

ETHICS ISSUES FACING IN-HOUSE LAWYERS WHO REPRESENT COMPANIES IN JOINT VENTURES

Hypotheticals and Analyses*

**Thomas E. Spahn
McGuireWoods LLP**

* These analyses primarily rely on the ABA Model Rules, which represent a voluntary organization's suggested guidelines. Every state has adopted its own unique set of mandatory ethics rules, and you should check those when seeking ethics guidance. For ease of use, these analyses and citations use the generic term "legal ethics opinion" rather than the formal categories of the ABA's and state authorities' opinions -- including advisory, formal and informal.

© 2012 McGuireWoods LLP. McGuireWoods LLP grants you the right to download and/or reproduce this work for personal, educational use within your organization only, provided that you give proper attribution and do not alter the work. You are not permitted to re-publish or re-distribute the work to third parties without permission. Please email Thomas E. Spahn (tspahn@mcguirewoods.com) with any questions or requests.

TABLE OF CONTENTS

<u>Hypo No.</u>	<u>Subject</u>	<u>Page</u>
1	Ethics and Privilege Issues for a Lawyer Representing a Joint Venture	1
2	Waiver Danger during Joint Venture Creation Negotiations	17
3	Possibility of a Common Interest Agreement Protecting Communications during Joint Venture Creation Negotiations.....	20
4	Lawyers' Joint Representation of Their Company and the Joint Venture	56
5	Effect of Adversity between Joint Venture Members	127
6	Conflicts and Privilege Ramifications of a Contract Joint Venture.....	152
7	Effect of Adversity between Members	169

Ethics and Privilege Issues for a Lawyer Representing a Joint Venture

Hypothetical 1

Recently your company and another large chemical company formed an LLC to operate a joint venture that shows great promise. The management team from both members of the joint venture LLC has asked you whether the LLC can hire one law firm to represent the joint venture. Although the potential cost savings are attractive, the firm and you (as inside counsel) have a number of questions to consider.

- (a) Must the firm disclose to the other company that it represents your company on a totally unrelated matter?

YES

- (b) Will the privilege protect the firm's communications with joint venture employees assigned by either of the members to the joint venture?

YES

- (c) If adversity develops between the two members, may the firm be adverse to your company?

NO

- (d) If adversity develops between the two members, may the firm be adverse to the other company?

NO

- (e) If adversity develops between the two members, may the firm be adverse to the joint venture itself?

NO

Analysis

(a) A lawyer representing a joint venture should, and probably must, advise all members of the joint venture about any unrelated representations of any of the members. This is because the other members have the right to worry that the lawyer will somehow favor his or her other clients while representing the joint venture in dealing with third parties.

(b) Under the Upjohn standard or control group principles, a lawyer representing a joint venture should be able to engage in privileged communications with employees of the joint venture as long as the communications meet all of the requirements of privileged communications.

(c)-(e) A number of courts have indicated that a lawyer representing a joint venture is essentially deemed to also represent its members, because of the likelihood that the lawyer will acquire confidential information from the members.

Several courts have reached that conclusion, based on the relatively intimate relationship between the joint venture and its members.

- Funding Grp. v. Estate of Deen, No. 2 CA-CV 2010-0029, 2010 Ariz. App. Unpub. LEXIS 229, at *4-5, *5 n.4, *11-12, *14 (Ariz. Ct. App. Nov. 19, 2010) (disqualifying a lawyer who had represented a joint venture and one of its members, and later began to represent one of the members against another; explaining the situation: "Silver King then filed a notice to the court, stating that Ronald Deen and San Felice would not be appearing for the depositions scheduled for the next day, as they 'adamantly object[ed] to being deposed by their former counsel, Mr. Strojnik.' The notice also stated that Silver King had filed a complaint with the Arizona State Bar Association against Strojnik and would 'refrain from being subjected to depositions until the ethical matters have been resolved.' A few days later, TFG [plaintiff] filed a motion to compel discovery, specifying the instances in which Silver King had failed to comply with discovery rules." (footnote omitted); explaining that "Strojnik was general counsel for both APM and the joint venture, and until he was disqualified by the trial court, he was also counsel for TFG in this case."; "TFG argues the

trial court erred by disqualifying its counsel, Peter Strojnik. Specifically, it contends 'counsel never represented any of the adverse parties at any time' because Strojnik never individually represented San Felice, Deen, or SKMC. Strojnik was general counsel for both APM and the joint venture. He was also a permanent member of the joint venture's policy committee. Silver King moved to disqualify Strojnik based primarily on the conflict of interest between his representation of San Felice and Deen as part of the joint venture and his representation of TFG in the lawsuit against Silver King."; noting that TFG "nonetheless concedes 'there are difficulties in determining the existence of an attorney-client relationship when a lawyer represents a small entity with 'extensive common ownership and management,' such as a limited partnership.'").

- Hakimian Mgmt. Corp. v. Richard C. Fiore, Inc., No. 600472/02, 2007 N.Y. Misc. LEXIS 4844, at *14-15, *15-16, *19-21, *23-24 (N.Y. Sup. Ct. Jul. 9, 2007) (disqualifying a law firm under both a conflict of interest and the witness/advocate rule; noting that the firm had represented one joint venture participant in creating the joint venture, and then had represented the joint venture in dealing with third parties; disqualifying the lawyer from representing one of the participants against the other; "Kessler admits that he had discussions with Fiore and Sullivan with respect to the parameters of the deal with the EDC and his comments on the proposed draft contracts submitted by the EDC, yet he denies that he received confidential information from Fiore and Sullivan Kessler then asserts that he was 'never made privy to any proprietary information' by either Fiore and Sullivan 'that would be adverse to their interests in relation to the Hakimians', and that 'the Hakimian group and the RCF group were, for purposes of the negotiations of the contract of sale, united in interest as members of the LLC.'" (internal citation omitted); "The submissions of the parties establish that Kessler assumed a lead role in drafting the Joint Venture Agreement and the Operating Agreement for the LLC; however, Fiore and RCF were represented by the Schwartz in reviewing the drafts of these documents. Kessler was, however, the only attorney representing Fiore, RCF, as well as the other members of the LLC, including the Hakimians and Sullivan, in the negotiations with the EDC concerning the contract of sale for the Seaport properties, and related matters. Therefore, Fiore and RCF have established that they had a prior attorney-client relationship with Kessler. Further, the negotiations with the EDC regarding the contract of sale for the Seaport Project is a matter which is substantially related to the instant action, in which R&E is representing HMC and the Hakimians, whose position in this litigation is materially adverse to that of Fiore and RCF. Accordingly, Fiore and RCF have established all of the three criteria for disqualifying Kessler from representing the HMC and the Hakimians in this action."; "In the instant case, HMC and the Hakimians did not rebut the presumption that all of the attorneys in the law firm of R&E should be disqualified from representing them in the instant action. They

have failed to demonstrate that any confidential information Kessler acquired from Fiore and RCF in the course of representing them, as members of the LLC, in the negotiations and drafting of the contract of sale with the EDC, is unlikely to be significant or material in this litigation. Given Kessler's extensive involvement in setting up the joint venture (the LLC), in the negotiations with the EDC and the drafting of the contract of sale on behalf of the parties, R&E's 'burden in rebutting the presumption' that Kessler 'acquired material confidences is especially heavy'. . . . Kessler's conclusory denials that he acquired confidential information from Fiore and RCF are insufficient to rebut the presumption of disqualification of the entire R&E law firm. Moreover, in view of the fact that R&E is a medium sized 'boutique' law firm of only 41 attorneys, similar to the law firm at issue in Kassis, it is highly likely that any information Kessler acquired from Fiore and RCF will be shared with other attorneys in the firm. Accordingly, Kessler's conclusory statement that none of the other attorneys at R&E have 'asked me any questions about the negotiations, other than the bare bones facts, as set forth above, regarding my role as an attorney'. . . is insufficient to rebut the presumption that the entire firm should be disqualified."; "R&E should be disqualified from representing HMC and the Hakimians in the present action, which is substantially related to the work performed by firm partner Robert Kessler, Esq. in representing the LLC and all of its members, including Fiore and RCF, in the formation of the parties' joint venture and in the negotiation and drafting of the contract of sale in the ultimately unsuccessful deal with the EDC.").

- Al-Yusr Townsend & Bottum Co., Ltd. v. United Mid East Co., Inc., Civ. A. No. 95-1168, 1995 U.S. Dist. LEXIS 14622. at *9, *9-10, *11, *11-12, *12 (E.D. Pa. Oct. 3, 1995) (disqualifying a lawyer who had represented a joint venture from representing one participant against another participant; "The threshold inquiry under the Rule is whether defendant is a 'former client,' the answer to which depends on whether there exists an attorney-client relationship between an attorney representing a joint venture and the individual members of that joint venture. Plaintiff contends that there is no such relationship. Plaintiff relies on Rule 1.13 in support of that position, which states that a 'lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents' (emphasis added). Plaintiff's attempt to draw a technical distinction between representing the joint venture and representing the constituents of that joint venture, however, fails."; "While no Pennsylvania law addresses the issue of whether an attorney-client relationship exists between an attorney representing a joint venture and the individual members of that joint venture, the nature of a joint venture compels this Court to conclude that such a relationship does exist. 'To constitute a joint venture certain factors are essential: (1) each party to the venture must make a contribution, not necessarily of capital, but by way of services, skill, knowledge, materials or money; (2) profits must be shared among the parties; (3) there must be a 'joint proprietary interest and right of mutual control over

the subject matter' of the enterprise; (4) usually, there is a single business transaction rather than a general and continuous transaction.' McRoberts v. Phelps, 391 Pa. 591, 599, 138 A.2d 439, 443-444 (1958). This description of a joint venture highlights the import of the members' individual interests. So intertwined are these interests with those of the joint venture as a whole that it certainly would be reasonable for a member to expect of the attorney representative the whole that the attorney is representing the individual member as well. Under Pennsylvania law, such an expectation is sufficient to form the basis of an implied attorney-client relationship."; "[I]t was reasonable for the defendants to believe that Mr. Blackburn was representing them because of his characterizations of their communications as privileged and confidential and his references to them as his 'clients.'"; "[W]hile there is no Pennsylvania case law directly on point, analogous authority in the context of associations provides support for the conclusion that an attorney-client relationship does not exist between the attorney representing a joint venture and the individual members of that joint venture. In Philadelphia Housing Authority v. Am. Radiator & Standard Sanitary Corp., 294 F. Supp. 1148, 1150 (E.D. Pa. 1969), the court held that each individual member of an unincorporated association is a client of the association's lawyer. A joint venture has been characterized as an association, specifically as an 'association of parties -- of rather recent origin -- to engage in a single business enterprise for profit.' McRoberts, 391 Pa. at 600. As such, Philadelphia Housing is apposite, and provides support for the conclusion that there exists an attorney-client relationship between an attorney representing a joint venture and the individual members of that joint venture."; "In conclusion then, defendants are 'former clients' under Rule 1.9. Having so concluded, the next inquiry under Rule 1.9 is whether at issue in the instant action is 'the same or a substantially related matter' as that at issue during Mr. Blackburn's representation of the Joint Venture.").

On the other hand, a lawyer who carefully defines the client might be able to take matters adverse to a principal of one of the joint venture members.

- Spiniello Cos. v. Metra Indus., Inc., Civ. A. No. 05-5075 (SRC), 2006 U.S. Dist. LEXIS 72961, at *11-12 (D.N.J. Oct. 6, 2006) (declining to disqualify a lawyer from adversity to a principal in one of the joint venture participants the lawyer represented; "The magistrate judge correctly found, based on the evidence presented, that Spiniello Companies -- and not its president Mr. Stivaly -- was Mr. Riordan's client in the CEPS litigation and that Mr. Riordan's communications with Mr. Stivaly were conducted in the context of Mr. Stivaly's position as president of Spiniello Companies. The magistrate judge concluded that this contact between Mr. Riordan and Mr. Stivaly, who was also president of Metra Industries, did not give rise to an attorney-client relationship between Mr. Riordan and Mr. Stivaly or between Mr. Riordan and

Metro Industries. Mr. Stivaly's communications with Mr. Riordan, the court below reasoned, were for the benefit of Spiniello Companies, Mr. Riordan's client and Mr. Stivaly's employer. This Court holds that those findings are supported by the record. Defendants have not presented any evidence to this Court that suggests that an attorney-client relationship existed between Mr. Stivaly and Mr. Riordan or between Metra Industries and Mr. Riordan with regard to the CEPS litigation.").

Although not directly on point, it is worth considering a similar issue courts address in connection with corporate "families."

When representing a corporation, the entity is the client.¹ However, it is unclear whether all members of the corporate "family" are also clients for conflicts purposes.²

ABA Model Rules. The ABA's Ethics 2000 Task Force added the following language to the ABA Model Rules, which weighs in favor of permitting a lawyer to take positions adverse to a corporate client's affiliate -- but without creating any bright-line rules.

A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

ABA Model Rule 1.7 cmt. [34].

¹ ABA Model Rule 1.13(a).

² When this issue arises in the context of the attorney-client privilege, most courts have held that all members of the corporate family are within the scope of the privilege. See, e.g., Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1493 n.6 (9th Cir. 1989); United States v. AT&T, 86 F.R.D. 603, 616-17 (D.D.C. 1979); Weil Ceramics & Glass, Inc. v. Work, 110 F.R.D. 500, 503 (E.D.N.Y. 1986).

The ABA has also issued a legal ethics opinion discussing this issue.³ In ABA LEO 390 (1/25/95) the ABA rejected a per se determination that representation of one

³ ABA LEO 390 (1/25/95) ("A lawyer who represents a corporate client is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter. However, a lawyer may not accept such a representation without consent of the corporate client if the circumstances are such that the affiliate should also be considered a client of the lawyer; or if there is an understanding between the lawyer and the corporate client that the lawyer will avoid representations adverse to the client's corporate affiliates; or if the lawyer's obligations to either the corporate client or the new, adverse client, will materially limit the lawyer's representation of the other client. Even if the circumstances are such that client consent is not ethically required, as a matter of prudence and good practice a lawyer who contemplates undertaking a representation adverse to a corporate affiliate of a client will be well advised to discuss the matter with the client before undertaking the representation."; explaining that "[c]learly, the best solution to the problems that may arise by reason of clients' corporate affiliations is to have a clear understanding between lawyer and client, at the very start of the representation, as to which entity or entities in the corporate family are to be the lawyer's clients, or are to be so treated for conflicts purposes"; noting that "considerations of client relations will ordinarily dictate the lawyer's course of conduct" without addressing ethics issues; noting that "circumstance of only partial ownership . . . is a variable that might affect the result in a particular case," but does not fundamentally change the analysis; holding that "in the absence of a clear understanding otherwise, the better course is for a lawyer to obtain the corporate client's consent before the lawyer undertakes a representation adverse to its affiliate"; also noting that lawyers must follow whatever retainer contract they enter into with clients, but that "a client that has such an expectation [that its lawyer will not be adverse to its affiliate] has an obligation to keep the lawyer apprised of changes in the composition of the corporate family"; addressing various factors in determining the propriety of a lawyer taking matters adverse to the affiliate of a corporate client; "[T]he nature of the lawyer's dealings with affiliates of the corporate client may be such that they have become clients as well. This may be the case, for example, where the lawyer's work for the corporate parent -- say, on a stock issue or bank financing -- is intended to benefit all subsidiaries, and involves collecting confidential information from all of them. Even if the subject matter of the lawyer's representation of the corporate client does not involve the affiliate at all, however, the lawyer's relationship with the corporate affiliate may lead the affiliate reasonably to believe that it is a client of the lawyer. For example, the fact that a lawyer for a subsidiary was engaged by and reports to an officer or general counsel for its parent may support the inference that the corporate parent reasonably expects to be treated as a client. . . . A client-lawyer relationship with the affiliate may also arise because the affiliate imparted confidential information to the lawyer with the expectation that the lawyer would use it in representing the affiliate. . . . Additionally, even if the affiliate confiding information does not expect that the lawyer will be representing the affiliate, there may well be a reasonable view on the part of the client that the information was imparted in furtherance of the representation, creating an ethically binding obligation that the lawyer will not use the information against the interests of any member of the corporate family. Finally, the relationship of the corporate client to its affiliate may be such that the lawyer is required to regard the affiliate as his client. This would clearly be true where one corporation is the alter ego of the other. It is not necessary, however, for one corporation to be the alter ego of the other as a matter of law in order for both to be considered clients. A disregard of corporate formalities and/or a complete identity of managements and boards of directors could call for treating the two corporations as one. . . . The fact that the corporate client wholly owns, or is wholly owned by, its affiliate does not in itself make them alter egos. However, whole ownership may well entail not merely a shared legal department but a management so intertwined that all members of the corporate family effectively operate as a single entity; and in those circumstances representing one member of the family may effectively mean representing all others as well. Conversely, where two corporations are related only through stock ownership, the ownership is less than a controlling interest and the lawyer has had no dealing whatever with the affiliate, there will rarely be any reason to conclude that the affiliate is the lawyer's client"; also

corporate affiliate and adversity to another automatically creates a conflict. The ABA indicated that the existence of a conflict depends on: the lawyer's and client's understanding of which corporate entities are clients; the client's expectations about an attorney-client relationship with the affiliated corporation; the facts of the representation (such as whether the lawyer actually performs work for a corporate affiliate, reports to the general counsel of a parent when working for a subsidiary, etc.); the nature of the corporate affiliation (such as any alter ego relationships among corporate affiliates); and whether the lawyer has acquired any confidential information from the corporate affiliate. The ABA indicated that adversity to a corporation generally amounts only to "indirect" adversity to an affiliated corporation, because the adversity only derivatively affects the affiliate.

Finally, the ABA explained that even in the absence of a conflict lawyers might be prohibited from taking positions adverse to a corporate client's affiliate if their diligence or judgment on behalf of the corporate client might be adversely affected (if, for instance, the corporate client would "resent" the lawyer undertaking the representation).

distinguishing between direct and indirect adversity; "The paradigm situation here is presented by a lawyer's bringing a lawsuit, unrelated in substance to the lawyer's representation of a corporate client, seeking substantial money damages against a wholly owned subsidiary of the client: if the suit is successful, this will affect adversely not only the subsidiary but the parent as well, in the sense that one of its assets is the equity in the subsidiary, and its consolidated financial statements may (unless the subsidiary has applicable insurance coverage) reflect the impact of material adverse judgments against the subsidiary"; explaining that a lawyer's representation that involves "attacking the conduct or credibility of the second client or seeking to compel resisted discovery from the client" is directly adverse, but that positional adversity is not directly adverse; including that financial impact on another member of a corporate family is only indirect adversity; nevertheless finding that even such an indirect adversity might be a "material limitation" under Model Rule 1.7(b) ultimately shifting the burden of proof on the lawyers seeking to undertake the representation; "[I]n any instance where the lawyer concludes that no client consent is required, under either paragraph of Rule 1.7, the lawyer should be prepared to show how he was able to make the various determinations required without contacting the client for information or consent -- particularly determinations (a) that the client does not have an expectation that the corporate affiliate will be treated as a client, and (b) that the proposed representation adverse to the affiliate will not have a material adverse effect on the representation of the client.").

As might be expected, the ABA advised lawyers to resolve any doubts in favor of withdrawal, and suggested that a lawyer should discuss matters with the existing client even if consent is not required.

Restatement. The Restatement takes the same basic approach.

For purposes of identifying conflicts of interest, a lawyer's client is ordinarily the person or entity that consents to the formation of the client-lawyer relationship, see § 14. For example, when a lawyer is retained by Corporation A, Corporation A is ordinarily the lawyer's client; neither individual officers of Corporation A nor other corporations in which Corporation A has an ownership interest, that hold an ownership interest in Corporation A, or in which a major shareholder in Corporation A has an ownership interest, are thereby considered to be the lawyer's client.

Restatement (Third) of Law Governing Lawyers § 121 cmt. d.

The Restatement includes two illustrations (Illustrations 6 and 7) which distinguish between: (1) a lawyer taking a litigation matter against a client's wholly owned subsidiary, when the lawsuit might materially affect the client's value; and (2) a lawyer taking a litigation matter against a company that is 60% owned by the client's parent, in a matter that will not materially affect either the defendant's or the parent's financial position -- the former is unacceptable, while the latter is acceptable.

State Ethics Rules. Nationwide, states have struggled with this issue. Florida⁴ and Washington, D.C.,⁵ have explicit ethics rules that recognize the separate identity of corporate clients, and generally allow a lawyer representing one member of a corporate

⁴ Fla. Rules of Prof'l Conduct R.4-1.7 Comment; Fla. Rules of Prof'l Conduct R. 4-1.13 Comment.

⁵ D.C. Rules of Prof'l Conduct R.1.7 Comment 17.

family to take positions adverse to another member of the corporate family. Most states' ethics rules provide no specific guidance.

State Bar Opinions. State bars also take differing approaches.

Not surprisingly, New York's new ethics rules effective April 1, 2009 deal with this issue. One of the comments to New York Rule 1.7 essentially follows the ABA approach -- without coming to a definitive conclusion.

A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should always seek informed consent of the client organization before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer will avoid representation adverse to the client's affiliates, (ii) the lawyer's obligations to either the organizational client or the new client are likely to adversely affect the lawyer's exercise of professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. Whether the affiliate should be considered a client will depend on the nature of the lawyer's relationship with the affiliate or on the nature of the relationship between the client and its affiliate. For example, the lawyer's work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, and the client's overall mode of doing business, may be so extensive that the entities would be viewed as "alter egos." Under such circumstances, the lawyer may conclude that the affiliate is the lawyer's client despite the lack of any formal agreement to represent the affiliate.

New York Rule 1.7 cmt. [34]. The New York Bar adopted two other comments not found in the ABA Model Rules. The first provides helpful guidance to lawyers

attempting to analyze the conflict of interest situation (although without providing absolute certainty), and the second reminds lawyers of the economic impact of their analysis.

Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate. Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer's client.

New York Rule 1.7 cmt. [34A].

Finally, before accepting a representation adverse to an affiliate of a corporate client, a lawyer should consider whether the extent of the possible adverse economic impact of the representation on the entire corporate family might be of such a magnitude that it would materially limit the lawyer's ability to represent the client opposing the affiliate. In those circumstances, Rule 1.7 will ordinarily require the lawyer to decline representation adverse to a member of the same corporate family, absent the informed consent of the client opposing the affiliate of the lawyer's corporate client.

New York Rule 1.7 cmt. [34B].

Predictably, the New York City Bar has also frequently analyzed this issue.

Unfortunately, the New York City Bar's most recent analysis adopts the sort of fact-intensive standard that lacks predictability.⁶

⁶ New York City LEO 2005-05 (6/2005) (addressing what are called "thrust upon" conflicts; among other factors, analyzing the ethics rules governing a lawyer's adversity to a corporate client; "Previous opinions have articulated the circumstances under which an apparent conflict involving a member of a current client's corporate family will be considered an actual conflict of interest requiring consent to continue representing both parties. This determination is based on several factors, including the

The Illinois Bar has taken essentially the same fact-laden approach.⁷

relationship between the two corporate entities, and the relationship between the work the law firm is doing for the current client and the work the law firm wishes to undertake in opposition to the client's corporate family member. See Eastman Kodak Co. v. Sony Corp., 2004 WL 2984297 at *3 (W.D.N.Y. Dec. 27, 2004) ("[t]he relevant inquiry centers on whether the corporate relationship between the two corporate family members is 'so close as to deem them a single entity for conflict of interest purposes'"); Discotrade Ltd v. Wyeth-Ayerst Int'l, Inc., 200 F.Supp.2d 355, 358-59 (S.D.N.Y. 2002) (concluding that a corporate affiliate was also a client for conflict purposes because, among other things, the affiliate was an operating unit or division of an entity that shared the same board of directors and several senior officers and used the same computer network, e-mail system, travel department and health benefit plan as the client); J.P. Morgan Chase Bank v. Liberty Mutual Insurance Co., 189 F.Supp.2d 20, 21 (S.D.N.Y. 2002) (concluding that a subsidiary of a corporate client is also a client for conflicts purposes because 'the relationship [between the two] is extremely close and interdependent, both financial and in terms of direction'; among other things they operated from the same headquarters, shared the same board of directors, and the general counsel (and senior vice president) of the parent was also the general counsel (and senior vice president) of the subsidiary). See also N.Y. City Eth. Op. 2003-03 (whether a corporate affiliate is a client for conflicts purposes 'will depend on many factors, including the relationship between the two corporations and the relationship between the work the law firm is doing for the current client and the work the law firm wishes to undertake in opposition to the client's corporate family member'); [s]ee also ABA Formal Op. No. 95-390 (1995) (factors as to whether a corporate affiliate of a client is also considered a client include whether the subject matter of the representation involves the affiliate; whether affiliate reasonably believes that it is a client of the lawyer; whether the affiliate imparted confidential information to the lawyer in expectation of representation; and whether the lawyer may be required to regard the affiliate as a client due to the relationship between the client and affiliate); N.Y. County Eth. Op. 684 (1991) (factors as to whether representation of parent company extends to subsidiary include whether either the parent or subsidiary reasonably believes that an attorney-client relationship exists; whether counsel to the parent is privy to confidential information about subsidiary that could be detrimental to the subsidiary's interests; and whether the parent's interests would be materially adversely affected by an action against its subsidiary).").

⁷ Illinois LEO 95-15 (5/1996) (addressing the ability of a lawyer representing a corporation to take matters adverse to one of the client's wholly owned subsidiaries; "The Committee therefore concludes that a corporate affiliation, including a majority or even sole ownership of a subsidiary, without more, does not make a client corporation's affiliate an additional client of the lawyer. Because a corporate client's affiliate is not deemed to be a client of the corporation's lawyer merely because of the affiliation, then a representation adverse to the affiliate will not be directly adverse to 'another client' within the meaning of Rule 1.7(a)."; "The Committee notes, as do the ABA and the California Bar, that there may well be particular circumstances that would require the lawyer to consider a subsidiary or other constituent of a corporate client to be a client of the lawyer as well. Such instances could include, for example, situations where the lawyer's work for a corporate parent involves direct contact with its subsidiaries and the receipt of information concerning the subsidiaries protected by Rule 1.6 or situations where the client corporation and the subsidiary in question have the same management group. Another situation that would require the lawyer to treat a corporate affiliate as a client is where one entity could be considered the alter ego of the other. In these kinds of circumstances, the lawyer would be required to seek the corporate client's consent, with appropriate disclosure, before accepting a representation adverse to the affiliate."; "In conclusion, the Committee believes that the Rules of Professional Conduct generally permit a lawyer to accept a proposed representation adverse to a subsidiary or other affiliate of an existing corporate client entity. As also noted above, however, this general proposition may be altered by the specific facts and circumstances of any particular situation. As noted above, the better solution to the issue addressed in this opinion is the agreement of lawyers and corporate clients, in defining the scope of an engagement, as to those affiliates that will be included in the corporate client group.").

In California LEO 1989-113, the California Bar concluded that

[a] parent corporation, even one which owns 100 percent of the stock of a subsidiary, is still, for purposes of rule 3-600, a shareholder and constituent of the corporation. Rule 3-600 makes clear that in the representation of corporations, it is the corporate entity actually represented, rather than any affiliated corporation, which is the client.

California LEO 1989-113 (1989). Furthermore, "[t]he fact of total ownership does not change the parent corporation's status as a constituent of the subsidiary." The parent corporation argued that a successful action against its subsidiary would adversely affect its finances. The Bar rejected this argument:

[H]ere, the parent is not a party to the suit against the subsidiary, and there is no prospect that it will be made a party. The representation against the subsidiary can therefore have no direct consequences on the parent; the only adversity can be that indirect adversity which might result from the diminution in the value of the parent's stock in the subsidiary if the attorney's suit against the subsidiary is ultimately successful. This possible indirect impact is insufficient to give rise to a breach of the duty of loyalty owed to the parent.

Id. The California Bar recognized only one exception to this rule -- if corporate form is disregarded and a parent is considered its subsidiary's "alter ego."

Case Law. Courts also take differing positions. Some courts hold that the representation of one member of the corporate family makes other members "clients" for conflicts purposes.⁸ Other courts have found that the representation of one member of the corporate family does not have that effect.⁹

⁸ Board of Managers v. Wabash Loftominium, L.L.C., 876 N.E.2d 65, 74 (Ill. App. Ct. 2007); Avocent Redmond Corp. v. Rose Elecs., 491 F. Supp. 2d 1000 (W.D. Wash. 2007); UCAR Int'l, Inc. v. Union Carbide Corp., No. 00 Civ. 1338 (GBD), 2002 U.S. Dist. LEXIS 21766 (S.D.N.Y. Nov. 7, 2002); Travelers Indem. Co. v. Gerling Global Reinsurance Corp., No. 99 Civ. 4413 (LMM), 2000 U.S. Dist. LEXIS 11639 (S.D.N.Y. Aug. 14, 2000); Discotrade Ltd. v. Wyeth-Ayerst Int'l, Inc., 200 F. Supp. 2d 355

The case law has generally looked at the same factors as the legal ethics opinions, and has often resulted in law firms' disqualification.

- GSI Commerce Solutions, Inc. v. Babycenter, L.L.C., 618 F.3d 204, 211, 213, 210, 210-11, 211, 211-12, 212 n.3 (2nd Cir. 2010) (disqualifying the law firm of Blank Rome from handling a matter adverse to BabyCenter, a wholly owned subsidiary of Blank Rome's client Johnson & Johnson; ultimately adopting a "operationally integrated" standard for determining what a law firm's corporate client's affiliate should be regarded as a law firm "client" for conflict purposes; noting that the Blank Rome retainer letter contained the following provision: "'Unless otherwise agreed to in writing or we specifically undertake such additional representation at your request, we represent only the client named in the engagement letter and not its affiliates, subsidiaries, partners, joint venturers, employees, directors, officers, shareholders, members, owners, agencies, departments or divisions.'"; noting that Johnson & Johnson complained about Blank Rome's role only after the mediation failed; "Although the American Bar Association ('ABA') and state disciplinary codes provide valuable guidance, a violation of those rules may not warrant disqualification. . . . Instead, disqualification is warranted only if 'an attorney's conduct tends to taint the underlying trial.'" (citation omitted); "The factors relevant to whether a corporate affiliate conflict exists are of a general nature. Courts have generally focused on: (i) the degree of operational commonality between affiliated entities, and (ii) the extent to which one depends financially on the other. As to operational commonality, courts have considered the extent to which entities rely on a common infrastructure. . . . Courts have also focused on the extent to which the affiliated entities rely on or otherwise share common personnel such as managers, officers, and directors."; "This focus on shared or dependent control over legal and management issues reflects the view that neither management nor in-house legal counsel should, without their consent, have to place their trust in outside counsel in one matter while opposing the same counsel in another."; "[W]e agree with the ABA that affiliates should not be considered a single entity for conflicts purposes based solely on the fact that one entity is a wholly-owned subsidiary of the other, at least when the subsidiary is not otherwise operationally integrated with the parent company." (emphasis added); "First, Babycenter substantially relies on J&J for accounting, audit, cash management, employee benefits, finance, human resources, information technology, insurance, payroll, and travel

(S.D.N.Y. 2002); Stratagem Dev. Corp. v. Heron Int'l N.V., 756 F. Supp. 789 (S.D.N.Y. 1991); In re Blinder, Robinson & Co., 123 B.R. 900, 909-10 (Bankr. D. Colo. 1991); Teradyne, Inc. v. Hewlett-Packard Co., No. C-91-0344 MHP ENE, 1991 U.S. Dist. LEXIS 8363 (N.D. Cal. June 6, 1991).

⁹ Whiting Corp. v. White Machinery Corp., 567 F.2d 713 (7th Cir. 1977); Brooklyn Navy Yard Cogeneration Partners, L.P. v. Superior Court, 70 Cal. Rptr. 2d 419 (Cal. Ct. App. 1997); Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264 (D. Del. 1980).

services and systems. Second, both entities rely on the same in-house legal department to handle their legal affairs. The member of J&J's in-house legal department who serves as 'board lawyer' for BabyCenter helped to negotiate the E-Commerce Agreement between BabyCenter and GSI that is the subject of the present dispute. Moreover, J&J's legal department has been involved in the dispute between GSI and BabyCenter since it first arose, participating in mediation efforts and securing outside counsel for BabyCenter. Finally, BabyCenter is a wholly-owned subsidiary of J&J, and there is at least some overlap in management control."; "GSI argues that BabyCenter and J&J have forfeited any right to contest Blank Rome's representation. It focuses on the fact that J&J and BabyCenter waited several months before objecting to Blank Rome as counsel. We reject GSI's argument because a party's delay in raising a conflict-of-interest objection does not prohibit a court from deciding whether a conflict of interest exists."; ultimately holding that Blank & Rome's retainer letter was insufficient to allow the law firm to represent a party adverse to the Johnson & Johnson affiliate; noting among other things that the retainer letter purported to allow Blank Rome to sue even departments and divisions of Johnson & Johnson, which would clearly be unethical).

- Honeywell Int'l Inc. v. Philips Lumileds Lighting Co., Case No. 2:07-CV-463-CE, 2009 U.S. Dist. LEXIS 12496, at *7 (E.D. Tex. Jan. 6, 2009) (disqualifying Paul Hastings from adversary to Philips Lumileds while simultaneously representing one of its corporate affiliates; noting that courts follow a fact-specific analysis in determining a lawyer's ability to take a matter adverse to a corporate affiliate; noting that the two Philips affiliates share a common legal department, "common management, computer networks, and marketing designs"; also noting that the two companies use the same logo in advertisements).
- Board of Managers v. Wabash Loftominium, L.L.C., 876 N.E.2d 65, 74 (Ill. App. Ct. 2007) (assessing the conflict of interests involved in litigation brought by a lawyer who moved from the Chicago law firm of Michael Best & Friedrich to the firm of Arnstein & Lehr, which was then representing related corporations; describing the connection between the defendants and the law firm's clients, most of which involved indirect ownership through LLCs; upholding the trial court's reliance on Illinois LEO 95-15, which points to related corporations' "same management group" as a factor demonstrating that the related companies should be considered as the same client for conflicts purposes; "The particular circumstances of this case indicate Arnstein [law firm] was engaged by and reports to a management group that runs parent, subsidiary, and affiliated corporations that own, manage, and develop residential condominium properties in Chicago. The particular circumstances of this case would lead the management group and the Ambelos corporations [the holding company which developed residential

condominium projects in Chicago] to reasonably believe they were Arnstein's existing clients."; noting that the law firm had represented "this management group" on sixty different matters between 1999 and 2005; explaining that any the doubt about the existence of a lawyer-client relationship be clarified by the lawyer; "Significantly, there is no indication that Arnstein took any affirmative action to inform the Ambelos management group that it was ending their long-term attorney-client relationship regarding the ownership, management, and development of residential condominium properties in Chicago."; also rejecting the law firm's effort to avoid disqualification by imposing an internal screen; disagreeing with the law firm that the clients had waived their right to complain about the conflict by not raising it for six or seven months after learning that the lawyer had moved to the new law firm).

Best Answer

The best answer to **(a)** is **YES**; the best answer to **(b)** is **YES**; the best answer to **(c)** is **NO**; the best answer to **(d)** is **NO**; the best answer to **(e)** is **NO**.

Waiver Danger during Joint Venture Creation Negotiations

Hypothetical 2

You are representing your company in negotiations with another company over the creation of a joint venture.

You just read a memorandum that one of your company's vice presidents sent to the other company -- under a strict confidentiality agreement. The memorandum included the following three sentences:

Our anti-trust attorney has reviewed the current and proposed language and has found that we are at risk and should not proceed. This finding is based, in part, on a review of the case facts from a recent case in Oregon. We strongly believe it is in your and our best interests to avoid the increased possibility of a similar situation ever happening here.

You wonder about the effect of the vice president including those sentences in the memorandum to the other company.

- (a) Has your company's vice president waived the attorney-client privilege by including those three sentences in its memorandum to the other company?

YES (PROBABLY)

- (b) If your company has waived the privilege, will the waiver extend to other internal corporate communications on the antitrust issue?

MAYBE

Analysis

This scenario comes from a recent case that provides a frightening reminder of how fragile the attorney-client privilege can be.

(a) As in similar situations, the scenario involves attorney-client issues, although it also clearly implicates corporate lawyers' ethics duty of maintaining their clients' confidences under ABA Model Rule 1.6.

In Heartland Surgical Specialty Hospital, LLC v. Midwest Div., Inc., Case No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 8690, at *9-10 (D. Kan. Feb. 6, 2007), CIGNA sent a memorandum to HCA while the two companies were negotiating a business transaction. In addressing one issue being negotiated, the CIGNA memorandum contained the following three sentences:

'Our anti-trust attorney has reviewed the current and proposed language and has found that CIGNA is at risk and should not proceed. This finding in [sic] based, in part, on a review of the case facts from a recent case in Oregon. We strongly believe it is in HCA's and CIGNA's best interests to avoid the increased possibility of a similar situation ever happening here.'

Id. at *9-10.

Another company eventually sued both CIGNA and HCA. HCA produced the memorandum to the plaintiff, who then argued that CIGNA had waived the privilege, and triggered a subject matter waiver.

(b) The court agreed that there had been a waiver, and then required CIGNA to produce additional internal CIGNA memoranda and e-mail chains regarding the antitrust issue. Most courts would not find a subject matter waiver in these circumstances, but this case highlights the tremendous risk that corporations face whenever they disclose privileged communications to a third party -- even under a confidentiality agreement.

Best Answer

The best answer to (a) is **PROBABLY YES**; the best answer to (b) is **MAYBE**.

Possibility of a Common Interest Agreement Protecting Communications during Joint Venture Creation Negotiations

Hypothetical 3

Having been "burned" in previous joint venture creation negotiations by a privilege waiver problem, you are trying to figure out a way to preserve privilege protection for communications between your company and another proposed joint venture member. The in-house lawyer representing the other member has suggested a common interest agreement as a way to preserve privilege from third parties' waiver claims.

May your company avoid waiving privilege protection during joint venture creation negotiations by entering into a common interest agreement with the other proposed member?

NO (PROBABLY)

Analysis

Many lawyers are tempted to arrange for common interest agreements between their respective clients, in an effort to contractually assure privilege protection in a scenario that would otherwise result in waiver of the privilege. However, the enormous variations in courts' recognition of and application of the common interest doctrine create uncertainties that should give clients and their lawyers great pause before entering into such agreements.

Necessity for Litigation or Anticipated Litigation. One of the most profound variations among courts' attitudes involves the role of litigation or anticipated litigation in the common interest doctrine. A recent trend makes this issue even more uncertain.

Courts have adopted essentially five approaches in analyzing the role of litigation or anticipated litigation in connection with a common interest doctrine claim.

First, some courts do not recognize the common interest doctrine, and thus presumably do not apply the desired protection even in the midst of litigation.

Second, some courts apply the common interest doctrine only to participants already involved in active litigation.

For instance, in 2009 a court explained that under Hawaii law, "the joint litigant common interest privilege is limited to co-parties and their counsel in pending litigation."¹ Similarly, the Northern District of Mississippi explained in 2006 that "the party asserting the [common interest] privilege must have been, at the time of the communication, a co-party to pending litigation with the party to whom it bears a relationship of common interest."² That court acknowledged that "[t]he same-action, pending-litigation requirement drastically differs state from federal common interest privilege law."³

Some courts have articulated a confusing standard that seems to require that a participant be involved in actual litigation.⁴

Third, some courts require that each of the participants demonstrate that it either was already involved in litigation or anticipated (to some degree) involvement in

¹ In re Sandwich Islands Distilling Corp., Ch. 7. Case No. 07-01029, 2009 Bankr. LEXIS 3009, at *6 (D. Bankr. Haw. Sept. 21, 2009) ("Pre-litigation communications among multiple parties and their counsel are not privileged.").

² United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483, 487-88 (N.D. Miss. 2006).

³ Id. at 488.

⁴ Ayers Oil Co. v. Am. Bus. Brokers, Inc., No. 2:09 CV 02 DDN, 2009 U.S. Dist. LEXIS 111928, at *6 (E.D. Mo. Dec. 2, 2009) (declining to apply the common interest doctrine to communications to and from a company who "is not a party to this litigation").

litigation. In other words, involvement in or anticipated involvement in litigation is a requirement for each participant.

For instance, in American Legacy Foundation v. Lorillard Tobacco Co.,⁵ the court arrived at two different conclusions based on differing facts. The court held that an anti-smoking foundation could enter into an effective common interest arrangement with its advertising agency, because that agency was at risk of litigation from cigarette manufacturers. In contrast, the foundation could not enter into a common interest arrangement with its public relations agency, which had not been threatened with litigation.⁶

More recently, a Virginia state court held that the common interest doctrine could not apply to a company and a recently employed doctor working for the company because they were "not co-defendants" or "potential parties in this civil action."⁷ Other courts have undertaken the same analysis for each participant in a claimed common interest agreement.⁸

⁵ C. A. No. 19406, 2004 Del. Ch. LEXIS 157 (Del. Ch. Nov. 3, 2004).

⁶ Id. at *18-19.

⁷ Campbell v. Dastoor, 79 Va. Cir. 569, 572 (Va. Cir. Ct. 2009) ("Defendant and Dr. Polverino are not co-defendants. Additionally, PCA and Dr. Polverino are not potential parties in this civil action because this suit is covered by a claims made policy issued to PCA. Thus, the 'common interest' doctrine does not apply.").

⁸ Square D Co. v. E.I. Elecs., Inc., 264 F.r.D. 385, 391 (N.D. Ill. 2009) (explaining that common interest "must relate to a litigation interest," and "there is no indication that Siemens is facing any threat of suit."); FTC v. Think All Publ'g, L.L.C., Case No. 4:07-cv-011, 2008 U.S. Dist. LEXIS 18623, at *3-4 (E.D. Tex. Mar. 11, 2008) ("The FTC states 'all that matters is that there is the potential for an action to have been brought' against one of these Defendants involving issues common to both the instant and hypothetical lawsuits. . . . Under this view, the joint defense doctrine would potentially be as expansive as the imagination of the lawyer who asserts it. Moreover, and more importantly, the FTC's invocation of the joint defense privilege is inadequate under the rubric enunciated by the Fifth Circuit Court of Appeals. The FTC has not even stated that a third party from which it received documents requested by the Defendants anticipates or could potentially anticipate litigation against the Defendants on issues surrounding this lawsuit.").

This approach creates enormous uncertainty, because if one participant in a common interest agreement falls short of meeting whatever standard that court sets, presumably no participant in the common interest arrangement can successfully claim privilege.

In essence, this involves what could be called a "weakest link" concept. If ten participants enter into a common interest agreement and begin to exchange privileged communications, such a disclosure presumably would destroy the privilege if any of the ten participants fell short of meeting the exacting standards of the common interest doctrine. That "weakest link" would be a stranger to the privilege, just like any other third party. Sharing work product among the participants normally would not have this ill effect. This is because even though the participant falling short of the common interest doctrine standard would be a third party, he or she would not be an unfriendly third party.

Unfortunately, some courts applying this standard use ambiguous language. Courts applying the common interest doctrine to participants who only anticipate litigation frequently use phrases such as the following in analyzing the protection:

[T]he weight of authority does not require that there be actual litigation in progress for the common interest doctrine to apply.⁹

This type of statement makes sense, but could be easily overread. It is one thing for a court to state that a participant in a valid common interest agreement does not need to be an actual party in ongoing litigation, but it is another to provide protection for

⁹ FSP Stallion 1, LLC v. Luce, Case No. 2:08-cv-01155-PMP-PAL, 2010 U.S. Dist. LEXIS 110617, at *58 (D. Nev. Sept. 30, 2010).

communications to and from a participant who does not anticipate being involved in litigation.

Courts demanding that each participant establish involvement in, or anticipated involvement in, litigation must obviously then determine what level of "anticipation" will suffice. Variations in courts' standards create uncertainty, which is compounded by the fact that common interest participants who are not already in litigation will have a difficult time predicting where litigation might begin. Thus, they probably will not know what court will ultimately analyze whether each participant has established the necessary anticipation of litigation, and therefore will have no certainty about whether each participant will meet that standard.

Courts have articulated the following degree of anticipation required before participants in a common interest arrangement may have protected communications:

- Substantial possibility of litigation;¹⁰
- Strong possibility of future litigation;¹¹
- Palpable threat of litigation;¹²
- Realistic basis for believing that the participant will be a party;¹³

¹⁰ Niagara Mohawk Power Corp. v. Megan-Racine Assocs, Inc. (In re Megan-Racine Assocs., Inc.), 189 B.R. 562, 574 (Bankr. N.D.N.Y. 1995) ("[T]he parties asserting the [joint defense] privilege must demonstrate that a substantial probability of litigation existed at the time the material sought to be protected was created.").

¹¹ Metro Wastewater Reclamation Dist. v. Cont'l Cas. Co., 142 F.R.D. 471, 479 (D. Colo. 1992).

¹² Power-One, Inc. v. Artesyn Techs., Inc., Civ. A. No. 2:05cv463, 2007 U.S. Dist. LEXIS 28630, at *5 (E.D. Tex. Apr. 18, 2007) ("[T]he Fifth Circuit appears to generally require a 'palpable threat of litigation at the time of the communication.'" (citation omitted)); In re Santa Fe Int'l Corp., 272 F.3d 705, 714 (5th Cir. 2001). ("[W]hen the threat of litigation is merely a thought rather than a palpable reality, the joint discussion is more properly characterized as a common business undertaking, which is unprivileged, and certainly not a common legal interest" (internal citation omitted)).

¹³ Chan v. City of Chicago, 162 F.R.D. 344, 346 (N.D. Ill. 1995) ("The rule is well established that parties facing a common litigation opponent may share privileged communications without waiving the

- Threatened litigation;¹⁴
- Anticipated litigation;¹⁵
- More than a "fear" of a lawsuit (which the court said was a "concern shared by most -- if not all -- corporations.");¹⁶
- Some prospect of litigation;¹⁷
- Potential litigation;¹⁸

privilege that each would hold It would seem, however, that there must be some realistic basis for believing that someone will become a joint defendant before a joint defense privilege can arise.").

¹⁴ Stenovich v. Wachtell, Lipton, Rosen & Katz, 756 N.Y.S.2d 367, 378 (N.Y. Sup. Ct. 2003) ("The common interest privilege applies to parties facing common problems in pending or threatened civil litigation. However, the privilege is limited to communications between counsel and parties with respect to legal advice in pending or reasonably anticipated litigation in which the joint consulting parties have a common legal interest. It does not protect business or personal communications.").

¹⁵ Allied Irish Banks, p.l.c. v. Bank of Am., N.A., 252 F.R.D. 163, 175 (S.D.N.Y. 2008) ("New York law appears to restrict the doctrine to communications with respect to legal advice 'in pending or reasonably anticipated litigation.'" (citation omitted)); Coachmen Indus. Inc. v. Kemlite, Cause No. 3:06-CV-160 CAN, 2007 U.S. Dist. LEXIS 82196, at *11-12 (N.D. Ind. Nov. 2, 2007) ("This Court finds that the better approach to determine whether there is a common interest is to evaluate the totality of the circumstances between the parties. A non-exhaustive list of factors this Court will consider are: 1) whether the interest is actually a legal interest, 2) whether the parties are or anticipate being engaged in litigation"); Am. Legacy Found. v. Lorillard Tobacco Co., C. A. No. 19406, 2004 Del. Ch. LEXIS 157, at *11 (Del. Ch. Nov. 3, 2004).

¹⁶ LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 661 F. Supp. 2d 958, 966 (N.D. Ill. 2009) ("Whirlpool's position that fear of lawsuit, alone, justifies a common legal interest has no cognizable boundaries and runs the risk of allowing the common interest exception to swallow the rule. Fear of lawsuit is a concern shared by most -- if not all -- corporations, and it is not clear that this fear justifies the common interest exception articulated by the Seventh Circuit.").

¹⁷ Gonzales v. United States, No. C-08-03189 SBA (EDL), 2010 U.S. Dist. LEXIS 52950 (N.D. Cal. May 4, 2010) ("The joint defense doctrine protects communications between the parties where they are 'part of an on-going and joint effort to set up a common defense strategy' in connection with actual or prospective litigation." (citation omitted)); Fed. Election Comm'n v. Christian Coal., 178 F.R.D. 61, 73 (E.D. Va.) ("In every case cited by the Fourth Circuit to support its broad reading of the privilege in Under Seal, both parties claiming the common interest privilege were involved in some type of litigation. It is true that the prospect for litigation could be so remote that it involved 'potential co-parties to prospective litigation,' but the prospect of litigation still had to be there." (citation omitted); finding the common interest doctrine inapplicable), aff'd in part, modified in part, 178 F.R.D. 456 (E.D. Va. 1998).

¹⁸ United States v. Dose, No. CR04-4082-MWB, 2005 U.S. Dist. LEXIS 526, at *47, *49 (N.D. Iowa Jan. 12, 2005) ("Such an agreement is present only when parties to actual or potential litigation enter into an agreement to exchange information for the purpose of advancing their common interest."; finding no joint defense agreement, "either express or implied"); In re Grand Jury Subpoena, 274 F.3d 563, 575 (1st Cir. 2001) ("[A] joint defense agreement may be formed only with respect to the subject of potential or actual litigation").

- Contemplated litigation;¹⁹
- Facing no immediate threat of litigation.²⁰

At least one court has applied the same "anticipation of litigation" standard in analyzing a common interest agreement that it would use in analyzing a work product claim.²¹ Requiring the same "anticipation of litigation" for a viable common interest agreement as that required for the work product doctrine protection removes one variable as clients and their lawyers contemplate the possibility of a common interest agreement. Although courts vary dramatically on the type of "anticipation" required for the work product protection, at least tying the common interest doctrine analysis into that case law makes it somewhat easier for litigants and those who fear litigation.

On the other hand, equating the anticipation of litigation requirement in the context of the work product doctrine and the common interest doctrine might trigger the frightening prospect that participants in a common interest agreement must start preserving pertinent documents if they claim that they anticipated litigation at the time.

Fourth, some courts hold that the common interest doctrine can protect communications to and from a participant who itself might not be involved in or

¹⁹ Beyond Sys., Inc. v. Kraft Foods, Inc., Civ. A. No. PJM-08-409, 2010 U.S. Dist. LEXIS 40423 (D. Md. April 23, 2010) ("Litigation under a common interest agreement may be actual, pending or contemplated against a common adversary."); United States v. Under Seal (In re Grand Jury Subpoenas 89-3 & 89-4, John Doe 89-129), 902 F.2d 244, 249 (4th Cir. 1990) ("Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.").

²⁰ United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987) ("Even where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications.").

²¹ United States v. Duke Energy Corp., 214 F.R.D. 383, 388-89 (M.D.N.C. 2003).

anticipate being involved in litigation, but who has a common interest with another participant who is in litigation or anticipates being in litigation. This is a significantly different standard from the approach described immediately above, in which each common interest participant must itself anticipate being in litigation. If a court insists on some connection between litigation and the common interest agreement, this approach makes the most sense.

In some situations, courts have applied this approach to protect communications between a party and a non-party who never had a realistic fear of being sued.²² For instance, the Fourth Circuit recognized that the United States Government could enter into a valid common interest agreement with the maker of smartphones whose shutdown could dramatically affect the government, even though the government

²² In some situations, it can be difficult to analyze whether courts really mean what they say. For instance, in 2009 the Eastern District of New York explained that the common interest doctrine "may also cover non-parties after an action has been commenced." Am. Eagle Outfitters, Inc. v. Payless Shoesource, Inc., No. CV 07-1675 (ERK) (VVP), 2009 U.S. Dist. LEXIS 105608, at *5 (E.D.N.Y. Nov. 12, 2009). That court cited an earlier Northern District case. Lugosch v. Congel, 219 F.R.D. 220 (N.D.N.Y. 2003). That earlier decision answered with "an unreserved affirmative" the question of whether "a non-party to the litigation can join a joint defense agreement, receive all of the benefit inured under such agreement, and be obligated to the same degree as the co-parties." Id. at 238. However, that 2003 decision's analysis explained what it meant.

[T]he joint defense privilege should not be so narrowly construed to be limited solely to co-parties as long as the parties sharing the information have the same reasonable expectation of a shared legal bond and the anticipation of litigation is present.

Id. (emphasis added).

The 2003 decision then explained that "the real prospect of litigation may be a sufficient basis to form a joint defense agreement almost at any stage where litigation is feared," and then used the "palpable likelihood of litigation" standard. Id. Given this analysis, the 2009 American Eagle conclusion presumably rests on at least some of the common interest participants' anticipation of litigation to a certain degree.

showed no signs of entering the litigation as plaintiff and certainly would not have been a defendant.²³

Interestingly, in a two-week period, different courts explained the logic for this approach as it involves plaintiffs and defendants. In one case, the Central District of California analyzed a common interest agreement between a copyright owner and a royalty income recipient. The court found that they could share a common interest, even though one of them did not expect to be a plaintiff in the action that the other brought.

There may be all sorts of reasons, however, why one party and not another chooses to pursue litigation, even if they share common legal interests: one party may be willing to front expenses, and another not; one party may have a different assessment from another of the likelihood of a positive result, or the extent, or enforceability of any recovery; one party, but not another, may have other business relationships with third parties which, in its judgment, counsel against pursuing litigation; one party may find settlement terms palatable, while another party does not. The fact that different considerations may animate different strategies does not gainsay that the legal interests align. . . . [T]he fact that parties may have inchoate adverse interests does not mean that they do not share legal interests. The fact that Plaintiffs have chosen to sue and, so far, UPIP has not, does not itself establish an adverse interest, because, among other things, Plaintiffs are not dependent upon UPIP's suing in order to seek recovery; the statute gives them standing to sue by themselves, and therefore they can seek recovery without UPIP's having done so.²⁴

²³ Hunton & Williams v. United States DOJ, 590 F.3d 272 (4th Cir. 2010).

²⁴ Perrey v. Televisa, S.A. de C.V., Case No. CV 09-06508 FMC (RZx), 2009 U.S. Dist. LEXIS 107797, at *6 & *8 (C.D. Cal. Nov. 18, 2009).

In the other case, the Southern District of Florida explained why a possible defendant could participate in a common interest agreement even if it was not ultimately sued.

[D]espite Plaintiff's arguments to the contrary, the fact that Tabyana was not ultimately named in this suit, and the fact that NCL has asserted that Tabyana bears full responsibility, does not change their common interest at the time the report was shared with NCL. If the position Plaintiff urges is adopted, then litigants could always obtain joint defense materials that were shared confidentiality between aligned potential or actual parties by either dismissing one party from the case, or not naming all of the possible defendants to a particular action. Similarly, the fact that Tabyana Tours arguably cannot now be named as a defendant in this litigation because the statute of limitations has elapsed does not lift the work product protection veil from the Tabyana Incident Report.²⁵

Other courts have also taken this common-sense approach.²⁶ This analysis makes great sense, because it would prevent the sort of mischief several courts have warned against.

Fifth, some courts apply the common interest doctrine in the absence of any litigation or anticipated litigation.

²⁵ Fojtasek v. NCL (Bahamas) Ltd., 262 F.R.D. 650, 656 (S.D. Fla. 2009).

²⁶ Cooley v. Strickland, 269 F.R.D. 643, 652 (S.D. Ohio 2010) ("It is not necessary that a common legal interest be derived from legal action; it is possible for two or more parties to share a common interest without becoming parties to the same litigation."); Pampered Chef v. Alexanian, 737 F. Supp. 2d 958, 965 & n.5 (N.D. Ill. 2010) ("Although originally limited in application to co-defendants, the Seventh Circuit permits both potential parties and parties who are not otherwise joined in litigation to assert the 'common legal interest' privilege, even where it is not anticipated that the party will be sued in the future."); "The privilege does not require that the interest be in litigation or that litigation be actual or imminent for communications to be privileged. . . . So, the fact that Ms. Salela is not a defendant in this case – which plaintiff suggests scotches the common interest doctrine . . . – does not matter."); Am. Eagle Outfitters, Inc. v. Payless Shoesource, Inc., No. CV 07-1675 (ERK)(VVP), 2009 U.S. Dist. LEXIS 105608, at *5 (E.D.N.Y. Nov. 12, 2009) ("The rule may be invoked whether or not an action has been commenced . . . and may also cover non-parties after an action has been commenced.").

The common interest doctrine developed in criminal litigation and eventually spread to civil litigation. However, nearly every court requires there to be some litigation or anticipated litigation.

This was not always easy to tell, because courts recognizing that participants could enjoy the common interest doctrine protection in the absence of pending litigation often stated that principle in a somewhat ambiguous way. Some courts indicating that a common interest agreement can be effective in the absence of any litigation do not really mean that, but instead mean that the agreement can be effective in the absence of current ongoing litigation. In other words, these courts simply state that anticipated rather than ongoing litigation can support a common interest agreement. However, their shorthand way of explaining this might seem to offer common interest agreement protection in the absence even of anticipated litigation.

As it frequently does, the Restatement takes an extremely broad view of the availability of the common interest doctrine protection.

If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.²⁷

The phrase "nonlitigated matter" certainly sounds like a situation in which none of the participants anticipates being in litigation, rather than just a situation where there was no current ongoing litigation.

²⁷ Restatement (Third) of Law Governing Lawyers § 76(1) (2000); Restatement (Third) of Law Governing Lawyers § 76 reporter's note cmt. b (2000).

Some courts have articulated a standard that does not seem to require even anticipated litigation. In 2007, the Seventh Circuit was the first to take this position.

[C]ommunications need not be made in anticipation of litigation to fall within the common interest doctrine. . . . The weight of authority favors our conclusion that litigation need not be actual or imminent for communications to be within the common interest doctrine. At least five of our sister circuits have recognized that the threat of litigation is not a prerequisite to the common interest doctrine.²⁸

A quick look at these "five of our sister circuits" shows that the court's reliance on them is shaky at best.²⁹

Approximately two weeks later, the Third Circuit was even more explicit.

[T]he community-of-interest privilege allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others. It applies in civil and criminal litigation and, even in purely transactional contexts.³⁰

Since then, a number of other courts have taken the same position.³¹

²⁸ United States v. BDO Seidman, LLP, 492 F.3d 806, 816 & n.6 (7th Cir. 2007).

²⁹ In re Grand Jury Subpoena (Custodian of Records, Newparent, Inc.), 274 F.3d 563, 572 (1st Cir. 2001) simply says that the common interest "privilege sometimes may apply outside the context of actual litigation." In re Regents of Univ. of Cal., 101 F.3d 1386, 1390-91 (Fed. Cir. 1996) talks about "pre-litigation advice" that might be sought and obtained outside the "shadow of litigation." United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989) simply states that it is "unnecessary that there be actual litigation in progress for the common interest rule" to apply. United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996) says essentially the same thing -- "it is unnecessary that there be actual litigation in progress for this privilege to apply." United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987), aff'd in part and vacated in part on other grounds explains that a common interest participant does not need to face "immediate liability," although the case discusses the "paradigm" as involving participants facing "possible indictment."

³⁰ Teleglobe Commc'ns Corp. v. BCE (In re Teleglobe Commc'ns Corp.), Inc., 493 F.3d 345, 364 (3d Cir. 2007).

³¹ Leslie Controls, Inc., 437 B.R. 493, 496 (Bankr. D. Del. 2010) ("[T]he common interest doctrine 'applies whenever the communication is made in order to facilitate the rendition of legal services to each of the clients involved in the conference.'" (citation omitted)); Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 870 N.E.2d 1105, 1110 (Mass. 2007) ("Courts have said that the common interest doctrine is not limited to litigation or impending litigation."; quoting the Restatement, which recognizes the applicability of the common interest doctrine in a "nonlitigated matter"); Baden Sports, Inc. v. Kabushiki

In 2010, the Southern District of New York indicated that the Department of Treasury and the New York Federal Reserve Board could share a common interest, noting that "[a]lthough the doctrine is most frequently applied in the context of litigation, it also has been successfully invoked with respect to joint legal strategies in non-litigation settings."³²

Interestingly, few courts seem to have precisely articulated the type of common interest that will successfully support a common interest agreement in a transactional setting. In 2010, a Delaware court found that the common interest doctrine applied in what the court called a "transactional context," explaining that in such a context "'common interest' has been defined 'so parallel and non-adverse that, at least with respect to the transaction involved, [the two parties] may be regarded as acting as joint venturers.'"³³ The court then explained what interests the two transactional parties had in the case pending before the court.

Newco and Huawei appear to have had a common interest in obtaining CFIUS [Committee on Foreign Investment in the U.S.] approval and seeing the merger to its completion. The two companies, however, had adverse interests both in negotiating the Side Letter and in determining, if necessary,

Kaisha Molten, No. CV06-0210 MJP, 2007 U.S. Dist. LEXIS 29334, at *3 (W.D. Wash. Apr. 20, 2007) ("The common interest extension of the privilege is available irrespective of litigation, begun or contemplated."); Zolin, 809 F.2d at 1417 ("Even where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications."; finding that the common interest doctrine protected from disclosure communications between the defendant and representatives of a co-defendant church); Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1172 (D.S.C. 1974) ("The third parties receiving copies of the communication and claiming a community of interest may be distinct legal entities from the client receiving the legal advice and may be a non-party to any anticipated or pending litigation.").

³² Fox News Network, LLC v. United States Dep't of the Treasury, 739 F. Supp. 2d 515, 563 (S.D.N.Y. 2010).

³³ 3Com Corp. v. Diamond II Holdings, Inc., C.A. No. 3933-VCN, 2010 Del. Ch. LEXIS 126, at *32 (Del. Ch. May 31, 2010 (citation omitted)).

responsibility for the Merger Agreement's termination. Because of their potentially conflicted relationship, the Court will review the challenged communications in camera to determine Newco and Huawei's position vis-à-vis one another at the time each challenged communication was made. If the parties were in common interest with respect to the matters addressed, the communication will remain privileged.³⁴

Despite the clarity of this language, it still seems too early to see this as a trend. It certainly makes sense to apply common interest protection to parties in a transaction who anticipate some litigation with a third party over the transaction. Similarly, it seems logical to apply the doctrine to communications between transactional parties if one of the parties will essentially "inherit" the other party's litigation or litigation risk. Of course, in that case, the common interest doctrine might not be necessary because the parties would almost surely be exchanging work product.

However, applying common interest protection in other purely transactional contexts seems to create a privilege protection without limits. Parties to a transaction always share a common interest in consummating the transaction, but it is difficult to imagine that such a common interest would satisfy the fairly exacting requirements of a common interest doctrine. In fact, that sort of common interest often fails to satisfy courts' standards.

In any event, it will be interesting to see if other courts follow the two circuits and several other courts' approach in expanding the common interest doctrine so that it includes purely transactional settings in the absence of anticipated litigation.

³⁴ Id. at *32-33 (footnote omitted).

Type of Common Interest that Can Support a Common Interest Agreement.

As with other areas of the common interest doctrine, courts disagree about the type of common interest that justifies the privilege protection.

The Restatement takes a predictably liberal approach, indicating that the common interest "may be either legal, factual, or strategic in character."³⁵ A few courts seem to take an equally broad view. For instance, one court held that the common interest doctrine covered communications between a patent developer and a patent licensee, because "[b]oth parties had the same interest in obtaining strong and enforceable patents."³⁶

Most courts are far more restrictive.

First, it is clear that the interest must be legal rather than primarily business or financial. For instance, the District of Nevada explained in 2010 that "for the common interest doctrine to apply, the parties must share a common legal interest, rather than a commercial or a financial interest."³⁷

Courts have used various terms to describe the type of common legal interest that must underlie a common interest arrangement:

- Common legal strategy;³⁸
- Common legal interest;³⁹

³⁵ Restatement (Third) of Law Governing Lawyers § 76 cmt. e (2000).

³⁶ In re Regents of Univ. of Cal., 101 F.3d 1386, 1390 (Fed. Cir. 1996).

³⁷ FSP Stallion 1, LLC v. Luce, Case No. 2:08-cv-01155-PMP-PAL, 2010 U.S. Dist. LEXIS 110617, at *58 (D. Nev. Sept. 30, 2010).

³⁸ U.S. Info. Sys. v. Int'l Bhd. of Elec. Workers Local Union No. 3, No. 00 Civ. 4763 (RMB)(JCF), 2002 U.S. Dist. LEXIS 17532, at *7 (S.D.N.Y. Sept. 17, 2002).

- Coordinated legal strategy.⁴⁰

Common interest participants nearly always define (or at least mention) their common legal interest when entering into a common interest agreement, so this requirement is fairly easy to articulate. It is also so ambiguous as to be difficult for an adversary to challenge. Therefore, this requirement usually creates problems only for common interest participants who are not careful enough to use those terms in the agreement itself.

Second, the majority view focuses on the litigation element. Many courts recognize the common interest doctrine only when the participants are in or anticipate litigation. In those courts, common interest participants who are not already in litigation must obviously try to fit themselves within the courts' doctrine. Not surprisingly, lawyers frequently try to mention litigation as they articulate the common interest, but courts often reject such efforts. For instance, in 2010 the District of Nevada explained the approach that most courts take.

[T]he common interest doctrine does not apply simply because the parties are interested in developing a business deal that complies with the law, and a common goal to avoid litigation. A desire to comply with applicable laws and to avoid litigation does not transform their common interest and enterprise into a legal, as opposed to a commercial, matter.⁴¹

³⁹ Johnson Matthey, Inc. v. Research Corp., No. 01 Civ. 8115 (MBM)(FM), 2002 U.S. Dist. LEXIS 13560, at *16 (S.D.N.Y. July 23, 2002).

⁴⁰ Shamis v. Ambassador Factors Corp., 34 F. Supp. 2d 879, 893 (S.D.N.Y. 1999); United States v. Weissman, No. S194CR.760CSH, 1996 U.S. Dist. LEXIS 19066, at *29-31 (S.D.N.Y. Dec. 26, 1996).

⁴¹ FSP Stallion 1, 2010 U.S. Dist. LEXIS 110617, at *67-68.

Thus, common interest participants usually cannot assure success by pointing to a common desire to avoid litigation or a concern about possible litigation.⁴² This is similar to the general inapplicability of the work product doctrine to documents created in an effort to avoid litigation. This element obviously mirrors the pertinent court's insistence on some connection to litigation. Essentially, it can prevent those hoping to arrange a common interest agreement from obtaining the desired protection merely by mentioning "litigation" in some way.

Third, even if the common interest participants can point to litigation or anticipated litigation underlying their agreement, they must also explain how their common interest relates to that litigation. As one court put it, common interest agreements must be based on more than simply the participants' "desire to succeed in an action."⁴³ Instead, the participants generally must prove that they were engaged in joint strategizing about the litigation or anticipated litigation.

Because most courts have not abandoned the litigation requirement for common interest agreements, it is difficult to know what interest will successfully support a common interest agreement. It would seem remarkably easy to articulate some common legal interest in connect with a transaction, which perhaps is one reason why other courts have not rushed to drop the litigation requirement.

To the extent that common interest participants try to satisfy whatever standard they think a court will apply, the case law at least provides some of the "magic words"

⁴² TIFD III-E Inc. v. United States, 223 F.R.D. 47, 50 (D. Conn. 2004) ("The rule does not encompass a joint business strategy that merely happens to include as one of its elements a concern about litigation.").

⁴³ Cendant Corp. v. Shelton, Civ. No. 3:06CV00854(AWT), 2007 U.S. Dist. LEXIS 62491, at *7 (D. Conn. Aug. 24, 2007) (citation omitted).

that the participants can add to their common interest agreement. However, even that does not bring any certainty. First, the participants usually do not know what court ultimately will judge the efficacy of their agreement. Unless they can identify a likely adversary who would challenge their privilege assertions in some later litigation, the participants will probably have no way of knowing where the challenge will come. Second, courts' terminology is so vague that even using a court's own language is not likely to absolutely assure the desired protection. All of this points to the great risks of relying on a common interest agreement in seeking privilege protection, and the wisdom of also considering a joint representation.

Clients and their lawyers must assess the common interest doctrine in light of many courts' insistence that the doctrine applies only when the participants are in or anticipate litigation. To the extent that the court requires the participants to demonstrate that they are either in or anticipate litigation, it should not be necessary to also require an exact correlation between the participants' interests. Courts should be able to rely on litigants' own enlightened self-interest in disclosing protected communications or materials to others. As a practical matter, a litigant will not share protected communications or materials with someone who does not share at least some common strategic interest. Thus, it might have made sense to examine the commonality of interests when the participants did not also have to demonstrate that they were in or reasonably anticipated litigation, but the majority of courts' application of the litigation element essentially moots the commonality issue.

Courts disagree about the required degree of commonality of interests among the participants. As with other areas of this doctrine, courts' different approaches are on a continuum.

At one end of the spectrum, some courts articulate the requirement that the common interest participants' interests be identical. Many courts take this approach.⁴⁴ For obvious reasons, this is a very difficult standard to meet. Even joint clients' interests are not always "identical." If common interest participants' interests came close to meeting that exacting standard, presumably the same lawyer would represent all of them in a joint representation, with no need for the riskier common interest arrangement.

These courts probably mean that the participants' interests must be identical in the areas in which they are common. In other words, there must be at least some interests that are exactly the same among the participants, even if they disagree about other interests. This is a more logical meaning of the term "identical."

Other courts explicitly reject the need for common interest participants to have an identical interest. For instance, in 2010 the Western District of Oklahoma applied New York law in explaining that

[w]hile some courts require that the legal interest between the parties be identical rather than simply similar . . . , other

⁴⁴ Mainstreet Collection, Inc. v. Kirkland's, Inc., 270 F.R.D. 238, 243 (E.D.N.C. 2010) ("Defendants must show that the alleged privileged communication was made in the course and furtherance of a joint legal effort between parties with an identical legal interest, and that the privilege has not been waived."); Pampered Chef v. Alexanian, 737 F. Supp. 2d 958, 964 (N.D. Ill. 2010) ("Parties may assert a common interest where they have an identical – not merely similar – legal interest in the subject matter of a communication and the communication is made in the course of furthering the ongoing, common enterprise."); John B. v. Goetz, No. 3:98-0168, 2010 U.S. Dist. LEXIS 8821 (M.D. Tenn. Jan. 28, 2010); Ayers Oil Co. v. Am. Bus. Brokers, Inc., No. 2:09 CV 02 DDN, 2009 U.S. Dist. LEXIS 111928, at *4-5 (E.D. Mo. Dec. 2, 2009).

courts have found that "a total identity of interest among the participants is not required under New York law. Rather, the privilege applies where an 'interlocking relationship' or a 'limited common purpose' necessitates disclosure to certain parties."⁴⁵

Similarly, the Fourth Circuit's application of the common interest agreement in the context of the United States Government's desire to avoid shutdown of its employees' BlackBerries found that the government's interest was not exactly the same as the manufacturer's interests.

It does not matter that RIM was motivated by the commercial benefit that would accrue to it if it succeeded in opposing the BlackBerry injunction while the government was motivated by concern for the public interest. What matters is that there was a unity of interest in preserving a non-disruptive pattern of governmental BlackBerry use, and RIM and DOJ could rely on one another's advice, secure in the knowledge that privileged communications would remain just that.⁴⁶

At the other end of the spectrum, some courts hold that actual current adversaries can engage in a common interest agreement.

Such a broad approach makes sense in the case of transactional adversaries facing some litigation threat. For instance, one court applied the common interest doctrine in protecting communications between opposite sides of a corporate acquisition because the companies shared a common interest in dealing with the acquired company's asbestos litigation liabilities.⁴⁷

⁴⁵ Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n, Case No. CIV-08-1125-C, 2010 U.S. Dist. LEXIS 61612, at *11 (W.D. Okla. June 22, 2010).

⁴⁶ Hunton & Williams v. United States DOJ, 590 f.3d 272, 282-83 (4th Cir. 2010).

⁴⁷ La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp., 253 F.R.D. 300 (D.N.J. 2008).

Thus, some courts have honored common interest agreements between participants facing a common adversary while disagreeing about their relative liability. In 2009, the Eastern District of New York indicated that co-defendants could enter into a common interest agreement despite the inherent adversity caused by their disagreement about one's indemnity obligation to the other.

Given their mutual interest in the overall outcome of the litigation, it serves the purpose of the common interest rule to permit Payless and Jimlar to obtain its protection notwithstanding that they may disagree about a collateral matter, i.e., the scope of their respective obligations under the indemnity provision.⁴⁸

Similarly, in 2010 the Eastern District of Wisconsin held that two defendants being sued by a plaintiff could enter into a common interest agreement despite the defendants' simultaneously entering into arbitration "to determine the relative fault between themselves."⁴⁹

In advance of the arbitration, Defendants signed a joint defense agreement and agreed to share confidential and privileged materials between each other so that an arbitrator could determine relative fault between the two parties. This agreement was made with the understanding that the information disclosed would not lose any privileges and would not be subject to discovery by the Plaintiffs. The Defendants argue that this agreement to privately arbitrate a dispute between themselves entitles them to what is known as a 'community of interest' privilege.⁵⁰

⁴⁸ Am. Eagle Outfitters, Inc. v. Payless Shoesource, Inc., No. CV 07-1675 (ERK)(VVP), 2009 U.S. Dist. LEXIS 105608, at *11 (E.D.N.Y. Nov. 12, 2009).

⁴⁹ Roper v. Old Republic Ins. Co., Case No. 09-C-154, 2010 U.S. Dist. LEXIS 8350, at *3 (E.D. Wis. Feb. 1, 2010).

⁵⁰ Id. at *4.

In another case, a debtor which had not yet declared bankruptcy negotiated with a creditor in an effort to determine how to maximize recovery from insurance companies. The court rejected the insurance companies' argument that the debtor and the creditor could never enter into a common interest agreement.

The Insurers argue, in effect, for establishment of a per se rule that parties engaged in negotiations can never share a common interest. While there are cases that support this argument, they are not universal. For example, the Third Circuit has held that parties engaged in merger negotiations may share a common interest. This Court believes that the imposition of a black-line rule is inappropriate. Rather, commonality must be measured on a case by case basis.⁵¹

Interestingly, the court used several dinner analogies in describing how the debtor and the creditor had a common interest, despite the fact that they were clearly direct adversaries.

In this case, the question is, regardless of the fact that there were ongoing plan negotiations, whether the Debtor shared information with the Ad Hoc Committee and the Pre-Petition FCR that was related to the parties['] common legal interest against their 'common enemy,' the Insurers? The Court finds that they did. The Debtor, the Ad Hoc Committee and the Pre-Petition FCR had a conflicting interest relating to the distribution of the Debtor's assets. Each of those parties clearly desired to obtain the largest share of those assets as possible. However, the parties shared a common interest in maximizing the asset pool, which would include insurance proceeds. To return to the pie analogy, the size of the pie and the size of the pieces are two separate questions. The parties are in accord as to the former and adversaries as to the latter. The information contained in the documents that were shared with the Ad Hoc Committee and the Pre-Petition FCR goes to the size of the asset pool – a matter of common interest. Think of Thanksgiving. Everyone wants the biggest turkey possible (except,

⁵¹ In re Leslie Controls, Inc., 437 B.R. 493, 501-02 (Bankr. D. Del. 2010) (footnote omitted).

perhaps, the chef) but all bets are off when it's time to wrestle over who gets a leg.⁵²

Courts that do not require an identical interest have articulated the following standards required to support a common interest agreement (moving toward the other end of the spectrum, which permits quite a bit of adversity among the common interest participants).

- When the participants have interests that are nearly identical;⁵³
- When the participants have a strong identity of interests;⁵⁴
- When the participants have "at least a substantially similar legal interest";⁵⁵
- When the participants' interests are not entirely congruent;⁵⁶
- When the participants do not have interests that are in all respects compatible;⁵⁷
- When the participants "may have inchoate adverse interests";⁵⁸
- When the participants might "one day become adversaries";⁵⁹

⁵² Id. at 501-02 & n.37.

⁵³ United States v. Doe, 429 F.3d 450, 453 (3d Cir. 2005).

⁵⁴ McNally Tunneling Corp. v. City of Evanston, No. 00 C 6979, 2001 U.S. Dist. LEXIS 17090, at *7 (N.D. Ill. Oct. 16, 2001).

⁵⁵ In re Leslie Controls, Inc., 437 b.R. 493, 496 (Bankr. D. Del. 2010).

⁵⁶ Restatement (Third) of Law Governing Lawyers § 76 cmt. e (2000) ("The communication must relate to the common interest, which may be either legal, factual, or strategic in character. The interests of the separately represented clients need not be entirely congruent.").

⁵⁷ United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979).

⁵⁸ Perrey v. Televisa, S.A. de C.V., Case No. CV 09-06508 FMC (RZx), 2009 U.S. Dist. LEXIS 107797, at *8 (C.D. Cal. Nov. 18, 2009).

⁵⁹ Pampered Chef v. Alexanian, 737 F. Supp. 2d 958, 966-67 (N.D. Ill. Sept. 14, 2010) ("The plaintiff contends that the parties to the agreement might one day become adversaries. And so they might. . . . However, the potential for adversity adheres in many situations. It is one that the common interest agreement in this case recognizes, . . . , as does the common interest doctrine, itself. Hence the rule that communications are not privileged in a subsequent controversy between the original parties. . . . More importantly, the possibility of future discord between the parties is analytically irrelevant to the current alignment of their interests. It is enough that the parties presently share a common interest.").

- When participants have "different and potentially adverse interests";⁶⁰
- When the participants "are in conflict on some points," as long as they "have agreed to work toward a mutually beneficial goal";⁶¹
- When the participants have interests that "may even be adverse in some respects";⁶²
- When the participants have some adverse interests;⁶³
- When the participants interests are not identical, and even when the parties' interests are adverse in substantial respects;⁶⁴
- When the participants have interests that are not completely adverse;⁶⁵
- When there is "the possibility of future discord between the parties," which is "analytically irrelevant to the current alignment of their interests";⁶⁶
- When the participants anticipate litigating against each other eventually.⁶⁷

⁶⁰ Meza v. H. Muehlstein & Co., 98 Cal. Rptr. 3d 422, 432 (Cal. Ct. App. 2009).

⁶¹ Cooley v. Strickland, 269 F.R.D. 643, 652 (S.D. Ohio 2010).

⁶² Holmes v. Collection Bureau of Am., Ltd., No. C 09-02540 WHA, 2010 U.S. Dist. LEXIS 4253, at *6 (N.D. Cal. Jan. 8, 2010).

⁶³ Am. Eagle Outfitters, Inc. v. Payless Shoesource, Inc., No. CV 07-1675 (ERK)(VVP), 2009 U.S. Dist. LEXIS 105608, at *6-7 (E.D.N.Y. Nov. 12, 2009) ("Although some courts in this circuit have articulated a requirement that the common interest be 'identical' and not merely 'similar,' . . . that requirement has been called into question Thus, the fact that the parties asserting the rule have some diverging interests does not eradicate, but rather only limits, the scope of the protection it affords."); United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 28 (1st Cir. 1989).

⁶⁴ Value Prop. Trust v. Zim Co. (In re Mortgage & Realty Trust), 212 B.R. 649, 653 (Bankr. C.D. Cal. 1997) ("The common interest privilege does not require a complete unity of interests among the participants. . . . The privilege applies where the interests of the parties are not identical, and it applies even where the parties' interests are adverse in substantial respects. The privilege applies even where a lawsuit is foreseeable in the future between the codefendants.").

⁶⁵ United States v. Moscony, 927 F.2d 742, 753 (3d Cir.), cert. denied, 501 U.S. 1211 (1991).

⁶⁶ Pampered Chef v. Alexanian, 737 F. Supp. 2d 958, 967 (N.D. Ill. 2010).

⁶⁷ Niagara Mohawk Power Corp. v. Megan-Racine Assocs, Inc. (In re Megan-Racine Assocs., Inc.), 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995) ("In recognizing the exigencies of the joint-defense privilege, courts have not required a total identity of interest among the participants. The privilege applies when a limited common purpose necessitates disclosure to certain parties. Thus, even where a later law-suit is foreseeable between the co-defendants that does not prevent them from sharing confidential information for the purpose of a common interest.").

These decisions display a remarkable range of possibilities. Some courts demand that there be no adversity whatever, while others honor a common interest arrangement if there is any similarity at all in the participants' interests. This uncertainty dramatically reduces the usefulness of common interest arrangements. Clients and their lawyers must very carefully analyze the risks and rewards of attempting to assert a common interest doctrine protection. They might also want to consider a joint representation.

Need for a Lawyer's Participation in Protected Communications. Courts disagree about the need for a lawyer's participation in a communication deserving protection under the common interest doctrine.

Courts take one of three approaches in analyzing the necessity for a lawyer's involvement.

First, some courts appear to hold that the common interest doctrine can broadly protect communications among common interest agreement participants without any lawyer's involvement. For instance, a 2010 Eastern District of New York case indicated that unrepresented individuals can benefit from common interest agreements.⁶⁸ An earlier case seemed to indicate that common interest participants can communicate among themselves without a lawyer's involvement.⁶⁹ However, these comments should

⁶⁸ United States v. Hatfield, No. 06-CR-0550 (JS), 2010 U.S. Dist. LEXIS 4026, at *18 (E.D.N.Y. Jan. 8, 2010) ("[A]s joint defense agreements exist between the parties, not the attorneys, unrepresented individuals can enter into and benefit from these kinds of agreements.").

⁶⁹ United States v. Under Seal (In re Grand Jury Subpoenas 89-3 & 89-4, John Doe 89-129), 902 F.2d 244, 249 (4th Cir. 1990) ("[P]ersons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.").

be taken with a grain of salt. That broad a view of the common interest doctrine would dramatically expand privilege protection.

Second, some courts protect communications directly among common interest agreement participants under certain limited conditions. Although the Restatement indicates that an unrepresented party cannot participate in a common interest agreement, it explains that the privilege can protect communications directly between the clients if the communications were "made for the purpose of communicating with a privileged person."⁷⁰ For communications meeting that standard, the Restatement explains "any member of a client set — a client, the client's agent for communication, the client's lawyer, and the lawyer's agent . . . — can exchange communications with members of a similar client set."⁷¹ In 2008, well-respected Southern District of New York Magistrate Judge James Francis indicated that such direct participant communications deserve protection if one of the participants relays a lawyer's advice to another participant.⁷² Similarly, a circuit court explained that "[e]ven if we assume that the joint-defense privilege shields some communications between co-defendants made outside of counsel's presence, it would apply only if the communications were made pursuant to specific instructions by the lawyer."⁷³ Other courts have taken a similar approach.⁷⁴

⁷⁰ Restatement (Third) of Law Governing Lawyers § 76 cmt. d (2000).

⁷¹ Id.

⁷² Gucci Am., Inc. v. Gucci, No. 07 Civ. 6820 (RMB) (JCF), 2008 U.S. Dist. LEXIS 101760 (S.D.N.Y. Dec. 15, 2008).

⁷³ United States v. Mikhel, 199 Fed. Appx. 627, 628 (9th Cir. 2006) (unpublished opinion).

⁷⁴ John B. v. Goetz, No. 3:98-0168, 2010 U.S. Dist. LEXIS 8821, at *296 (M.D. Tenn. Jan. 28, 2010) ("The joint-defense privilege shields some communications between co-defendants made outside of their

Third, some courts apply what appears to be a per se rule requiring a lawyer's participation in the communications in order for them to deserve common interest doctrine protection.⁷⁵ However, these courts do not require both lawyers to be present.⁷⁶

Some courts adopting such a restrictive approach have applied it in circumstances that other courts would find eligible for protection. For instance, one court refused to protect communications by one participant's executive directly to another participant's executive even though the executive had first discussed a matter with his own attorney before calling his counterpart at the other participating company.⁷⁷

Another court held that what it called the "joint defense" privilege did not protect direct communications between clients. As that court explained:

counsel's presence, but only if the communications were pursuant to specific instructions of their counsel."); Zitzka v. Westmont, No. 07 C 0949, 2009 U.S. Dist. LEXIS 41081, at *6 (N.D. Ill. May 13, 2009) ("Importantly for our purposes here, the common interest doctrine may apply in certain circumstances to communications between two non lawyers who are both covered by the common interest."); Rembrandt Techs., L.P. v. Harris Corp., C.A. No. 07C-09-059-JRS, 2009 Del. Super. LEXIS 46, at *30 (Del. Super. Ct. Feb. 12, 2009) ("The Court finds that separately represented clients sharing a common legal interest may, at least in certain situations and under the close supervision of counsel, communicate directly with one another regarding that shared interest.").

⁷⁵ Cooley v. Strickland, 269 F.R.D. 643, 653 (S.D. Ohio 2010); In re Outsidewall Tire Litig., Case No. 1:09cv1217, 2010 U.S. Dist. LEXIS 67578 (E.D. Va. July 6, 2010); Cooper Health Sys. v. Virtua Health, Inc., 259 F.R.D. 208, 214 (D.N.J. 2009) ("Further, the privilege does not extend to communications between non-attorneys who simply have a joint interest. The community of interest privilege is applicable to communications amongst attorneys, 'to be eligible for continued protection, the communication must be shared with the attorney of the member of the community of interest.'" (citation omitted)); Post v. Killington, Ltd., Case No. 2:07-cv-252, 2009 U.S. Dist. LEXIS 6399, at *18 (D. Vt. Jan. 14, 2009) ("There is no basis under Vermont law, given a clear rule and the admonition to construe the rule narrowly, to conflate the two provisions of the rule and extend the attorney-client privilege to communications among representatives of different corporate clients in the absence of their attorneys or representatives.").

⁷⁶ Corporate Express Office Prods., Inc. v. Gamache (In re Wagar), Civ. No. 1:06-MC-127 (LEK/RFT), 2006 U.S. Dist. LEXIS 90345, at *36-37 (N.D.N.Y. Dec. 13, 2006) ("Neither is it necessary for the attorney representing the communicating party to be present when the communication is made to the other party's attorney." (citation omitted)); RLS Assocs., LLC v. United Bank of Kuwait, PLC, No. 01 Civ. 1290 (CSH) (DF), 2003 U.S. Dist. LEXIS 4539, at *4 (S.D.N.Y. Mar. 24, 2003).

⁷⁷ Walsh v. Northrop Grumman Corp., 165 F.R.D. 16, 18 (E.D.N.Y. 1996).

[S]ince communications directly between National Union and Zurich were never privileged, they cannot become privileged by virtue of the joint defense privilege. Such communications would be privileged only if they were made to their respective counsel and then shared by counsel with the other attorneys or their clients. In short, direct communications between or among various clients do not become privileged by the joint defense privilege; rather, privileged communications with counsel that are transmitted by counsel to joint defense counsel or their clients simply remain privileged through the joint defense privilege.⁷⁸

The Third Circuit explained the basis for this seemingly harsh rule.

The requirement that the clients' separate attorneys share information (and not the clients themselves) derives from the community-of-interest privilege's roots in the old joint-defense privilege, which (to repeat) was developed to allow attorneys to coordinate their clients' criminal defense strategies. . . . Because the common-interest privilege is an exception to the disclosure rule, which exists to prevent abuse, the privilege should not be used as a post hoc justification for a client's impermissible disclosures. The attorney-sharing requirement helps prevent abuse by ensuring that the common-interest privilege only supplants the disclosure rule when attorneys, not clients, decide to share information in order to coordinate legal strategies.⁷⁹

Courts' differing approaches to the necessity of a lawyer's involvement adds to the uncertainty surrounding common interest agreements. Because common interest participants will not know when an adversary might challenge the agreement's effectiveness, the safest approach is to communicate only through the lawyers.

Courts Rejecting Common Interest Agreements' Effectiveness. Courts have rejected the applicability of the common interest doctrine in many other situations. In

⁷⁸ Rhodes v. AIG Domestic Claims, Inc., Dkt. No. 05-1306-BLS2, 2006 Mass. Super. LEXIS 19, at *31 (Mass. Super. Ct. Jan. 23, 2006).

⁷⁹ Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 364-65 (3d Cir. 2007).

some cases the courts have found that one or more of the participants did not have an adequate anticipation of litigation to trigger the doctrine's protection. In other cases, courts have found the common interest doctrine inapplicable because the participants did not share a sufficiently common interest. In some situations, the courts found the doctrine applicable at certain times but inapplicable at other times.

Courts have rejected the applicability of the common interest doctrine as asserted by the following participants:

- Debtor and creditor engaging in pre-petition strategizing;⁸⁰
- Company and its litigation finance company assisting in the litigation;⁸¹
- Government and a qui tam plaintiff;⁸²
- Insurance company and insured;⁸³
- Corporate audit committee and executive being investigated for wrongdoing;⁸⁴
- City and a property owner;⁸⁵

⁸⁰ In re Leslie Controls, Inc., 437 B.R. 493, 500 (Bankr. D. Del. 2010).

⁸¹ Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373 (D. Del. 2010).

⁸² In re Aftermarket Filters Antitrust Litig., Case No. 08 C 4883, MDL Dkt. No. 1957, 2010 U.S. Dist. LEXIS 122111, at *18-20, *22-23 (N.D. Ill. Nov. 18, 2010).

⁸³ Evansville Greenway & Remediation Trust v. S. Ind. Gas & Elec. Co., Inc., No. 3:07-cv-0066-SEB-WGH, 2010 U.S. Dist. LEXIS 41899 (S.D. Ind. Apr. 28, 2010) ("Even so, the cases cited by SIGECO in support of its contention that insureds and insurers do not possess common interests are inapposite, because they relate to the common interest privilege in the context of the insured/insurer(s) relationship under circumstances where their interests had become adverse. . . . Those cases simply do not apply to a third party's attempt to obtain documents that were prepared in connection with the insured's and insurer's pursuit of their mutual interests.").

⁸⁴ United States v. Hatfield, No. 06-CR-0550 (JS), 2010 U.S. Dist. LEXIS 4026, at *23 (E.D.N.Y. Jan. 8, 2010) ("Mr. Brooks has pointed to no authority suggesting that audit committees can enter into joint defense agreements with the very corporate executives they are supposedly investigating, and the Court's own research could find none.").

⁸⁵ In re Condemnation of 16.2626 Acre Area, 981 A.2d 391, 398 (Pa. Commw. Ct. 2009) ("Far from being co-defendants, the City and the RDA were adverse parties in the present condemnation proceedings. The mere assertion that the parties 'supported' each other's prior, separate, legal pursuits

- Company and its advertising agencies;⁸⁶
- Company and its land purchase agent;⁸⁷
- Company's audit committee and a third party witness;⁸⁸
- Company and consultant with a financial state in the success of company transactions;⁸⁹
- Litigant and payee of fees;⁹⁰
- Government regulator and regulated company;⁹¹

(the City's request for permission to acquire Parcel C and RDA's declaratory judgment action), even if proved, sheds no light on the underlying common legal interest allegedly motivating such support.").

⁸⁶ LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 661 F. Supp. 2d 958, 966-67 (N.D. Ill. 2009) ("Examining the communications withheld by Whirlpool, the communications suggest Whirlpool's firm control over the relationship rather than joint strategy. The documents withheld by Whirlpool paint a picture of Whirlpool's one-sided control of the advertising strategy pursued by its outside agencies. . . . Extending the exception to Whirlpool's relationship, based on the information currently before the Court, would permit two companies to argue a common legal interest simply because they routinely deal with one another and neither desires to be sued.").

⁸⁷ Rockies Express Pipeline LLC v. 58.6 Acres, Case No. 1:08-cv-0751-RLY-DML, 2009 U.S. Dist. LEXIS 121618, at *3, *12 (S.D. Ind. Dec. 31, 2009).

⁸⁸ N.Y. City Emps.' Ret. Sys. v. Berry (In re Juniper Networks, Inc. Sec. Litig.), Case Nos. C 06-4327 & 08-00245 JW (PVT), 2009 U.S. District LEXIS 118859, at *9 (N.D. Cal. Dec. 9, 2009) ("In the present case, the Audit Committee has not carried its burden of establishing that the communications that occurred during the Audit Committee's interview of Fisher were privileged. The communications occurred in the presence of Fisher's attorney (a third party who was not the agent of either Juniper or its attorneys), and the Audit Committee has not shown that the 'joint defense' or 'common interest' doctrine applies.").

⁸⁹ Ayers Oil Co. v. Am. Bus. Brokers, Inc., No. 2:09 CV 02 DDN, 2009 U.S. Dist. LEXIS 111928, at *5-6 (E.D. Mo. Dec. 2, 2009) ("The record of this action indicates that Fecht has a commercial arrangement with Monroe [president of defendant company] on a transaction-by-transaction basis by which commissions for commercial transactions are shared between them. . . . Fecht and Monroe agreed to divide the labor necessary to complete the brokerage of a sale, with Fecht supplying industry expertise and Monroe completing contractual and financial provisions. . . . Fecht would receive 40% of any brokerage commission earned by ABB. . . . Fecht has no official position with ABB and has never owned any interest in ABB. . . . However, Fecht is not asserting any common claim with ABB, is not a party to this litigation to which the email relates, and shares no common adversary. Therefore, Fecht shares no legal interest in the matter, and stands only to benefit commercially, through a resulting business commission.").

⁹⁰ Cozzens v. City of Lincoln Park, Case No. 08-11778, 2009 U.S. Dist. LEXIS 64112, at *12 (E.D. Mich. July 24, 2009) ("It was conceded that Mr. Seagraves had no interest in the lawsuit except as it represented a potential source of funds from which a loan made by Mr. Seagraves to Mr. Bednarski could be paid.").

⁹¹ Hope for Families & Cmty. Serv., Inc. v. Warren, Case No. 3:06-CV-1113-WKW [WO], 2009 U.S. Dist. LEXIS 5253, at *87 (M.D. Ala. Jan. 26, 2009) ("[O]ne party is the regulator, the other is the

- Bankruptcy trustee and creditor;⁹²
- Company and board members being investigated for wrongdoing;⁹³
- Company and the government cooperating in an investigation into a third party's alleged wrongdoing;⁹⁴
- Inventor of patent and purchaser;⁹⁵
- Two clients with similar problems;⁹⁶
- Company and a shareholder;⁹⁷
- Parties entering into a tolling agreement;⁹⁸

regulated; their interests could not be more legally adverse. The fact that they might share, or say they do, the same public policy interests 'of the best interests of the citizens of Macon County' does not -- could not -- merge their legal interests as the regulator and the regulated into a common interest.").

⁹² Grochocinski v. Mayer Brown Rowe & Maw LLP, 251 F.R.D. 316, 327 (N.D. Ill. 2008).

⁹³ SEC v. Roberts, 254 F.R.D. 371, 378 n.4 (N.D. Cal. 2008) ("The court notes that not only is the Board not Howrey's client such that the attorney-client privilege does not attach, the Board also does not have a common interest with the Special Committee since it was the Special Committee's mandate to ascertain whether members of the Board . . . may have engaged in wrongdoing.").

⁹⁴ In re Initial Pub. Offering Sec. Litig., 249 F.R.D. 457, 465 (S.D.N.Y. 2008); Reed v. Advocate Health Care, No. 06 C 3337, 2007 U.S. Dist. LEXIS 56245, at *7-8 (N.D. Ill. Aug. 1, 2007) ("[P]laintiffs have failed to show that they have a 'common interest' with the government. The cases cited by plaintiffs in which courts had found no waiver of the work-product privilege are distinguishable because there, the government had a common interest with the sharer of information because it was actively pursuing litigation or at least an investigation against the common adversary. Here, there is no evidence of even a governmental investigation of defendants concerning the nurse wages, let alone any litigation.").

⁹⁵ GP Indus., LLC v. Bachman, Case Nos. 8:06CV50 & 51, 2008 U.S. Dist. LEXIS 69886, at *32 (D. Neb. Sept. 16, 2008).

⁹⁶ Sokol v. Wyeth, Inc., No. 07 Civ. 8442 (SHS)(KNF), 2008 U.S. Dist. LEXIS 60976, at *115-17 (S.D.N.Y. Aug. 4, 2008).

⁹⁷ Infinite Energy, Inc. v. Econnergy Energy Co., Case No. 1:06CV1214-SPM/AK, 2008 U.S. Dist. LEXIS 63493, at *8 (N.D. Fla. July 23, 2008) ("When asked what the common interests of Credit Suisse and Econnergy were in connection with the merger agreement Sprott [deponent] said, 'getting the deal done and selling the company.' . . . And when asked if there were any other interests, he responded 'not that comes to mind.'" (citation omitted)); Net2Phone, Inc. v. eBay, Inc., Civ. A No. 06-2469 (KSH), 2008 U.S. Dist. LEXIS 50451, at *24-25, *29, *29-30 (D.N.J. June 25, 2008) (not for publication) ("Simply because in-house counsel enforced the corporation's patents, which would benefit its shareholders, does not mean that they shared a legal interest. Put differently, a legal interest cannot arise simply because a company acts in a way that advances the economic interests of its majority shareholder. A logical extension of plaintiff's argument would expand the application of the common interest doctrine to cover all business transactions where a company acted in the interest of its majority shareholder. While shareholders and the corporation may share an interest in commercial success, this shared economic interest is not a legal interest.").

- Employee plaintiff who settled her case and then shared information with the defendant's law firm;⁹⁹
- Litigants coordinating only logistical and scheduling issues;¹⁰⁰
- Banks negotiating but not yet agreed upon merger;¹⁰¹
- Corporation and bidder for the majority of its assets;¹⁰²
- Companies working together on a patent;¹⁰³
- Company and an executive cooperating in an internal investigation;¹⁰⁴
- Company and the government cooperating in pursuing corporate executive wrongdoers;¹⁰⁵

⁹⁸ AMEC Civil, LLC v. DMJM Harris, Inc., Civ. A. No. 06-064 (FLW), 2008 U.S. Dist. LEXIS 54466, at *8-9 (D.N.J. July 10, 2008) ("Regardless of whether parties have a joint defense strategy, their discussion of possible future litigation between themselves is not a common interest in anticipation of future litigation brought by a third party. . . . The tolling agreement portions of the Agreement refer to adverse, not common[,] interests between DMJM, H&H, and NJDOT, so the common interest privilege is inapplicable, and the tolling portions of the document are indiscoverable.").

⁹⁹ Roush v. Seagate Tech., LLC, 59 Cal. Rptr. 3d 275, 286 (Cal. Ct. App. 2007).

¹⁰⁰ Avocent Redmond Corp. v. Rose Elecs., Inc., 516 F. Supp. 2d 1199, 1204 (W.D. Wash. 2007) ("But they do not identify any communication between themselves and either their client or Cybex's counsel regarding a joint defense effort or strategy. The fact that they coordinated some of their efforts, like planning the Apex deposition, discussing discovery matters, and attending to other nonsubstantive scheduling matters, appears to be a necessary result of Judge Zilly's decision to combine the cases for pre-trial discovery, rather than a reflection of any joint defense strategy.").

¹⁰¹ Blau v. Harrison (In re JP Morgan Chase & Co. Sec. Litig.), MDL No. 1783, Master Dkt. No. 06 C 4674, 2007 U.S. Dist. LEXIS 60095, at *13-14 (N.D. Ill. Aug. 13, 2007) ("Fundamentally, the Court does not understand how Bank One and JP Morgan can be said to share a common legal interest prior to their signing the merger. Prior to the merger, these organizations stood on opposite sides of a business transaction. From a business standpoint and from a legal standpoint, the merger parties' interests stood opposed to each other. They had no common interest, and indeed, their interests were in conflict – each company wanted to get the best deal from the other company, and to the extent that one succeeded in its goal, the other suffered.").

¹⁰² Nidec Corp. v. Victor Co. of Japan, No. C-05-0686 SBA (EMC), 2007 U.S. Dist. LEXIS 48841, at *14-15 (N.D. Cal. July 3, 2007) ("In the instant case, there appears little to indicate that Defendants and the TPG fund might ever engage in joint litigation. The TPG fund was simply considering buying a majority share of JVC. It will not likely become a joint defendant with JVC.").

¹⁰³ Avago Techs. Gen. IP PTE LTD. v. Elan Microelectronics Corp., Case No. C04-05385 RMW (HRL), 2007 U.S. Dist. LEXIS 24419, at *9-10 (N.D. Cal. Mar. 20, 2007) (not for publication) ("Simply working together with another company on a patent does not guarantee that the common interest exception to waiver will apply.").

¹⁰⁴ Under Seal v. United States (In re Grand Jury Subpoena: Under Seal), 415 F.3d 333, 341 (4th Cir. 2005), cert. denied, 156 U.S. 1131 (2006).

- Patent assignor and an assignee;¹⁰⁶
- Bank and its investment advisors;¹⁰⁷
- Affiliated corporations trying to assure that one of the corporations received payment;¹⁰⁸
- Alleged victim of a fraud and the FBI, which was investigating the fraud;¹⁰⁹
- Company and its outside auditor;¹¹⁰
- Licensor and licensee;¹¹¹
- World Trade Center loan servicer and its insurance advisor;¹¹²
- World Trade Center lessee and its insurance broker;¹¹³
- Companies jointly lobbying government regulators;¹¹⁴
- Company being investigated by the FTC and its advertising agency;¹¹⁵

¹⁰⁵ United States v. Reyes, 239 F.R.D. 591, 603-04 (N.D. Cal. 2006); Mass Mut. Life v. State, Op. No. 90062, 2005 Conn. Super. LEXIS 2220, at *12 (Conn. Super. Ct. Aug. 25, 2005) (unreported opinion); McKesson HBOC, Inc. v. Superior Ct., 9 Cal. Rptr. 3d 812 (Cal. Ct. App. 2004); United States v. Bergonzi, 216 F.R.D. 487 (N.D. Cal. 2003).

¹⁰⁶ Knoll Pharms. Co. v. Teva Pharms. USA, Inc., Case No. 01 C 1646, 2004 U.S. Dist. LEXIS 24057, at *10 (N.D. Ill. Nov. 19, 2004).

¹⁰⁷ Stenovich v. Wachtell, Lipton, Rosen & Katz, 756 N.Y.S.2d 367, 378, 378-79 (N.Y. Sup. Ct. 2003).

¹⁰⁸ Gulf Islands Leasing, Inc. v. Bombardier Capital, Inc., 215 F.R.D. 466, 472-73 (S.D.N.Y. 2003).

¹⁰⁹ Spanierman Gallery v. Merritt, No. 00 Civ. 5712(LTS)(THK), 2003 U.S. Dist. LEXIS 22141 (S.D.N.Y. Dec. 5, 2003).

¹¹⁰ Medinol, Ltd. v. Boston Sci. Corp., 214 F.R.D. 113, 117 n.3 (S.D.N.Y. 2002) (explicitly disagreeing with the conclusion in In re Pfizer Inc. Sec. Litig., No. 90 Civ. 1260, 1993 U.S. Dist. LEXIS 18215 (S.D.N.Y. Dec. 22, 1993)).

¹¹¹ Johnson Matthey, Inc. v. Research Corp., No. 01 Civ. 8115 (MBM)(FM), 2002 U.S. Dist. LEXIS 13560 (S.D.N.Y. July 23, 2002).

¹¹² SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC, No. 01 Civ. 9291 (JSM), 2002 U.S. Dist. LEXIS 11949 (S.D.N.Y. July 3, 2002).

¹¹³ SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC, No. 01 Civ. 9291 (JSM), 2002 U.S. Dist. LEXIS 10919, at *14-15 (S.D.N.Y. June 19, 2002) (the insurance broker "is not a party to this litigation, and its legal position will be unaffected by the outcome of this case").

¹¹⁴ Bowman v. Brush Wellman, Inc., No. 00 C 50264, 2001 U.S. Dist. LEXIS 14088, at *8-10 (N.D. Ill. Sept. 13, 2001).

- Two companies entering into a license agreement;¹¹⁶
- Company and an investment banker that had not been threatened with litigation;¹¹⁷
- Presidential advisor and the federal government;¹¹⁸
- First Lady and the federal government;¹¹⁹
- Parties interested in preserving someone's reputation;¹²⁰
- Company and its financial advisor;¹²¹
- Party and its "management consultant";¹²²
- Companies negotiating a merger (before execution of the merger agreement);¹²³
- Two corporations involved in an arms-length asset purchase;¹²⁴
- Company and a prospective buyer of the company.¹²⁵

The length and variety of this list highlight the enormous stakes in any dispute over a purported common interest arrangement. The participants cannot seek a declaratory judgment in advance that the privilege will protect communications that they

¹¹⁵ In re Application of FTC, Misc. No. M18-304 (RJW), 2001 U.S. Dist. LEXIS 5059, at *9 (S.D.N.Y. Apr. 19, 2001).

¹¹⁶ In re Sulfuric Acid Antitrust Litig., 235 F.R.D. 407, 429 (N.D. Ill. 2006); Ronald A. Katz Tech. Licensing, L.P. v. AT&T Corp., 191 F.R.D. 433, 436-37 (E.D. Pa. 2000).

¹¹⁷ Blanchard v. Edgemark Fin. Corp., 192 F.R.D. 233, 236 (N.D. Ill. 2000).

¹¹⁸ In re Lindsey, 158 F.3d 1263, 1279 (D.C. Cir.), cert. denied, 525 U.S. 996 (1998).

¹¹⁹ In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 922 (8th Cir.), cert. denied, 521 U.S. 1105 (1997).

¹²⁰ United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996).

¹²¹ Walsh v. Northrop Grumman Corp., 165 F.R.D. 16, 18-19 (E.D.N.Y. 1996).

¹²² Russell v. Gen.I Elec. Co., 149 F.R.D. 578, 580 (N.D. Ill. 1993).

¹²³ Zirn v. VLI Corp., Civ. A. No. 9488, 1990 Del. Ch. LEXIS 135 (Del. Ch. Aug. 13, 1990).

¹²⁴ Cheeves v. S. Clays, Inc., 128 F.R.D. 128, 130-31 (M.D. Ga. 1989).

¹²⁵ Oak Indus. v. Zenith Indus., No. 86C4302, 1988 U.S. Dist LEXIS 7985, at *11 (N.D. Ill. July 27, 1988).

share with each other or communications between them. In each of these situations, the participants presumably thought that they had properly created a common interest arrangement that allowed them to share privileged communications without destroying the privilege. Yet their adversaries successfully argued that the participants were not entitled to that protection. This allowed the adversaries to gain access to all of the shared communications that were intrinsically privileged before disclosure to the other common interest participants.

Participants who fail to properly create a common interest arrangement because they did not anticipate litigation presumably can rely on the von Bulow doctrine to prevent a subject matter waiver caused by disclosure of privileged communications outside the intimate attorney-client relationship. Clients who fail to properly create a common interest arrangement because they lacked a sufficiently common interest (rather than sufficient anticipation of litigation) might not be able to rely on the von Bulow doctrine. Disclosure to gain some advantage in a judicial setting will often trigger a subject matter waiver. Although no court seems to have held this, presumably that rule might apply when co-defendants disclose privileged communications even though they have interests that are too adverse to support a common interest agreement. To be sure, one would think that the subject matter waiver doctrine would apply more to disclosures seeking an advantage in the dispute with the plaintiff rather than one of the other defendants. Still, there seems to be a theoretical possibility that the court might not apply the protective von Bulow doctrine. In such a situation, common interest participants might face the draconian consequence of a subject matter waiver for having

unsuccessfully attempted to create a common interest arrangement. Courts seem not to have addressed these nuances.

In this hypothetical, the two members negotiating a joint venture arrangement are clearly adversaries (albeit transactional adversaries). It is difficult to conceive of any court finding that a common interest agreement could cover their adversarial negotiations.

- See, e.g., In re Sulfuric Acid Antitrust Litig., 235 F.R.D. 407, 429 (N.D. Ill. 2006) (assessing privilege issues in an antitrust case; finding that the joint defense or common interest doctrine could not apply to a joint venture partner during the negotiation of the joint venture arrangement; "They are still competitors, perhaps more so than partners, and do not share an interest sufficiently common to extend the attorney-client privilege to their discussions."; contrasting that situation with the disclosure of documents after the joint venture arrangement was consummated; "Unlike the September 13, 1999 email from John Hammond (Appendix to Plaintiff's Motion, Ex. 17), this email clearly concerns the Noranda-DuPont joint venture, and concerns a legal matter in which the two companies share a common interest. It reflects legal advice from a DuPont attorney, Jim Higgins, regarding the legal consequences of a proposed course of conduct. The material is appropriately redacted.").

As explained above, the Seventh Circuit recognizes the effectiveness of common interest agreements in the absence of any litigation. Most courts would not follow this approach, and therefore presumably would find that a common interest agreement would not prevent a waiver even after the joint venture began operations.

Best Answer

The best answer to this hypothetical is **PROBABLY NO**.

Lawyers' Joint Representation of Their Company and the Joint Venture

Hypothetical 4

Your company and another company created an LLC joint venture, and you would like to jointly represent your client and the LLC. However, that arrangement has prompted you to ask some questions.

- (a) May you jointly represent your company and the joint venture?

YES

- (b) If you are not fully licensed in the state where the joint venture will operate, may you jointly represent your company and the joint venture?

YES (PROBABLY)

- (c) Will the attorney-client privilege protect your communications with your company's employees who have been assigned to the LLC?

YES

- (d) Will the privilege protect your communications with the other member's employees assigned to the joint venture?

MAYBE

- (e) If your company asks you for a confidential analysis of how it might unwind the joint venture, must you advise the joint venture's management about that request?

MAYBE

- (f) How do you advise one of your company's designated LLC board members if the board member asks about the following scenario: the joint venture was hoping to develop a product that would generate profits for both members, but one of the joint venture's scientists has just developed a product that could be hugely profitable for the joint venture, but would compete directly with one of your

company's main products. Should your company's designated LLC board member vote to continue developing that product?

MAYBE

- (g) If you discover that one of your company's employees assigned to the joint venture has engaged in serious misconduct that might substantially harm the joint venture, must you report that to the joint venture?

YES (PROBABLY)

Analysis

(a) Given all of the ethics, privilege and other ramifications that can flow from properly characterizing a representation, many lawyers do not give it enough thought until it is too late.

Lawyers can (1) separately represent clients on separate matters (as most outside lawyers do on a daily basis); (2) separately represent clients on the same matter; or (3) jointly represent clients on the same matter. As in so many other contexts, lawyers should always explain the nature of a representation to clients at the start.

Existence of a Joint Representation. The first step in analyzing the ethics (or privilege) effect of a joint representation is determining whether such a joint representation exists.

Surprisingly, very few authorities or cases deal with this issue. The ABA Model Rules do not devote much attention to the creation of an attorney-client relationship. The relatively new rule governing "prospective" clients explains the creation of that relationship (ABA Model Rule 1.18(a)) and the absence of that relationship. Id. cmt. [2].

The many ABA Model Rule comments dealing with what the rules call a "common representation" focus on the effects and risks of such a common representation, not on its creation. ABA Model Rule 1.7 cmts. [29]-[33].

Thus, the ABA Model Rules implicitly look to other legal principles to define the beginning of an attorney-client relationship.

The Restatement's provision addressing what it calls "co-clients" essentially points back to the general section about the creation of an attorney-client relationship in a single-client setting.

Whether a client-lawyer relationship exists between each client and the common lawyer is determined under § 14, specifically whether they have expressly or impliedly agreed to common representation in which confidential information will be shared. A co-client representation can begin with a joint approach to a lawyer or by agreement after separate representations had begun.

Restatement (Third) of Law Governing Lawyers § 75 cmt. c (2000) (emphasis added).

Restatement § 14 includes the predictable analysis of such a relationship formation.¹

That section of the Restatement does not even mention joint representations. Thus, the Restatement apparently assumes that a joint representation begins in the same way as a sole representation.

¹ Restatement (Third) of Law Governing Lawyers § 14 (2000) ("A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or (2) a tribunal with power to do so appoints the lawyer to provide the services.").

The few cases to have dealt with this issue have also pointed to the obvious indicia of an attorney-client relationship. For instance, the Third Circuit noted the obvious:

The keys to deciding the scope of a joint representation are the parties' intent and expectations, and so a district court should consider carefully (in addition to the content of the communication themselves) any testimony from the parties and their attorneys on those areas.

.....

When, for example, in-house counsel of the parent [company] seek information from various subsidiaries in order to complete the necessary public filings, the scope of the joint representation is typically limited to making those filings correctly. It does not usually involve jointly representing the various corporations on the substance of everything that underlies those filings.

.....

The majority -- and more sensible -- view is that even in the parent-subsidiary context a joint representation only arises when common attorneys are affirmatively doing legal work for both entities on a matter of common interest.

Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 363, 372-73, 379 (3d Cir. 2007) (emphases added).

An earlier First Circuit opinion provided a little more detailed explanation of what courts should look for, but also articulated the obvious factors.

In determining whether parties are "joint clients," courts may consider multiple factors, including but not limited to matters such as payment arrangements, allocation of decisionmaking roles, requests for advice, attendance at meetings, frequency and content of correspondence, and the like.

FDIC v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000) (emphasis added).

An earlier district court decision listed ten factors.

[S]ince the ultimate question is whether the law will deem two (or more) parties to have been "joint clients" of a particular lawyer, it also is necessary (in conducting this inquiry into all the relevant circumstances) to analyze all pertinent aspects of the relationship and dynamics between (a) the party that claims to have been a joint client and (b) the party that clearly was a client of the lawyer in question. This analysis should include (but not necessarily be limited to) (1) the conduct of the two parties toward one another, (2) the terms of any contractual relationship (express or implied) that the two parties may have had, (3) any fiduciary or other special obligations that existed between them, (4) the communications between the two parties (directly or indirectly), (5) whether, to what extent, and with respect to which matters there was separate, private communication between either of them and the lawyer as to whom a 'joint' relationship allegedly existed, (6) if there was any such separate, private communication between either party and the alleged joint counsel, whether the other party knew about it, and, if so, whether that party objected or sought to learn the content of the private communication, (7) the nature and legitimacy of each party's expectations about its ability to access communications between the other party and the allegedly joint counsel, (8) whether, to what extent, and with respect to which matters either or both of the alleged joint clients communicated privately with other lawyers, (9) the extent and character of any interests the two alleged joint parties may have had in common, and the relationship between common interests and communications with the alleged joint counsel, (10) actual and potential conflicts of interest between the two parties, especially as they might relate to matters with respect to which there appeared to be some commonality of interest between the parties, and (11) if disputes arose with third parties that related to matters the two parties had in common, whether the alleged joint counsel represented both parties with respect to those disputes or whether the two parties were separately represented.

Sky Valley Ltd. P'ship v. ATX Sky Valley, Ltd., 150 F.R.D. 648, 652-53 (N.D. Cal. 1993).

More recently, another court cited essentially the same basic factors.

As in the single-client representation, the joint-client relationship begins when the "co-clients convey their desire for representation, and the lawyer accepts." . . . Whether joint representation exists depends on the understanding of counsel and the parties in light of the circumstances.

Robert Bosch LLC v. Pylon Mfg. Corp., 263 F.R.D. 142, 145 (D. Del. 2009).²

The creation of a joint representation requires a meeting of the minds, not just one or the other client's understanding or expectation. For instance, one court rejected the argument "that a joint representation of Party A and Party B may somehow arise through the expectations of Party B alone, despite Party A's views to the contrary."³

Analyzing these factors often requires a fact-intensive examination of the situation. For instance, as discussed more fully below, the Delaware Bankruptcy Court conducted a hearing focusing on such issues in the Teleglobe case. The court took testimony from the clients and the lawyers involved. The court ultimately determined

² Robert Bosch LLC v. Pylon Mfg. Corp., 263 F.R.D. 142, 145 (D. Del. 2009) ("As in the single-client representation, the joint-client relationship begins when the 'co-clients convey their desire for representation, and the lawyer accepts.' Just because clients of the same lawyer share a common interest does not mean they are co-clients. Whether joint representation exists depends on the understanding of counsel and the parties in light of the circumstances. It continues until it is expressly terminate[d] or circumstances indicate to all the joint clients that the relationship has ended. . . . In that relationship, the co-clients and their common counsel's communications are protected from disclosure to persons outside the joint representation. Waiver of the privilege requires the consent of all joint clients. A co-client, however, may unilaterally waive the privilege regarding its communications with the joint attorney, but cannot unilaterally waive the privilege for the other joint clients or any communications that relate to those clients." (footnotes omitted)).

³ Neighborhood Dev. Collaborative v. Murphy, 233 F.R.D. 436, 441-42 (D. Md. 2005) ("What the Court takes exception to is NDC's effort to merge these two principles - to argue, in effect, that a joint representation of Party A and Party B may somehow arise through the expectations of Party B alone, despite Party A's views to the contrary. This position is untenable, because it would, as Defendant Murphy points out, 'allow the mistaken (albeit reasonable) belief by one party that it was represented by an attorney, to serve to infiltrate the protections and privileges afforded to another client.' . . . In other words, NDC suggests that Party A's (Murphy's) attorney-client privilege may be eviscerated by Party B's (NDC's) erroneous belief that it, too, was represented by Party A's counsel (AGG). Unsurprisingly, NDC cites no authority in support of this remarkable proposition. Moreover, NDC's argument runs contrary to the general policy that joint representations of clients with potentially adverse interests should be undertaken only when subject to very narrow limits." (footnote omitted)).

that there was no joint representation between now-bankrupt corporations and their former parent. Teleglobe USA Inc. v. BCE Inc. (In re Teleglobe Commc's Corp.), 392 B.R. 561, 589, 590 (Bankr. D. Del. 2008).

Clients' Arguments that a Joint Representation Did Not Exist. In some situations, one client has an incentive to claim that a lawyer did not jointly represent it and another client.

Two scenarios seem to frequently involve this issue: (1) one of the arguable joint clients (usually a corporate family member) declares bankruptcy, and non-bankrupt arguable joint clients (usually corporate affiliates) argue that the same lawyer did not jointly represent all of them in the transaction resulting in the bankruptcy -- thus allowing those non-bankrupt companies to withhold documents from the bankruptcy trustee; or (2) a corporation argues that the same lawyer did not jointly represent it and a current or former executive or employee -- thus allowing the company to withhold documents from the now-adverse executive/employee or to exercise sole power to waive the privilege protecting communications with its lawyer. In those situations, one of the arguable joint clients has an interest in arguing that no joint representation ever existed (at least on the pertinent matter).

The first scenario clearly sets up a fight over the existence of a joint representation. The trustee generally argues that the lawyer jointly represented the corporate family members on the same matter, while the non-bankrupt affiliate argues that the lawyer did not jointly represent the corporate family members on the matter. If the bankrupt affiliate wins, it generally obtains access to all of the lawyer's

communications and documents. If the non-bankrupt affiliate wins, it usually can maintain the privilege that would protect its own communications with the lawyer.

Some large well-known law firms have found themselves dealing with this very troubling situation. For instance, a court ordered Troutman Sanders to produce to Mirant's bankruptcy trustee files that the firm created while jointly representing Mirant and its previous parent (The Southern Company) during Mirant's spin-off. In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005).

More recently, several courts extensively dealt with these issues in the bankruptcy of several well-known Canadian and U.S. companies. These courts' analyses provide perhaps the clearest discussion of the existence and effects of joint representations.

In Teleglobe, the Delaware District Court ordered several law firms to produce documents to bankrupt second-tier subsidiaries of Canada's largest broadcasting company -- finding that the law firms had jointly represented the entire corporate family.⁴ The court even ordered the production of communications between Shearman & Sterling and the corporate parent, noting that the in-house lawyers who had received the Shearman & Sterling communications jointly represented the entire corporate family.

The Third Circuit reversed.⁵ Although remanding for a more precise determination of which corporate family members the in-house lawyers and outside lawyers represented, the Third Circuit affirmed the basic premise that in-house and

⁴ Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), Civ. No. 04-1266-SLR, 2006 U.S. Dist. LEXIS 48367 (D. Del. June 2, 2006), rev'd and remanded, 493 F.3d 345 (3d Cir. 2007).

⁵ Teleglobe Commc'ns Corp. v. BCE Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345 (3d Cir. 2007).

outside lawyers who jointly represent corporate affiliates generally cannot withhold documents relating to the joint representation from any of the clients.

Before remanding to the district court for an assessment of whether a joint representation existed, the Third Circuit provided some very useful guidance. Among other things, the Third Circuit explained how the district court should assess the existence of a joint representation (discussed above).

On remand, the bankruptcy court for the District of Delaware ultimately found that there had not been a joint representation. In assessing the existence of a joint representation, the bankruptcy court conducted a lengthy hearing, taking evidence and testimony from various business folks and lawyers.⁶ Among other things, the bankruptcy court noted that the ultimate parent was a Canadian company while the subsidiaries were American companies; that there was no retainer letter describing the relationship; and that the parent had a separate law department from the subsidiaries.

More recently, another court dealt with the same issue -- but in the context of a corporate parent's sale of a subsidiary in the ordinary course of business, rather than in a bankruptcy setting. In that case, the law firms of Blank Rome and Quarles & Brady represented a parent and its fully owned subsidiary in a transaction involving the subsidiary's sale to a new owner. The subsidiary later sued its former parent, and sought the law firms' files. The court ordered production of the files, despite the law firms' argument that they never represented the subsidiary in the transaction. The court noted that the parent had presented "no evidence indicating that it ever hired separate

⁶ Teleglobe USA, Inc., 392 B.R. 561 (Bankr. D. Del. 2008).

counsel for [the subsidiary] before the date it was sold to [buyer]," so "the only attorneys who could have been representing [the subsidiary] at the moment the Lease Term Sheet was signed were Blank Rome and Quarles & Brady."⁷ The court even ordered the production of a post-transaction document -- Blank Rome's invoice which referred to the firm's pre-transaction work.

It is unfortunate that cases dealing with the existence of joint representations seem to arise most frequently in the corporate context.

In some ways, it should be easier to determine if individuals have been jointly represented in the trust and estate context than if corporations had been jointly represented. In the corporate family world, the attorney-client privilege can protect communications between the parent's lawyer and employees of any wholly owned subsidiaries (and perhaps partially owned subsidiaries controlled by the parent). This is because every employee in the corporate family ultimately owes fiduciary duties to the parent. For this reason, in-house lawyers and outside lawyers representing a corporate family do not have to carefully establish an attorney-client relationship with corporate affiliates in order to assure privilege.⁸

⁷ 625 Milwaukee, LLC v. Switch & Data Facilities Co., Case No. 06-C-0727, 2008 U.S. Dist. LEXIS 19943, at *12 (E.D. Wis. Feb. 29, 2008).

⁸ Given the context of in-house lawyers' practice, it can be especially difficult to analyze whether such lawyers jointly represented multiple clients. The Third Circuit explained why.

When, for example, in-house counsel of the parent seek information from various subsidiaries in order to complete the necessary public filings, the scope of the joint representation is typically limited to making those filings correctly. It does not usually involve jointly representing the various corporations on the substance of everything that underlies those filings.

Telelobe Commc'ns Corp., 493 F.3d at 372-73. Thus, the Third Circuit recognized that

In contrast, a lawyer representing individuals in the trust and estate setting might be more likely to explain whether the lawyer has an attorney-client relationship with one or more family members.

Third Parties' Arguments that a Joint Representation Did Not Exist. While only a handful of courts have dealt with disputes among arguable joint clients about the existence of a joint representation, even fewer courts have addressed a third party's argument that a joint representation did not exist.

This is somewhat surprising, because third parties have a huge incentive to prove that a valid joint representation did not exist. Doing so presumably would give them access to communications among the parties incorrectly claiming privilege protection under the joint representation doctrine. This is because the clients will probably have disclosed privileged communications outside the intimate attorney-client relationship they enjoyed with their own lawyer. Yet very little case law deals with such predictable attacks. Perhaps this is because clients can generally agree to be jointly represented by the same lawyer without risking some third party challenging the wisdom

[t]he majority -- and more sensible -- view is that even in the parent-subsiary context a joint representation only arises when common attorneys are affirmatively doing legal work for both entities on a matter of common interest.

Id. at 379.

Thus, analyzing the existence of a joint representation involving in-house lawyers can be even more challenging, because in-house lawyers can enjoy some benefits of a joint representation (the ability to engage in privileged communications beyond their client/employer's employees) without actually establishing a joint representation with those other entities. In Teleglobe, the Third Circuit warned that

[a] broader rule would wreak havoc because it would essentially mean that in adverse litigation a former subsidiary could access all of its former parent's privileged communications because the subsidiary was, as a matter of law, within the parent entity's community of interest.

Id.

of such an agreement. If the joint parties and the lawyer unanimously take the position that they had entered into such an arrangement, there is not much that a third party can do to challenge their testimony.

About the only arguable grounds for a third party's attack on the existence of a joint representation is that the joint clients' interests were so divergent that the same lawyer could not possibly have represented them both. Of course, this goes back to an ethics issue. Under ABA Model Rule 1.7(b), the only totally prohibited "concurrent" representation is one in which a lawyer asserts a claim against another client being represented by the same lawyer or her partner "in the same litigation or other proceeding before a tribunal." ABA Model Rule 1.7(b)(3). That is not even a joint representation on the same matter -- so there are very few per se unethical joint representations.

To be sure, several ABA Model Rules comments warn lawyers that there might be limits on their joint representations of multiple clients in what the ABA Model Rules call a "common representation." See, e.g., ABA Model Rule 1.7 cmts. [29]-[33]. But the threshold is very low for such joint representations.⁹

Courts recognize some limits on a lawyer's ability to represent clients with divergent interests. For instance, one court pointed to "the general policy that joint representations of clients with potentially adverse interests should be undertaken only

⁹ Jointly represented clients and their lawyer may also attempt to resolve any adversity by agreeing to prospective consents allowing the lawyer to keep representing one of the clients even in matters adverse to the other jointly represented clients. See, e.g., ABA Model Rule 1.7 cmt. [22]; Restatement (Third) of Law Governing Lawyers § 31(2)(e) (2000).

when subject to very narrow limits." Neighborhood Dev. Collaborative v. Murphy, 233 F.R.D. 436, 442 (D. Md. 2005).¹⁰

However, some courts and bars have approved joint representations even of opposite sides in transactions.

- Van Kirk v. Miller, 869 N.E.2d 534 (Ind. Ct. App. 2007) (approving the validity of a consent allowing a lawyer to represent both sides in a negotiated transaction).

¹⁰ Interestingly, even if a lawyer was found to have engaged in some improper conduct by jointly representing multiple clients with adverse interests, that would not necessarily result in loss of the privilege.

In its analysis of a possible joint representation among corporate affiliates, the Third Circuit's decision in Teleglobe explained that even as between the joint clients the privilege can protect communications with a joint lawyer who should not have represented joint clients whose interests are adverse to one another.

The Restatement's conflicts rules provide that when a joint attorney sees the co-clients' interests diverging to an unacceptable degree, the proper course is to end the joint representation. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmts. e(1)-(2). As the Court of Appeals for the D.C. Circuit noted in Eureka Inv. Corp. v. Chicago Title Ins. Co., 240 U.S. App. D.C. 88, 743 F.2d 932 (D.C. Cir. 1984) (*per curiam*), courts are presented with a difficult problem when a joint attorney fails to do that and instead continues representing both clients when their interests become adverse. *Id.* at 937-38. In this situation, the black-letter law is that when an attorney (improperly) represents two clients whose interests are adverse, the communications are privileged against each other notwithstanding the lawyer's misconduct. *Id.*; see also J. WIGMORE, EVIDENCE § 2312 (McNaughton rev. ed. 1961).

Teleglobe Commc'ns Corp., 493 F.3d at 368.

The much older Eureka case did not receive much attention until Teleglobe cited it, but stands for the same proposition. Eureka Inv. Corp. v. Chicago Title Ins. Co., 743 F.2d 932, 937-38 (D.C. Cir. 1984) ("Given Eureka's expectations of confidentiality and the absence of any policy favoring disclosure to CTI, Eureka should not be deprived of the privilege even if, as CTI suggests, the asserted attorney-client relationship should not have been created. We need not express any view on CTI's contention that Fried, Frank should not have simultaneously undertaken to represent Eureka in an interest adverse to CTI and continued to represent CTI in a closely related matter. As Wigmore's second principle expressly states, counsel's failure to avoid a conflict of interest should not deprive the client of the privilege. The privilege, being the client's, should not be defeated solely because the attorney's conduct was ethically questionable. We conclude, therefore, that Eureka was privileged not to disclose the requested documents.").

Thus, joint clients can even keep from one another privileged communications if a lawyer has been improperly representing them (presumably in violation of the conflicts of interest rules). A fortiori, one would expect that a third party would be unable to pierce the privilege despite such adversity between the jointly represented clients.

- North Carolina LEO 2006-3 (1/23/09) (holding that a lawyer can represent both the buyer and seller in a real estate transaction).
- But see New York LEO 807 (1/29/07) ("The buyer and seller of residential real estate may not engage separate attorneys in the same firm to advance each side's interests against the other, even if the clients give informed consent to the conflict of interest.").

Thus, the ethics rules, ethics opinions and case law recognize that lawyers can jointly represent a client with potential or even actual adverse interests, as long as a lawyer reasonably believes that he or she can adequately represent all the clients, and as long as the clients consent after full disclosure.

Joint clients and their lawyer also have power to define the "information flow" within a joint representation -- although there are certainly some limits on this power, just as there are limits on the power to avoid any loyalty issues. ABA Model Rule 1.7 cmt. [31] ("In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential."); Restatement (Third) of Law Governing Lawyers § 60 cmt. I (2000) ("Co-clients can also explicitly agree that the lawyer is not to share certain information.").¹¹

In the Teleglobe case (discussed in detail above), the Third Circuit indicated that in the corporate family context "a joint representation only arises when common

¹¹ To be sure, there are limits on such agreements, and courts reject obviously contrived arrangements, at least in disputes between former jointly represented clients. See, e.g., In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005) (rejecting the applicability of a "Protocol" entered into by a parent and a then-subsiary which authorized their joint lawyer Troutman Sanders to keep confidential from one client what it learned from the other; noting that the general counsel of the subsidiary agreed to the Protocol after the subsidiary became an independent company, but also explaining that the general counsel had ties both to the parent and to Troutman).

Thus, courts might reject an obvious effort to favor one of the former joint clients at the expense of another, although the authorities concede that jointly represented clients and their lawyer may agree to a limited information flow during a joint representation).

attorneys are affirmatively doing legal work for both entities on a matter of common interest." Teleglobe Commc'ns Corp., 493 F.3d at 379. However, the Third Circuit did not assess what would happen if a lawyer represented multiple corporations (or any other clients, for that matter) on a matter in which the client did not have a "common interest." Thus, it is unclear whether the Third Circuit was simply describing the situation before it, or what explains the contours of an acceptable joint representation.

Significantly, the Third Circuit dealt with the possibility of adverse interests in discussing one jointly represented client's ability to withhold its own privileged communications -- when they were sought by another jointly represented client in a later dispute between them.

In any event, not many third parties seem to have challenged the existence of a joint representation.

One 2010 case highlights what a difficult task third parties might have in doing so. In Oppliger v. United States, No. 8:06CV750 & 8:08CV530, 2010 U.S. Dist. LEXIS 15251 (D. Neb. Feb. 8, 2010), the court rejected the United States Government's argument that the attorney-client privilege did not protect communications between a company's buyer and seller -- who claimed that they had hired the same lawyer to represent them both in resolving a dispute over the sale. In fact, the court explained that the issue on which the same lawyer represented the buyer and the seller "constitutes a claim for breach of the Purchase Agreement." Id. at *14. That comes close to the totally prohibited "concurrent" representation under ABA Model Rule 1.7 (explained above) -- although that prohibition applies only to the actual assertion of a claim "in the same litigation or other proceeding before a tribunal." ABA Model Rule

1.7(b). Here, apparently, the parties had not asserted claims in litigation or other proceedings. However, it is remarkable that they would hire the same lawyer to represent them both in connection with such a possible claim.

The court's analysis showed how difficult it is for a third party to breach the privilege in this setting.

As a general rule, when individuals share an attorney as joint clients, the attorney-client privilege will protect communications, between the attorney and the joint clients, from all third parties, absent effective waiver. . . . The issue before the court is whether Mr. Oppliger and Mr. Behrns were joint clients of Mr. Gardner [lawyer]. A number of factors are relevant to determine the relationship between the individuals and counsel including the reasonable subjective views and conduct of the individuals and the attorney. . . . In this case, the undisputed facts show the attorney and both clients reasonably believed joint representation existed. In fact, the document at issue begins: the law firm's attorneys 'have represented and continue to represent each of the persons and entities addressed in this letter.' . . . Mr. Oppliger and Mr. Behrns met with Mr. Gardner regarding legal representation for a single issue for which they sought a cooperative resolution. Furthermore, the legal representation resulted in a settlement agreement. . . . Accordingly, the court finds a joint client relationship existed.

Oppliger, 2010 U.S. Dist. LEXIS 15251, at *11-12 (emphasis added). The court rejected the government's argument that it "defies logic to find a common interest existed between two parties who had 'adverse interests' and were on opposite sides of a civil dispute." Id. at *13.

In this case, Mr. Oppliger and Mr. Behrns sought an apparently amicable and joint resolution of an issue "which allegedly constitutes a claim for breach of the Purchase Agreement." . . . Mr. Oppliger and Mr. Behrns sought joint counsel, agreed to joint representation, and ultimately resolved the potential problem between them through a

settlement agreement. The facts show that at the time of the relevant communications, Mr. Oppliger and Mr. Behrns were reasonable in believing in the existence of common interests and possessed reasonable expectations of confidentiality sufficient to support the attorney-client privilege.

Id. at *13-14.

If courts recognize an effective joint representation of companies on the opposite side of such a possible claim, it is difficult to see any situation in which a court would agree with a third party's challenge to a joint representation.

Surely a court would not honor an obviously contrived joint representation concocted solely to preserve an attorney-client privilege protection that would otherwise not exist. However, no courts seem to have found such a situation.

Perhaps there is a self-policing aspect to this issue. Any lawyer jointly representing clients in such a questionable arrangement would presumably be subject to disqualification from representing either client if either client wanted to end the relationship. It seems likely that no lawyer who has traditionally represented either one of the joint clients on other matters would want to take that risk.

For whatever reason, courts simply seem not to "look behind" joint representations whose existence is supported by the clients and their joint lawyer.

This scenario could call for either a joint representation or separate representations, so the lawyer should define the nature of the representation.

Requirements of a Joint Representation. The ABA Model Rules identify two issues that lawyers must address when jointly representing clients on the same matter.

First, lawyers must deal with the issue of loyalty. The loyalty issue itself involves two types of conflicts of interest -- one of which looks at whether the lawyer's

representation is directly adverse to another client, and the other of which requires a far more subtle analysis -- because it examines one representation's effect on the lawyer's judgment.

Every lawyer is familiar with the first type of conflict of interest -- which exists if "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1). At the extreme, this type of direct conflict involves a representation that the ABA Model Rules flatly prohibit. Lawyers can never undertake a representation that involves "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." ABA Model Rule 1.7(b)(3). Even if representation does not violate this flat prohibition, adversity might nevertheless create a conflict of interest if a lawyer represents one client "directly adverse" to another client. For instance, a lawyer jointly representing two co-defendants in a lawsuit obviously cannot "point the finger" against one of the clients (without consent), even if such an argument does not amount to "the assertion of a claim."

Some folks describe this first variety of conflict as a "light switch" conflict, because a representation either meets this standard or it does not. This is not to say that it can be easy to analyze such conflicts. But a lawyer concluding that a representation will be "directly adverse to another client" must deal with the conflict.

The second type of conflict involves a much more subtle analysis. As the ABA Model Rules explain it, this type of conflict exists if

there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's

responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphasis added).

This has been called a "rheostat" conflict. Unlike making a "yes" or "no" determination as required in analyzing the first type of conflict, a lawyer dealing with a "rheostat" conflict has a more difficult task. The lawyer must determine if some other duty, loyalty or interest has a "significant risk" of "materially" limiting the lawyer's representation of a client. This often involves a matter of degree rather than kind. For example, a lawyer with mixed feelings about abortion might feel awkward representing an abortion clinic, but would be able to adequately represent such a client. However, a vehemently pro-life lawyer might well find her representation of such a client "materially limited" by her personal beliefs. Thus, this second type of conflict requires a far more subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if the lawyer "reasonably believes" that she can "provide competent and diligent representation," the representation does not violate the law, and each client provide "informed consent." ABA Model Rule 1.7(b).¹²

Second, lawyers must deal with the issue of information flow. Even if there is no conflict between jointly represented clients, lawyers must analyze whether they must, may or cannot share information learned from one jointly represented client with the other clients.

¹² The ABA Model Rules require such consent to be "confirmed in writing," but many states do not. ABA Model Rule 1.7(b)(4).

A comment to the ABA Model Rules explains the factors that lawyers must consider when determining whether they can undertake a joint representation.

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

ABA Model Rule 1.7 cmt. [29] (emphases added). Thus, lawyers should consider whether adversity already exists, and the likelihood that it will arise in the future.

Lawyers concluding that they can enter into a joint representation (because adversity is not inevitable) have three basic options.

First, they can say nothing to their clients -- and deal with any adversity if it develops. Because there is no conflict until such adversity develops, there is no need for disclosure and consent. The advantage of this approach is that the lawyer is more likely to obtain the business. The disadvantage is that all of the clients will be

disappointed if adversity develops -- and might feel that the lawyer has been deceitful by not advising them of that possibility.

Second, the lawyer can salute the possibility of adversity, and advise the clients that they (and the lawyer) will have to deal with adversity if it ever develops. This has the advantage of warning the clients that they might have to address adversity, but of course leaves the outcome of any adversity uncertain.

Third, a lawyer can very carefully describe in advance what will happen if adversity develops. In most situations, the lawyer will have to drop all of the clients. ABA Model Rule 1.7 cmt. [29] ("Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails."). In certain limited situations, the clients might agree in advance that the lawyer will continue representing one of the clients and drop the other clients -- although there is rarely absolute certainty about that strategy working. The advantage of this approach is that the clients and the lawyer will know in advance what is likely to happen if adversity develops. The disadvantage of this approach is that the lawyer must describe this "parade of horrors" to the clients in advance -- and therefore may frighten away the potential clients.

The Restatement takes the same basic approach to conflicts as the ABA Model Rules. Restatement (Third) of Law Governing Lawyers §§ 121, 128 (2000).

The Restatement contains a separate provision dealing with joint representations in a "nonlitigated matter."

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent two or more clients in a matter not involving litigation if there is a substantial risk that the lawyer's representation of one or more of the clients

would be materially and adversely affected by the lawyer's duties to one or more of the other clients.

Restatement (Third) of Law Governing Lawyers § 130 (2000).

A comment provides some additional guidance.

When multiple clients have generally common interests, the role of the lawyer is to advise on relevant legal considerations, suggest alternative ways of meeting common objectives, and draft instruments necessary to accomplish the desired results. Multiple representations do not always present a conflict of interest requiring client consent For example, in representing spouses jointly in the purchase of property as co-owners, the lawyer would reasonably assume that such a representation does not involve a conflict of interest. A conflict could be involved, however, if the lawyer knew that one spouse's objectives in the acquisition were materially at variance with those of the other spouse.

Id. cmt. c.

The Restatement then provides several illustrations of how the duty of loyalty plays out in a trust and estate setting in which a lawyer wants to represent a husband and wife.

The first illustration involves a situation in which the lawyer knows both spouses and believes that their interests are aligned.

Husband and Wife consult Lawyer for estate-planning advice about a will for each of them. Lawyer has had professional dealings with the spouses, both separately and together, on several prior occasions. Lawyer knows them to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Lawyer may represent both clients in the matter without obtaining consent While each spouse theoretically could make a distribution different from the other's, including a less generous bequest to each other, those possibilities do not

create a conflict of interest, and none reasonably appears to exist in the circumstances.

Id. illus. 1 (emphasis added).

The second Restatement illustration explains the lawyer's duty if one of the spouses appears to be overbearing, and the lawyer senses a disagreement about the spouses' estate objectives.

The same facts as in Illustration 1, except that Lawyer has not previously met the spouses. Spouse A does most of the talking in the initial discussions with Lawyer. Spouse A does most of the talking in the initial discussions with Lawyer. Spouse B, who owns significantly more property than Spouse A, appears to disagree with important positions of Spouse A but to be uncomfortable in expressing that disagreement and does not pursue them when Spouse A appears impatient and peremptory. Representation of both spouses would involve a conflict of interest. Lawyer may proceed to provide the requested legal assistance only with consent given under the limitations and conditions provided in § 122.

Id. illus. 2 (emphasis added). Section 122 of the Restatement explains that a lawyer facing this situation must obtain informed consent after providing "reasonably adequate information about the material risks of such [joint] representation." Restatement (Third) of Law Governing Lawyers § 122(1) (2000).

The third illustration in the series involves spouses who might disagree about their estate objectives, but seem to be intelligent and independent enough to provide the lawyer adequate direction.

The same facts as in Illustration 1, except that Lawyer has not previously met the spouses. But in this instance, unlike in Illustration 2, in discussions with the spouses, Lawyer asks questions and suggests options that reveal both Spouse A and Spouse B to be knowledgeable about their respective rights and interests, competent to make

independent decisions if called for, and in accord on their common and individual objectives. Lawyer has adequately verified the absence of a conflict of interest and thus may represent both clients in the matter without obtaining consent (see § 122).

Restatement (Third) of Law Governing Lawyers § 130 cmt. c, illus. 3 (2000) (emphasis added). In that situation, the lawyer can proceed to jointly represent the husband and wife, with disclosure and consent.

Thus, the Restatement essentially follows the ABA Model Rules approach, but provides very useful examples that can guide lawyers' analysis of whether they can undertake a joint representation on the same non-litigated matter.

In assessing the issue of loyalty, a lawyer probably would conclude that he or she can jointly represent members of a joint venture. The lawyer must also address the information flow issue -- which is discussed below.

(b) Courts and bars generally permit in-house lawyers to represent their client/employer's affiliates. This issue involves both unauthorized practice of law issues (analyzing whether an in-house lawyer can ever represent a company other than his or her employer) and multijurisdictional practice issues (whether an in-house lawyer may represent a corporate affiliate in the state where the lawyer is not fully licensed).

Unauthorized Practice of Law. The initial issue is whether an in-house lawyer may represent her employer's corporate affiliates. The answer is usually yes. That basic approach clearly applies to wholly-owned subsidiaries. As the percentage of ownership dwindles, presumably the permissibility of the behavior disappears --

although partially owned subsidiaries might fall under the definition of corporate "affiliates" or "related" entities.¹³

General Rules. Somewhat surprisingly, the ABA Model Rules do not explicitly address the permissibility of in-house lawyers representing a client/employer's corporate affiliates (other than in the multijurisdictional practice rule).¹⁴

The ABA addressed the issue of in-house lawyers representing corporate affiliates in ABA Informal Op. 973 (8/26/67).

In what was among the first analyses of the propriety of an in-house lawyer representing those other than the immediate client/employer, the ABA addressed the following question:

May an attorney employed by a corporation render legal services to a subsidiary thereof or to other corporations interrelated therewith through interlocking directorates without direct lawyer client relationship with said subsidiaries or interrelated corporations, and without additional consideration from said sources?

ABA Informal Op. 973 (8/26/67). The ABA concluded that "there is no real problem" with such representation as long as "there is substantial identity of underlying ownership of both the employer corporation and the other corporation for which the staff attorney of the employer is requested to perform legal services." The ABA explained that "substantial identity of underlying ownership" exists

in such situations as where the other corporation is a wholly owned subsidiary of the employer, or the employer is a

¹³ In-house lawyers practicing continuously in a state where they are not licensed also face limitations on their ability to represent their client/employer's corporate affiliates -- such a practice implicates a subset of the unauthorized practice of law rules called "multijurisdictional practice."

¹⁴ ABA Model Rule 5.5(d)(1).

wholly owned subsidiary of the other corporation, or the stock of both the employer and the other corporation is owned by substantially the same shareholders in substantially the same proportions.

Id.

The ABA indicated that under those circumstances "we would as a matter of reality and practicality ignore, for purposes of ethical considerations, the separate legal identities of the employer and the other corporation," so that there "would in substance be only one 'client' involved." Id. (emphasis added).

The ABA warned such lawyers not to allow what the ABA calls their "basic client" to direct their judgment while representing the related entities. The ABA's reference to a "basic client" seems to recognize that there are several "clients" involved -- which is inconsistent with its earlier conclusion that "in substance" there is only one "client." The ABA nevertheless concluded that the in-house lawyer could provide legal advice to the other entities.

In discussing the lawyer's salary, the ABA explained that the payment of anything more than the "precise cost" of the lawyer's services by those related corporations would be impermissible.

The ABA suggested an alternative if the corporation did not require the lawyer's full time services -- adding the lawyer to the payroll of the other corporation on a part time basis.

The Restatement takes a similarly broad view.

Under traditional concepts of unauthorized practice, a lawyer employed by an organization may provide legal services only to the organization as an entity with respect to its own interests and not, for example, to customers of the

entity with respect to their own legal matters. Included within the powers of a lawyer retained by an organization . . . should be the capacity to perform legal services for all entities within the same organizational family.

Restatement (Third) of Law Governing Lawyers § 4 cmt. e (2000) (emphasis added).

Most states' legal ethics opinions have tended to follow the ABA's and the Restatement's lead in taking a very liberal approach to such representations.

- Virginia LEO 1838 (5/10/07) (indicating that in-house lawyers can provide legal services to their employer's sister corporation, as long as the lawyers provide "independent professional judgment" on behalf of the sister company "free of any interference or direction" from the lawyer's employer, and as long as the lawyers do not share the sister company's confidences with their employer; the Bar explaining (1) that "discharging this duty of confidentiality to [the sister corporation] may require [the lawyers] to work off-site, at a physically separate office, rather than on the premises of [their employer]"; (2) that the lawyers must be conscious of possible conflicts between their clients, and should address conflicts "with a letter of representation that outlines who the lawyer would continue to represent, if either, in the event of a conflict"; (3) that the lawyers' employer can charge and collect legal fees from the sister corporation for the lawyers' work, as long as the amount is a simple reimbursement, and the employer does not earn any "direct or indirect profit for legal services provided").
- Texas LEO 512 (6/1995) (an in-house lawyer for a corporation may perform legal services for joint ventures "in corporate and partnership form, with other corporations," even if the in-house lawyer's employer is only a minority owner of the joint venture).
- Philadelphia LEO 93-1 (4/1993) (an in-house lawyer for a "medical management services company" may perform legal services for separately incorporated clinics, which all have "common shareholders, with the major shareholder of the Corporation being a shareholder in most of the clinics," as long as the in-house lawyer avoids conflicts).
- Virginia UPL Op. 69 (12/3/84) (holding that an in-house lawyer may represent a client/employer "and its affiliates" in court).
- Tennessee LEO 84-F-80 (10/17/84) (in-house lawyers may represent the client/employer's subsidiaries and related partnerships).

- Tennessee LEO 83-F-52 (8/12/83) (an in-house lawyer employed by a limited partnership may represent related partnerships and corporations, even those not under the "structural umbrella" of the corporation which is a general partner and majority interest holder of the in-house lawyer's direct employer, but "which are owned, at least in part, by the principals or some of the principals in the firms" related to the partnerships and corporations, as long as: the cost of the services are appropriately shared; the in-house lawyer's "direct employer" does not direct the in-house lawyer's judgment while representing other entities; and the lawyer avoids conflicts).
- Massachusetts LEO 83-9 (6/21/83) (in-house lawyers may represent a direct employer's subsidiary and "affiliates"; as long as the lawyers avoid conflicts, they may even represent affiliates if there is "a departure from . . . commonality of ownership interest" with the direct employer; lawyers must avoid having their judgment directed by the direct employer, and should advise both the "primary employer" and the other represented entities that the lawyer may not keep secret from one what is learned from others; also explaining that "[a] pro rata share of the cost of an attorney's services may be allocated to the affiliated corporation, but an attorney's fees separately charged may not be paid to the corporation").
- Dallas LEO 1982-3 (7/16/82) (in-house lawyers may perform services for a "related group" of corporations, because "affiliated or related corporations, in effect, may be regarded as a single entity" for conflicts purposes).
- Texas LEO 343 (9/1968) (corporations wholly owned and 50% owned by an in-house lawyer's direct employer are "for all practical purposes only one client," so that "it makes no difference which corporation is the general employer of the lawyer"; lawyers must be aware of possible conflicts if they represent "related corporations, which do not technically involve a parent, subsidiary or controlled corporation," but even in those situations "the possibility of the lawyer aiding his general corporate employer in the unauthorized practice of law . . . is more imaginary than real," because the in-house lawyer's employer "is merely providing a convenient means whereby the lawyer's services can be made available to the related corporations as they have need for such services").

Interestingly, one state has adopted a statute explicitly permitting such a practice by in-house lawyers.

Nothing in this section shall prohibit an attorney retained by a corporation, whether or not the attorney is also a salaried employee of the corporation, from representing the corporation or an affiliate, or from representing an officer,

director, or employee of the corporation or an affiliate in any matter arising in connection with the course and scope of the employment of the officer, director, or employee.

N.C. Gen. Stat. § 84-5(b) (emphasis added).

Only one legal ethics opinion seemed to be critical of such a practice, and even that opinion did not prohibit the practice.

- Wisconsin LEO E-89-8 (1989) (explaining that "[a]lthough dual representation of a house counsel's employer and entities affiliated with the employer may be possible under some circumstances, it would seem generally ill advised unless the ownership interest in the respective entities were identical" (emphasis added)).

Ethics Issues Implicated by In-House Lawyers' Representation of Affiliates.

Not surprisingly, in-house lawyers' representation of their client/employer's affiliates involves a number of ethics issues.

Such a practice can result in conflicts of interest issues if adversity develops between the in-house lawyers' clients.

- Virginia LEO 1838 (5/10/07) (indicating that in-house lawyers can provide legal services to their employer's sister corporation, as long as the lawyers provide "independent professional judgment" on behalf of the sister company "free of any interference or direction" from the lawyer's employer, and as long as the lawyers do not share the sister company's confidences with their employer; the Bar explaining (1) that "discharging this duty of confidentiality to [the sister corporation] may require [the lawyers] to work off site, at a physically separate office, rather than on the premises of [their employer]"; (2) that the lawyers must be conscious of possible conflicts between their clients, and should address conflicts "with a letter of representation that outlines who the lawyer would continue to represent, if either, in the event of a conflict"; (3) that the lawyers' employer can charge and collect legal fees from the sister corporation for the lawyers' work, as long as the amount is a simple reimbursement, and the employer does not earn any "direct or indirect profit for legal services provided").
- Texas LEO 512 (6/1995) (holding that in-house lawyers may represent joint ventures in which their corporate employer is only a minority owner, as long as the lawyers avoid conflicts; explaining that the "potential conflict does not

arise by virtue of the extent of control or ownership that the corporation has in the joint venture, or because the corporation charges or does not charge an amount for providing the in-house lawyer. It is the simultaneous representation of the joint venture and the corporation that presents the potential for conflict"; "It is only when a potential or actual conflict develops into an impermissible conflict that the lawyer should withdraw.").

- ABA LEO 392 (4/24/95) (finding that corporations may not profit from "renting" their in-house lawyers to others, but that in-house lawyers may receive compensation above the corporation's costs without violating the ethics rules, as long as the lawyers "are in a position to give conflict-free representation to their other clients" and do not allow the corporate employer to interfere with their judgment).
- Massachusetts LEO 83-9 (6/21/83) (allowing in-house lawyers to represent companies "affiliated" with their client/employer, but recognizing that conflicts rules must be obeyed; also noting "the clients' consent to the representation after such disclosure is a prerequisite to multiple representation by the attorney").

These states' warning that lawyers representing multiple members of a corporate family must avoid conflicts seems somewhat inconsistent with the basic principle upon which the liberal approach rests -- that the lawyer is really representing just one "client."

A number of state bars have dealt with the ethics implications of an in-house lawyer's client/employer charging for the lawyer's services provided to others. The analysis takes one of several approaches.

First, some opinions have adopted a per se rule finding improper any arrangement under which the client/employer corporation receives any fee for the lawyer's services -- because the arrangement violates either the UPL or the fee-sharing rules.

These harsh opinions do not directly discuss in-house lawyers' representation of a client/employer's corporate affiliates, but would seem to apply if interpreted literally.

- See, e.g., Wisconsin LEO E-89-8 (1989) ("Wisconsin for-profit business entities may not engage in the practice of law . . . [so] full-time house counsel may not participate in any arrangement under which his or her employer charges for his or her legal services.").

Second, a number of opinions found that a client/employer corporation's profiting from the in-house lawyer's services would violate the UPL or fee-sharing rules. Unlike the per se approach discussed above, these opinions allow the corporation to receive fees that equal the corporation's cost (presumably covering the in-house lawyer's salary, overhead, etc.).

- Virginia LEO 1838 (5/10/07) (indicating that in-house lawyers can provide legal services to their employer's sister corporation, as long as the lawyers provide "independent professional judgment" on behalf of the sister company "free of any interference or direction" from the lawyer's employer, and as long as the lawyers do not share the sister company's confidences with their employer; the Bar explaining (1) that "discharging this duty of confidentiality to [the sister corporation] may require [the lawyers] to work off site, at a physically separate office, rather than on the premises of [their employer]"; (2) that the lawyers must be conscious of possible conflicts between their clients, and should address conflicts "with a letter of representation that outlines who the lawyer would continue to represent, if either, in the event of a conflict"; (3) that the lawyers' employer can charge and collect legal fees from the sister corporation for the lawyers' work, as long as the amount is a simple reimbursement, and the employer does not earn any "direct or indirect profit for legal services provided" (emphasis added)).
- Texas LEO 531 (12/1999) ("the corporation may not charge wholly-owned subsidiaries 'market-based fees' for the legal services rendered by the corporation's in-house counsel. To permit the corporation to recover anything other than its 'costs' (even if those costs were later reimbursed to the subsidiary by means of a rebate) would permit the corporation to profit financially from the legal services provided by its in-house counsel and thereby engage in the unauthorized practice of law").
- Texas LEO 512 (6/1995) (concluding that a lawyer employed by a corporation may provide legal services to such related entities as a joint venture in which the corporate employer is a minority owner, as long as "any reimbursement by the joint venture or the other venturers for the compensation paid by the corporation to the lawyer is calculated in good faith to pay no more than the full costs to the corporation of the portion of the

lawyer's time that is devoted to services for the joint venture" (emphasis added)).

- ABA LEO 392 (4/24/95) (analyzing a corporation's "rent" of its in-house lawyer to perform legal work for "other clients"; concluding that "while a corporation should be free to require its lawyers to reimburse its costs of employing in-house counsel when the lawyers do work for others, or to be made whole for the costs it actually incurred in a case when its lawyers are awarded fees by a court, a corporation may not reap profits from the work of its in-house attorneys" (emphasis added); explaining that "[i]t is permissible for the in-house lawyers, rather than the corporation, to receive a reasonable fee beyond the amount the lawyers cost the corporation" as long as the lawyers do not let the corporation guide their professional judgment).
- Virginia UPL Op. 69 (12/3/84) (a Virginia licensed in-house lawyer may represent a bank, its affiliates and "second-tier" affiliates in judicial proceedings; the in-house lawyer and staff may prepare loan documents on behalf of the bank and affiliates, and collect a fee from the customers for the preparation -- as long as the fee "bears a reasonable relationship to the legal expense associated with the transaction").
- ABA Informal Op. 973 (8/26/67) (warning that any compensation to the client/employer risks having a nonlawyer direct the lawyer's services; "[t]echnically, we believe that reimbursement by the other corporation to the employer of the precise cost to it of supplying the lawyers' services would not constitute exploitation of his professional services in this limited monetary sense. However, payment of anything more would, and precise calculation of exact cost to the employer may not be practical."; concluding that the corporation charging for an in-house lawyer's services performed "for other corporations not owned by substantially the same interests as his own employer . . . very probably result[s] in violations" of the UPL prohibition and the rule prohibiting lawyers from having their professional guidance directed by nonlawyers).

Third, one legal ethics opinion seems to have permitted an internal corporate allocation of costs, but not a direct charge by the corporate client/employer (this opinion does not make much sense, and seems to emphasize form over substance).

- Massachusetts LEO 83-9 (6/21/83) (permitting in-house lawyers to represent corporations affiliated with their client/employer; explaining that "[a] pro rata share of the cost of an attorney's services may be allocated to the affiliated corporation, but an attorney's fees separately charged may not be paid to the corporation").

Thus, legal ethics opinions differ about whether corporations may charge for (or profit) from services that their in-house lawyers provide to others. The plurality of opinion seems to permit charges, but not profits.

Whatever the formulation, this issue probably will not present a great impediment to most corporations, most of which would probably be willing to forego any profits (or even reimbursement) in order to shield their in-house lawyers from possible UPL charges (and save the corporation from the leverage that those charges might give an adversary).

A small number of legal ethics opinions have dealt with the possible ethics violation involving a nonlawyer (the corporate employer) directing a lawyer's judgment.

These opinions have warned lawyers to avoid the problem, rather than finding an inevitable violation.

- ABA LEO 392 (4/24/95) (noting that a corporation's profiting from "renting" its in-house lawyers to others would "encourage greater interference with the professional judgment of a lawyer than would occur if the corporation simply were to receive reimbursement of costs"; explaining that lawyers may receive compensation beyond the corporation's costs without violating the ethics rules, "[s]o long as the lawyers do not permit any interference by the corporate employer with their professional judgment").
- Massachusetts LEO 83-9 (6/21/83) (finding that in-house lawyers may represent corporate "affiliates" of their employers, but warning that the lawyers may not permit "the entity which employs or pays the attorney to render legal services for another to direct or regulate the attorney's professional judgment in rendering such legal services").

A number of legal ethics opinions have dealt with the confidentiality implications of in-house lawyers providing legal services to those other than their direct client/employers.

- Virginia LEO 1838 (5/10/07) (indicating that in-house lawyers can provide legal services to their employer's sister corporation, as long as the lawyers provide "independent professional judgment" on behalf of the sister company "free of any interference or direction" from the lawyer's employer, and as long as the lawyers do not share the sister company's confidences with their employer; the Bar explaining (1) that "discharging this duty of confidentiality to [the sister corporation] may require [the lawyers] to work off site, at a physically separate office, rather than on the premises of [their employer]"; (2) that the lawyers must be conscious of possible conflicts between their clients, and should address conflicts "with a letter of representation that outlines who the lawyer would continue to represent, if either, in the event of a conflict"; (3) that the lawyers' employer can charge and collect legal fees from the sister corporation for the lawyers' work, as long as the amount is a simple reimbursement, and the employer does not earn any "direct or indirect profit for legal services provided" (emphasis added)).
- Massachusetts LEO 83-9 (6/21/83) ("[W]hen representing a company other than his or her primary employer, the attorney and his or her employer should understand that the confidences and secrets of the affiliate may not, without the affiliate's consent after full disclosure, be revealed by the attorney to, or used for the benefit of, the employer. When representing an affiliate and the employer, both clients should be advised that their respective confidences and secrets gained by the attorney in the course of the representation may not be withheld from the other, unless the clients make some other arrangement." (emphasis added)).

As with the conflicts analysis, these opinions recognize that the in-house lawyers are representing multiple clients.

While most analyses of in-house lawyers providing legal services to those other than their client/employer analyze hypothetical situations, a few legal ethics opinions offer advice about how to structure a representation so that it avoids any ethics violations.

The very first ABA analysis of this issue suggested one solution, and a later state legal ethics opinion echoed the ABA's thoughts.

- ABA Informal Op. 973 (8/26/67) (allowing in-house lawyers to provide legal services to affiliated corporations if there "is substantial identity of underlying ownership" of the affiliated corporation and the client/employer; finding

various ethics prohibitions on in-house lawyers providing legal services to affiliated corporations "not owned by substantially the same interests as his own employer," but noting that "such of the other corporations as desire to have his services available on a regular basis could place him on their own payrolls on a part-time basis, with perhaps a corresponding reduction in his salary from his basic regular employer, or he could be retained and compensated directly and separately by any corporation other than his employer for each service he performs for such other corporation and his employer could make a pro rata reduction in his salary for the period involved, based upon the amount of his time devoted to the affairs of the other corporation rather than to his employer's business" (emphases added)).

- Washington Advisory Op. 1594 (1995) (finding that nothing in the Washington State ethics rules "prohibit a lawyer from being part-time, in-house corporate counsel for more than one client").

Other states would presumably recognize this solution too, because most (if not all) states permit lawyers to work for more than one employer -- although the lawyer must obviously avoid conflicts problems, etc. However, lawyers choosing this solution must be licensed by the state in which they hope to set up a separate practice -- to avoid violating multijurisdictional prohibitions.

Multijurisdictional Practice. The other issue involves multijurisdictional practice. Not surprisingly, the unauthorized practice of law analysis for in-house lawyers differs dramatically from lawyers who draw their clients from the public.

The ABA Model Rules contain a provision essentially permitting in-house lawyers to establish a "systematic and continuous presence" in a jurisdiction where they are not licensed.

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that . . . are provided to the lawyer's employer or its organizational affiliates and are not services or which the form requires pro hac vice admission.

ABA Model Rule 5.5(d)(1) (emphasis added). A comment provides additional guidance

Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to access the lawyer's qualifications and the quality of the lawyer's work.

ABA Model Rule 5.5(d)(1) cmt. [16] (emphasis added).

The Restatement deals with in-house lawyers in a comment rather than in a black letter rule.

. . . [s]tates have permitted practice within the jurisdiction by inside legal counsel for a corporation or similar organization, even if the lawyer is not locally admitted and even if the lawyer's work consists entirely of in-state activities, when all of the lawyer's work is for the employer-client . . . and does not involve appearance in court. Leniency is appropriate because the only concern is with the client-employer, who is presumably in a good position to assess the quality and fitness of the lawyer's work. In the course of such work, the lawyer must deal with outsiders, such as by negotiating with others in settling litigation or directing the activities of lawyers who do enter an appearance for the organization in litigation.

Restatement (Third) of Law Governing Lawyers § 3 cmt. f (2000) (emphasis added).

Thus, the good news for in-house lawyers is that they generally may move to another state (at least a state which has adopted the ABA Model Rules approach) and

establish a "systematic and continuous presence" in that state without obtaining a license from that state.

The bad news is that the state probably will require some sort of registration and (not surprisingly) payment of a fee.

The ABA Model Rules recognize that

[i]f an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

ABA Model Rule 5.5(d)(1) cmt. [17] (emphasis added).

In 2008, the ABA adopted a model process for in-house lawyers to register in a state where they are not licensed, but in which they are continuously practicing. ABA Model Rule for Registration of In-House Counsel. In essence, this rule requires in-house counsel to register with the bar of the state in which they are practicing within 180 days of beginning to work in that state. Such in-house lawyers can represent the client/employer and its organizational affiliates, and also provide legal services to corporate directors, officers and employees -- "but only on matters directly related to their work for the entity and only to the extent consistent with" the conflicts rules. Such lawyers cannot appear before a court or a tribunal, but are permitted to engage in pro bono work. Not surprisingly, such lawyers would be subject to discipline by the bar of the state with which they are registered.

Somewhat surprisingly, in 2009 the New York Bar explained that the applicable rule in New York was not clear.

- New York LEO 835 (12/24/09) (explaining that the new New York ethics rules do not provide any guidance for out-of-state lawyers from acting as in-house lawyers in New York; "The question whether an out-of-state lawyer may serve as in-house counsel for a New York corporation and maintain an office in New York for that purpose is a question of law, and is not answered by the New York Rules of Professional Conduct. The question is therefore beyond our jurisdiction and we offer no opinion on the question. Because the question is a recurring one, however, this Committee urges the Appellate Divisions and/or the New York State Legislature to provide further guidance regarding whether and to what extent out-of-state lawyers - especially in-house lawyers who provide services solely to a corporate employer - are authorized to practice law in New York.").

Every state seems to be moving in the direction of requiring in-house lawyers to establish some official relationship with their state's bar. In 2009, the ABA/BNA Lawyers' Manual on Professional Conduct reported that just fourteen states had such a process in 2003, but by February 2009 the number of states had grown to thirty-two. ABA/BNA Lawyers' Manual on Professional Conduct (2/18/09) at 93.

Although ABA Model Rule 5.5(b)(1) allows in-house lawyers to establish a "systematic and continuous presence" in a jurisdiction in which they are not licensed, the rule limits the clients to whom such in-house lawyers can provide services.

This rule allows out-of-state in-house lawyers to continuously practice in a state where they are not licensed, as long as their legal services

are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission

ABA Model Rule 5.5(d)(1) (emphasis added).

Thus, such in-house lawyers must limit their representation to their client/employer and its "organizational affiliates." Comment [16] to that rule explains that the term "organizational affiliates" means

entities that control, are controlled by, or are under common control with the employer.

ABA Model Rule 5.5 cmt. [16].

Similarly, the Restatement indicates that such in-house lawyers may provide legal services to "all entities within the same organizational family." Restatement (Third) of Law Governing Lawyers § 4 cmt. e (2000) (emphasis added).

Most states have adopted this basic limitation.

- D.C. Ct. App. R. 49 ("Unauthorized Practice of Law") (allowing "[i]nternal" counsel to practice law in D.C., but "only to one's regular employer"; the Commentary to Rule 49(c)(6) explains that the exception is based on "the confinement of the lawyer's professional services to activities internal to the employer").
- Florida Bar R. 17-1.2(b) (defining a "business organization" which an "authorized house counsel" can represent without a full license as "a corporation, partnership, association or other legal entity (taken together with its respective parents, subsidiaries, and affiliates) authorized to transact business in this state that is not itself engaged in the practice of law or the rendering of legal services outside such organization, whether for a fee or otherwise, and does not charge or collect a fee for the representation or advice other than to entities comprising such organization by the activities of the authorized house counsel" (emphasis added)).
- Kentucky Sup. Ct. R. 2.111 (allowing in-house lawyers to represent their employers and "affiliated entities").
- Missouri Sup. Ct. R. 8.105 (permitting Missouri in-house counsel a "[l]imited admission" to the Missouri Bar, allowing them to represent corporate employers -- including their "subsidiaries or affiliates" (emphasis added)).
- South Carolina App. Ct. R. 405(a)(9) (providing for a limited certificate for in-house lawyers who represent corporations, as long as the in-house lawyers' work is provided "solely for the business employer or the parent or subsidiary of such employer" (emphasis added)).
- Washington Admis. to Prac. R. 8(f) (recognizing a "limited license" for in-house lawyers, which limits their practice to representing their corporate employer -- "including its subsidiaries and affiliates" (emphasis added)).

(c)-(d) Under well-recognized law, an outside or in-house lawyer representing an entity such as a joint venture LLC can have privileged communications with employees of that entity if the communications otherwise meet the Upjohn standard (or the control group standard in those few states following that more limited approach).

(e) Beside the issue of loyalty, lawyers must also deal with the information flow in any joint representation. It makes sense to analyze the information flow issue in three different scenarios: (1) when the lawyer has not raised the issue with the clients at the start of the representation, so there is no agreement among them about the information flow; (2) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will not share secrets between or among the jointly represented clients; (3) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will share secrets between or among the jointly represented clients.

Wisdom of Agreeing in Advance on the Information Flow. Although arranging for jointly represented clients to agree in advance on the information flow does not solve every problem, it certainly reduces the uncertainty and potentially saves lawyers from an awkward situation (or worse).

Thus, several authorities emphasize the wisdom of lawyers explaining the information flow to their clients at the beginning of any joint representation, and arranging for the clients' consent to the desired information flow. Whether the clients agree to a "keep secrets" or "no secrets" approach, at least an explicit agreement provides guidance to the clients and to the lawyer.

The ABA Model Rules advise lawyers to address the information flow issue at the beginning, but in essence directs the lawyer to arrange for a "no secrets" approach.

The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

ABA Model Rule 1.7 cmt. [31] (emphases added).

The ACTEC Commentaries repeatedly advise lawyers to address the information flow at the beginning of a joint representation.

When the lawyer is first consulted by the multiple potential clients, the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them. . . . The better practice in all cases is to memorialize the clients' instructions in writing and give a copy of the writing to the client.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 75 (4th ed. 2006),

http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf

(emphasis added).

Before, or within a reasonable time after commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the implications of a joint representation (or a separate representation, if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules). . . . In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed

to the degree that the lawyer could not effectively represent each of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.7, at 91-92 (4th ed. 2006),

http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf.

(emphases added).

The ACTEC Commentaries even provide an illustration emphasizing this point.

Example 1.7-1. Lawyer (L) was asked to represent Husband (H) and Wife (W) in connection with estate planning matters. L had previously not represented either H or W. At the outset L should discuss with H and W the terms upon which L would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each.

Id. at 92 (emphasis added).

Not surprisingly, bars have provided the same guidance.

- District of Columbia LEO 327 (2/2005) (addressing a situation in which a law firm which jointly represented several clients withdrew from representing some of the clients and continued to represent other clients; explaining that the law firm which began to represent the clients dropped by the first firm asked that firm to disclose all of the information it learned during the joint representation, which the firm refused to provide; ultimately concluding that the firm had to disclose to its successor all of the information it had acquired from any of the clients during the joint representation; "Under the terms of the retainer agreement, the prior firm's duty to communicate any relevant information to the other clients included any relevant information learned from other clients in the same matter, and this duty attached at the moment the prior firm learned the information. This underscores how important it is for a lawyer carefully to explain to all clients in a joint representation that, when they agree that any relevant or material information may be shared with one another, they cannot expect that any relevant or material confidential information they may subsequently reveal to the lawyer will be kept from the other co-clients." (emphasis added)).

- District of Columbia LEO 296 (2/15/00) ("A joint representation in and of itself does not alter the lawyer's ethical duties to each client, including the duty to protect each client's confidences."; "The best practice is clearly to advise clients at the outset of a representation of the potential for ethical conflicts ahead. Written disclosure of potential effects of joint representation and written consent can substantially mitigate, if not eliminate, the ethical tensions inherent in common representation."; reiterating that the "mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another"; ultimately concluding that a "lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement." (emphasis added)). Later changes in the Washington, D.C. ethics rules affect the substantive analysis in this legal ethics opinion, but presumably do not affect the opinion's suggestion that lawyers and clients agree in advance on the information flow.)

At least one state supreme court has also articulated the wisdom of this approach.

[A]n attorney, on commencing joint representation of co-clients, should agree explicitly with the clients on the sharing of confidential information. In such a "disclosure agreement," the co-clients can agree that any confidential information concerning one co-client, whether obtained from a co-client himself or herself or from another source, will be shared with the other co-client. Similarly, the co-clients can agree that unilateral confidences or other confidential information will be kept confidential by the attorney. Such a prior agreement will clarify the expectations of the clients and the lawyer and diminish the need for future litigation.

A. v. B., 726 A.2d 924, 929 (N.J. 1999) (emphases added).

Interestingly, authorities disagree about the necessity for lawyers to undertake this "best practices" step.

In a Florida legal ethics opinion arising in the trust and estate context, the Florida Bar acknowledged that lawyers did not have to address the information flow issue at the

beginning of a representation. Still, the Bar's discussion of the analysis in the absence of such an agreement highlighted the wisdom of doing so.

- Florida LEO 95-4 (5/30/97) (analyzing a joint representation in an estate-planning setting; "In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation." (emphasis added)).

On the other hand, a Kentucky court punished a lawyer for not addressing the information flow with jointly represented clients (in a high-stakes context).

- Unnamed Attorney v. Ky. Bar Ass'n, 186 S.W.3d 741, 742, 743 (Ky. 2006) (privately reprimanding a lawyer who had jointly represented a husband and wife in connection with a criminal investigation for failing to explain to the jointly represented clients that he would share the investigation results with both of them; explaining that "Movant advised the Does that a conflict of interest could arise in the course of his work on their behalf. He also advised them that if a conflict of interest did arise he might be required to withdraw from the joint employment. However, he did not advise them that any and all information obtained during the joint representation or obtained in any communication to him by them would be available to each client and exchanged freely between the clients in the absence of a conflict of interest. Movant asserts that he did not anticipate the possibility that the interests of the Does would become so materially divergent that there would be a conflict of interest in providing the results of the investigation to each of them. He acknowledges that he did not explain the potential ramifications of joint representation in that regard." (emphasis added); noting that "[t]he investigation produced information that indicated that one of the Does was directly involved in the shooting, contrary to what Movant had been told. Upon discovery of this information, and following communications with the KBA Ethics Hotline, Movant determined that he should withdraw from the joint employment. Furthermore, Movant concluded that he should not disclose certain results of his investigation to either Mr. or Mrs. Doe without the consent of each of them, which they declined to give. Movant encouraged each of them to obtain new counsel, and they followed this advice."; "In this case there was a lack of required communication by Movant. Specifically, Movant failed to explain that there would be no confidentiality as between the

clients and the lawyer, that all information discovered would be furnished to both, and that each client was owed the same duty. When the investigation uncovered information that was favorable to one client but harmful to the other, Movant refused to release the information he had gathered without the acquiescence of both clients, which was not given. This resulted from his failure to initially explain the implications of common representation to both clients. When the investigation revealed that one of the clients was involved in the homicide, Movant had a duty with respect to that client to keep that fact confidential. On the other hand, he had a duty to the other client to provide exculpatory information which necessarily included information he was obligated to keep confidential." (emphasis added)).

Although the Kentucky case did not involve a trust and estate context, it highlights the wisdom of lawyers addressing the information flow at the beginning of any representation.

Authorities Recognizing a "Keep Secrets" Default Rule. The ABA Model Rules and many courts and bars generally recognize that lawyers who have not advised their jointly represented clients ahead of time that they will share information may not do so absent consent at the time. Such a default position might be called a "keep secrets" rule.

Interestingly, some apparently plain language from the ABA Model Rules seems inconsistent with a later ABA legal ethics opinion involving the information flow issue.

As explained above, the ABA Model Rules explicitly advise lawyers to arrange for their jointly represented clients' consent to a "no secrets" approach -- but then immediately back off that approach.

The pertinent comment begins with the basic principle that makes sense.

As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each

client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4.

ABA Model Rule 1.7 cmt. [31] (emphasis added).

However, the comment then explains how this basic principle should guide a lawyer's conduct when beginning a joint representation -- in a sentence that ultimately does not make much sense.

The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

Id. ABA Model Rule 1.7 cmt. [31] (emphasis added).

This is a very odd comment. If a lawyer arranges for the jointly represented clients' consent to an arrangement where "information will be shared," one would think that the lawyer and the client would have to comply with such an arrangement. However, the very next phrase indicates that a lawyer having arranged for such a "no secrets" approach "will have to withdraw" if one of the jointly represented clients asks that some information not be shared.

It is unclear whether that second phrase involves a situation in which one of the clients indicates that she does not want the information shared -- but has not yet actually disclosed that information to the lawyer. That seems like an unrealistic scenario. It is hard to imagine that a client would tell his lawyer: "I have information that I want to be kept secret from the other jointly represented client, but I'm not going to tell you what that information is." It seems far likelier that the client would simply disclose

the information to the lawyer, and then ask the lawyer not to share it with the other jointly represented client. But if that occurs, one would think that the lawyer would be bound by the first phrase in the sentence -- which plainly indicates that "information will be shared" among the jointly represented clients.

Perhaps this rule envisions a third scenario -- in which one of the jointly represented clients begins to provide information to the lawyer that the lawyer senses the client would not want to share, but then stops when the lawyer warns the client not to continue. For instance, the client might say something like: "I have a relationship with my secretary that my wife doesn't know about." Perhaps the ABA meant to deal with a situation like that, in which the lawyer will not feel bound to share the information under the first part of the sentence, but instead withdraw under the second part of the sentence. However, it would seem that any confidential information sufficient to trigger the lawyer's warning to "shut up" would be sufficiently material to require disclosure to the other jointly represented client.

Such a step by the lawyer would also seem unfair (and even disloyal) to the other client. After all, the clients presumably have agreed that their joint lawyer will share all material information with both of them. The lawyer's warning to the disclosing client would seem to favor that client at the expense of the other client.

Even if this third scenario seems unlikely in the real world, this ABA Model Rules Comment's language makes sense only in such a context.

This confusing ABA approach continued in a 2008 legal ethics opinion. In ABA LEO 450 (4/9/08), the ABA dealt with a lawyer who jointly represented an insurance company and an insured -- but who had not advised both clients ahead of time of how

the information flow would be handled. Thus, the lawyer had not followed the approach recommend in ABA Model Rule 1.7 cmt. [31].

In ABA LEO 450, the ABA articulated the dilemma that a lawyer faces if one client provides confidential information -- in the absence of some agreement on information flow. Such a lawyer faces a dilemma if he learns confidential information from one client that will cause that client damage if disclosed to the other client.

Absent an express agreement among the lawyer and the clients that satisfies the "informed consent" standard of Rule 1.6(a), the Committee believes that whenever information related to the representation of a client may be harmful to the client in the hands of another client or a third person, . . . the lawyer is prohibited by Rule 1.6 from revealing that information to any person, including the other client and the third person, unless disclosure is permitted under an exception to Rule 1.6.

ABA LEO 450 (4/9/08) (emphases added). The ABA then explained that a lawyer in that setting would have to withdraw from representing the clients. Absent a valid consent, a lawyer must withdraw from representing the other client if the lawyer cannot make the disclosure to the client, and cannot fulfill his other obligations without such a disclosure. Id.

One would have expected the ABA to cite the Rule 1.7 comment addressed above.

The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other.

ABA Model Rule 1.7 cmt. [31] (emphasis added).

However, the ABA legal ethics opinion instead inexplicably indicated that such a prior consent might not work. The ABA explained that it was "highly doubtful" that consents provided by the jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. ABA LEO 450 (4/9/08).¹⁵ This conclusion seems directly contrary to Comment [31] to ABA Model Rule 1.7 -- which advises that lawyers should obtain such an informed consent "at the outset of the common representation."

¹⁵ ABA LEO 450 (4/9/08) ("When a lawyer represents multiple clients in the same or related matters, the obligation of confidentiality to each sometimes may conflict with the obligation of disclosure to each." Lawyers hired by an insurance company to represent both an insured employer and an employee must explain at the beginning of the representation whom the lawyer represents (which is based on state law). If there is a chance of adversity in this type of joint representation, "[a]n advance waiver from the carrier or employer, permitting the lawyer to continue representing the insured in the event conflicts arise, may well be appropriate." The lawyer faces a dilemma if he learns confidential information from one client that will cause that client damage if disclosed to the other client; "Absent an express agreement among the lawyer and the clients that satisfies the 'informed consent' standard of Rule 1.6(a), the Committee believes that whenever information related to the representation of a client may be harmful to the client in the hands of another client or a third person, . . . the lawyer is prohibited by Rule 1.6 from revealing that information to any person, including the other client and the third person, unless disclosure is permitted under an exception to Rule 1.6." It is "highly doubtful" that consents provided by the jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. Absent a valid consent, a lawyer must withdraw from representing the other client if the lawyer cannot make the disclosure to the client, and cannot fulfill his other obligations without such a disclosure. In the case of a lawyer hired by an insurance company to represent an insured, "[t]he lawyer may not reveal the information gained by the lawyer from either the employee or the witness, or use it to the benefit of the insurance company, . . . when the revelation might result in denial of insurance protection to the employee." "Lawyers routinely have multiple clients with unrelated matters, and may not share the information of one client with other clients. The difference when the lawyer represents multiple clients on the same or a related matter is that the lawyer has a duty to communicate with all of the clients about that matter. Each client is entitled to the benefit of Rule 1.6 with respect to information relating to that client's representation, and a lawyer whose representation of multiple clients is not prohibited by Rule 1.7 is bound to protect the information of each client from disclosure, whether to other clients or otherwise." The insured's normal duty to cooperate with the insurance company does not undermine the lawyer's duty to protect the insured's information from disclosure to the insurance company, if disclosure would harm the insured. A lawyer hired by an insurance company to represent both an employer and an employee must obtain the employee's consent to disclose information that might allow the employer to seek to avoid liability for the employee's actions (the employee's failure to consent to the disclosure would bar the lawyer from seeking the employer's consent to forego such a defense). A lawyer facing this dilemma may have to withdraw from representing all of the clients, but "[t]he lawyer may be able to continue representing the insured, the 'primary' client in most jurisdictions, depending in part on whether that topic has been clarified in advance.").

All in all, the ABA approach to this elemental issue is confusing at best. The pertinent ABA Model Rule and comment apparently apply only in a setting that seems implausible in the real world. And the pertinent ABA legal ethics opinion compounds the confusion by apparently precluding exactly the type of "no secrets" joint representation arrangement that Comment [31] encourages lawyers to arrange.

Most courts and bars take the ABA Model Rules approach -- finding that a joint representation is not sufficient by itself to allow a lawyer jointly representing multiple clients to share all confidences among the clients.

Under this approach, the absence of an agreement on information flow results in the lawyer having to keep secret from one jointly represented client material information that the lawyer learns from another jointly represented client.

- Unnamed Attorney v. Kentucky Bar Ass'n, 186 S.W.3d 741, 742, 743 (Ky. 2006) (privately reprimanding a lawyer who had jointly represented a husband and wife in connection with a criminal investigation for failing to explain to the jointly represented clients that he would share the investigation results with both of them; explaining that "Movant advised the Does that a conflict of interest could arise in the course of his work on their behalf. He also advised them that if a conflict of interest did arise he might be required to withdraw from the joint employment. However, he did not advise them that any and all information obtained during the joint representation or obtained in any communication to him by them would be available to each client and exchanged freely between the clients in the absence of a conflict of interest. Movant asserts that he did not anticipate the possibility that the interests of the Does would become so materially divergent that there would be a conflict of interest in providing the results of the investigation to each of them. He acknowledges that he did not explain the potential ramifications of joint representation in that regard." (emphasis added); noting that "[t]he investigation produced information that indicated that one of the Does was directly involved in the shooting, contrary to what Movant had been told. Upon discovery of this information, and following communications with the KBA Ethics Hotline, Movant determined that he should withdraw from the joint employment. Furthermore, Movant concluded that he should not disclose certain results of his investigation to either Mr. or Mrs. Doe without the consent of each of them, which they declined to give. Movant encouraged

each of them to obtain new counsel, and they followed this advice." (emphasis added); "In this case there was a lack of required communication by Movant. Specifically, Movant failed to explain that there would be no confidentiality as between the clients and the lawyer, that all information discovered would be furnished to both, and that each client was owed the same duty. When the investigation uncovered information that was favorable to one client but harmful to the other, Movant refused to release the information he had gathered without the acquiescence of both clients, which was not given. This resulted from his failure to initially explain the implications of common representation to both clients. When the investigation revealed that one of the clients was involved in the homicide, Movant had a duty with respect to that client to keep that fact confidential. On the other hand, he had a duty to the other client to provide exculpatory information which necessarily included information he was obligated to keep confidential." (emphasis added)).

- District of Columbia LEO 327 (2/2005) (addressing a situation in which a law firm which jointly represented several clients withdrew from representing some of the clients and continued to represent other clients; explaining that the law firm which began to represent the clients dropped by the first firm asked that firm to disclose all of the information it learned during the joint representation, which the firm refused to provide; ultimately concluding that the firm had to disclose to its successor all of the information it had acquired from any of the clients during the joint representation; "[I]t was 'understood that (a) we will not be able to advise you about potential claims you may have against any of the Other Individuals whom we represent and (b) information you provide to use in connection with our representation of you may be shared by us with the Other Individuals whom we represent.'"; "After apparently learning certain confidential information from one of the jointly represented clients, the prior firm withdrew from representing the other clients and continued to represent only the client from whom the confidential information had been learned. Upon assuming the representation of the other clients, the inquiring law firm requested that the prior firm disclose all information relevant to its prior representation of those clients, including the confidential information that had led to its withdrawal. The prior firm refused. The inquirer seeks an opinion whether, under these circumstances, the prior firm is required to share with the other clients all relevant information learned during its representation, including any relevant confidences and secrets."; "[T]he retainer agreement here expressly provided that information disclosed in connection with the representation 'may be shared' with the other clients in the same matter."; "The retainer agreement presumably reflects a collective determination by all co-clients that the interests in keeping one another informed outweighs their separate interests in confidentiality. Where the disclosing client has expressly or impliedly authorized the disclosure of relevant, confidential information to the lawyer's other clients in the same

matter, the duty to keep the non-disclosing clients informed of anything bearing on the representation that might affect their interests requires the lawyer to disclose the confidential information. . . . Where the disclosing client has unambiguously consented to further disclosure, a lawyer's duty of loyalty to and the duty to communicate with the non-disclosing client tips the balance in favor of disclosure. Indeed, in light of the disclosing client's consent, there is nothing left on the other side of the balance. (footnote omitted); "It is, of course, possible that a client who has otherwise consented to the disclosure of confidential information may withdraw such consent for a specific disclosure. Where a client informs the lawyer before disclosing certain confidential information that he or she intends to reveal something that may not be shared with the lawyer's other clients (notwithstanding a prior agreement to do so), the lawyer has an obligation at that point to inform the client that no such confidences may be kept. . . . Under the terms of the retainer agreement, the prior firm's duty to communicate any relevant information to the other clients included any relevant information learned from other clients in the same matter, and this duty attached at the moment the prior firm learned the information. This underscores how important it is for a lawyer carefully to explain to all clients in a joint representation that, when they agree that any relevant or material information may be shared with one another, they cannot expect that any relevant or material confidential information they may subsequently reveal to the lawyer will be kept from the other co-clients."; "If the clients had not all agreed that the prior firm was authorized to share relevant or material information, the 'default' rule in our jurisdiction is that the prior firm would have been prohibited from sharing one client's confidences with the others. . . . But by contracting around this 'default' rule, the clients (and the prior firm) agreed that relevant or material information would be shared. Under these specific circumstances -- where the disclosing client has effectively consented to the disclosure -- an attorney's subsequent refusal to share such information with the other clients violates the D.C. Rules of Professional Conduct." (emphasis added); "[A] lawyer violates the D.C. Rules of Professional Conduct when her [sic] or she withholds from one client relevant or material confidential information obtained from a co-client who has consented to the disclosure."; "Where one client has given consent to the disclosure of confidential information by the lawyer to another client, we have already concluded that the lawyer may reveal the confidence or secret. Here we conclude that the lawyer must do so if the information is relevant or material to the lawyer's representation of the other client. Because the disclosing client previously has waived confidentiality, there is nothing to weigh against either the lawyer's duty of loyalty to the non-disclosing client or the lawyer's obligation to keep that client reasonably informed of anything bearing on the representation that might affect that client's interests.").

- District of Columbia LEO 296 (2/15/00) ("The inquirer, a private law firm ('Firm'), has asked whether it is allowed or obligated to advise an employer, who paid the law firm to obtain a work trainee visa from the Immigration and Naturalization Service ('INS') for its alien employee, of its subsequent discovery that the employee had fabricated the credentials that qualified her for the visa."; "The Firm desires to advise fully at the least the petitioning Employer of the alien employee's falsification. However, it does not wish to violate any duty under Rule 1.6 to protect client confidences or secrets that may exist between the alien and the Firm."; "In a joint representation, a lawyer owes ethical duties of loyalty and confidentiality, as well as the duty to inform, to each client. A joint representation in and of itself does not alter the lawyer's ethical duties to each client, including the duty to protect each client's confidences." (emphasis added); "The best practice is clearly to advise clients at the outset of a representation of the potential for ethical conflicts ahead. Written disclosure of potential effects of joint representation and written consent can substantially mitigate, if not eliminate, the ethical tensions inherent in common representation."; "Where duties to the two clients conflict, and no advance consent has been obtained, the law firm should make an effort to fulfill its duties to the employer by seeking the employee's informed consent to divulge the information. In the alternative, the Firm should encourage the employee client to divulge the facts to the Employer client. The Firm's fiduciary duty to the Employer requires an affirmative effort to achieve disclosure within the bounds of Rule 1.6 before withdrawing from the representation."; "Without clear authorization, a lawyer may not divulge the secrets of one client to another, even where the discussion involves the subject matter of the joint representation. This is particularly true where disclosure would likely be detrimental to the disclosing client. None of the other exceptions set forth in Rule 1.6 applies. Thus, absent client consent, the Firm may not divulge the secret. This result may seem unpalatable to the extent that the Employer who is also a client is left employing a dishonest worker whose visa has been fraudulently obtained pursuant to a petition signed by the Employer under penalty of perjury. Striking the balance in favor of protecting client confidences and secrets is nonetheless required by our Rules. The guarantee of confidentiality of communication between client and attorney is a cornerstone of legal ethics." (emphases added); ultimately concluding that a "lawyer who undertakes representation of two clients in the same matter should address in advance and, where possible in writing, the impact of joint representation on the lawyer's duty to maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement. The mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another."; "Where express consent to share client confidences has not been obtained and one client shares in confidence relevant information that the lawyer should report to the non-disclosing client in order to keep that client reasonably informed, to

satisfy his duty to the non-disclosing client the lawyer should seek consent of the disclosing client to share the information directly to the other client. If the lawyer cannot achieve disclosure, a conflict of interest is created that requires withdrawal." [Although Washington, D.C. revised its ethics rules in 2007, new comments [14] - [18] to D.C. Rule 1.7 follow the ABA approach, and thus presumably do not affect the continuing force of this earlier legal ethics opinion.]

- Florida LEO 95-4 (5/30/97) (analyzing a joint representation in an estate-planning setting; analyzing a situation in which the client husband confides in the lawyer that the husband would like to make "substantial beneficial disposition" to another woman with whom the husband had been having an affair; framing the issue as: "We now turn to the central issue presented, which is the application of the confidentiality rule in a situation where confidentiality was not discussed at the outset of the joint representation." (emphasis added); "It has been suggested that, in a joint representation, a lawyer who receives information from the 'communicating client' that is relevant to the interests of the non-communicating client may disclose the information to the latter, even over the communicating client's objections and even where disclosure would be damaging to the communicating client. The committee is of the opinion that disclosure is not permissible and therefore rejects this 'no-confidentiality' position." (emphasis added); "It has been argued in some commentaries that the usual rule of lawyer-client confidentiality does not apply in a joint representation and that the lawyer should have the discretion to determine whether the lawyer should disclose the separate confidence to the non-communicating client. This discretionary approach is advanced in the Restatement, sec. 112, comment I. [Proposed Final Draft, Mar. 29, 1996]. This result is also favored by the American College of Trusts and Estates in its Commentaries on the Model Rules of Professional Conduct (2d ed. 1995) (hereinafter the 'ACTEC Commentaries'). The Restatement itself acknowledges that no case law supports the discretionary approach. Nor do the ACTEC Commentaries cite any supporting authority for this proposition."; "The committee rejects the concept of discretion in this important area. Florida lawyers must have an unambiguous rule governing their conduct in situations of this nature. We conclude that Lawyer owes duties of confidentiality to both Husband and Wife, regardless of whether they are being represented jointly. Accordingly, under the facts presented Lawyer is ethically precluded from disclosing the separate confidence to Wife without Husband's consent." (emphasis added); "The committee recognizes that a sudden withdrawal by Lawyer almost certainly will raise suspicions on the part of Wife. This may even alert Wife to the substance of the separate confidence. Regardless of whether such surmising by Wife occurs when Lawyer gives notice of withdrawal, Lawyer nevertheless has complied with the Rules of Professional Conduct and has not violated Lawyer's duties to Husband."; ultimately concluding that "in a joint

- representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation." (emphasis added)).
- New York LEO 555 (1/17/84) (addressing the following situation: "A and B formed a partnership and employed Lawyer L to represent them in connection with the partnership affairs. Subsequently, B, in a conversation with Lawyer L, advised Lawyer L that he was actively breaching the partnership agreement. B preceded this statement to Lawyer L with the statement that he proposed to tell Lawyer L something 'in confidence.' Lawyer L did not respond to that statement and did not understand that B intended to make a statement that would be of importance to A but was to be kept confidential from A. Lawyer L had not, prior thereto, advised A or B that he could not receive from one communications regarding the subject of the joint representation that would be confidential from the other. B has subsequently declined to tell A what he has told Lawyer L. Lawyer L now asks what course he may or must take with respect to disclosure to A of what B has told him and with respect to continued representation of the partners."; ultimately concluding that "It is the opinion of the Committee that (i) Lawyer L may not disclose to A what B has told him, and (ii) Lawyer L must withdraw from further representation of the partners with respect to the partnership affairs."; "The Committee believes that the question ultimately is whether each of the clients, by virtue of jointly employing the lawyer, impliedly agrees or consents to the lawyer's disclosing to the other all communications of each on the subject of the representation. It is the opinion of the Committee that, at least in dealing with communications to the lawyer directly from one of the joint clients, the mere joint employment is not sufficient, without more, to justify implying such consent where disclosure of the communication to the other joint client would obviously be detrimental to the communicating client. This is not to say that such consent is never to be found. The lawyer may, at the outset of the joint representation or even perhaps at some later stage if otherwise appropriate, condition his acceptance or continuation of the joint representation upon the clients' agreement that all communications from one on the subject of the joint representation shall or may be disclosed to the other. Where one joint client is a long-time client and the other is introduced to the lawyer to be represented solely in the one joint matter, it may be appropriate for the lawyer to obtain clear consent from the new client to disclosure to the long-time client. . . . Whatever is done, the critical point is that the circumstances must clearly demonstrate that it is fair to conclude that the clients have knowingly consented to the limited non-confidentiality."

(emphasis added); "Both EC 5-16 and Rule 2.2 of the Model Rules emphasize that, before undertaking a joint representation, the lawyer should explain fully to each the implications of the joint representation. Absent circumstances that indicate consent in fact, consent should not be implied."; "Of course, the instant fact situation is a fortiori. Here, the client specifically in advance designated his communication as confidential, and the lawyer did not demur. Under the circumstances, the confidence must be kept.").

Authorities Recognizing a "No Secrets" Default Rule. In stark contrast to the ABA Model Rules' and various state bars' requirement that lawyers keep secrets in the absence of an agreement to the contrary, some authorities take the opposite approach.

These authorities set the "default" position as either requiring or allowing disclosure of client confidences among jointly represented clients in the absence of an explicit agreement to do so.

The Restatement takes this contrary approach.

Before turning to the Restatement's current language, it is worth noting that the Restatement itself explains both the history of the Restatement's conclusion and the lack of much other support for its approach.

The position in the Comment on a lawyer's discretion to disclose hostile communications by a co-client has been the subject of very few decisions. It was approved and followed in *A v. B.*, 726 A.2d 924 (N.J.1999). It is also the result favored by the American College of Trusts and Estates Counsel in its ACTEC Commentaries on the Model Rules of Professional Conduct 68 (2d ed. 1995) ("In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. . . ."); on the need to withdraw when a disclosing client refuses to permit the lawyer to provide the information to another co-client, see *id.* at 69; see generally Collett, *Disclosure, Discretion, or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence*, 28 *Real Prop. Prob. Tr. J.* 683 (1994). Council Draft No. 11 of the Restatement (1995) took the position that disclosure to an affected, noninformed co-client was mandatory, in view of the

common lawyer's duties of competence and communication and the lack of a legally protected right to confidentiality on the part of the disclosing co-client. That position was rejected by the Council at its October 1995 meeting, resulting in the present formulation.

Restatement (Third) of Law Governing Lawyers § 60 reporter's note cmt. I (2000).

Thus, the Restatement changed from required disclosure to discretionary disclosure in the final version.

Elsewhere the Restatement again admits that

There is little case authority on the responsibilities of a lawyer when, in the absence of an agreement among the co-clients to restrict sharing of information, one co-client provides to the lawyer material information with the direction that it not be communicated to another co-client.

Restatement (Third) of Law Governing Lawyers § 60 cmt. I (2000).

Perhaps because of the Restatement's changing approach during the drafting process, the Restatement contains internally inconsistent provisions. Some sections seem to require disclosure of one jointly represented client's confidences to the other, while other sections seem to merely allow such disclosure.

The mandatory disclosure language appears in several Restatement provisions.

The Restatement first deals with this issue in its discussion of a lawyer's basic duty of confidentiality.

Sharing of information among the co-clients with respect to the matter involved in the representation is normal and typically expected. As between the co-clients, in many such relationships each co-client is under a fiduciary duty to share all information material to the co-clients' joint enterprise. Such is the law, for example, with respect to members of a partnership. Limitation of the attorney-client privilege as applied to communications of co-clients is based on an assumption that each intends that his or her communications

with the lawyer will be shared with the other co-clients but otherwise kept in confidence. . . . Moreover, the common lawyer is required to keep each of the co-clients informed of all information reasonably necessary for the co-client to make decisions in connection with the matter. . . . The lawyer's duty extends to communicating information to other co-clients that is adverse to a co-client, whether learned from the lawyer's own investigation or learned in confidence from that co-client.

Id. (emphases added).

Mandatory language also shows up in the Restatement provision dealing with attorney-client privilege issues.

Rules governing the co-client privilege are premised on an assumption that co-clients usually understand that all information is to be disclosed to all of them. Courts sometimes refer to this as a presumed intent that there should be no confidentiality between co-clients. Fairness and candor between the co-clients and with the lawyer generally preclude the lawyer from keeping information secret from any one of them, unless they have agreed otherwise.

Restatement (Third) of Law Governing Lawyers § 75 cmt. d (2000) (emphases added).

Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients. . . . In the absence of such an agreement, the lawyer ordinarily is required to convey communications to all interested co-clients.

Id. (emphasis added).

The Restatement provides a helpful illustration explaining this "default" rule in the attorney-client privilege context.

Client X and Client Y jointly consult Lawyer about establishing a business, without coming to any agreement about the confidentiality of their communications to Lawyer. X sends a confidential memorandum to Lawyer in which X outlines the proposed business arrangement as X understands it. The joint representation then terminates,

and Y knows that X sent the memorandum but not its contents. Subsequently, Y files suit against X to recover damages arising out of the business venture. Although X's memorandum would be privileged against a third person, in the litigation between X and Y the memorandum is not privileged. That result follows although Y never knew the contents of the letter during the joint representation.

Id. illus. 1 (emphasis added).

Although appearing in the privilege section, this language seems clear on its face -- requiring disclosure to the other jointly represented clients rather than just allowing it.

Thus, the Restatement's provision on privilege seems to require (rather than just allow) disclosure among jointly represented clients -- and also indicates that a lawyer who is jointly representing clients must disclose such information even once the joint representation has ended. Both of these provisions seem to contradict the discretionary language in the central rule on the information flow issue (discussed below). The latter provision seems especially ironic. It provides that a lawyer who is no longer even representing a former client must disclose information to that now-former client that the lawyer earlier learned from another jointly represented client. If such a duty of disclosure exists after the representation ends, one would think that even a higher duty applies in the course of the representation.

The discretionary disclosure language appears elsewhere.

In one provision, the Restatement seems to back away from the position that a lawyer must share confidences (in the absence of an agreement dealing with information flow), and instead recognizes that the lawyer has discretion to do so -- when withdrawing from a joint representation.

There is little case authority on the responsibilities of a lawyer when, in the absence of an agreement among the co-clients to restrict sharing information, one co-client provides to the lawyer material information with the direction that it not be communicated to another co-client. The communicating co-client's expectation that the information be withheld from the other co-client may be manifest from the circumstances, particularly when the communication is clearly antagonistic to the interests of the affected co-client. The lawyer thus confronts a dilemma. If the information is material to the other co-client, failure to communicate it would compromise the lawyer's duties of loyalty, diligence . . . , and communication (see § 20) to that client. On the other hand, sharing the communication with the affected co-client would compromise the communicating client's hope of confidentiality and risks impairing that client's trust in the lawyer. Such circumstances create a conflict of interest among the co-clients. . . . The lawyer cannot continue in the representation without compromising either the duty of communication to the affected co-client or the expectation of confidentiality on the part of the communicating co-client. Moreover, continuing the joint representation without making disclosure may mislead the affected client or otherwise involve the lawyer in assisting the communicating client in a breach of fiduciary duty or other misconduct. Accordingly, the lawyer is required to withdraw unless the communicating client can be persuaded to permit sharing of the communication. . . . Following withdrawal, the lawyer may not, without consent of both, represent either co-client adversely to the other with respect to the same or a substantially related matter In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose. Beyond such a limited warning, the lawyer, after consideration of all relevant circumstances, has the further discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy. In making such determinations, the lawyer may take into account superior legal interests of the lawyer or of affected third persons, such as an interest implicated by a threat of physical harm to the lawyer or another person.

Restatement (Third) of Law Governing Lawyers § 60 cmt. I (2000) (emphases added).

This seems like the reverse of what the rule should be. One would think that a lawyer should have discretion to decide during a representation whether to share confidences with the other clients, but have a duty to share confidences if the lawyer obtains information so material that it requires the lawyer's withdrawal.

The Restatement then provides three illustrations guiding lawyers in how they should exercise their discretion to disclose the confidence -- depending on the consequences of the disclosure.

These illustrations seem to adopt the discretionary approach rather than the mandatory approach of the other Restatement section.

Interestingly, all of the illustrations involve a client disclosing the confidence to the lawyer -- and then asking the lawyer not to share the confidence with another jointly represented client. As explained above, the ABA Model Rules provisions seem to address a much less likely scenario -- in which the client asks the lawyer not to share information after telling the lawyer that the client has such information but before the client actually shares it with the lawyer.

The three Restatement illustrations represent a spectrum of the confidential information's materiality.

The first scenario involves financially immaterial information that could have an enormous emotional impact -- the lawyer's desire to leave some money to an illegitimate child of which his wife is unaware.

2. Lawyer has been retained by Husband and Wife to prepare wills pursuant to an arrangement under which each spouse agrees to leave most of their property to the

other Shortly after the wills are executed, Husband (unknown to Wife) asks Lawyer to prepare an inter vivos trust for an illegitimate child whose existence Husband has kept secret from Wife for many years and about whom Husband had not previously informed Lawyer. Husband states that Wife would be distraught at learning of Husband's infidelity and of Husband's years of silence and that disclosure of the information could destroy their marriage. Husband directs Lawyer not to inform Wife. The inter vivos trust that Husband proposes to create would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will, because Husband proposes to use property designated in Husband's will for a personally favored charity. In view of the lack of material effect on Wife, Lawyer may assist Husband to establish and fund the inter vivos trust and refrain from disclosing Husband's information to Wife.

Restatement (Third) of Law Governing Lawyers § 60 cmt. 1, illus. 2 (2000) (emphases added). The second scenario involves information that is more monetarily material.

3. Same facts as Illustration 2, except that Husband's proposed inter vivos trust would significantly deplete Husband's estate, to Wife's material detriment and in frustration of the Spouses' intended testamentary arrangements. If Husband refuses to inform Wife or to permit Lawyer to do so, Lawyer must withdraw from representing both Husband and Wife. In the light of all relevant circumstances, Lawyer may exercise discretion whether to inform Wife either that circumstances, which Lawyer has been asked not to reveal, indicate that she should revoke her recent will or to inform Wife of some or all the details of the information that Husband has recently provided so that Wife may protect her interests. Alternatively, Lawyer may inform Wife only that Lawyer is withdrawing because Husband will not permit disclosure of relevant information.

Id. illus. 3 (emphases added). The final scenario involves very material information in another setting -- one jointly represented client's conviction for an earlier fraud.

4. Lawyer represents both A and B in forming a business. Before the business is completely formed, A

discloses to Lawyer that he has been convicted of defrauding business associates on two recent occasions. The circumstances of the communication from A are such that Lawyer reasonably infers that A believes that B is unaware of that information and does not want it provided to B. Lawyer reasonably believes that B would call off the arrangement with A if B were made aware of the information. Lawyer must first attempt to persuade A either to inform B directly or to permit Lawyer to inform B of the information. Failing that, Lawyer must withdraw from representing both A and B. In doing so, Lawyer has discretion to warn B that Lawyer has learned in confidence information indicating that B is at significant risk in carrying through with the business arrangement, but that A will not permit Lawyer to disclose that information to B. On the other hand, even if the circumstances do not warrant invoking § 67, Lawyer has the further discretion to inform B of the specific nature of A's communication to B if Lawyer reasonably believes this necessary to protect B's interests in view of the immediacy and magnitude of the threat that Lawyer perceives posed to B.

Id. illus. 4 (emphases added).

Thus, the Restatement clearly takes a position that differs from the ABA Model Rules. In contrast to the ABA Model Rules approach, the Restatement does not require a lawyer to keep secret from one jointly represented client what the lawyer has learned from another jointly represented client.

However, the Restatement seems to conclude in some sections that in the absence of some agreement the lawyer must disclose such confidences, while in other sections seems to conclude that the lawyer has discretion whether or not to disclose confidences.

The ACTEC Commentaries take the same approach as the Restatement -- rejecting a "no secrets" approach in the absence of an agreement on information flow among jointly represented clients.¹⁶

In the absence of any agreement to the contrary (usually in writing), a lawyer is presumed to represent multiple clients with regard to related legal matters jointly with resulting full sharing of information between the clients. The better practice in all cases is to memorialize the clients' instructions in writing and give a copy of the writing to the client. Nothing in the foregoing should be construed as approving the representation by a lawyer of both parties in the creation of inherently adversarial contract (e.g., marital property agreement) which is not subject to rescission by one of the parties without the consent and joinder of the other. See ACTEC Commentary on MRPC 1.7 (Conflicts of Interest: Current Clients). The lawyer may wish to consider holding a separate interview with each prospective client, which may allow the clients to be more candid and, perhaps, reveal conflicts of interest that would not otherwise be disclosed.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 75-76 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf (emphasis added).

Like the Restatement, the ACTEC Commentaries provide some guidance to a lawyer jointly representing clients who learns confidences from one client that might be of interest to the other client (in the absence of a prior agreement dealing with the information flow).

¹⁶ In fact, as explained above, the Restatement points to the ACTEC Commentaries as one of the sources of its guidance. Restatement (Third) of Law Governing Lawyers § 60 reporter's notes cmt. I (2000).

The ACTEC Commentaries first explain that the lawyer should distinguish immaterial from material confidential information.

A lawyer who receives information from one joint client (the "communicating client") that the client does not wish to be shared with the other joint client (the "other client" is confronted with a situation that may threaten the lawyer's ability to continue to represent one or both of the clients. As soon as practicable after such a communication, the lawyer should consider the relevance and significance of the information and decide upon the appropriate manner in which to proceed. The potential courses of action include, inter alia, (1) taking no action with respect to communications regarding irrelevant (or trivial) matters; (2) encouraging the communicating client to provide the information to the other client or to allow the lawyer to do so; and (3) withdrawing from the representation if the communication reflects serious adversity between the parties. For example, a lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse. On the other hand, the lawyer might conclude that he or she is required to take some action with respect to a confidential communication that concerns a matter that threatens the interests of the other client or could impair the lawyer's ability to represent the other client effectively (e.g., "After she signs the trust agreement, I intend to leave her . . ." or "All of the insurance policies on my life that name her as beneficiary have lapsed"). Without the informed consent of the other client, the lawyer should not take any action on behalf of the communicating client, such as drafting a codicil or a new will, that might damage the other client's economic interests or otherwise violate the lawyer's duty of loyalty to the other client.

Id. at 76 (emphases added).

The ACTEC Commentaries suggest that the lawyer facing this awkward situation first urge that the client providing the information to disclose the information herself to the other client.

In order to minimize the risk of harm to the clients' relationship and, possibly, to retain the lawyer's ability to represent both of them, the lawyer may properly urge the communicating client himself or herself to impart the confidential information directly to the other client. See ACTEC Commentary on MRPC 2.1 (Advisor). In doing so, the lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer's obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or both of the clients may be jeopardized. In addition, the lawyer may mention that the failure to communicate the information to the other client may result in a disciplinary or malpractice action against the lawyer.

Id. at 76-77 (emphases added).

The ACTEC Commentaries then describe the lawyer's next step -- ultimately concluding that the lawyer has discretion to disclose such confidential information.

If the communicating client continues to oppose disclosing the confidence to the other client, the lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action. In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response, the lawyer should consider his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer or otherwise obtained by the lawyer regarding the subject of the representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed. In some instances the lawyer must also consider whether the situation involves such adversity that the lawyer can no longer effectively represent both clients and is required to withdraw from representing one or both of them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). A letter of withdrawal that is sent to the other client may arouse the other client's suspicions to

the point that the communicating client or the lawyer may ultimately be required to disclose the information.

Id. at 77 (emphases added).

The ACTEC Commentaries' conclusion about a lawyer's withdrawal in this awkward situation makes little sense. There are a number of situations in which a lawyer must withdraw from a representation without explaining why. In a joint representation context, a lawyer who has arranged for a "keep secrets" approach might well have to withdraw from both representations if information the lawyer has learned from one client (and must keep secret from the other client) would materially affect the lawyer's representation of one or both clients. Even outside the joint representation context, lawyers might learn information from one client that would effectively preclude the lawyer from representing another client.

For instance, representing a client in a highly secret matter (which that client has asked to remain completely confidential) might become the possible target of another client's hostile takeover effort. A lawyer invited to represent that second client while simultaneously representing the first client would have to politely decline that piece of work -- without explaining why. The second client undoubtedly would have suspicions about the reason for the lawyer's refusal to take on the work (a simultaneous representation of the target in an unrelated matter), but the lawyer could not explicitly disclose the reason why the lawyer could not take on the work.

Thus, it does not make much sense to say (as the ACTEC Commentaries indicate) that the withdrawal letter "may arouse the other client's suspicions to the point that the communicating client or the lawyer may ultimately be required to disclose the

information." Id. If there is a duty not to disclose the information, the lawyer sending the withdrawal letter simply cannot make the disclosure, regardless of any client's suspicions.

Although most states seem to take the "keep secrets" default position (discussed above), at least one state appears to adopt the approach taken by the Restatement and the ACTEC Commentaries -- recognizing lawyers' discretion in this situation.

In 1999, the New Jersey Supreme Court analyzed a situation in which a lawyer jointly representing a husband and a wife in estate planning learned from a third party that the husband had fathered a child out of wedlock. A. v. B., 726 A.2d 924 (N.J. 1999).

The court explained that the retainer letter signed by the husband and wife "acknowledged that information provided by one client could become available to the other," but did not explicitly require such sharing. Id. at 928. As the court explained it,

[t]he letters, however, stop short of explicitly authorizing the firm to disclose one spouse's confidential information to the other. Even in the absence of any such explicit authorization, the spirit of the letters supports the firm's decision to disclose to the wife the existence of the husband's illegitimate child.

Id. The New Jersey Supreme Court ultimately explained that the lawyer in that situation had discretion to disclose the information.

In the absence of an agreement to share confidential information with co-clients, the Restatement reposes the resolution of the lawyer's competing duties within the lawyer's discretion.

Id. at 929.

The New Jersey Supreme Court recognized that the ACTEC Commentaries "agreed with this approach, while other state bars have taken the opposite position." Among other things, the New Jersey Supreme Court noted that the lawyer had learned the information from a third party, rather than one of the jointly represented clients. The court ultimately found it unnecessary to "reach the decision whether the lawyer's obligation to disclose is discretionary or mandatory" -- but clearly rejected the "keep secrets" approach.¹⁷

At least one bar also rejected the "keep secrets" approach in the absence of a previous agreement about information flow -- although in an opinion dealing with a

¹⁷ A. v. B., 726 A.2d 924, 928, 929, 929-30, 931, 932 (N.J. 1999) (analyzing a situation in which a lawyer jointly representing a husband and wife in estate planning learns from a third party that the husband fathered a child out of wedlock; "In addition, the husband and wife signed letters captioned 'Waiver of Conflict of Interest.' These letters acknowledge that information provided by one client could become available to the other. The letters, however, stop short of explicitly authorizing the firm to disclose one spouse's confidential information to the other. Even in the absence of any such explicit authorization, the spirit of the letters supports the firm's decision to disclose to the wife the existence of the husband's illegitimate child."; "As the preceding authorities suggest, an attorney, on commencing joint representation of co-clients, should agree explicitly with the clients on the sharing of confidential information. In such a 'disclosure agreement,' the co-clients can agree that any confidential information concerning one co-client, whether obtained from a co-client himself or herself or from another source, will be shared with the other co-client. Similarly, the co-clients can agree that unilateral confidences or other confidential information will be kept confidential by the attorney. Such a prior agreement will clarify the expectations of the clients and the lawyer and diminish the need for future litigation. In the absence of an agreement to share confidential information with co-clients, the Restatement reposes the resolution of the lawyer's competing duties within the lawyer's discretion."; "In authorizing non-disclosure, the Restatement explains that an attorney should refrain from disclosing the existence of the illegitimate child to the wife because the trust 'would not materially affect Wife's own estate plan or her expected receipt of property under Husband's will.'"; noting that the American College of Trust and Estate Counsel agree with this discretionary standard; also acknowledging that "[t]he Professional Ethics Committees of New York and Florida, however, have concluded that disclosure to a co-client is prohibited. New York State Bar Ass'n Comm. on Professional Ethics, Op. 555 (1984); Florida State Bar Ass'n Comm. on Professional Ethics, Op. 95-4 (1997)."; emphasizing that the lawyer learned the information from a third party, not from either of the jointly represented clients; "Because Hill Wallack [lawyer] wishes to make the disclosure, we need not reach the issue whether the lawyer's obligation to disclose is discretionary or mandatory. In conclusion, Hill Wallack may inform the wife of the existence of the husband's illegitimate child."; "The law firm learned of the husband's paternity of the child through the mother's disclosure before the institution of the paternity suit. It does not seek to disclose the identity of the mother or the child. Given the wife's need for the information and law firm's right to disclose it, the disclosure of the child's existence to the wife constitutes an exceptional case with 'compelling reason clearly and convincingly shown.'" (citation omitted)).

lawyer's duty to disclose all pertinent information to former jointly represented clients.

Although this scenario deals with privilege rather than ethics, it highlights the issue.

- Maryland LEO 2006-15 (2006) (holding that a lawyer fired by one of two jointly represented clients [who have now become adversaries] must withdraw from representing both clients, even if both clients consent to the lawyer's continuing to represent just one of the clients; "The lawyer is likely unable to provide competent and diligent representation to clients with interests that are diametrically opposed to one another. Further, (b)(3) [Maryland Ethics Rule 1.7(b)(3)] forbids the continued representation, even with a waiver, where one client asserts a claim against the other. That appears to be the case here, and, therefore, the conflict is not waivable."; also holding that the lawyer must provide both of the formerly jointly represented clients the lawyer's files; "With regard to the remaining two issues, former-Client B should have unfettered access to Attorney 1's files under what has been recognized by some courts as the 'Joint Representation Doctrine, ' which provides that: 'Generally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other, and those confidential communications are not within the privilege in subsequent adverse proceedings between the co-clients.' (emphasis added)).

Although similar to a court's dicta, the Maryland LEO's approach places it on the "no secrets" side of the divide among courts and bars.

In the absence of some agreement among jointly represented clients about information flow, it is unclear whether a lawyer will be bound by the ABA Model Rules approach or some case law in the pertinent jurisdiction that follows the Restatement approach.

(f) This scenario highlights the great difficulty facing a joint venture entity's boards of directors.

A board member honoring his or her fiduciary duties to the joint venture would vote in favor of development, while that same board member honoring his or her fiduciary duties to the joint venture member would vote against development of such a

product. The law is not very clear about this issue. This is another reason why lawyers involved in joint ventures should carefully document their responsibilities and arrange for similarly specific descriptions of responsibilities of each member's representative on the board and of employee assigned to the joint venture.

(g) A lawyer who jointly represents a member and a joint venture must, absent some explicit agreement to the contrary, comply with the ethics rules that govern the lawyer representing an entity.

The ABA Model Rules continue the general principle that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." ABA Model Rule 1.13(a).

The ABA Model Rules also contain elaborate provisions governing lawyers who learn that a constituent is "engaged in action, intends to act or refuses to act" in a matter "related to the representation" that is either a "violation of a legal obligation to the organization" or "a violation of law which reasonably might be imputed to the organization" and "is likely to result in substantial injury to the organization." ABA Model Rule 1.13(b).

Under the new version of the ABA Model Rules, "[u]nless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances[,] to the highest authority that could act on behalf of the organization as determined by applicable law." ABA Model Rule 1.13(b).

Sarbanes-Oxley regulations parallel these requirements.

Best Answer

The best answer to (a) is **YES**; the best answer to (b) is **PROBABLY YES**; the best answer to (c) is **YES**; the best answer to (d) is **MAYBE**; the best answer to (e) is **MAYBE**; the best answer to (f) is **MAYBE**; the best answer to (g) is **PROBABLY YES**.

Effect of Adversity between Joint Venture Members

Hypothetical 5

It looks like adversity is beginning to develop between your company and the other member of an LLC joint venture. You are jointly representing your company and the joint venture itself. You are wondering to what extent such adversity affects your ability to represent your company in any upcoming dispute.

- (a) May you represent your company in a dispute with the joint venture?

NO

- (b) May you represent your company in a dispute with the other member?

NO

- (c) Are there any steps you could have taken to assure your availability to represent your company in the event of such adversity?

YES

Analysis

(a) Absent consent, a lawyer may not represent one client in a matter that is "directly adverse to another client." ABA Model Rule 1.7(a)(1). Therefore, a lawyer jointly representing two clients cannot represent one of the jointly represented clients adverse to one of the other jointly represented clients absent the consent of both.

Because you represent the joint venture, you cannot be adverse to it without its consent.

(b) Although you do not represent the other member of the joint venture, the issue here is whether your representation of the joint venture makes the other member a "client" for conflicts purposes.

As explained above, several courts have concluded that a lawyer representing a joint venture may not later be adverse to one of the joint venture's members on matters relating to the joint venture. These courts point to the relatively intimate relationship between the joint venture and its members, and the likelihood that the lawyer has gained confidential information from the members.

(c) Arranging for a limited representation and (especially) a prospective consent might allow a lawyer jointly representing clients to later represent one client against the other, even in a substantially related matter.

No ethics rule automatically prohibits a client from granting a prospective consent. However, lawyers arranging or (especially) relying on such prospective consents must be very wary.

ABA Model Rules. A comment to ABA Model Rule 1.7 explains that

[t]he effectiveness of such [prospective] waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot

be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

ABA Model Rule 1.7 cmt. [22].

The ABA added this comment in 2002, as part of the Ethics 2000 revisions. The new comment greatly expands the ABA's endorsement of prospective consents. In fact, the Ethics 2000 changes were so dramatic that the ABA took the fairly unusual step of withdrawing an earlier opinion that dealt with prospective consents. ABA LEO 436 (5/11/05) (withdrawing earlier ABA LEO 372 (4/16/93), because recent changes to Model Rule 1.7 and especially Comment [22] allow "effective informed consent to a wider range of future conflicts" than permitted under the older version of the Model Rule; explaining that open-ended prospective consents are likely to be valid if (for instance) the client "has had the opportunity to be represented by independent counsel in relation to such consent and the consent is limited to matters not substantially related to the subject of the prior representation"; continuing to recognize that such prospective consents do not authorize the lawyer to "reveal or use confidential client information" absent an additional explicit consent).

Restatement. The Restatement takes the same basic approach. Restatement (Third) of Law Governing Lawyers, § 122 cmt. d (2000) warns that prospective consents are "subject to special scrutiny," but acknowledges that they are often appropriate.

A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent. . . . On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for

each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.

Restatement (Third) of Law Governing Lawyers, § 122 cmt. d (2000). A later comment implicitly deals with prospective consents in a discussion of the client's ability to revoke a consent.

The issue of withdrawal of consent typically arises when consent was given in general terms or long in advance, and a direct conflict thereafter arises between the parties. Courts generally hold that such changed circumstances permit the objecting client to withdraw consent.

Restatement (Third) of Law Governing Lawyers § 122 reporter's note cmt. f.

State Legal Ethics Opinions. Every bar that has addressed the issue of prospective consents has refused to adopt a per se prohibition of such consents.

- New York City LEO 2008-2 (9/2008) (explaining that an in-house lawyer could obtain a prospective consent allowing the lawyer to take matters adverse to a former corporate affiliate; noting that the in-house lawyer might consider obtaining prospective consents from the various clients; "Careful drafting of the advance waiver will enhance the possibility that inside counsel will be able to continue to represent one or more clients after a conflict arises. In the context of a joint representation of a parent and an affiliate, the advance waiver should: [i]dentify for the clients the potential or existing conflicts with as much specificity as possible; [m]ake clear to the clients that the confidences and secrets of the affiliate will be shared with the parent; and [o]btain agreement from the affiliate that if inside counsel can no longer represent both parent and affiliate, inside counsel can continue to represent the parent irrespective of the confidences and secrets that the affiliate may have shared with counsel and irrespective of what work counsel may have performed for the affiliate.").
- New York LEO 823 (6/30/08) ("A lawyer cannot continue to represent joint clients in litigation if their strategies significantly diverge. The lawyer can continue to represent one of the joint clients in the litigation if the former client

provides informed consent to the future representation and the lawyer can represent the current client zealously and competently. The lawyer is required to comply with the court's procedures for withdrawal.").

- Pennsylvania LEO 2006-200 (7/26/06) (addressing a lawyer's simultaneous representation of a corporation and one of its constituents; acknowledging the possibility that the clients could grant a prospective consent; "In seeking to obtain a prospective waiver from clients, it frequently will be difficult for an attorney to make 'full disclosure' to the same extent as may be made with a concurrent waiver. This difficulty arises because it may not be clear to the attorney at the outset of the representation which conflicts might later arise. To satisfy his obligation of full disclosure the lawyer seeking a prospective waiver should, at a minimum, advise the client of the types of possible future adverse representations that the lawyer envisions, as well as the types of matters that may present such conflicts. The lawyer also should disclose the measures that he will implement to protect the client or prospective client should a conflict arise."; offering several examples of future conflicts that might arise between a corporate client and an individual client; "The following examples illustrate situations when future conflicts may arise: (a) A substantial discrepancy could develop between the testimony of the corporate representatives and the employee. (b) Based on newly discovered evidence, the corporation could reevaluate its decision as to whether the employee's actions were within the scope of the employee's employment, or whether they constituted actual fraud, willful misconduct or actual malice. (c) The corporation could later seek to disavow responsibility for the employee's actions. (d) A disagreement could arise as to whether the employee's actions were contrary to applicable laws or the corporation's policies and procedures. (e) A substantial difference could arise between the employee and the corporation regarding their respective goals in the litigation, for example, on questions such as the possibility or desirability of settlement. (i) The employee may seek vindication of her reputation or a trial on the merits of the case while the corporation's interest may be more economically motivated and oriented toward obtaining a favorable settlement in lieu of a trial, or (ii) The employee may desire to avoid the publicity and potential embarrassment of a trial and, therefore, favor settlement while the corporation as a matter of business judgment may favor litigation as a means of deterring future unfounded claims. (f) The corporation and the employee may disagree with one another at some point over other aspects of legal tactics and strategy."; advising the lawyer to explain the nature of the joint representation to both clients; "Once it is decided that the lawyer will represent the corporation and the constituent, it is important to have a clear understanding with both clients about: (1) whether and what kind of confidential information will be shared; (2) who will control the privilege with respect to such information; (3) how the attorney-client privilege will operate in the event a dispute arises between the clients concerning the matter; and (4) whether the

lawyer will continue to represent the corporation even if a conflict develops between the corporation and the constituent. We recommend that all such understandings be confirmed in writing.").

- New York City LEO 2006-1 (2/17/06) ("We conclude here that a law firm may ethically request an advance waiver that includes substantially related matters if the following conditions are met: (a) the client is sophisticated; (b) the waiver is not applied to opposite sides of the same litigation and opposite sides in a starkly disputed transactional matter; (c) the law firm is able to ensure that the confidences and secrets of one client are not shared with, or used for the advantage of, another client; (d) the conflict is consentable under the tests of DR 5-105(C); and (e) special consideration is given to the other factors described in Formal Opinion 2001-2."; explaining that Formal Opinion 2001-2 indicated that "[I]n a transactional setting in which the parties' interests are inherently antagonistic, such as when one party is a hostile bidder and the other an unwilling target in a corporate takeover, or when lawyers in the same law firm would be required to negotiate substantive business terms head-to-head, simultaneous representation generally will be ethically prohibited. But in transactional settings in which the adversity between clients is less stark, the application of DR 5-105 is more relaxed and nuanced. We also observed in Formal Opinion 2001-2 that many law firms service clients that insist the firm simultaneously represent multiple clients with differing interests in a single negotiated transaction – an observation that has even more force today.").
- Oregon LEO 2005-122 (8/2005) ("Nothing in Oregon RPC 1.7 prohibits a blanket or advance waiver from the State or from a nongovernment client as long as Lawyer adequately explains the material risks and available alternatives. See, e.g., ABA Formal Ethics Op No 05-436. Lawyer must be sensitive, however, to situations that were not contemplated in the original disclosure or that constitute nonwaivable conflicts. In the former situation, Lawyer would need to obtain the informed consent of each affected client as to the new conflict. In the latter situation, Lawyer would have to decline representation in the new matter that gives rise to the conflict. Oregon RPC 1.16(a)(1).").
- District of Columbia LEO 309 (9/20/01) ("Advance waivers of conflicts of interest are not prohibited by the Rules of Professional Conduct. Such waivers, however, must comply with the overarching requirement of informed consent. This means that the less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advance waiver will be valid. An advance waiver given by a client having independent counsel (in-house or outside) available to review such actions presumptively is valid, however, even if general in character. Regardless of whether reviewed by independent counsel, an advance waiver of conflicts will not be

valid where the two matters are substantially related to one another."; noting that "the lawyer must make full disclosure of facts of which she is aware, and hence cannot seek a general waiver where she knows of a specific impending adversity unless that specific instance also is disclosed"; "Finally, any decision to act on the basis of an advance waiver should be informed by the lawyer's reasoned judgment. For example, a prudent lawyer ordinarily will not rely upon an advance waiver where the adversity will involve allegations of fraud against the other client or is a litigation in which the existence or fundamental health of the other client is at stake. In accordance with the foregoing, a client not independently represented by counsel (including in-house counsel) generally may waive conflicts of interest only where specific types of potentially adverse representations or specific types of adverse clients are identified in the waiver correspondence. A client that is independently represented by counsel generally may agree to waive such conflicts even where the specificity requirements set out in the preceding sentence are not satisfied."; noting the following prospective consent language, although not describing the text as "authoritative or exclusive": "As we have discussed, the firm represents many other companies and individuals. It is possible that during the time we are representing you, some of our current or future clients will have disputes or transactions with you. [For example, although we are representing you on _____, we have or may have clients whom we represent in connection with _____.] You agree that we may continue to represent, or undertake in the future to represent, existing or new clients in any matter, including litigation, even if the interests of such other clients in such other matters are directly adverse to yours, so long as those matters are not substantially related to our work for you.").

- California LEO 1989-115 (1989) (declining to find that all prospective consents are inappropriate; "Consequently, it is the opinion of the Committee that if, within the meaning of rule 3-310(F), the client is 'informed' of the potential risks that are foreseeable at the time of the consent, no Rule of Professional Conduct is violated by the attorney's requiring the client's advance waiver."; "[T]he nature of the subsequent conflict of interest may range from simply representing two clients in entirely unrelated matters to actually representing both side in the same dispute. While a court would doubtless preclude a lawyer from representing both sides simultaneously, the Committee believes that in such situation, if the original waiver was informed, local counsel could withdraw from its representation of lead counsel's client and continue to represent its own client even if otherwise confidential information would be used against lead counsel's client." (footnote omitted); "If the subsequent representation was unrelated to the original matter, the Committee believes that local counsel could continue its participation in the original matter at the same time as it is representing its own client in the unrelated matter."; "In summary, then, it is the opinion of the Committee that

- the execution of an advance waiver of conflict of interest and confidentiality protections is not per se improper; that to the extent that the waiver of confidentiality is 'informed,' it is valid; that to the extent that a potential client ripens into an actual conflict, the advance waiver may or may not be sufficient depending upon the degree of involvement and the nature of the subsequent conflict; that regardless of the validity of the waiver, it cannot be asserted as a defense to a disciplinary proceeding charging incompetent performance of legal services; and that under no circumstances may the agreement be used for the purposes of limiting the lawyer's civil liability for malpractice.").
- N.Y. County Law. Ass'n LEO 724 (undated) (finding that a lawyer might ethically seek a client's prospective consent; "The degree of disclosure that must be made in order for the client's or prospective client's consent to be 'informed' will also depend on other factors. For example, when the lawyer is seeking an advance waiver from a sophisticated client, such as a large corporation with in-house counsel, the adequacy of disclosure will be put to a less stringent test than if the client were a small business, an individual unsophisticated with respect to legal matters, a child or an incapacitated person."; "The Code does not require that the facts of each future adverse representation be known to the parties or described with precision in order for consent to be 'informed.' If such were the rule, no advance waiver would ever be enforceable; by their nature, such waivers include clients and claims that are not yet known. If the subsequent conflict should have been reasonably anticipated by the original client based on the disclosures made and the scope of the consent sought, we see no reason why the lawyer should not be permitted to rely on such consent under DR 5-105(C)."; "Notwithstanding that a lawyer may have obtained a client's consent to a future conflict, the lawyer must reassess the propriety of the adverse concurrent representation under the 'obviousness' test discussed above when the conflict actually arises. The lawyer must determine whether he or she can adequately represent the interests of all affected clients at that time. Of course, if the actual conflict that materializes is materially different than the conflict that has been waived, the lawyer may not rely on the consent previously obtained."; "A lawyer can seek and a client or prospective client can give an advance waiver with respect to conflicts of interest that may arise in the future. The lawyer must first evaluate whether the future representation is likely to give rise to a non-consentable conflict. If the lawyer determines that the prospective conflict is consentable, he or she can proceed to make full disclosure to the client or prospective client and obtain that person or entity's consent. The validity of the waiver will depend on the adequacy of disclosure given to the client or prospective client under the circumstances, taking into account the sophistication and capacity of the person or entity giving consent.").

Case Law. Not surprisingly, courts uphold the effectiveness of prospective consents that meet the generally-accepted standard -- providing some specific description of the type of adversity that might develop.

- McKesson Info. Solutions Inc. v. Duane Morris LLP, Civ. No. 2006CV121110 (Fulton County (Ga.) Super. Ct. Mar. 6, 2007) (in earlier order disqualifying Duane Morris, addressing McKesson's "Verified Complaint for Emergency Injunctive Relief and Disqualification of Duane Morris LLP" ("Nov. 7, 2006 Order")); explaining that Duane Morris was representing two individuals in arbitration against McKesson while simultaneously representing two of McKesson's sister subsidiaries in a separate action in Pennsylvania (Nov. 7, 2006 Order); noting that Duane Morris undertook Pennsylvania representation of the two other McKesson subsidiaries as local counsel pursuant to an April 27, 2006 engagement letter which "attempts to distinguish between McKesson Corporation's entities and contains a waiver of future conflicts" (Nov. 7, 2006 Order at 2); noting that Duane Morris's adversary in the arbitration and one of its clients in the Pennsylvania bankruptcy action were part of the same segment of the overall McKesson corporate family, and among other things reported to the same law department (Nov. 7, 2006 Order); rejecting Duane Morris's argument that the McKesson entities are separate for conflicts purposes (Nov. 7, 2006 Order); holding that Georgia's ethics rules apply because Duane Morris's lawyers' conduct is occurring in Georgia (Nov. 7, 2006 Order); and quoting Duane Morris's engagement letter signed by McKesson in the Pennsylvania bankruptcy action: "Given the scope of our business and the scope of our client representations through our various offices in the United States and abroad, it is possible that some of our present or future clients will have matters adverse to McKesson while we are representing McKesson. We understand that McKesson has no objection to our representation of parties with interests adverse to McKesson and waive any actual or potential conflict of interest as long as those other engagements are not substantially related to our services to McKesson. We agree, however, that McKesson's consent to, and waiver of, such representation shall not apply in any instance where, as a result of our representation of McKesson, we have obtained proprietary or other confidential information of a non-public nature, that, if known to such other client, could be used in any such other matter by such client to McKesson's material disadvantage or potential material disadvantage. By agreeing to this waiver of any claim of conflicts as to matters unrelated to the subject matter of our services to McKesson, McKesson also agrees that we are not obligated to notify McKesson when we undertake such a matter that may be adverse to McKesson." (Nov. 7, 2006 Order at 10-11); holding that in this case the consent was inadequate and invalid as a matter of Georgia law: "In this case, Defendant's engagement letter does not refer to any particular

parties or circumstances under which adverse representation would be undertaken. As such, the Court finds that MMM and MAI [Duane Morris's clients in the Pennsylvania bankruptcy action] could not have reasonably anticipated that Defendant would actually consider representation of the Smiths [Duane Morris's clients in the Georgia action against the other McKesson subsidiary] in the concurrent action where the adverse party is attacking McKesson Corporation products and accusing it of fraudulent conduct. Courts must ensure that the trust and loyalty owed by lawyers to their clients are not compromised." (Nov. 7, 2006 Order at 11); the November 7, 2006 Order was later vacated after Duane Morris's representation of the McKesson subsidiaries in the Pennsylvania bankruptcy case ended, and Duane Morris sent a letter to McKesson's lawyer in the Pennsylvania bankruptcy matter indicating that Duane Morris "intended to withdraw as counsel for MMM and MAI" in the Pennsylvania bankruptcy matter (Mar. 6, 2007 Order on Motion for New Trial and to Vacate the Permanent Injunction and To Dismiss on the Grounds that the Controversy is Now Moot, slip op. at 3-4); also noting that Duane Morris had moved to withdraw as counsel for the McKesson entities in the Pennsylvania bankruptcy matter, which was granted by the bankruptcy court (slip op. at 4); rejecting McKesson's reliance on the "hot potato" rule, based on its argument that Duane Morris's withdrawal as counsel occurred during the pendency of the arbitration in Georgia (slip op. at 5); holding that Duane Morris "did not improperly terminate or prematurely abandon its attorney-client relations" with the McKesson subsidiaries it was representing in the Pennsylvania bankruptcy proceeding (slip op. at 6); noting that neither of the McKesson entities or the chief lawyer representing them in the Pennsylvania bankruptcy matter objected to Duane Morris's motion to withdraw, which the bankruptcy court granted).

- Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1102-03 (N.D. Cal. 2003) (upholding the following prospective consent in a retainer letter between the Heller Ehrman Law Firm and First Data: "Our engagement by you is also understood as entailing your consent to our representation of our other present or future clients in "transactions," including litigation in which we have not been engaged to represent you and in which you have other counsel, and in which one of our other clients would be adverse to you in matters unrelated to those that we are handling for you. In this regard, we discussed [Heller's] past and on-going representation of Visa U.S.A. and Visa International (the latter mainly with respect to trademarks) (collectively, "Visa") in matters which are not currently adverse to First Data. Moreover, as we discussed, we are not aware of any current adversity between Visa and First Data. Given the nature of our relationship with Visa, however, we discussed the need for the firm to preserve its ability to represent Visa on matters which may arise in the future including matters adverse to First Data, provided that we would only undertake such representation of Visa under

- circumstances in which we do not possess confidential information of yours relating to the transaction, and we would staff such a project with one or more attorneys who are not engaged in your representation. In such circumstances, the attorneys in the two matters would be subject to an ethical wall, screening them from communicating from [sic] each other regarding their respective engagements. We understand that you do consent to our representation of Visa and our other clients under those circumstances.""; noting that First Data moved to disqualify Heller Ehrman from representing Visa in an action against First Data; approving the prospective consent and denying First Data's motion to disqualify -- because the prospective consent provided a specific enough disclosure of the possible adversity and thus resulted in a knowing consent).
- Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc., 142 F. Supp. 2d 579, 582, 582-83 (D. Del. 2001) (denying Apple's motion to disqualify the Dechert Price firm; "As a general matter, a client may expressly or impliedly waive his objection and consent to an adverse representation. Given the facts in the record, Apple cannot reasonably or credibly maintain that Albert P. Cefalo, in-house counsel for Apple, believed that he was merely granting a transactional waiver."; "Given that Cefalo, who was the Director of Intellectual Property at Apple, knew about the possibility of suit from Elonex, his discussion with Tim Blank of Dechert in Boston was reasonably sufficient, or should have been sufficient, to cause Apple to appreciate the significance of any potential conflicts. Therefore, considering that Elonex had not yet filed a suit, the court concludes that Dechert had provided Apple with sufficient information about the possible conflict. The facts in the record suggest that Dechert obtained a prospective waiver from Apple. The ABA has affirmed the validity of the prospective waivers. . . . A prospective waiver should identify the potential opposing party, the nature of the likely subject matter in dispute, and permit the client to appreciate the potential effect of the waiver. . . . Therefore, considering that Blank identified the possibility of this patent infringement suit, Cefalo was already aware of the possibility of suit, and the two discussed methods of dealing with the conflict, the court finds that Blank sufficiently explained the conflict in order to obtain a prospective waiver from Apple.").
 - General Cigar Holdings, Inc. v. Altadis, S.A., 144 F. Supp. 2d 1334, 1336, 1339 (S.D. Fla. 2001) (enforcing a prospective consent obtained by Latham & Watkins; explaining that the client signed an engagement letter with the following provision: "Our firm has in the past and will continue to represent clients listed on the attached Exhibit A (each an 'Exhibit A Client') in matters not substantially related to this engagement. Accordingly, each Client agrees to waive any objection, based upon this engagement, to any current or future representation by the firm of any of the Exhibit A Clients, its respective parent, subsidiaries and affiliates in any matter not substantially related to this

representation. Of course, we will not accept any representation that is adverse to you in this matter.""; finding the prospective consent enforceable; "The engagement letter in the instant case was reviewed by outside counsel and the respective representatives of the corporations. As in Fisons [Fisons Corp. v. Atochem North America, Inc.], No. 90 Civ. 1080 (JMC), 1990 U.S. Dist. LEXIS 15284 (S.D.N.Y. Nov. 14, 1990)], it is clear that advance consent was obtained from knowledgeable and sophisticated parties. There is no dispute that the predecessors of Altadis, U.S.A. were aware of the Latham attorneys' relationship with General Cigar. Allowing for advance, informed consent has significant advantages to both clients and lawyers alike, especially where large firms and sophisticated clients are involved. While the engagement letter could have been more explicit, under the circumstances, it represents informed consent for potential adverse actions.").

In contrast, some courts reject the effectiveness of prospective consents that tend to be too broad.

- All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc., Nos. C 07-1200, -1207, -1212 & No. 06-2915, 2008 U.S. Dist. LEXIS 106619, at *10-11, *11, *20-21, *24, *7-8, *33-34, *37-38 (N.D. Cal. Dec. 18, 2008) (assessing a situation in which lawyer John Vandeveld had represented Infineon's Vice President of Sales in connection with antitrust issues relating to the pricing of DRAM, and later joined (through a law firm merger) Crowell & Moring -- who was representing plaintiffs in an action against Infineon involving antitrust issues; noting: that Vandeveld's firm merged with Crowell on October 6, 2008, that two days later Infineon demanded that Crowell withdraw from representing its client in the case against Infineon, and that one day after the letter Crowell "despite its belief that there was no adversity between Hefner [former Infineon executive] and its current clients in this litigation, decided to erect an 'ethics wall' to protect against the inadvertent disclosure of confidential information to personnel at Crowell that the Lightfoot Vandeveld lawyers learned during their representation of Hefner"; explaining that as part of the "ethics wall . . . [a]ccording to Crowell, Crowell's document management system has been specially coded so that none of the former attorneys and staff of Lightfoot Vandeveld can access any documents related to the current litigation"; rejecting Crowell's argument that Vandeveld did not have an attorney-client relationship with Infineon and therefore should not be disqualified or cause Crowell & Moring to be disqualified; "[A] conflict of interest may be created when, as here, an attorney (Vandeveld) has acquired confidential information about a non-client (Infineon) in connection with his representation of a client (Hefner), such as when an attorney obtains confidential information about a co-defendant of a client during a joint defense of an action. Indeed, contrary to plaintiffs' contention, the fact that Vandeveld and Infineon never had an attorney-client relationship is not

determinative of whether disqualification of Crowell is appropriate because 'an attorney's receipt of confidential information from a non-client may lead to the attorney's disqualification.'"; pointing to Crowell & Moring's ethics screen at highlighting the firm's belief that there might be a problem; "Crowell's reaction to discovering that Vandeveldel had previously represented Hefner in prior litigation relating to DRAM price-fixing immediately erecting an ethical wall -- suggests that Crowell recognized that Vandeveldel had a duty to protect the confidential information he received from Infineon in the course of that litigation."; also rejecting Crowell's argument that a joint defense agreement under which Vandeveldel represented the Infineon executive contained a valid prospective consent in which Infineon agreed not to seek his disqualification; noting that the joint defense agreement contained the following consent language: "While the precise nature of each possible conflict that may arise in the future cannot be identified at the present time, each client member after being informed of the general nature of the conflicts that may arise, knowingly, and intelligently waives any conflict of interest that may arise on account of this Agreement, including specifically from an attorney member of this Agreement, other than his, her or its own attorney, cross-examining him, her or it at trial in any other proceeding arising from or relating to the above Investigation. Each client member further waives any claim of conflict of interest which might arise by virtue of participation by his, her or its attorney in this Agreement. Each attorney member and client member waives any right to seek the disqualification of counsel for any other attorney member who is a party to this Agreement based upon a communication of joint-defense privileged information."; finding the prospective consent ineffective; "The court is not convinced that Infineon gave its informed consent to waive its right to seek disqualification of Vandeveldel under the circumstances. Plaintiffs did not offer persuasive evidence or argument indicating that the prospective waiver provision sufficiently disclosed the nature of the conflict that has subsequently arisen between the parties, and that Infineon knowingly and specifically waived its right to object to this conflict. Neither the language of the JDA nor the argument advanced by plaintiffs compels the conclusion that Infineon consented to Vandeveldel prospectively undertaking adverse representation on behalf of plaintiffs against Infineon in substantially related litigation. Indeed, the only specific conflict waived by the parties in the JDA was the conflict that could arise if an attorney member of the joint defense (e.g., Vandeveldel) cross-examined a defendant that the attorney member did not represent (i.e., Infineon) at trial or in any other proceeding arising from or relating to the joint defense. In other words, the parties to the JDA waived any duty of confidentiality for purposes of cross-examining testifying defendants. To the extent that plaintiffs urge the court to adopt a broader reading of the Paragraph 13, the court declines to do so."; ultimately finding that "disqualification of the entire Crowell firm is warranted. First, plaintiffs have not shown that Infineon's motion to disqualify was tactically motivated or otherwise brought for an improper purpose, such as to delay the proceedings.

- Second, while the court is mindful of the financial ramifications that disqualification of plaintiffs' counsel may subject plaintiffs to at this stage of the litigation, plaintiffs will not, as they suggest, be required to hire new counsel and prepare for a trial that is only six months away. Plaintiffs are simply mistaken in this regard. Only the dispositive motions involving Sun are being heard in December 2008 and only the trial of Sun will go forward in June 2009. The dispositive motions and trial for the four plaintiffs involved in this motion have yet to be scheduled. Thus, there is plenty of time for new counsel to get up to speed.").
- Celgene Corp. v. KV Pharm. Co., Civ. A. No. 07-4819 (SDW), 2008 U.S. Dist. LEXIS 58735, at *3-4, *13-14, *21-24, *32, *41 (D.N.J. July 28, 2008) (not for publication) (concluding that the following prospective consent in retainer letters between the law firm of Buchanan & Ingersoll and one of its clients was not sufficient to avoid the firm's disqualification: "Recognizing and addressing conflicts of interest is a continuing issue for attorneys and clients. We have implemented policies and procedures to identify actual and potential conflicts at the outset of each engagement. From time to time we may be asked to represent someone whose interests may differ from the interests of the Company. We are accepting this engagement with the Company's understanding and express consent that our representation of the Company will not preclude us from accepting an engagement from a new or existing client, including litigation or other matters that may involve the Company. However, we will not accept an engagement that is directly adverse to the Company or any of its subsidiaries if either: (1) it would be substantially related to the subject matter of our representation of the Company or representation of Anthrogenesis Corp.; or (2) would impair the confidentiality of proprietary, sensitive or otherwise confidential communications made to us by the Company or Anthrogenesis Corp."; analyzing the standard for judging prospective consents under Congoleum [Century Indem. Co. v. Congoleum Corp.], 426 F.3d 675 (3d Cir. 2005)]; concluding that the Buchanan Ingersoll retainer letters did not satisfy the standard; "[T]ruly informed consent' requires the attorney to provide meaningful consultation to the client about potential conflicts. Thus, in determining whether Celgene gave 'truly informed consent,' the inquiry focuses in part on how Buchanan actually consulted with its client, Celgene, and informed Celgene about the potential conflict when consent was obtained."; concluding that the Buchanan Ingersoll retainer letters did not satisfy the standard; "This Court has examined the 2003 Retention Agreement and the 2006 Engagement Letter and does not find within either of those documents any of the following: 1) any statements which adequately communicate a proposed course of conduct with regard to concurrent conflicts of interest; 2) any explanation of the material risks of the course of conduct with regard to concurrent conflicts of interest; or 3) any explanation of reasonably available alternatives to the proposed course of conduct. . . . This Court finds no basis to conclude that either agreement

manifests informed consent, within the meaning of RPC 1.0(e), for several reasons. First, both agreements propose a future course of conduct that is very open-ended and vague. Both provisions are so general that a reader has no clear idea what course of conduct Buchanan anticipated: what kinds of cases are substantially related? Did the parties anticipate that Buchanan would be adverse to Celgene in other patent cases? Second, there is nothing in the agreements to indicate that Buchanan communicated to Celgene adequate information or explanation about the risks of the proposed course of conduct, with regard to concurrent conflicts of interest: would Celgene be comfortable if Buchanan represented a generic pharmaceutical company in a patent case? Third, there is nothing in the agreements to indicate that Buchanan explained to Celgene reasonably available alternatives to the proposed course of conduct, such as Celgene asking Buchanan to specifically define 'substantially related' or requesting an even broader limitation -- perhaps that Buchanan would not represent any generic drug companies. The record does not show that Celgene received anything in return for agreeing to these provisions. Indeed, the agreements only appear to benefit Buchanan -- which further underscores the importance of Buchanan fully explaining the meaning and implications of the waiver. Neither agreement manifests informed consent within the meaning of RPC 1.7(b) and 1.0(e)."; "It is significant that Buchanan does not even assert, no less offer supporting evidence, that Buchanan at any time provided a consultation to Celgene on the conflict waiver, nor that Buchanan provided full -- or any -- disclosure on the matter of conflicts of interest, nor that Buchanan communicated 'adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.' RPC 1.0(e)."; ultimately holding that Buchanan Ingersoll did not carry its burden of proof in establishing that the client gave "truly informed consent" to the firm's representation of another client adverse to it).

- Wolk v. Flight Options, Inc., No. 03-cv-06840, 2005 U.S. Dist. LEXIS 19891 (E.D. Pa. Sept. 13, 2005) (refusing to validate a contingency fee arrangement because the lawyer had included a general prospective consent in the retainer agreement).
- Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 801-02, 820, 821 (N.D. Cal. 2004) (disqualifying Morgan Lewis & Bockius from representing a client adverse to another client who had signed a retainer letter containing the following prospective consent: "'Morgan, Lewis & Bockius is a large law firm, and we represent many other companies and individuals. It is possible that some of our present or future clients will have disputes or other dealings with you during the time that we represent you. Accordingly, as a condition of our undertaking of this matter for you, you agree that Morgan, Lewis & Bockius may continue to represent, or may undertake in the future to represent, existing or new clients in any matter, including litigation, that is not

substantially related to our work for you, even if the interests of such clients in those other matters are directly adverse to you. Further, you agree in light of its general consent to such unrelated conflicting representations, Morgan, Lewis & Bockius will not be required to notify you of each such representation as it arises. We agree, however, that your prospective consent to conflicting representations contained in the preceding sentence shall not apply in any instance where, as the result of our representation of you, we have obtained confidential information of a non-public nature that, if known to another client of ours, could be used to your material disadvantage in a matter in which we represent, or in the future are asked to undertake representation of, that client.""; finding the prospective consent ineffective; "Applying these factors to the waiver executed by Dr. Winchell at Thomas' request, Winchell Decl., Ex. 1, the Court finds as follows: (1) the terms of the waiver are extremely broad and were evidently intended to cover almost any eventuality; (2) its temporal scope is likewise unlimited; (3) the record contains no evidence of any discussion of the waiver; (4) the waiver lacks specificity as to the conflicts that it covers and effectively awards Morgan, Lewis an almost blank check; (5) however, Morgan Lewis explicitly stated that it would not seek to represent Dr. Winchell and an adverse client in a 'substantially related' matter; and (6) Dr. Winchell's education and business experience are strongly indicative of a high degree of sophistication. Thus, the fifth and sixth factors tend to support a finding of informed consent, but the first four weigh in the opposite direction. The interests of justice (factor 7) remain to be determined." (footnote omitted); also explaining that "[u]nder the law of this jurisdiction, even if a prospective waiver of conflict has been obtained, the attorney must request a second, more specific waiver, 'if the [prospective] waiver letter insufficiently disclosed the nature of the conflict that subsequently arose between the parties.' . . . This Morgan, Lewis did not do.").

- Goss Graphics Sys., Inc. v. MAN Roland Druckmaschinen Aktiengesellschaft, No. C00-0035 MJM, 2000 U.S. Dist. LEXIS 18100, at *7 (N.D. Iowa May 25, 2000) (disqualifying Kirkland & Ellis from representing a client adverse to another firm client who had signed a retainer letter with the following prospective consent: "In the event a present conflict of interest exists between [Goss] and [Kirkland's] other clients or in the event one arises in the future, [Goss] agrees to waive any such conflict of interest or other objection that would preclude [Kirkland's] representation of another client in other current or future matters. Accordingly, our representation of [Goss] in connection with the [Bankruptcy Proceedings] and in connection with any future matter will be with the understanding that such representation will not preclude [Kirkland] from continuing any present representation or assuming future representation in other matters that another client may request (other than a matter where [Goss] and another [Kirkland] client are on opposing sides of litigation).").

- Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356, 1359, 1359-60, 1360 (N.D. Ga. 1998) (disqualifying defendants' local counsel despite the following prospective consent which plaintiff Worldspan signed when the law firm began to represent plaintiff on unrelated matters approximately five years earlier: "As we have discussed, because of the relatively large size of our firm and our representation of many other clients, it is possible that there may arise in the future a dispute between another client and WORLDSPAN, or a transaction in which WORLDSPAN's interests do not coincide with those of another client. In order to distinguish those instances in which WORLDSPAN consents to our representing such other clients from those instances in which such consent is not given, you have agreed, as a condition to our undertaking this engagement, that during the period of this engagement we will not be precluded from representing clients who may have interests adverse to WORLDSPAN so long as (1) such adverse matter is not substantially related to our work for WORLDSPAN, and (2) our representation of the other client does not involve the use, to the disadvantage of WORLDSPAN, of confidential information of WORLDSPAN, we have obtained as a result of representing WORLDSPAN."; "Looking only at the original letter itself, the Court finds that its very language is ambiguous. The phrase 'will not be precluded from representing clients who may have interests adverse to WORLDSPAN so long as (1) such adverse matter' does not necessarily or even impliedly foreshadow future directly adverse litigation. It is the opinion of the Court that future directly adverse litigation against one's present client is a matter of such an entirely different quality and exponentially greater magnitude, and so unusual given the position of trust existing between lawyer and client, that any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information."; noting that the prospective consent allowed the law firm to begin to represent new clients in matters adverse to its existing client WORLDSPAN, which the court indicated carried "added weight" in its analysis).
- Hasco, Inc. v. Roche, 700 N.E.2d 768, 776 (Ill. App. Ct. 1998) (finding that prospective consent language in a retainer letter was not sufficient; explaining the consent letter contained the following provision: "'6. Waiver of Conflict of Interest. Each of Clients, as a subordinated lender to Arauca, has a claim against Arauca arising from any default by Arauca in repayment of the subordinated debt. Clients have been advised by Arauca that Arauca presently lacks sufficient resources to repay the subordinated debt. SRZ is presently representing Arauca in its pursuit of claims against FOC to recover lost profits on the Syntex transaction and for other relief. SRZ is also furnishing other legal advice to Arauca and its general partner, Arauca General, Inc. ("AGI"). A conflict exists between the interests of Arauca, AGI

and each of the Clients. By executing this letter-agreement, each of the Clients hereby consents to waive any conflict of interest associated with the representation by SRZ of Arauca and the representation of Clients by SRZ with respect to their claims against FOC. Each Client further recognizes and acknowledges the SRZ shall have no obligation to advise any Client with respect to any actual or potential claim against Arauca.""; concluding that "[a]lthough the Schuyler parties argue that this waiver extends to the NASD arbitration dispute, the circuit court correctly determined that this conflict waiver was limited to SRZ's representation of the subordinated lenders in the West Virginia lawsuit").

- Florida Ins. Guar. Ass'n v. Carey Canada, Inc., 749 F. Supp. 255, 259-60 (S.D. Fla. 1990) (disqualifying a law firm from representing the insured in a lawsuit by the insurer against the insured; rejecting the law firm's argument that it had a prospective consent, because the law firm had "failed to come forward with any written instrument evidencing such consent," and "has been unable to identify any single [insurance company] employee much less a specific conversation that ever provided [the law firm] with standing consent to sue" the insurance company).

Not surprisingly, courts generally recognizing the effectiveness of prospective consents apply them as they are written -- which sometimes trips up law firms which have not adequately defined the scope of the prospective consent.

- See, e.g., Brigham Young Univ. v. Pfizer, Inc., Case No. 2:06-CV-890 TS BCW, 2010 U.S. Dist. LEXIS 104164, at *5-6, *11, *12 (D. Utah Sept. 29, 2010) (finding that a prospective consent Brigham Young University signed when retaining Winston & Strawn allowed Winston & Strawn only to represent existing clients in matters adverse to BYU; quoting the following prospective consent language: "Advance Patent Waiver: As you may know, universities frequently hold patents in the product and inventions developed at such universities. Winston & Strawn LLP currently represents multiple pharmaceutical and other companies with respect to patent and intellectual property matters (collectively, the "Other Clients"), including litigation (the "Patent Matters"). Winston & Strawn LLP is not currently representing any Other Clients in matters adverse to the University. Because of the scope of our patent practice, however, it is possible that Winston & Strawn LLP will be asked in the future to represent one or more Other Clients in matters, including litigation, adverse to the University. Therefore, as a condition to Winston & Strawn LLP's undertaking to represent you in the BYU Matters, you agree that this firm may continue to represent Other Clients in the Patent Matters, including litigation, directly adverse to the University and hereby waive any conflict of interest relating to such representation of Other

Clients.""; finding that the prospective consent was limited only to current Winston & Strawn clients; "[T]he plain language of the engagement letter limits the term 'Other Clients' to companies the firm is, at the present, acting in their behalf or stead."; "The Court finds the plain language to be clear and fully supports the Magistrate Judge's conclusion that 'the waiver only applies to clients that Winston was representing with respect to patent and intellectual property matters as of the date of the agreement.'"; disqualifying Winston & Strawn from representing a new client (Pfizer) in a matter adverse to BYU).

Consent Language. Lawyers hoping to arrange for an effective prospective consent must undertake an awkward balancing act.

The kind of explicit (often ugly) language that might be required to assure an effective prospective consent could prompt the requested client to turn down the request for consent, or even become angry at being asked. On the other hand, a proposed prospective consent that attempts to "finesse" the issue by not explicitly describing the possible adversity, or not describing litigation as included within the scope of the prospective consent,¹ might ultimately prove to be ineffective if a court must later assess the consent.

The New York City Bar provided the following example of prospective consent language that would cover matters substantially related to what the firm was handling for the client.

You also agree that this firm may now or in the future represent another client or clients with actually or potentially differing interests in the same negotiated transaction in which the firm represents you. In particular, and without

¹ Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356, 1359-60 (N.D. Ga. 1998) (disqualifying defendant's local counsel despite a prospective consent; "It is the opinion of this Court that future directly adverse litigation against one's present client is a matter of such an entirely different quality and exponentially greater magnitude, and so unusual given the position of trust existing between lawyer and client, that any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information." (emphasis added)).

waiving the generality of the previous sentence, you agree that we may represent [to the extent practicable, describe the particular adverse representations that are envisioned, such as "other bidders for the same asset" or "the lenders or parties providing financing to the eventual buyer of the asset"]. This waiver is effective only if this firm concludes in our professional judgment that the tests of DR 5-105 are satisfied. In performing our analysis, we will also consider the factors articulated in ABCNY Formal Opinion 2001-2, including (a) the nature of any conflict; (b) our ability to ensure that the confidences and secrets of all involved clients will be preserved; and (c) our relationship with each client. In examining our ability to ensure that the confidences and secrets of all involved clients will be preserved, we will establish an ethical screen or other information-control device whenever appropriate, and we otherwise agree that different teams of lawyers will represent you and the party adverse to you in the transaction.

New York City LEO 2006-1 (2/17/06) (footnote omitted).

The same legal ethics opinion suggested the following prospective consent language that would not cover substantially related matters.

Other lawyers in the Firm currently do [XXX] work for [existing client] and its affiliates, and expect to continue to do such work. In order to avoid any misunderstanding in the future, we ask that you confirm that the Company agrees to waive any conflict of interest which may be deemed to arise as a result of such representation. Please also confirm that neither the Company nor any of its affiliates will seek to disqualify our Firm from representing [existing client] or its affiliates in existing or future [XXX] or other matters. Our agreement to represent you is conditioned upon the understanding that we are free to represent any clients (including your adversaries) and to take positions adverse to either the company or an affiliate in any matters (whether involving the same substantive area(s) of law for which you have retained us or some other unrelated area(s), and whether involving business transactions, counseling, litigation or other matters), that are not substantially related to the matters for which you have retained us or may hereafter retain us. In this connection, you should be aware that we provide services on a wide variety of legal subjects,

to a large number of clients both in the United States and internationally, some of whom are or may in the future operate in the same area(s) of business in which you are operating or may operate. (A summary of our current practice areas and the industries in which we represent clients can be found on our web site at www.XXX.com.) You acknowledge that you have had the opportunity to consult with your company's counsel [if client does not have in-house counsel, substitute: 'with other counsel'] about the consequences of this waiver. In this regard, we have discussed with you and you are aware that we render services to others in the area(s) of business in which you currently engage.

New York City LEO 2006-1 (2/17/06).

The Washington, D.C., Bar suggested the following prospective consent language (although warning that the language was not "authoritative or exclusive").

"As we have discussed, the firm represents many other companies and individuals. It is possible that during the time we are representing you, some of our current or future clients will have disputes or transactions with you. [For example, although we are representing you on _____, we have or may have clients whom we represent in connection with _____.] You agree that we may continue to represent, or undertake in the future to represent, existing or new clients in any matter, including litigation, even if the interests of such other clients in such other matters are directly adverse to yours, so long as those matters are not substantially related to our work for you."

District of Columbia LEO 309 (9/20/01).

Courts have rejected the effectiveness of the following prospective consent provisions.

"While the precise nature of each possible conflict that may arise in the future [in connection with a common interest agreement among several separately represented companies] cannot be identified at the present time, each client member after being informed of the general nature of the conflicts that may arise, knowingly, and intelligently

waives any conflict of interest that may arise on account of this Agreement, including specifically from an attorney member of this Agreement, other than his, her or its own attorney, cross-examining him, her or it at trial in any other proceeding arising from or relating to the above Investigation. Each client member further waives any claim of conflict of interest which might arise by virtue of participation by his, her or its attorney in this Agreement. Each attorney member and client member waives any right to seek the disqualification of counsel for any other attorney member who is a party to this Agreement based upon a communication of joint-defense privileged information."

All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc., Nos. C 07-1200, -1207, -1212 & No. 06-2915, 2008 U.S. Dist. LEXIS 106619, at *7-8, *32-34 (N.D. Cal. Dec. 18, 2008).

"Recognizing and addressing conflicts of interest is a continuing issue for attorneys and clients. We have implemented policies and procedures to identify actual and potential conflicts at the outset of each engagement. From time to time we may be asked to represent someone whose interests may differ from the interests of the Company. We are accepting this engagement with the Company's understanding and express consent that our representation of the Company will not preclude us from accepting an engagement from a new or existing client, including litigation or other matters that may involve the Company. However, we will not accept an engagement that is directly adverse to the Company or any of its subsidiaries if either: (1) it would be substantially related to the subject matter of our representation of the Company or representation of Anthrogenesis Corp.; or (2) would impair the confidentiality of proprietary, sensitive or otherwise confidential communications made to us by the Company or Anthrogenesis Corp."

Celgene Corp. v. KV Pharm. Co., Civ. A. No. 07-4819 (SDW), 2008 U.S. Dist. LEXIS 58735, at *3-4 (D.N.J. July 28, 2008) (not for publication).

"Morgan, Lewis & Bockius is a large law firm, and we represent many other companies and individuals. It is

possible that some of our present or future clients will have disputes or other dealings with you during the time that we represent you. Accordingly, as a condition of our undertaking of this matter for you, you agree that Morgan, Lewis & Bockius may continue to represent, or may undertake in the future to represent, existing or new clients in any matter, including litigation, that is not substantially related to our work for you, even if the interests of such clients in those other matters are directly adverse to you. Further, you agree in light of its general consent to such unrelated conflicting representations, Morgan, Lewis & Bockius will not be required to notify you of each such representation as it arises. We agree, however, that your prospective consent to conflicting representations contained in the preceding sentence shall not apply in any instance where, as the result of our representation of you, we have obtained confidential information of a non-public nature that, if known to another client of ours, could be used to your material disadvantage in a matter in which we represent, or in the future are asked to undertake representation of, that client."

Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 801-02 (N.D. Cal. 2004).

"In the event a present conflict of interest exists between [Goss] and [Kirkland's] other clients or in the event one arises in the future, [Goss] agrees to waive any such conflict of interest or other objection that would preclude [Kirkland's] representation of another client in other current or future matters. Accordingly, our representation of [Goss] in connection with the [Bankruptcy Proceedings] and in connection with any future matter will be with the understanding that such representation will not preclude [Kirkland] from continuing any present representation or assuming future representation in other matters that another client may request (other than a matter where [Goss] and another [Kirkland] client are on opposing sides of litigation)."

Goss Graphics Sys., Inc. v. MAN Roland Druckmaschinen Aktiengesellschaft, No. C00-0035 MJM, 2000 U.S. Dist. LEXIS 18100, at *7 (N.D. Iowa May 25, 2000).

"As we have discussed, because of the relatively large size of our firm and our representation of many other clients, it is possible that there may arise in the future a dispute between

another client and WORLDSPAN, or a transaction in which WORLDSPAN's interests do not coincide with those of another client. In order to distinguish those instances in which WORLDSPAN consents to our representing such other clients from those instances in which such consent is not given, you have agreed, as a condition to our undertaking this engagement, that during the period of this engagement we will not be precluded from representing clients who may have interests adverse to WORLDSPAN so long as (1) such adverse matter is not substantially related to our work for WORLDSPAN, and (2) our representation of the other client does not involve the use, to the disadvantage of WORLDSPAN, of confidential information of WORLDSPAN, we have obtained as a result of representing WORLDSPAN."

Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356, 1359 (N.D. Ga. 1998).

In contrast, a court upheld the effectiveness of the following prospective consent.

"Our engagement by you is also understood as entailing your consent to our representation of our other present or future clients in 'transactions,' including litigation in which we have not been engaged to represent you and in which you have other counsel, and in which one of our other clients would be adverse to you in matters unrelated to those that we are handling for you. In this regard, we discussed [Heller's] past and on-going representation of Visa U.S.A. and Visa International (the later mainly with respect to trademarks) (collectively, 'Visa') in matters which are not currently adverse to First Data. Moreover, as we discussed, we are not aware of any current adversity between Visa and First Data. Given the nature of our relationship with Visa, however, we discussed the need for the firm to preserve its ability to represent Visa on matters which may arise in the future including matters adverse to First Data, provided that we would only undertake such representation of Visa under circumstances in which we do not possess confidential information of yours relating to the transaction, and we would staff such a project with one or more attorneys who are not engaged in your representation. In such circumstances, the attorneys in the two matters would be subject to an ethical wall, screening them from communicating from [sic] each

other regarding their respective engagements. We understand that you do consent to our representation of Visa and our other clients under those circumstances."

Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1102-03 (N.D. Cal. 2003).

Best Answer

The best answer to (a) is **NO**; the best answer to (b) is **NO**; the best answer to (c) is **YES**.

Conflicts and Privilege Ramifications of a Contract Joint Venture

Hypothetical 6

The last time your company created a joint venture with another chemical company, both you and the company had real problems. Your company now wants to start a joint venture without creating a separate entity, but instead by entering into a contract with the other chemical company. You have never dealt with an arrangement like that before, and you wonder about how that will affect your responsibilities.

- (a) If you represent only your company in connection with the joint venture, will the privilege protect your communications with the other member's employees assigned to the joint venture?

MAYBE

- (b) May you jointly represent both members in connection with the joint venture's operations?

MAYBE

- (c) May you assure privilege protection for your communications with the other member's employees assigned to the joint venture by arranging for a common interest agreement between your company and the other member?

NO (PROBABLY)

Analysis

- (a) An in-house lawyer employed by one member of the joint venture but representing a contract joint venture must analyze the privilege implications of communicating with the contract joint venture's employees.

There is not much case law in the context of joint ventures, but at least one court has indicated that an unincorporated association operating as a joint venture requires a privilege analysis based on the individual members rather than the joint venture itself.

- In re Sunrise Sec. Litig., 130 F.R.D. 560, 571 (E.D. Pa. 1989) ("Because the JFGD joint venture was an unincorporated association of Robert Jacoby, William Frame, Gitomer and Devaney, the joint venture has no claim of privilege other than that of its individual members. In other words, each individual member of the JFGD joint venture must establish each element of the privilege to support the joint venture's privilege. The waiver of privilege by Robert Jacoby, William Frame and Devaney thus has waived the JFGD joint venture's privilege as well, and I will order Blank Rome to produce those documents withheld on its behalf.").

The issue becomes very complicated in the context of a contract joint venture, whose employees come from the joint venture's members.

Under the majority Upjohn standard, the privilege should protect a lawyer's communications with employees of the lawyer's client, even if they are assigned to a joint venture. One might argue that those employees are no longer loyal solely to their employer (the lawyer's client). However, most courts would probably protect those communications.

In control group states such as Illinois, the protection would depend on the employees' place in the corporate hierarchy.

It is difficult to articulate a legal theory under which the attorney-client privilege would protect communications between a joint venture member's lawyer and employees assigned to the joint venture by the other member.

This presents a different situation from a joint representation, in which a member's lawyer also represents the joint venture. In that situation, the lawyer's representation of the joint venture supports the argument that all of the joint venture's

employees are available for privileged communications, because any one of them might have information that the joint venture's lawyer requires or to give advice to the joint venture.

One possible theory in the scenario presented in this hypothetical is reliance on what is called the "functional equivalent" doctrine.

This is called the Bieter doctrine after a 1994 Eighth Circuit case.¹ If one hoped for a decision expanding the attorney-client privilege in the corporate context, Bieter presented a perfect opportunity. In that case, an independent contractor advisor engaged in "daily interaction" with a company in an effort to develop a parcel of land.² The independent contractor worked out of the company's offices and was paid a monthly fee along with expenses. At some point the independent contractor entered into an employment relationship with the company, but essentially performed exactly the same duties as before. The court noted that "it appears that [the independent contractor/later employee's] duties remained substantially the same throughout."³

Most courts that have addressed the issue have followed the Bieter doctrine. For instance, the Ninth Circuit explicitly adopted the Bieter standard in 2010.⁴

Interestingly, corporate lawyers hoping to establish (ahead of time or retroactively) such a "functional equivalent" standard might run into some opposition

¹ In re Bieter Co., 16 F.3d 929, 938 (8th Cir. 1994).

² Id. at 933.

³ Id. at 934.

⁴ United States v. Graf, 610 F.3d 1148 (9th Cir. 2010) (the court ultimately determined that a company consultant did not meet that standard).

from human resources departments worried about employee benefits and other ramifications of such a characterization.

Courts determining the applicability of the "functional equivalent" doctrine originally examined such factors as the percentage of time the independent contractor spent at the company and whether the contractor used a company office.⁵ In essence, these traditional factors looked for the indicia of a normal employee/employer relationship.

In a fascinating development, some courts have looked beyond these traditional factors, and examined just the role that an independent contractor played rather than the logistical arrangements such as work hours, presence at the company's location, etc. These courts are essentially extending privilege protection to communications with non-employees who would otherwise normally fall outside the privilege as client agents/consultants whose participation is not necessary for the transmission of communications to and from the client.

This expansion of the "functional equivalent" doctrine is one of the most significant new privilege trends in the corporate context. In essence, it represents an "end run" around the majority rule, which takes a very narrow approach to the privilege applicable to communications to and from a client's agent. Under the most expansive cases, corporations can protect a much broader spectrum of communications with consultants which otherwise would fall outside the privilege.

⁵ Export-Import Bank of the United States v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113, 114 (S.D.N.Y. 2005).

Lawyers wishing to maximize their corporate client's protection should be looking for the type of indicia that can satisfy the Bieter standard. In fact, lawyers should proactively work with their corporate clients to either assure that they can satisfy the standard, or treat the independent contract as outside the attorney-client privilege. The worst scenario is for the client and the lawyer to consider independent contractors as within the intimate attorney-client relationship even though they are not.

Whether applying the traditional indicia or the newer approach, many courts have found that non-employees should be treated for privilege purposes as the "functional equivalent" of employees. The following list is in reverse chronological order, which tends to highlight the newer and broader standards.

- Insurance company's founder and current consultant;⁶
- Consultant whose company managed the plaintiff's business, including overseeing its operations and sales of a product that was at issue in the litigation;⁷
- Consultant who wrote up a patent for an invention;⁸
- Two advisors and consultants to a board of trustee, who "performed functions that would have been performed by high-level managers with significant

⁶ Graf, 610 F.3d at 1159 ("We find the reasoning in Bieter persuasive and adopt its principles in the Ninth Circuit. We hold that Graf's role at Employers Mutual was that of a functional employee. As discussed above, Graf communicated with insurance brokers and agents on behalf of Employers Mutual and managed company employees. More importantly, Graf was the company's primary agent in its communications with corporate counsel. As we have previously noted, '[a]s fictitious entities, corporations can seek and receive legal advice and communicate with counsel only through individuals empowered to act on behalf of the corporation.' Admiral Ins., Co., 881 F.2d at 1492. The district court correctly held that Graf was that person."; relying on this conclusion in finding that as a functional employee Graf would not have been separately represented by the company's lawyer, and thus ultimately rejecting his privilege claim).

⁷ Mt. Hawley Ins. Co. v. Felman Prod., Inc., Case No. 3:09-cv-00481, 2010 U.S. Dist. LEXIS 49083 (S.D. W. Va. May 18, 2010).

⁸ Coorstek, Inc. v. Reiber, Civ. A. No. 08-cv-01133-KMT-CBS, 2010 U.S. Dist. LEXIS 42594 (D. Colo. Apr. 5, 2010).

responsibilities had [the company] conducted its business in a more traditional corporate setting";⁹

- Chief of Cardiology for a practice group, even though he only worked twenty hours per month at the practice and also had a "full-time position with a private cardiology group";¹⁰
- Company consultant who was a former lawyer for the company;¹¹
- Employees of two consulting companies which assisted a party in preparing a bid;¹²
- Consultant/lobbyists assisting a casino in obtaining a bingo license in Alabama;¹³
- Company accountant and tax consultant, even though he was employed by his own firm;¹⁴

⁹ Trs. of Elec. Workers Local No. 26 Pension Trust Fund v. Trust Fund Advisors, Inc., 266 F.R.D. 1, 8 (D.D.C. 2010).

¹⁰ United States ex rel. Fry v. Health Care Alliance of Greater Cincinnati, Case No. 1:03-cv-167, 2009 U.S. Dist. LEXIS 122921, at *12 n.3 (S.D. Ohio Dec. 11, 2009).

¹¹ Raymond Road Assocs., LLC v. Taubman Centers, Inc., No. X02UWYCV075007877S, 2009 Conn. Super. LEXIS 2875, at *26-27 (Conn. Sup. Ct. Oct. 30, 2009) ("Defendants and their counsel specifically included Mr. Tennyson in the core group of Defendants' representatives responsible for deciding issues of legal strategy. His duties did not change dramatically after he left the company. His position was never filled by the company. All of these communications occurred under the express understanding that they would be kept confidential.").

¹² ACS State Healthcare, LLC v. FourThought Grp., Inc., No. 4:08CV03021, 2009 U.S. Dist. LEXIS 67866, at *6 (D. Neb. Aug. 3, 2009) ("Applying these principles to the case-at-hand, the Court finds that MatrixPointe and SES constituted FourThought's representative for purposes of the attorney-client privilege, and the communications at issue are privileged. MatrixPointe and SES worked closely with FourThought in developing its bid to the Nebraska RFP, were named and included in the Nebraska bid proposal, and possessed information that facilitated the ability of FourThought's counsel to represent FourThought.").

¹³ Hope for Families & Cmty. Serv., Inc. v. Warren, Case No. 3:06-CV-1113-WKW, 2009 U.S. Dist. LEXIS 46009 (M.D. Ala. Apr. 21, 2009).

¹⁴ RoDa Drilling Co. v. Siegal, Case No. 07-CV-400-GFK-FHM, 2009 U.S. Dist. LEXIS 4559, at *4-5 (N.D. Okla. Jan. 22, 2009) ("Defendants argue that Mr. Holthouse cannot claim to be the functional equivalent of a RoDa employee because Mr. Holthouse has testified he is an accountant and tax consultant employed by his own firm. . . . At the preliminary injunction hearing Mr. Holthouse testified extensively about the efforts he undertook on RoDa's behalf in discussing and documenting the terms of the deal made between RoDa and Defendants. He also testified about the efforts he undertook on RoDa's behalf to effect the transfer of title to the investment properties to RoDa, which efforts included obtaining legal advice on RoDa's behalf. To conclude that Mr. Holthouse is not the functional equivalent of a RoDa employee in regard to his communications with counsel would be to elevate form over substance. The communications submitted in camera and Mr. Holthouse's testimony reveal that

- Business consultant;¹⁵
- Client's consultant, who acted as the client's "eyes and ears" at a construction project;¹⁶
- Auto dealership's advisor who performed site design and evaluation services, and investigated regulatory requirements covering the project site -- although the advisor had other clients and spent only about one quarter of his time on the dealership's project;¹⁷
- Advisor who assisted the defendant in negotiations, but who did not draw a salary, keep track of the time he worked for the defendant, or work in the defendant's office (but who "should be characterized as the functional equivalent of an executive, due to his high-level oversight of the company and his interest in the company's financial health.");¹⁸
- A company's president's acquaintance, who was "intimately involved" in achieving the company's "chief objective, obtaining a patent";¹⁹
- Public relations consultant;²⁰

Mr. Holthouse functioned as an employee, representative or agent of RoDa in seeking and receiving legal advice for RoDa such that his communications with counsel are afforded the same attorney-client privilege as if he were a RoDa employee.").

¹⁵ Sieger v. Zak, No. 19978/05, 2008 N.Y. Slip Op. 50418U (N.Y. Sup. Ct. Feb. 21, 2008).

¹⁶ American Mfrs. Mut. Ins. Co. v. Payton Lane Nursing Home, Inc., CV 05-5155 (SJF) (AKT), 2008 U.S. Dist. LEXIS 100080, at *11-12 (E.D.N.Y. Dec. 11, 2008).

¹⁷ MLC Auto., LLC v. Town of S. Pines, No. 1:05cv1078, 2007 U.S. Dist. LEXIS 2841 (M.D.N.C. Jan. 11, 2007).

¹⁸ Memry Corp. v. Ky. Oil Tech., N.V., Case No. C04-03843 RMW (HRL), 2007 U.S. Dist. LEXIS 3094, at *11 (N.D. Cal. Jan. 4, 2007) (not for citation).

¹⁹ DE Techs., Inc. v. Dell, Inc., Civ. A. No. 7:04CV00628, 2006 U.S. Dist. LEXIS 62580, at *6-8 (W.D. Va. Sept. 1, 2006) ("The court believes that it is especially appropriate to look beyond the existence of a formal employment relationship in those cases involving a small, fledgling company which is compelled by circumstance to rely on compensation in kind, or even prior friendships with consulting specialists, in obtaining information required by the company's attorney in order to provide legal services. . . . In short, the court is unable to conclude, based on the existing record, that the documents at issue are, or are not, privileged. The court does conclude, however, that resolution of this issue cannot turn solely, or even primarily, on the nature of the employment relationship between DE and the various third parties listed above. In the case of Blasdel, it is just as likely that the consultant was a 'functional equivalent' of a DE employee. For these reasons, the court sustains plaintiff's objections to the orders granting defendant's motions to compel.").

²⁰ FTC V. Glaxosmithkline, 294 F.3d 141, 148 (D.C. Cir. 2002) ("the consultants acted as part of a team with full-time employees regarding their particular assignments' and, as a result, the consultants 'became intergral members of the team assigned to deal with issues [that] . . . were completely

- Government affairs consultant;²¹
- A Colorado Department of Corrections independent contractor;²²
- Nontestifying expert;²³
- Consultants hired "for the express purpose of assisting with efforts" to sell a company.²⁴

To be sure, not all courts have taken this expansive view.²⁵ Courts have rejected the "functional equivalent" doctrine's applicability to the following:

- Environmental consultant;²⁶
- Accountant;²⁷
- Whirlpool's advertising agencies;²⁸

intertwined with [GSK's] litigation and legal strategies." (internal citation omitted)); Viacom, Inc. v. Sumioto Corp. (In re Copper Market Antitrust Litig.), 200 F.R.D. 213, 219 (S.D.N.Y. 2001).

²¹ Glaxosmithkline, 294 F.3d at 148.

²² Alliance Constr. Solutions, Inc. v. Dep't of Corr., 54 P.3d 861, 863 (Colo. 2002).

²³ W. Res., Inc. v. Union Pac. R.R. Co., No. 00-2043-CM, 2002 U.S. Dist. LEXIS 1911 (D. Kan. Jan. 31, 2002).

²⁴ McCaugherty v. Siffermann, 132 F.R.D. 234, 239 (N.D. Cal. Aug. 10, 1990).

²⁵ LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 661 F. Supp. 2d 958 (N.D. Ill. 2009).

²⁶ AVX Corp. v. Horry Land Co., Civ. A. No. 4:07-cv-3299-TLW-TER, 2010 U.S. Dist. LEXIS 125169, at *23 (D.S.C. Nov. 24, 2010) ("Unlike Bieter, there is no indication here that any consultant was hired by AVX, appeared as a representative of AVX, or otherwise functioned as an employee of AVX.").

²⁷ RCC, Inc. v. Cecchi, Civ. No. 323447, 2010 Md. Cir. Ct. LEXIS 8 (Md. Cir. Ct. Nov. 18, 2010).

²⁸ LG Elec. U.S.A., 661 F. Supp. 2d at 963, 965 (N.D. Ill. 2009) (noting that Northern District of Illinois cases have "expressed doubts regarding the functional equivalent test"; ultimately finding the advertising agency employees outside the doctrine; "Whirlpool's agencies may prepare its marketing materials, but Whirlpool, like Merck, exercises the final say in all of its advertisements, closely monitors all agency work, and retains all rights in the agencies' work product. Whirlpool claims that '[i]t would be effectively impossible for Whirlpool employees to communicate critical information to their agency counterparts, if they could not discuss legal issues or the Law Department's input,' . . . but this misconstrues the scope of the attorney-client privilege. To the extent that agencies need to be informed, Whirlpool's non-legal employees may screen counsel's legal advice and communicate Whirlpool's business concerns to the agencies without revealing Whirlpool's confidential communications to its counsel. . . . Whirlpool does not allow its agencies the freedom to design advertisements without Whirlpool's internal marketing approval. Accordingly, even assuming arguendo that the Seventh Circuit would adopt the de facto employee test applied by other circuits -- which is not at all clear -- the factors delineated in Asia Pulp, 232 F.R.D. at 113 [Export-Import Bank of the United States v. Asia Pulp & Paper]

- A company's financial consultant who apparently never used an office made available to him in defendant's premises, and who was able to "start and build a successful consulting business" despite spending 80-85 percent of his time working on a restructuring deal for the defendant;²⁹
- Duke University official appointed by MIT to conduct an investigation into an MIT student's suicide;³⁰
- A former 25-year employee, now acting as a full-time consultant;³¹
- Employees of a company providing computing, consulting and other support services to credit card issuers, concluding the company "was merely a transaction processing and computer services corporation provided standard trade services" to the bank;³²
- An apartment complex's "managing agent";³³
- Employees of a consulting firm assisting GMAC in GMAC's investigation of the financial effect of the 9-11 attack on the World Trade Center;³⁴

Co., Ltd., 232 F.R.D. 103 (S.D.N.Y. 2005)], establish that Whirlpool's agencies do not qualify for the de facto exception.").

²⁹ Export-Import Bank of the United States v. Asia Pulp & Paper Co., 232 F.R.D. 103, 113-114 (S.D.N.Y. 2005).

³⁰ Carpenter v. MIT, No. 03-2660, 2005 Mass. Super. LEXIS 246, at *7-9 (Mass. Super. Ct. May 17, 2005).

³¹ Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equip. Res., Inc., Civ. A. No. 03-1496 c/w 03-1664 SECTION: "A" (4), 2004 U.S. Dist. LEXIS 10048, at *15 (E.D. La. June 2, 2004) ("The Court finds that Freeport has not carried its burden in setting forth sufficient facts for the Court to decide with a reasonable certainty that the attorney-client privilege is applicable here, as the court found in Bieter. For example, Freeport has not established, or attempted to establish, that Mr. Maduell holds himself out to be or is perceived by others as Freeport's representative. Nor has Freeport shown the Court, for instance, that Mr. Maduell is the intimate link with the development of Main Pass Energy Hub project, and the project is the sine qua non of Freeport's existence. As another example, Freeport does not assert that Mr. Maduell owns any equity interest in the Main Pass Energy Hub project. The above are some examples of the characteristics considered by the Bieter Court in determining that Mr. Klohs was more than an independent contractor for Bieter Company. Freeport's general contentions regarding Mr. Maduell's length of time in association with Freeport or the fact that he works in Freeport's office and assists with the development of the Main Pass Energy Hub project fall short of the findings in Bieter.").

³² In re Currency Conversion Fee Antitrust Litig., MDL No. 1409, M 21-95, 2003 U.S. Dist. LEXIS 18636, at *7 (S.D.N.Y. Oct. 21, 2003).

³³ Horton v. United States, 204 F.R.D. 670, 672 (D. Colo. 2002).

³⁴ SR Int'l Bus. Ins. Co. Ltd. v. World Trade Ctr. Props. LLC; World Trade Center Properties LLC, No. 01 Civ. 9291 (JSM), 2002 U.S. Dist. LEXIS 11949, at *13 (S.D.N.Y. July 3, 2002) ("The Harbor Group is a separate and independent corporation that provides consulting services to banks, lenders, and other corporate clients relating to insurance issues. . . . Just as this Court found with respect to the relationship

- Employees of the insurance broker for the World Trade Center's lessee, who participated in discussions with the lessee's employees after the 9-11 attack on the World Trade Center;³⁵
- Former Home Depot independent contractor.³⁶

Absent reliance on the "functional equivalent" doctrine or some other theory, it is difficult to imagine what privilege principle would protect such communications.

In fact, a troubling development in privilege law can prevent the privilege from protecting widespread communications even within the same corporation -- let alone within the joint venture which is not the lawyer's client.

The inclusion of extraneous employees in intra-corporate communications risks the privilege in one or more of three possible ways.³⁷ First the widespread circulation

between the Silverstein Parties and employees of Willis, there has been no showing on this motion . . . that the Harbor Group employees' roles were functionally equivalent to those employees of GMAC.").

³⁵ SR Int'l Bus. Ins. Co. Ltd. v. World Trade Ctr. Props. LLC; World Trade Center Properties LLC, No. 01 Civ. 9291 (JSM), 2002 U.S. Dist. LEXIS 10919 (S.D.N.Y. June 19, 2002); (addressing interactions between Silverstein's employees and employees of Willis, Silverstein's insurance broker; ultimately concluding that Willis employees were not the functional equivalent of the Silverstein employee).

³⁶ Miramar Constr. Co. v. Home Depot, Inc., 167 F. Supp. 2d 182, 185 (D.P.R. 2001) (holding that extending the privilege to such an independent contractor "would represent a tremendous expansion of the privilege beyond corporate employees to any individual contractually associated with a corporation on a full-time basis for some period of time. This Court declines to take such a path, in view of the important principle that the privilege is to be 'narrowly confined because it hinders the courts in the search for truth.'"(citation omitted)).

³⁷ Restatement (Third) of Law Governing Lawyers § 73 cmt. g (2000) ("The need-to-know limitation . . . permits disclosing privileged communications to other agents of the organization who reasonably need to know of the privileged communication in order to act for the organization in the matter. Those agents include persons who are responsible for accepting or rejecting a lawyer's advice on behalf of the organization or for acting on legal assistance, such as general legal advice, provided by the lawyer. Access of such persons to privileged communications is not limited to direct exchange with the lawyer. A lawyer may be required to take steps assuring that attorney-client communications will be disseminated only among privileged persons who have a need to know.) (citation omitted); The need-to-know properly extends to all agents of the organization who would be personally held financially or criminally liable for conduct in the matter in question or who would personally benefit from it, such as general partners of a partnership with respect to a claim for or against the partnership. It extends to persons, such as members of a board of directors and senior officers of an organization, whose general management and supervisory responsibilities include wide areas of organizational activities and to lower-echelon agents of the organization whose area of activity is relevant to the legal advice or service rendered."); In re General Instrument Corp. Sec. Litig., 190 F.R.D. 527, 531 (N.D. Ill. 2000) ("Other documents have distribution lists so vast, or that clearly involve outside third parties, that

could tend to demonstrate that the communication must have involved business rather than legal matters (and thus did not deserve privilege protection from the beginning). Second, the inclusion of the employees might destroy the important "expectation of confidentiality" element of any attorney-client privilege claim. Third, the widespread circulation could be seen as waiving the privilege.

The Southern District of New York dealt with this issue in Verschoth v. Time Warner Inc., No. 00 Civ. 1339 (AGS) (JCF), 2001 U.S. Dist. LEXIS 3174 (S.D.N.Y. Mar. 22, 2001), upheld in an opinion by U.S. District Court Judge Allen Schwartz, 2001 U.S. Dist. LEXIS 6693 (S.D.N.Y. May 22, 2001). In that case, the court found that Time

there can be no valid claim of confidentiality."; ordering a corporation which had been sued in a derivative action to produce privileged documents under the fiduciary exception and because the corporation had filed an inadequate privilege log); Alexander v. FBI, 186 F.R.D. 154, 162 (D.D.C. 1999) (in lawsuit arising from "Filegate" scandal, the court held that the attorney-client privilege covered a date book maintained by a Department of Defense employee; finding that attorney-client privilege did not protect from disclosure otherwise privileged information one Department of Defense employee shared with another, because the Department of Defense did not establish why the second employee was obligated to receive the information); Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 174 F.R.D. 609, 633 (M.D. Pa. 1997) ("The communications retain their privileged status if the information is relayed to other employees or officers of the corporation on a need to know basis. Only when the communications are relayed to those who do not need the information to carry out their work or make effective decisions on the part of the company is the privilege lost."); Nance v. Thompson Med. Co., 173 F.R.D. 178, 181, 184 (E.D. Tex. 1997) ("Disclosure of privileged communications to non-lawyers within the company involved in the subject matter of the communication does not waive the privilege. As long as the communication is made, either from client to attorney or attorney to client, for the purpose of facilitating or obtaining legal advice in the course of a professional relationship, that communication is privileged." (citation omitted); finding that the attorney-client privilege protected from disclosure documents distributed to a doctor "when he was a high-level employee of the defendant" but did not protect documents sent to the same doctor "when he was serving as an outside consultant, not an employee of the defendant"); Bank of New York v. Meridien Biao Bank Tanzania Ltd., No. 95CIV.4856(SS), 1996 WL 474177, at *2 (S.D.N.Y. Aug. 21, 1996) ("The burden is on the corporation asserting the privilege to show that it preserved the confidentiality of the communication by limiting dissemination only to employees with a need to know."; finding that "[t]he individuals who received copies of the memorandum were apparently vice presidents and an in-house attorney involved with the same issues" so "[d]istribution to this limited extent did not destroy the privilege"); Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 491 (S.D.N.Y. 1993) (holding that "disclosure of attorney confidences to corporate employees for purposes unrelated to the obtaining of legal services from the corporation's attorneys will vitiate the privilege," and warning that "[i]f a corporation wants the benefit of the privilege it should enforce a fairly firm 'need to know' of the communication rule."). See also ABA LEO 398 (Oct. 27, 1995) (a lawyer who allows a computer maintenance company access to the client's files must ensure that the company establish reasonable procedures to protect the confidentiality of the information in the files, and would be "well-advised" to secure the company's written assurance of confidentiality).

Warner could not assert privilege for communications to or from, or in the presence of, a former assistant managing editor of Sports Illustrated, who continued to provide freelance editing for the magazine. The otherwise privileged communications related to an employment discrimination case brought by a Time Warner employee, who was a long-time friend of the editor. The court held that the editor "had no managerial responsibilities" for the employment issues discussed at the meeting, and therefore "it was not necessary" for him to be involved in the meeting or in later communications. Id. at *8. The court also provided examples of the "need to know" standard.

The "need to know" must be analyzed from two perspectives: (1) the role in the corporation of the employee or agent who receives the communication; and (2) the nature of the communication, that is, whether it necessarily incorporates legal advice. To the extent that the recipient of the information is a policymaker generally or is responsible for the specific subject matter at issue in a way that depends upon legal advice, then the communication is more likely privileged. For example, if an automobile manufacturer is attempting to remedy a design defect that has created legal liability, then the vice president for design is surely among those to whom confidential legal communications can be made. So, too, is the engineer who will actually redesign the defective part: he or she will necessarily have a dialogue with counsel so that the lawyers can understand the practical constraints and the engineer can comprehend the legal ones. By contrast, the autoworker on the assembly line has no need to be advised of the legal basis for a charge [sic] in production even though it affects the worker's routine and thus is within his or her general area of responsibility. The worker, of course, must be told what new production procedure to implement, but has no need to know the legal background.

Id. at *6-7.

Another court even found that a company's distribution of a privileged memorandum to six corporate employees created "serious doubts" as to its privileged nature.³⁸

One recent decision highlighted this inherent risk.

In In re Vioxx Products Liability Litigation, 501 F. Supp. 2d 789 (E.D. La. 2007), a magistrate judge dealt with defendant Merck's privilege assertion for 30,000 documents (approximately 500,000 pages) out of the 2,000,000 documents Merck produced in the Vioxx case. Many if not most of the withheld documents are internal Merck e-mails.

Significantly, the magistrate judge adopted nearly in toto the Report of a Special Master he appointed to deal with privilege issues -- American University law professor Paul Rice, who is one of the country's leading authors and experts on privilege.

The Report recited the standard rule that in-house lawyers must make a "clear showing" that they are acting in a legal capacity, because in-house lawyers provide so many other types of advice. Id. at 797 (citation omitted). It then recognized that the problem of determining the in-house lawyer's role "has been exacerbated by the advent of e-mail that has made it so convenient to copy legal counsel on every communication that might be seen as having some legal significance at some time regardless of whether it is right for legal analysis." Id. at 798.

In contrast, the Report assumed that communications to and from Merck's outside lawyer involves legal advice "unless the content of the communications indicated otherwise." Id. at 813 n.12.

³⁸ Jonathan Corp. v. Prime Computer, Inc., 114 F.R.D. 693, 696 n.6 (E.D. Va. 1987).

The Report criticized Merck for failing to provide specific evidentiary support for withholding many of the e-mails, and also rejected what it called Merck's "pervasive regulation theory" -- under which all e-mails deserved privilege protection due to the pervasive nature of government regulation in the drug industry. Id. at 800. The Report likewise rejected Merck's "reverse engineering theory," under which the privilege would protect all electronic communications in which lawyers and nonlawyers participated in drafting a document (making their changes in the electronic document being exchanged) -- because an adversary can isolate nonlawyers' suggested changes from documents in their files, thereby determining by process of elimination what changes the lawyer made. Id. at 804.

Although these factors might have affected the Report's conclusions, most of the Report's analyses and presumptions would apply to any company in which lawyers and their clients communicate primarily by e-mail, and lawyers provide legal advice by making edits in documents that are being exchanged electronically.

In its discussion of the basic principles at play, the Report described several basic concepts:

- A communication or a draft document sent simultaneously to lawyers and nonlawyers "usually" does not deserve privilege protection, because its "primary purpose" is not legal advice. Id. at 805.
- Although the company might be able to withhold as privileged separate e-mail communications to and from only the lawyer, or references to the lawyer receiving a blind copy, the company generally cannot withhold communications that show the lawyer as one recipient among many (for the reason mentioned above).

The Report then listed several substantive guidelines the Special Masters used in making their privilege calls.

- The privilege protected e-mails "addressed solely to an attorney with apparently limited circulation and an identifiable legal question." Id. at 809.
- E-mails and attachments sent only to an in-house lawyer "for examination, review, comment, and approval" -- and the lawyer's response -- deserved privilege protection "unless the document on which the comments and changes were being proposed was not a typical legal instrument." Id. at 811.

The Report protected as privileged e-mail strings (and attachments) sent only to a lawyer for her review or advice, even if the underlying string would not intrinsically deserve privilege protection -- "on the assumption that the original messages and attachments were produced from the files of the original authors and recipients." In contrast, the privilege did not protect e-mails if "the integration of an attorney in the e-mail thread" was "through a communication that was sent to many for review and comment, including an attorney" -- because it would not then have been sent primarily for legal assistance. Id.

- E-mails sent to nonlawyers after a lawyer's involvement in the e-mail thread deserved privilege protection only if "it was clear that legal advice previously obtained was being circulated to those within the corporate structure who needed the advice," or if "the conveyance was by the lawyer" and it appeared that it was "for the purpose of acquiring more information" the lawyer needed. Id. at 811-12.
- The Report acknowledged that the privilege is more likely to protect e-mails that were copied rather than sent directly to nonlawyers, because "the possibilities were greater that copies were being sent simply to inform those recipients of the nature of the legal advice being sought." This rationale would not cover e-mails sent to nonlawyers as "part of a mandatory process of company-wide review, comment and approval." Id. at 812.
- Not surprisingly, non-substantive cover e-mails did not deserve privilege protection.
- Normally, each communication in an e-mail thread should have been independently logged. As the Report explained, "[s]imply because technology has made it possible to physically link these separate communications (which in the past would have been separate memoranda) does not justify treating them as one communication and denying the demanding party a fair opportunity to evaluate privilege claims raised by the producing party." Id.

The court's application of these basic principles proved a bit more forgiving than the remarkably harsh abstract statement, but the case nevertheless represents a

frightening condemnation of the approach many if not most corporations take when involving in-house lawyers in internal corporate communications.

The Middle District of Florida recently adopted the Vioxx approach in analyzing privilege claims of another drug company -- AstraZeneca. In re Seroquel Prods. Liability Litig., No. 6:06-md-1769-Orl-22DAB, 2008 U.S. Dist. LEXIS 39467 (M.D. Fla. May 7, 2008).

Other courts have explicitly criticized Vioxx. One court held that it was "hesitant to rely on the Vioxx case as persuasive authority" in the case before the court, because the Vioxx decision focused on Merck's "pervasive regulation" theory and "reverse engineering" theory that were not involved in the case before the court.³⁹

Similarly, another court held that an executive did not destroy the privilege protection by including "other high-level personnel" in communications to the company lawyer.⁴⁰ More recently, a court held that the circulation of draft 10-K language to those "directly concerned with the matter of the Form 10-K disclosures" did not destroy the privilege, because "[t]o disallow corporations the space to collectively discuss sensitive information with legal counsel would be to ignore the realities of large-scale corporate operation." Roth v. Aon Corp., 254 F.R.D. 538, 541, 542 (N.D. Ill. 2009).

To enhance the odds of successfully asserting privilege, in-house lawyers and their clients should clearly articulate (in the body of the communication) the legal nature of the communication. Ideally, in-house lawyers would establish separate lines of

³⁹ Southeastern Pa. Transp. Auth. v. CaremarkPCS Health, L.P., 254 F.R.D. 253, 261 n.3 (E.D. Pa. 2008) (internal quotations omitted).

⁴⁰ In re New York Renu, MDL No. 1785, 2008 U.S. Dist. LEXIS 88515, at *6-7 (D.S.C. May 6, 2008).

communications with the business persons needing their legal advice -- who would then act on the advice. For example, a business person drafting a contract would separately ask for the lawyer's input, then circulate the amended draft contract to others within the company who need to review it for non-legal purposes.

Of course, in-house lawyers must balance the company's interest in preserving the privilege with the efficiencies required in today's world. In-house lawyers might choose to have these separate communications only for critically important matters, essentially foregoing privilege protection for their more mundane communications or edits.

Cases such as this highlight the need to treat privileged communications like the "crown jewels" -- even within the company.

(b) It may be possible for a lawyer to jointly represent both members, but such an arrangement triggers all of the loyalty and information flow issues discussed above. Any dispute would also trigger the conflicts principles discussed above, and might well require the lawyer to withdraw from representing the client absent consent at the time or a very explicit prospective consent.

(c) For the reasons discussed above, a common interest agreement might not be available to assure privilege protection in the absence of litigation or anticipated litigation. A common interest agreement would also have to meet the other exacting standards discussed above, including the existence of an identical legal interest, and the participation of a lawyer in the communications sought to be protected.

Best Answer

The best answer to (a) is **MAYBE**; the best answer to (b) is **MAYBE**; the best answer to (c) is **PROBABLY NO**.

Effect of Adversity between Members

Hypothetical 7

Your company's use of a contract rather than an entity joint venture arrangement seems to be running off the tracks again, and adversity is developing between your company and the other member. Now you wonder where that leaves you.

- (a) If you have jointly represented both members in the joint venture in connection with third party matters, may you represent your company in a dispute with the other member?

NO

- (b) If your company entered into a common interest agreement with the other member related to threatened litigation with a third party, may you represent your company in a dispute with the other member?

MAYBE

Analysis

(a) As in all joint representations, a lawyer may not represent one jointly represented client adverse to another jointly represented client absent consent at the time or an explicit prospective consent.

(b) Perhaps surprisingly, lawyers representing participants in a common interest agreement might find themselves in exactly the same position as a lawyer who actually represents the other participants.

Lawyers for one common interest participant normally receive privileged and confidential communications from the other participants. Some courts have found that the receipt of this confidential and privileged communication essentially renders all of the participants in the common interest agreement "clients" for conflicts purposes. The

disqualifying effect of a lawyer's participation in a common interest arrangement depends on what confidential information the lawyer obtained as part of the arrangement.

As one court explained it, common interest agreement participants establish an "implied attorney-client relationship" with lawyers for the other participants.¹ Taking this to its logical extreme, some courts have held that a law firm wishing to take later positions adverse to those other participants cannot do so without their consent.²

In one case, a well-known law firm hired two lawyers who had been representing its adversary in litigation. Those lawyers obtained their client's consent to join the law firm and an agreement not to disqualify the law firm from representing the adversary. As part of this arrangement, the two lawyers were screened from the litigation once they joined the law firm. However, the two lawyers' client had been a participant in a common interest agreement. Other participants sought the law firm's disqualification, arguing that the firm also needed their consent to the arrangement. Even though the two lawyers had been completely screened from the litigation, the court disqualified the law firm.³

More recently, a lawyer who had represented one participant in a common interest arrangement later joined the law firm representing the plaintiff who had dismissed that participant from the lawsuit. Other participants moved to disqualify the

¹ United States v. Austin, 416 F.3d 1016, 1021(9th Cir. 2005).

² All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc., Nos. C-07-1200, -1207 & -1212, & C 06-2915, 2008 U.S. Dist. LEXIS 106619, at *34 (N.D. Cal. Dec. 18, 2008); In re Skiles, 102 S.W.3d 323 (Tex. Ct. App. 2003); GTE North, Inc. v. Apache Prods. Co., 914 F. Supp. 1575, 1581 (N.D. Ill. 1996).

³ In re Gabapentin Patent Litig., 407 F. Supp. 2d 607, 615 (D.N.J. 2005).

plaintiff's firm, arguing that the lawyer had also obtained their confidences as part of the common interest arrangement. The lawyer filed a declaration stating that he never spoke with any of the other participants while representing his former client and that he did not share any information about the case with any lawyer at the plaintiff's firm. Despite this declaration, and the fact the lawyer left the plaintiff's firm after only seven months, the court disqualified the plaintiff's law firm.⁴

One court has taken the opposite position. In a criminal case, that court refused to prevent one common interest agreement participant's lawyer from being adverse to another participant.⁵ The District of Columbia Bar has taken the same approach.⁶

Although courts seem not to have addressed it, common interest agreement participants should be able to vary these rules in the agreement itself. In essence, the common interest participants could each grant a prospective consent allowing the other participants' lawyers to take positions adverse to them. Clients can agree to such prospective consents, so common interest agreement participants should also be able to do so — especially because they share with the other participants only what they decide to share.

Lawyers would be wise to consider this risk and possible solution whenever they arrange for their clients' participation in a common interest agreement.

⁴ Meza v. H. Muehlstein & Co., No. B201427, 2009 Cal. App. Unpub. LEXIS 396 (Cal. Ct. App. Jan. 20, 2009).

⁵ United States v. Stepney, 246 F. Supp. 2d 1069, 1074-75 (N.D. Cal. 2003).

⁶ District of Columbia LEO 349 (9/2009).

Best Answer

The best answer to (a) is **NO**; the best answer to (b) is **MAYBE**.