



1 Mr. Heller telephoned attorney Steve Morris of the law firm of Morris, Pickering & Peterson to inquire  
2 about Mr. Morris serving as Chinois’s local counsel. Mr. Heller states that his law partner, Mr.  
3 Fagelbaum, had previously worked with Mr. Morris in other litigation and suggested him to Mr. Heller.  
4 *Heller Declaration*, ¶ 3.

5 According to Mr. Heller, after introducing himself, he told Mr. Morris that he represented  
6 Chinois in the action against Forum Shops LLC in Delaware and that Chinois planned to file an action  
7 in Las Vegas. *Id.* ¶ 4. Mr. Heller and Mr. Morris discussed the pros and cons of filing in state versus  
8 federal court, potential causes of action, that the proposed action in Nevada would contain eight causes  
9 of action for damages and injunctive relief, possible defendants, litigation strategy, prospects for  
10 settlement, other counsel expected to be included in the case and potential state and federal judges.  
11 According to Mr. Heller, “[i]n response, Mr. Morris provided legal and other advice on all these  
12 subjects and his personal and professional views on counsel and judges.” *Id.* ¶ 4.

13 At some point during the conversation, Mr. Heller disclosed to Mr. Morris that Caesars Palace  
14 was one of the contemplated defendants in the lawsuit. *Id.* ¶ 5. Mr. Morris then revealed that his firm  
15 had represented Caesars. According to Mr. Heller, Mr. Morris did not state that he could not act as  
16 local counsel for Chinois, “but indicated it might be a problem.” *Id.* It appears from Mr. Heller’s  
17 declaration, that the telephone conversation then concluded. Chinois thereafter retained C. Stanley  
18 Hunterton of Hunterton & Associates, to act as local counsel in the Nevada action. *Id.*

19 On January 8, 2008, Chinois filed its complaint in the Nevada District Court against Forum  
20 Shops, LLC, Forum Developers Limited Partnership, Simon Property Group Limited Partnership,  
21 Simon Property Group, Inc., Caesars Palace Corp. and Caesars Palace Property Corporation. *Heller*  
22 *Declaration*, ¶ 6. *See also Petition for Removal (#1), Exhibit “A”*. On February 7, 2008, Defendant  
23 Caesars removed the action to Federal Court. Mr. Heller states that “[t]o my surprise, Caesars was  
24 represented by Mr. Morris’ partner, Kris Pickering and MP&P.” *Heller Declaration*, ¶ 6.

25 Mr. Heller states that he called Mr. Morris on February 13, 2008 to object to his firm  
26 representing Caesars because of their previous conversation regarding the case. According to Mr.  
27 Heller, “Mr. Morris responded by stating that he had only a vague recollection of the details of the call,  
28 that he had not taken any notes and had not discussed the call with anyone else.” *Id.* ¶ 7. Mr. Morris

1 also assured Mr. Heller that he had no involvement in the case.

2 On February 14, 2008, Mr. Morris sent an email letter to Mr. Heller regarding their conversation  
3 on February 13, 2008. *Motion (#70), Exhibit "A."* In his letter, Mr. Morris stated he had thought about  
4 their conversation the previous day and Mr. Heller's belief that Mr. Morris's law firm and Ms.  
5 Pickering should not represent Caesars in this case. Mr. Morris stated that notwithstanding Mr. Heller's  
6 call (the day before), he was unable to recall anything about their earlier "conversation several weeks or  
7 months ago" which justified Mr. Heller's request that Mr. Morris and his firm not represent Caesars in  
8 the lawsuit. Mr. Morris further stated that he had only the faintest recollection of the conversation, that  
9 he recalled that Mr. Heller stated that he represented Chinois at the Forum Shops in some form of  
10 dispute with another tenant or subtenant involving a nightclub. Mr. Morris also stated that he recalled  
11 telling Mr. Heller that Simon is the lessor of the Forum Shops and would be a difficult party to litigate  
12 against. Mr. Morris also recalled that he told Mr. Heller that Simon leases the ground for the Forum  
13 Shops from Caesars and that his law firm represents Harrah's which owns Caesars.

14 Mr. Morris's letter further stated that he did not recall the context in which the remarks were  
15 made, but he probably said "we would not represent tenants at the Forum shops because of the  
16 relationship between the Forum and Caesar's." *Motion (#70), Exhibit "A."* Mr. Morris stated that he  
17 either recommended attorney Stan Hunterton, or confirmed another lawyer's recommendation of Mr.  
18 Hunterton to Mr. Heller as local counsel, and that they also discussed attorney Harold Gewerter. Mr.  
19 Morris indicated that he did not recall what he said about Mr. Gewerter, although he believed it would  
20 have involved his assessment of Mr. Gewerter's skills and experience based on Mr. Morris's  
21 knowledge of him. *Id.* Mr. Morris closed his letter by stating:

22 That's about all I can recall. I took no notes when we spoke, and I did not  
23 make a record that we had spoken. I did not speak to anyone in the firm  
24 about our call, not even Kris. Frankly, I put the call completely out of  
25 mind and did not recall it from the message you left with my secretary  
26 yesterday to return your call, which, of course, I did. Until you told me  
27 yesterday that we had spoken some time ago, I did not associate you with  
28 litigation here. I did not speak with anyone in the firm about your earlier  
call, and I was, until you mentioned it yesterday, unaware that you have  
anything to do with the lawsuit in which Kris represents Caesar's. I am  
not familiar with the case or involved in it in any respect.

For these reasons, I do not believe you have a basis to ask that the firm  
discontinue representing Caesar's in the case in which you and Stan are

1 involved. I regret that our brief conversation last year which apparently  
2 resulted in you retaining Stan prompts you to believe otherwise.

3 *Motion (#70), Exhibit "A."*

4 Mr. Heller responded to Mr. Morris's email letter as follows:

5 I [A?]good deal more about the Chinois dispute was discussed than you  
6 recall.  
7 However, in light of your very limited recollection of what was discussed,  
8 and the fact that you are not personally involved in the case, I see no  
9 problem with your partner's continued participation in the litigation.  
10 BTW, Stan Hunterton was recommended by a close friend and colleague  
11 in Los Angeles, but you recall correctly making some very favorable  
12 comments to me about Stan (all of which have proven to be true).  
13 My Partner Jerry Fagelbaum sends his warm regards.  
14 Hope we get to work together on the same side next time.

11 *Motion (#70), Exhibit "A."*

12 In response to Mr. Heller's email, attorney Kris Pickering sent the following email to Mr.  
13 Heller:

14 Thank you,

15 In the interest of full disclosure, you should also know that Steve and I  
16 are married.

17 I can confirm, though, that he never discussed his conversation with me  
18 and, further, that I will keep this work separate from him.

18 *Id.*

19 Mr. Heller then responded to Ms. Pickering as follows:

20 I really appreciate the clarification and your assurance. It was  
21 unnecessary but very kind of you to write. Caesars is very fortunate to  
22 have you in their corner.

22 *Id.*

23 In his Declaration in support of Plaintiff's motion to disqualify, Mr. Heller states that based  
24 upon the assurances in Mr. Morris's February 14 email response that "he had erected the equivalent to  
25 an ethical wall around himself and would have no involvement in the case, Chinois did not press its  
26 objections to Kris Pickering and MP&P representing Caesars in this case." *Heller Declaration*, ¶ 8.

27 Following these communications, the litigation proceeded. Co-Defendants Forum Shops, LLC,  
28 et. al., filed a motion to dismiss on March 17, 2008. The Caesar Defendants, through Ms. Pickering,

1 filed their motion to dismiss on July 1, 2008. Various extensions to file reply briefs and other briefs  
2 were thereafter granted and the hearing on the motions to dismiss was continued to December 2, 2008.  
3 In the meantime, Ms. Pickering ran for and was elected to the Nevada Supreme Court on November 4,  
4 2008. As a result, she was required to withdraw from her law practice before her swearing in on  
5 January 5, 2009. Other counsel were apparently unavailable for the December 2, 2008 hearing on the  
6 motions to dismiss. Ms. Pickering attempted to get the motion rescheduled prior to her departure from  
7 the law firm but was unable to do so. During December, Ms. Pickering indicated that Mr. Morris  
8 would be taking over Defendant Caesars' defense. In response to that information, Plaintiff's counsel  
9 sent a letter to Ms. Pickering on December 23, 2008 objecting to Mr. Morris now becoming involved as  
10 counsel for Caesars. *Motion (#70), Exhibit "C."* Ms. Pickering responded that Mr. Morris's  
11 communication with Mr. Heller prior to the lawsuit did not disqualify him or the firm from continuing  
12 to represent Caesars. Ms. Pickering also suggested that Plaintiff had waived its objections to Mr.  
13 Morris or his law firm representing Caesars in the case. Plaintiff thereupon filed its instant Motion to  
14 Disqualify (#70).

15 In his Declaration in support of Defendant Caesars' Opposition to the Motion to Disqualify  
16 (#78), Mr. Morris indicated that his conversation with Mr. Heller occurred "sometime in or about  
17 October 2007." He described it as "brief, but cordial." *Morris Declaration (#78), ¶ 2.* He states that  
18 Mr. Heller told him that he represented Chinois and that he was looking for local counsel. Mr. Morris  
19 also states that Mr. Heller indicated that he was considering other Las Vegas counsel besides Mr.  
20 Morris. *Id.* ¶ 3. Mr. Heller told him that the Simon parties had sued Chinois in Delaware and he was  
21 thinking of filing a lawsuit on Chinois's behalf against Simon in Las Vegas. *Id.* ¶ 4. Mr. Heller asked  
22 him about his experience with the local courts, his assessment of the calendars and the quality of the  
23 judiciary in the state and federal court. Mr. Morris states that he responded to these inquiries and  
24 provided his opinions. Mr. Morris denies, however, that Mr. Heller informed him that the Delaware  
25 action was limited to declaratory relief or that the proposed Nevada action would involve eight causes  
26 of action. *Id.* ¶ 5. While he and Mr. Heller did discuss Mr. Morris's prior litigation experience with the  
27 Simon parties, and Mr. Morris told him that they would be formidable opponents, Mr. Morris denies  
28 that they discussed "litigation strategy," possible defendants beyond the Simon entities, or the prospects

1 for settlement. *Id.* ¶ 6.

2 Mr. Morris believes that he remarked during the conversation that Caesars was the ground lessor  
3 for the Forum Shops and that his law firm represents Harrah's, the owner of Caesars. Mr. Morris states:  
4 "It is in this context I believe Mr. Heller, for the first and only time, suggested that Caesars might be  
5 drawn into the litigation being contemplated for a reason he did not express." *Id.* At that point, Mr.  
6 Morris states that he advised Mr. Heller that he could not represent tenants at the Forum because of the  
7 relationship between Forum and Caesars. *Id.* According to Mr. Morris, they then discussed other  
8 potential local counsel, including Mr. Hunterton or Mr. Gewerter and the conversation concluded. *Id.*  
9 ¶¶ 7-8.

10 Defendant has also provided a declaration of Michael Kostrinsky, the Chief Litigation Officer of  
11 Harrah's Operating Company, who states that he contacted Ms. Pickering in late January 2008 and  
12 requested that she represent Caesars in this lawsuit. *Kostrinsky Declaration (#78)*, ¶ 3. Ms. Pickering  
13 thereafter handled the case until after she was elected to the Nevada Supreme Court. Following her  
14 election, Mr. Kostrinsky requested that the case be transferred to Mr. Morris. Mr. Kostrinsky notes that  
15 Mr. Morris and Ms. Pickering have represented Caesars and/or its parent, Harrah's, in many matters for  
16 the ten years he has been the Chief Litigation Officer. Mr. Kostrinsky states that he was not aware of  
17 Mr. Morris's communication with Mr. Heller in October 2007 until the motion for disqualification was  
18 filed.

19 In his Supplemental Declaration (#80), Mr. Heller disputes the assertions made by Mr. Morris  
20 in his affidavit as follows: (1) The conversation between he and Mr. Morris occurred shortly before  
21 Plaintiff consulted with attorney Hunterton in December 2007; (2) Mr. Heller told Mr. Morris that the  
22 Simon entities were the operators and lessors of the Forum Shops of which Chinois was a tenant -- Mr.  
23 Morris did not communicate that information to him; (3) Mr. Heller advised Mr. Morris of Chinois  
24 intention to file a more comprehensive lawsuit in Nevada than the declaratory relief action that Simon  
25 filed in Delaware. This included naming additional defendants, including Caesars; (4) Mr. Heller  
26 discussed the eight causes of action that Chinois planned to allege in its Nevada action and he  
27 specifically raised with Mr. Morris how adding Caesars as a defendant could affect the prosecution of  
28 the case and the prospects for settlement; (5) Mr. Morris was equivocal as to whether Caesars'

1 involvement as a defendant in the action would prevent him from handling the representation. Mr.  
2 Heller inferred that Mr. Morris might obtain a waiver of the conflict; and (6) Mr. Heller discussed his  
3 thoughts on litigation strategy and settlement especially in light of Caesars potentially being added as a  
4 defendant, and Mr. Morris gave his views on these subjects, and legal advice regarding venue, possible  
5 claims, counsel and judges. *Heller Supplemental Declaration (#80)*, ¶3.

#### 6 DISCUSSION

7 Plaintiff argues that an implied attorney-client relationship arose between Chinois and Mr.  
8 Morris as a result of the confidential information and advice that Mr. Heller and Mr. Morris exchanged  
9 during their pre-lawsuit telephone conversation. Although Plaintiff waived its objection to Ms.  
10 Pickering and the Morris Pickering & Peterson law firm representing Caesars in February 2008,  
11 Plaintiff argues that the waiver was based on the representations that Mr. Morris would have no  
12 involvement in the case. Now that Defendant Caesars intends to have Mr. Morris defend the case,  
13 Plaintiff argues that the waiver of objection no longer applies and Mr. Morris and his law firm should  
14 be disqualified.

15 LR IA 10-7(a) of the Local Rules of Practice for this District provides that an attorney admitted  
16 to practice in this District shall adhere to the standards of conduct prescribed in the Model Rules of  
17 Professional Conduct as adopted and amended from time to time by the Supreme Court of Nevada,  
18 except as such may be modified by this court. Thus, the Nevada Rules of Professional Conduct  
19 generally govern the issue of attorney disqualification. *See In re County of Los Angeles*, 223 F. 3d 990,  
20 995 (9th Cir. 2000); *United States v. Walker River Irrigation Dist.*, Not Reported in F.Supp.2d, 2006  
21 WL 618823 (D. Nev. 2006); *In-N-Out Burger v. In & Out Tire & Auto, Inc.*, 2008 WL 2937294 \*2  
22 (D.Nev. 2008).

23 In *United States v. Walker River Irrigation Dist.*, the court recited the standards applied by  
24 federal courts in considering attorney disqualification motions. The court states:

25 Disqualification is a “drastic measure which courts should hesitate to  
26 impose except when absolutely necessary[.]” *Freeman v. Chicago*  
27 *Musical Instrument Co.*, 689 F.2d 715, 721-22 (7th Cir.1982), because it  
28 takes away one party’s ability to chose his own representation, and it is  
often a tactic used to create delay or harassment, *Miller v. Alagna*, 138  
F.Supp.2d 1252, 1258-59 (C.D.Cal.2000). Motions to disqualify are  
therefore subject to strict judicial scrutiny, *Optyl Eyewear Fashion Intern.*

1                    *Corp. v. Style Companies, Ltd.*, 760 F.2d 1045, 1050 (9th Cir.1985), and  
2 courts have wide discretion in their rulings to further the interests of  
3 fairness to all parties, *Int'l Bus. Mach. Corp. v. Levin*, 579 F.2d 271, 279  
4 (3d Cir.1978).

5                    Close cases, however, are resolved in favor of disqualification. *In-N-Out Burger v. In & Out*  
6 *Tire & Auto, Inc.*, 2008 WL 2937294 at \*2 (D.Nev. 2008), citing *Palmer v. Pioneer Ins. Assocs.*, 19  
7 F.Supp.2d 1157, 1162 (D.Nev. 1998). *See also Nevada Yellow Cab Corp. v. Eighth Judicial Dist.*  
8 *Court*, 123 Nev. 44, 152 P.3d 737, 743 (2007).

9                    Rule 1.9(a) of the Nevada Rules of Professional Conduct provides that a lawyer who has  
10 formerly represented a client in a matter shall not thereafter represent another person in the same or a  
11 substantially related matter in which the person's interests are materially adverse to the interests of the  
12 former client unless the former client gives informed consent, confirmed in writing. The party seeking  
13 disqualification must establish three elements under Rule 1.9(a): (1) that it had an attorney-client  
14 relationship with the lawyer, (2) that the former matter and the current matter are substantially related,  
15 and (3) that the current representation is adverse to the party seeking disqualification. *Nevada Yellow*  
16 *Cab Corp., supra*, 152 P.3d at 741. If these three elements are established then the court will presume  
17 that the attorney received confidential information during the representation of the former client that  
18 will be harmful to its interests. *North American Deed Co., Inc. v. Joseph*, 334 B.R. 443, 451 (Bk.  
19 D.Nev 2005). This presumption is irrebuttable. *Id.*

20                    There is no question that Mr. Heller communicated with Mr. Morris about representing Chinois  
21 in the lawsuit it was planning to file in Nevada and that Mr. Morris's partner, Ms. Pickering, and their  
22 law firm were subsequently retained to represent the Defendant Caesars in that action. The disputed  
23 issue is whether an implied attorney-client relationship was formed during the telephone conversation  
24 between Mr. Morris and Mr. Heller, or alternatively, whether Mr. Morris received confidential  
25 information from Mr. Heller that disqualifies him from representing Defendant Caesars in this action.

26                    Rule 1.18 of Nevada Rules of Professional Conduct governs in regard to consultations between  
27 an attorney and a prospective client. Subsection (a) of the rule provides that a person who discusses  
28 with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a  
prospective client. Subsection (b) provides that even when no client-attorney relationship ensues, a



1 lawyer who has had discussions with a prospective client shall not use or reveal information learned in  
2 the consultation except as Rule 1.19 would permit with respect to information of a former client.

3 Subsection (c) further states:

4 A lawyer subject to paragraph (b) shall not represent a client with  
5 interests materially adverse to those of a prospective client in the same or  
6 a substantially related matter if the lawyer received information from the  
prospective client that could be significantly harmful to that person in the  
matter, except as provided in paragraph (d).

7 Under paragraph (d), representation is permissible even when the lawyer has received  
8 disqualifying information, if (1) both the affected client and the prospective client have given informed  
9 consent confirmed in writing, or (2) the lawyer who received the information took reasonable measures  
10 to avoid exposure to more disqualifying information than was reasonably necessary to determine  
11 whether to represent the prospective client and the disqualified lawyer is timely screened from any  
12 participation in the matter and is apportioned no part of the fee therefrom. Written notice must also be  
13 promptly given to the prospective client.

14 Prior to the adoption of ABA Model Rule 1.18, courts evaluated disqualification motions  
15 involving an attorney's preliminary discussions with a prospective client in regard to whether an  
16 implied attorney-client relationship arose. *Polyagro Plastics, Inc. v. Cincinnati Milacron, Inc.*, 903  
17 F.Supp. 253, 256 (D. Puerto Rico 1999), states in this regard:

18 A party does not need to produce a formal contract or fee payment to  
19 establish an attorney-client relationship. *Westinghouse Elec. Corp. v.*  
20 *Kerr-McGee*, 580 F.2d 1311, 1319 (7<sup>th</sup> Cir.), *cert. denied*, 439 U.S. 955,  
21 99 S.Ct. 353, 58 L.Ed.2d 346 (1978). A fiduciary relationship in which  
22 client confidences must be protected may arise from a "preliminary  
23 consultation by a prospective client with a view to retention of a lawyer,  
although actual employment does not result." *Id.* Accordingly, a party  
24 may establish an implied attorney-client relationship if (i) the party  
submitted confidential information to the attorney, and (ii) the party did  
25 so with the reasonable belief that his lawyer was acting as the party's  
attorney. *Nelson*, 823 F.Supp. at 1445; *Nemours Fdtn.*, 632 F.Supp. at  
423-24.<sup>1</sup>

26 ...

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27 <sup>1</sup>*Nelson v. Green Builders, Inc.*, 823 F.Supp. 1439, 1445 (E.D. Wis. 1993); and *Nemours Fdtn.*  
28 *v. Gilbane, Aetna, Federal Ins. Co.*, 632 F.Supp. 418, 423-24 (D. Del. 1986).

1           As *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, 980 P.2d 371,  
2 380 (Cal. 1999) states, “[t]he primary concern is whether and to what extent the attorney acquired  
3 confidential information. (citation omitted). That question is not necessarily answered by the amount of  
4 time involved. ‘Even the briefest conversation between a lawyer and a client can result in the  
5 disclosure of confidences.’ (*Novo Trapeutisk etc. v. Baxter Travenol Lab.*, (7<sup>th</sup> Cir. 1979) 607 F.2d 186,  
6 195).”

7           In contrast to cases in which there was an explicit attorney-client relationship which gives rise to  
8 a presumption that confidences were divulged, the question of whether confidential information passed  
9 between the prospective client and the attorney is crucial in determining whether an implied attorney-  
10 client relationship existed, and therefore must be proved rather than assumed. *Polyagro*, 903 F.Supp. at  
11 257. *See also Guerrero v. Bluebeard’s Castle Hotel, Inc.*, 982 F.Supp.343, 347 (D. Virgin Islands  
12 1997) (“[a]n implied attorney-client relationship arises, however, only if confidential information **is in**  
13 **fact** transmitted from the prospective client to the lawyer . . .” (emphasis in original)); *Laryngeal Mask*  
14 *Company Ltd. v. Ambu A/S*, 2008 WL 558561 \*4 (S.D.Cal. 2008) (the party seeking disqualification  
15 must show that the meeting went beyond “initial or peripheral contacts” and involved the disclosure of  
16 some confidential information).

17           The court in *Polyagro* also stated that the “definition of ‘confidential information’ for purposes  
18 of a disqualification motion is information that if revealed could put the plaintiff at a disadvantage or  
19 the other party at an advantage.” *Id.* at 258. Rule 1.18(c) similarly provides that in order for  
20 disqualification to apply, the lawyer must have “received information from a prospective client that  
21 could be significantly harmful to that person in the matter.” In *ADP, Inc. v. PMJ Enterprises, LLC*,  
22 2007 WL 836658 \*5 (D.N.J. 2008), the court stated that under Rule 1.18(c) “the moving party must  
23 proffer compelling evidence that significantly harmful information was disclosed.” This is probably an  
24 overly strict interpretation of the rule. In *Sturdivant v. Sturdivant*, 241 S.W.3d 740 (Ark 2006), the  
25 court affirmed an order disqualifying a lawyer in a child custody case pursuant to Rule 1.18. The court  
26 stated:

27                       As to whether May received information that “could be significantly  
28                       harmful” to Timothy, we agree with the circuit court that a lawyer who  
                              consults with a prospective client about a change-of-custody proceeding

1 will necessarily become privy to information that could be used to the  
2 disadvantage of that person in the same proceeding. Similarly, the circuit  
3 court could reasonably conclude that a prospective client would not know  
whether the information disclosed during the consultation “could be  
significantly harmful.”

4 *Sturdivant*, 241 S.W.3d at 747.

5 As *Sturdivant* indicates, a court may be more likely to infer that potentially harmful confidential  
6 information was disclosed where the consultation was with a lay person who may not fully appreciate  
7 the significance of the disclosures. This factor can cut the other way, however, where attorneys  
8 engaged in substantive, detailed discussions about a case. In *People ex rel. Dept. of Corporations v.*  
9 *SpeeDee Oil Change Systems, Inc.*, for example, the consultation included a one to two hour meeting  
10 between the lawyers during which the case was discussed in substantial detail. The consulted attorney  
11 also performed some preliminary research on issues that were discussed during the meeting. The court  
12 found that confidential information was exchanged and that disqualification was proper. In *Laryngeal*  
13 *Mask Company Ltd. v. Ambu A/S*, the plaintiff’s in-house counsel engaged in a one-hour consultation  
14 with two attorneys whom they were considering retaining in a patent infringement lawsuit. Although  
15 there was a dispute whether confidential information and advice was disclosed and rendered during the  
16 meeting, the court concluded that the moving party met its burden for disqualification:

17 [T]he Court finds that the undisputed facts strongly indicate that an  
18 implied attorney-client relationship was formed. The November meeting  
19 was conducted in private with the client representatives, both of whom  
20 were lawyers, and the Finnegan lawyers at their office. The stated  
21 purpose of the meeting was to determine if Finnegan was interested in  
22 and qualified to represent Plaintiffs in anticipated patent litigation against  
23 Ambu. All participants were knowledgeable, not only about the subject  
24 matter of the patent law, but also about the ethical duties of the legal  
profession. The prospective client brought documents and sample  
products to explain the case to the lawyers. Though most of these  
materials were publicly available (*e.g.*, the prosecution of the patent and  
the two devices), Plaintiffs did bring some confidential notes with them  
*i.e.* Marzen brought notes from his meeting with the board of directors.  
Finally, it is not disputed that Plaintiff sought in good faith to retain  
Finnegan.

25 *Laryngeal* at \*4.

26 In deciding whether disqualification is required, the courts also consider whether information  
27 discussed during the consultation was later publicly disclosed before the lawyer or law firm was  
28 retained. In *Polyagro*, the plaintiff’s attorney testified that he informed the attorney about the facts of

1 the case regarding equipment that did not function properly, including the opinions of one of plaintiff's  
2 experts. Plaintiff's counsel also told the attorney that the matter was putting financial pressure on the  
3 plaintiff and there was a sense of urgency in moving the case along. He also informed the attorney of  
4 the various legal theories that he was planning to pursue and that plaintiff had discovered that it had  
5 been sold a prototype machine which was contrary to the defendant's representations. Plaintiff's  
6 counsel also discussed damages theories. The defendant's attorney testified that the discussion was  
7 much more general and did not involve specific information about the alleged defects in the machinery.  
8 In holding that plaintiff's counsel did not communicate confidential information, the court found that  
9 most of the topics were discussed in more detail in plaintiff's complaint which was filed before the  
10 attorney was retained as local counsel by the defendant. In holding that plaintiff did not meet its burden  
11 to justify disqualification of defendant's counsel, the court also stated:

12 ... [E]veryone is entitled to the judicial process being one of integrity.  
13 Because the information passed by Ginsberg to Cespedes was less  
14 specific than that information contained in the complaint, which was filed  
15 prior to the representation of defendants by Cespedes' law firm, there has  
been no damage to the integrity of this process. Defendants could not  
have discovered any information from Cespedes that was not available  
upon the filing of this action.

16 *Polyagro*, 903 F.Supp. at 259.

17 In *ADP, Inc. v. PMJ Enterprises, LLC*, the court also held that most of the information  
18 discussed in the meeting was not confidential or harmful and was disclosed in the plaintiff's complaint.  
19 This included the causes of action alleged by plaintiff. The court also held that much of the information  
20 that plaintiff's counsel allegedly disclosed regarding his client's settlement position was not  
21 confidential or significantly harmful. As to confidential settlement information that would have been  
22 significantly harmful, the court held that plaintiff had not met his burden to show that the information  
23 was, in fact, disclosed during the meeting.

24 In this case, Mr. Heller and Mr. Morris disagree about several matters concerning their  
25 telephone conversation. First, they have different recollections as to when the conversation occurred.  
26 While Mr. Morris recalls the telephone call as "brief," Mr. Heller indicates that it lasted up to twenty  
27 minutes. While both attorneys agree that the purpose of the call was to see whether Mr. Morris could  
28 serve as local counsel, Mr. Morris states that he understood that he was only one of the lawyers that

1 Plaintiff was considering retaining. Mr. Heller states, however, that his intention was to retain Mr.  
2 Morris as local counsel if he was available and willing. Both attorneys agree that they discussed the  
3 fact that Chinois had been sued in Delaware and that it intended to sue Simon in Nevada. They both  
4 agree that they discussed whether the suit should be filed in state or federal court and they discussed the  
5 local judiciary and Mr. Morris gave advice on those matters. Although Mr. Heller states that he  
6 discussed the eight causes of action to be alleged in Plaintiff's complaint, Mr. Morris recalls no such  
7 discussion. Nor does he recall any discussion about "litigation strategy" in regard to the particulars of  
8 the case or discussions regarding Plaintiff's settlement position. Mr. Morris, however, recalls that he  
9 told Mr. Heller that the Simon entities would be a difficult opponent. Mr. Heller, however, states that  
10 they also discussed the effect that naming Caesars as a defendant would have on Chinois's settlement  
11 position.

12 As indicated above, Plaintiff has the burden of showing that confidential information was  
13 disclosed to Mr. Morris that could be significantly harmful to Plaintiff in this lawsuit. Given the  
14 participants' disputed versions of what was discussed, the Court considers other relevant facts and  
15 circumstances which either tend to support or undermine the parties' positions. First, while the length  
16 of the conversation is not determinative, the telephone conversation between Mr. Heller and Mr. Morris  
17 lasted no more than 20 minutes according to Mr. Heller, and was arguably much briefer according to  
18 Mr. Morris. This was not a planned face-to-face meeting to discuss representation such as occurred in  
19 *SpeeDee Oil* or *Laryngeal Mask* in which it is more likely that confidential information will be  
20 disclosed. Mr. Morris was not provided with documents, confidential or otherwise, to review.

21 It also appears that the conversation involved fairly general matters such as Mr. Morris's  
22 evaluation of the local courts, judges and other attorneys who might serve as local counsel.<sup>2</sup> While Mr.  
23 Heller and Mr. Morris dispute the extent to which the specific claims in the lawsuit were discussed, the  
24

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25  
26 <sup>2</sup>It appears that Mr. Morris engaged in discussions with Mr. Heller about the planned lawsuit and  
27 related matters before he determined whether he might have a conflict of interest in representing  
28 Plaintiff. Comment 4 to Rule 1.18 states that in order to avoid acquiring disqualifying information, the  
lawyer should limit the initial interview to only such information as appears reasonably necessary for  
that purpose.

1 claims were subsequently publicly disclosed in the filed complaint. Other than generalities, Plaintiff  
2 has not indicated what if any additional information was conveyed about the eight causes of action that  
3 would be harmful to Plaintiff if Mr. Morris represented Defendant Caesars. *See Polyagro* and *ADP*,  
4 *supra*. Plaintiff has also failed to show that specific confidential information about its settlement  
5 position was disclosed to Mr. Morris that could be harmful to its position in this case.

6 The circumstances regarding Caesars' subsequent retention of Ms. Pickering and the  
7 communications that occurred between counsel in February 2008 are also relevant in assessing whether  
8 confidential information was disclosed to Mr. Morris. Contrary to Plaintiff's suggestion, it does not  
9 appear that Ms. Pickering or Caesars attempted to construct an ethical barrier concerning Mr. Morris  
10 based on their knowledge that he had obtained confidential information during his telephone  
11 conversation with Mr. Heller. Instead, it appears that Caesars and Ms. Pickering were unaware of Mr.  
12 Morris's telephone conversation with Mr. Heller at the time she was retained to defend the action. It  
13 also appears that Mr. Morris was unaware that Caesars had retained Ms. Pickering or his law firm prior  
14 to his phone call with Mr. Heller on February 13, 2008. In response to Mr. Heller's phone call, Mr.  
15 Morris and Ms. Pickering informed Mr. Heller that Mr. Morris was not involved in the case and had not  
16 discussed the telephone conversation with Ms. Pickering or other members of the law firm. They also  
17 indicated that Mr. Morris would have no future involvement in the case. This appears to have been a  
18 reasonable resolution of the issue at the time since Ms. Pickering was handling the case. It does not,  
19 however, constitute an implied admission that Mr. Morris actually received confidential information  
20 from Mr. Heller.

21 Mr. Heller's response to Mr. Morris's and Ms. Pickering's February 14, 2008 emails, however,  
22 casts some doubt on his assertion that he and Mr. Morris discussed confidential information that could  
23 be significantly harmful to Chinois if Mr. Morris or his law firm represented Caesars. In response to  
24 Mr. Morris's email letter, Mr. Heller stated that a "good deal more about the Chinois dispute was  
25 discussed than you recall." However, he accepted Mr. Morris's representation that he had little  
26 recollection of their conversation. Perhaps more tellingly, even after being informed that Ms. Pickering  
27 is not only Mr. Morris's law partner, but also his spouse, Mr. Heller did not express any concern about  
28 her handling Caesars' defense. Regardless of Ms. Pickering's and Mr. Morris's assurances that they



