Iowa Ethics Opinion

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WHEN LAWYERS CHANGE LAW FIRMS: GUIDELINES FOR LAWYERS, THEIR EXISTING LAW FIRMS, AND POTENTIAL FUTURE LAW FIRMS.

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INTRODUCTION

The Committee is asked to provide guidance to lawyers and law firms terminating their relationship. Changing an employment or practice situation is fraught with client notification and conflicts of interest problems as well as issues concerning fiduciary duties owed to employers or partners and their clients. Even prospective law firms risk importing the new hire's conflicts, which can cause the firm to be disqualified from representing its existing clients. The problem is insidious and can even apply to the hiring of law student interns and clerks and possibly staff.[2]

[2] Iowa R. Prof'l. C. 32: 1.10 may create vicarious conflict of interest among lawyers in a firm, which may even extend to non-lawyer staff, including law clerks. See State ex rel. Creighton Univ. v. Hickman, 245 Neb. 247, 512 N.W.2d 374 (1994) (Opposing counsel had to be disqualified after hiring a clerical worker that, unbeknownst to the firm, had worked on the same case as an attorney for an adverse party because the hardship worked by disqualification was outweighed by the need to maintain the confidentiality of communications and avoid the appearance of impropriety.) Williams v. Trans World Airlines, Inc., 588 F. Supp. 1037, 1043 (W.D. Mo. 1984) (The fact that a staff is not a lawyer does not make it less likely that confidential information would be released. "In fact, a persuasive argument can be made that a non-lawyer would be more likely to reveal confidential information. Presumably, an attorney would be acutely aware of his or her ethical obligation not to reveal confidences of a former client. A non-lawyer

One's duty to a client can sometimes result in the inability to disclose information to prospective employers resulting in loss of opportunity for employment. In some situations, the process is made difficult because of acrimony between the lawyer, the law firm and even the prospective new firm. Law firms have been known to refuse to provide conflict of interest information or to require a fee from the requesting lawyer. In some, albeit rare situations lawyers have engaged in the tactic of "grabbing and leaving." [3]

By this opinion, we hope to bring clarity and certainty to an admittedly complex problem.

Analysis

We are guided by three American Bar Association formal opinions: ABA Formal Op. 99-414 (1999) "*When a Lawyer Changes Firms*"; ABA Formal Op. 09-455 (2009) "*Disclosure of Conflicts When Lawyers Change Firms*" and ABA Formal Op. 96-400 (1996) "*Job Negotiations with Adverse Firm or Party*". We read these opinions through the lens of *Watson, P.C. v. Peterson*, 650 N.W.2d 562 (Iowa 2002) which is the leading authority in Iowa.[4]

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might not be as sensitive to the need to safeguard the confidences of his or her previous employer gained while working with an attorney.) See also, United States ex rel. Grimm Constr. Co. v. Sae Civil Constr., 4:CV95-3058, 1996 U.S. Dist. LEXIS 3454, at *8-9 (D. Neb. Jan. 29, 1996) ("The fact that Mr. Griek is not an attorney may actually increase the possibility that by hiring him as a trial consultant he may be induced to reveal privileged attorney-client communications.") However to the extent that there is a presumption of shared confidences with staff which would require disqualification, it is rebuttable. But see: Bechtold v. Gomez, 254 Neb. 282, 576 N.W.2d 185 (1998), ("We refused to apply an irrebuttable presumption of shared confidences to the law student.").

[3] Watson, P.C. v. Peterson, 650 N.W.2d 562, 565 (Iowa 2002) "Although no Iowa cases are directly on point, the facts of this case are not uncommon. In fact, it has been observed that "law firms are under siege." See Robert W. Hillman, Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving, 67 Tex. L. Rev. 1, 1 (1988) [hereinafter Hillman]. Because of lateral movement by attorneys between firms, there is "the ever-present threat of [a lawyer] leaving and taking what many regard as the firm's assets--its clients." Id. at 4. This phenomenon is referred to as "grabbing and leaving"."

[4] In 1982, our predecessor committee issued ISBA Comm. On Prof'l Ethics & Conduct Formal Op 82-23 identifying the law firm from which the lawyer was departing as the entity to send departure notification to affected clients. That opinion was rejected by the Iowa Supreme Court in Watson, P.C. v. Peterson, 650 N.W.2d 562 (Iowa 2002). It is

We start with the lawyer's search for employment: What can be disclosed, when should the employer law firm be notified and should the client know that the lawyer is searching for employment. Then we transition to notifying the client of the lawyer's departure: Who sends the notice, to whom and what should it say and how the files are transferred. We conclude with post termination issues: The obligation to facilitate conflicts of interest checks, inquiries for the lawyer who has left the firm, email transfer and web page and search engine optimization and disparaging remarks.

We present the opinion in the form of fourteen factors.

A. Three Lists

Three "lists" form the foundation for the change of firm process: The Active Client List (ACL), the Conflict of Interest List (COIL) and the Closed File List (CFL).

1. Active Client List: *The ACL identifies those clients for whom the lawyer has a present and ongoing attorney-client relationship and to whom the lawyer is primarily responsible for providing legal services.*

When several lawyers are involved with the client's matter determining who is "primarily responsible" for servicing the client can be difficult. Because practice situations vary it would not be prudent to create a one-size-fits-all algorithm. However, the answer to the following questions may assist lawyers and law firms when creating the ACL:

- Which lawyer introduced the client to the law firm;
- Which lawyer signed the engagement agreement with the client;
- Which lawyer is lead counsel in court for the client's case;

important to note that Watson and the formal opinion were decided under the prior Iowa Code of Professional Responsibility. In 2005 Iowa adopted the Iowa Rules of Professional Conduct.

- Which lawyer is the lead agent for the client in transactions; and
- Which lawyer did the law firm assign to be primarily responsible for the client.

The list should include the client's name, unless the client has instructed that identity should be confidential, and the matter of the representation described in reasonably sufficient detail to facilitate a determination whether future engagements are substantially related and are materially adverse to the subject of the representation. Iowa R. Prof'l C. 32: 1.7 (a)(1); 32:1.9(a) and (b) and 32: 1.10 (b) (1) and (2). See also the requirement of a client list in IA Sup. Ct. R. 39.18(b)(2) *eff* 12/25/17.(39.18(2) "Client list and location of key information. Each attorney in private practice must maintain a current list of active clients, in a location accessible by the attorney or entity designated under this rule.") However, the description should not disclose attorney-client protected information.

2. The Conflict of Interest List. *COIL contains clients whose matters are both active and closed and pertains to all lawyers in the law firm.*

The COIL is important because it provides the information necessary for future conflict of interest analysis: The client's name, the subject matter of the representation and the names of the lawyers servicing the client and who had access to their attorney-client and confidential material. Under Iowa R. Prof'l C. 32: 1.9 'my partner's client is considered my client' for purposes of conflicts of interest, even if the lawyer had no contact with the client or the client's matter. Client, for purpose of the COIL, does not just include clients with whom the lawyer or law firm has accepted engagement, it also includes prospective clients whose matter the lawyer or law firm did not accept. Iowa R. Prof'l. C. 32:1.18.

3. The Closed File List. *The CFL is an inventory of those client matters which have concluded and for which the lawyer's representation has ended.*

The CFL differs from the ACL and COIL because it focuses on files rather than clients. While the file may be closed and representation ended, the lawyer and law firm have an enduring responsibility of attorney-client privilege, confidentiality and the duty to avoid future conflicts of interest. Iowa R. Prof'l C. 32: 1.9.

B. The Job Search

4. Preliminary Discussions: *Lawyers can engage in preliminary discussion for employment without notifying their law firms or clients, but in doing so should avoid disclosing the identity of clients, client matters, or any information that could violate the lawyer's fiduciary duty to their employer or law firm.*

When engaging in initial discussions, lawyers should be mindful that they owe multiple, often symbiotic fiduciary duties to their law firms and clients.

(i) Fiduciary Duty to One's Law Firm

Lawyers must remember that they owe fiduciary duties to their existing law firms and to clients. The fiduciary duty to the law firm is based upon common law. ABA Formal Op. 99-414 cautions:

> "Charges of breach of fiduciary and other duties owed the former firm also might be avoided if the departing lawyer and her new firm go no further than the permissible conduct noted in Graubard Mollen v. Moskovitz, 86 N.Y.2d 112, 653 N.E.2d 1179 (1995), and avoid the conduct the court found actionable, such as secretly attempting to lure firm clients to the new firm

(even when the departing lawyer originated and had principal responsibility for the clients' matters) and lying to clients about their right to remain with the old firm and to partners about the lawyer's plans to leave. Although that case involved civil litigation, other courts have imposed discipline on lawyers for similar conduct because it involved dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c).[5]"

One commentator has noted:

"In the leading case of Meehan v. Shaughness, 535 N.E.2d 1255 (Mass. 1989), the Supreme Judicial Court of Massachusetts held that two partners owed fiduciary obligations to their remaining partners and that they could be held civilly liable for breach of those obligations. However, the court decided that the withdrawing partners did not breach their fiduciary obligations by making "logistical arrangements" for their new firm (executing a lease, preparing a list of clients they expected to retain after their departure, and arranging for financing based on their expected clientele) because fiduciaries may "plan to compete with the entity to which they owe allegiance," provided that they do not otherwise breach their fiduciary obligations. *Id.* at 1264."

Nathan M. Crystal, "*So you are thinking about moving – a primer on Ethical Obligations of Departing Lawyers and their Firms*" 24 S. Carolina Lawyer 10 (2013)

[5] Footnote 18 of the ABA opinion is instructive and gives guidance as to what not do to when preparing to leave one's law firm: " FN 18. See, e.g., In the Matter of Cupples, 979 S.W.2d 932, 935 (Mo. 1998); In re Cupples, 952 S.W.2d 226, 236-37 (Mo. 1997) (in separate disciplinary proceedings involving a lawyer in connection with his departure from two different law firms, the court held that the lawyer's conduct, which included secreting client files as he prepared to withdraw from a firm, removing files without client consent, failing to inform client of change in nature of the representation, and other actions constituted conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Missouri's counterpart to Model Rule 8.4(c)). See also In re Smith, 853 P.2d 449, 453 (Or. 1992) (Before leaving law firm, lawyer met with new clients in his office, had them sign retainer agreements with him, and took files from the office. In imposing a four (4) month suspension from practice of law, the Court stated that "although there is no explicit rule requiring lawyers to be candid and fair with their partners or employers, such an obligation is implicit in the prohibition of DR 1-102(A)(3) against dishonesty, fraud, deceit, or misrepresentation.").

Watson is instructive regarding problems that can be created by surreptitious activity by the departing lawyer. Watson, P.C. v. Peterson, 650 N.W.2d 562, 565 (Iowa 2002) (Although no Iowa cases are directly on point, the facts of this case are not uncommon. In fact, it has been observed that "law firms are under siege." See Robert W. Hillman, Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving, 67 Tex. L. Rev. 1, 1 (1988) [hereinafter Hillman]. Because of lateral movement by attorneys between firms, there is "the ever-present threat of [a lawyer] leaving and taking what many regard as the firm's assets--its clients." *Id.* at 4. This phenomenon is referred to as "grabbing and leaving.")

However, the *Watson* court rightfully recognized that "grabbing" is not limited to the departing lawyer. Law firms intending to retain their clients also attempt to grab the client from the departing lawyer. This is sometimes called "clamp and stay." *Id*, at 650 N.W.2d 562, 565-66 (Iowa 2002). [6]

(ii) What Can/Cannot Be Disclosed

In preparing for preliminary discussions with potential new employers, the lawyer should study ABA Formal Op. 09-455 (2009) "Disclosure of Conflicts When Lawyers Change Firms" which provides guidance concerning when, and under what circumstances the ACL can be disclosed without violating Model (Iowa) Rule of Professional Conduct 32: 1.6.

C. Disclosures

At some point, preliminary discussions transition to negotiations.

[6] Albeit in dicta, *Watson* observed: "However, one judge, obviously disdaining the practice of grabbing and leaving, has stated: "It is noble and daring to embark on a career of law by cutting the umbilical cord that ties one to an employment contract. But taking the heart and soul of the benefactor is immoral, illegal and repulsive. If they want their own firm, let them get their own clients. Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 252 Pa. Super. 553, 382 A.2d 1226, 1233 (Pa. Super. Ct. 1977)" Watson, P.C. v. Peterson, 650 N.W.2d 562, 566 (Iowa 2002)

5. Conflicts Disclosure: ***When preliminary discussions have progressed to where the prospective new firm must perform a conflict of interest analysis, the lawyer should notify the lawyer's current law firm of the intended termination.***

Notifying one's employer of an intended termination is stressful. Failing to notify the employer, disclosing the ACL to other law firms in the community, and being found out by one's employer or partners can generate hostility that can last a career and must be avoided at all cost. Comment [13] to Rule 32:1.6 describes important matters to consider when disclosing relevant portions of the ACL:

> "[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See rule 32:1.17, comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also

govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these rules."

Both lawyer and law firm have legitimate interests to protect, and it is imperative they discuss, and hopefully conclude, how they will facilitate the disclosing process. While law firms may naturally be reluctant to authorize disclosure of the list, they have an ethical obligation to facilitate the disclosure. Likewise, the prospective law firm, in receiving the list, has an obligation to hold the information in confidence. See Iowa R. Prof'l C. 32: 1.6(b)(7) and comment 13 thereto. All participants are well advised to review ABA Formal Op. 09-455.

6. Opposing Counsel Potential. *While opposing counsel in ongoing matters is often a source for potential employment it comes with special ethical problems which could cause one or both being disqualified from representation in the ongoing matter.*

Prior to entering into preliminary discussions for employment, both lawyers should review ABA Formal Op. 96-400 (1996) Job Negotiations with Adverse Firm or Party. The opinion cautions, and we agree, that all parties should consider notifying and obtaining the consent of their respective clients prior to engaging in negotiations.

D. Notice to Clients

When a termination or separation date has been determined, clients must be notified of the separation and their right to change counsel.

7. Joint Notice to Active Clients: *Once the separation date has been determined, the departing lawyer and law firm should jointly notify those clients on the Active Client List.*

The purpose of notifying clients on ACL is to advise them of their right to select counsel. The purpose is not to facilitate "grab and leave" or the converse "clamp and stay"[7]. Watson, P.C. v. Peterson, 650 N.W.2d 562 (Iowa 2002) and ABA Formal Op. 99-414 (1999). IA Sup. Ct. R. 33.2(6) requires lawyers to "cooperate in the transfer of files, wills, and other documents to another attorney when requested to do so, orally or in writing, by a person authorized to make that request. We will provide reasonable assistance in organizing and explaining items transferred, recognizing that such cooperation assists the client in receiving competent legal representation."

The client should be told they have the choice to remain with the law firm or have their representation transferred to the departing lawyer and how to do so. If the parties cannot agree, they should designate an independent transfer agent the clients could contact should they have questions regarding transfer of representation.

The client's election should be sent to the law firm, or in the case of a unilateral notice (see, factor 8, below), the transfer agent, who will provide a copy to the departing lawyer and law firm if necessary.

The law firm is responsible to facilitate the transfer without cost to the client or departing lawyer. The following is a suggested, but not mandated, client notification form:

> "Effective, <DATE> Attorney <Departing Lawyer> will be leaving our firm and will establish practice with <NEW FIRM> located at <ADDRESS>. If you wish, <Departing Lawyer> will continue to represent you, or you can stay with the law firm or you could have another lawyer or law firm to represent you. Simply give us your indication:

[7] See FN 5.

<Departing lawyer> will represent me _____, or

I wish to stay with the firm: _____, or

I wish to engage the services of a new and different lawyer or law firm to represent me: _____.

If you have questions regarding your continued representation or the transfer of your matter, please contact <NAME OF TRANSFER AGENT> at <CONTACT INFORMATION> and h/she will assist you.

/s/ Departing Lawyer /s/ Law Firm Partner

8. Unilateral Notice*: If the lawyer and law firm cannot agree to jointly notify clients of the lawyer's departure and the client's right to elect representation, they should designate an independent transfer agent to do so.*

Joint notification is highly encouraged. However, in rare instances if the parties cannot come to agreement *Watson* would authorize the departing lawyer to unilaterally send notice to all clients on the ACL. Before doing so, the law firm should be given twenty days written notice of the lawyer's intent to engage unilateral notification to the law firm, with a copy of the ACL, during which time neither the law firm nor the lawyer should send notification to the clients on the ACL. During this time, unless the parties can agree on joint notification, the departing lawyer shall appoint a lawyer not associated with either the departing lawyer, the new firm or the law firm to act as transfer agent who shall, after the expiration of the aforesaid time period, send notification to all clients on the ACL. The following is a suggested, but not mandatory notification form:

"Effective, <DATE> <Departing Lawyer> will be leaving the <LAW FIRM> and will establish practice with <NEW FIRM> located at <ADDRESS>. You have a choice as to who will represent you. If you wish, <DEPARTING

LAWYER>, the <LAW FIRM> or another lawyer to represent you, simply give me your indication:

<Departing lawyer> will represent me _____, or

<Law Firm> will represent me _____, or

I wish to engage the services of a new and different lawyer or law firm. _____.

If you have questions regarding your continued representation or the transfer of your matter, please contact <NAME OF TRANSFER AGENT> at <CONTACT INFORMATION> and I will assist you.

On behalf of:

<Departing Lawyer> < Law Firm>

/s/ Transfer Agent

9. Prior Clients: *Clients on the CFL to whom the lawyer has provided legal services while employed by the law firm on matters that have been concluded, need not be notified of the lawyer's departure from the law firm and the law firm should retain their file unless the client requests otherwise.*

Those clients whose matters are closed as shown on the CFL, shall be considered individuals with a "prior professional relationship with the lawyer" under Iowa R. Prof'l C. 32:7.3(a)(2). However, unless the lawyer knows (or should know from the association with the law firm or other source or situation) that the client has an ongoing relationship with the law firm, contact may be prohibited by Iowa R. Prof'l C. 32: 4.2.

E. Post Separation Matters

Lawyers and law firms have obligations to each other and their clients that continue beyond their separation.

10. Post Termination Conflicts: *Law Firms have an ethical duty to determine the existence of conflicts of interest.*

From time to time, it will be necessary for the departed lawyer to consult with the prior law firm to check for conflicts of interest regarding new matters. Iowa R. Prof'l C. 32:1.10. The law firm has an ethical obligation under Iowa R. Prof'l C. 32: 1.6 (b)(7) and Comment 13, to provide the information.

The COIL provides information concerning clients of the remaining members of the law firm. The lawyer who has left the practice will not have access to the law firm's COIL and without timely, accurate and complete information, complying with the imputed conflict rule, Iowa R. Prof'l. C. 32: 1.10, becomes impossible. As previously indicated, lawyers and law firms have an obligation to facilitate each other's conflict of interest analysis.

11. Conflicts Arbitrator. *In the event a dispute arises between lawyer, law firm and prospective new firm regarding conflicts of interest and the necessity for or scope of the client disclosure, the parties should appoint a conflicts arbitrator to resolve the conflict.*

Conflicts between the lawyer, law firm and new law firm will undoubtedly arise. If the parties cannot come to accord, they should engage an independent, fair and confidential resolution process. ABA Formal Op. 09-455 (2009) describes a conflicts arbitration process, which we approve:

> "In some situations, resolving whether a lawyer's move to a new firm would result in a conflict of interest requires fact-intensive analysis of information beyond just the persons and issues involved in a representation.

Such an analysis will often be required in determining whether there is a "substantial relationship" between two matters for purposes of Rule 1.9. (Duties to Former Clients) In such cases, the firm may be able to resolve the question based on information available from sources other than the moving lawyer. If not, the moving lawyer must either seek prior client consent, be screened from the current representation pursuant to Rule 1.10(a)(2) (Imputation of Conflicts), forgo the move, or persuade the prospective firm to undertake an alternative method of detecting and resolving the conflicts of interest issue consistent with the stated exceptions to Rule 1.6 (Confidentiality).

An alternative suggested by some commentators is retention by the moving lawyer, the prospective new firm, or both, of an independent or intermediary lawyer to receive and analyze conflicts information in confidence. This approach should not compromise any privilege nor frustrate the reasonable expectations of a client. It also conforms to Rule 1.6(b)(4), which expressly permits disclosure of protected information to secure legal advice about a lawyer's compliance with the Rules. The intermediary lawyer then may advise one or both, without disclosing any facts to the other, of the intermediary lawyer's conclusion on the resolution of, or the inability to resolve, any conflicts of interest that may have been detected.

Procedures involving use of intermediary lawyers when lawyers move between firms have been described by Professors Tremblay, and Wald, as well as by Professors Hazard and Hodes. "If a client has instructed the moving lawyer not to reveal particular information to any other person, including other firm lawyers, that information cannot properly be imparted to the intermediary lawyer."

12. Client or Potential Client Inquiries: *Law Firms have a duty to facilitate transfer of calls and communication to the lawyer who has left the law firm.*

Iowa R. Prof'l C. 32: 8.4 (a) and (c) prohibit a lawyer or law firm from violating the Rules or otherwise engaging in dishonesty, fraud, deceit or misrepresentation. After the lawyer has departed, the law firm may receive phone, mail or electronic communication for the separated lawyer in which case the inquirer should be given the lawyer's current contact information. Likewise, the law firm should facilitate electronic transfer of the lawyer's email communication, however web pages and search engine optimization need only be reconfigured to eliminate reference to the lawyer who has left the practice.

13. Disparagement: *Lawyers and law firms should refrain from unfounded accusations of impropriety.*

Recognizing that lawyer-law firm separations can sometimes be acrimonious, Iowa lawyers are reminded to take guidance from IA Sup. R. 33.2(4) "We will not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety."

14. Intellectual and Proprietary Property: *Unless the parties have agreed otherwise, intellectual property created by the departing lawyer in the scope of the employment may constitute work for hire and belong to the law firm.*

Law firms frequently create brief banks and form banks to expedite the building and delivery of their legal services[8]. The brief or form bank may have been created as a result of the work of the employed lawyer as well as other lawyers acting within the scope of their duties, while being paid by the law firm. These resources can constitute works made for hire within the meaning of 17 U.S.C. § 101 ("A "work made for hire" is-- (1) a work prepared by an employee within the scope of his or her employment")[9] Departing lawyers should be cautious when taking this type of product from the law firm without the law firm's knowledge and consent.

CONCLUSION

When terminating their relationship, lawyers and law firms should be ever mindful that law is a profession and not a competitive business. Little time will pass when either the lawyer or remaining members law firm will need the other, or be opposite of the other or appear before the other.

[8] See, for example Jenkins v. Astrue, 544 F. Supp. 2d 736, 742-43 (N.D. Ind. 2008). Jenkin's fee application was opposed because of the use of his firm's brief bank. In defending the application, he explained the use of a brief bank enhanced and reduced costs. The court held: "This court agrees with Jenkins that his fee request is reasonable. This court utilizes boilerplate language and also maintains a computerized bank of legal precedent. Yet, like Jenkins' attorney, the court must conduct new research every time a case is presented, which research is often time-consuming. Thus this court fully understands Jenkins' attorneys method of drafting briefs. Jenkins' attorney is to be commended for his use of time-saving methodologies, not penalized."

[9] See also Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S. Ct. 2166 (1989)