IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D13-1038

ANHEUSER-BUSCH COMPANIES, INC. and ANHEUSER-BUSCH, INCORPORATED,

Petitioners,

v.

CHRISTOPHER STAPLES,

Respondent.

_____/

Opinion filed October 09, 2013.

Petition for Writ of Certiorari – Original Jurisdiction.

E. T. Fernandez, III and Brian Sebaaly of Fernandez Trial Lawyers, P.A., Jacksonville, for Petitioners.

Philip S. Kinney of Kinney & Sasso, PL, Jacksonville and Brett Hastings of Brett A. Hastings, P.A., Jacksonville, for Respondent.

LEWIS, C.J.

Petitioners, Anheuser-Busch Companies, Inc. and Anheuser-Busch, Incorporated, petition for a writ of certiorari and challenge an Order Disqualifying Law Firm. We conclude that the trial court, based upon the record before it, did

not depart from the essential requirements of the law in determining that a conflict of interest existed and in disqualifying the law firm representing both Petitioners, the alleged tortfeasors in a negligence suit brought by Respondent, Christopher Staples, and Respondent's employer with respect to its workers' compensation lien claim against any judgment awarded to Respondent as a result of his lawsuit. We, therefore, deny the certiorari petition.

After he was injured while working for his employer, Respondent received workers' compensation benefits. He subsequently filed a negligence/premises liability action against Petitioners, seeking damages for the injuries he sustained in the accident occurring on their premises. The law firm at issue entered an appearance on behalf of Petitioners in the tort action. The firm also filed a Notice of Lien pursuant to section 440.39(3)(a), Florida Statutes, in the tort action on behalf of the employer. Prior to a scheduled mediation, Respondent moved to disqualify the law firm. Both Petitioners and Respondent's employer filed a Consent to Representation with respect to the law firm. The trial court entered an order disqualifying the firm, finding in part that the interests of the firm's clients were directly adverse to one another. After determining that Respondent had standing to raise the conflict of interest, the trial court noted that even if Respondent lacked the requisite standing, it would have raised the issue itself and reached the conclusion that disqualification was necessary. It also determined

under Rule 4-1.7 of the Florida Rules of Professional Conduct that the conflict could not be waived because it was unreasonable for the firm to believe that it would be able to provide competent and diligent representation to each affected client and because the representation of Petitioners involved the assertion of a position adverse to Respondent's employer.

Petitioners filed a motion for rehearing and claimed for the first time that an indemnity agreement existed between themselves and the employer and that, as a result, the trial court's conclusion that their interests were fundamentally antagonistic to the employer's interests was erroneous. The indemnity agreement was not attached to the motion or to an accompanying affidavit. The trial court denied the motion for rehearing, and this proceeding followed.

Certiorari is the appropriate remedy to review an order granting a motion to disqualify counsel. See Transmark, U.S.A., Inc. v. State, Dep't of Ins., 631 So. 2d 1112, 1116 (Fla. 1st DCA 1994). While it is true, as Petitioners and the dissent point out, that disqualification of a party's counsel is an extraordinary remedy that should be resorted to sparingly, see Vick v. Bailey, 777 So. 2d 1005, 1007 (Fla. 2d DCA 2000), we find no departure from the essential requirements of the law in this case. The dissent acknowledges that the law firm's representation of Petitioners and Respondent's employer amounted to a conflict of interest under rule 4-1.7(a) of the Florida Rules of Professional Conduct. The dissent then characterizes the

issue in this proceeding as being whether the trial court's legal ruling that Petitioners and Respondent's employer could not waive the conflict departed from the essential requirements of the law. However, the only issues Petitioners have raised before us are whether Respondent had standing to seek disqualification of the law firm and whether, if Respondent had the requisite standing to do so, the existence of the indemnity agreement that was not brought to the trial court's attention until the filing of Petitioners' motion for rehearing established that Petitioners' interests were not fundamentally antagonistic to Respondent's employer's interest.[1]

Contrary to the dissent's characterization of the issue presented in this case, Petitioners have not argued in this proceeding that the trial court's analysis under rule 4-1.7(b) was erroneous, that the trial court departed from the essential requirements of the law in concluding that the law firm could not reasonably believe that it was capable of providing competent and diligent representation to each affected client under rule 4-1.7(b)(1), or that mediation does not constitute a "proceeding before a tribunal" for purposes of rule 4-1.7(b)(3). In fact, Petitioners did not cite to rule 4-1.7(b) in their certiorari petition or in their reply to

[1] Petitioners do not argue that the trial court erred in denying their motion for rehearing. See Fitchner v. Lifesouth Cmty. Blood Ctrs., Inc., 88 So. 3d 269, 278 (Fla. 1st DCA 2012) (noting that trial courts are not required to consider new issues presented for the first time on rehearing).

Respondent's response. Nor was any mention of the rule or the trial court's analysis as to the rule made at oral argument. Although the dissent correctly notes that Petitioners cited to State Farm Mutual Automobile Insurance Co. v. K.A.W., 575 So. 2d 630 (Fla. 1991), and Anderson Trucking Service, Inc. v. Gibson, 884 So. 2d 1046 (Fla. 5th DCA 2004), in their certiorari petition, neither of those cases cited to rule 4-1.7(b). Moreover, Petitioners relied upon those two cases in support of their argument that Respondent lacked standing to seek disqualification of the law firm, not in support of any of the issues raised by the dissent. Furthermore, while Respondent's response to the certiorari petition contains one citation to rule 4-1.7(b), Petitioners made no mention of the rule or the issue of waiver or consent in their reply to the response.

The dissent obviously finds certain aspects of this case concerning. However, we are not at liberty to address issues that were not raised by the parties. See Philip J. Padovano, Florida Appellate Practice § 18.5, at 340-41 (2011 ed.) (noting that an issue on appeal must be one that was raised by a party to the proceeding and citing Lightsee v. First National Bank of Melbourne, 132 So. 2d 776 (Fla. 2d DCA 1961), for the proposition that an appellate court is "not authorized to pass upon issues other than those properly presented on appeal"); David M. Dresdner, M.D., P.A. v. Charter Oak Fire Ins. Co., 972 So. 2d 275, 281 (Fla. 2d DCA 2008) (deeming any potential issue pertaining to the final judgment

for attorney's fees and costs waived or abandoned as no argument regarding the issue was made on appeal).[2]

Accordingly, because Petitioners have failed to establish that the trial court departed from the essential requirements of the law with respect to the specific issues actually raised in this proceeding, we DENY their certiorari petition on the merits.

BENTON, J., CONCURS WITH OPINION; MAKAR, J., DISSENTING.

[2] We note that even if Petitioners had raised the issues addressed by the dissent, we would still deny the certiorari petition. We disagree with the dissent's assertion that the trial court departed from the essential requirements of the law in determining, pursuant to rule 4-1.7(b)(1), that it was unreasonable for the law firm to believe that it could provide competent and diligent representation to both Petitioners and Respondent's employer. As the trial court reasoned based upon the facts before it, Petitioners' interest would lie in minimizing the damages awarded by a verdict or settlement while the employer's interest would lie in helping Respondent recover the maximum possible damages against Petitioners so that it could maximize its recovery on its workers' compensation lien. With respect to rule 4-1.7(b)(3), while the dissent focuses on whether mediation constitutes a "proceeding before a tribunal," the employer's Notice of Lien was filed in the underlying tort case. There is no question that the underlying case constitutes a "proceeding before a tribunal." As such, the dissent's focus on mediation is much too narrow.

BENTON, J., concurring.

By petition for writ of certiorari, the defendants in a premises liability case ask us to quash the order disqualifying their trial counsel on conflict-of-interest grounds. They argue here, as they did below, that they have given informed consent in writing to the representation, well aware that the same law firm represents the plaintiff's employer, and that the same law firm has filed a lien asserting the plaintiff's employer is entitled to reimbursement, from any recovery the plaintiff may receive from petitioners, for workers' compensation benefits that the employer paid the plaintiff.

After reciting the facts in its order disqualifying law firm,[3] the trial court ruled that a conflict existed (and that whether or not plaintiff had standing to raise the conflict was "likely moot,"[4]) and then went on:

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[3]The trial court set out its fact findings in numbered paragraphs as follows:

> This case arises from the following circumstances:
>
> 1. The Plaintiff, Christopher Staples ("Plaintiff"), was an employee of Container Carrier Corporation ("Employer").
>
> 2. On January 27, 2003, while working for the Employer, the Plaintiff was injured at the Jacksonville brewing and shipping facility of Anheuser-Busch, Inc. Plaintiff alleges that the accident occurred because of the negligence of two related Anheuser-Busch entities, Anheuser-Busch Companies, Inc., and Anheuser-Busch, Inc. ("Defendants").

3. The Employer is a corporation separate and distinct from the Defendant corporations.

4. The Plaintiff received worker's compensation benefits from the Employer as a result of this accident. Because the Employer is self-insured against worker's compensation claims, there is no Carrier in the worker's compensation case.

5. The Plaintiff filed a negligence/premises liability action against the Defendants, seeking damages for the injuries he sustained in the January 27, 2003, accident at the Defendants' brewery.

6. The law firm of Fernandez Trial Lawyers, P.A. ("the firm"), which has represented the Defendants in past actions, entered an appearance on behalf of both Defendants in this tort action.

7. The firm also filed a Notice of Lien in this tort action on behalf of the Employer. The lien was filed pursuant to section 440.39(3)(a), Fla. Stat.

8. When mediation was scheduled for November 1, 2012, in this case, Plaintiff's counsel discussed with the firm his concern about the fact that the firm was representing both the Defendants in the tort action and the Employer in the same action. On behalf of the firm, attorney E.T. Fernandez, III, responded in writing, indicating that the interest of the Employer with regard to the worker's compensation lien would be addressed at mediation by, and negotiated by, Mr. James Gourley, a non-lawyer claims manager employed by the Employer. Because Plaintiff's counsel still had continuing concerns, the mediation was cancelled.

> The next question to be answered is therefore: Can this conflict be waived by the clients?
>
> An untitled subsection (b) of Rule 4-1.7 ("Conflict of Interest; Current Clients"), Florida Rules of Professional Conduct, states:
>
> > (b) Notwithstanding the existence of a conflict of interest under subdivision (a), a 1awyer 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

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> 9. After learning of the dual representation, Plaintiff's counsel moved promptly to file the pending disqualification motion.
>
> 10. Both the Defendants in the tort case and the Employer have filed waivers of any conflict which may currently or in the future exist because of the law firm's representation of all three in the tort case.

(Footnotes omitted.)

[4] The trial court ruled:

> [E]ven if Plaintiff here had no standing, the Court would "raise the question" of disqualification itself and reach the same result required by this order. Consequently, the issue of Plaintiff's standing to pursue disqualification is likely moot.

> position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.
>
> Each of these four criteria must be met for a lawyer to proceed with dual representation in the face of a conflict of interest. In the present case, neither criterion (1) nor criterion (3) is met. It is not reasonable for the challenged law firm in this case to conclude that it will be able to provide competent and diligent representation to the divergent interests of each client. Further, the representation requires the firm to assert for one or more clients positions which are adverse to those of one or more of the other clients, and to do so in the same proceeding before the same tribunal.
>
> Because fewer than all the requirements of the rule are met, client consent to continued dual representation by the law firm is insufficient to permit the firm to continue its representations in the face of a conflict. The conflict is thus not one capable of being waived by client consent.

As is clear from the trial court's order, the trial court had not been told of any indemnity agreement between the owner of the premises and the plaintiff's employer when its order was entered. Petitioners did advert to such an agreement in an affidavit attached to their motion for rehearing in the trial court. But they

never favored the trial judge with a copy of the indemnity agreement. That did not surface until it appeared in the appendix to the amended petition for writ of certiorari.

Yet in this proceeding petitioners rely heavily on the indemnity agreement for the proposition that any conflict of interest was waived. (Disputing this contention at oral argument, respondent took the position that the agreement did not apply in any event because petitioners alone were alleged to have been negligent.) The belatedly disclosed indemnity agreement is plainly not something we should address now for the first time, or a proper basis for issuance of the writ. For this reason alone, the petition should be denied.

If the respondent had never filed suit, or if the employer had never filed the lien aligning itself against the defendant in the main action, the conflict might have been waivable. But by the time the trial court entered the order under challenge here, these parties were "adversaries in litigation." As a comment to the Third Restatement of the Law Governing Lawyers explains:

> Conflicts between adversaries in litigation. When clients are aligned directly against each other in the same litigation, the institutional interest in vigorous development of each client's position renders the conflict nonconsentable (see § 128, Comment c, & § 129). The rule applies even if the parties themselves believe that the common interests are more significant in the matter than the interests dividing them. While the parties might give informed consent to joint representation for purposes of negotiating their differences (see § 130, Comment d), the

> joint representation may not continue if the parties become opposed to each other in litigation.

Restatement (Third) of Law Governing Lawyers § 122 cmt. g(iii) (2013). The employer's lien was filed, not with the mediator, but with the court. Thereafter, the conflict between the employer and the petitioners became, in the terminology of the restatement, "nonconsentable."

The filing of the lien in this case was "the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal." R. Regulating Fla. Bar 4-1.7(b)(3). The premises liability claim remained unresolved. Cf. City of Hollywood v. Lombardi, 770 So. 2d 1196, 1198-1202 (Fla. 2000). Counsel filed the employer's lien in the judicial proceeding, not in the mediation, which was, after all, court-ordered. The employer—by seeking to participate in any recovery with its employee, the plaintiff (respondent)—asserted a position (as a statutory indemnitee) adverse to petitioners, the defending owners of the premises "in the same proceeding before a tribunal," the Circuit Court for the Fourth Judicial Court. Id. See generally The Club at Hokuli'a, Inc. v. Am. Motorists Ins. Co., No. 10-00241 JMS-LEK, 2010 WL 3465278, at *5 (D. Haw. Sept. 3, 2010) report and recommendation adopted sub nom, 2010 WL 4386741 (D. Haw. 2010) ("Oceanside notes that, as a general rule, indemnitors are aligned with their indemnitees in cases where the principal obligation is in dispute.").

MAKAR, J., dissenting.

I.

While at an Anheuser-Busch (A-B) brewing and shipping facility in Jacksonville, Florida, Christopher Staples was involved in an accident connected to his employment with Container Carrier Corporation (Container). Mr. Staples received workers' compensation benefits from Container, which is self-insured. Mr. Staples then filed suit against A-B, seeking to recover on negligence and premises liability theories.

Fernandez Trial Attorneys, P.A. (Fernandez), which had been A-B's legal counsel in the past, appeared on behalf of A-B in the lawsuit. Pertinent to this proceeding, Fernandez also filed a notice of lien on behalf of Staples's employer, Container, against any future judgment in Mr. Staples's favor to recoup its expenditures in the workers' compensation proceeding.

Mediation in the matter was scheduled, but cancelled after Mr. Staples's counsel made an issue of Fernandez representing both A-B and Container at the mediation. Fernandez indicated that it would attend on behalf of A-B and that a non-lawyer claims manager employed by Container would attend on behalf of that company. Upon cancellation of the mediation, Mr. Staples promptly filed a motion alleging that a conflict of interests existed between A-B and Container and that

Fernandez should be disqualified from further representing A-B and Container in the case.

Fernandez responded with client waivers demonstrating that both A-B and Container understood and consented to Fernandez representing their interests jointly. Both companies waived "any conflict which may currently or in the future exist because of the law firm's representation" of them in the litigation. The trial court, after considering legal memoranda and argument of counsel, issued a lengthy order that, distilled to its core, found as a matter of law that a non-waivable conflict existed as to Fernandez's concurrent representation of A-B and Container. The trial court prohibited Fernandez from representing either A-B or Container, allowing both companies thirty days to get new lawyers to represent them individually. Fernandez seeks certiorari review, asserting the trial court departed from the essential requirements of law in denying A-B and Container their right to be represented by counsel of their choice. See Yang Enterprises, Inc. v. Georgalis, 988 So. 2d 1180, 1183 (Fla. 1st DCA 2008) ("Certiorari is the appropriate remedy to review orders denying a motion to disqualify counsel."). As this Court recently noted, "because disqualification of counsel denies a party its counsel of choice, such disqualification constitutes a material injury not remediable on plenary appeal." Walker v. River City Logistics Inc., 14 So. 3d 1122, 1123 (Fla. 1st DCA

2009). Thus, the only question is whether the order below departed from the essential requirements of law. Id.

II.

Disqualification of a lawyer is a serious matter, so serious that it is highly disfavored because it operates to deprive a litigant of its chosen attorney, interfering with a relationship having constitutional implications. In re BellSouth Corp., 334 F.3d 941, 955-56 (11th Cir. 2003). It follows that disqualification of counsel is an extraordinary step, resorted to only sparingly. Melton v. State, 56 So. 3d 868, 872-73 (Fla. 1st DCA 2011) (citing Minakan v. Husted, 27 So. 3d 695 (Fla. 4th DCA 2010); Walker, 14 So. 3d 1122 (Fla. 1st DCA 2009)). Motions for disqualification are "generally viewed with skepticism because . . . [they] are often interposed for tactical purposes." Yang Enterprises, 988 So. 2d at 1183 (citations omitted).

No dispute exists that Fernandez's representation of A-B and Container in this litigation amounts to a conflict as defined under the Rules of Professional Responsibility. See R. Regulating Fla. Bar 4-1.7(a). But that does not end the analysis. Both A-B and Container recognized this conflict, voluntarily agreed they both wanted Fernandez to represent them, and explicitly waived the conflict in writing. That was their informed choice to make. What constitutes a conflict under subsection (a) of Rule 4-1.7 is not necessarily a non-waivable conflict under

subsection (b); if that were the case no conflicts could ever be waived. The question raised here is whether the trial court's legal ruling, that the conflict between A-B and Container was non-waivable under the circumstances presented, departs from the essential requirements of law.[5] It does for two reasons.

A.

First, the interests of A-B and Container in this routine tort case are not so fundamentally antagonistic that disqualification is compelled. It is not uncommon that clients choose to have one lawyer represent their interests jointly, even if a conflict exists. If clients are fully informed and make voluntary decisions to allow for joint representation (here through written waivers), the basic concerns of the Rules are ameliorated.

To demonstrate that a conflict is one to which a client may consent, four criteria must be met:

[5] Fernandez's petition, though not citing Rule 4-1.7, asserts that its disqualification was improper because the trial court misapplied the legal standard, tracking language from the caselaw interpreting the rule. See, e.g., State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630 (Fla. 1991) (citing Rule 4-1.7); Anderson Trucking Serv., Inc. v. Gibson, 884 So. 2d 1046 (Fla. 5th DCA 2004) (citing K.A.W.). Mr. Staples's response, understanding the nature of Fernandez's legal challenge, contains citations to the caselaw applying Rule 4-1.7 as well as to both subsections of Rule 4-1.7. Identification of the specific judicial act to be reviewed (the disqualification order) and the legal reasoning for its reversal (it applied the incorrect legal standard under the caselaw applying Rule 4-1.7) enables appellate review. See Philip J. Padovano, Florida Appellate Practice § 16:9 (2012 ed.) (citing cases).

> (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 position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

R. Regulating Fla. Bar 4-1.7(b). The trial court set out these criteria in its order, holding that criteria (1) and (3) were not shown. Though the trial court's order is lengthy, the totality of its reasoning as to these two criteria is contained in these two sentences:

> It is not reasonable for the challenged law firm in this case to conclude that it will be able to provide competent and diligent representation to the divergent interests of each client. Further, the representation requires the firm to assert for one or more clients positions which are adverse to those of one or more of the other clients, and to do so in the same proceeding before the same tribunal.

Addressing the first sentence, it is clear legal error to conclude that a lawyer cannot reasonably represent two sophisticated corporate businesses that have voluntarily and specifically averred that they desire the lawyer to jointly represent them and waive in writing "any conflict which may currently or in the future exist because of the law firm's representation" in the matter. To the contrary, it is presumptively reasonable for a lawyer representing A-B and Container under the circumstances of this case at the mediation stage to believe he will be able to "provide competent and diligent representation to each affected client." Id. Multi-party representation

may not be the norm, but it has become commonplace due to its significant benefits (and risks)[6] that the parties may choose to bear. See William E. Wright, Jr., Ethical Considerations In Representing Multiple Parties In Litigation, 79 Tul. L. Rev. 1523, 1526 (2005) (discussing ethical considerations and practical issues arising in multiple-party representation) (noting that "applying economic realities and recognizing strategic alliances, it is often advantageous to limit the number of attorneys involved in litigation").

Nothing in the record establishes that joint representation was other than reasonable. Fernandez believed it could provide competent and diligent representation to A-B and Container, an assessment in which both companies concurred. Mr. Staples's counsel could identify no prejudice arising from the joint representation. As such, the trial court's ruling to the contrary simply disregards the voluntary, fully-informed decisions of A-B and Container, thereby depriving *two* clients of their chosen lawyer's services. Harm of this type and magnitude is irremediable once judgment is entered making certiorari appropriate. While trial courts should be wary, as the trial court here was, to potential conflicts that run afoul of the Rules, the joint representation of A-B and Container, supported by

[6] That A-B and Container have agreed to joint representation by Fernandez does not end Fernandez's ethical responsibilities, which include continual reevaluation of the joint representation under ethical rules and full, ongoing communications with A-B and Container as circumstances evolve or change.

written waivers, with no countervailing harm to Mr. Staples, provides no legal basis to conclude that criterion (1) was unmet.

B.

Next, the second sentence—which is an almost verbatim statement of the language of criterion (3)—misapprehends the procedural context of the case. The third criterion only applies where "the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same *proceeding before a tribunal*." (Emphasis added). This criterion does not apply in this case at this juncture because mediation is not a "proceeding before a tribunal." The Florida Bar Rules define "Tribunal" as

> a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A . . . body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

R. Regulating Fla. Bar 4 (preamble). Mediations do not meet this definition; no neutral official renders a binding legal judgment. Instead, in mediation the "decisionmaking authority rests with the parties." § 44.1011, Fla. Stat. The mediator lacks authority to adjudicate any aspect of a dispute. Fla. R. Med. 10.420(a)(2). Because mediation does not meet the definition of "tribunal," a mediation cannot be a "proceeding before a tribunal" as specified in Rule 4-1.7(b)(3).

Florida Rule 4-1.7 is an analogue of Model Rule of Professional Conduct 1.7, which likewise prohibits representation involving "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." Model Rules of Prof'l Conduct R. 1.7. The definition of tribunal is also similar. Id. R. 1.0. Notably, the commentary to Model Rule 1.7, discussing paragraph (b)(3), states that "this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under [the terminology rule])." Id. R. 1.7 cmt. 17. Because mediation is not a proceeding before a tribunal, criterion (3) of Rule 4-1.7(b) is met, and the conflict presented in this case was one to which A-B and Container may consent at the mediation stage.[7]

That mediation is outside of the Rule's application is consistent with the goal that mediation be a cost-efficient way to resolve disputes. Here, the disqualification order did the opposite; it created a domino effect that multiplied the costs on two companies that did no more than try to reduce their legal expense by using one law firm. Such a result makes little sense in the mediation context.

[7] If the case goes beyond meditation and a "proceeding before a tribunal"—such as a trial—is scheduled, the question of whether a conflict then exists can be raised. At that point, the trial court can assess whether joint representation, if it still exists, will involve the "assertion of a position adverse to another client" that fails to meet 4-1.7(b)—along with the other criteria of the Rule. Whether a lienor would appear at trial in this type of case is doubtful, but it might occur.

Beyond that, counsel for Mr. Staples at oral argument was unable to identify any harm to Mr. Staples's interests that would result from the Fernandez firm's joint representation; none. Even if A-B and Container were to hire separate counsel, nothing would prevent the new attorneys from collaborating on behalf of their clients. Given the irremediable harm to A-B and Container it causes, and the absence of any harm to Mr. Staples from the joint representation by Fernandez, the disqualification of Fernandez has no utility other than as an impediment to mediation. If allowed to stand, the order may embolden the tactical use of threats of disqualification as a strategy to gain settlement leverage at the mediation stage by potentially raising litigation costs to opponents.[8]

A side issue that has no bearing on the legal issue presented is the trial court's denial of A-B and Container's motion for rehearing. Perhaps because they believed their written waivers were sufficient to resolve the conflict issue, or even for their own strategic reasons, A-B and Container did not initially disclose a previously signed indemnity agreement between themselves. The agreement—

[8] Tempering this tactic is that litigants, absent a special relationship to the lawyers sought to be disqualified, ordinarily will lack standing to make formal motions to disqualify. See Zarco Supply Co. v. Bonnell, 658 So. 2d 151, 154 (Fla. 1st DCA 1995) (finding standing only where movant could demonstrate prejudice). Here, the trial court erred in concluding that Mr. Staples had standing to seek to disqualify Fernandez because, as admitted at oral argument, Mr. Staples can point to no prejudice arising from the joint representation by Fernandez. The trial court, however, can sua sponte raise conflict issues, making Mr. Staples's standing a non-issue.

identified in an affidavit submitted with their motion for rehearing—reflects that Container agreed to indemnify A-B for any liability in this case. The effect of the agreement aligned the interests of A-B and Container because any judgment against A-B would be a liability of Container. The trial court was not made aware of this agreement prior to its initial decision; had it been brought to the trial court's attention, it would have been helpful in solidifying that the joint representation met applicable legal standards. Even without the indemnity agreement, the record sufficiently shows that disqualification of Fernandez was unwarranted.

III.

Because the trial court's ruling departs from the essential requirements of law, depriving two clients of the services of their chosen counsel, the disqualification order should be reversed with instructions to allow Fernandez to represent both A-B and Container.