for everyone in the office;
- Check for varying spellings of names;
- Show any party's relationship with the client; and
- Remind lawyers to document all conflict search results with memos in the file.

Conflicts of Interest Checklist

- All attorneys and staff must disclose necessary information concerning potential conflicts relating to past clients at prior places of employment, but not confidential information. (See page 29.)
- Prior to the initial consultation, the potential clients must disclose all name information, including their other names (*i.e.*, maiden, other marital, etc.), opposing parties' names, and associated persons' and/or entities' names. (See pages 26-28.)
- Thereafter, at the initial consultation, the potential clients must disclose more detailed information in order for a more comprehensive conflicts check to be made. (See pages 26-28.)
- The attorney then performs the conflicts check, reviewing the master client list, the former client list, and the subject matter list, if applicable.
- The Conflicts Search Results Memo must be circulated to all attorneys and staff for their review and input. (See page 29.)
- Follow up with any attorney or staff member who fails to return the Conflicts Search Results Memo within 24 hours of distribution. (See page 29.)
- Analyze the results of the circulated memo and of the preliminary and comprehensive conflicts checks to determine whether there exists a conflict.
- If no conflict is found, the new client is entered into the conflict system and sent an engagement letter.
- If a conflict is found and the attorney is not allowed to accept the representation, send a non-engagement letter explaining the conflict. (See page 30.)
- If a conflict is found and the attorney is allowed to accept the representation:
 - disclose the circumstances which give rise to the actual or potential conflict;
 - disclose a description of actual/foreseeable adverse effects of those circumstances;
 - if the potential conflict arises out of dual or multiple representation, then disclose that no attorney-client privilege exists as between the clients;
 - if the potential conflict arises out of a past representation (*i.e.*, past representation of adverse party in an unrelated matter), then disclose all pertinent non-privileged facts necessary for the potential client to make an informed decision as to whether to waive the conflict.
- Obtain written informed consent after advising the potential client to seek independent legal advice regarding the waiver. (See page 31.)¹
- If a conflict is found, all necessary disclosures are made, and written informed consent is obtained, accept the representation by sending an engagement letter.²
- Once representation has been accepted, perform another conflicts check each time a new party enters into the legal matter. If the new party creates a conflict, withdraw and send a disengagement letter. (See page 32.)

¹ Remember, some conflicts cannot be waived, even though an informed consent was obtained.

² However, we recommend that you do *not* accept the representation because informed consents do not cure all conflicts and there may still be a violation of the ethical rules.

Additional Resources for Conflicts of Interest

Book and Articles

- ▶ ABA, *The Business Lawyer*, Conflict of Interest Issues, 50 Bus. Law 1381 (1995).
- ▶ *Lawyers Liability Review*, Vol. 14, No. 10 (Oct. 2000).
- ▶ Mallen, Ronald E., Smith, Jeffrey M., *Legal Malpractice No. 2*, Chapter 14, Fiduciary Obligations in General; Chapter 15, Fiduciary Obligations - Conflicting Interests; Chapter 16, Fiduciary Obligations Adverse Representation (4th ed. 1996).
- ▶ National Reporter on Legal Ethics and Professional Responsibility, *Kansas Formal and Informal Opinions*, Opinion No. 95-04, Conflict of Interest; Adverse Representation (University Publications of America).
- ▶ Ciolino, Dane S., *Louisiana Professional Responsibility Law and Practice 2004*, 2nd Edition (Louisiana State Bar Association, 2004).

Case Management (Conflicts) Software

- ▶ Case Master 10, Software Technology, Inc., (402)423-1440
- ▶ Amicus Attorney V, Gavel & Gown Software, (800)472-2289
- ▶ Abacus Law, Abacus Data Systems, (800)726-3339
- ▶ CLS/Summit, Computer Law Systems, (800)932-9038
- ▶ Thomson Elite, (800)977-6529
- ▶ Tussman Program 7.1, Tussman Programs, Inc., (800)228-6589
- ▶ TimeMatters, Data.Txt Corp., (800)328-2898
- ▶ Northshore Technology Center, (985)893-7062

Conflicts of Interest Search Form

(Privileged and Confidential)

The following must be completed by the potential client, attorneys and staff:

1. Obtain all the information on the potential client:

Name _____
Other names _____
Nicknames _____
Address _____
Spouse's name _____
Spouse's other names _____
Spouse's nicknames _____
Address (if different) _____
Opposing parties' names _____
Associated persons or entities _____

Potential client stops here and Preliminary Conflict Check performed. If no conflict is found, potential client completes § 2 and then attorneys and staff complete the remainder.

2. Determine which area of law is involved and write in the names, nicknames or other names of the associated persons/entities involved:

If litigation matter, who is the:

Insured _____
Plaintiff(s) _____
Defendant(s) _____
Insurer _____
Tutor/minor _____
Expert witness(es) _____

If divorce matter, who is the:

Client _____
Spouse _____
Child(ren) _____
What is/are the age/ages of the child(ren)? _____

Continued

If corporate/business/real estate matter, who is the:

Owner(s)/spouse(s) _____

Buyer(s) _____

Partner(s) _____

Seller(s) _____

Officer(s) _____

Directors _____

Shareholder(s) _____

Subsidiaries/affiliates _____

Key employees _____

Property address(es) _____

Any opposing party in a transaction _____

If probate matter, who is the:

Deceased _____

Spouse/child(ren)/heir(s)/legatee(s) _____

Succession representative _____

Attorney for succession representative _____

If worker's compensation matter, who is the:

Injured worker _____

Employer _____

Insurer _____

If estate planning matter, who is the:

Testator/testatrix _____

Spouse/child(ren)/heir(s)/legatee(s) _____

Trustee _____

Continued

If criminal matter, who is the:

Accused _____

Victim(s) _____

Witness(es) _____

Co-Defendant(s) _____

If bankruptcy matter, who is the:

Client _____

Creditor(s) _____

Spouse _____

Results of Search

Conflict System Search done by _____

Title _____ Relationship to firm _____

Instructions:

- Duplicate of this form and attached Conflicts Search Results Memo routed to and signed by all attorneys and staff.
- No conflict found; entered as new client into conflict system and engagement letter sent by _____
- Conflict found, analyzed, and client accepted (explain reasons)

- Engagement and Informed Consent letters sent by _____
- Conflict found, client not accepted, non-engagement letter sent by _____

Conflicts of Interest Search Results Memo

1. Circulate this form to all attorneys and staff, making sure to attach the completed Conflicts of Interest Search Form.
2. Give a deadline for the return of the memo: _____
3. Have all attorneys and staff answer all of the following questions:
 - a. Do you have any business interest with:
Client? Yes _____ No _____
Anyone associated with client? Yes _____ No _____
Anyone associated with persons/entities? Yes _____ No _____
 - b. Do you have any personal interests with:
Client? Yes _____ No _____
Anyone associated with client? Yes _____ No _____
Anyone associated with persons/entities? Yes _____ No _____
 - c. Have you had any current or past relationship, affiliation or association with this client? Yes _____ No _____
 - d. Do you know of any reason we should not represent this client? Yes _____ No _____

If you have answered yes to any of the above, please give details below:

Signature of Attorney/Staff: _____ Date: _____

Sample Conflict of Interest Non-Engagement Letter

June 20, 20—

Mr. John J. Non-Client
123 Main Street
Anytown, Louisiana 45678

Re: Conference on June 19, 20—;
Potential Personal Injury Claim against Mr. Smith.

Dear Mr. Non-Client:

I enjoyed meeting with you recently regarding your potential claim against Mr. Smith. As we discussed, I have a possible conflict of interest. Although we did not discuss the particulars of your potential claim, it does not appear to be appropriate under the ethical rules for our firm to represent you. We must therefore decline to represent you. Under these circumstances, you should consult other counsel immediately to determine your rights and interests. Please keep in mind that you may be facing important deadlines, so you should not delay in contacting other counsel.

Thank you for offering us this engagement. If we may be of service to you in other matters in the future, we hope you will contact us then.

Sincerely,

FIRM NAME

Attorney Name

Sample Conflict of Interest Informed Consent Letter

June 20, 20—

Mr. John J. Potential Client
123 Main Street
Anytown, Louisiana 45678

Dear Mr. Potential Client:

Below is your Informed Consent of our firm representing you in a business acquisition, to which you may agree after careful consideration of all the facts, even though there are actual and potential conflicts of interest. At this time, we wish to remind you of the relevant information with respect to the potential conflict, which you should use to make your decision.

- This representation will
- This representation will also
- “ _____”

We previously recommended to you in writing that you seek independent legal advice regarding the conflicts. Having followed that advice, you sought independent legal counsel and were apprised of conflicts that exist and may arise. Nevertheless, if you knowingly and voluntarily consent to representation by the firm, (FIRM NAME), and waive any and all actual and potential conflicts of interest, please sign below and return this letter to us.

[Optional]

[Additionally, Attorney Smith has been disqualified from taking any role in the representation of your case and will be screened from any participation in the matter. He will not be given any part of the legal fee, nor will he be allowed to reveal any of your confidential information he obtained while working at his prior law firm.]

All affected clients have been put on notice by being sent a copy of this informed consent letter.

Sincerely,

FIRM NAME

Attorney Name

Client Signature _____

Client Name Typed _____

Date _____

Sample Conflict of Interest Disengagement Letter

June 20, 20—

Mr. John J. Former Client
123 Main Street
Anytown, Louisiana 45678

Re: File Subject or Matter Description
Calcasieu Parish, Louisiana

Dear Mr. Former Client:

Thank you for allowing us to be of service to you in the above-captioned matter. The joining of A.B. Sea, Inc. in your lawsuit has created a conflict of interest for our firm because one of our partners, (Attorney Name), has been and continues to be A.B. Sea's primary counsel in other matters. Your continued representation would result in an adverse conflict of interest.¹ Therefore, we must withdraw from representation of you at this time. Additionally, Mr. Wisdom will refer A.B. Sea to independent counsel for representation in your matter.

We are enclosing your entire file with this letter, as well as a check in the amount of \$750.00, representing a refund to you of the amount of the advance deposit which has not been earned. You should contact other counsel immediately to further pursue (and protect) your interests in this matter. Your new counsel should have adequate time to serve your best interests, and you should provide said counsel with your file for necessary review. A complete status of the matter with deadlines noted is attached.

Our final invoice for service rendered is enclosed. It was a pleasure serving you, and we wish you the best in all your future endeavors.

Sincerely,

FIRM NAME

Attorney Name

Enclosures

(CAVEAT: Make sure any withdrawal/termination is in compliance with Rule 1.16 of the Rules of Professional Conduct, see page 91.)

¹ A conflict that is reasonably anticipated, although not present at the inception of the representation, can be waived in advance with adequate disclosure and consent by the client.

Sample Conflict of Interest Financial Assistance Agreement

June 20, 20—

Mr. John J. Client
123 Main Street
Anytown, Louisiana 45678

Dear Mr. Client:

This is a Financial Assistance Agreement between you, Client, and our firm, outlining the terms by which this firm may advance you financial assistance in connection with pending or contemplated litigation, as permitted by Rule 1.8 (e) of the Rules of Professional Conduct and jurisprudence.

Subject to your written consent below, we may advance you any or all of the following:

- Court costs and expenses of litigation, including but not limited to: Filing fees; deposition costs; expert witness fees; transcript costs; witness fees; copy costs; photographic, electronic, or digital evidence production; investigation fees; related travel expenses; litigation related medical expenses; and any other specific expense directly related to our representation. [Your repayment of these expenses advanced by our firm is contingent on the outcome of the matter for which you hired our firm, provided these expenses were reasonably incurred] or [Your repayment of these expenses advanced by our firm is not contingent upon the outcome of the matter for which you hired our firm, and you remain liable to us for these expenses]. We will provide you with a written statement of our specific financial assistance and the timeframe within which you have to repay it;
- [If you are an indigent client, and are unable to pay for legal representation, our firm may pay court costs and expenses of litigation on your behalf];
- Actual invoiced costs incurred solely for purposes of our representation: Computer legal research charges; long distance telephone expenses; postage charges; copying charges; mileage and outside courier service charges .We *cannot* pass on to you any overhead costs that may be incurred by us, which may include, but are not limited to: Office rent; utility costs; charges for local telephone services; office supplies; fixed asset expenses; ordinary secretarial and staff services. [However, if you are paying us at an *hourly rate*, and not at a fixed rate or on a contingency basis, we may advance you reasonable charges for paralegal services. If we do advance paralegal services to you, you will be notified at the beginning of the representation.]
- If you are in necessitous circumstances (after a determination by us that without minimal financial assistance, your case would be adversely affected), we may provide financial assistance to you, in addition to court costs and litigation expenses, as follows:
 - You acknowledge that we have not used this advance or loan guarantee as an inducement by us, or anyone acting on our behalf, to secure employment;
 - You acknowledge that neither our firm, nor anyone acting on our behalf, has offered to make advances or loan guarantees prior to being hired by you, nor that we publicized or advertised a willingness to make advances or loan guarantees to you;
 - Financial assistance may not exceed the minimum sum necessary to meet your needs, and/or your spouse's needs, and/or your dependents' needs for food, shelter, utilities, insurance, non-litigation related medical care and treatment, transportation expenses, education, or other *documented expenses* necessary for living; [Please note that a blanket request for assistance without documented receipts or invoices cannot be honored.]
 - You agree that you will not broadcast to others our financial assistance to you.

Subject to your written consent below, we may advance you financial assistance, with the following restrictions:

- Financial assistance that we may provide to you cannot bear interest, fees or charges of any nature;
- We may use our firm's line of credit or loans obtained from financial institutions in which we have no ownership, control and/or security interest (unless our ownership, control and/or security interest of a publicly traded financial institution is less than 15%), provided we make reasonable, good faith efforts to obtain a favorable interest rate;
- In using a line of credit or loan, we may not pass on to you interest charges, including any fees or other charges connected to such loans, in an amount exceeding the actual charge by the third party lender, or ten percentage points (10%) above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding, whichever is less;

- We may only provide a guarantee or security on a loan to you to the extent that the interest charges, including any fees or other charges connected to such loans, do not exceed ten percentage points (10%) above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding;
- Prior to the execution of any settlement documents, approval or any disbursement sheet (as provided in Rule 1.5), or upon submission of a bill for our services, we will provide you with a complete text of Rule 1.8 (e), as re-enacted, of the Louisiana Rules of Professional Conduct, effective date of April 1, 2006;

This Agreement is null unless you date and sign below.

Sincerely,

FIRM NAME

ATTORNEY'S NAME (typed or printed)

CLIENT'S NAME (typed or printed)

ATTORNEY'S SIGNATURE

CLIENT'S SIGNATURE

DATE

DATE

WITNESS NAME (typed or printed)

WITNESS'S SIGNATURE

DATE

CO-COUNSELING AGREEMENT

This Agreement is entered into by and among TAHIRIH JUSTICE CENTER, and [Law Firm], as co-counsel (hereinafter “co-counsel”) representing [client] in an action against [Defendants], for wage and hour and related claims from the time she entered the United States, approximately [date] until [date].

The purpose of this agreement is to clarify the rights and responsibilities of co-counsel with respect to the conduct of litigation, including payment of litigation expenses and the recovery of costs and attorney’s fees. This agreement does not preclude co-counsel from entering into different agreements regarding other matters.

The parties agree as follows:

1. RELATIONSHIP OF CO-COUNSEL

Co-counsel agree that decisions about the conduct of the litigation will, whenever possible, be made by consensus. [Law firm] will be designated as lead counsel. Lead counsel shall be responsible for directing the course and conduct of the litigation and ensuring that the matter is prosecuted in a timely and professional manner. Lead counsel shall also determine the assignment of specific task responsibility to all attorneys participating in the case. Co-counsel agree to work cooperatively and to keep each other apprised of all developments in the case, including communications with the client, court and opposing counsel.

2. IDENTIFICATION

Pleadings and other papers shall bear the names of all participating attorneys, and shall be signed by or on behalf of the principal drafter.

3. LITIGATION EXPENSES

[Law firm] shall be responsible for advancing all litigation expenses in the case not paid for by Plaintiff. For purposes of this Agreement, litigation expenses shall include filing fees, court fees, certified reporters’ fees, other fees in connection with depositions, fees for service of process, photocopying costs, mailing/shipping costs, long distance telephone calls and faxes, consultant fees, witness fees, payments to expert witnesses, necessary travel costs, and any other fees or expenses arising from this litigation. Litigation expenses do not include overhead costs such as rent, local telephone calls, secretarial time or payment of salaries for attorneys or paralegals working on this case. No co-counsel shall incur any litigation expenses exceeding \$500 without approval from [law firm].

4. LIABILITY FOR ASSESSMENT OF FEES OR SANCTIONS

Liability for fees, costs or sanctions assessed directly against attorneys in this case shall be shared equally by co-counsel, unless the assessment resulted from actions taken outside the generally agreed-upon litigation strategy. In that case, the firm or agency employing the attorney responsible for those actions shall be deemed liable for the assessment. Nothing in this agreement shall be considered as acceptance of responsibility or liability on behalf of any of the individual attorneys for the fees, costs or sanctions imposed.

5. MAINTENANCE AND EXCHANGE OF RECORDS

Co-counsel agree to maintain a complete, detailed and contemporaneous record of time (to the nearest 1/10 of an hour) devoted to the prosecution of this action. Co-counsel shall use best efforts to exchange time records and current billing rates, along with records of the litigation costs and other costs charged to the case, quarterly.

6. RECOVERY OF ATTORNEY FEES AND LITIGATION EXPENSES

In the event that the litigation is successful in whole or in part, co-counsel shall jointly seek court-awarded litigation expenses and attorney fees for all time and expenses reasonably expended in the case. In the event attorney fees and/or expenses are recovered pursuant to settlement or court award, they shall be divided among co-counsel as follows:

- a. If expenses and fees are recovered by settlement or court order, each co-counsel shall first be reimbursed, from the lump sum, the full amount of litigation expenses it paid, provided the recovery is sufficient to cover such expenses;
- b. If expenses and fees recovered by settlement or court order exceed the amount to be repaid to counsel pursuant to section 6 a., the balance after such payments are made shall be reimbursed to co-counsel on a pro rata basis, based on the total lodestar, unless some other allocation is specified by settlement or court order. [Law firm] agrees to donate any attorney fees awarded or attributed to it to the Tahirih Justice Center after all litigation expenses and fees are recovered.
- c. Expenses that are reduced or disallowed by the court or discounted by settlement shall also be deducted on a pro rata basis, based on the proportion of total expenses and shall not be borne only by the organization whose costs and expenses have been reduced, disallowed or discounted.

7. BILLING JUDGMENT

Co-counsel will each be responsible for exercising reasonable billing judgment over the number of hours per attorney, legal worker, or law student submitted in a fee petition or recovered in settlement.

8. PUBLIC RELATIONS AND CONTACT WITH MEDIA

Each co-counsel shall have the opportunity to review and comment on every press release before it is released to the media. To the extent feasible, all co-counsel should be consulted before any attorney working on the matter contacts or provides comment to the media.

9. MALPRACTICE COVERAGE

Co-counsel represent that they carry and will continue to carry their own complete coverage of malpractice insurance during the pendency of this litigation.

10. WITHDRAWAL

This Agreement shall terminate at the conclusion of the litigation. However, any co-counsel may withdraw from representation prior to the conclusion of the litigation, provided that such withdrawal is consistent with the Rules of Professional Conduct for the State Bar of Virginia and the applicable provisions of Virginia law.

11. DISPUTE RESOLUTION

In the event of any dispute among co-counsel regarding this Agreement or the distribution of any recovery under this Agreement, co-counsel shall attempt in good faith to resolve the matter through negotiation and, if unsuccessful, shall agree upon a neutral third party to assist them in attempting to resolve the matter informally. If these measures are unsuccessful, the dispute shall be referred for binding arbitration with JAMS or another mutually agreed upon alternative dispute resolution provider. Co-counsel shall bear its own fees and costs, and shall share any mutual costs (e.g., arbitrator's fee), regardless of the outcome of the dispute.

Dated: _____

TAHIRIH JUSTICE CENTER

Dated: _____

[LAW FIRM]

TBA