BASIC CONFLICTS OF INTEREST RULES: PART I

Hypotheticals and Analyses*

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***** 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.

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General Rule -- Adversity to Current Clients

Hypothetical 1

You serve on a bar committee considering fundamental changes to your state's ethics rules. You have been asked to pick one of two basic conflicts rules that will govern a lawyer's adversity to a current law firm client.

What basic conflicts rule should apply to a lawyer's adversity to a current law firm client?

> A conflict exists only if lawyers at the firm are representing opposite sides in a transaction or in litigation.
>
> **A conflict exists whenever a lawyer becomes adverse to a current law firm client, even on a matter totally unrelated to the law firm's representation of that client.**

Analysis

Lawyers' conflicts of interest rules often seem counterintuitive and much too severe. However, the ABA Model Rules and all but one state (Texas) apply a per se standard in the most common conflicts context.

Direct Adversity

The ABA Model Rules recognize what they call "a concurrent conflict of interest" if

> the representation of one client will be directly adverse to another client

ABA Model Rule 1.7(a)(1).

Lawyers' duty of loyalty to their clients prohibits any lawyer in a law firm from taking a matter adverse to any current law firm client on any matter, even if the matter bears no relationship whatever to the law firm's work for that client.

- ABA Model Rule 1.7 cmt. [6] ("[A]bsent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.").

- ABA Model Rule 1.7 cmt. [7] ("Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.")

- ABA LEO 1495 (12/9/82) (without consent, a lawyer may not be adverse to a current client even on a matter unrelated to that on which the lawyer is representing the client).

The one jurisdiction taking a different position is (perhaps not surprisingly) Texas. That state follows the ABA Model Rules in prohibiting lawyers from representing opposite sides of the same litigated matter, but otherwise apparently allows lawyers to take matters adverse to current clients as long as the matters are not "substantially related" to the matter then being handled by the lawyer for that client.

> (a) A lawyer shall not represent opposing parties to the same litigation.
>
> (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
>
> > (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer[']s firm; or
> >
> > (2) reasonably appears to be or become adversely limited by the lawyer[']s or law firm's responsibilities to another client or to a third person or by the lawyer[']s or law firm's own interests.
>
> (c) A lawyer may represent a client in the circumstances described in (b) if:
>
> > (1) the lawyer reasonably believes the representation of each client will not be materially affected; and

> (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

Texas Rule 1.06(a)-(c).

Best Answer

There is no "best" answer, but the governing standard is the more restrictive view.

N 3/12; B 8/14

Conflicts Arising in the Course of a Representation

Hypothetical 2

You have represented the developer of a proposed office building for several years. The key zoning hearing will take place two weeks from now. One of your partners received a call this morning from a nearby landowner (whom your law firm represents on one unrelated matter). The landowner wanted to hire your firm to appear at the zoning hearing and oppose the development. Your partner knew enough to turn down the representation, but now you wonder what effect the landowner's actions will have on your long-standing representation of the developer.

Without the other landowner's consent, may you represent the developer at the upcoming zoning hearing?

NO (PROBABLY)

Analysis

This hypothetical comes from a July 2009 Philadelphia legal ethics opinion.[1] In Philadelphia LEO 2009-7, the bar held that the situation did not involve a "thrust upon"

[1] Philadelphia LEO 2009-7 (7/2009) (analyzing a situation in which a law firm had "for a long period of time" represented the builder of a proposed office building, but learned two weeks before a scheduled zoning presentation that a neighbor of the building (whom the law firm represented on unrelated matters) opposed the project; explaining the effect of the later-developing conflict; "[I]t is apparent that at the moment when the Neighbor Client determined that he or she was opposed to the project, and so advised a lawyer at the firm, a conflict developed under Rule 1.7(a)(1) in that the representation of the Developer Client was at that point directly adverse to another client. As of that moment, then, the law firm and the clients faced a difficult situation. Plainly, the law firm did the right thing by telling both clients immediately of the conflict and declining to accept the representation of the Neighbor Client in opposing the application."; "But that does not entirely resolve the problem in that the Neighbor Client remains a client of the firm, albeit in an unrelated matter having nothing to do with the development project, and Neighbor Client remains opposed to the project on which the law firm would be advancing the interests of the Developer Client. Even if the Neighbor Client is not represented by the law firm, he -- either himself or with the assistance of another lawyer -- will continue opposing the project, perhaps even appearing at the very tribunal before whom a lawyer from the inquirer's firm plans to present the Developer Client's proposal and advocate for its approval over the opposition of the Neighbor Client and others. It is even possible that the Neighbor Client would testify as to his or her views regarding the matter and could even be cross-examined by a lawyer from the law firm."; explaining that the law firm had three choices: (1) withdraw from representing the developer in the project; (2) withdraw from representing the developer in litigation or some other administrative matters in which the neighbor might appear; (3) seek a waiver from the neighbor; explaining that the law firm might be able to arrange for some other lawyer to cross[-]examine the neighbor at any hearing; "[I]t could even reach the point where the Neighbor Client would have to be cross[-]examined by a member of the law firm. That could perhaps be remedied by having any cross[-]examination handled by another law firm brought in for that purpose."; holding that the

conflict -- which would relieve the lawyer of a duty to withdraw because the conflict arose from an unforeseen client action.

> The Committee does not believe that the thrust upon exception permits the law firm to withdraw from the representation of the Neighbor Client because the conflict that arose is not an 'unforeseeable development,' as that term is used in the comment. When the law firm accepted the representation of the developer with the idea of undertaking the project at issue, it was foreseeable that at some point in the future persons could emerge to oppose the project. That is inherent in a real estate development project over the time it is designed and promoted."; "It is true, of course, that the specific identity of such a client or clients may not have been ascertainable at the time of the Developer Client's engagement of the firm, but the Committee believes that under all the circumstances -- that is, where the law firm in question is large and has many clients, some of whom can reasonably be expected to live in proximity to the development project -- the development of such conflicts is not unforeseeable, and is a risk that law firms take on in the course of doing business.

Philadelphia LEO 2009-7 (7/2009).

The Philadelphia Bar addressed the issue as a regular conflict, although it arose after the law firm had represented its developer client "for a long period of time."

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law firm could not drop the neighbor as a client in order to avoid a conflict; "The hot potato rule in general disallows a law firm from discharging a client for the purpose of eliminating a conflict where it desires to accept the representation of another client. This rule is a salutary one in that it prevents law firms from violating a duty of loyalty to a client that already exists in favor of a perhaps more lucrative client relationship."; finding the "thrust upon" doctrine inapplicable; "The Committee does not believe that the thrust upon exception permits the law firm to withdraw from the representation of the Neighbor Client because the conflict that arose is not an 'unforeseeable development,' as that term is used in the comment. When the law firm accepted the representation of the developer with the idea of undertaking the project at issue, it was foreseeable that at some point in the future persons could emerge to oppose the project. That is inherent in a real estate development project over the time it is designed and promoted."; "It is true, of course, that the specific identity of such a client or clients may not have been ascertainable at the time of the Developer Client's engagement of the firm, but the Committee believes that under all the circumstances -- that is, where the law firm in question is large and has many clients, some of whom can reasonably be expected to live in proximity to the development project -- the development of such conflicts is not unforeseeable, and is a risk that law firms take on in the course of doing business.").

> [I]t is apparent that at the moment when the Neighbor Client determined that he or she was opposed to the project, and so advised a lawyer at the firm, a conflict developed under Rule 1.7(a)(1) in that the representation of the Developer Client was at that point directly adverse to another client. As of that moment, then, the law firm and the clients faced a difficult situation. Plainly, the law firm did the right thing by telling both clients immediately of the conflict and declining to accept the representation of the Neighbor Client in opposing the application."; "But that does not entirely resolve the problem in that the Neighbor Client remains a client of the firm, albeit in an unrelated matter having nothing to do with the development project, and Neighbor Client remains opposed to the project on which the law firm would be advancing the interests of the Developer Client. Even if the Neighbor Client is not represented by the law firm, he -- either himself or with the assistance of another lawyer -- will continue opposing the project, perhaps even appearing at the very tribunal before whom a lawyer from the inquirer's firm plans to present the Developer Client's proposal and advocate for its approval over the opposition of the Neighbor Client and others. It is even possible that the Neighbor Client would testify as to his or her views regarding the matter and could even be cross-examined by a lawyer from the law firm.

Id. The Philadelphia Bar held that the law firm could not cure the conflict by dropping the landowner as a client.

> The hot potato rule in general disallows a law firm from discharging a client for the purpose of eliminating a conflict where it desires to accept the representation of another client. This rule is a salutary one in that it prevents law firms from violating a duty of loyalty to a client that already exists in favor of a perhaps more lucrative client relationship.

Id.

The bar ultimately explained that the law firm had three choices: (1) withdraw from representing the developer in the project; (2) withdraw from representing the developer in litigation or some other administrative matters in which the neighbor might

appear (although the law firm might be able to arrange for some other lawyer to cross-examine the neighbor at any hearing); (3) seek a waiver from the neighbor.

This frightening scenario highlights the need for lawyers to carefully check conflicts when they begin a matter, monitor the matter as it proceeds, and be prepared to deal with any conflict that arises during the course of the representation.

This type of last-minute conflict can arise in real life, not just theorized in a legal ethics opinion. In 2013, the well-known Cooley law firm discovered that it had a conflict just a few days before it was to start a jury trial.

- Jan Wolfe, Did Conflicts Derail Patent Trial Against Research in Motion?, AmLaw Litig. Daily, Mar. 6, 2013 ("A team of patent litigators from Cooley LLP arrived Monday morning at the federal courthouse in Dallas prepared to kick off a jury trial against Research in Motion (RIM) Ltd. Instead, a judge postponed the trial and told the Cooley lawyers and their adversaries at Sidley Austin and McDermott Will & Emery that they could go home."; "The lawyers won't tell us why the trial was called off, and the judge's one-paragraph order postponing the proceedings doesn't give a reason. But recently filed court papers do offer some clues, describing how Cooley may have discovered a crippling client conflict at the eleventh hour."; "Cooley's client in the case is Innovative Sonic, a non-practicing entity that claims RIM's Blackberry smartphones infringe three of its patents. But Cooley also has a longtime client relationship with Qualcomm Inc., which makes mobile chipsets that power some of RIM's Blackberry devices. Other Blackberry smartphones use chipsets manufactured by Marvell Technology Group Ltd. "; "The infringement suit against RIM involves Blackberrys with both types of chipsets. And that, according to an emergency motion Cooley filed on Sunday, turns out to be a big problem."; "The firm told United States District Judge Ed Kinkeade that a month before trial, RIM's lawyers made source code available to Innovative Sonic that RIM was supposed to have produced more than a year ago. Based on experts' review of the code, the Cooley lawyers argued in Sunday's motion that if infringement occurs in the Qualcomm-related devices, it occurs as the result of the operation of Qualcomm chipsets that aren't modified by RIM. That means that Innovative Sonic can't accuse RIM of infringement without also leveling the same accusation at one of Cooley's own clients.").

Cooley's conflict appeared to involve a severe type of positional adversity (involving factual rather than legal matters). However, last-minute conflicts can arise in

more direct circumstances. For instance, lawyers representing a hospital in defending against a malpractice case might discover late in the discovery process that the individual responsible for some error was not employed by the hospital -- but rather worked for an independent contractor that the law firm represents on unrelated matters. Because the lawyers' other client might face liability for its employee's error, the lawyers representing the hospital would be unable (absent consent) to pursue a legal remedy against the other client or even "point the finger" at the other client.

Best Answer

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

N 3/12; B 8/14

"Thrust Upon" Conflicts

Hypothetical 3

For the past three years, you have represented a car dealership in bitter litigation against a sub-prime lender. You just learned this afternoon that one of your firm's bank clients plans to purchase the sub-prime lender, and make it a division of the bank.

Will this purchase create a conflict for you, requiring the bank's consent to your continued representation of the car dealership?

MAYBE

Analysis

In some situations, clients unintentionally (or perhaps even intentionally) create conflicts -- usually by engaging in some corporate transaction. For instance, lawyers vigorously litigating against a defendant company will immediately face a conflict if another law firm client buys the defendant company. If that occurs, the lawyers will find themselves litigating against a client the firm represents on unrelated matters.

Applying the standard unforgiving conflicts rule does not seem fair to the client whom the lawyer has been vigorously representing. And applying the rule also seems unfair to the lawyers, who have not contributed to the conflict in any way.

The ABA Model Rules recognize that in certain limited situations lawyers facing this dilemma may be able to withdraw from the representation to cure such a conflict.

> Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict.

ABA Model Rule 1.7 cmt. [5]. Thus, the ABA Model Rules apparently still prohibit the lawyer from such acute adversity against the client which has triggered the conflict, but permit the lawyer to drop the client. This might solve the lawyers' technical ethics problem, but could create obvious business issues if lawyers can resolve a conflict only by dropping an important law firm client.

The Restatement takes the same basic approach.

> A lawyer may withdraw in order to continue an adverse representation against a theretofore existing client when the matter giving rise to the conflict and requiring withdrawal comes about through initiative of the clients. An example is a client's acquisition of an interest in an enterprise against which the lawyer is proceeding on behalf of another client. However, if the client's acquisition of the other enterprise was reasonably foreseeable by the lawyer when the lawyer undertook representation of the client, withdrawal will not cure the conflict. In any event, continuing the representation must be otherwise consistent with the former-client conflict rules.

Restatement (Third) of Law Governing Lawyers discusses this issue in § 132 cmt. j (2000).

Washington, D.C., ethics rules recognize the same dilemma, but prescribe exactly the opposite solution -- permitting the lawyer to keep representing the existing client rather than having to withdraw from representing the suddenly adverse client.

> If a conflict not reasonably foreseeable at the outset of representation arises . . . after the representation commences, and is not waived . . . , a lawyer need not withdraw from any representation [unless the conflict would adversely affect the lawyer's judgment].

Washington D.C. Rule 1.7(d).

Some jurisdictions seem to recognize both possible remedies.

- Orange County, Cal., LEO 2012-01 (2012) ("Assuming a conflict of interest is created for Attorney A due to Big Bio's [company which acquired a lawyer's client Small Bio] acquisition of Small Bio [law firm's client on matters unrelated to Big Bio's litigation against LTC] on the one hand, and Big Bio's litigation against LTC [law firm's other current client], on the other, and assuming Attorney A cannot obtain informed written consent waivers to address this conflict: Attorney A may withdraw from representing either LTC or Big Bio if he complies with his ethical duties regarding withdrawal from representation; and Attorney A may ethically withdraw from representing one client and continue to represent the other if he has received no confidential information from the now-former client that is substantially related to the matter in which representation is ongoing.").

The New York City Bar discussed this issue in depth, taking an equally broad view of possible solutions. In New York City LEO 2005-05 (6/05),[1] the New York City Bar explained that

> When, in the course of continuing representation of multiple clients, a conflict arises through no fault of the lawyer that was not reasonably foreseeable at the outset of the representation, does not involve the exposure of material confidential information, and that cannot be resolved by the

[1] New York City LEO 2005-05 (6/2005) (addressing what are called "thrust upon" conflicts; "When, in the course of continuing representation of multiple clients, a conflict arises through no fault of the lawyer that was not reasonably foreseeable at the outset of the representation, does not involve the exposure of material confidential information, and that cannot be resolved by the consent of the clients, a lawyer is not invariably required to withdraw from representing a client in the matter in which the conflict has arisen. The lawyer should be guided by the factors identified in this opinion in deciding from which representation to withdraw. In reaching this decision, the overarching factor should be which client will suffer the most prejudice as a consequence of withdrawal. In addition, the attorney should consider the origin of the conflict, including the extent of opportunistic maneuvering by one of the clients, the effect of withdrawal on the lawyer's vigor of representation for the remaining client, and other factors mentioned in this opinion."; analyzing among other things whether there is a "concurrent conflict" if a lawyer represents a corporation and takes a matter adverse to one of the client's affiliates; also noting that "many courts have applied a flexible approach to 'thrust upon' situations that focuses on balancing the interests of all affected parties rather than mechanically applying the 'hot potato' rule to prevent a lawyer from withdrawing from one client in order to continue representing the other"; listing various factors the lawyer must analyze; "First, the conflict must be truly unforeseeable. . . . Second, the conflict must truly be no fault of the lawyer. . . . Third, the conflict must be between concurrent clients. . . . Of course, attorneys must keep in mind that the continued representation of one client after withdrawing from the other must still satisfy DR 5-108, the rule governing former client conflicts. . . . Finally, implementation of the balancing test for thrust upon conflicts must be performed in good faith. Where the attorney's decision regarding withdrawal appears opportunistic, for example the retained client generates significantly more fees than the dropped client and there are no other factors that weigh in favor of retaining that client, any insistence that the conflict was thrust upon the lawyer, or protestations of prejudice to the major client, may be viewed skeptically.").

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Id. Earlier in its opinion, the New York City Bar explained some of the factors.

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Id.

The ethics opinion presented two scenarios. The first involved the following facts:

> A law firm represents Client A in a breach of contract suit against Company B. During the pendency of that suit, Client C, a longtime ongoing client of the law firm, acquires Company B in a stock sale, and Company B becomes a wholly owned subsidiary of Client C. The law firm (which does not represent Client C in the acquisition of B) informs Clients A and C that it wishes to continue to represent each of them in their respective matters. Client A consents to a conflict of interest waiver, but Client C does not. May the

> law firm continue to represent at least one client, and if so, may the law firm choose which client to represent?

Id. The ethics opinion presented a fairly elaborate answer, requiring the lawyer to determine which client would be most prejudiced by the lawyer's withdrawal.

> [I]n Scenario 1, the law firm would first need to determine who would be most prejudiced by the withdrawal. This would depend in part on the complexity of the breach of contract suit against B and how close to trial the suit is. The closer the suit is to trial, the more Client A would be prejudiced if the law firm withdrew from representation. In contrast, if the law firm had only recently been retained to represent Client A in the breach of contract suit and had yet to engage in extensive discovery, the prejudice to Client A from withdrawal would not be as great. Other factors that would determine which client would be most prejudiced involve, for example, the financial costs to each and whether the lawyer has acquired material confidential information that could be used against the client from whom the lawyer withdraws. In addition, because Client C created the conflict, the law firm should question whether Client C is seeking to use the conflict as leverage to force the law firm off the case involving Client A. As noted in Installation Software, [Installation Software Techs., v. Wise Solutions, 2004 WL 524829 at *4 (N.D. Ill. 2004)] a 'conflict by acquisition' should not give the acquiring client a means to strategically disadvantage Client A, who is in effect an innocent bystander with respect to Client C's acquisition of Client A's adversary (Company B). More broadly, we believe that it will generally appear fairer and more understandable to a client whose lawyer withdraws because of a conflict if the client's action gave rise to the conflict in the first place. At the same time, if Client C is a large, important client of the firm, the law firm must be wary in applying the balancing test that it is not motivated by purely economic factors to retain Client C. After weighing all of the factors, if the law firm decides that the balancing test favors Client C, it should inform Client A that due to a conflict of interest it must withdraw from representing that client in the law suit against Company B. If the law firm concludes that the factors weigh in favor of Client A, it should inform Client C that it will not withdraw from representing Client A in the breach of contract suit. At that point, it will be up to Client C to decide whether

> it wishes to consent to the conflict after all, or terminate its relationship with the law firm.

Id.

The legal ethics opinion's second scenario presented a slightly different factual setting.

> A law firm has advised Client A for several years regarding various intellectual property licensing issues. The law firm has also advised Client B for several years on general corporate transactional matters not involving intellectual property licensing, including current negotiations with Company C to form a joint venture. During the course of those negotiations, Client A acquires Company C. Upon learning of the merger, the law firm seeks to obtain conflict of interest waivers from Clients A and B so that it may continue to represent both clients in their respective matters. Client A agrees to provide the necessary conflict of interest waiver, but Client B does not. May the law firm continue to represent at least one of the clients, and if so, may the law firm choose which client to represent?

Id. Interestingly, the ethics opinion did not provide an answer to that scenario.

The ethics opinion concluded with several suggestions for how lawyers can avoid a "thrust upon" conflict dilemma.

> Lawyers may take several steps to anticipate and potentially avoid concurrent client conflicts. In particular, some conflicts may be avoided by obtaining advance consents from clients to waive conflicts that may come up in the future. Of course, the fact that 'thrust upon' conflicts by definition are not reasonably foreseeable may make it particularly difficult in some cases to obtain enforceable advance waivers. Nonetheless, in appropriate instances clients can give informed and therefore effective waivers in advance to a sufficiently described set of circumstances without necessarily knowing all details or the identity of the other client. See N.Y. City Eth. Op. 2004-02 (the lawyer seeking an advance waiver should be as specific as possible regarding the types of possible future adverse representations, the types of matters that might present conflicts, and at least the class of potentially conflicted

> clients); see also N.Y. County Eth. Op. 724 (1998); ABA Formal Op. No. 93-372 (1993). In addition, attorneys may be able to draft the letter of engagement to avoid uncertainty as to whether the representation is ongoing or not, and who is the client. For example, the lawyer could clarify that he or she only represents the client in a particular area or for a particular matter, and representation in any other matter would necessitate a separate agreement. Similarly, the lawyer could clarify that he or she represents only specified entities within the corporate family, and not current or future affiliates.

Id. (footnote omitted).

At least one court has relied on these principles in declining to disqualify a law firm that would otherwise have faced an insoluble conflict.

- Commonwealth Scientific & Indus. Research Corp. v. Toshiba Am. Info. Sys., Inc., 297 F. App'x 970, 974 (Fed. Cir. 2008) (unpublished opinion) (refusing to disqualify the intellectual property firm of Townsend and Crew, despite the firm's simultaneous representation of Marvell [defendant] in an action adverse to CSIRO while simultaneously representing CSIRO in other matters; relying upon the "'thrust upon'" exception to the "'hot potato'" rule -- which appears in ABA Model Rule No. 1.7 comment 5; finding that Townsend could rely on the conflict "thrust upon" it by its client Marvell's tardy disclosure of an indemnity agreement between it and CSIRO).

On the other hand, some courts disqualify law firms in this situation.

- Beth Winegarner, O'Melveny DQ'd By Conflict of Interest Synopsys IP Row, Law360, Mar. 7, 2014 ("A California federal judge on Friday barred O'Melveny & Myers LLP from defending ATopTech Inc. against Synopsys Inc.'s patent-infringement suit over electronic design automation, saying O'Melveny's discussions about one of the asserted patents with a corporate client that Synopsys later bought created a conflict. United States District Court Judge Maxine Chesney said from the bench that because O'Melveny conceded that they discussed Synopsys' United States Patent Number 6,237,127 while representing Magma Design Automation Inc. in an earlier case, the law bars them from representing ATopTech, which Synopsys accuses of infringing the '127 patent. There's also strong evidence that another Synopsys patent in the case, United States Patent Number 6,507,941, also came up in O'Melveny's talks with Magma, the judge said. 'Once you get talking, you talk about everything,' Judge Chesney said. 'It's a long relationship O'Melveny had with Magma . . . and I would expect it would be equally thorough in this situation [with ATopTech], in terms of what they would explore.' Although

> Judge Chesney said on a personal level she would prefer not to change counsel partway through the case, under the circumstances, 'I think the law requires it.' O'Melveny & Myers represented Magma for nearly a decade in a series of patent cases related to electronic design automation, Magma's bread and butter, Synopsys argued in its motion to disqualify. Synopsys bought Magma --- along with all of its intellectual property -- in 2012, court records show.").

The court's decision to disqualify O'Melveny might have rested on the information issue, which nearly always creates more troublesome conflicts dilemma than the loyalty issue.

Best Answer

The best answer to this hypothetical is **MAYBE**.

B 8/14

Lawyer-Caused Conflicts

Hypothetical 4

One of your partners currently represents your firm's largest client (a bank) in litigation against a borrower. The borrower has been represented by a boutique litigation firm, although a corporate firm in your building performs nearly all of the borrower's transactional work. You just heard that your firm's management has discussed merging with the corporate law firm.

Would a merger between your firm and the corporate law firm create a conflict (thus requiring the borrower's consent to your continued representation of the bank in your litigation)?

YES

Analysis

Unlike unforeseeable client-caused mergers or other corporate transactions that create a conflict, most courts and bars use a traditional conflicts analysis when assessing the effect of a law firm merger. Picker Int'l, Inc. v. Varian Associates, Inc., 869 F.2d 578 (Fed. Cir.1989); Harte Biltmore Ltd. v. First Pennsylvania Bank, 655 F. Supp. 419, 421 (S.D. Fla. 1987).

Similarly, Restatement (Third) of Law Governing Lawyers § 132 Reporter's Note cmt. j (2000) explains that "[c]ourts have shown much less willingness to accept withdrawal as a cure to conflicts created by mergers of law firms."

Courts take the same approach.

- Patton Boggs, LLP v. Chevron Corp., 791 F. Supp. 2d 13 (D.D.C. 2011) (rejecting Patton Boggs' request for a declaratory judgment that it did not have a conflict in representing adversaries of Chevron Corp., because the law firm had acquired a lobbying and consulting organization that had earlier assisted Chevron in a related matter).

Best Answer

The best answer to this hypothetical is **YES**.

B 8/14

Partnerships

Hypothetical 5

You occasionally represent a law firm in your city on labor and employment matters (your work has not given you any information about the law firm's finances). The firm has five partners and ten associates. You have met all of the firm's lawyers at social functions, but deal primarily with one of the partners. One of your partners just told you that the wife of another partner at that firm wants to hire your firm to file a divorce action against her husband.

May your firm represent the wife in suing one of your law firm client's partners for divorce (without that partner's consent)?

YES (PROBABLY)

Analysis

This hypothetical poses a question related to those dealing with corporations. Here, the question is whether a lawyer representing a partnership also represents -- for conflicts of interest purposes -- the partners.

The ABA has analyzed the ethical rules governing lawyers representing partnerships. In ABA LEO 361 (7/12/91), the ABA concluded that "[t]here is no logical reason to distinguish partnerships from corporations or other legal entities in determining the client a lawyer represents." Thus, "[a]n attorney-client relationship does not automatically come into existence between a partnership lawyer and one or more of its partners."

> [A] lawyer undertaking to represent a partnership with respect to a particular matter does not thereby enter into a lawyer-client relationship with each member of the partnership, so as to be barred, for example, . . . from representing another client on a matter adverse to one of the partners but unrelated to the partnership affairs.

Id.[1]

A California court has also held that "an attorney representing a partnership does not necessarily have an attorney-client relationship with an individual partner for purposes of applying the conflict of interest rules." Responsible Citizens v. Superior Court, 20 Cal. Rptr. 2d 756, 758 (Cal. Ct. App. 1993). The court rejected the "bright line rule that an attorney representing a partnership automatically represents each individual partner." Id. at 765. Accord Eurycleia Partners, LP v. Seward & Kissel, LLP, 910 N.E.2d 976, 981 (N.Y. 2009) ("We therefore hold that S&K's representation of this limited partnership, without more, did not give rise to a fiduciary duty to the limited partners. Hence, plaintiffs' breach of fiduciary duty claim against S&K was properly

[1] ABA LEO 361 (7/12/91) (explaining that a lawyer who represents a partnership does not automatically represent all of the individual partners, although the lawyer can establish a separate representation of the partners with disclosure and consent about the possible conflicts; also answering the following question: "Under what circumstances does information received by the partnership's lawyer from an individual partner constitute 'information relating to representation' of the partnership within the meaning of the Rule 1.6(a) so as to give the partnership a right to access to that information; and conversely, to what extent is each partner entitled to know whatever information has been conveyed on the partnership's behalf to the partnership's lawyer?"; concluding that "the Committee believes that information received by a lawyer in the course of representing the partnership is 'information relating to the representation' of the partnership, and normally may not be withheld from individual partners"; noting that this general rule would not apply "if the lawyer were representing the partnership in a dispute between the partnership and one or more individual partners"; noting that the issue of confidentiality "will often arise when the lawyer for a partnership also represents an individual partner, or a client adverse to the interests of an individual partner"; citing several cases in which a lawyer representing a partnership could not withhold information from any partner in an action by one of the partners to dissolve the partnership; holding that a lawyer representing a closely held corporation could not claim attorney-client privilege in withholding information about the communication between a lawyer and one of the officers (and co-owners) in an action brought in connection with the ouster of a second officer (and other co-owner); "The mandate of Rule 1.6(a), not to reveal confidences of the client, would not prevent the disclosure to other partners of information gained about the client (the partnership) from any individual partner(s). Thus, information thought to have been given in confidence by an individual partner to the attorney for a partnership may have to be disclosed to other partners, particularly if the interests of the individual partner and the partnership, or vis-a-vis the other partners, become antagonistic."; explaining that lawyers should define their role at the beginning of the representation; "If an attorney retained by a partnership explains at the outset of the representation, preferably in writing, his or her role as counsel to the organization and not to the individual partners, and if, when asked to represent an individual partner, the lawyer puts the question before the partnership or its governing body, explains the implications of the dual representation, and obtains the informed consent of both the partnership and the individual partners, the likelihood of perceived ethical impropriety on the part of the lawyer should be significantly reduced.").

dismissed."); Kline Hotel Partners v. AIRCOA Equity Interests, Inc., 708 F. Supp. 1193 (D. Colo. 1989) (holding that a general partnership's lawyer did not have an attorney-client relationship with the partnership's 50% general partner).

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.

B 6/14

Government Entities

Hypothetical 6

You joined your state's attorney general's office immediately after law school, and have developed an interesting practice representing state-operated colleges. One of your college clients just asked for your help in pursuing a matter adverse to another state entity (which funds and processes state employee health care claims). You have never worked for the state health care agency.

May you represent the state-operated college in a matter adverse to the state-operated health plan?

YES (PROBABLY)

Analysis

The question here is whether a lawyer's representation of one arm of the government precludes the lawyer's involvement in matters adverse to other arms of the government.

The ABA addressed this issue in ABA LEO 405 (4/19/97).[1] The ABA explained that determining whether a lawyer may represent one government entity while being adverse to another depends upon "whether the two government entities involved must be regarded as the same client" or whether one representation may be "materially

[1] ABA LEO 405 (4/19/97) (Determining whether a lawyer may represent one government entity while being adverse to another depends upon "whether the two government entities involved must be regarded as the same client" or whether one representation may be "materially limited" by the other, in which case the conflict might be curable with consent. Determining if governmental entities are the same client is a "matter of common sense and sensibility" including such factors as: entities' understandings and expectations; any understanding between the entities and the lawyers; whether the government entities have "independent legal authority with respect to the matter for which the lawyer has been retained"; and the entities' stake in the substantive issues or shared concerns about the outcome. Determining if one representation would be "materially limited" by another representation depends on whether the matter would affect the "financial well-being or programmatic purposes" of either client. In some situations, a lawyer's representation of a government entity "on an important issue of public policy so identifies her with an official public position" that the lawyer could not oppose the government, even on an entirely unrelated matter. (internal quotations and citations omitted)).

limited" by the other, in which case the conflict might be curable with consent. The ABA also explained that determining if governmental entities are the same client is a "matter of common sense and sensibility" including such factors as: entities' understandings and expectations; any understanding between the entities and the lawyers; whether the government entities have "independent legal authority with respect to the matter for which the lawyer has been retained"; the entities' stake in the substantive issues or shared concerns about the outcome. In discussing adversity, the ABA explained that determining if one representation would be "materially limited" by another representation depends on whether the matter would affect the "financial well-being or programmatic purposes" of either client. In some situations, a lawyer's representation of a government entity "on an important issue of public policy so identifies her with an official public position" that the lawyer could not oppose the government, even on an entirely unrelated matter.

The Restatement (Third) of Law Governing Lawyers § 97 cmt. c (2000) acknowledges that a government lawyer ultimately represents the public, but notes that such a definition is "not helpful." The Restatement proposes as the "preferable approach" an arrangement regarding "the respective agencies as the clients" and the lawyers representing those agencies "as subject to the direction of those officers authorized to act in the matter involved in the representation." The Restatement concludes that "[i]f a question arises concerning which of several possible governmental entities a government lawyer represents, the identity of the lawyer's governmental client depends on the circumstances."

One Illinois LEO took exactly the same approach.

- Illinois LEO 07-01 (7/2007) ("Because state government is not one entity composed of all departments under the jurisdiction of the Governor for purposes of resolving conflict of interest questions, a lawyer may represent one state government agency while representing a private party adverse to another state government agency."; "But, we caution this does not mean that each state governmental agency is necessarily a separate entity from every other state governmental agency. On a case-by-case basis additional information must be considered, such as 'whether or not each government entity has independent legal authority to act on the matter in question, and whether representation of one government entity has any importance to the other government entity.' ISBA Op. No. 01-07, citing ABA Formal Opinion 97-405 (the identity of a government client is partly a matter of 'common sense and sensibility' requiring an analytical approach looking at 'functional considerations as how the government client presented to the lawyer is legally defined and funded, and whether it has independent legal authority with respect to the matter for which the lawyer has been retained'). Additionally, one needs to consider 'whether or not decision makers within the government agencies with whom the lawyers would be working were one and the same.'").

A New York City LEO provided less guidance.

- New York City LEO 2004-03 (9/17/04) ("Government lawyers are subject to the rules that ordinarily govern the attorney-client relationship, including those governing conflicts of interest and entity representation. This opinion addresses various questions relating to government lawyers' conflicts of interest in civil litigation. The questions may ultimately be analyzed differently for government lawyers than for lawyers who represent private entity clients because of the legal framework within which government lawyers function. Questions such as who the lawyer represents, who has authority to make particular decisions in the representation, and whether the lawyer may represent multiple agencies with differing interests are largely determined by the applicable law. In dealing with government officers and employees, the government lawyer must comply with DR 5-109 and DR 5-105, as informed by applicable law. If the agency constituents are unrepresented, DR 5-109 requires the lawyer to clarify his or her role, as well as to report any discovered wrongdoing, as described in this opinion. When the government lawyer proposes to represent the constituent, a threshold question is whether the representation will be in the constituent's official or personal capacity. If the constituent would be represented personally, the lawyer must first determine whether the representation is permissible under the conflict of interest rule, DR 5-105, and the lawyer must comply with the rule's procedural requirements in light of the framework described in this opinion.").

A number of states have issued opinions dealing with the nature of multiple public defenders or legal services offices. The nature of those government lawyers' status can become important in a conflicts analysis if one of those offices takes a matter against a client represented by another office, or if one lawyer's individual disqualification might be imputed to all of the other offices.

In these opinions, the bars have held that the offices should not be considered "one firm" for imputation purposes.

- Ohio LEO 2010-5 (8/13/10) ("The assistant state public defenders in the state public defender's central appellate office located in the state's capital city and the assistant state public defenders in the state public defender's trial branch offices located in four different counties are not automatically considered lawyers associated in a firm for purposes of imputing conflicts of interest under Prof. Cond. Rule 1.10(a)."; "There is not a per se conflict of interest when an appellate assistant state public defender in the central appellate office conducts a merit review, asserts an appeal, or pursues a postconviction remedy asserting that another assistant state public defender in a branch office rendered ineffective assistance at trial."; "Under the organizational structure of the State Public Defender of Ohio, the central appellate office is separate from the trial branch offices located in four different counties. The four trial branch offices are described as 'essentially independent entities that have limited contact with the appellate attorneys' in the central office. The database of the central appellate office is separate from a trial branch office's database. The central office and the trial branch offices share Internet Technology support, the appellate attorneys do not have access to a trial branch office database. Each trial branch office has a branch office attorney director.").

- Virginia LEO 1776 (5/19/2003) (explaining that each jurisdiction's Public Defender and each jurisdiction's Capital Defense Unit should be considered separate legal entities for conflicts purposes, because each office acts independently, has a secure computer system and bears none of the indicia of offices in a multi-office law firm; noting that although a single state Commission oversees all of the offices, this fact should not result in a presumption that information in one office is shared with other offices; concluding that a Public Defender in an office may represent a capital defendant in a matter adverse to a client formerly represented by another lawyer in that office, "unless the defense of the current client would require the use of [protected] information obtained in the representation of the former client").

- North Carolina LEO 99-3 (4/23/99) (pointing to a North Carolina comment in explaining that "lawyers in different field offices of Legal Services of North Carolina may represent clients with materially adverse interests provided confidential information is not shared by the lawyers with the different field offices").

Courts generally take the same approach. For instance, in Brown & Williamson Tobacco Corp. v. Pataki, 152 F. Supp. 2d 276 (S.D.N.Y. 2001), the court refused to disqualify the law firm of Covington & Burling from representing plaintiff Brown & Williamson in a lawsuit against New York State, despite the law firm's long-term representation of New York state agencies on unrelated matters. The court explained that the identity of the law firm's client was not necessarily determined by the agency with which the law firm contracted, or the fact that the law firm's bills are directed to "State of New York." The court eschewed a "formalistic" approach, and instead found that "the agencies responsible for the matters specified in [the law firm's] contract are its clients." Id. at 287.

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.

B 6/14

Associations

Hypothetical 7

You have been asked to represent an association of companies based in your state's capital. This is a plum assignment, and you think it might give you a real marketing opportunity -- because you will have the chance to "schmooze" many potential clients at regular meetings of the association. However, one of your partners worries that there might be a downside risk to representing the association, because it might prevent your firm from being adverse to association members.

If your law firm represents the association, may you take matters adverse to individual members of the association (without their consent)?

YES (PROBABLY)

Analysis

This hypothetical also involves the difficult question of determining the client's identity.

Most authorities hold that a lawyer who represents an association does not automatically have an attorney-client relationship with each member of the association. This means that a lawyer representing an association generally may take matters adverse to association members, unless the lawyer has received confidential information from that member which the lawyer could use against the member's interest.

In 1992, the ABA issued an opinion explaining that a trade association's lawyer "generally" does not represent any association members, but might be precluded from adversity to one of the members if a lawyer acquires confidential information from that member as part of the trade association representation.[1]

[1] ABA LEO 365 (7/6/92) (a lawyer representing a trade association must first determine whether an attorney-client relationship exists with the individual members of the association; Rule 1.13 generally indicates that the lawyer represents the entity, and a comment to that rule "notes that the duties it defines apply equally to unincorporated associations. Thus the approach taken in this opinion is not affected by

The Restatement takes essentially the same approach.

> Lawyer represents Association, a trade association in which Corporation C is a member, in supporting legislation to protect Association's industry against foreign imports. Lawyer does not represent any individual members of Association, including Corporation C, but at the request of Association and Lawyer, Corporation C has given Lawyer confidential information about Corporation C's cost of production. Plaintiff has asked Lawyer to sue Corporation C for unfair competition based on Corporation C's alleged pricing below the cost of production. Although Corporation C is not Lawyer's client, unless both Plaintiff and Corporation C consent to the representation under the limitations and conditions provided in § 122, Lawyer may not represent Plaintiff against Corporation C in the matter because of the serious risk of material adverse use of Corporation C's confidential information against Corporation C.

Restatement (Third) of Law Governing Lawyers § 121 cmt. d, illus. 10 (2000).

State legal ethics opinions also generally hold that a lawyer representing a trade association does not automatically represent its members, but might face a conflict if the lawyer acquires confidential information from a member. See, e.g., District of Columbia LEO 305 (1/16/01) ("a lawyer who represents a trade association does not, without more, represent the members of the association").

Case law tends to apply the same standard.

- E2Interactive, Inc. v. Blackhawk Network, Inc., No. 09-cv-629-s/c, 2010 U.S. Dist. LEXIS 48333, at *19, *24 (W.D. Wis. May 16, 2010) (refusing to disqualify Alston & Bird from handling a matter adverse to a Safeway

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whether or not the trade association is recognized as a separate jural entity."; explaining that although generally a trade association's lawyer does not represent individual members, "circumstances in a particular instance" might support a finding that such a relationship exists (for instance, the smaller the association, the more likely the relationship); noting that even if the lawyer does not represent the individual association members, the members might be considered "derivative" clients or "vicarious" clients for conflicts purposes; "For example, and most typically, if the member has disclosed relevant confidential information to the association's counsel (a factor that may indicate the existence of an actual lawyer-client relationship, but which in the Committee's view is also one of the particular facts that can require disqualification in the 'derivative' client analysis), disqualification is required.").

subsidiary while simultaneously representing Safeway itself in another matter; "Defendant's final argument is that it became a client of Alston's in connection with Alston's representation of the Consumer Choice Prepaid Card Coalition. A lawyer who represents a trade association does not have a conflict of interest with an individual member of the association if the lawyer 'neither has undertaken representation of the member nor otherwise stands in a lawyer-client relationship with that member.' ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-365 (1992)." (emphasis added); noting that Alston had stopped representing the Coalition at some point, which made the Coalition a past client; "[B]oth this lawsuit and the lobby efforts related in one way or another to 'gift cards,' which is defendant's business. But there must be something more to the phrase 'substantially related' than merely involving the client's business or its products in some general sense; otherwise, no lawyer could ever be adverse to a corporation that was a former client.").

- J.G. Ries & Sons, Inc. v. Spectraserv, Inc., 894 A.2d 681 (N.J. Super. Ct. App. Div. 2006) (a law firm representing a trade association may represent one member against another member in a matter unrelated to the trade association).

- United States v. Am. Soc'y of Composers, Authors & Publishers, 129 F. Supp. 2d 327, 337 (S.D.N.Y. 2001) (allowing an association's inside and outside counsel to handle litigation brought by an association member).

Interestingly, a New Jersey LEO explained that a lawyer representing a trade association could not effectively disclaim an attorney-client relationship if the lawyer obtains confidential information from a member. New Jersey LEO 712 (2/11/08) (explaining that communication to a nonprofit trade association's hotline staffed by attorneys would create an attorney-client relationship; "nonprofit trade association may not disclaim the formation of an attorney-client relationship, as it is likely such a relationship will arise in the course of the provision of services by the attorneys staffing the legal hotline. In addition, the association should file its legal services plan with the Supreme Court and demonstrate that its proposed services comply with RPC 7.3(e)(4).").

This standard can present logistical problems for law firms which represent trade associations. Those law firms presumably would have to run conflicts checks before answering any specific questions from any trade association members -- because the law firms might be representing other clients adverse to those members in unrelated matters. Fortunately, the members probably would be considered the law firm's "client" only during the telephone call or other communication -- after which the member would become a former client. If courts and bars take that approach, the law firm could immediately become adverse to that association member in an unrelated matter, as long as that matter did not involve any of the information that the law firm received from the association member during the communication.

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.

B 6/14

Insured/Insurance Company

Hypothetical 8

You had trouble finding a job after graduating from law school, but you finally landed an associate position at a law firm that primarily handles insurance defense work. During your first interview with an insured whom you have been asked to represent by the insurance company, the insured asks you a question that you cannot immediately answer: "Are you just representing me, or are you also representing the insurance company?"

When an insurance company hires a lawyer to represent one of its insureds, does that lawyer also represent the insurance company?

MAYBE

Analysis

Introduction

Properly identifying the "client" in an insurance context situation has enormous implications, but differs from state to state.

In 2013, the Southern District of Indiana noted that

> [j]urisdictions are divided on whether the attorney retained by an insurance company to defend the insured have [sic] an attorney-client relationship with both the insured **and** the insurance company."

Woodruff v. Am. Family Mut. Ins. Co., 291 F.R.D. 239, 243 (S.D. Ind. 2013. In the same year, the Eastern District of Pennsylvania explained that Pennsylvania had not decided the issue -- and then concluded with an unhelpful uncertainty.

- Camico Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP, Civ. A. No. 11-4753, 2013 U.S. Dist. LEXIS 10832, at *6-7, *9-10, *11, *12, *15 (E.D. Pa. Jan. 28, 2013) (holding that the lawyer hired by an insurance company to represent the insured does not automatically have a joint representation between the two of them; "The Pennsylvania Supreme Court has not addressed whether an insurance carrier is always a co-client with its insured when the carrier funds the defense of the insured. Indeed, this question continues to be the

> subject of debate among scholars and courts." (emphasis added); "The Restatement (Third) of the Law Governing Lawyers . . . rejects an absolute rule. The Restatement discusses representations in the insurer-insured context, noting that, '[t]he insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 14.' Restatement (Third) of the Law Governing Lawyers § 134 cmt. f."; "Teleglobe [Teleglobe Communications Corp, 493 F.3d 345 (3d Cir. 2007)] provides additional support for the position that insured and insurer are not considered co-clients whenever the insurer pays for the defense of the insured."; "The Court concludes, . . . that where an insurer funds the defense of its insured, the insurer may be, but is not always, a co-client of the insured." (emphasis added); "[N]o evidence was offered in support of this alleged participation by CAMICO in a joint representation.").

Some states' rules wisely alert lawyers of the need for clarity. A unique Florida Rule warns lawyers to explain to everyone involved in such a situation the exact identity of the lawyer's "client."

> Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

Florida Ethics Rule 4-1.7(e). An accompanying comment provides a further explanation.[1]

To make matters more complicated, lawyers might not find controlling guidance in their states' ethics opinions.

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[1] Florida Rule 4-1.7 cmt. ("The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.").

In 2013, an Oregon federal court bluntly reminded everyone that courts, rather than bars, define attorney-client relationships.

- Evraz Inc. N.A. v. Riddell Williams P.S., Civ. No. 3:08-cv-00447-AC, 2013 U.S. Dist. LEXIS 165430, at *13, *14, *20, *21 (D. Or. Nov. 21, 2013) ("The court finds that an attorney-client relationship did not exist between Continental [defendant insurance company] and Stoel Rives [law firm plaintiff wants to hire]. Resolution of this issue begins with Continental's assumption that legal ethics opinions are controlling of this court's determination. They are not. Several Oregon State Bar ethics opinions suggest that in some circumstances, an insurer retaining counsel pursuant to a duty to defend an insured gives rise to a tri-partite attorney-client relationship between the attorney and both the insurer and insured." (emphasis added); Continental overlooks well-established Oregon law that legal ethics opinions are advisory only." (emphasis added); "The Oregon Supreme Court determines the standards that govern attorneys and its standard controls this court's determination here."; "[T]he record lacks objective evidence of an attorney-client relationship between Stoel Rives and Continental."; "Continental has pointed to no act or representation by Stoel Rives that would give Continental a reasonable basis to think Stoel Rives also became its lawyer in the Portland Harbor Superfund litigation after Continental accepted Evraz's tender of defense.").

Bars naturally defer to courts' conclusion about such relationships.

- District of Columbia LEO 290 (4/20/99) ("The Committee concludes that the law firm ethically may submit an insured's detailed bills that contain protected information to the insurer only after the lawyer has informed the insured about the nature and potential consequences of both the requested disclosure and non-disclosure and the insured has consented to the release of the information. Disclosure of such information to an independent auditing agency also may occur only with consent of the insured after disclosure. Consent to disclose confidences and secrets to the Insurer may not provide a basis to infer consent to disclose the same information to another entity who performs work for the insurer."; "It has been suggested that the existence of legal privilege provides a basis to infer consent to disclosure or implied authorization. Communications among the insurer, insured and lawyer may be privileged, at least in part, because the lawyer is representing both parties, because there is a joint defense agreement or because a legal doctrine governing the 'tripartite' relationship of insurer-insured-attorney applies. This is a matter of substantive law beyond the scope of the Committee's opinion. In any event, the mere existence of a possible privilege among insurer, insured and counsel does not in and of itself provide a basis to infer client consent to disclosure of confidences or secrets. Except as allowed by Rule 1.6, a lawyer may not release information relating to the representation of a

> client to anyone, including a co-client, unless the first client consents after disclosure or an exception is met. To the extent it is relevant, the existence of a joint privilege may bear on the consequences of disclosure of which the client must be apprised before consenting." (emphases added); "The inquirer has also asked whether it would be ethically permissible to provide the same detailed billing information and work product directly to the outside auditing agency. If the auditor is an independent entity from the insurance company, disclosure to the auditor is only permissible if the provisions of Rule 1.6 have been met. Even if disclosure to the insurance company has been consented to by the client, that consent should not be assumed to include consent to disclosure to a third party auditor. The Rule 1.6 considerations we have described with respect to insurance company disclosure should be separately addressed when disclosure to an auditor is requested."; "The inquirer also asked whether the Rules of Professional Conduct apply if the lawyer provides the protected information to the insurer, who then sends it to the outside auditor. The Rules of Professional Conduct do not apply to an insurer and insurance companies are therefore not bound by this opinion. Prior to disclosure of protected information to the insurer, however, the lawyer should instruct the insurer not to release the protected information and should designate all such information clearly. If there is reason to believe that the insurer will not follow this instruction, the lawyer should so advise the client, prior to disclosure, explaining any additional risks that would result from disclosure by the insurer to a third party.").

Thus, lawyers may have to look for guidance in several places.

ABA Model Rules

Unfortunately, the ABA Model Rules do not provide guidance on this issue.

Restatement

The Restatement acknowledges that the law governing the relationship between the insured and the insurer is beyond the scope of its rules. However, the Restatement urges attorney-client privilege protection for pertinent communications, and provides guidance to lawyers receiving conflicting instructions from an insurance company and an insured.

> A lawyer might be designated by an insurer to represent the insured under a liability-insurance policy in which the insurer undertakes to indemnify the insured and to provide a

defense. The law governing the relationship between the insured and the insurer is, as stated in Comment a, beyond the scope of the Restatement. Certain practices of designated insurance-defense counsel have become customary and, in any event, involve primarily standardized protection afforded by a regulated entity in recurring situations. Thus a particular practice permissible for counsel representing an insured may not be permissible under this Section for a lawyer in noninsurance arrangements with significantly different characteristics.

It is clear in an insurance situation that a lawyer designated to defend the insured has a client-lawyer relationship with the insured. The insurer is not, simply by the fact that it designates the lawyer, a client of the lawyer. Whether a client-lawyer relationship also exists between the lawyer and the insurer is determined under § 14. Whether or not such a relationship exists, communications between the lawyer and representatives of the insurer concerning such matters as progress reports, case evaluations, and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding. Similarly, communications between counsel retained by an insurer to coordinate the efforts of multiple counsel for insureds in multiple suits and such coordinating counsel are subject to the privilege. Because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer. . . .

The lawyer's acceptance of direction from the insurer is considered in Subsection (2) and Comment d hereto. With respect to client consent (see Comment b hereto) in insurance representations, when there appears to be no substantial risk that a claim against a client-insured will not be fully covered by an insurance policy pursuant to which the lawyer is appointed and is to be paid, consent in the form of the acquiescence of the client-insured to an informative letter to the client-insured at the outset of the representation should be all that is required. The lawyer should either withdraw or consult with the client-insured . . . when a substantial risk that the client-insured will not be fully covered becomes apparent.

Restatement (Third) of Law Governing Lawyers § 134 cmt. f (2000).

An illustration provides an example of a scenario in which a lawyer may follow the insurance company's direction, because it would not prejudice the insured.

> Insurer, a liability-insurance company, has issued a policy to Policyholder under which Insurer is to provide a defense and otherwise insure Policyholder against claims covered under the insurance policy. A suit filed against Policyholder alleges that Policyholder is liable for a covered act and for an amount within the policy's monetary limits. Pursuant to the policy's terms, Insurer designates Lawyer to defend Policyholder. Lawyer believes that doubling the number of depositions taken, at a cost of $5,000, would somewhat increase Policyholder's chances of prevailing and Lawyer so informs Insurer and Policyholder. If the insurance contract confers authority on Insurer to make such decisions about expense of defense, and Lawyer reasonably believes that the additional depositions can be forgone without violating the duty of competent representation owed by Lawyer to Policyholder (see § 52), Lawyer may comply with Insurer's direction that taking depositions would not be worth the cost.

Restatement (Third) of Law Governing Lawyers § 134 cmt. f, illus. 5 (2000). The Restatement also provides guidance to lawyers facing the more awkward situation, in which the insurance company's instruction might harm the insured.

> Material divergence of interest might exist between a liability insurer and an insured, for example, when a claim substantially in excess of policy limits is asserted against an insured. If the lawyer knows or should be aware of such an excess claim, the lawyer may not follow directions of the insurer if doing so would put the insured at significantly increased risk of liability in excess of the policy coverage. Such occasions for conflict may exist at the outset of the representation or may be created by events that occur thereafter. The lawyer must address a conflict whenever presented. To the extent that such a conflict is subject to client consent . . . , the lawyer may proceed after obtaining client consent under the limitations and conditions stated in § 122.

> When there is a question whether a claim against the insured is within the coverage of the policy, a lawyer designated to defend the insured may not reveal adverse confidential client information of the insured to the insurer concerning that question . . . without explicit informed consent of the insured . . . . That follows whether or not the lawyer also represents the insurer as co-client and whether or not the insurer has asserted a "reservation of rights" with respect to its defense of the insured . . . .
>
> With respect to events or information that create a conflict of interest between insured and insurer, the lawyer must proceed in the best interests of the insured, consistent with the lawyer's duty not to assist client fraud . . . and, if applicable, consistent with the lawyer's duties to the insurer as co-client . . . . If the designated lawyer finds it impossible so to proceed, the lawyer must withdraw from representation of both clients as provided in § 32 . . . . The designated lawyer may be precluded by duties to the insurer from providing advice and other legal services to the insured concerning such matters as coverage under the policy, claims against other persons insured by the same insurer, and the advisability of asserting other claims against the insurer. In such instances, the lawyer must inform the insured in an adequate and timely manner of the limitation on the scope of the lawyer's services and the importance of obtaining assistance of other counsel with respect to such matters. Liability of the insurer with respect to such matters is regulated under statutory and common-law rules such as those governing liability for bad-faith refusal to defend or settle. Those rules are beyond the scope of this Restatement.

Restatement (Third) of Law Governing Lawyers § 134 cmt. f (2000).

States Recognizing an Attorney-Client Relationship only with the Insured

In some states, it is very clear that a lawyer hired by an insurance company to represent its insured represents only the insured.

- Evraz Inc. N.A. v. Riddell Williams P.S., Civ. No. 3:08-cv-00447-AC, 2013 U.S. Dist. LEXIS 165430, *4, *13-14, *22, *23 (D. Or. Nov. 21, 2013) (finding that a law firm which represented an insured did not also represent its insurance company; "The court finds that no attorney-client relationship existed between Continental [defendant insurance company] and Stoel Rives

[law firm plaintiff wants to hire] under controlling Oregon Supreme Court precedent and, alternatively, under the Oregon State Bar ethics opinion upon which Continental relies. The court also finds no representational conflict would be created by allowing Stoel Rives to represent Evraz in its coverage litigation against Continental."; "The court finds that an attorney-client relationship did not exist between Continental and Stoel Rives. Resolution of this issue begins with Continental's assumption that legal ethics opinions are controlling of this court's determination. They are not. Several Oregon State Bar ethics opinions suggest that in some circumstances, an insurer retaining counsel pursuant to a duty to defend an insured gives rise to a tri-partite attorney-client relationship between the attorney and both the insurer and insured. . . . Continental overlooks well-established Oregon law that legal ethics are advisory only." (emphasis added); "Continental overlooks the absence of two crucial facts: it did not hire and did not pay Stoel Rives."; "Evraz, not Continental, hired Stoel Rives to represent it in the Portland Harbor Superfund litigation. Evraz hired Stoel Rives five years before Continental accepted Evraz's tender of defense under a reservation of rights in November 2004."; "Evraz, not Continental, paid Stoel Rives. Continental disputes this by stating it 'funded' Evraz's defense pursuant to the insurance contract, but undisputed is that Continental never paid Stoel Rives, a critical distinction here because of Continental's rigid reliance on the context-specific default rule. Here, Continental reimbursed Evraz who then paid Stoel Rives, which Evraz had directly retained and paid to represent it long before Continental accepted Evraz's tender of defense. The payment relationship between Evraz and Stoel Rives never changed after Continental appeared. Continental provides neither analysis nor authority to support its assertion that it should be found to have paid Stoel Rives as the default rule contemplates and, thus, trigger its application to the specific facts present here.").

- Larson v. One Beacon Ins. Co., Civ. A. No. 12-cv-03150-MSK-KLM, 2013 U.S. Dist. LEXIS 81181, at *15, *16 (D. Colo. June 10, 2013) ("In Colorado insurance cases, 'an attorney retained by the insurance carrier owes a duty to the insured only; there is no attorney-client relationship between an insurance carrier and the attorney it hires to represent the insured.'" (citation omitted) (emphasis added); "[T]he communications between Ms. Tester [Insured] and Mr. Thomas [Lawyer hired by the insurance carrier to represent the insured] are generally protected, but not when those communications are between Ms. Tester and/or Mr. Thomas on the one hand and Defendant and/or Defendant's legal counsel on the other.").

- EMC Ins. Co. v. Mid-Continent Cas. Co., Civ. A. No. 10-cv-03005-LTB-KLM, 2012 U.S. Dist. LEXIS 142977, at *7 (D. Colo. Oct. 3, 2012) ("In Colorado insurance cases, 'an attorney retained by the insurance carrier owes a duty to the insured only; there is no attorney-client relationship between an insurance carrier and the attorney it hires to represent the insured.'").

- Alaska LEO 2008-2 (9/11/08) ("The subrogated insurer's right to receive proceeds from the insured plaintiff's recovery in a lawsuit does not make the insurer a 'client' of the lawyer under the ethics rules.").

- Commercial Union Ins. Co. v. Marco Int'l Corp., 75 F. Supp. 2d 108, 109, 111 (S.D.N.Y. 1999) (holding that a lawyer representing an insurance company in litigation with an insured over coverage was not disqualified from handling that representation while simultaneously pursuing a subrogation case in which the law firm technically represents the insured; "The firm Nicoletti, Hornig & Sweeney ('NH&S') represents Commercial, with which it has a long relationship, and therefore Marco, in that suit, which remains pending. Although representing Marco in name, NH&S reports to Commercial. Marco pays none of NH&S's fees and has no role in directing or controlling the litigation." (footnotes omitted) (emphasis added); "Certainly Marco is neither a litigant nor a client of NH&S in the subrogation case in the usual sense. Under the terms of the policy, Marco was obligated to assign and subrogate to Commercial its right to prosecute and recover any claim against third parties responsible for the loss on which Commercial made payment. The subrogation case, although brought in Marco's name, is Commercial's alone. Marco has no material pecuniary or other interest in the subrogation suit. Its role in the suit is limited to providing documents and testimony as required by the cooperation clause of the policy. Moreover, Marco did not retain NH&S to prosecute the suit, it pays none of NH&S's fees, and it has no control over the prosecution, settlement or dismissal of the matter. In consequence, NH&S represents Marco in the subrogation case only as a matter of form, and it cannot be said to stand in a traditional attorney-client relationship with Marco. As a matter of substance, NH&S's client in the subrogation case is Commercial." (footnote omitted) (emphases added)).

- Virginia LEO 1723 (11/23/98) (a lawyer hired by an insurance carrier to represent an insured "must represent the insured with undivided loyalty," and may not (1) agree to an insurance carrier's restrictions on the lawyer's representation of the insured "absent full disclosure and consent of the client at the outset of the representation and absent a determination that the client's rights will not be materially impaired by the restrictions" such as limitations on discovery and the use of experts and other third party vendors, and requirements for "pre-approval for time spent on research, travel and the taking and summarizing of depositions"; (2) submit detailed information to a firm selected by the insurance carrier to audit billing statements, without the insured client's consent after "full and adequate disclosure"; or (3) recommend that the client consent to such disclosure to the auditor if it would prejudice the client).

- Norman v. Ins. Co. of N. Am., 239 S.E.2d 902, 907 (Va. 1978) ("[A]n insurer's attorney, employed to represent an insured, is bound by the same high

standards which govern all attorneys, and owes the insured the same duty as if he were privately retained by the insured.").

States Recognizing a Joint Representation of the Insurance Company and the Insured

In other states, the lawyer selected by the insurance company to represent the insured is characterized as representing both the insured and the insurance company. This is sometimes called a "tripartite" relationship.

For instance, several North Carolina ethics opinions explicitly indicate that such a lawyer has a joint representation.

- North Carolina LEO 2003-12 (10/21/04) ("Prior ethics opinions have firmly established that a lawyer defending an insured at the request of an insurer represents both clients. Rule 1.7, cmt. [29] to [33]; . . . . The lawyer's primary duty of loyalty, however, is to the insured.").

- North Carolina LEO 99-14 (1/21/00) (holding that "[a] lawyer who is hired by an insurance carrier to defend one of its insureds (or third-party beneficiary) represents both the insurer and the insured (or third-party beneficiary). See RPC 91, RPC 103, and RPC 172. However, when the insured has contractually surrendered control of the defense and of the authority to settle the lawsuit to the insurance carrier, the defense lawyer is generally obligated to accept the instructions of the insurance carrier in these matters. RPC 91."; also addressing the following question: "May Attorney D disclose to Insurance Company information relative to Defendant's desire to offer no defense including statements, actions, and conduct that indicate that Defendant would like the Inlaws to be successful in the lawsuit?"; answering as follows: "No. Disclosure of this information to Insurance Company may be harmful to the interests of Defendant because Insurance Company may use this information to deny coverage to Defendant. Rule 1.6(a). Nevertheless, Attorney D may inform Insurance Company that Defendant has instructed him to take a substantially different approach on the defense than that requested by Insurance Company. He may also inform Insurance Company that he cannot represent Insurance Company in a coverage dispute, and he may advise Insurance Company to obtain independent counsel on this matter.").

- North Carolina LEO CPR 255 (1/18/80) (explaining that a lawyer hired by an insurance company to represent an insured has an attorney-client relationship with both the company and the insured -- meaning that "[i]f conflicts of interest develop between the insured and insurer, such conflicts should be frankly discussed with both, and each should be advised he/it has the right to seek

advice from other, independent counsel"; also holding that a lawyer representing an insurance company can simultaneously represent a plaintiff seeking recovery from another insured).

Other states take the same approach.

- Med. Assurance Co. v. Weinberger, 295 F.R.D. 176, 184-85 (N.D. Ind. 2013) ("PCF readily admits that tripartite attorney-relationship between Medical Assurance, Hough [lawyer], and the Weinberger defendants extends the attorney-client privilege among the three parties and that waiver of the privilege by one does not constitute a waiver by the other party.").

- Bank of Am. N.A. v. Superior Court, 151 Cal, Rptr. 3d 526, 531 (Cal. Ct. App. 2013) (recognizing a tripartite relationship between an insurance carrier, an insured, and the lawyer hired by the former to represent the latter; "When an insurer retains counsel to defend its insured, a tripartite attorney-client relationship arises among the insurer, insured, and counsel. As a consequence, confidential communications between either the insurer or the insured and counsel are protected by the attorney-client privilege, and both the insurer and insured are holders of the privilege. In addition, counsel's work product does not lose its protection when it is transmitted to the insurer." (emphasis added); "In this case, we hold the same tripartite attorney-client relationship arises when a title insurer retains counsel to prosecute an action on behalf of the insured pursuant to the title policy.").

- Vicor Corp. v. Vigilant Ins. Co., 674 F.3d 1, 19, 20 (1st Cir. 2012) (analyzing a situation in which a plaintiff sued an insurance company to recover money it paid in settling an underlying case; holding that even though the insurance company had paid for the defense of the underlying case under reservation of rights, it was entitled to some but not all communications between insured and the insured's litigation counsel, because under Massachusetts law that lawyer was deemed to represent both the insurance company and the insured; "Vicor argues that the defense attorneys in the Ericsson litigation did not represent both Vicor and the insurers. Massachusetts law, however, considers an attorney retained by an insurer to represent the insured as the attorney for both."; "Here, the record reflects multiple letters, reports and other communications between underlying defense counsel and the insurers regarding such matters as liability assessment, strategic litigation planning and calculations of potential damage outcomes. All were marked as 'privileged and confidential,' and the parties agree they were privileged as to third-parties, such as Ericsson."; "[W]e conclude that the district court erred, and Vicor cannot rely on the attorney-client privilege to shield all communications between it and underlying defense counsel."; "The fact that both the insured and insurer are deemed to be clients does not mean that all communications are excepted from the applicable privileges, or that the insurers are necessarily entitled to the entire defense file, as they claim.").

- State Farm Mut. Auto Ins. Co. v. Fed. Ins. Co., 86 Cal. Rptr. 2d 20, 22, 24, 26, 27, 29 (Cal. Ct. App. 1999) (holding that a lawyer who was hired an insurance company to represent its insured has an attorney-client relationship with the insurance company, and can be disqualified from representing other clients adverse to the insurance company even on unrelated matters; explaining the issue: "The primary issue presented by this appeal is whether, for purposes of disqualification, the attorney representing an insured is also representing the insurance company. If the insurance company is a client, this case poses a secondary question regarding the applicable disqualification standard. The issue becomes whether the insurance company is a 'former' or a 'concurrent' client when the attorney files a complaint naming the insurance company as a defendant and then settles the insured's case."; explaining that the law firm McCormick was retained in 1996 to represent State Farm on coverage issues adverse to Federal, and also retained by Federal Insurance to represent its insured; noting that McCormick represented State Farm in February 4, 1998, declared to a judgment action against Federal, but continued to represent Federal's insured on the unrelated matter until that case settled on May 28, 1998; noting that under California law "it has been held that an insurance company is a client with respect to its ability to assert the attorney-client privilege. . . . Between the attorney and the insurer who retained the attorney and paid for the defense, there exists a separate attorney-client relationship endowed with confidentiality."; "In the absence of a conflict of interest between the insurer and the insured that would preclude an attorney from representing both, the attorney has a dual attorney-client relationship with insurer and insured."; "Here, McCormick was representing Federal in the Pinion matter [action in which McCormick represented Federal's insured] when McCormick filed the underlying complaint against Federal on behalf of State Farm. Approximately three months later, the Pinion case settled. Thus, there existed a period of time during which McCormick was simultaneously representing clients with adverse interests. Further, before the settlement, Federal's counsel alerted McCormick to this alleged conflict. Nevertheless, the trial court analyzed the relationship as if it were a successive representation and applied the substantial relationship test on the ground that the Pinion case had concluded by the time the disqualification motion was heard."; "However, the fact that the Pinion case happened to settle before the disqualification motion was heard should not absolve McCormick from its ethical obligations toward Federal. McCormick knowingly undertook adverse concurrent representation when it filed the underlying complaint. Even if McCormick had initially been unaware of this adverse representation, Federal's counsel notified McCormick of the conflict on at least two occasions before the Pinion case settled. Nevertheless, McCormick took no action in response. Thus, the 'exceptions' noted above do not apply."; "Therefore, although this fortuitous settlement acted to sever McCormick's relationship with its preexisting client, it did not remove the taint of a three-month concurrent representation."; rejecting State Farm's argument that Federal consented to the adverse representation because it hired

McCormick when it knew that McCormick was representing State Farm in its coverage dispute with Federal; finding that McCormick was responsible for the conflict; "[T]he burden was on McCormick to avoid creating a conflict. McCormick should not have accepted the cases referred by Federal when it was aware that it might be filing a lawsuit against Federal on behalf of another client. Consequently, there is no basis for finding that Federal impliedly consented to the adverse representation.").

States Recognizing Some Other Arrangement

Some states seem to follow yet another approach.

In 2012, the Eastern District of Kentucky described an insurance company as the "primary client" of a lawyer retained to represent its insured.

- Lee v. Med. Protective Co., 858 F. Supp. 2d 803, 805 (E.D. Ky. 2012) (analyzing privilege issues in a third party bad faith context; "Plaintiffs' first argument is that the file is not privileged because there is no attorney-client relationship between the insurance company and the attorney retained by it to defend the insureds. This argument is totally without merit. First, Asbury v. Beerbower, 589 S.W.2d 216 (Ky. 1979), clearly holds that statements, given by an insured to an adjuster before the company has hired an attorney, but to be given to the attorney who will ultimately be retained, partake of the insurer's attorney-client privilege. The implication is that the insurance company is the primary client." (emphasis added)).

In the same year, the Louisiana Supreme Court indicated that an insured's lawyer's duty to the insured was limited to the insured's insurance policy's terms.

- In re Zuber, 101 So. 3d 29, 33, 34-35, 35 n.8 (La. 2012) (explaining that a lawyer retained by an insurance company to defend an insured must advise the insured of developments in the proceedings even if the insurance company had the exclusive right to settle; "In this case, we are called upon to decide the scope of a lawyer's duties to a client, where the client's rights are contractually limited by the terms of the client's insurance policy."; "Consistent with this guidance, we interpret Rule 1.2 as requiring a lawyer who represents an insurer and insured in a case involving a 'consent to settle' clause to advise the insured as soon as practicable (generally at the inception of representation) of the limited nature of the representation the attorney will provide to the insured. Once the lawyer has made appropriate disclosure to the insured of the limited nature of the representation being offered under the insurance contract and the insured indicates consent by accepting the defense, the lawyer may then proceed with the representation at the direction of the insurer in accordance with the terms of the insurance contract,

including settling the claim within the limits of the policy at the insurer's sole direction. However, the lawyer should make efforts to keep the insured reasonably apprised of developments in the case." (footnote omitted) (emphasis added); "If the attorney knows that the insured objects to a settlement, the attorney may not settle the claim at the direction of the insurer without first giving the insured the opportunity to reject the defense offered by the insurer and to assume responsibility for his own defense at his own expense. However, in the instant case, neither Mr. Zuber nor Ms. Nobile knew that Dr. Teague objected to a settlement, as he candidly admits he 'never did write or call anyone about that.'"; ultimately concluding that the uncertainty about the law meant that the lawyer had not clearly violated the ethics rules).

Implications for a Law Firm Representing Insureds

For law firms, there are possible micro and macro implications.

Recognizing a joint representation when a lawyer represents an insured might prevent the lawyer from representing the insured against the insurance company in that matter. Not surprisingly, states disqualify lawyers attempting to do so.

- Yellow Cab Corp. v. Eighth Judicial Dist. Court, 152 P.3d 737, 739, 740-741, 741, 742 (Nev. 2007) (noting that under Nevada law a lawyer retained by an insurance company that represented insured has an attorney-client relationship with both the insurance company and the insured; disqualifying the lawyer from representing the insured in an action against the insurance company in the same case in which the lawyer had earlier represented both them; "In concluding that writ relief is not warranted in this case, we expressly adopt the majority rule that counsel retained by an insurer to represent its insured represents both the insurer and the insured in the absence of a conflict. Thus, an attorney-client relationship existed between ICW and the associate who had previously defended Yellow Cab, who was now employed by Vannah's new firm."; "A threshold issue that must be addressed is whether ICW waived any conflict by waiting over two years into the litigation before filing its motion to disqualify counsel. Waiver requires the intentional relinquishment of known right. . . . If intent is to be inferred from conduct, the conduct must clearly indicate the party's intention. . . . Thus, the waiver of a right may be inferred when a party engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished. . . . However, delay alone is insufficient to establish a waiver. . . . Here, ICW identified VCVG's potential conflict almost immediately and asked Vannah to withdraw. He refused. When ICW and Yellow Cab decided to try mediation, ICW postponed any motion for disqualification, while stating that it reserved its right to file such a motion if mediation failed. When

> mediation failed, ICW promptly filed its motion. Thus, ICW's conduct does not demonstrate, as required for waiver, a clear intent to relinquish its right to challenge Vannah and his firm."; "With respect to the relationship between an insurer and counsel the insurer retains to defend its insured, the majority rule is that counsel represents both the insurer and the insured in the absence of a conflict. . . . This rule requires that the primary client remains the insured, but counsel in this situation has duties to the insurer as well. . . . Courts adopting this rule note that, while the insured is the primary client, counsel generally learns confidential information from both the insured and the insurer and thus owes both of them a duty to maintain this confidentiality; . . . and, since counsel generally offers legal advice to both the insured and the insurer, counsel owes a duty of care to both. . . . Finally, as most states, including Nevada, have a rule that permits joint representation when no actual conflict is present, . . . courts that have adopted a dual-representation principle in insurance defense cases reason that joint representation is permissible as long as any conflict remains speculative."; "While we have not directly addressed this issue in our prior opinions, we have implicitly recognized that an attorney-client relationship exists between a medical malpractice insurer and the lawyer it retains to defend its insured doctor. . . . Also, in considering whether the insurer can assert an attorney-client or work product privilege for documents prepared during the representation of an insured, we have presumed that an attorney-client relationship exists between the insurer and counsel it retained for its insured. . . . We now expressly adopt the majority rule concerning the relationship between an insurer and counsel retained by the insurer to defend its insured.").

Although this approach makes sense, a number of scenarios might present the awkward situation in which a lawyer diligently representing the insured might be required to take positions adverse to the insurance company -- which is considered another "client" in those states.

In one interesting 2008 legal ethics opinion, the Philadelphia Bar dealt with a situation in which a lawyer selected by an insurance company was defending a driver after an accident in which the driver's family members were killed or injured. The driver directed the lawyer selected to defend her "not to vigorously defend against my family's

injuries." The Philadelphia Bar indicated that the lawyer "is bound to honor the client's decision in this regard."[2]

On a micro level, law firms could face a very difficult situation if their retention as an insured's lawyer prevented the law firm from adversity to the insurance company on unrelated matters (in other words, if the insurance company becomes a law firm client for all purposes, rather than just for analyzing the law firm's freedom to become adverse to the insurance company in the same matter in which the firm represents the insured).

The cases in which courts disqualify law firms from adversity to insurance companies they represent tend to focus on the law firm's acquisition of confidential information from the insurance company.

- Allendale Mut. Ins. Co. v. Excess Ins. Co., C.A. No. 94-0614B, 1995 U.S. Dist. LEXIS 19882, at *16 (D.R.I. June 1, 1995) (assessing the situation in which a law firm had represented many insurance companies and insureds on unrelated matters; disqualifying the law firm from representing plaintiffs in actions against the insurance companies because the law firm had represented the company in several matters; "Prudential's insureds were being represented by K&T at the time this instant complaint was filed. While K&T states it represented only the insureds and not Prudential directly, it has been held that where there is no dispute between an insurer and insured, 'as a fundamental proposition a defense lawyer is counsel to both the insurer and the insured. He owes to each a duty to preserve the confidences and secrets imparted to him during the course of representation.'" (citation omitted)).

[2] Philadelphia LEO 2008-11 (2008) ("It is the Committee's understanding that the inquirer is defense counsel for an individual who was the driver of a car involved in a one-vehicle accident in which her husband and one son were injured and another son killed. The inquirer has been retained in this role by the client's liability insurer."; "The inquirer's client's husband has instituted suit against her. The client is said to have $25,000/50,000 (presumably per claim and in the aggregate, respectively) in liability insurance limits. The client is the sole defendant and it is the inquirer's belief that there are no liability defenses."; "The client has expressly instructed the inquirer not to 'vigorously defend against my family's injuries' and not to hire expert witnesses. At the same time, the inquirer is concerned because 'the insurance policy obligates me to defend the insured.'"; "It is the Committee's further understanding that the client has discussed with the inquirer and understands the potential adverse consequences of such a 'limited defense' position and has directed the inquirer to continue to proceed as directed. Under the circumstances, therefore, it is the Committee's opinion that the inquirer is bound to honor the client's decision in this regard.").

- Sacca & Sons, Inc. v. E. Coast Excavators, Inc., [no number in original], 1992 Mass. App. Div. 6, 7 (Mass. Dist. Ct. Jan. 24, 1992) (declining to disqualify a lawyer from adversity to an insurance carrier even though the lawyer had represented the insurance carrier, because the carrier was a "secondary" client, and the lawyer did not acquire any confidential information from it);

- Gray v. Commercial Union Ins. Co., 468 A.2d 721, 724-26 (N.J. Super. Ct. App. Div. 1983) (assessing the ability of a lawyer who under New Jersey law represented both the insurance company and the insured to take positions adverse to the insurance company in unrelated cases; ultimately holding that the lawyer could not be adverse to the insurance company because he had acquired pertinent information while representing the insured; "[I]t is evident that neither Colqujoun nor any members of the firm in which he is a member can properly represent Gray in this action against Commercial Union. First, there is no dispute that Colquhoun maintained an attorney-client relationship with Commercial Union. Colquhoun's argument, that he did not have a 'true' attorney-client relationship with Commercial Union because his professional duty ran to the latter's insureds and not the insurer itself[,] cannot withstand scrutiny. Concededly, it can be said that '[t]hese interrelationships among a liability insurer, its insured, and the attorney chosen by the insurer to represent the insured, are sui generis. The canons and disciplinary rules do not address themselves frankly and explicitly to this special set of relationships, and there is awkwardness in attempts to apply the canons and rules.' . . . Nonetheless, this ambiguity exists only as to instances of a conflict of interest between the insurer and the insured, which raise the question of the lawyer's primary allegiance. There is no dispute that a fundamental proposition a defense lawyer is counsel to both the insurer and the insured. . . . It may not be seriously disputed that as a result of his 20 years as one of Commercial Union's lawyers, Colquhoun has obtained confidential information and possesses knowledge of certain internal policies of Commercial Union that he will be able to use against it in the Gray litigation. According to Gray's complaint, (1) Commercial Union's management opposed certain changes he made in the operation of the New Jersey claims department and retaliated by forcing him out of his job and (2) Commercial Union determined to drive out all pre-merger personnel 'by making policies of personnel reduction and unwarranted increases in casualty reserves.' Both of these charges rest upon factual allegations regarding the operation of Commercial Union's New Jersey claims department. It is exactly these facts to which Colquhoun was privy during his 20 years of defending claims for Commercial Union. As one of Commercial Union's New Jersey counsel, it is difficult to conceive that Colquhoun would not have become familiar with the structure, operation and policies of its claims department. . . . Although this general information may not be specifically relevant to the merits of the Gray-Commercial Union dispute, it constitutes secrets or confidences of the former client that could be used against it to its substantial disadvantage.").

The confidential information issue normally does not even arise when a lawyer represents one client adverse to another of the lawyer's clients (even on an unrelated matter) -- so these few decisions tend to support the position that the insurance company does not become a law firm client for all purposes.

On a macro level, a small number of cases have found that an insurance company which hires a lawyer to represent its insured should be considered the lawyer's "client" not only in that matter (the "tripartite relationship"), but in all matters -- thus presumably precluding the lawyer from simultaneously representing other clients adverse to the insurance company, even in unrelated matters.

- Nationwide Mut. Fire Ins. Co. v. Bourlon, 617 S.E.2d 40, 46, 47, 48 (N.C. Ct. App. 2005) ("In construing the effect of the tripartite relationship between an attorney, an insurer, and an insured, several courts across the country have held that the 'common interest' or 'joint client' doctrine applies. Under this doctrine, communications between the insured and the retained attorney are not privileged to the extent that they relate to the defense for which the insurer has retained the attorney."; "In light of the foregoing, we are persuaded that the common interest or joint client doctrine applies to the context of insurance litigation in North Carolina. Therefore, where, as here, an insurance company retains counsel for the benefit of its insureds, those communications related to the representation and directed to the retained attorney by the insured are not privileged as between the insurer and the insured. Nevertheless, we note that application of the common interest or joint client doctrine does not lead to the conclusion that all of the communications between defendant and Patterson were unprivileged. Instead, the attorney-client privilege still attaches to those communications unrelated to the defense of the underlying action, as well as those communications regarding issues adverse between the insurer and the insured. Specifically, 'communications that relate to an issue of coverage . . . are not discoverable . . . because the interests of the insurer and its insured with respect to the issue of coverage are always adverse.'" (citation omitted); addressing the obligation of the lawyer (retained by the insurance company to represent the insured) to provide his file to the insurance carrier; "[W]e are not persuaded that the trial court erred by concluding that Patterson was prohibited from providing the file to plaintiff in a wholesale manner. As discussed above, some communications contained in the file may have been privileged, including those communications unrelated to the underlying action or defendant's counterclaims, those communications regarding coverage

issues made prior to defendant's counterclaims, and those communications unrelated to the conduct forming the basis of defendant's counterclaims. Therefore, we agree that Patterson's file should not have been provided to plaintiff in a wholesale manner. Instead, the file should have been submitted to the trial court for in camera review aimed at determining which documents in the file were privileged. Accordingly, we conclude that the trial court did not err by ruling that Patterson breached his attorney-client relationship with defendant when he provided plaintiff with the entire file from the underlying action."), aff'd 625 S.E.2d 779 (N.C. 2006).

- State Farm Mut. Auto. Ins. Co. v. Fed. Ins. Co., 86 Cal. Rptr. 2d 20 (Cal. Ct. App. 1999) (assessing a situation in which a law firm hired by defendant Federal Insurance to represent one of its insureds simultaneously sued Federal Insurance on behalf of State Farm in a completely unrelated matter; noting that the case in which the law firm represented Federal Insurance's insured later settled, but for three months the law firm was simultaneously representing one of Federal Insurance's insureds while representing State Farm in a lawsuit against Federal Insurance; explaining the California position that a law firm representing an insured has a "triangular" arrangement in which the law firm also is deemed to represent the insurance company; disqualifying the law firm from its representation of State Farm adverse to Federal Insurance).

These cases make little sense. Considering the insurance company a lawyer's "client" is somewhat of a fiction in any event. Considering the company a client generally seems inconsistent with normal attorney-client relationship rules, and could hamper a lawyer's ability to represent another regular client who happens to have insurance coverage that will pay for the lawyer's defense of those clients. A lawyer might be reluctant to represent that regular client in an insured case, if such a representation would also make the insurance company a lawyer's "client" for all purposes.

The insurance company-insured relationship can implicate other ethics principles as well. Even if a law firm does not represent both the insured and the insurance company, the insured's duty of cooperation can affect the lawyer's normal duty of confidentiality owed to the insured.

Best Answer

The best answer to this hypothetical is **MAYBE**.

B 6/14

Estates

Hypothetical 9

As part of your local bar's mentoring initiative, you answer ethics questions from recent law school graduates. You just received a call from a young lawyer who wants to start taking trust and estate matters. Although she poses her question in the abstract, the answer could affect her day-to-day actions.

If an executor hires the young lawyer to perform work, who is the lawyer's client?

The estate?

The executor (but only in his or her fiduciary capacity)?

The executor in all his or her capacities?

THE EXECUTOR (BUT ONLY IN HIS OR HER FIDUCIARY CAPACITY)

Analysis

This issue has generated considerable debate among trust and estate lawyers. An estate does not have a separate existence as an entity (such as a corporation), so it is difficult to conceive of the "estate" as a client. On the other hand, it seems odd to consider the client to be an individual -- because the individual's interests could differ from that of the corpus at issue (for instance, if the executor seeks inappropriately large fees from the estate) or from other beneficiaries.

The ABA Model Rules acknowledge differences in states' approach.

> For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of

> interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

ABA Model Rule 1.7 cmt. [27] (emphasis added).

Not surprisingly, the American College of Trust & Estate Counsel ("ACTEC") Commentaries also deal with this issue. ACTEC also recognizes the debate, and the majority view that a lawyer generally represents the fiduciary (executor or trustee) rather than an estate, trust, etc.

> A very small minority of cases and ethics opinions have adopted the so-called entity approach under which the fiduciary estate is characterized as the lawyer's client. However, most cases and ethics opinions treat the fiduciary as the lawyer's client and the beneficiaries as persons to whom the lawyer may owe some duties.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.13, at 128 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf.

As the ACTEC Commentaries recognize, most states view the fiduciary as the real "client."

> [W]hen a fiduciary hires an attorney for guidance in administering a trust, the fiduciary alone, in his or her capacity as fiduciary, is the attorney's client. . . . The trust is not the client, because 'a trust is not a person but rather "a fiduciary relationship with respect to property."'. . . Neither is the beneficiary the client, because fiduciaries and beneficiaries are separate persons with distinct legal interests.

Borissoff v. Taylor & Faust, 93 P.3d 337, 340 (Cal. 2004).

As explained by the ACTEC Commentaries, the case law on this issue is mixed. Some cases reject the "entity" approach.

> Gonzales v. United States, No. C-08-03189 SBA (EDL), 2010 U.S. Dist. LEXIS 52950, at *3 (N.D. Cal. May 4, 2010) ("Plaintiff has cited no authority to support the argument that an estate is like a corporation for purposes of the attorney-client privilege. Second, even if an estate is like a corporation for purposes of the attorney-client privilege, there has been no showing that Mr. Smith [decedent's tax preparer, accountant and fact witness] was an employee of the corporation who was empowered to speak for the corporation under the test from Upjohn [Upjohn Co. v. United States, 449 U.S. 383 (1981)].").

Other states adopt the "entity" approach.

- North Carolina LEO 99-4 (10/22/99) ("RPC 137 states that 'in accepting employment in regarding to an estate, an attorney undertakes to represent the personal representative in his or her official capacity and the estate as an entity.' After undertaking to represent all of the co-executors, a lawyer may not take action to have one co-executor removed." (emphasis added)).

Given the importance of defining the "client" for lawyers trying to assess their responsibilities, this uncertainty is remarkable.

Best Answer

The best answer to this hypothetical is **THE EXECUTOR (BUT ONLY IN HIS OR HER FIDUCIARY CAPACITY)**.

B 6/14

Bond Counsel

Hypothetical 10

After about ten years in the business world, you decided to become a lawyer. Although you were involved in many bond deals in your previous career, you never had to answer a question that one of your law professors just posed to you.

When you act as bond counsel, is the bond issuer your client?

MAYBE

Analysis

Remarkably, courts, bars, and academics have never settled on the identity of bond counsel's "client."

A 2005 article in The Bond Lawyer raises the question, but does not come to any conclusion. Instead, the article warns bond counsel that they should try to articulate in some written memorialization to whom they will owe duties. William H. McBride, Who is the Client of Underwriters' Counsel?, The Bond Lawyer (Journal of Nat'l Ass'n of Bond Lawyers), June 1, 2005, at 33.

It does not seem appropriate to define the issuer as bond counsel's client. If anything, the issuer should be considered an adversary. Theoretically, the future purchasers of the bonds should be considered bond counsel's clients. However, that is not a very satisfying answer, because those folks are not even identified when bond counsel provides legal services as part of the transaction.

Best Answer

The best answer to this hypothetical is **MAYBE**.

B 6/14

Joint Representations: Creation

Hypothetical 11

You have handled most of the legal work for a wealthy businessman and his equally successful long-time girlfriend. Neither one has any children or previous spouses. They show no signs of marrying, although they seem very committed to one another. Both the businessman and his girlfriend have independently mentioned retaining you to prepare estate planning documents. You have not spoken to either one of them about their intent, but you assume that they would probably leave most of their wealth to each other (and perhaps some charities).

If you prepare estate planning documents for the businessman and his girlfriend, will it be a joint representation?

MAYBE

Analysis

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.

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[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 that there was no joint representation between now-bankrupt corporations and their

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[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)).

former parent. Teleglobe USA Inc. v. BCE Inc. (In re Teleglobe Commc'ns 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 outside lawyers who jointly represent corporate affiliates generally cannot withhold documents relating to the joint representation from any of the clients.

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[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).

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 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

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

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]

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[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.

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

> [t]he 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.

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 of such an agreement. If the joint parties and the lawyer unanimously take the position

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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.

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.

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[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.

- 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).

- 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. l (2000) ("Co-clients can also explicitly agree that the lawyer is not to share certain information.").[11]

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[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-subsidiary 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).

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 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, Nos. 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.

Best Answer

The best answer to this hypothetical is **MAYBE**.

B 6/14

Joint Representations: Loyalty Issues

Hypothetical 12

Although you generally handle transactional work for several family-owned companies and their owners, you also help some of your clients with their estate planning. The president of one of your corporate clients just called to say that he would like you to prepare a new will for him and his fourth wife. You worry that the president's interests are or will become adverse to her interests.

May you jointly represent the president and his fourth wife in preparing their estate plan?

YES

Analysis

Lawyers can (1) separately represent clients on separate matters (which most lawyers generally do on a daily basis); (2) separately represent clients on the same matter; or (3) jointly represent clients on the same matter. This hypothetical deals with the third scenario.

Conflicts of interest can arise in any of these contexts. However, lawyers jointly representing clients on the same matter must be especially careful when undertaking and continuing such a joint representation.

ABA Model Rules

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 <u>significant risk</u> that the representation of one or more clients will be <u>materially limited</u> 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).[1]

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.

This hypothetical deals with the first issue -- loyalty.

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[1] 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 horribles" to the clients in advance -- and therefore may frighten away the potential clients.

Restatement

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.

ACTEC Commentaries

Given the frequent joint representation of spouses or other family members in trust and estate planning work, it should come as no surprise that the ACTEC Commentaries extensively deal with a lawyer's responsibility for analyzing the propriety of such a joint representation.

Like the ABA Model Rules and the Restatement, the ACTEC Commentaries warn lawyers that they must assess the likelihood of adversity before undertaking a joint representation.

> A lawyer who is asked to represent multiple clients regarding related matters must consider at the outset whether the representation involves or may involve impermissible conflicts, including ones that affect the interests of third parties or the lawyer's own interests.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.7, at 92 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf (emphasis added).

For obvious reasons, a lawyer may not undertake a joint representation if serious adversity exists from the beginning.

> Some conflicts of interest are so serious that the informed consent of the parties is insufficient to allow the lawyer to undertake or continue the representation (a "non-waivable" conflict). Thus, a lawyer may not represent clients whose interests actually conflict to such a degree that the lawyer cannot adequately represent their individual interests. A lawyer may never represent opposing parties in the same litigation. A lawyer is almost always precluded from representing both parties to a pre-nuptial agreement or other matter with respect to which their interests directly conflict to a substantial degree. Thus, a lawyer who represents the personal representative of a decedent's estate (or the trustee of a trust) should not also represent a creditor in connection with a claim against the estate (or trust). This prohibition applies whether the creditor is the fiduciary individually or another party. On the other hand, if the actual or potential conflicts between competent, independent parties are not substantial, their common interests predominate, and it otherwise appears appropriate to do so, the lawyer and the parties may agree that the lawyer will represent them jointly subject to MRPC 1.7 or act as an intermediary pursuant to former MRPC 2.2 (Intermediary).

Id. at 93 (emphases added).

The presence of some adversity does not automatically preclude a lawyer from at least beginning a joint representation.

> Subject to the requirements of MRPCs 1.6 and 1.7 (Conflict of Interest: Current Clients), a lawyer may represent more than one client with related, but not necessarily identical, interests (e.g., several members of the same family, more than one investor in a business enterprise). The fact that the goals of the clients are not entirely consistent does not necessarily constitute a conflict of interest that precludes the same lawyer from representing them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Thus, the same lawyer may represent a husband and wife, or parent and child, whose dispositive plans are not entirely the same.

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).

Not surprisingly, lawyers must monitor possible later adversity.

> The lawyer must also bear this concern [possible "impermissible conflicts"] in mind as the representation progresses: What was a tolerable conflict at the outset may develop into one that precludes the lawyer from continuing to represent one or more of the clients.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.7, at 92 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf.

Thus, the ACTEC Commentaries recognize both a spectrum of adversity, and the possibility that the adversity might increase or decrease over time.

* * *

In this hypothetical, the lawyer may ethically undertake the joint representation of the husband and his fourth wife. There is no current adversity to prohibit the joint representation. However, given the possibility of adversity developing in the future, it would be wise for the lawyer to address that possibility now, and deal with the effect of such adversity arising in the future. Absent such pre-planning, the lawyer presumably would be required to withdraw from representing the husband and his fourth wife in their estate planning work should adversity develop (it would also be wise to address the information flow issue at the beginning of such a joint representation).

Best Answer

The best answer to this hypothetical is **YES**.

Joint Representations: Information Flow Duties in the Absence of an Agreement

Hypothetical 13

For the past six months, you have been representing a husband and wife in preparing their estate plan. You did not explain to either client whether you could (or must) disclose to one spouse what the other spouse told you in connection with their estate planning. Over lunch early this afternoon, the wife told you in confidence that several years before meeting her current husband she had an affair with a coworker and had an illegitimate child. Her husband does not know anything about this, but the wife is considering if she should make arrangements for her illegitimate child to receive some of her estate.

Shell-shocked, you return to the office and discuss this issue with one of your senior partners.

(a) Must you tell the husband about his wife's illegitimate child?

MAYBE

(b) May you tell the husband about his wife's illegitimate child?

MAYBE

(c) May you continue to jointly represent the client?

MAYBE

Analysis

(a)-(c) Any lawyer considering a joint representation of multiple clients on the same matter must deal with the issues of loyalty and information flow.[1]

[1] Not surprisingly, lawyers representing separate clients on separate matters must maintain the confidentiality of the information learned from each of the separate clients. In other words, there is no information flow in such a setting, absent client consent.

> The representation by one lawyer of related clients with regard to unrelated matters does not necessarily involve any problems of confidentiality or conflicts. Thus, a lawyer is generally free to represent a parent in connection with the purchase of a condominium and a child

In some ways, the loyalty issue is easier to address -- because lawyers cannot be adverse to any current client (absent consent). It might be difficult to determine whether any adversity is acute enough to require disclosure and consent, but the "default" position is fairly easy to articulate -- the lawyer must withdraw from representing all of the jointly represented clients.

The issue of information flow can be far more complicated. 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.

This hypothetical deals with the first scenario.

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).

> regarding an employment agreement or an adoption. Unless otherwise agreed, the lawyer must maintain the confidentiality of information obtained from each separate client and be alert to conflicts of interest that may develop. The separate representation of multiple clients with respect to related matters, discussed above, involves different considerations.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 77 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf.

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 direct 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.

ABA Model Rules. 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. (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.

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.

Id. (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).[2] This conclusion seems directly contrary to Comment [31] to ABA Model

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[2] 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.").

Rule 1.7 -- which advises that lawyers should obtain such an informed consent "at the outset of the common representation."

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.

Courts and Bars. 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. 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." (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 l. [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.

Restatement. 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. l (2000).

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

Elsewhere the Restatement again admits that

> [t]here 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. l (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. l (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. l, 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.

ACTEC Commentaries. 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.[3]

[3] 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. l (2000).

> 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).

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.

Courts and Bars. 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.[4]

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 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

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[4] 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)).

> 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.

Best Answer

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

B 6/14

Joint Representations: Information Flow Duties Under an Agreement to Keep Secrets

Hypothetical 14

About six months ago, a well-known basketball coach asked you to represent him and his wife in preparing their estate plan. The coach had been the subject of tabloid rumors, and you did not want to be surprised by some disclosures that you might have to share with his wife. At the beginning of the representation, you therefore had your clients sign a retainer agreement indicating that you would not share with both clients information that you learn from one of the clients. Just as you feared, your basketball coach client told you this morning that he had been romantically involved (for about 15 minutes) with another woman at a bar, and worries that she will claim paternity if she has a baby.

(a) Must you tell the wife about this incident?

NO

(b) May you tell the wife about this incident?

NO

(c) May you continue to jointly represent the client?

NO (PROBABLY)

Analysis

(a)-(c) 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.

This hypothetical deals with the second scenario.

In essence, a lawyer arranging for an explicit "keep secrets" arrangement among jointly represented clients has contractually duplicated the ethics rules' principles governing separate representations on the same or unrelated matters.

Given the importance of confidentiality, it should come as no surprise that a lawyer generally must honor such a "keep secrets" arrangement among jointly represented clients. The real key to such a "keep secrets" joint representation is whether the lawyer can avoid conflicts of interest. Thus, such an arrangement inevitably involves the issue of loyalty in the joint representation context.

ABA Model Rules

The ABA Model Rules recognize that in certain situations clients can agree that their joint lawyer will not share all information.

> 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. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

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

The trade secrets example highlights the limited circumstances in which such a "keep secrets" approach might work. It seems clear that a lawyer representing multiple companies might be able to adequately serve all of them without disclosing one client's trade secrets to the other clients.

However, in other circumstances, such an arrangement would almost surely prevent the lawyer from adequately representing all of the clients. To be sure, the ABA Model Rules do not explicitly indicate that a lawyer must honor such a no-secrets agreement. However, the ABA generally takes the approach that lawyers maintain each client's secrets from the other even in the absence of any agreement -- so it seems safe to presume that lawyers must keep secrets to comply with such an explicit agreement that they will do so.

Restatement

The Restatement also recognizes that in some circumstances a "keep secrets" approach might work -- using a trust and estate example. However, the Restatement's acknowledgement of such a theoretical possibility comes with several warnings.

> Occasionally, some estate-planning lawyers have urged or contemplated "co-representation" of multiple clients in nonlitigation representations, such as husband and wife. . . . The concept is that the lawyer would represent the two or more clients on a matter of common interest on which they otherwise have a conflict of interest only after obtaining informed consent of all affected clients. Its distinguishing feature is that the arrangement would entail, as a matter of specific agreement between the clients and lawyer involved, that the lawyer would provide separate services to each client and would not share confidential information among the clients, except as otherwise agreed or directed by the client providing the information. . . . The concept of simultaneous, separate representation apparently has not yet been the specific subject of litigation, statute, or professional rule. The risks of conflict and subsequent claims for malpractice are obviously substantial, and any lawyer considering this novel form of representation presumably would fully inform clients of its risks. At least at this point, the advice should include informing the clients that the structure is untried and might have adverse consequences unintended by the lawyer or clients.

Restatement (Third) of Law Governing Lawyers § 130 reporter's note cmt. c (2000) (emphases added). Thus, the Restatement's endorsement of this type of arrangement is half-hearted to say the least.

Not surprisingly, the Restatement indicates that a lawyer agreeing to keep one jointly represented client's confidential information from others must honor that agreement -- although the lawyer might have to withdraw from a representation depending on the information that the lawyer learns.

> Co-clients may understand from the circumstances those obligations on the part of the lawyer and their own obligations, or they may explicitly agree to share information. Co-clients can also explicitly agree that the lawyer is not to share certain information, such as described categories of proprietary, financial, or similar information with one or more other co-clients. . . . A lawyer must honor such agreements.

Restatement (Third) of Law Governing Lawyers § 60 cmt. l (2000) (emphasis added). The Restatement makes the same point later in the same comment.

> Even if the co-clients have agreed that the lawyer will keep certain categories of information confidential from one or more other co–clients, in some circumstances it might be evident to the lawyer that the uninformed co-client would not have agreed to nondisclosure had that co-client been aware of the nature of the adverse information. For example, a lawyer's examination of confidential financial information, agreed not to be shown to another co-client to reduce antitrust concerns, could show in fact, contrary to all exterior indications, that the disclosing co-client is insolvent. In view of the co-client's agreement, the lawyer must honor the commitment of confidentiality and not inform the other client, subject to the exceptions described in § 67. The lawyer must, however, withdraw if failure to reveal would mislead the affected client, involve the lawyer in assisting the communicating client in a course of fraud, breach of fiduciary duty, or other unlawful activity, or, as would be true in most such instances, involve the lawyer in representing conflicting interests.

Id. (emphasis added).

Thus, the Restatement acknowledges that a "keep secrets" approach is theoretically possible, but might result in the lawyer's mandatory withdrawal.

ACTEC Commentaries

The ACTEC Commentaries take the same basic approach as the Restatement, but provide a somewhat more optimistic analysis of whether such an arrangement will work.

> There does not appear to be any authority that expressly authorizes a lawyer to represent multiple clients separately with respect to related legal matters. However, with full disclosure and the informed consents of the clients, some experienced estate planners regularly undertake to represent husbands and wives as separate clients. Similarly, some estate planners also represent a parent and child or other multiple clients as separate clients. A lawyer who is asked to provide separate representation to multiple clients should do so with great care because of the stress it necessarily places on the lawyer's duties of impartiality and loyalty and the extent to which it may limit the lawyer's ability to advise each of the clients adequately. For example, without disclosing a confidence of one spouse, the lawyer may be unable adequately to represent the other spouse. However, within the limits of MRPC 1.7 (Conflict of Interest: Current Clients), it may be possible to provide separate representation regarding related matters to adequately informed clients who give their consent to the terms of the representation. It is unclear whether separate representation could be provided within the scope of former MRPC 2.2 (Intermediary). The lawyer's disclosures to, and the agreement of, clients who wish to be separately represented should, but need not, be reflected in a contemporaneous writing. Unless required by local law, such a writing need not be signed by the clients.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 76 (4th ed. 2006),

http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf (emphases added).

Interestingly, the ACTEC Commentaries do not explicitly indicate that lawyers must honor such a "keep secrets" approach. However, there certainly is no indication in the Commentaries that lawyers can ignore such an explicit agreement.

The ACTEC Commentaries also explain this possible arrangement in its later discussion of Rule 1.7.

> [S]ome experienced estate planners believe that a lawyer may represent a husband and wife as separate clients between whom information communicated by one spouse will not be shared with the other spouse. In such a case, each spouse must give his or her informed consent confirmed in writing. The same requirements apply to the representation of others as joint or separate multiple clients, such as the representation of other family members, business associates, etc.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.7, at 92 (4th ed. 2006) http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf (emphasis added).

Thus, the ACTEC Commentaries acknowledge the possibility that a "keep secrets" approach might work, although twice pointedly using the term "experienced estate planners" in describing who might take that approach.

* * *

As described above, authorities seem to agree that jointly represented clients can consent in advance to their joint lawyer keeping secret from one client what the lawyer has learned from another jointly represented client. However, they also warn

that such an arrangement carries a great risk that the lawyer will face a loyalty conflict of interest.

The type of conflict that such a situation might generate does not necessarily involve a lawyer's representation of one client adverse to another client under ABA Model Rule 1.7(a)(1). Instead, the conflict is likely to arise under the so-called "rheostat" variety of conflicts described in ABA Model Rule 1.7(a)(2) -- because there would be a "significant risk" that the lawyer's representation of the client providing information or of the other client "will be materially limited by the lawyer's responsibilities" to maintain the confidentiality of the information. For example, a lawyer jointly representing a husband and wife in their estate planning under a "keep secrets" approach obviously could not continue representing them if the husband confidentially told the lawyer that he intended to prepare a secret codicil leaving all his money to his mistress, or the wife confidentially told the lawyer that she was lying to her husband about the extent of her assets. Thus, a "keep secrets" approach is likely to trigger the "materially limited" representation type of conflict rather than the "directly adverse" type of conflict.

Best Answer

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

B 6/14

Joint Representations: Information Flow Duties Under a "No Secrets" Agreement

Hypothetical 15

You have been representing a husband and wife in their estate planning for about two years. At the beginning of the representation, you had both of your clients sign an explicit "no secrets" retainer agreement. Your goal was to avoid the awkward situation in which one of the clients asks you to keep secret material information from the other client, and the clients have not agreed in advance on how to handle such a conflict.

During your most recent meeting with just the husband, he tells you that he has fallen in love with his neighbor, and plans to divorce his wife. When he asks you to keep this information secret until he is ready to break the news to his wife, you remind him of the agreement that he and his wife signed two years ago that there would be "no secrets" in the estate planning process. You can tell from the horrified look on the husband's face that he has forgotten about that agreement.

(a) Must you tell the wife about the husband's divorce plans?

MAYBE

(b) May you tell the wife about the husband's divorce plans?

MAYBE

(c) May you continue to jointly represent the client?

NO

Analysis

(a)-(c) 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.

This hypothetical deals with the third scenario.

Surprisingly, the authorities disagree about how a lawyer must act in the face of such an agreement.

ABA Model Rules

The ABA Model Rules include a provision that seems to answer the question, but then introduces uncertainty.

> 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).

The first part of the sentence makes sense -- it would seem to require lawyers to honor such arrangements.

However, the reference to withdrawal is confusing. It is unclear whether the ABA Model Rules address the lawyer's withdrawal before advising the other client of the material information, or after doing so. Either way, one would expect a clearer explanation.

A 2008 ABA legal ethics opinion dealing with this issue indicated that the lawyer must maintain the confidence learned from one of the jointly represented clients "[a]bsent an express agreement among the lawyer and clients" to the contrary.[1] This

[1] 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

language implies that the lawyer would be obligated to disclose the confidence to the other clients if the clients had agreed in advance that the lawyer would share any secrets.[2]

However, ABA LEO 450 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

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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." (emphasis added)).

[2] In fact, that legal ethics opinion warns that such "an express agreement" might not work. The ABA explained that it was "highly doubtful" that a prospective consent provided by 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).

the conflict" will satisfy the "informed consent" standards. ABA LEO 450 (4/9/08). 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."

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.

Restatement

The Restatement also seems to provide explicit guidance requiring disclosure if the clients have agreed in advance that there would be no secrets.

> Co-clients may understand from the circumstances those obligations on the part of the lawyer and their own obligations, or they may explicitly agree to share information. Co-clients can also explicitly agree that the lawyer is not to share certain information, such as described categories of proprietary, financial, or similar information with one or more other co-clients. . . . A lawyer must honor such agreements.

Restatement (Third) of Law Governing Lawyers § 60 cmt. l (2000) (emphases added). Thus, the Restatement apparently requires lawyers to comply with any "no secrets" agreement.

ACTEC Commentaries

The ACTEC Commentaries take a different approach. They explain that such a prior agreement is only one factor (apparently not dispositive) as the lawyer decides

whether to share information the lawyer has learned from one jointly represented client with the other client.

The ACTEC Commentaries suggest that a lawyer facing this awkward situation first urge the client providing information to authorize the lawyer's disclosure of the information to the other jointly represented 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.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 76-77 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf (emphasis added).

This seems like an odd and illogical approach. If a client has explicitly agreed that the lawyer must share information with the other jointly represented clients, one would think that the lawyer would simply comply with that agreement -- rather than try to talk the client into making the disclosure himself or herself.

The ACTEC Commentaries' confusing approach continues in the next paragraph -- which describes a lawyer's responsibility if the client declines to comply with the explicit agreement that the joint lawyer would share all confidences with all jointly represented clients.

> 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).

If the clients had already agreed that there will be no secrets, why does the lawyer have to "consider" anything? One would think that the lawyer would simply honor the agreement. In fact, it would be easy to envision that a lawyer declining to do so would be guilty of some ethics or fiduciary duty breach.

State Authorities

Only a few states seem to have dealt with this issue. These states require lawyers to honor such agreements.

A 2005 District of Columbia legal ethics opinion indicates that a lawyer in this setting must disclose the confidential information to the other jointly represented client.

- District of Columbia LEO 327 (2/2005) ("[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; emphases added); "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." (emphasis added); "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 circumstance -- 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.").

New York has also dealt with this issue, and concluded that a lawyer in this circumstance must share material information if the clients have agreed in advance that the lawyer will do so.

- 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." (emphases 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.").

In 1999, a New Jersey court found it unnecessary to decide whether a lawyer could, or was obligated to, disclose the client confidences to other jointly represented clients -- when the retainer agreement indicated that the lawyer could share confidences

but not that the lawyer necessarily would disclose them.[3] The court was saved from this issue because the lawyer wanted to disclose the information.

* * *

All in all, the ABA Model Rules' and the Restatement's approach seems logical -- requiring lawyers to comply with their jointly represented clients' "no secrets" agreement. The ACTEC Commentaries' contrary position (apparently giving a lawyer discretion to ignore such an agreement) seems wrong.

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[3] 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)).

Best Answer

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

B 6/14

Joint Representations: Privilege Ramifications in a Later Dispute among Jointly Represented Clients

Hypothetical 16

Last year, you represented a husband and wife in preparing their joint estate plan. You had not addressed the "information flow" aspect of the joint representation, but fortunately that issue did not arise during the course of your work. However, you just learned that the couple is in the midst of a bitter divorce. The husband's lawyer just called to insist that you make available all of your estate planning files to him. In particular, the husband's lawyer wants all of your email communications with his wife, some of which were not copied to him at the time. Given the apparently contentious nature of the divorce, you would not be surprised if the wife's lawyer objects to this "instruction."

If the wife's lawyer objects, must you nevertheless give the husband's lawyer communications that occurred during the joint representation?

YES (PROBABLY)

Analysis

As in nearly every other way, joint representations on the same matter generate complicated and subtle issues involving the fate of the attorney-client privilege if the joint clients have a falling-out. In that situation, one former jointly represented client might try to block the other former jointly represented client's access to communications and documents reflecting his or her private communications with their joint lawyer.

Of course, a lawyer in this awkward situation does not face a dilemma if both of the former jointly represented clients agree to the lawyer's disclosure of the joint files to both clients or their new lawyers. A controversy arises only if one of the former clients objects to the lawyer providing such access to both of the former clients.

It is important to recognize that the privilege issue focuses on the ability of the former clients to obtain and then use communications and documents that deserved

privilege protection when created or made.[1] Most importantly, the privilege protection prevents third parties from obtaining access to those communications and documents -- absent a waiver (discussed below). Thus, the privilege generally continues to shield the communications and documents from the world -- the issue is whether one former jointly represented client can shield the communications and documents from the other former jointly represented client. As explained more fully below, however, the issue of one former jointly represented client's access to the other's communication might affect what third parties will also be given access to them.

One might have thought that the privilege effect of a dispute among former jointly represented clients would simply mirror the arrangement they had during happier days. Although the ABA Model Rules seem to indicate (although not very clearly) that a lawyer for jointly represented clients must keep secrets absent an agreement to the contrary, both the Restatement and the ACTEC Commentaries apparently take the opposite approach (although, again, not very clearly).

If a court applied one of these general principles during a joint representation, one would expect a court to apply the same standard after a joint representation ends -- whether the former jointly represented clients are in litigation with each other or not. And certainly if the law recognizes -- or the clients agree to -- a "no secrets" standard, there is no reason why the same standard would not apply after the joint representation

[1] As a matter of ethics, a lawyer in this setting theoretically might have to resist one joint client's request for the communications or documents -- if the other client insists that the lawyer do so. This presumably would generate some dispute in court, with the normal fight over discovery. Even though the lawyer could properly predict that he or she would ultimately be compelled to turn over the communications or documents, doing so unilaterally (without the formal clients' unanimous consent or court order) might put the lawyer at risk.

ends. Thus, it is somewhat odd that the law developed a separate jurisprudence on the effect of former jointly represented clients' disputes with each other.

Although the authorities differ somewhat in their approach, the bottom line is that most authorities allow the former jointly represented clients to obtain such access, and then use the privileged communications and documents in a dispute with the other former clients. Although some of the authorities and case law use the term "waiver" in discussing this approach, it would seem more accurate to use the term "evaporation" in describing what happens to the privilege in that situation. Neither former jointly represented client can disclose any jointly owned privileged communications to third parties even if there is a falling-out among the former clients. Still, their use of such communications or documents might provide access to such third parties, thus causing the privilege to essentially "evaporate."

ABA Model Rules

The ABA Model Rules provide some guidance about the attorney-client privilege implications of a joint representation.

> A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

ABA Model Rule 1.7 cmt. [30] (emphasis added).

Interestingly, this approach seems inconsistent with the ABA Model Rules' and ABA LEO 450's[2] statement that lawyers must maintain the confidentiality of information obtained from each jointly represented client -- in the absence of an explicit "no secrets" agreement.

If the ABA's "default" position is that a lawyer jointly representing clients must keep confidences even in the best of times, one would expect a consistent approach if the joint clients have a falling-out. In other words, one would expect the ABA to allow now-adverse joint clients to withhold their privileged communications from the other, since that is what the ABA required (absent some agreement to the contrary) when the joint clients were not adverse to one another.

This inconsistency should come as no surprise -- the ABA Model Rules and the pertinent legal ethics opinions contain numerous internal inconsistencies.

Restatement

The Restatement takes the same basic approach as the ABA Model Rules.

> (1) If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68-72 and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.
>
> (2) Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them.

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

[2] ABA LEO 450 (4/9/08).

However, the Restatement includes more subtle provisions than found in the ABA Model Rules, which provide more useful guidance.

Several Restatement provisions deal with the rights of the joint clients themselves to access, while other provisions deal with the power of the joint clients to waive their own privilege and the privilege covering joint communications.

First, a jointly represented client's general power to seek the lawyer's communications or documents relating to the joint representation generally covers even communications of which the jointly represented client was unaware at the time.

> As stated in Subsection (2), in a subsequent proceeding in which former co-clients are adverse, one of them may not invoke the attorney-client privilege against the other with respect to communications involving either of them during the co-client relationship. That rule applies whether or not the co-client's communication had been disclosed to the other during the co-client representation, unless they had otherwise agreed.

Id. cmt. d (emphasis added).

An illustration explains how this principle works.

> 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 (emphases added).

Second, the Restatement indicates that this general rule does not apply in all circumstances. The provision recognizes that the general rule governs "[u]nless the co-clients have agreed otherwise." Restatement (Third) of Law Governing Lawyers § 75 (2000). Presumably this refers to a "keep secrets" approach to which the clients have earlier agreed.

> Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients. If the co-clients have so agreed and the co-clients are subsequently involved in adverse proceedings, the communicating client can invoke the privilege with respect to such communications not in fact disclosed to the former co-client seeking to introduce it. In the absence of such an agreement, the lawyer ordinarily is required to convey communications to all interested co-clients . . . .

Id. (emphasis added). The clients apparently therefore have at least some power to mold the effect of a later dispute on their attorney-client privilege.

Thus, the Restatement follows the ABA Model Rules in prohibiting jointly represented clients from withholding communications or documents from each other based on the attorney-client privilege -- but then adds an exception if the clients have agreed to a different approach.

The Restatement also contains provisions addressing a jointly represented client's power to waive the attorney-client privilege -- thus freeing that client to disclose privileged communications or documents to outsiders.

Not surprisingly, the Restatement confirms that all jointly represented clients must join in any waiver if a third party seeks the privileged communications.

> If a third person attempts to gain access to or to introduce a co-client communication, each co-client has standing to assert the privilege. The objecting client need not have been

> the source of the communication or previously have known about it.

Id. cmt. e. Thus, a joint client generally has the right to defend the privilege even if he or she was not aware of the communications.

The Restatement also recognizes that each client has the power to waive the privilege for that client's own communications with the joint lawyer.

> [I]n the absence of an agreement with co-clients to the contrary, each co-client may waive the privilege with respect to that co-client's own communications with the lawyer, so long as the communication relates only to the communicating and waiving client.

Id. (emphasis added).

The reference to an agreement by co-clients "to the contrary" makes less sense here than in the context discussed below. As explained above, a "keep secrets" approach allows each client to maintain control over (and privilege for) its own confidential communications with the lawyer. Here, the issue is whether the client has the power to waive his or her own communications with the lawyer -- which seems obvious. There is no reason to give the other jointly represented clients any veto power over that client's power to control his or her own communications with the lawyer. However, the reference to a possible agreement "to the contrary" in this provision apparently means that a client may voluntarily give the other jointly represented clients a veto over the client's waiver of such private communications. It is difficult to imagine why a client would ever agree to such a provision.

If a document contains the client's own communications (over which the client has sole power) and other communications over which the client does not have sole power, it may be necessary to redact part of the document.

> One co-client does not have authority to waive the privilege with respect to another co-client's communications to their common lawyer. If a document or other recording embodies communications from two or more co-clients, all those co-clients must join in a waiver, unless a nonwaiving co-client's communication can be redacted from the document.

Id. (emphasis added). Thus, the rule might be applied on a sentence-by-sentence basis.

Another Restatement provision carries a frightening risk -- explaining the dramatic waiver effect of one jointly represented client's disclosure to another jointly represented client once they are adversaries.

> Disclosure of a co-client communication in the course of subsequent adverse proceeding between co-clients operates as waiver by subsequent disclosure under § 79 with respect to third persons.

Id. (emphasis added).

It is unclear whether this Restatement provision applies only to a disclosure outside the former jointly represented clients, or whether it also includes one such client's disclosure to the other "in the course of the proceeding." The former interpretation makes the most sense, because disclosure among the former jointly represented clients might take place on a friendly basis.

Interestingly, this provision would seem to preclude any type of protective measures that the parties might agree to, or that a court might order in a fight between the clients. For instance, a court might enter orders requiring in camera disclosure, closing the courtroom during a trial, etc. While there might be constitutional limits on such steps, one might think that keeping the privileged information from third parties would allow the former jointly represented clients (now adversaries) to avoid

"evaporation" of the privilege that might harm both of them. It would also prevent one of the parties from seeking some advantage in their dispute by explicitly or implicitly threatening to harm the other party by allowing such evaporation. Still, the Restatement provision seems clear, and would have a dramatic effect in event of such a dispute.

The Restatement does not address another interesting issue -- whether disclosure of privileged communications in this setting triggers a subject matter waiver that might allow third parties to obtain access to additional privileged communications between former jointly represented clients on the same matter. Such an effect would exacerbate the damage caused by the waiver.

All in all, the Restatement provides detailed and sometimes counter-intuitive rules describing the impact of a falling-out among joint clients.

State Bars' Approach

Not many state bars have dealt with this issue. In most respects, the case law parallels the ABA Model Rules' and the Restatement's analysis.

Many courts have stated the general proposition that all jointly represented clients must join in a waiver absent a dispute among them.

> It bears noting that waiver by one joint client of its communications with an attorney does not enable a third party to discover each of the other joint clients' communications with the same counsel. Rather, "[o]ne co-client does not have authority to waive the privilege with respect to another co-client's communications to their common lawyer."

Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman, No. 01 Civ. 8539 (RWS), 2006 U.S. Dist. LEXIS 73272, at *8 (S.D.N.Y. Oct. 6, 2006) (citation omitted). Accord Interfaith Housing Del., Inc. v. Town of Georgetown, 841 F. Supp. 1393, 1402

(D. Del. 1994) ("[T]he Court predicts the Delaware Supreme Court would hold that when one of two or more clients with common interests waives the attorney-client privilege in a dispute with a third party, that one individual's waiver does not effect a waiver as to the others' attorney-client privilege.").

Thus, jointly represented clients usually must unanimously vote to waive the privilege covering any of their joint communications -- as long as they are still on friendly terms.

Courts also acknowledge that even jointly represented clients generally maintain sole control over their own unilateral communications with the joint lawyer, and therefore can waive protection covering those communications.

In one case, the Third Circuit addressed this issue. Not surprisingly, the Third Circuit's analysis started with the general rule -- requiring joint clients' unanimous consent to waive any jointly-owned privilege.

> When co-clients and their common attorneys communicate with one another, those communications are "in confidence" for privilege purposes. Hence the privilege protects those communications from compelled disclosure to persons outside the joint representation. Moreover, waiving the joint-client privilege requires the consent of all joint clients.

Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 363 (3d Cir. 2007). The Third Circuit then described each jointly represented client's power to waive its own communications.

> A wrinkle here is that a client may unilaterally waive the privilege as to its own communications with a joint attorney, so long as those communications concern only the waiving client; it may not, however, unilaterally waive the privilege as to any of the other joint clients' communications or as to any of its communications that relate to other joint clients.

Id. This power to waive apparently applies at all times, and thus clearly applies when the former jointly represented clients end up in a dispute.

Numerous courts have articulated the basic rule that former jointly represented clients cannot withhold privileged communications from each other in a later dispute between them.

- Ft. Myers Historic L.P. v. Economou (In re Economou), 362 B.R. 893, 896 (Bankr. N.D. Ill. 2007) ("When two or more clients consult or retain an attorney on matters of common interest, the communications between each of them and the attorney are privileged against disclosure to third parties. . . . However, those communications are not privileged in a subsequent controversy between the clients."; finding the common interest doctrine inapplicable because the situation did not involve joint clients hiring the same lawyer).

- Teleglobe Commc'ns Corp., 493 F.3d at 366, 368 (assessing efforts by a trustee for bankrupt second-tier subsidiaries to discover communications between the parent and the parent's lawyers; ultimately reversing a district court's finding that the trustee deserved all of the documents, and remanding for determination of whether the parent's lawyers jointly represented the now-bankrupt second-tier subsidiaries in the matter to which the pertinent documents relate; "The great caveat of the joint-client privilege is that it only protects communications from compelled disclosure to parties outside the joint representation. When former co-clients sue one another, the default rule is that all communications made in the course of the joint representation are discoverable."; rejecting the corporate parent's argument that the default rule could be the opposite when the lawyer jointly represents the parent company and its wholly owned subsidiaries; "Simply following the default rule against information shielding creates simpler, and more predictable, ground rules."; "We predict that Delaware courts would apply the adverse litigation exception in all situations, even those in which the joint clients are wholly owned by the same person or entity.").

- In re JDN Real Estate--McKinney L.P., 211 S.W.3d 907, 922 (Tex. App. 2006) ("Where the attorney acts as counsel for two parties, communications made to the attorney for the purpose of facilitating the rendition of legal services to the clients are privileged, except in a controversy between the clients.").

- Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman, No. 01 Civ. 8539 (RWS), 2006 U.S. Dist. LEXIS 73272, at *8, *9-11 (S.D.N.Y. Oct. 6, 2006) (addressing efforts by the official Committee of Asbestos Claimants to seek communication relating to the company's spin-off of a subsidiary; "It

bears noting that waiver by one joint client of its communications with an attorney does not enable a third party to discover each of the other joint clients' communications with the same counsel. Rather, '[o]ne co-client does not have authority to waive the privilege with respect to another co-client's communications to their common lawyer.' Restatement (Third) of The Law Governing Lawyers, § 75 cmt. 3 (2000). In instances where a communication involves 'two or more co-clients, all those co-clients must join in a waiver, unless a nonwaiving co-client's communication can be redacted from the document.' Id."; also analyzing the Committee's claim that what the court called the "joint client exception" applied; "The Committee contends that notwithstanding the above rule, the joint-client doctrine prohibits ISP from maintaining a privilege over materials relating to the 1997 Transactions that G-I also claimed as privileged. In other words, the Committee argues that prior to the spin-off, G-I and ISP were represented by the same attorney on a matter of common interest (the 1997 transactions) and that, as such, ISP and G-I jointly held the privilege. The Committee further contends that because G-I and ISP shared legal representation on a matter, neither can assert the privilege against the other. Under the joint client exception to the attorney-client privilege, 'an attorney who represents two parties with respect to a single matter may not assert the privilege in a later dispute between the clients.' . . . Under the general rule, the joint client exception may be invoked by one former joint client against another only in a subsequent proceeding in which the two parties maintain adverse positions. . . . In the instant case, G-I and ISP do not maintain adverse positions in the underlying litigation. Indeed, it is not G-I that here seeks to invoke the joint client doctrine, but rather the Committee, a third-party, that seeks to do so. The Committee highlights the adverse between G-I and ISP that results from the April 28 Opinion -- namely that G-I's privilege with respect to materials surrounding the 1997 Transactions was eviscerated while ISP's was not. It is concluded that such adversity arising out of the application of the privilege or the production of documents does not warrant invocation of the joint client exception. Because ISP and G-I do not maintain adverse positions vis-A-vis [sic] the plaintiff Committee's claims, it is concluded that the joint client exception is inapplicable in the instant case.").

- Anderson v. Clarksville Montgomery Cnty. Sch. Bd., 229 F.R.D. 546, 548 (M.D. Tenn. 2005) ("[U]ntil such time as a plaintiff withdraws and truly becomes adverse to his former co-plaintiffs, it appears appropriate to maintain the attorney-client privilege absent a waiver by all plaintiffs.").

- Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 639 (Iowa 2004) ("[E]xceptions have been carved from the attorney-client privilege. . . . This exception is known as the 'joint-client' exception. Actual consultation by both clients with the attorney is not a prerequisite to the application of the joint-client exception. . . . The attorney is duty-bound to divulge such communications by one joint client to the other joint client. . . . Thus, when

the same attorney acts for two parties, the communications are privileged from third persons in the controversy, but not in a subsequent controversy between the two parties.").

- Koen Book Distribs. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo, P.C., 212 F.R.D. 283 (E.D. Pa. 2002) (holding that a law firm's internal documents about its own possible malpractice must be produced, because the law firm was guilty of a conflict of interest in continuing to represent the client while internally analyzing the possible malpractice; applying the doctrine that the communications to a common lawyer by jointly represented clients are not privileged in a later dispute between the clients).

- Duncan v. Duncan, 56 Va. Cir. 262, 263, 263-64 (Va. Cir. Ct. 2001) (addressing efforts by a lawyer to avoid discovery sought by plaintiff (administrator of a daughter's estate) from the lawyer, who formerly represented both the plaintiff and his former wife (mother of the deceased daughter); "Although no Virginia Court appears to have addressed this issue directly, the clear majority of reviewing courts has held that the attorney-client privilege does not preclude an attorney, who originally represented both parties in a prior matter, from disclosing information in a subsequent action between the parties."; "Plaintiff's exhibits establish that Greenspun's [lawyer] representation of Plaintiff and Defendant was joint in nature. The parties executed a joint agreement engaging Greenspun's services. He represented both parties in an investigation related to the parties' common interest, namely criminal liability for their daughter's death and loss of parental rights. Furthermore, Greenspun freely shared information regarding elements of the case with, and between, both parties. The Defendant recognized that Greenspun was sharing information disclosed by the Defendant with Plaintiff during the parties' prior joint representation. Lastly, the parties did not have an implied or express agreement with Greenspun that he would maintain their respective confidences in this joint representation. Defendant's communications with Greenspun are not privileged in the absence of an agreement between the parties stipulating otherwise."; ordering the lawyer to answer deposition questions and produce documents to plaintiff).

- Kroha v. Lamonica, No. X02CV980160366S, 2001 Conn. Super. LEXIS 81, at *12 (Conn. Super. Ct. Jan. 3, 2001) ("[T]he privilege applies more broadly to all communications between two or more persons who consult the same attorney on any matter of joint interest between them.").

- FDIC v. Ogden Corp., 202 F.3d 454, 461 (1st Cir. 2000) ("Despite its venerable provenance, the attorney-client privilege is not absolute. One recognized exception renders the privilege inapplicable to disputes between joint clients. . . . Thus, when a lawyer represents multiple clients having a common interest, communications between the lawyer and any one (or more) of the clients are privileged as to outsiders but not inter sese." (citation

omitted); "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"; holding that the FDIC had established that it was a joint client of a law firm and therefore could obtain access to the law firm's documents in a dispute between the FDIC and the other clients).

- Ashcraft & Gerel v. Shaw, 728 A.2d 798, 812 (Md. Ct. Spec. App. 1999) (finding that a law firm which jointly represented clients must disclose privileged information if the clients later become adverse to one another; specifically finding that one of the clients may obtain information about communications between the other client and the joint lawyer even if the party was not present during those communications; "[T]he principles of duty, loyalty, and fairness require that when two or more persons with a common interest engage an attorney to represent them with respect to that interest, the attorney privilege against disclosure of confidential communications does not apply between them, regardless of whether both or all clients were present during the communication. To hold otherwise would be inconsistent with the high level of trust that we expect in an attorney-client relationship.").

- Opus Corp. v. IBM, 956 F. Supp. 1503, 1506 (D. Minn. 1996) ("'When an attorney acts for two different clients who each have a common interest, communications of either party to the attorney are not necessarily privileged in subsequent litigation between the two clients.'" (quoting Bituminous Cas. Corp. v. Tonka Corp., 140 F.R.D. 381, 387 (D. Minn. 1992))).

- Griffith v. Davis, 161 F.R.D. 687, 693 (C.D. Cal. 1995) (noting that the "'joint client doctrine'" applies "where two clients share the same lawyer. . . . Under this doctrine, communications among joint clients and their counsel are not privileged in disputes between the joint clients, but are protected from disclosure to others." (citation omitted)).

- Arce v. Cotton Club, No. 4:94CV169-S-O, 1995 U.S. Dist. LEXIS 21539 (N.D. Miss. Jan. 13, 1995) (holding that the dispute between jointly represented clients meant that none of the clients could assert the privilege as to communications shared with the joint lawyer).

- Interfaith Housing Del., 841 F. Supp. at 1398 n.4 (holding that a town council can "waive its privilege as well as any protection accorded communications from its councilmembers. Further, should a dispute arise between various members of the town council, the protection of the attorney-client privilege would not apply because the requisite . . . commonality of interest would be lacking.").

- Scrivner v. Hobson, 854 S.W.2d 148, 151 (Tex. Ct. App. 1993) ("With regard to the attorney-client privilege, the general rule is that, as between commonly represented clients, the privilege does not attach to matters that are of mutual interest. . . . Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.").

- In re Grand Jury Subpoena Dated Nov. 26, 1974, 406 F. Supp. 381, 393-94 (S.D.N.Y. 1975) ("Relevant case law makes it clear that the rule thus described by McCormick . . . squarely applies when former joint clients subsequently face one another as adverse parties in litigation brought by any one of them. . . . The rule may also be invoked in an action brought by or against a successor-in-interest to a former joint client where any one of the other former joint clients stands as an opposing party in such action. . . . On the other hand, it has been ruled that the privilege of one joint client cannot be destroyed at the behest of the other where the two have merely had a 'falling out' in the sense of ill-feeling or divergence of interests.").

All of these cases recite the same basic principle -- jointly represented clients cannot claim privilege protection when one seeks privileged communications from the other in a later dispute among them. However, courts disagree about what type of dispute will trigger this rule.

Degree of Adversity

The key authorities and the case law take differing approaches in assessing the level of hostility between former jointly represented clients that must arise before the privilege evaporates.

The ABA Model Rules indicate that the privilege evaporates "if litigation eventuates" between the former jointly represented clients. ABA Model Rule 1.7 cmt. [30] (emphasis added). The Restatement indicates that the privilege evaporates "in a subsequent adverse proceeding" between the former jointly represented clients. Restatement (Third) of Law Governing Lawyers § 75 (2000) (emphasis added).

The "adverse proceeding" language seems broader than the "litigation" language. For instance, it might include administrative proceedings that do not count as litigation under some courts' standards. However, both the ABA Model Rules and the Restatement obviously require a high degree of adversity among the former joint clients before finding that the privilege "evaporates."

Courts have also taken differing positions on the degree of adversity among former jointly represented clients that triggers the privilege's evaporation. Some courts point to proceedings between the former clients.[3] However, other courts have found the same effect in the case of a dispute[4] or controversy[5] between the former jointly represented clients. One court used the phrase "truly becomes adverse to his former co-plaintiffs."[6]

Not many cases explain what type of adversity would not trigger this effect. One court provided at least some guidance.

> Relevant case law makes it clear that the rule thus described by McCormick [preventing one former jointly represented client from invoking the privilege in a dispute among the former jointly represented clients] . . . squarely applies when former joint clients subsequently face one another as adverse parties in litigation brought by any one of them. . . . The rule may also be invoked in an action brought by or against a successor-in-interest to a former joint client where any one of the other former joint clients stands as an

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[3] See, e.g., Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663, 670 (N.Y. 1996).

[4] Griffith, 161 F.R.D. at 693.

[5] Brandon, 681 N.W.2d at 642 ("[W]hen the same attorney acts for two parties, the communications are privileged from third persons in the controversy, but not in a subsequent controversy between the two parties.").

[6] Anderson, 229 F.R.D. at 548 ("[U]ntil such time as a plaintiff withdraws and truly becomes adverse to his former co-plaintiffs, it appears appropriate to maintain the attorney-client privilege absent a waiver by all plaintiffs.").

> opposing party in such action. . . . On the other hand, it has been ruled that the privilege of one joint client cannot be destroyed at the behest of the other where the two have merely had a 'falling out' in the sense of ill-feeling or divergence of interests.

In re Grand Jury Subpoena, 406 F. Supp. at 393-94 (emphasis added).

Of course, if a former jointly represented client wanted to assure "evaporation" of the privilege, that client could turn a "dispute" or a "controversy" into "litigation" or a "proceeding." Thus, any of the former jointly represented clients has the power itself to cause the privilege to "evaporate."

Joint Clients' Power to Change the Rules

As explained above, the Restatement indicates that jointly represented clients can agree to change the general rules -- allowing them to withhold privileged communications from each other in the event of a dispute, and (apparently) even granting another jointly represented client a "veto power" over the client's waiver of its own personal communications with a joint lawyer. Restatement (Third) of Law Governing Lawyers § 75 cmt. d (2000).

Not many courts or authorities have dealt with this intriguing issue.

- 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-subsidiary 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).

- N.Y. City LEO 2004-02 (6/2004) ("Multiple representations of a corporation and one or more of its constituents are ethically complex, and are particularly so in the context of governmental investigations. If the interests of the corporation and its constituent actually or potentially differ, counsel for a corporation will be ethically permitted to undertake such a multiple representation, provided the representation satisfies the requirements of DR

> 5-105(C) of the New York Code of Professional Responsibility: (i) corporate counsel concludes that in the view of a disinterested lawyer, the representation would serve the interests of both the corporation and the constituent; and (ii) both clients give knowledgeable and informed consent, after full disclosure of the potential conflicts that might arise. In determining whether these requirements are satisfied, counsel for the corporation must ensure that he or she has sufficient information to apply DR 5-105(C)'s disinterested lawyer test in light of the particular facts and circumstances at hand, and that in obtaining the information necessary to do so, he or she does not prejudice the interests of the current client, the corporation. Even if the lawyer concludes that the requirements of DR 5-105(C) are met at the outset of a multiple representation, the lawyer must be mindful of any changes in circumstances over the course of the representation to ensure that the disinterested lawyer test continues to be met at all times. Finally, the lawyer should consider structuring his or her relationships with both clients by adopting measures to minimize the adverse effects of an actual conflict, should one develop. These may include prospective waivers that would permit the attorney to continue representing the corporation in the event that the attorney must withdraw from the multiple representation, contractual limitations on the scope of the representation, explicit agreements as to the scope of the attorney-client privilege and the permissible use of any privileged information obtained in the course of the representations, and/or the use of co-counsel or shadow counsel to assist in the representation of the constituent client." (emphases added)).

Effect of a Lawyer's Improper Joint Representation

Several cases have dealt with an exception to these general rules.

Under this rarely-applied principle, 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 a later dispute between them.[7]

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[7] 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

The much older Eureka case did not receive much attention until Teleglobe cited it, but stands for the same proposition.

> 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.

Eureka Inv. Corp. v. Chi. Title Ins. Co., 743 F.2d 932, 937-38 (D.C. Cir. 1984).

Under this approach, joint clients can withhold 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 not be able to pierce the privilege despite the adversity between the jointly represented clients.

> 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 8 J. WIGMORE, EVIDENCE § 2312 (McNaughton rev. ed. 1961).

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

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.

B 6/14

Creditors

Hypothetical 17

A large rehabilitation hospital chain has been in the news lately, because it may have inflated its earnings over the past several years by engaging in improper accounting. Some of your clients have sold goods and services to the hospital chain, and several have asked you for advice about how they should proceed (for instance, whether they should file lawsuits and seek pre-judgment attachment of hospital assets).

(a) May you advise more than one creditor of the hospital chain about how to proceed?

YES (PROBABLY)

(b) May you represent more than one creditor in filing lawsuits against the hospital chain?

MAYBE

(c) Would it make a difference if some of your creditor clients are secured creditors, and some are unsecured creditors?

MAYBE

Analysis

The traditional concept of a "joint representation on the same matter" involves the same lawyer jointly representing a group of clients who have common goals, meet together to discuss strategy, etc.

This hypothetical also deals with separate representations on the same matter -- although each client is seeking independent advice rather than acting in concert with the other clients.

(a) Unless you believe that the hospital chain does not have sufficient assets to satisfy all of the creditors' claims, there would be no per se prohibition on

representing multiple creditors. However, any doubt about the hospital chain's ability to satisfy all creditors creates the possibility of a conflict among the clients -- who might end up fighting over a limited fund.

At least one bar has indicated that lawyers may undertake joint representations even if their common adversary may not be able to satisfy all the clients' claims.

- North Carolina RPC 251 (7/18/97) (holding that a lawyer can represent multiple plaintiffs even if there is not enough money to satisfy all their claims, as long as they all consent; "The representation of multiple claimants in a common accident can lead to two different conflicts of interest. On the one hand, there may be questions of liability and, therefore, potential crossclaims among the claimants. Representing clients with potential claims against each other places the lawyer in the position of being an advocate against his or her own client or clients and, ordinarily, is impermissible. See Rule 5.1(a). One the other hand, although there may be no crossclaims between the claimants, as in this inquiry, when there are limited insurance funds from which multiple claimants may be compensated, there is a potential for competition between the claimants for their share of the insurance proceeds. A lawyer who represents multiple claimants in this situation risks becoming an advocate for the increased recovery of one claimant at the expense of the other claimants. Nevertheless, this potential conflict does not involve direct antagonistic interests and can be more readily managed than the former conflict.").

(b) The onset of litigation makes the possibility of a conflict even more acute, and may trigger the need for explicit disclosure and consent.

Perhaps the most difficult setting for this debate involves bankruptcy proceedings.

- Restatement (Third) of Law Governing Lawyers § 128 cmt. c(ii) (2000) ("With respect to bankruptcy, there is substantial disagreement whether certain types of cases or proceedings should be considered under the automatic rule of Subsection (2) [automatically prohibiting litigation adversity to a current client without its consent] or under the general rule of § 121 [prohibiting conflict of interests, defined as a "substantial risk" that a representation will "materially and adversely" affect a current client] and, in general, whether general conflict-of-interest rules should be changed in some instances. Tribunals must resolve such questions in light of a body of decisions developed in the specific context of bankruptcy, and often the issues are

controlled by statute. The Restatement takes no position on the applicability of Subsection (2) in the many situations that may arise in bankruptcy.")

(c) The status of some clients as secured creditors and some as unsecured creditors does not necessarily resolve the conflict. For instance, it might be possible for the unsecured creditors to challenge the security arrangements -- which would be an obvious conflict if the lawyer were challenging another client's security.

In some situations, it might be possible for a lawyer to represent a secured creditor, and also represent an unsecured creditor who does not believe that there is any chance to successfully challenge the first client's security (and therefore agrees to a limited representation by the lawyer, which would preclude a challenge to the other creditor's security interest).

Best Answer

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

N 3/12; B 8/14

Estate Administration

Hypothetical 18

You represent one of your neighbors, who has been named executor of his wealthy mother's estate. Your neighbor and his sister are the only two beneficiaries of their mother's estate. Your neighbor and his sister have been feuding for years, and you expect disputes to arise between your neighbor and his sister.

May you represent your neighbor in his role as executor and also in his role as a beneficiary?

MAYBE

Analyses

Determining the permissibly of a joint representation in an estate administration setting obviously starts with identifying the "client" for conflicts analysis purposes.

Most courts and bars consider an estate administration lawyer's "client" to be the executor rather than the "estate" or "trust" -- because those are not considered separate legal entities like corporations.

If the same individual acts both as an executor and as a beneficiary under the estate, most bars and courts take what could be seen as a counter-intuitive approach allowing the representation. In essence, the representation is not considered "joint" because there is only one client -- although that client wears different hats.

- Baker Manock & Jensen v. Superior Court, 96 Cal. Rptr. 3d 785, 787, 789, 791, 792 (Cal. Ct. App. 2009) (analyzing a situation in which a law firm which had prepared the decedent's will represented two of the decedent's four sons as co-executors of the will; ultimately overturning the lower court's disqualification of the law firm from representing both the executors and one of the executors in his individual capacity as a beneficiary of his mother's estate -- in opposing his brother's application seeking judicial confirmation that a petition would not violate the "no contest" clause in his mother's will; "The trial court concluded the law firm had a conflict of interest. The court reasoned as follows: Because it had represented Lillian [decedent] in the

drafting of her will, the law firm had a 'duty of loyalty' to Lillian. Because it drafted the will, the law firm had a 'duty of care' to the beneficiaries of the will. Because it represented the executor, the law firm was not permitted to 'represent a beneficiary of an estate in a controversy with other beneficiaries except in those unusual cases where each of the parties expressly consents in writing and the attorney is not professionally hampered by the conflict problem."; ultimately holding that "we conclude the attorney for the executor does not have a conflict of interest merely because he or she represents one beneficiary of a will in a dispute with another beneficiary, unless such representation presents a conflict between two clients of the attorney, namely, the executor and the represented beneficiary"; "[W]here the executor has a good faith belief that a contestant (whether a beneficiary or a stranger to the will) seeks to deprive the estate of assets rightfully belonging to the estate, it cannot be a conflict of interest for the executor's attorney merely to represent the executor in the discharge of the executor's duty to preserve the estate."; "[I]n the case before us there is no divergence of the interests of George as executor and George as beneficiary. Accordingly, there is no conflict of interest in representing both the executor and the beneficiary.").

- Virginia LEO 1599 (8/12/94) (explaining that a lawyer representing an executor and one of two beneficiaries does not have a conflict unless the lawyer also represents the other beneficiary; must advise the client that communications with the client as beneficiary may not be entitled to attorney-client privilege protection, because communications with the client as fiduciary may similarly not be protected from disclosure to the beneficiaries; has "no attorney-client relationship with the beneficiaries of the estate other than the executor;" has no "derivative duty" to the other beneficiary by virtue of the client's fiduciary duty (as executor) to the other beneficiary, although the lawyer must "be alert to indications that [the other beneficiary] does not understand the attorney's role;" may not advise or represent the executor in actions that breach the executor's fiduciary duty; does "not take on the executor's duties to the beneficiaries simply by performing the executor's administrative tasks;" may not charge for any services rendered to the client in the client's capacity as a beneficiary).

- Virginia LEO 260 (5/16/75) (explaining that it is not improper for a lawyer representing an executor-beneficiary to fail to advise another beneficiary whose interests "potentially" conflict with those of the executor-beneficiary to hire another lawyer, but the executor has a fiduciary duty to advise the other beneficiary to hire another lawyer).

Not surprisingly, the American College Trusts & Estates Counsel has dealt with this issue. The ACTEC Commentaries first address the lawyer's representation of

someone in a fiduciary role, as compared to the lawyer's representation of him or her in an individual capacity.

> A lawyer represents the fiduciary generally (i.e., in a representative capacity) when the lawyer is retained to advise the fiduciary regarding the administration of the fiduciary estate or matters affecting the estate. On the other hand, a lawyer represents a fiduciary individually when the lawyer is retained for the limited purpose of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or the persons beneficially interested in the estate. For example, a lawyer represents a fiduciary individually when the lawyer, who may or may not have previously represented the fiduciary generally with respect to the fiduciary estate, is retained to negotiate with the beneficiaries regarding the compensation of the fiduciary or to defend the fiduciary against charges or threatened charges of maladministration of the fiduciary estate. A lawyer who represents a fiduciary generally may normally also undertake to represent the fiduciary individually. If the lawyer has previously represented the fiduciary generally and is now representing the fiduciary individually, the lawyer should advise the beneficiaries of this fact.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2, at 35 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf. The ACTEC Commentaries conclude that a lawyer representing a fiduciary in an individual capacity owed "few, if any, duties to the beneficiaries of the fiduciary estate other than the duties the lawyer owes to other third parties generally."[1] The Commentary provides some analysis of those peripheral duties.[2]

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[1] American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2, at 36 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf ("The scope of the representation of a fiduciary is an important factor in determining the nature and extent of the duties owed to the beneficiaries of the fiduciary estate. For example, a lawyer who is retained by a fiduciary individually may owe few, if any, duties to the beneficiaries of the fiduciary estate other than duties the lawyer owes to other third parties generally. Thus, a lawyer who is retained by a fiduciary to advise the

The ACTEC Commentaries acknowledge that a lawyer may represent the same person who is both an executor and beneficiary (with possible interests adverse to other beneficiaries' interests).[3] Not surprisingly, the Commentaries warn lawyers that they should carefully explain all of this to their clients and to the beneficiaries.[4]

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fiduciary regarding the fiduciary's defense to an action brought against the fiduciary by a beneficiary may have no duties to the beneficiaries beyond those owed to other adverse parties or nonclients. In resolving conflicts regarding the nature and extent of the lawyer's duties, some courts have considered the source from which the lawyer is compensated. The relationship of the lawyer for a fiduciary to a beneficiary of the fiduciary estate and the content of the lawyer' s communications regarding the fiduciary estate may be affected if the beneficiary is represented by another lawyer in connection with the fiduciary estate. In particular in such a case, unless the beneficiary and the beneficiary's lawyer consent to direct communications, the lawyer for the fiduciary should communicate with the lawyer for the beneficiary regarding matters concerning the fiduciary estate rather than communicating directly with the beneficiary. See MRPC 4.2 (Communications with Persons Represented by Counsel). However, even though a separately represented beneficiary and the fiduciary are adverse with respect to a particular matter, the fiduciary and a lawyer who represents the fiduciary generally continue to be bound by duties to the beneficiary. Additionally, the lawyer's communications with the beneficiaries should not be made in a manner that might lead the beneficiaries to believe that the lawyer represents the beneficiaries in the matter except to the extent the lawyer actually does represent one or more of them.")

[2] American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2, at 36 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf ("The nature and extent of the lawyer's duties to the beneficiaries of the fiduciary estate may vary according to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries. Some courts have characterized the beneficiaries of a fiduciary estate as derivative or secondary clients of the lawyer for the fiduciary. The beneficiaries of a fiduciary estate are generally not characterized as direct clients of the lawyer for the fiduciary merely because the lawyer represents the fiduciary generally with respect to the fiduciary estate.").

[3] American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2, at 33 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf ("Example 1.2-1. Lawyer (L) drew a will for X in which X left her entire estate in equal shares to A and B and appointed A as executor. X died, survived by A and B. A asked L to represent her both as executor and as beneficiary. L explained to A the duties A would have as personal representative, including the duty of impartiality toward the beneficiaries. L also described to A the implications of the common representation, to which A consented. L may properly represent A in both capacities. However, L should inform B of the dual representation and indicate that B may, at his or her own expense, retain independent counsel. In addition, L should maintain separate records with respect to the individual representation of A, who should be charged a separate fee (payable by A individually) for that representation. L may properly counsel A with respect to her interests as beneficiary. However, L may not assert A's individual rights on A's behalf in a way that conflicts with A's duties as personal

Even though most courts and bars would find such a joint representation ethically permissible, a lawyer might well chose not to undertake such a representation -- because of the obvious emotional issues involved.

Best Answer

The best answer to this hypothetical is **MAYBE**.

representative. If a conflict develops that materially limits L's ability to function as A's lawyer in both capacities, L should withdraw from representing A in one or both capacities. See MRPC 1.7 (Conflict of Interest: Current Clients) and MRPC 1.16 (Declining or Terminating Representation).").

[4] American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2, at 33 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf ("As a general rule, the lawyer for the fiduciary should inform the beneficiaries that the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client; that while the fiduciary and the lawyer will, from time to time, provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests.").

Litigation Joint Representations

Hypothetical 19

For the past ten years, you have primarily handled asbestos defense work. You just learned that several hundred plaintiffs (all represented by the same law firm) filed an action against over 20 defendants in Mississippi state court. The plaintiffs claim that they were exposed to various companies' asbestos while working at a shipyard.

May you represent more than one defendant in this action?

YES (PROBABLY)

Analysis

A lawyer's ability to represent multiple clients on the same matter depends on the likelihood of adversity.

An ABA Model Rule comment provides guidance.

> 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]. Thus, the ABA Model Rules do not per se prohibit a lawyer from representing joint clients in litigation (or in other contexts).

If adversity is apparent at the start, a lawyer obviously cannot undertake the representation without disclosure and consent from all the clients (and in some situations a lawyer may not even ask for such consent, if the lawyer does not reasonably believe that he can adequately represent the clients). If adversity seems unlikely, a lawyer might be able to undertake the joint representation with the hope that adversity does not develop. The lawyer might also be able to address the adversity at the beginning, with a prospective consent allowing the lawyer to continue representing one client even if the representation becomes adverse to one of the other clients (of course, the lawyer would then have to withdraw from representing that other client). Not every court or bar would honor such a prospective consent, because they generally address the effectiveness of such consent both when the client grants the consent and when the lawyer wants to rely on the consent.

In addition to addressing such loyalty issues, lawyers entering into joint representations should also address information-flow issues. Absent an agreement among the clients to the contrary, a lawyer jointly representing multiple clients cannot automatically assume that information received from one of the clients should be shared with the other clients. Of course, the inability to share such information creates a nearly insoluble conflict for the lawyer -- sometimes requiring a lawyer's withdraw without even explaining why the lawyer must withdraw.

State bars generally take the same approach as the ABA Model Rules.

- Arizona LEO 07-04 (11/2007) ("The representation of multiple clients in a single litigation matter is generally permissible so long as the lawyer

reasonably believes that he or she will be able to provide competent and diligent representation to each client, the representation does not involve the assertion of a claim by one client against another client, and each client gives informed consent, confirmed in writing. Ethical Rule ('ER') 1.7(b). The requirement of informed consent arises only if, as an initial matter, the lawyer determines that the lawyer can, in fact, competently and diligently represent each client in the particular matter. Once that determination is made, the lawyer bears the burden of showing that there was adequate disclosure to each client and that each client gave an informed consent. The disclosures required to obtain the client's 'informed consent' will depend on the facts and circumstances of the particular matter. The lawyer must explain the possible effects of the common representation on the lawyer's obligations of loyalty, confidentiality and the attorney-client privilege. In addition to the confirming writing required by ER 1.7(b), informed consent usually will require that the lawyer explain the advantages and disadvantages of the common representation in sufficient detail so that each client can understand why separate counsel may be desirable. Finally, during the course of the matter, the lawyer must continue to evaluate whether conflicts have arisen that may require additional disclosures and consent or withdrawal from the representation"; noting the possibility of what the bar called "testimonial conflicts" and "Conflicting Settlement Positions")

- North Carolina LEO 2003-1 (4/18/03) (holding that a lawyer must withdraw from a joint representation of a general contractor and surety if positional adversity develops; "Ordinarily, the interests of the surety and the general contractor will be aligned in defending a payment bond claim. However, the lawyer has an obligation to assert only valid defenses to the claims asserted and to avoid unnecessary delay in the proceedings. Rule 3.1 and 3.2 The lawyer should explain these duties to both parties at the outset. If the general contractor insists upon a course of conduct that would violate the Rules of Professional Conduct, the lawyer must withdraw from the joint representation and advise both the general contractor and the surety to obtain separate counsel."; "Similarly, if the lawyer believes that an appropriate defense action taken on behalf of the general contractor would interfere with a legal duty the surety owes to the claimant/supplier, such that the surety could be exposed to a bad faith claim, a conflict arises. In this situation, the lawyer must withdraw from the representation of both parties and may only continue with the representation of the general contractor with the consent of the surety. Rule 1.9(a).")

Thus, lawyers considering joint representations in a litigation setting must look down the road, and assess the possibility of adversity developing between the jointly represented clients. Although lawyers have some power to define the effect of such

adversity in advance (by arranging for prospective consents), a lawyers can never be certain that they can drop one jointly represented client and continue representing another if adversity develops. Therefore, lawyers must advise their clients that the development of adversity might require the lawyer's withdraw from representing all of the clients.

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.

Limiting the Representation

Hypothetical 20

You represent a snowblower manufacturer. A plaintiff allegedly injured by one of the snowblowers has sued your client and the retailer from which the plaintiff purchased the snowblower. In your quick review of the case, you find that there is some dispute about whether the retailer altered some of the snowblower's controls before selling the snowblower to the plaintiff. Your client normally indemnifies retailers for any lawsuits they face from injured plaintiffs, but a retailer would not be entitled to such indemnification if it modified any of the snowblower's controls.

If the manufacturer and the retailer agree to postpone any dispute about the indemnification until after the plaintiff's lawsuit has been resolved, may you represent both the manufacturer and the retailer in the plaintiff's action?

MAYBE

Analysis

The manufacturer and the retailer obviously share an interest in defeating the plaintiff's claim. For instance, it might be possible to show that the plaintiff misused the snowblower, ignored warnings, etc.

On the other hand, the possibility of some retailer modification to the snowblower makes possible adversity between it and the manufacturer likely at some point. While it might be possible to postpone such adversity until after resolution of the underlying lawsuit, the adversity might arise much earlier. For instance, you would have to explore such possible modification during your preparation of the retailer's witnesses. The issue might also come up during the deposition of the manufacturer's witnesses. The way you prepare and defend such depositions (among other things) might have a dramatic effect on the later indemnification dispute between the manufacturer and the retailer.

Therefore, postponing the actual indemnification issue until later might not prove to be a panacea for the possible adversity. In fact, undertaking the joint representation might ultimately prejudice both clients -- if you are forced to drop both of the clients in the middle of discovery.

Best Answer

The best answer to this hypothetical is **MAYBE**.

Opposite Sides of the Same Transaction

Hypothetical 21

In a classic "good news bad news" telephone call, you just learned that your best client has found a buyer for a prime piece of real estate it has been trying to sell. The "bad news" is that one of your partners represents the buyer in nearly all of its real estate matters. Your client has asked whether it is possible for your law firm to represent both the buyer and the seller in this real estate transaction.

May your law firm represent both the buyer and the seller in a real estate transaction?

MAYBE

Analysis

An ABA Model Rule comment discusses the possibility of lawyers representing opposite sides of the same transaction.

> Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

ABA Model Rule 1.7 cmt. [28] (emphasis added).

The Restatement contains seemingly conflicting discussions of this issue. One section warns lawyers that they may not safely act as "mere scriveners" in preparing transactional documents, but instead must explicitly explain any limitations in a representation.

> Conflicted but unconsented representation of multiple clients, for example of the buyer and seller of property, is sometimes defended with the argument that the lawyer was performing the role of mere "scrivener" or a similarly mechanical role. The characterization is usually inappropriate. A lawyer must accept responsibility to give customary advice and customary range of legal services, unless the clients have given their informed consent to a narrower range of the lawyer's responsibilities.

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

Two Restatement illustrations describe scenarios in which lawyers may not jointly represent opposite sides of the same transaction.

> Lawyer has been asked by Buyer and Seller to represent both of them in negotiating and documenting a complex real-estate transaction. The parties are in sharp disagreement on several important terms of the transaction. Given such differences, Lawyer would be unable to provide adequate representation to both clients.
>
> 11. The facts being otherwise as stated in Illustration 10, the parties are both in agreement on terms and possess comparable knowledge and experience in such transactions, but, viewed objectively, the transaction is such that both parties should receive extensive counseling concerning their rights in the transaction and possible optional arrangements, including security interests, guarantees, and other rights against each other and in resisting the claims of the other party for such rights. Given the scope of legal representation that each prospective client should receive, Lawyer would be unable to provide adequate representation to both clients.

Restatement (Third) of Law Governing Lawyers § 122 cmt. g(iv), illus. 10 & 11 (2000).

However, another section seems to acknowledge that lawyers may jointly represent opposite sides in the same transaction, although explaining the obvious conflicts implications.

> Client A and Client B give informed consent to a joint representation by Lawyer to prepare a commercial contract. Lawyer's bill for legal services is paid by both clients and the matter is terminated. Client B then retains Lawyer to file a lawsuit against former Client A on the asserted ground that A breached the contract. Lawyer may not represent Client B against Client A in the lawsuit without A's informed consent . . . . Client A's earlier consent to Lawyer's joint representation to draft the contract does not itself permit Lawyer's later adversarial representation.

Restatement (Third) of Law Governing Lawyers § 122 cmt. c(i), illus. 1 (2000).

Some states permit lawyers to represent both sides of friendly business transactions.

- Vermont LEO 2011-2 (2011) (addressing the following question: "An attorney inquires whether the attorney may continue to represent both the lender and the borrower/buyer in a real estate transaction, giving consideration to the changes in the rules and regulations applicable to real estate practice and the changes to the Rules of Professional Conduct."; finding such action proper under certain circumstances; "Prior to commencing the representation of multiple clients in a single transaction, the attorney must make an independent determination that the attorney will be able to provide 'diligent and competent representation to each affected client.' This assessment must be made on a case by case basis; it can never be presumed that it is generally acceptable to represent two parties in a single transaction. The assessment must be made based on the circumstances of each party, in particular, the sophistication and general knowledge of each party should be taken into account when making the assessment. Once the attorney makes the determination that both parties can be appropriately represented, the attorney must make a meaningful disclosure of the risks and benefits of the multiple representation to both parties and obtain each party's informed consent."; "An attorney who undertakes the representation of the lender and borrower/buyer in a real estate transaction may find that a more extensive conflict arises during the course of the representation. For example, the attorney may know that the lender does not allow concessions by the sellers to the buyers in excess of the closing costs, but the attorney is advised at the commencement of the representation that the first task will be to negotiate a

substantial concession by the seller to the buyer well in excess of the estimated closing costs, and to disguise the concession to avoid the lender's rules. The attorney is now presented with a new conflict in which the rules permitting a waiver will not likely apply. The attorney has information gained in the course of the representation which the attorney must now disclose to the lender client. However, having obtained the information from a current client, the attorney must first obtain consent, after disclosure from the borrower client before advising the lender of the circumstances. In this example, it is unlikely that the borrower will authorize the attorney to share the information with the lender. The attorney must now withdraw because the attorney can no longer provide competent representation to both parties. Whether the attorney can continue to represent one party after withdrawing is governed by the provisions of Rule 1.9.").

- Pennsylvania LEO 2009-003 (1/26/09) (explaining that an in-house lawyer for a real estate developer may represent buyers and sellers of real estate in transactions in which the developer is involved; "Your employer has already given permission for you to be retained by individuals who would participate in these real estate transactions. Your participation would not be directly prohibited, at out [sic] the outset, but we believe that, prior to retention, you should obtain informed consent from your clients, pursuant to Rule 1.7(b)(4), for reasons presented in example [7] of the comments. You should inform your potential clients that although these transactions normally proceed uneventfully, there is a potential for conflict of interest in the event that the transaction fails and there are conflicting claims to the sum on deposit that your client initially provided or to which your client became entitled."; "In the event that such a conflict would arise in connection with the transaction, that conflict could not be resolved by consent, on the part of either your employer or your client, because the transaction becomes a prohibited representation as discussed in the comments in Rule 1.7. [Y]ou would be unable to continue representation of either party, your employer or your client, and you therefore would be required to withdraw from any and all representation. . . . You informed me that your employer is willing to have you withdraw from representing that party, in the event of such a conflict, and your client would also be required to permit such withdrawal in the even[t] that the projected conflict actually arises."; inexplicably not dealing with the unauthorized practice of law issue).

- North Carolina LEO 2006-3 (1/23/09) (holding that a lawyer can represent both the buyer and seller in a real estate transaction).

- North Carolina LEO 99-8 (10/22/99) ("[A] lawyer may represent all parties in a residential real estate closing and subsequently represent only one party in an escrow dispute provided the lawyer insures that the conditions for waiver of an objection to a possible future conflict of interest set forth in RPC 168 are satisfied."; explaining that "[t]he closing lawyer represents the buyer, the

seller, and the lender in the closing after satisfying the conditions for multiple representation set forth in RPC 210. As in the preceding inquiry, the buyer and the seller enter into an agreement that appoints the closing lawyer escrow agent. The escrow agreement also provides that, in the event of a dispute, the funds will be given to another escrow agent and the closing lawyer will represent the buyer in the escrow dispute. May a lawyer participate in an arrangement in which one of the lawyer's clients agrees in advance to waiver any objection to a possible future conflict of interest?").

- North Carolina LEO 97-8 (1/16/98) (holding that a lawyer can represent both the buyer and the developer in a real estate closing under certain circumstances; "The lawyer may proceed with the common representation only if the lawyer reasonably believes that his or her loyalty to the seller will not interfere with the lawyer's responsibilities to the buyer. Rule 2.2(a)(3). Also, the lawyer may not proceed with the common representation unless he or she reasonably believes that there is little likelihood that an actual conflict will arise out of the common representation and, should a conflict arise, the potential prejudice to the parties will be minimal."; "If the lawyer reasonably believes the common representation can be managed, the lawyer must make full disclosure of the advantages and risks of common representation and obtain the consent of both parties before proceeding with the representation. . . . This disclosure should include informing the seller that, in closing the transaction, the lawyer has equal responsibility to the buyer and, regardless of the prior representation of the seller, the lawyer cannot prefer the interests of the seller over the interests of the buyer. With regard to the buyer, the lawyer must fully disclose the lawyer's prior and existing professional relationship with the seller. This disclosure should include a general explanation of the extent of the lawyer's prior and current representation of the seller and a specific explanation of the lawyer's legal work, if any, on the property that is the subject of the transaction. The latter should include the disclosure of all legal work relating to the development of a subdivision if relevant."; "Full disclosure to the seller and to the buyer must also include an explanation of the scope of the lawyer's representation. . . . In addition, the lawyer should explain that if a conflict develops between the seller and the buyer, the lawyer must withdraw from the representation of all parties and may not continue to represent any of the clients in the transaction. RPC 210 and Rule 2.2(c). For example, the lawyer may not take a position of advocacy for one party or the other with regard to the completion of the construction of the house, the escrow of funds for the completion of the construction, problems with title to the property, and enforcement of the warranty on new construction. Areas of potential conflict should be outlined for both parties prior to obtaining their separate consents to the common representation."; "The disclosure required must be made prior to the closing of the transaction. The Revised Rules of Professional Conduct do not require the consents to be in writing. However, obtaining written consents is the better practice."; "If common representation is permitted under the conditions

outlined above, Attorney may perform legal services for both parties as necessary to close the transaction including offering an opinion as to title to the buyer. Either party may be charged for the lawyer's services as appropriate.").

- Virginia LEO 1216 (5/8/89) (a lawyer may represent the buyer and seller in a real estate transaction as long there is consent after full disclosure).

- Virginia LEO 1149 (12/19/88) (a lawyer may represent the buyer and seller in a real estate transaction as long as both consent and are advised of their right to retain independent counsel).

Other courts are much more hostile to such joint representations. See, e.g., In re Katz, 981 A.2d 1133 (Del. 2009) (suspending for three months a lawyer who represented both a lender and a borrower, and failed to disclose unfavorable term provisions to the borrower that the lawyer represented; noting that Delaware has various guidelines governing this situation).

Two analyses undertaken about the same time show these differing attitudes. An Indiana court held that the same lawyer could represent both sides of a negotiated transaction, while the New York State Bar held just the opposite.

- Van Kirk v. Miller, 869 N.E.2d 534, 542-43, 543, 546 (Ind. Ct. App. 2007) (assessing the validity of a consent allowing a lawyer to represent both sides in a negotiated transaction involving the sale of a sports bar; "Although Van Kirk [purchaser of the sports bar] argues that the conflict at issue herein was nonconsentable, we find his arguments to be unpersuasive. First, Van Kirk and Summers [seller of the sports bar], while clearly protecting their own self-interests, had a common goal--the finalization of the B&T transaction. And, as noted above, Rule 1.7 provides that dual representation is permissible where the clients' interests are 'generally aligned . . . even though there [are] some difference[s].' Prof. Cond. R. 1.7 cmt. 28. Furthermore, Summers and Van Kirk independently negotiated . . . the terms of the transaction and contacted Miller [lawyer] to draft an agreement that would finalize the deal. Miller did not sit on both sides of the table during the negotiations and, instead, was employed to draft the agreement memorializing the terms that Summers and Van Kirk had independently negotiated. In sum, it was reasonable for Miller to conclude that he could competently and diligently draft an agreement for the parties; therefore, we conclude that the conflict at issue herein was consentable. For that reason, it was permissible for Miller to

represent both Summers and Van Kirk if he obtained a valid conflict waiver for the dual representation."; finding that the following language created a valid consent: "[Van Kirk and Summers] have each been represented over some time by attorney [Miller] and each well understands that a conflict of interest would preclude Miller, or those who practice with him, from fully representing the interests of one against the other in the contemplated sale of [B&T] stock and the land at 2809 West Main Street, Fort Wayne, Indiana. The terms of the proposed sale have been largely negotiated by the parties without the intervention of attorney Miller, and each of us hereby waives the conflict of interest which would otherwise preclude attorney Miller from representing either of us in the preparation of a proposed sale and closing documents. We understand the conflict which could arise; we understand we have the right to demand that attorney Miller turn the files for this transaction over to independent counsel of our own choice, without any such conflicts; and we freely agree to permit him to represent both of us in the proposed preparation of documents and closing."; also granting summary judgment for the lawyer on a malpractice claim by the proposed buyer of the sports bar after the transaction collapsed; "While it is unfortunate that Summers and Van Kirk did not successfully close on the B&T deal as originally intended, it does not automatically follow that Miller committed legal malpractice because the anticipated deal collapsed. There is no evidence that Miller favored Summers during the dual representation and there is no evidence that Van Kirk told Miller to stop representing Summers after Van Kirk terminated Miller's representation. In sum, we cannot conclude that Miller breached his duty to Van Kirk and, therefore, we cannot conclude that Miller committed legal malpractice." (footnote omitted)) (emphases added).

- New York LEO 807 (1/29/07) ("A part-time associate of a law firm is 'associated' with the law firm for the purpose of imputation of conflicts of interest. 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."; "We concluded in N.Y. State 162 (1970) that a single lawyer could represent both parties to a real estate transaction where the interests of buyer and seller are not actually or potentially differing or would vary only slightly. In N.Y. State 611 (1990), we opined that a single lawyer could represent the seller and the lender in a real estate transaction where the parties have reached a complete accord on the business terms of the transaction, no points of importance remain for negotiations, and a title policy is to be obtained. See also N.Y. County 615 (1973) (lawyer may represent in a real estate transaction, with their consent, both buyer and seller who had already agreed upon the purchase price, time and manner of payment, and other terms and conditions of the sale)."; "Under DR 5-105(D), these limitations on a single lawyer representing two parties in a real estate transaction apply as well to representation by a single law firm. The opinions discussed above, in which we concluded that a single lawyer may, in unusual and very limited

> circumstances, undertake dual representation of both parties to a real estate transaction, involve cases where there is little or no actual adversity between the two parties and they have both sought out a single lawyer (or law firm) to represent them jointly. This might occur, for example in a family transaction or where two clients of a lawyer or law firm have agreed on substantially all of the terms of the transaction and together ask the lawyer or law firm to document the transaction for them both. The situation under consideration in this opinion is quite different: Here is a buyer and a seller of residential real estate each determined at the outset of the negotiations to be represented by separate lawyers in separate firms, and the two clients separately approached lawyers in different firms to negotiate the terms of the transaction between them. The parties' decision at the outset that they should be represented by two different lawyers in two different firms reflects an actual adversity and conflict of interest between them that would require the two lawyers to negotiate or bargain against each other as adversaries. A conflict like the one here is not consentable under DR5-105(C). In such a situation, a disinterested lawyer would not conclude that the two lawyers could 'competently represent the interests of each.' See N.Y. City 2001-2 ('If the dual representations require lawyers to directly negotiate the substantive business terms with each other, the direct adversity could preclude such concurrent representation -- even with consent.')." (footnote omitted)) (emphases added).

Courts have also dealt with the effect of possible conflicts in this settling on any resulting business arrangement's enforceability.

- LK Operating, LLC v. Collection Grp., LLC, 279 P.3d 448, 455, 455-56, 456 (Wash. Ct. App. 2012) (holding that lawyer's ethics breach in representing two clients with adverse interests does not justify invalidating the business arrangement; "The courts of this state have applied RPC 1.8 (restricting business transactions with a client) to refuse to enforce fee agreements with attorneys as being against public policy. . . . The application of the RPC and result in these cases was not, however, categorical. The lawyer could show that the contract was fair and reasonable, free from undue influence, and made after a fair and dull disclosure of the facts before the court would hold any agreement void or voidable."; "We conclude, however, that RPC 1.7 cannot provide the basis for rescission. RPC 1.8, which has provided the legal basis for rescission, is different in its wording and its effect from RPC 1.7. A lawyer violates RPC 1.8 when the lawyer enters into a business transaction with his or her client without the minimum notice and disclosure, and without giving the client the opportunity to seek the advice of independent counsel. We will then generally refuse efforts by the lawyer to enforce those agreements."; "What we have with RPC 1.7 is a rule to regulate the attorney-client relationship and ensure that an attorney's representation is not materially limited by conflicting interests. . . . ('The rule assumes that multiple

representation will necessarily require consultation and consent in writing, reasonably so since the rule imposes these requirements anytime there is a potential conflict.'). The differences are important."; "The problem with applying RPC 1.7 here is that the remedy, rescission, could easily fall on an innocent client. And it is not the client who should pay for the sins of its lawyer. Even if the lawyer breached his or her fiduciary duties, it is the lawyer who should suffer the consequences, not the client. It is not the client(s) who did anything wrong; it is the lawyer by representing clients on both sides. The appropriate remedy is to file a disciplinary action with the Washington State Bar Association."; "In sum, we agree Mr. Powers violated RPC 1.7. But that violation cannot be grounds to rescind any investment agreement between LKO and TCG.").

Lawyers should undertake such joint representation only with great care, and after a detailed analysis of the existing and possible future adversity between the jointly represented clients.

Best Answer

The best answer to this hypothetical is **MAYBE**.

N 3/12; B 8/14

Opposite Sides of the Same Litigation

Hypothetical 22

Your law firm represents a number of small companies in your city. One of your clients has asked you to prepare and file a collection case against another local company which has failed to pay for a large printing job that your client performed for the other company. You know that one of your partners handles most of the corporate matters for the potential defendant company. Your client has told you that it would consent to your law firm representing the defendant in the case, because your client trusts you to vigorously pursue the collection case.

With the defendant company's consent, can your law firm represent both the plaintiff and the defendant in the collection case?

NO

Analysis

The ABA Model Rules prohibit lawyers (even with consent) from representing a client if the representation 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).

Several ABA Model Rule comments provide additional explanation.

> Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

ABA Model Rule 1.7 cmt. [16].

A later comment suggests how

> [p]aragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. . . . [S]imultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question."

ABA Model Rule 1.7 cmt. [23].

The Restatement takes essentially the same approach.

- Restatement (Third) of Law Governing Lawyers § 122(2)(b) (2000) ("[n]otwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if . . . one client will assert a claim against the other in the same litigation").

The Restatement provides an example of such a per se prohibition.

- Restatement (Third) of Law Governing Lawyers § 122 cmt. g(iii), illus. 8 (2000) ("A and B wish to obtain an amicable dissolution of their marriage. State law treats marriage dissolution as a contested judicial proceeding. Lawyer is asked to represent both A and B in negotiation of the property settlement to be submitted to the court in the proceeding. Informed consent can authorize Lawyer to represent both parties in the property-settlement negotiations (subject to exceptions in some jurisdictions, where interests of children are involved, for example), but consent does not authorize Lawyer to represent both A and B if litigation is necessary to obtain the final decree. The parties may agree that Lawyer will represent only one of them in the judicial proceeding. The other party would either be represented by another lawyer or appear pro se . . . .").

Several comments provide further explanation.

- Restatement (Third) of Law Governing Lawyers § 122 cmt. g(iii) (2000) ("Whether clients are aligned directly against each other within the meaning of this Comment requires examination of the context of the litigation. In multi-party litigation, a single lawyer might, for example, represent members of a class in a class action, multiple creditors or debtors in a bankruptcy proceeding, or multiple interested parties in environmental clean-up litigation . . . . Joint representation is appropriate following effective client consent, together with compliance with applicable statutory or rule requirements, which may require court approval of the representation after

disclosure of the conflict. Such joint representation is appropriate, notwithstanding that the co-clients may have conflicting claims against each other in other matters as to which the lawyer is not providing representation. The clients may also give informed consent to joint representation while they negotiate any differences they may have in the matter in litigation, perhaps employing the lawyer as appropriate in such negotiations . . . , or prior agreement on such negotiated matters may be a condition of the clients' consent . . . . Where the alignment of parties, clients, and claims is such that the lawyer will not oppose another client with respect to the matters of dispute between them, as indicated in § 122(2)(b), there is no conflict. Thus, in complex litigation, the same lawyer may represent two defendants with largely congruent positions with respect to their defense, if other counsel are representing the two clients with respect to a dispute between them.").

- Restatement (Third) of Law Governing Lawyers § 122 cmt. g(iii) (2000) ("When clients are aligned directly against each other in the same litigation, the institutional interest in vigorous development of each client's position renders the conflict nonconsentable . . . . The rule applies even if the parties themselves believe that the common interests are more significant in the matter than the interests dividing them. While the parties might give informed consent to joint representation for purposes of negotiating their differences . . . , the joint representation may not continue if the parties become opposed to each other in litigation.").

These issues are more acute in the criminal context.

- United States v. Daugerdas, 735 F. Supp. 2d 113, 118 (S.D.N.Y. 2010) (granting the government's motion to disqualify the Sonnenschein Law Firm from representing both BDO's former Chairman (Field) and a witness cooperating with the government; "While this Court does not question the ethical wall constructed by Sonnenschein between its Dallas and Chicago offices, . . . the simultaneous representation of a defendant and a cooperating witness undermines the integrity of these proceedings. Sonnenschein does not identify a single case in which a court permitted a law firm to simultaneously represent a defendant and a cooperating witness with adverse interests in the same criminal proceeding. The explanation for this seems clear: most firms do not entertain this type of concurrent representation.").

- People v. Hernandez, 896 N.E.2d 297 (Ill. 2008) (holding that a criminal defense lawyer faced a per se conflict in representing both a criminal defendant and the victim; finding that the lawyer's conflict violated the criminal defendant's Sixth Amendment rights, and reversing the defendant's conviction).

- United States v. Edwards, 39 F. Supp. 2d 716, 731-32 (M.D. La. 1999) (in a criminal action, disqualifying a lawyer who was representing multiple criminal

> defendants; holding that the lawyer had earlier represented both a corporation and its sole shareholder; "As a general rule, an attorney for a corporation represents the corporation, and not its shareholders. The issue of attorney-client relationship becomes more complicated in the case of a small closely-held corporation with only a few shareholders or directors. In such cases, the time between individual and corporate representation can become blurred. The determination whether the attorney represented the individual of the small closely-held corporation is fact-intensive and must be considered on a case-by-case basis." (footnote omitted)).

One bar even pointed to this strict prohibition in holding that lawyer fired by one of two jointly represented clients could not continue to represent the other client even if both consented.[1]

This per se prohibition can have an interesting effect on a lawyer's role as mediator. An ABA Model Rules comment addresses this issue.

> Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

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[1] 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.").

ABA Model Rule 1.7 cmt. [17].

Interestingly, states take differing positions on whether a lawyer-mediator who has successfully resolved a divorce or other contentious matter may prepare documents memorializing the settlement agreement. In 2007, the Maryland Bar noted the differing positions taken by states, and ultimately held that the lawyer could not draft a settlement agreement.

- Maryland LEO 2007-19 (11/5/07) ("The gist of the issue involves the question of whether an attorney-mediator can draft a settlement agreement for unrepresented parties in resolution of a dispute the mediator has been asked to resolve. The short answer to that question is that an attorney-mediator may not draft a settlement agreement on behalf of unrepresented parties to the mediation."; "It is common for mediators to assist the parties in preparing a term sheet or a memorandum of understanding to set forth the essential terms of the mediated resolution of the dispute. This activity is undertaken as a mediator, not as the lawyer for either party. We see no problem with a lawyer-mediator engaging in this task."; "When the task changes from memorializing the understanding to drafting legally binding documents, the mediator's role as scrivener changes to legal practitioner."; "This issue is not one without difference of opinion. Other states that have considered the issue under the Model Rules reached conflicting conclusions. Utah, North Carolina, Virginia and New Hampshire, all reached the same conclusion that we do. New York, Connecticut and Massachusetts reach the opposite conclusion. We believe the Utah Committee's analysis to be best under Maryland law." (emphasis added; footnotes omitted); ultimately concluding that the mediator "cannot represent both parties in the dispute" and therefore could not draft a settlement agreement for the parties as opposed to "a document that memorializes the understanding that was reached by the parties").

As the Maryland legal ethics opinion recognized, some states permit mediators to engage in such practice.

- ABA Section of Dispute Resolution, Comm. on Mediator Ethical Guidance Op. 2010-1 (2010) (explaining that the mediator handling a no-fault divorce has asked whether he or she could also prepare documents memorializing the parties' agreement on property issues and child support issues; explaining that the mediator had to comply with ABA guidelines, which require full disclosure to the client about the limits of the mediator's abilities to provide legal advice or information, and the inability of the mediator to represent the

parties; "The Committee sees no ethical impediment under the Model Standards to the mediator performing a drafting function that he or she is competent to perform by experience or training. A mediator may, in drafting a mediated settlement agreement or MOU, act as a 'scrivener' -- simply memorializing the parties' agreement without adding terms or operative language. The Model Standards arguably also permit a mediator to, if she has the necessary background and experience, provide legal information to the parties. If, however, the mediator puts on his or her legal counsel's hat, by giving legal advice or performing tasks typically done by legal counsel, then the mediator runs the serious risk of inappropriately mixing the role of legal counsel and mediator without disclosing the implications of that shift in roles or without getting party consent.").

- New York State LEO 736 (1/3/01) ("An attorney-mediator may prepare divorce documents incorporating a mutually acceptable separation agreement and represent both parties only in those cases where mediation has proven entirely successful, the parties are fully informed, no contested issues remain, and the attorney-mediator satisfies the 'disinterested lawyer' test of DR 5-105(C).").

- Michigan LEO RI-278 (8/12/96) ("A lawyer acting as a mediator in a domestic dispute resolution process may draft documents which purport to represent the understanding reached between the parties."; "The lawyer mediator is not per se prohibited from preparing pleadings for purposes of implementation of the memorandum of understanding. However, any activity in this regard would be construed as legal services by a lawyer, not mediation, and would necessarily invoke MRPC 1.7, 2.2, and other ethics duties.").

Other states take exactly the opposite approach.

- Ohio LEO 2009-4 (6/12/09) ("Upon conclusion of domestic relations mediation, a lawyer-mediator may not, pursuant to Prof. Cond. Rule 1.7(c)(2), prepare necessary legal documents, such as petitions, decrees, and ancillary documents, for filing by or on behalf of both the parties in a domestic relations proceeding. Upon conclusion of domestic relations mediation, a lawyer-mediation, a lawyer-mediator may prepare necessary legal documents, such as petitions, decrees, and ancillary documents, for filing by or on behalf of one of the parties to a domestic relations proceeding, provided the following conditions are met. First, as required by Prof. Cond. R. 1.12(b), during mediation, a lawyer-mediator must not negotiate to subsequently represent one of the parties. Second, as required by Prof. Cond. R. 1.12(a), both parties must give informed consent, confirmed in writing to a lawyer-mediator's subsequent representation of one of the parties. Third, as required by R.C. 102.03(A)(1) and through application of Prof. Cond. R. 1.7(c)(1), during employment or for one year after employment with the court, a lawyer-mediator who is a court employee must not undertake a

representation in a matter in which he or she personally participated. Fourth, as required by Prof. Cond. R. 4.3, if one party is unrepresented, a lawyer-mediator who subsequently represents the other party, must properly deal with the unrepresented party. Fifth, a lawyer-mediator who undertakes a subsequent legal representation must comport with any applicable standards of practice for mediators.").

- Texas LEO 583 (9/2008) ("Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may not agree to serve both as a mediator between parties in a divorce and as a lawyer to prepare the divorce decree and other necessary documents to effect an agreement resulting from the mediation. Because a divorce is a litigation proceeding, a lawyer is not permitted to represent both parties in preparing documents to effect the terms of an agreed divorce.").

- Utah LEO 05-03 (9/30/05) ("When a lawyer-mediator, after a successful mediation, drafts the settlement agreement, complaint and other pleadings to implement the settlement and obtain a divorce for the parties, the lawyer-mediator is engaged in the practice of law and attempting to represent opposing parties in litigation. A lawyer may not represent both parties following a mediation to obtain a divorce for the parties.").

Best Answer

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

N 3/12; B 8/14

Identifying the Client Within a Corporate Entity

Hypothetical 23

As the General Counsel of your publicly traded client, you naturally find yourself dealing with complicated situations. You just received a call from one of your client's directors, who serves on the Audit Committee. She has asked you to hire an outside law firm to assist the Audit Committee in conducting an internal corporate investigation into possible accounting irregularities. A prominent local lawyer comes immediately to mind, and within five minutes you have him on the phone. Before you can explain the situation in any detail, he asks you a simple question.

Who will be the outside law firm's client in this representation --

The board member who called you?

The Audit Committee?

The Board of Directors?

The corporation?

The corporation's shareholders?

THE CORPORATION (ACTING THROUGH THE BOARD OF DIRECTORS)

Analysis

As in so many other contexts involving ethics, the attorney-client privilege and other doctrines, the key to beginning the analysis involves properly defining the client. There are many constituencies inside a corporation that could establish a separate attorney-client relationship with an outside or an in-house lawyer.

"Default" Position: Corporation as the Client

The "default" position is that a lawyer advising a corporation's constituent represents the corporation as an institution.

> A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

ABA Model Rule 1.13(a).

In several cases, courts applied this "default" position in situations in which the lawyers apparently did not clearly identify their client.

For instance, one court held that WilmerHale represented "the entire corporation, and not just the Audit Committee" (meaning that the firm's communications with corporate employees deserved privilege protection).[1] An earlier New York state court case held that a lawyer providing advice to a company's Special Litigation Committee represented both the committee "and the corporation as a whole" -- which the court equated as representing "the plaintiff shareholders."[2]

Representation of Corporate Constituents Rather than the Corporation

Although the "default" position normally defines the client as the corporation itself rather than any of its constituents, courts sometimes find that lawyers have or could have established an attorney-client relationship with one of the corporation's constituents.

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[1] Lawrence E. Jaffee Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412 (N.D. Ill. 2006).

[2] Weiser v. Grace, 683 N.Y.S.2d 781, 786 (N.Y. Sup. Ct. 1998) (assessing plaintiff shareholders' efforts to obtain documents from the special litigation committee of defendant company; "The court recognizes that some of the documents sought may contain privileged matter which may be immune from discovery, notwithstanding their relevance to issues of good faith and the reasonableness of the investigation. Thus, an in camera review is the appropriate procedural vehicle to ensure that those privileges are not violated, while permitting plaintiffs to obtain the discovery necessary to challenge the SLC's [Special Litigation Committee] good faith. However, the court notes that the application of the attorney-client privilege is problematic. The SLC's counsel represents both the SLC and the corporation as a whole (e.g., the plaintiff shareholders). Under such circumstances, the attorney-client privilege would not bar discovery of all communications between counsel and the SLC."; noting that the Garner doctrine might entitle plaintiffs to review the documents, and ordering an in camera review to assist in that determination).

A Delaware court held that a special board committee could have hired its own lawyer to represent just a committee, and withheld privileged communications from other members of the board.[3]

In 2008, the Northern District of California held that Howrey represented only the Special Committee of a company's Board, and not the Board itself -- concluding that the Special Committee and the Board did not even share a "common interest."

> 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.

SEC v. Roberts, 254 F.R.D. 371, 378 n.4 (N.D. Cal. 2008).[4]

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[3] Moore Bus. Forms, Inc. v. Cordant Holdings Corp., Civ. A. Nos. 13911 & 14595, 1996 Del. Ch. LEXIS 56 (Del. Ch. June 4, 1996) (assessing a dispute between a corporation and a plaintiff shareholder who had sued the corporation over the right of the shareholder's designee to review information furnished to other board members; ultimately granting the shareholder's motion to compel discovery, because the shareholder was entitled to the information that its designated director was entitled to see; noting that the company could have included a different provision in the stockholder agreement or arranged for appointment of a special committee; "Under either scenario the special committee would have been free to retain separate legal counsel, and its communications with that counsel would have been properly protected from disclosure to Moore [shareholder] and its director designee. Neither approach was followed here.").

[4] SEC v. Roberts, 254 F.R.D. 371, 378 n.4, 378 (N.D. Cal. 2008) (assessing privilege issues in connection with an internal corporate investigation of possible options backdating at McAfee, conducted by the Howrey law firm; concluding that the McAfee Board and the Special Committee did not share a common interest; "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. In this respect, this court disagrees with the conclusion reached in In Re BCE West, L.P., No. M-8-85, 2000 U.S. Dist. LEXIS 12590, 2000 WL 1239117 (S.D.N.Y. Aug. 31, 2000)."; finding that Howrey's disclosure to the Board triggered a waiver; "Certain instances of waiver are straightforward. When Howrey 'detailed for the Board the various stock option issues, improprieties and erroneous option grant dates that were discovered in the investigation,' . . . it waived the work product privilege with respect to its conclusions regarding which option grant dates were improper or erroneous."; ultimately finding a broad scope of waiver, although applied on an interviewee-by-interviewee basis -- so that Howrey's disclosure of its opinions about the interview or the interviewee triggered a subject matter waiver covering materials that the law firm created during that interview).

Defining the lawyer's "client" in this way can have dramatic effects. The Northern District of California found that Howrey's communications with Board members who did not serve on the Special Committee did not even deserve privilege protection.

> The notes with respect to communications between Howrey and the Board or members of the Board that are not members of the Special Committee are not protected by the attorney-client privilege since they are not with respect to communications between Howrey and its client, the Special Committee of the Board.

Id. at 383 (emphasis added). This was a remarkable finding, because in most situations a corporation's lawyer can rely on the Upjohn standard to protect the lawyer's communications with other constituents of the corporation (such as employees) even if the lawyer does not separately represent them.

In addition to aborting the privilege, defining the client relationship so narrowly can destroy the privilege in another way. The Northern District of California held that Howrey waived the attorney-client privilege by reporting to the full board its finding following an options backdating investigation.

> Certain instances of waiver are straightforward. When Howrey 'detailed for the Board the various stock option issues, improprieties and erroneous option grant dates that were discovered in the investigation,' . . . it waived the work product privilege with respect to its conclusions regarding which option grant dates were improper or erroneous.

Id. This finding undoubtedly came as a shock to the lawyers and their "client," the Special Committee. Such a privilege dispute highlights the risks of failing to have carefully defined the "client."

In 1998, a Delaware state court assessed a similar situation, in which Orrick Herrington was hired by a single-member Special Committee of a client board of

directors -- to investigate possible options backdating.[5] That court also found that Orrick Herrington waived the attorney-client privilege protection by reporting on its investigation to the full board, which included two directors who themselves were targets of the investigation (and who were accompanied at the board meeting by their personal lawyers from Quinn Emanuel).[6]

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[5] Ryan v. Gifford, Civ. A. No. 2213-CC, 2008 Del. Ch. LEXIS 2, at *3, *10, *10-11, *11, *12, *12 n.9, *16, *17-18 (Del. Ch. Jan. 2, 2008) (unpublished opinion) (addressing a situation in which the law firm of Orrick Herrington and forensic accounting firm LECG conducted an investigation into possible options backdating by executives and directors of Maxim; noting that Maxim's board established a Special Committee composed of a single director, which was not an "independent Special Litigation Committee" under Delaware law; explaining that the single-member Special Committee retained Orrick, who did not provide a written report but instead presented an oral report to a Maxim board meeting attended by three directors represented by the law firm of Quinn Emanuel in the derivative action that prompted Orrick Herrington's investigation; noting that Maxim's board found that some directors received backdated options, but did not take any action to recover any damages; further explaining that Maxim "provided details of this work to third-parties, including NASDAQ and publicly to investors (through the SEC Form 8-K). Moreover, the Special Committee itself provided a number of documents to the SEC, the United States Attorney's Office, and Maxim's current and former auditors."; also noting that "the director defendants in this case have specifically made use of the Special Committee's findings and conclusions for their personal benefit and have argued to this Court that the Special Committee's exoneration of them should be accorded deference. The director defendants have made these arguments in a brief, opposing plaintiffs' motion to amend the complaint, in which coincidentally Maxim has expressly joined. Further, the director defendants have extensively relied upon the Special Committee's findings both in opposing plaintiffs' motion for summary judgment and in support of their own motion for summary judgment. At the time of the November 30 decision, in their unamended summary judgment brief, the director defendants explicitly rely upon the unwritten 'findings' of the Special Committee that purport to absolve the director defendants of liability." (footnote omitted); "[T]he director defendants have submitted an amended brief in support of their motion for summary judgment that purports to disavow reliance on the Special Committee's findings, despite their explicit reliance thereon in the first brief in support of their motion."; noting that in an earlier opinion "the Court ruled that Maxim, its Special Committee and Orrick must produce all material[s] related to the Special Committee's investigation that were withheld on grounds of attorney-client privilege."; "The Court also directed Orrick to turn over its work-product, including its interview notes, for in camera review. Orrick does not seek to appeal any aspect of this Court's ruling, including the ruling that plaintiffs have made a showing of good cause to obtain its non-opinion work product."; noting that Maxim did not appeal the court's earlier decision that the Garner doctrine overcame any privilege claim; after explaining that the court's Garner determination "provides an independent basis" for its conclusion requiring Maxim to disclose the documents; also noting the directors' essentially inaccurate description about whether they were relying on Orrick Herrington's report; "At the time of the November 30 decision, however, the director defendants explicitly asserted that the findings of the Special Committee were entitled to deference from this Court. Moreover, even if this Court ignores the suspicious timing of the director defendants' purported disavowal of reliance on the investigation, Maxim seeks to further avail itself of the Special Committee's report, which will redound to the benefit of the director defendants."; declining to certify an appeal).

[6] Id. at *23.

Wisdom of Carefully Defining the "Client"

For obvious reasons, lawyers and corporations with which the lawyers work share an interest in carefully defining the "client" at the start of any representation -- at least if application of the "default" position would frustrate the intended representation.

Lawyers planning ahead can avoid extreme prejudice by undertaking this common sense step. In 2006, the Alabama Supreme Court held that a bankrupt company's trustee could not gain access to documents created by Skadden, Arps -- because that law firm represented just the company's outside directors, not the company.[7]

The court pointed to the following language in Skadden, Arps' retainer letter with the corporation's outside directors.

> We are pleased that you as outside directors (the "Outside Directors") of Just For Feet, Inc. (the "Company") have decided to engage [the Skadden law firm] to assist you in your review of various matters relative to the Company. . . .

[7] Ex parte Smith, 942 So. 2d 356, 357-58, 360-61 (Ala. 2006) (addressing efforts by a bankruptcy trustee to obtain communications that the bankrupt company's outside directors had with the Skadden law firm before the bankruptcy; finding that the following language in the outside directors' retainer letter with Skadden created a separate attorney-client relationship between the outside directors and Skadden, that allowing them to withhold the documents from the bankruptcy trustee: "'We are pleased that you as outside directors (the "Outside Directors") of Just For Feet, Inc. (the "Company") have decided to engage [the Skadden law firm] to assist you in your review of various matters relative to the Company. . . . With respect to the Company and its subsidiaries and parties affiliated with the Outside Directors generally, it is our understanding that the [Skadden law firm] is not being asked to provide, and will not be providing, legal advice to, or establishing an attorney-client relationship with, the Company, its subsidiaries, any such affiliated party or any Outside Director in his individual capacity and will not be expected to do so unless the [Skadden law firm] has been asked and has specifically agreed to do so.'"; explaining that "if a corporate officer or director can have a personal attorney-client privilege with regard to communications with corporate counsel concerning the general affairs of the company, then directors and officers can have their own personal outside counsel and their communications with counsel regarding their personal rights and liabilities will be privileged, even though those communications pertain to matters relating to the affairs of the company. We hold that the outside directors and the Skadden law firm were free to form their own attorney-client relationship, to which JFF was not a party, regarding the directors' individual personal rights and liabilities stemming from 'various matters relative to the Company.'").

> With respect to the Company and its subsidiaries and parties affiliated with the Outside Directors generally, it is our understanding that the [Skadden law firm] is not being asked to provide, and will not be providing, legal advice to, or establishing an attorney-client relationship with, the Company, its subsidiaries, any such affiliated party or any Outside Director in his individual capacity and will not be expected to do so unless the [Skadden law firm] has been asked and has specifically agreed to do so.

Ex parte Smith, 942 So. 2d 356, 357-58 (Ala. 2006).

Of course, lawyers and everyone else with whom the lawyer deals must remember the "client's" identity on a day-to-day basis. This allows the lawyer to assure privilege protection where appropriate and (especially) to avoid waiver.

Unfortunately, courts sometimes inexplicably ignore these careful lawyers' best efforts. A 2012 Pennsylvania appellate court decision highlights this risk.[8]

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[8] Kirschner v. K&L Gates LLP, 46 A.3d 737, 742, 743, 744, 749, 749 n.3, 749, 749-50, 750, 751, 753, 753 n.6, 754 (Pa. Super. Ct. 2012) (holding that a liquidation trustee can pursue malpractice, breach of fiduciary duty, and other claims against K&L Gates on behalf of a bankrupt company, despite a retainer letter explicitly indicating that K&L Gates did not represent the company, but instead represented only the special committee of a board of directors; explaining that after several of its senior financial executives resigned after accusing CEO Podlucky of financial improprieties, Le-Nature's board of directors determined that it was "in the best interest of the Company to appoint a special committee of independent directors" to investigate matters; noting that the Special Committee determined that "it was critical to retain on behalf of the company, legal counsel with experience in conducting such investigations; noting that K&L Gates's retainer letter contained the following provision: "'**We understand that we are being engaged to act as counsel for the special committee and for no other individual or entity, including the Company or any affiliated entity, shareholder, director, officer or employee of the Company not specifically identified herein. We further understand that we are to assist the Committee in investigating the facts and circumstances surrounding the aforementioned resignations and assist the Special Committee in developing any findings and recommendations to be made to the full Board of the Company with respect thereto. The attorney-client relationship with respect to our work, including our work product, shall belong to the Committee. Only the Committee can waive any privilege relating to such work.**'"; noting that K&L Gates hired P&W as a financial expert pursuant to a retainer letter that contained the following sentence: "'**P&W shall provide general consulting, financial accounting, and investigative or other advice as requested by K&L [Gates] to assist it in rendering legal advice to Le[-]Nature's.**" (alterations in original); explaining that K&L gave a draft of its investigation report to Podlucky, even though he was not a member of the Special Committee; reciting the report as finding no evidence that Podlucky had engaged in impropriety; pointing out that Poducky later hired K&L Gates on behalf of the company to prepare an initial public offering, but that eventually a custodian found "massive fraud" at the company, which caused it to declare bankruptcy; acknowledging that the trial court had dismissed the liquidation trustee's legal malpractice/negligence claim against the firm, because the firm had been retained to protect the interests of the shareholders

In Kirschner v. K&L Gates LLP, 46 A.3d 737 (Pa. Super. Ct. 2012), a Pennsylvania appellate court held that the liquidation trustee for Le-Nature could pursue malpractice, negligence, breach of fiduciary duty and other claims against the law firm of K&L Gates -- despite an explicit provision in the firm's retainer letter disclaiming any representation of the company itself, and instead indicating that the company board's Special Committee was the firm's sole client.

After a number of Le-Nature's senior financial executives left the company and alleged that CEO Podlucky was engaging in financial improprieties, Le-Nature's board of directors unanimously passed a resolution indicating that it was "in the best interest of the Company to appoint a special committee of the independent directors to conduct an

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rather than the company itself; reversing the trial court's finding, concluding "[t]he averments of the Amended Complaint, taken as true, establish that Le-Nature's, acting through its Board and the Board's Special Committee, sought the legal advice and assistance of K&L Gates's. Specifically, Le-Nature's sought K&L Gates's legal advice and assistance in investigating allegations of fraud, and in preparing findings and recommendations for action to be taken by Le-Nature's."; "As a committee of the Board, the Special Committee had the fiduciary duty to act in the best interests of not only the shareholders, but also the corporation."; "Contrary to the arguments of K&L Gates and Ferguson, no conflict of interest existed between Le-Nature's and the Special Committee as the Special Committee owed a fiduciary duty to act in the best interests of the company."; "By its Resolution, the Board authorized the Special Committee to retain counsel to conduct an investigation 'on behalf of the company.'"; "Under Delaware law, the Board could not authorize the Special Committee to act solely on behalf of investors. Such authorization would violate the Board's fiduciary duty to Le-Nature's. . . . [U]nder Delaware law, the Special Committee only could act in the best interests of Le-Nature's and its shareholders."; "K&L Gates retained P&W to provide, inter alia, consulting, financial and investigative advice to K&L Gates 'to assist it in rendering legal advice to Le[-]Nature's.'" (alteration in original); "In addition to the foregoing, the Amended Complaint asserts that K&L Gates provided a draft of its Report not only to the Special Committee, but also to Podlucky. . . . Podlucky was not a member of the Special Committee."; also reversing the trial court's finding that the liquidation trustee could not seek damages because the company was already insolvent when K&L Gates prepared its report; the "trial court rejected Trustee's claim for damages because Le-Nature's was insolvent at the time K&L Gates prepared its Report in December 2003"; "[W]e conclude that Trustee seeks traditional tort damages. The fact of Le-Nature's insolvency does not negate the harm allegedly resulting from K&L Gates's professional negligence."; "Despite the fact that other courts may have determined that similar complaints involving Le-Nature's have alleged deepening insolvency as damages, we conclude that the Complaint before this Court does not, under Pennsylvania law."; "According to the Amended Complaint, these damages were reasonably foreseeable and K&L Gates's malpractice enabled Podlucky and the interested directors to continue their fraudulent activity.").

investigation" into the executives' resignations.[9] The board appointed three independent directors to serve on the Special Committee, who then determined that "it was critical to retain on behalf of the company, legal counsel with experience in conducting such investigations."[10]

The Special Committee retained K&L Gates to conduct the investigation "on behalf of the Company." The law firm's retainer letter with the Special Committee contained the following paragraph:

> We understand that we are being engaged to act as counsel for the special committee and for no other individual or entity, including the Company or any affiliated entity, shareholder, director, officer or employee of the Company not specifically identified herein. We further understand that we are to assist the Committee in investigating the facts and circumstances surrounding the aforementioned resignations and assist the Special Committee in developing any findings and recommendations to be made to the full Board of the Company with respect thereto. The attorney-client relationship with respect to our work, including our work product, shall belong to the Committee. Only the Committee can waive any privilege relating to such work.

Id. at 743.

To assist the investigation, K&L retained a financial expert, P&W, pursuant to a retainer letter that contained the following sentence:

> P&W shall provide general consulting, financial accounting, and investigative or other advice as requested by K&L [Gates] to assist it in rendering legal advice to Le[-]Nature's.

Id. at 744 (alterations in original). K&L Gates later sent a draft of its report to Podlucky, even though he was not a member of the Special Committee. The firm found no

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9 Id. at 742.

10 Id.

widespread fraud, and was later retained by Podlucky on behalf of the company to help with an initial IPO.

After new allegations of fraud, the company was placed in the hands of a custodian, and later declared bankruptcy.

The appellate court acknowledged that the trial court dismissed the claims against K&L Gates because the firm had been retained "solely to protect the interests of the remaining equity holders," rather than the company itself. Id. at 748.

The appellate court nevertheless reversed, concluding that

> [t]he averments of the Amended Complaint, taken as true, establish that Le-Nature's, acting through its Board and the Board's Special Committee, sought the legal advice and assistance of K&L Gates. Specifically, Le-Nature's sought K&L Gates's legal advice and assistance in investigating allegations of fraud, and in preparing findings and recommendations for action to be taken by Le-Nature's.

Id. at 749. The appellate court pointed to a number of facts in support of its conclusion.

- "As a committee of the Board, the Special Committee had the fiduciary duty to act in the best interests of not only the shareholders, but also the corporation."[11]
- "Contrary to the arguments of K&L Gates and Ferguson, no conflict of interest existed between Le-Nature's and the Special Committee as the Special Committee owed a fiduciary duty to act in the best interests of the company."[12]
- "By its Resolution, the Board authorized the Special Committee to retain counsel to conduct an investigation 'on behalf of the company.'"[13]
- "Under Delaware law, the Board could not authorize the Special Committee to act solely on behalf of investors. Such authorization would violate the Board's

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11 Kirschner v. K&L Gates LLP, 46 A.3d 737, 749 (Pa. Super. Ct. 2012).

12 Id. at 749 n.3.

13 Id. at 749.

fiduciary duty to Le-Nature's. . . . [U]nder Delaware law, the Special Committee only could act in the best interests of Le-Nature's and its shareholders."[14]

- "K&L Gates retained P&W to provide, inter alia, consulting, financial and investigative advice to K&L Gates 'to assist it in rendering legal advice to Le[-]Nature's.'"[15]

- "In addition to the foregoing, the Amended Complaint asserts that K&L Gates provided a draft of its Report not only to the Special Committee, but also to Podlucky. . . . Podlucky was not a member of the Special Committee."[16]

The appellate court also concluded that that liquidation trustee was seeking traditional tort damages from the law firm, which negated the relevance of whether or not the company was insolvent at the time K&L Gates provides its report.[17]

K&L Gates unsuccessfully sought the Pennsylvania Supreme Court's review of the appellate court's reinstatement of the malpractice action against it.

- Gina Passarella, K&L Gates' Appeal of Le-Nature's Trustee $500 Mil. Suit Denied, Legal Intelligencer, Apr. 25, 2013 ("The Pennsylvania Supreme Court has declined to take a case in which K&L Gates was appealing the reinstatement of a $500 million lawsuit against the firm by the trustee of bankrupt bottling company Le-Nature's."; "K&L Gates and co-defendant accounting firm Pascarella & Wiker had asked the justices to review the Superior Court decision to reinstate the professional negligence and breach of fiduciary duty case against them. The high court denied that request in a one-page order late Wednesday."; "K&L Gates and Pascarella & Wiker had argued the firms only had a duty to the special committee of Le-Nature's that hired them in 2003, and not to a trustee of the now-bankrupt company. Allegheny County Court of Common Pleas Senior Judge R. Stanton Wettick Jr. agreed, finding they had no obligation beyond the special committee and that the trustee could not claim damages for deepening insolvency of the

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14 Id. at 749-50.

15 Id. at 750.

16 Id. at 750.

17 The court pointed to the theory of "deepening insolvency," but found that the complaint did not allege such a theory. "Despite the fact that other courts may have determined that similar complaints involving Le-Nature's have alleged deepening insolvency as damages, we conclude that the Complaint before this Court does not, under Pennsylvania law." Id. at 753 n.6.

company between the 2003 internal investigation and the 2006 collapse of the company."; "But Superior Court Judge John L. Musmanno said in his May 2012 opinion that the special committee had a duty to the company and K&L Gates was providing legal services to Le-Nature's through the special committee."; "'K&L Gates was retained to investigate the exact type of injury being inflicted upon Le-Nature's,' Musmanno said. 'By negligently conducting its investigation, K&L Gates affirmatively caused harm to Le-Nature's by concealing the looting of the company and wrongdoing by [former chief executive officer Gregory J.] Podlucky, and affirmatively representing that no evidence of fraud or misconduct existed.'"; "The amici law firms had argued in their brief to the Superior Court that 'for the first time,' the court ruled 'an implied attorney-client relationship could be inferred from circumstantial evidence even where two sophisticated parties have entered into a representation agreement that expressly disavows that such a relationship exists.' They argued the engagement letter between K&L Gates and the special committee expressly disavowed any relationship between the law firm and Le-Nature's.").

Perhaps not surprisingly, the law firm eventually settled the malpractice case -- paying nearly $24 million.

- Dan Packel, K&L Gates' $24M Malpractice Deal OK'd In Le-Nature's Case, Law360, Feb. 27, 2014 ("A Pennsylvania bankruptcy judge on Thursday approved a $23.75 million settlement between K&L Gates LLP and the liquidation trustee of defunct drink maker Le-Nature's Inc. in a legal malpractice case, a day after the accounting firm serving as co-defendant dropped its opposition.").

Best Answer

The best answer to this hypothetical is **THE CORPORATION (ACTING THROUGH THE BOARD OF DIRECTORS)**.

B 6/14

Identifying the Client Within a Closely Held Corporation

Hypothetical 24

You have represented a closely held corporation for several years, dealing with each of the two owners and many of the corporation's employees. The two owners have been quarreling more vigorously than usual lately, and you wonder what that means for your representation.

If the two owners become acutely adverse, can you represent the corporation and one of the owners in litigation against the other owner?

MAYBE

Analysis

Identifying the client in the corporate context can become more difficult with closely held corporations.

Only a surprisingly few number of cases deal with this issue. The cases focus on a number of topics involving the ramifications of attorney-client relationships. Of course, the most acute problems involve lawyers' ability to represent a closely held company against one of its owners, or jointly represent the company and one owner against another owner. In other cases, courts address the ability of a closely held corporation's owner to file a malpractice action against the company's lawyer. Some cases discuss an owner's attempt to obtain the company lawyer's files.

Analyzing Representations in the Context of Closely Held Corporations

Before turning to the majority "default" rule and the minority rule applying to lawyers who represent closely held corporations, it is worth noting an obvious point. Lawyers can intentionally represent a closely held corporation and/or its constituents. Those representations can be sole representations, or joint representations.

Importantly, any intentionally represented corporation or constituent deserves all the rights that clients possess, absent some contractual limitation in a retainer agreement or elsewhere.

In 2003, the California Bar dealt with a lawyer who was simultaneously representing a closely held corporation and a CFO (on unrelated personal matters). California LEO 2003-163 (2003).

The Bar dealt with two scenarios -- in which either the CFO himself or the corporation's President informed the lawyer about the CFO's possible sexual harassment of several company employees. The Bar outlined the two scenarios as follows:

> Lawyer serves as an outside attorney for a closely held corporation, Corp. Lawyer handles most of Corp's general legal matters, including alerting Corp to, and advising Corp about, potential liabilities. Corp has been run for some time by its two principal shareholders, Prexy, the President, and CFO, the Chief Financial Officer, who are old friends. Lawyer has represented CFO on a number of personal matters not related to Corp. Some of CFO's personal matters remain pending, including the purchase and sale of real and personal property, a reckless driving charge, and family matters. Most recently, CFO consulted Lawyer on a modification of a support matter relating to his former marriage, and this support issue remains open. Lawyer does not represent Corp and CFO as joint clients on any single matter.
>
> Lawyer learns that CFO might have sexually harassed several Corp employees. We are asked to consider Lawyer's duties if she learns of the possible sexual harassment in either of two ways: (1) CFO goes to Lawyer's office and asks to speak to Lawyer privately on a 'personal matter,' Lawyer asks CFO to continue, and CFO admits incidents of sexual harassment; or (2) Prexy tells Lawyer that Prexy has learned of a particular incident of sexual harassment by CFO, plus rumors of several others, and needs Lawyer's advice concerning what Corp should do.

Id.

The California Bar explained that if the CFO himself provided the information, the lawyer had to keep it secret from the corporate client.

> Assuming that CFO did have an objectively reasonable basis for believing that CFO was speaking to Lawyer in confidence as CFO's personal attorney, then Lawyer's duty to preserve CFO's secrets would prevent Lawyer from revealing any information about the sexual harassment that Lawyer learned directly from CFO or as a result of her representation of CFO. Such information would be embarrassing or detrimental to CFO. This restriction means that Lawyer could not reveal CFO's admitted harassment to anyone affiliated with Corp, including Corp's Board or Prexy.

Id.

Because maintaining the confidentiality of the information would "impede Lawyer's ability to discharge her duties to Corp," the lawyer would have to withdraw from representing the closely held corporation if the CFO did not consent to the lawyer's disclosure to the corporation of the protected client information about his alleged sexual harassment. Id.

> If CFO denies Lawyer permission to share with Corp the information that CFO has given to Lawyer, then Lawyer must withdraw from representing Corp on those matters to which the confidential information given to the lawyer by CFO is pertinent.

Id.

In the second scenario, the lawyer acquired information from the President about the CFO's possible sexual harassment. That scenario involved a completely different conclusion.

Although the lawyer obviously could discuss the pertinent information with the company's executives, the lawyer could not give advice adverse to her other client (the

CFO) -- even though the lawyer's representation of the CFO on personal matters bore no relationship to the company.

> We now turn to the second variant of the hypothetical, which posits that Lawyer learns of CFO's alleged harassment from Prexy, the President of Corp, not from CFO. Under these facts, Lawyer learns the information about CFO as a result of Lawyer's representation of Corp, not CFO. Thus, Lawyer is not obligated to treat the information as CFO's client secret. Nevertheless, Lawyer still faces a potential conflict between Lawyer's duties to Corp and Lawyer's duty of loyalty to CFO. . . . If Lawyer were to provide advice to Corp about how to react to the allegations that CFO has committed sexual harassment, then Lawyer will be giving legal advice to Corp that is adverse to CFO. Such advice would almost certainly involve potential adverse employment consequences to CFO, as well as civil liability.

Id.

Because the lawyer could not "cure the conflict by unilaterally dropping CFO as a client," the lawyer could advise the company about the sexual harassment only with the CFO's consent -- which the lawyer could request only if the company authorized the disclosure of the company's protected client information to the CFO. Id. And the CFO's failure to consent would require the lawyer's withdrawal from representing the company on that matter.

> If Corp will not allow Lawyer to seek CFO's consent, or if CFO declines to waive the duty of loyalty, then Lawyer must withdraw from representing Corp if Lawyer cannot advise Corp competently without violating Lawyer's duty of undivided loyalty to CFO. Lawyer is obligated to withdraw from representing Corp only to the extent necessary to resolve the conflict of interest. On the facts presented to us, we believe that Lawyer would have to withdraw from her representation of Corp to the extent that Lawyer's representation includes identifying and assessing potential claims against Corp arising from CFO's conduct.

Id.

These principles apply with equal force to all corporations and their constituents, but lawyers representing clients in a closely held corporation context are more likely to intentionally represent constituents -- thus triggering all of the dilemmas involving confidential information and conflicts.

In 2014, a New Jersey court dealt with conflicts within a closely held corporation. Comando v. Nugiel, Dkt. No. A-2403-13T4, 2014 N.J. Super. Unpub. LEXIS 1365 (N.J. Super. Ct. App. Div. June 11, 2014). In that case, a law firm representing a closely held corporation and one of its two owners faced a disqualification motion filed by the other owner. She claimed that the law firm had also represented her on related matters. The court described the law firm's work for the closely held corporation.

> In early 2011, Comando [owner seeking the law firm's disqualification] and Nugiel [other owner] formed 10 Centre [closely held corporation] as a holding company to acquire and manage real property that would become RCP's [tenant owned by Nugiel] headquarters. Nugiel requested Nash [lawyer] and NMM [Nash's law firm] to provide legal representation in '(1) the formation of the limited liability company, (2) preparation of the RCP lease for the property, (3) preparation of an operating agreement for [10 Centre], and (4) assistance with legal issues surrounding obtaining the financing needed by [10 Centre] to purchase the new headquarters' for RCP. There is no mention of the preparation or existence of a new engagement letter for these new legal services and nothing to explain what role Comando had in engaging NMM. NMM incorporated 10 Centre and served as its registered agent. In preparation of 10 Centre's operating agreement, Nash acknowledged he conducted conference calls with Nugiel and Comando, summarized provisions of the drafted documents, and emailed a memo to both Nugiel and Comando regarding modifications of the agreement terms. Nash also assisted with the preparation, modification and execution of an 'agreement for purchase and sale' of the realty ultimately acquired by 10 Centre. In the purchase of the realty, Nash assisted with the preparation, review and execution of several agreements related to the intricate multi-million dollar

> acquisition and the financing and re-financing of a bridge loan. It is unclear whether he provided individual legal advice to Nugiel regarding this transaction, while also acting as 10 Centre's counsel. Nash also drafted a lease agreement allowing RCP to lease the property acquired by 10 Centre for twenty years at a flat rent. In this regard, Nash insists he took direction from Nugiel and 'never gave [] Comando any personal advice or counsel on those issues.'

Id. at *6-8.

In resisting the owner's disqualification motion, the law firm relied on one of its lawyer's memoranda "accompanying transmittal of 10 Centre's proposed operating agreement, in which he stated:"

> As an initial matter (and as you both know) I must stress that I represent [Nugiel] and RCP [] in several matters. I have drafted the attached based on your instructions, but I do not represent [Comando] in connection with these matters. [Comando], this operating agreement is a complicated document, I advise you to obtain separate counsel to advise you and advocate for your interests in connection with the attached. Review of this cover note is not a substitute for a careful review of the attached with your own counsel. Please let me know if you would like me to refer an attorney to you.

Id. at *8-9 (emphasis added).

However, the court rejected the lawyer's argument that his law firm had never represented Comando.

> This assertion contradicts his claim of serving as counsel for the corporation not its members and also his written representations contained in an opinion letter delivered to TD Bank in respect of the highly complex financing arrangement. In issuing his legal opinion, Nash stated NMM "acted as special counsel to 10 Centre Drive, LLC (the 'Borrower'), RCP Management Company, Inc. (the 'Equity Guarantor') and Mary Faith Radcliffe and Elizabeth Comando (each, an 'Individual Guarantor' and collectively, the 'Individual Guarantors') in connection with the closing . . . of a $1,500,000 mortgage loan from you to Borrower (the

> 'First Mortgage Loan') and a $350,000 bridge loan from you to Borrower (the 'Bridge Loan,['] and together with the First Mortgage Loan, the 'Loan Facilities')."

Id. at *8 (emphases added).

The court found that the law firm had represented Comando, and criticized the trial court for not having conducted an evidentiary hearing focusing on the extent of that representation.

> [W]e conclude the record is far too limited and contains material factual disputes making this court unable to discern the full extent and nature of NMM's prior legal representation of Comando, which could only have been determined following an evidentiary hearing. The evidence certainly shows NMM provided limited legal services to her and also rendered extensive legal services to 10 Centre, as well as RCP and Nugiel. . . . Regarding Comando's claim of disqualification based on her prior representation, although we conclude the judge inaccurately found NMM provided no legal representation to her, the record does not allow this court fully assess the extent and nature of that representation. Nevertheless, NMM's complete withdrawal renders the question moot.

Id. at *3-5 (emphases added).

The law firm apparently saw the handwriting on the wall, because it had already withdrawn from representing the closely held corporation by the time the court dealt with the now-moot disqualification motion.

If one closely held corporation's owner brings his or her lawyers "to the deal," those lawyers may lose sight of their equal duty of loyalty to the owner and to the corporation which that owner only partially owns.

A 1994 Fairfax County Virginia case involved a large law firm lawyer running into this problem.

- Saundra Torry, Judge Takes Firm to Task Over Conflicts of Interest, Wash. Post, June 13, 1994 ("A Fairfax County judge last week hit prominent D.C. lawyer Deanne Siemer and her firm, Pillsbury Madison & Sutro, with a $500,000 legal malpractice judgment, finding that Pillsbury lawyers violated conflict-of-interest rules by siding against their own client, a lobbying firm. In a harshly worded opinion, Circuit Court Judge Jane Roush asserted that Siemer 'willfully ignored' the D.C. Rules of Professional Conduct for lawyers, and that the law firm shared the blame for failing to heed the warnings of junior associates that the 'dual representation . . . was rife with conflicts of interest.' According to trial testimony, when internal tensions erupted at the lobbying firm of Murphy & Demory (a District firm that is incorporated in Virginia), Pillsbury lawyers assisted one partner, retired Adm. Daniel Murphy, in his plans to take control of the small corporation or divert its clients to a new firm, leaving Murphy & Demory to 'wither.' At the time, Pillsbury lawyers represented Murphy & Demory as a corporation, the judge ruled, and owed their allegiance to the entire firm, rather than to any individual officer. The ruling came in a lawsuit filed by the lobbying firm and Willard L. Demory, the partner left behind when Murphy resigned to start a competing lobbying firm. In the midst of the feud between Demory and Murphy, Demory fired Pillsbury and hired John Dowd, of Akin, Gump, Strauss, Hauer & Feld. Demory's lobbying firm later sued Murphy for breach of contract and Pillsbury for malpractice. The judge also awarded Demory's firm $1 million on his claims against Murphy." (emphasis added); "In a July 1992 computer e-mail message, Siemer [Pillsbury partner] asked [Pillsbury] associate Frazer Fiveash to research whether it was 'feasible for Dan [Murphy] to set up a new corporation and divert new business to [it] . . . while allowing the old corporation to wither. . . .' The message was used as a trial exhibit by the Akin, Gump legal team, which included Larry Tanenbaum, Joseph Esposito and Lucy Pliskin. At some points during the 1992 dispute, Pillsbury billed Murphy & Demory for the work it had done at Murphy's behest -- work that Demory knew nothing about. For instance, Pillsbury sent Murphy & Demory a $662 bill for researching Murphy's options, including forcing the company to dissolve. The bill, signed by Siemer, said the work had been on 'corporate matters.' Siemer, according to court records, later billed the company, at $305 an hour, for some of her time, too." (emphases added); "Siemer, with Pillsbury since 1990 and a onetime partner at Wilmer, Cutler & Pickering, also was haunted at trial by her own ethics expertise. She has written a book, 'Understanding Modern Ethical Standards,' for the National Institute on Trial Advocacy, a nonprofit group that teaches young lawyers how to try cases. Known nationally as a fierce litigator, Siemer is now the institute's chair-elect." (emphasis added)).

More recently, another large law firm faced financial exposure for not carefully identifying the "client."

- Meredith Hobbs, Holland & Knight's Lesson? Get a Disclaimer, Fulton County Daily Report, May 21, 2012 ("Legal malpractice lawyers say the best way for lawyers to protect themselves from the situation Holland & Knight finds itself in – on the hook for $34.5 million in damages for malpractice claims brought by unhappy real estate investors – is by having individuals involved in complex multi-party transactions sign waivers saying the firm doesn't represent them."; "Holland & Knight's lawyers weren't able to persuade the jury that the firm represented only Shailendra Group and some of the development entities the plaintiffs formed with Shailendra – but not the individual plaintiffs themselves, according to court documents."; "Holland & Knight's case could have been bolstered by a waiver specifying that then-partner Reeder Glass didn't represent the plaintiffs individually or provide them legal advice in the series of complex, multi-party real estate deals he handled for Shailendra Group and its investment partners, [Christine Mast, malpractice defense lawyer] said."; "One problem is that lawyers and clients may work on deals over an extended period of time, [Linley Jones, attorney handling plaintiffs malpractice,] said. 'Often they become very chummy. The lines of lawyer, friend and counselor can become blurred. That can make it awkward to send a letter saying you don't represent someone to a person you went to dinner with the night before.'"; "The malpractice lawyers agreed that relationship creep became a pitfall for Holland & Knight. The firm started out representing Shailendra Group, but then formed business entities for Shailendra and the other investors, according to the public record, said plaintiffs malpractice lawyer Rickman Brown of Evans, Scholz, Williams & Warncke.").

General "Default" Rule: Lawyers Represent the Closely Held Corporate Entity and Not Its Owners

As with all corporations, ABA Model Rule 1.13(a)'s "default" position recognizes that a corporation's lawyer represents the entity rather than any of its constituents. However, it is easy to see how corporate constituents in a closely held corporation context might reasonably believe that the company lawyer also represents them -- or at least feign such a belief if it suits their purposes.

Most corporations follow the general "default" rule absent evidence to the contrary.

- Weingarden v. Milford Anesthesia Assocs., P.C., No. NNHCV116016353S, 2013 Conn. Super. LEXIS 1239, at *20, *20-21, *22-23 (Conn. Sup. Ct. May 30, 2013) ("The other basis for the plaintiff's claim under rule 1.9 is that

by representing Milford Associates, Mathieson represented the shareholders and thus the plaintiff as a shareholder is a former client of Mathieson. Such an argument is easily rejected in light of clear authority to the contrary. . . . Rule 1.13 makes clear that a shareholder of an organization is not the client of that organization's lawyer absent some set of facts independently creating an attorney-client relationship." (emphasis added); "This principle is further supported in case law. In the analogous context of partnerships, '[a] partnership usually is a legal entity and is the lawyer's client. Thus a lawyer who represents a partnership does not thereby become counsel or owe a duty to the partners.'" (citation omitted); "The plain language of rule 1.13, the official comment to that rule, appellate case law explaining entity theory and the overwhelming stance taken in other Superior Court decisions makes it abundantly clear that the plaintiff cannot establish an attorney-client relationship with Mathieson simply by relying on his status as a shareholder of an organization that Mathieson represented. The plaintiff would have to demonstrate some other facts creating such a relationship, none of which have been shown here." (emphasis added)).

- Nilavar v. Mercy Health Sys., 143 F. Supp. 2d 909, 914, 915, 917 (S.D. Ohio 2001) (holding that the lawyer who represented a closed corporation did not also represent a major shareholder, and therefore could be adverse to the shareholder; "The fact that SRI was a close corporation does not lead to the conclusion that Plaintiff reasonably believed that he personally had an unrestricted attorney-client relationship with Mehnert. Between 1970 and 1983, SRI consisted of six physician-shareholders . . . . When Dr. Bavendam retired in 1983, the corporation was restructured, with the five remaining principals receiving equal shares in the corporation . . . . At the time, accordingly, Plaintiff would have had a twenty percent (20%) interest in the corporation. By 1991, SRI had approximately eleven principals . . . . Thus, assuming that each principal had an equal interest in the corporation, Plaintiff held approximately a nine percent (9%) interest in SRI at that time. As stated by the Correspondent Servs. [Correspondent Servs. Corp. v. J.V.W. Inv. Ltd., No. 99 Civ. 8934 (RWS), 2000 U.S. Dist. LEXIS 11881 (S.D.N.Y. Aug. 16, 2000)] court, even twenty percent is 'a far cry from the 50-50 ownership stake in Rosman [Rosman v. Shapiro, 653 F. Supp 1441 (S.D.N.Y.1987)].' Therefore, the degree to which Plaintiff shared an ownership interest in SRI does not provide a strong basis for the conclusion that Plaintiff believed, at the time that he communicated with SRI's corporate counsel, that he was communicating with Mehnert as his personal attorney." (emphasis added); "Although Plaintiff has stated in his affidavit that he was not informed by Mehnert that Frost & Jacobs was representing SRI alone, even when his and SRI's interests were aligned and, therefore, that Plaintiff should retain counsel to protect his interests, Plaintiff has not indicated that he entered into individual transactions or agreements with SRI, which would have warranted consultation with separate counsel. Plaintiff has not stated that he would have engaged separate counsel with regard to certain transactions, but for his

belief that Mehnert and Frost & Jacobs were acting for his benefit, as well as for the benefit of SRI. . . . In short, Plaintiff has not indicated, in any respect, that he believed that Mehnert and Frost & Jacobs implied that they were provided legal services for him personally, as well as for SRI, with regard to any transaction between himself and SRI. Accordingly, Plaintiff has not presented evidence to support the conclusion that Mehnert's failure to inform Plaintiff that he and Frost & Jacobs were acting solely for SRI led Plaintiff reasonably to believe that Mehnert had acted as his personal counsel."; "Plaintiff has provided no evidence that: (1) either Mr. Mehnert or Frost & Jacobs provided personal legal services to him, unconnected with the corporation; (2) either Mr. Mehnert or Frost & Jacobs provided specific services for SRI principals, in addition to the corporation . . .; or (3) that he paid for any legal services by Frost & Jacobs, ... In essence, Plaintiff has not provided evidence that he reasonably believed that Mr. Mehnert and Frost & Jacobs represented him individually, in addition to SRI, thus creating an attorney-client relationship between Frost & Jacobs and himself. Rather, Plaintiff's evidence indicates that he believed that his communications with Mr. Mehnert were confidential vis-à-vis MHS-WO [Mercy Health Systems – Western Ohio], but not vis-à-vis SRI and its principals. Therefore, Plaintiff has not established that he personally had an attorney-client relationship with Mr. Mehnert or Frost & Jacobs. Accordingly, Plaintiff's Motion to Disqualify Frost & Jacobs is OVERRULED." (footnote omitted)).

- Correspondent Servs. Corp. v. J.V.W. Inv. Ltd., No. 99 Civ. 8934 (RWS), 2000 U.S. Dist. LEXIS 11881, at *36, *36-37 (S.D.N.Y. Aug. 16, 2000) (refusing to disqualify Shaw Pittman from adversity to an individual who owned an interest in the corporation that Shaw Pittman represented; finding that the attorney-client relationship existed between Shaw Pittman and the corporation rather than the individual; "Here, the words and actions of the parties demonstrate that Shaw Pittman was engaged to act as attorney for JVW [corporation], not Kelleher [individual seeking to disqualify Shaw Pittman] individually. First, Kelleher concedes in an affidavit that he was 'acting on behalf of JVW' when he identified Shaw Pittman as a potential firm to represent JVW in the attempt to recover the missing assets. . . . Although Kelleher also asserts in the affidavit that Shaw Pittman was retained 'to act as the attorneys for JVW, Waggoner, and myself,' . . . this statement is not supported by any of the documents submitted in connection with these motions." (emphasis added); "Caruso wrote to Kelleher after the conference call with Kelleher and Duperier. The letter is addressed to Kelleher as Director of JVW and Trustee, stated that 'As the Director and Trustee, you no doubt possess E-mail, documents, etc. in your computer, in originals, or in first-stage fax copies,' and requested that copies of those be sent to Shaw Pittman to provide a background to the case. According to Caruso's (Shaw Pittman attorney) uncontradicted affidavit, Kelleher then faxed Caruso a quantity of materials consisting largely of JVW corporate documents and correspondence between Kelleher and others on JVW corporate letterhead.

In addition, Shaw Pittman's retainer was paid by JVW, not Kelleher, and Shaw Pittman's engagement letter stated that Shaw Pittman was 'pleased to have been engaged to represent J.V.W. Investments, Ltd.' for the purpose, inter alia, of recovering 'amounts due and owing to J.V.W. Investments, Ltd.' Shaw Pittman sent a bill on November 17, 1998 to 'J.V.W. Investments Ltd.' At Kelleher's address. Other documents support the conclusion that Kelleher, likewise, considered Shaw Pittman to be JVW's attorneys.").

- Jesse v. Danforth, 485 N.W.2d 63, 66, 67, 68, 68-69, 69 (Wis. 1992) (holding that a law firm's pre-incorporation representation of individuals did not prevent the law firm from adversity to two of the individuals on unrelated matters; "We conclude that the entity rule does extend to Drs. Danforth and Ullrich such that DeWitt's [Law firm] pre-incorporation involvement with Drs. Danforth and Ullrich is properly characterized as representation of MRIGM [a corporation created by the law firm at the direction of 23 doctors, including the two individual doctors now seeking to disqualify the law firm from adversity in an unrelated matter], not Drs. Danforth or Ullrich, i.e., DeWitt's client was and is MRIGM, not Drs. Danforth or Ullrich."; "If a person who retains a lawyer for the purpose of organizing an entity is considered the client, however, then any subsequent representation of the corporate entity by the very lawyer who incorporated the entity would automatically result in dual representation. This automatic dual representation, however, is the very situation the entity rule was designated to protect corporate lawyers against."; We thus provide the following guideline: where (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated, the entity rule applies retroactively such that the lawyer's pre-incorporation involvement with the person is deemed to be representation of the entity, not the person." (emphasis added); "In essence, the retroactive application of the entity rule simply gives the person who retained the lawyer the status of being a corporate constituent during the period before actual incorporation, as long as actual incorporation eventually occurred."; "This evidence overwhelmingly supports the proposition that the purpose of Flygt's pre-incorporation involvement was to provide advice with respect to organizing an entity and that Flygt's involvement was directly related to the incorporation. Moreover, that MRIGM was eventually incorporated is undisputed."; also finding that the individual doctors could not disqualify the law firm based on confidential information they gave the lawyer [who handled the incorporation]; "Drs. Danforth and Ullrich also contend that they provided certain confidential information to attorney Flygt that should disqualify DeWitt under SCR 20:1.6, the confidential information rule. Defendants point to questionnaires Flygt provided to the physicians involved in the MRI project which inquire, in part, as to the physicians' personal finances and their involvement in pending litigation."; "Because MRIGM, not the physician shareholders, was and is the client of DeWitt, and because the communications between Drs. Danforth and Ullrich were directly related to

the purpose of organizing MRIGM, we conclude that Drs. Danforth or Ullrich cannot claim the privilege of confidentiality."; finding that the law firm's current representation of a malpractice plaintiff suing the two doctors was not "directly adverse" to the corporation, even though the malpractice case could result in the doctors losing their licenses and therefore depriving the corporation of two shareholders and its president).

This general rule also applies in reverse. Several cases have held that lawyers representing owners of a closely held corporation do not necessarily represent the corporate entity when they file derivative actions -- even though the actions theoretically involve the lawyers representing the corporate entity's best interests.

- Simms v. Rayes, 316 P.3d 1235, 1238, 1238-39, 1239, 1240 (Ariz. 2014) (declining to disqualify Greenberg Traurig from simultaneously representing a minority owner of a limited partnership in a derivative case against other partners, while defending the minority owner in a lawsuit brought by the limited partnership; "As TP Racing [limited partnership] concedes, no attorney-client relationship exists between GT [Greenberg Traurig] and TP Racing. An attorney-client relationship exists when a person has manifested to a lawyer his intent that the lawyer provide him with legal services and the lawyer has manifested consent to do so. . . . Nothing in the record shows that TP Racing manifested to GT its intent that GT provide legal services to it or that GT manifested any consent to do so. GT's only attorney-client relationship is with Ron [minority partner of TP Racing]."; "The fact that GT's client Ron -- in his capacity as a minority partner of TP Racing -- has filed derivative claims on behalf of TP Racing changes nothing. Although no Arizona appellate court has considered the issue, courts that have considered the issue have held that lawyers are not disqualified from representing clients who are simultaneously pursuing direct claims against a corporation and derivative claims on behalf of that corporation." (emphasis added); "Derivative actions allow a minority shareholder to pursue a claim on behalf of a corporation when the management of the corporation has refused to pursue the claim itself. . . . The corporation is merely a nominal party in a dispute between a minority shareholder and the management that controls the corporation. . . . The corporation thus is not a 'client' of the lawyer for the minority shareholder and the lawyer has no attorney-client relationship with it."; "Because the lawyer in a derivative action has an attorney-client relationship only with the minority shareholder, nothing prevents the lawyer from also representing the minority shareholder on any direct claims against the corporation or its management that arise from the same set of facts. The shareholder may sue directly for harms the mismanagement of the corporation has caused him personally, and derivatively for harms the mismanagement has caused the corporation." (emphasis added); "TP Racing

nevertheless argues that even though no attorney-client relationship exists between GT and TP Racing, GT still has a conflict of interest under ER 1.7(a) because the derivative claims impose a fiduciary duty on GT to TP Racing that conflicts with GT's duty to Ron. Although a fiduciary duty does exist in a derivative action, it exists between the corporation or partnership and the minority shareholder or partner asserting the derivative claim. . . . Thus, Ron, as the minority limited partner asserting the derivative claim, has a fiduciary duty to act in TP Racing's interest. GT is counsel for the person having the fiduciary duty to TP Racing; the firm itself has no separate fiduciary duty to TP Racing.").

- Shen v. Miller, 150 Cal. Rptr. 3d 783 (Cal. Ct. App. 2012) (holding that a lawyer can represent the fifty-percent owner of a company in a derivative action and represent the same individual in an action against the other fifty-percent owner; noting that the lawyer also represented the fifty-percent owner in a wind-up lawsuit adverse to the company; rejecting the defendant half-owner's argument that the plaintiff's lawyer conflict because he was simultaneously representing the company in the derivative case while being adverse to it in the wind-up case; holding that the plaintiff's lawyer filed a derivative action "on behalf of" the company but did not represent the company; explaining that a lawyer representing a plaintiff in a derivative case is actually adverse to the company, although the company benefits if the plaintiff wins).

Under this majority approach, a closely held corporation's lawyer generally can represent the corporation in litigation against one or more of the corporation's constituents, because the lawyer has an attorney-client relationship with the corporate entity and not the constituents.

- Stanley v. Bobeck, 2009-Ohio-5696, at ¶ 16 (Ohio Ct. App. 2009) (reversing a lower court's order disqualifying a lawyer who had represented a limited liability company from representing the company in an action brought by a member of the limited liability company; "The trial court made an exception to this rule by concluding a closely held corporation is different from a large corporation because it is more like a partnership. No exception, however, was made regarding close corporations in the Rules of Professional Conduct. There is also no case law indicating that a different standard applies when the corporation is a closely held corporation. Moreover, there is no evidence that Stanley [member of the limited liability company] believed that MRFL [law firm] was acting as his personal attorneys when representing Sunshine I as Stanley never conferred with MRFL on legal matters. Therefore, because there was no prior attorney-client relationship between Stanley and MRFL,

the first prong of the Dana [Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882 (6th Cir. 1990)] test was not met." (emphases added)).

- Rhode Island LEO 2005-10 (11/10/05) (holding that a lawyer who represents a corporation can be adverse to constituents of the corporation; explaining the factual setting: "Two inquiring attorneys provided legal services to Corporation A relative to permits necessary for the development of real estate owned by the corporation. One inquiring attorney provided legal services relating to municipal permits; the other provided legal services relating to state environmental permits. Corporation A was then sold to a newly created corporation, Corporation B, which consisted of the same four principles and shareholders as Corporation A. The inquiring attorneys then also provided legal services to Corporation B relative to the permits for the original development project which Corporation B took over, but eventually abandoned because of financial reasons."; "Subsequently, Corporation B conveyed its tangible and intangible assets to Corporation C, an existing entity. The principals and shareholders of Corporation C are different from those of Corporation B. Corporation C wishes to proceed with the original development project, and has asked the inquiring attorneys to represent it relative to the necessary state and municipal permits."; "Meanwhile, however, two of the principals/shareholders of Corporation B, disgruntled by the decision to sell Corporation B's assets, have raised objections to the sale of Corporation C, and will likely pursue litigation in an attempt to void the sale. The real estate being developed which was the primary asset of Corporation B, was conveyed from Corporation B to Corporation C by warranty deed. The deed was signed by an authorized representative of Corporation B. The two disgruntled individuals have voiced opposition to the representation of Corporation C by the inquiring attorneys."; holding that the lawyer may represent the corporation adverse to constituents; "[T]he adversity in this dispute runs between two dissenting constituents of Corporation B and the remaining two constituents, and also between the two individual dissenters and Corporation C.").

In a more complicated scenario, applying the general rule also generally permits lawyers to represent a closely held company and some of its owners against other owners.

- Havasu Lakeshore Invs., LLC v. Fleming, 158 Cal. Rptr. 3d 311, 314, 319, 321 (Cal. Ct. App. 2013) (holding that a lawyer could represent a limited liability company and its managing members in a litigation against two members, each of whom owned approximately ten percent of the LLC interest; "The trial court disqualified a law firm from simultaneously representing a limited liability company, its managing member (a partnership), and the person who managed that partnership (who was not himself a

member of the company) in a lawsuit against two of the company's minority members. The court found that the interests of the company and the nonmember individual potentially conflicted, and concluded the law firm could not jointly represent the company and the nonmember individual against the company's minority members. The court based its ruling on rule 3-310(C) of the State Bar Rules of Professional Conduct and Gong v. RFG Oil, Inc. (2008) 166 Cal.App.4th 209, 214-216 [82 Cal. Rptr. 3d 416] (Gong), both of which concern an attorney's duty of loyalty to simultaneously represented clients. Because no actual conflict of interest existed between the company and the individual who managed the company's managing member, and there was no reasonable likelihood such a conflict would arise, we reverse the court's ruling." (footnote omitted); "With respect to the cross-complaint, there is no conflict; the LLC's interests and Peloquin's are clearly allied. The LLC and the other cross-complainants seek to recover the LLC's property and to restore value to the LLC. Fleming Jr., in his respondent's brief, agrees these are the LLC's litigation goals. These goals are beneficial to every member of the LLC, including the Flemings in their status as members of the LLC, and to Peloquin, in his status as a partner and principal in the LLC's other members."; "Fleming Jr. cites no authority for the proposition that an attorney may never jointly represent an entity and its management against a nonmanaging minority member.").

A 2013 District of Massachusetts decision extensively analyzed this issue, noting courts' differing approaches -- but ultimately applying the general rule to a lawyer's representation of a closely held corporation and some of its shareholders against other shareholders.

- Records v. Geils Unlimited Research, LLC, Civ. A. No. 12-11419-FDS, 2013 U.S. Dist. LEXIS 106375, at *8-9, *11-12, *12, *16, *16 n.5, *21 (D. Mass. July 30, 2013) (holding that even in the context of a close corporation, a lawyer can represent the corporation and some shareholders in litigation with other shareholders; "The First Circuit has held that '[a]bsent some evidence of true necessity, [the court] will not permit a meritorious disqualification motion to be denied in the interest of expediency unless it can be shown that the movant strategically sought disqualification in an effort to advance some improper purpose.' Fiandaca, 827 F.2d at 830-831 [Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir. 1987)]. Furthermore, the great majority of cases where motions to disqualify as untimely involved motions filed on the eve of trial. . . . Here, the litigation is still in its relative infancy. Accordingly, the Court will not deny the motion to disqualify attorney Butters and his firm is untimely."; "Plaintiffs seem to suggest that an attorney can never represent a corporation in a claim brought by a shareholder of that corporation. But it is well-settled that '[a] lawyer retained by a corporation represents the corporate entity, not

its shareholders, employees, or directors.'. . . Indeed, if plaintiffs' theory were correct -- and counsel for a corporation necessarily must represent the interests of all the shareholders -- it would lead to an absurd result: no corporation could ever retain counsel in a suit brought by a shareholder. That, obviously, cannot be the rule." (emphases added); "There may be circumstances, particularly involving close corporations, where an attorney for a corporation might in fact be precluded from representing that corporation in a claim brought by a minority shareholder. T&A may be such a close corporation, and individual defendants Justman, Klein, Salwitz, and Blankfield together appear to represent a majority of shareholder interests."; "[P]laintiffs have cited to no authority holding that counsel here owes a fiduciary duty to the minority shareholders, or that such a duty would survive the filing of a claim against the corporation by a minority shareholder. If there are facts in this case that might bear on the creation of such a duty, they have not been made part of the record. Under the circumstances, it does not appear that Butters owes a fiduciary duty to Geils, and, even if such a duty once existed, it may have terminated when his interests become [sic] adverse to the corporation. Accordingly, the Court will not disqualify attorney Butters on that basis." (footnote omitted) (emphasis added); "In Bovee v. Gravel, 174 Vt. 486, 811 A.2d 137 (2002), the Vermont Supreme Court addressed the issue of whether an attorney for a close corporation owes a separate duty of care to individual shareholders. The court surveyed opinions from a number of jurisdictions across the country and concluded as follows: 'Although a few courts have evinced a willingness to recognize an attorney's duty to care to the shareholders of a closely held corporation, these decisions are generally based on circumstances demonstrating a relationship between the attorney and a small number of shareholders approaching that of privity. See, e.g., United States v. Edwards, 39 F. Supp. 2d 716, 731-32 (M.D. La. 1999) ("The issue of attorney-client relationship becomes more complicated in the case of a small closely held corporation with only a few shareholders or directors. In such cases, the line between individual and corporate representation can become blurred."); Rosman v. Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (counsel for closely-held corporation consisting of two fifty-percent shareholders represented both corporate entity and individual shareholders).'"; '"Many courts, however, have refused to recognize a duty to nonclient shareholders even in such closely held corporations. See Skarbrevik v. Cohen, England & Whitfield, 231 Cal. App. 3d 692, 282 Cal. Rptr. 627, 634-36 (Ct. App. 1991) (counsel for close corporation owed no duty to nonclient shareholder); Brennan and Ruffner, 640 So. 2d 143, 145-46 (Fla. Dist. Ct. App. 1994) ('where an attorney represents a closely held corporation, the attorney is not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder'); Felty v. Hartweg, 169 Ill. App. 3d 406, 523 N.E.2d 555, 557, 119 Ill. Dec. 799 (Ill. App. Ct. 1988) (declining to recognize corporate attorney's duty to shareholders, court observed that 'even in closely held corporations, minority shareholders often have conflicting interests with the corporation')." (citation omitted)); "Rule 3.7

> provides that a lawyer who is a necessary witness 'shall not act as an advocate at trial.' (emphasis added). Therefore, it is not necessary to disqualify attorney Butters at this juncture. Indeed, plaintiffs . . . have yet to explain the testimony they intend to elicit from Butters. If plaintiffs in the future can meet their burden of showing that necessary testimony could not be acquired from another witness, it might then be appropriate to disqualify attorney Butters from serving as trial counsel. However, 'that future possibility provides no basis for disqualifying [Butters] from continuing to represent [defendants] in pre-trial activities.'" (citation omitted)).

Courts applying the general "default" rule also usually conclude that a closely held corporation's owner cannot file a malpractice action against the corporation's lawyer.

- Kelly Knaub, McNees Wallace Freed From Malpractice Suit Over Stock Sale, Law360, Mar. 11, 2014 ("The Pennsylvania Superior Court upheld a trial court decision letting law firm McNees Wallace & Nurick LLC off the hook in a case accusing the firm of committing legal malpractice in connection with All-Staffing Inc. (ASI) co-owner Alfonso Sebia's sale of stock during an acquisition of the company."; "In an opinion penned by Superior Court Judge Patricia H. Jenkins, the three-judge panel agreed with the Court of Common Pleas' determination that McNees Wallace did not have an attorney-client relationship with Sebia and his wife Pamela, also a plaintiff, saying the firm had only represented ASI. Alfonso Sebia owned 50 percent of the company's stock, while his partner, Stan Costello, owned the other half." (emphasis added); "'Viewed in the light most favorable to the Sebias, the evidence fails to establish that it was reasonable for them to believe McNees was representing them,' the opinion says."; "ASI, which Sebia and Costello formed in 1992, was a privately held professional employment organization that provided payroll, human resources and workers' compensation insurance services to its clients. Things went awry in 2007 after California-based Dalrada Corporation purchased ASI and its assets, including ASI stock, which were foreclosed on later that year by one of Dalrada's lenders. The Sebias -- who had carved out employment agreements during the acquisition -- were also fired."; "The Sebias sued McNees Wallace for legal malpractice, but the appeals court affirmed the trial court's decision, saying the firm had only represented ASI and not the Sebias."; "The appeals court said that ASI -- not the Sebias -- signed an engagement letter with McNees Wallace, which explicitly identified the firm's client as the corporation, not an individual shareholder. According to the court, the firm had included the following line in the letter: 'We always recommend that individual owners consider obtaining separate legal counsel. We do so here as well.'" (emphasis added); "Judge Jenkins wrote in the opinion that the Sebias never had face-to-face meetings with the firm, never received bills from it, never paid the firm's bills or

complained about its services. The Sebias did not ask the firm to perform due diligence during the Dalrada transaction, invite the firm to meetings with ASI's accountants or ask the firm for its opinion about the original or revised stock purchase agreements with Dalrada, according to the appeals court." (emphasis added)).

- Kurre v. Greenbaum Rowe Smith Ravin Davis & Himmel, LLP, Dkt. No. A-5323-07T1, 2010 N.J. Super. Unpub. LEXIS 832, at *2-3, *8-9 (N.J. Super. Ct. App. Div. Apr. 16, 2010) (holding that a shareholder could not file a derivative action against a closely held corporation's lawyer; "On August 3, 2001, Labriola Motors retained Greenbaum to represent it in connection with a proposed sale to Pine Belt Automotive, Inc. The retainer letter stated that Greenbaum would act as 'counsel to the Company' and expressly advised plaintiffs and Joseph, with whom Greenbaum had a prior relationship, that because each of their 'interests and concerns as shareholders of the Company differ in connection with the proposed transaction,' each 'should retain independent legal counsel and/or accounting or financial advisors to represent [them] in connection with [their] review, negotiation and execution of the contract documents.' Plaintiffs signed the retainer agreement and acknowledged 'that (i) this firm will represent only the Company in connection with the proposed transaction, and (ii) this firm has advised you of your right to obtain independent legal counsel.'" (emphasis added); "The record as a whole precludes consideration of a legitimate factual dispute concerning Greenbaum's representation of plaintiff's personally at any relevant time, or of any duty owed to them with respect to issues concerning the dealership. . . . Nor can they reasonably contend that they legitimately believed that Greenbaum represented them personally in the dealership's dealings with Nissan.").

- Bovee v. Gravel, 811 A.2d 137, 141 (Vt. 2002) (holding that a shareholder cannot directly sue the corporation's lawyer for malpractice; "Courts have generally refused . . . to recognize an exception to the privity requirement for shareholders' claims against a corporate attorney."; "Although a few courts have evinced a willingness to recognize an attorney's duty of care to the shareholders of a closely held corporation, these decisions are generally based on circumstances demonstrating a relationship between the attorney and a small number of shareholders approaching that of privity." (emphasis added); "Many courts, however, have refused to recognize a duty to nonclient shareholders even in such closely held corporations. See Skarbrevik v. Cohen, England & Whitfield, 231 Cal. App. 3d 692, 282 Cal. Rptr. 627, 634-36 (Ct. App. 1991) (counsel for close corporations owed no duty to nonclient shareholder); Brennan v. Ruffner, 640 So. 2d 143, 145-46 (Fla. Dist. Ct. App. 1994) ('where an attorney represents a closely held corporation, the attorney is not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder'); Felty v. Hartweg, 169 Ill. App. 3d 406, 523 N.E.2d 555, 557, 119 Ill. Dec. 799 (Ill. App. Ct. 1988) (declining to recognize

corporate attorney's duty to shareholders, court observed that 'even in closely held corporations, minority shareholders often have conflicting interests with the corporation.')." (emphasis added)).

- Brennan v. Ruffner, 640 So. 2d 143, 145-46, 146 (Fla. Dist. Ct. App. 1994) (holding that a shareholder controlling one-third of a company's stock cannot directly sue the company's lawyer; "Dr. Brennan argues that a separate duty to him as a shareholder arose by virtue of the lawyer's representation of the closely held corporation. Although never squarely decided in this state, we hold that where an attorney represents a closely held corporation, the attorney is not in privity with and therefore owes no separate duty of diligence and care to an individual shareholder absent special circumstances or an agreement to also represent the shareholder individually. While there is no specific ethical prohibition in Florida against dual representation of the corporation and the shareholder if the attorney is convinced that a conflict does not exist, an attorney representing a corporation does not become the attorney for the individual stockholders merely because the attorney's actions on behalf of the corporation may also benefit the stockholders. The duty of an attorney for the corporation is first and foremost to the corporation, even though legal advice rendered to the corporation may affect the shareholders. Cases in other jurisdictions have similarly held." (footnote omitted) (emphasis added); "[T]here are no facts to support Dr. Brennan's assertion that the primary intent of the corporation in hiring the attorney to draft the shareholder's agreement was to directly benefit Dr. Brennan individually. Dr. Brennan admits that there was an inherent conflict of interest between the rights of the individual shareholder and the corporation. This alone expressly undercuts a third party beneficiary claim. . . . A third party beneficiary theory of recovery has been rejected in other jurisdictions in similar circumstances on the basis that the individual shareholder cannot be an intended third party beneficiary of a shareholder's agreement because the interests of the corporation and the minority shareholder are potentially in opposition.").

- Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627, 634-35, 636, 637 (Cal. Ct. App. 1991) (holding that plaintiff officer, director, and 25 percent shareholder cannot directly sue the company's lawyer; "An attorney representing a corporation does not become the representative of its stockholders merely because the attorney's actions on behalf of the corporation also benefit the stockholders; as attorney for the corporation, counsel's first duty is to the corporation. . . . Corporate counsel should, of course, refrain from taking part in any controversies or factional differences among shareholders as to control of the corporation, so that he or she can advise the corporation without bias or prejudice. . . . Even where counsel for a closely held corporation treats the interests of the majority shareholders and the corporation interchangeably, it is the attorney-client relationship with the corporation that is paramount for purposes of upholding the attorney-client privilege against a minority shareholder's challenge. . . . These cases make

clear that corporate counsel's direct duty is to the client corporation, not to the shareholders individually, even though the legal advice rendered to the corporation may affect the shareholders." (emphases added); "Plaintiff in this case did not have close interaction, or any interaction at all, with defendant attorneys during the time period in which the legal services sued upon were rendered. The evidence at trial was that after the July 13, 1983, meeting, plaintiff was told by the other shareholders that defendant Comis would prepare the documents to effect the buy out of his shares, and that in August 1983, when plaintiff asked Erlich [one of the other three 25% shareholders] if the papers were ready, Erlich told plaintiff that because of their attorney's advice, he and the two other shareholders had decided not to pay him for his shares, and that no contract would be forthcoming."; "There was no contact between plaintiff and defendant Comis regarding the proposed buy out; the initial instructions regarding the drafting of buy out documents were given to Comis by Erlich. Nor was there any basis for plaintiff to place faith, confidence or trust in Comis to protect his interests in regard to this rift among the shareholders, particularly after he was told that it was on the basis of their attorney's advice that the other three shareholders had decided not to pay him for his shares. All the wrongful acts complained of were subsequent to the date he received that information, and he was completely unaware of any of those acts until after he brought this action."; "Applying these principles to the case before us, we conclude that plaintiff had no attorney-client relationship with defendant attorneys, he was not an intended beneficiary of the attorney-client relationship, and certainly had no reason to believe he was intended to be benefited by that relationship, particularly after he was told by Erlich that based on 'their attorney's counsel,' the majority shareholders would not pay him for his shares. The evidence at trial demonstrates that plaintiff was at that time a potential adverse party whose interests could not be, and were not, represented by his adversaries' chosen counsel, whose duty of loyalty was to his own clients. . . . The fact that defendant Comis could have foreseen the adverse consequences of his advice and its impact on plaintiff is not sufficient justification for fixing liability on him to a nonclient shareholder under these circumstances." (emphasis added); "Defendants owed no professional duty of care to plaintiff, and in the absence of duty, could not be held liable for professional negligence.").

A 2009 Western District of New York case applied the general rule in denying a closely held company's owners access to the company lawyer's files.

- MacKenzie-Childs LLC v. MacKenzie-Childs, 262 F.R.D. 241, 246, 248, 249, 250, 251, 252, 252-53, 253. 254, 255 (W.D.N.Y. 2009) (addressing privilege issues in a trademark case; explaining that a lawyer had represented a closely held business, which had eventually declared bankruptcy, with the assets sold to a number of successors; analyzing the ability of the former sole owners of the company to obtain privileged documents from the lawyer -- thus

raising the issue of whether the lawyer had represented them individually or their closely held company; explaining the co-owners' position that the lawyer represented them; "Victoria and Richard argue that Salai [lawyer] 'act[ed] as their personal attorney and not as attorney for their wholly owned company.'. . . Because they were fifty percent shareholders of a closely-held corporation, they continue, they had 'every right' to assume that Salai was acting as their personal attorney when he provided trademark and copyright advice. . . . In support of their position, they also offer copies of nearly thirty supplementary copyright registrations that Salai submitted on January 16, 1997, correcting earlier registrations for works previously identified as works for hire. . . . Salai signed each of the filings and certified that he was the 'duly authorized agent of Victoria and Richard [co-owners] MacKenzie-Childs.'" (internal citation omitted); explaining the basic rule involving an asset sale; "Where one corporation merely sells its assets to another, however, the privilege does not pass to the acquiring corporation unless (1) the asset transfer was also accompanied by a transfer of control of the business and (2) management of the acquiring corporation continues the business of the selling of the corporation."; also explaining how the joint representation and common interest doctrine apply in a corporate setting; "The concept of joint representation and the related common interest doctrine are particularly complex in the corporate setting. . . . Under this rule, courts presume that the corporation owns the privilege -- rather than the individual corporate representatives, or the individuals and the corporation jointly -- and the individuals bear the burden of rebutting the presumption."; "Despite this 'default' rule, courts have been willing to recognize that an individual corporate representative may assert an individual attorney-client privilege in communications with corporate counsel provided that certain requirements are met. . . . Some courts, such as the First, Third and Tenth Circuits, apply the following five-part test enunciated in Bevill to determine whether an individual has demonstrated a personal privilege in communications with corporate counsel."; "Thus, although this authority permits an individual to assert a personal privilege in certain communications with corporate counsel, it does not stand for the proposition that an individual and a corporation may enjoy a joint privilege in the same, non-segregable communication with counsel by a corporate representative in both his representative and individual capacity."; "Although the Second Circuit has acknowledged the Bevill test, it has not clearly adopted it. . . . It has made it clear, however, that whether Bevill is or is not applied, a prerequisite to assertion of a personal privilege by a corporate representative is proof that the employee 'ma[de] it clear to corporate counsel that he [sought] legal advice on personal matters.'" (citation omitted); noting the lawyer's testimony; "He testified that he always believed that he was acting as counsel to the corporation, and not as counsel to Richard and Victoria, individually. . . . He further testified that he never spoke to either of them about any matters, but instead communicated with other corporate employees, some of whom he identified in his testimony. . . . Invoices for his services were paid by the corporation, and not by Victoria and

Richard personally. . . . On this record, defendants' contention that Salai never provided legal advice or services to the corporation strains credulity and cannot be accepted."; holding that the privilege passed with the assets sole to various successors; "I find that MacKenzie-Childs II purchased substantially all of the assets then-owned and the business then-operated by MacKenzie-Childs I and thereafter continued the business in which MacKenzie-Childs I had been engaged. . . . Thus, I conclude that the attorney-client privilege passed from MacKenzie-Childs I to MacKenzie Childs II."; "I likewise conclude that the privilege passed again in 2008, this time from MacKenzie-Childs II to MacKenzie-Childs III. The record demonstrates that MacKenzie-Childs III purchased substantially all of the assets of MacKenzie-Childs II, including its intellectual property, and has continued the business of MacKenzie-Childs II and III. . . . Considering these facts, plaintiffs have the authority to assert -- as they did in Salai's deposition -- the attorney-client privilege to protect confidential communications made between representatives of MacKenzie-Childs I and Salai, as counsel to the corporation."; rejecting the co-owners' argument that they reasonably believe they were the lawyer's client; "[T]he fact that an attorney represents a corporation does not make that attorney counsel to the corporation's officers, directors, employees or shareholders." (emphasis added); "[W]hether Richard and Victoria believed that Salai was acting as their individual attorney and whether that belief was reasonable are simply irrelevant to the pending privilege doctrine." (emphasis added); "Rather, whether Richard and Victoria may establish a personal privilege in communications with Salai depends on proof that they sought legal advice from Salai about personal matters and that they made it clear to him that they were seeking advice in their individual, not representative, capacities." (emphasis added); "First, it does not allege that Victoria or Richard ever actually communicated directly with Salai, as opposed to communicating through other corporate representatives. Defendants have cited no authority, and the Court is unaware of any, to support the novel proposition that a privileged relationship may be created between an individual and a corporate attorney with whom the individual has never spoken nor directly communicated." (emphasis added); "Moreover, [there is] the dearth of any evidence showing that Victoria or Richard ever personally paid for Salai's legal advice."; "In sum, defendants' reliance on their 'reasonable belief' that Salai represented them personally because they were the sole shareholders and ultimate decisionmakers of a closely-held corporation is insufficient to establish a personal attorney-client privilege. Because they cannot even establish that they ever communicated directly with Salai, let alone that they made clear to him that they were seeking legal advice in their individual capacities, their contention that they possess a privilege capable of being waived must be rejected."; also finding that the lawyer must honor the current privilege owner's direction about documents; "Consistent with my determination that any attorney-client privilege belongs to the companies, and not to Victoria and Richard personally or jointly with the

> companies, Salai and HSE [lawyer's present firm] must respect plaintiffs' assertion of privilege concerning the requested documents.").

Minority View: A Corporation's Lawyer Also Owes Duties to its Owners

To be sure, some jurisdictions take a different approach.

For instance, a District of Columbia ethics rule comment explains that

> if the organization client is a corporation that is wholly owned by a single individual, in most cases for purposes of applying this rule, that client should be deemed to be the alter ego of its sole stockholder.

District of Columbia Rule 1.7 cmt. [23].

A Restatement provision similarly explains that lawyers representing corporations might owe duties to some of the corporation's constituents.

- Restatement (Third) of Law Governing Lawyers § 121 cmt. d (2000) ("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 . . . . 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."; "In some situations, however, the financial or personal relationship between the lawyer's client and other persons or entities might be such that the lawyer's obligations to the client will extend to those other persons or entities as well. That will be true, for example, where financial loss or benefit to the nonclient person or entity will have a direct, adverse impact on the client." (emphasis added)).

Courts taking what can be fairly described as the minority position generally point to two district court decisions articulating closely held corporation's lawyers' duty to corporate constituents.

- Rosman v. ZVI Shapiro, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1987) (finding that the half-owner of a corporation could reasonably have thought that the same lawyer representing the company also represented him, and therefore disqualifying that lawyer from representing the company and the company's other owner; "Rosman and Shapiro jointly consulted Y&Y [Law firm] for legal

advice concerning Filtomat's [defendant] contractual relationship with Filtration [defendant]. Moreover, it is clear that Y&Y now represents Shapiro against Rosman in two actions before the Court and that both actions focus on the identical issues discussed during the prior consultations. Based on these facts, Rosman seeks to disqualify Y&Y pursuant to Canons 4 and 9 of ABA Code of Professional Responsibility."; "It is clear that Rosman reasonably believed that Zisman [Y&Y lawyer] was representing him. Although, in the ordinary corporate situation, corporate counsel does not necessarily become counsel for the corporation's shareholders and directors . . ., where, as here, the corporation is a close corporation consisting of only two shareholders with equal interests in the corporation, it is indeed reasonable for each shareholder to believe that the corporate counsel is in effect his own individual attorney." (emphasis added); "This is especially true in this case because both Rosman's uncontradicted affidavit . . . and the shareholder agreement creating Filtomat . . ., demonstrate that both Rosman and Shapiro treated Filtomat as if it were a partnership rather than a corporation. In short, it would exalt form over substance to conclude that Y&Y only represented Filtomat, solely because Rosman and Shapiro chose to deal with Filtration through a corporate entity.").

- United States v. Edwards, 39 F. Supp. 2d 716, 731-32 (M.D. La. 1999) ("As a general rule, an attorney for a corporation represents the corporation, and not its shareholders. The issue of attorney-client relationship becomes more complicated in the case of a small closely-held corporation with only a few shareholders or directors. In such cases, the line between individual and corporate representation can become blurred. The determination whether the attorney represented the individual of the small closely-held corporation is fact-intensive and must be considered on a case-by-case basis. The court in Rosman v. Shapiro [653 F. Supp. 1441, 1445 (S.D.N.Y. 1987)] noted that although corporate counsel does not ordinarily become counsel for the shareholders and directors, in a closely-held corporation consisting of only two shareholders, 'it is indeed reasonable for each shareholder to believe that the corporate counsel is in effect his own individual attorney.' The court in Sackley v. Southeast Energy Group, Ltd. [No. 83 C 4615, 1987 U.S. Dist. LEXIS 10279, at *9-10 (N.D. Ill. June 19, 1987)] set forth a number of factors which could be considered: (1) 'whether the attorney ever represented the shareholder in individual matters'; (2) whether the attorneys' services were billed to and paid by the corporation'; (3) 'whether the shareholders treat the corporation as a corporation or as a partnership'; and (4) 'whether the shareholder could reasonably have believed that the attorney was acting as his individual attorney rather than as the corporation's attorney.'" (footnotes omitted) (emphasis added)).

A number of cases following this line essentially equate lawyers' representation of a closely held corporation with that of its owners, or warn lawyers of that risk.

- Eternal Pres. Assocs., LLC v. Accidental Mummies Touring Co., 759 F. Supp. 2d 887, 888-89, 893-94, 894 (E.D. Mich. 2011) (denying a motion to disqualify Clark Hill from representing both an LLC and an entity that controls the LLC's managing member; explaining that the LLC sued its half-owner, and that Clark Hill represented both the LLC and the other half-owner; "The Court finds that a conflict certainly exists; but the conflict is between Wolf [half owner of the LLC represented by Clark Hill] and DSC [entity controlling the managing member of the LLC] over who should control the litigation against AMTC [LLC represented by Clark Hill, and plaintiff in suing half-owner Wolf]. Disqualifying Clark Hill would do little to resolve that conflict, and the Court finds it unnecessary to do so under the Michigan Rules of Professional Conduct. Clark Hill's loyalties are not divided, since the firm is doing the bidding of AMTC's managing member. That is not to say, however, that Clark Hill may not have a fiduciary duty to Wolf as an equal member of AMTC. For now, however, the Court concludes that Clark Hill may continue to represent AMTC in this litigation, albeit at its peril. The motion to disqualify, therefore, will be denied."; "[A]s long as DSC controls AMTC, Clark Hill will not face that conflict. Clark Hill must follow the instruction of its client, and it must give advice unfettered by conflicting loyalty to another client. But it is unlikely that AMTC would consider the possibility of a suit against DSC while an entity controlled by DSC determines AMTC's litigation decisions. As long as DSC-controlled interests are in a position to decide what is in AMTC's best interests, Clark Hill's simultaneous representation of both AMTC and DSC will not violate Michigan Rule of Professional Conduct 1.7." (emphasis added); "It is important to note that Wolf's claim of conflict of interest is not based on Clark Hill's possession of confidential information . . . . Instead, it is based on the idea that Clark Hill, taking instruction from the managing member of AMTC, Marcon Eekstein (which is manages [sic] by Eekstein's Workshop, L.L.C., in turn wholly owned by DSC), will not pursue a litigation strategy that Wolf would like and DSC may not. That cannot constitute a violation of Michigan Rule of Professional Conduct 1.7(b); if it did, no lawyer could represent AMTC in the present litigation, regardless of which of the fifty percent members controlled AMTC. Disputes between constituent members over control of an entity should not be resolved under the guise of an attorney conflict of interest." (emphasis added); "That is not to say that Wolf may not have recourse against Clark Hill directly. An attorney who represents a closely held corporation and a controlling shareholder may also have a fiduciary [duty] to the other shareholder(s)." (emphasis added)).

- Classic Ink, Inc. v. Tampa Bay Rowdies, Civ. A. No. 3:09-CV-784-L, 2010 U.S. Dist. LEXIS 75220, at *6-7, *7-8 (N.D. Tex. July 23, 2010) (disqualifying a lawyer from adversity to an individual, based on the lawyer's previous representation of the entity solely owned by the individual; "Anderson was the sole shareholder, employee, and president of the Entity when it was formed. The Entity never grew significantly in size and eventually came to include a three-person Board of Directors, consisting of Anderson, his wife Carolyn

> Anderson, and fellow shareholder Mark Scott. At all times, the Entity fit the profile classification of a closely-held corporation, and it [sic] status as a closely-held corporation is undisputed by the parties." (footnote omitted); "The record and hearing testimony make clear that Anderson sought Hemingway [lawyer] because he knew Hemingway, trusted him, and needed legal assistance to help carry on his Internet sales activities. Although Anderson ultimately gave Hemingway approval to incorporate the Entity, it is apparent that incorporating the Entity was Hemingway's legal opinion and advice, which Anderson admittedly accepted and authorized, but not originally Anderson's idea. Hemingway testified that all of the legal work he performed was at the behest of his 'client,' referring to Anderson. That Hemingway, on the one hand, would call Anderson his client and, on the other hand, maintain the position that he never had an attorney-client relationship with Anderson does not square. As it is uncontroverted that the Entity did not exist at the time Anderson first met with and retained Hemingway, the court determines that, at best, Hemingway has demonstrated that he jointly represented Anderson and the Entity. Moreover, given their prior acquaintanceship and the absence of any documentation or contract narrowing Hemingway's representation solely to the Entity, it was reasonable for Anderson -- as well as an objective third-party observer -- to assume that Hemingway represented him and not just the Entity. Accordingly, the court concludes that Anderson has satisfied the first element of the 'substantial relationship' test. An actual attorney-client relationship existed between Anderson and Hemingway." (emphases added)).

Several ethics opinions have warned lawyers who represent closely held corporations that they must remain neutral in the owners' fight over control of the corporation.

- Alaska LEO 2012-3 (10/26/12) ("When conflict issues arise in the context of a small closely held business entity, for a number of reasons they can be very difficult to resolve. In a small, closely held organization, unlike a larger organization, each of the owners may have a direct and intimate responsibility for the operation of the business. The attorney for the organization may have dealt directly with each owner on a regular basis on many matters, or even with respect to the particular legal matter at issue. The constituent may have used the legal services of the attorney on unrelated matters or in circumstances in which it was reasonable for the constituent to conclude that the attorney was acting as the constituent's attorney. When owners in a small closely held organization clash, there is a high likelihood that the attorney will previously have received information or given advice to all concerned that is relevant to the dispute. Finally, when the owners have equal or nearly equal ownership rights and responsibilities, and where each may have been directly involved in giving instructions to the attorney in the past, the attorney may find

that it is hard to know who speaks for the business entity and thus who gives direction on behalf of the 'client.' Although ARPC 1.13(g) allows dual representation if the organization consents, it may be impossible to find an 'appropriate individual' or shareholder who is genuinely disinterested and who can thus approval dual representation." (footnote omitted) (emphasis added); "First, when an owner of a closely held organization, acting in a capacity as a representative or 'constituent' of the organization, consults with the organization's attorney, receives legal advice or provides confidential information no attorney client relationship is formed with the constituent. No conflict of interest arises if the interests of the constituent and the organization later diverge."; "Second, and conversely, advice given by counsel to a constituent regarding the constituent's individual legal issues (including, for example, legal advice regarding the constituent's rights or claims against the organization) may create either an actual or an implied attorney client relationship that gives rise to an impermissible conflict that precludes the attorney from representing the corporation on an issue adverse to the constituent's interests. Finally, to the extent that it is not possible to reconcile the conflict under the Rules of Professional Conduct, or it is not possible to determine who can make decisions on behalf of the client, the attorney must withdraw, rather than express a preference for one client over another." (footnote omitted); "The attorney for a closely held business entity can and should make clear that the attorney represents the organization, and not the individual owners. The attorney can and should make the implications of this clear as well. Any communications from one owner to the attorney regarding the affairs of the business are not likely to be protected from the other owner. The attorney may not favor the interests of one owner over another during the course of representing the business. If a conflict should arise among the owners the attorney may be required to withdraw from representing any party if the owners cannot agree on a waiver or some method of resolving the conflict." (footnotes omitted) (emphasis added)).

- Vermont LEO 2009-4 (2009) (holding that a law firm could represent a client adverse to the principal of a corporation which the law firm had previously represented, although the law firm could not use information obtained from the principal; explaining the situation: "The requesting attorney's firm represents A and has done so for a number of years. One matter handled by the requesting attorney was A's purchase of a parcel of land that adjoins lands owned by a corporation in which B is a principal. The firm has never represented the landowner corporation but has formed an LLC for B and has performed collection work for a different corporation in which B is also a principal. Both files are now closed. There are no open files in which either B or any of his business entities are represented by the firm."; "Recently, on A's behalf, the firm sent a letter to the landowner corporation disputing the landowner corporation's claimed right of access onto A's adjoining property. In response to that letter, B has claimed a conflict of interest and requested that the firm refrain from representing A in connection with the dispute."; "In

B's claim of conflict he asserts that the requesting attorney's firm's representation of A 'creates at least the appearance of conflict'. He also expresses a concern that his interest may have been compromised by dual loyalties. He goes on to claim that the firm is privy to financial and legal concerns that would compromise him in his negotiations with A. The firm has no active case files for B, and no retainer arrangement exists."; noting that the principal was never the law firm's client; "In the matter at hand, the firm has never actually represented the corporation which is the landowner. Rather, it has represented one of the principals of the landowner corporation in the formation of an LLC and it has performed collection work for an entirely different corporation. On these facts, we do not believe that the landowner corporation is even a former client. While this may seem an overly technical conclusion, clients should understand that they have separate legal identities from the entities they create so long as those entities have been properly formed and maintained." (emphasis added); warning the law firm that it could not use information obtained from the principal; "Having reached that conclusion, however[,] does not mean that the firm may use information obtained in the course of its work for B and B's other corporation in a manner which is adverse to B's interests. The firm has a continuing duty under Rule 1.9(c) to maintain the confidentiality of information obtained and not to use any information that it may have against B or B's interests." (emphasis added); "It is noted that Rule 1.9(c) does not preclude representation of A. Rather it prohibits the requesting attorney from using or revealing information relating to the former representation of B against B. Even if we (1) assume that the requesting attorney's firm has confidential or secret information obtained during the prior representations of B or B's other corporation; and (2) infer that the requesting attorney has access to all of the firm's files, Rule 1.9(c) does not preclude the requesting attorney from representing A. Rather it precludes the use of confidential or secret information to B's disadvantage.").

- California LEO 1999-153 (1999) (holding that a lawyer who had not previously represented a corporation or any of its executives may represent the company and one of its owners in an action brought by the other owner, as long as both of the lawyer's clients consent; articulating the issue as follows: "May a lawyer, who is not currently and has not previously represented a close corporation as to the subject of a dispute, be retained to represent the corporation and Shareholder A, who is authorized to retain and oversee counsel for the corporation, in a lawsuit brought by Shareholder B, the only other shareholder of the corporation, against both the corporation and Shareholder A?"; offering the following as a digest: "Under the particular facts presented, and subject to any limitations created by any fiduciary duties of Shareholder A, a lawyer may ethically represent both the corporation and Shareholder A in the lawsuit. To the extent a potential conflict of interest exists between Shareholder A and the corporation, the lawyer must obtain the informed written consent of both the corporation and Shareholder A before

commencing the representation under rule 3-310(C)(1) of the California Rules of Professional Conduct. Under the facts presented, the corporation's consent to the joint representation may be obtained from Shareholder A. Consistent with rule 3-310(C)(1), this joint representation is permissible only for so long as the corporation and A do not have opposing interests in the lawsuit which the attorney would have a duty to advance simultaneously for each. Additionally, the lawyer must fulfill those duties to the corporation described in rule 3-600."; noting that "[a]t the time of the engagement, Attorney is not currently and has not previously represented Corporation as to the subject matter of the dispute. In addition, Attorney has not previously represented Corporation in any matter." (emphasis added); explaining California law on this issue; "California law has long recognized that when a lawyer acts as corporate counsel, the lawyer's first duty is to the corporation. (Meehan v. Hopps, supra, 144 Cal. App. 2d at p. 293.) As a result, courts have held that corporate counsel should retain from taking part in any controversies or factual differences among shareholders as to control of the corporation so that he or she can advise the corporation without prejudice or bias. (Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp. (1995) 36 Cal. App. 4th 1832, 1842 [43 Cal. Rptr. 2d 327]; Skarbrevik v. Cohen, England & Whitfield, supra, 221 Cal. App. 3d at p. 704; Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 622 [120 Cal. Rptr. 253].) This rule generally applies when a lawyer who has been representing a corporation is asked to represent one shareholder against another shareholder in a dispute over control of the corporation. (Woods v. Superior Court (1983) 149 Cal. App. 3d 931 [197 Cal. Rptr. 185] (lawyer who for years represented corporation owned by husband and wife could not represent one shareholder against the other in a marital dissolution action when the corporation was the primary focus of the dispute); Goldstein v. Lees, supra, 46 Cal. App. 3d 614 [former corporate counsel who had material confidential information could not represent one shareholder in a proxy fight for control of the corporation].)" (emphases added); "On the other hand, a lawyer is not prohibited from taking actions on behalf of the corporation that negatively impact the interests of a shareholder or other constituents. (See Skarbrevik v. Cohen, England & Whitfield, supra, 231 Cal. App. 3d 692 [holding that a lawyer for a corporation may render advice and draft documentation for the corporation that results in a dilution of a minority shareholder's interest in the company]; Meehan v. Hopps, supra, 144 Cal. App. 2d 284 [corporation's lawyer may bring an action on behalf of the corporation's receiver against a majority shareholder who had previously dominated the corporation].)"; noting that the analysis might change if the adverse half-owner gains control of the company or obtains access to confidential communications; "To the extent that B, or another person such as a receiver, obtains the ability to control the affairs of Corporation, an actual conflict of interest could arise. In that situation, Attorney could receive conflicting instructions from Corporation and A. Attorney could be called on to advance inconsistent positions or to pursue a claim by Corporation against A, or vice versa. Attorney could be required to disclose confidential

communications with A in the course of the joint representation which A would not want disclosed. Both clients could make a demand on Attorney for the original file."; "Even if a change of control does not occur, a conflict of interest could arise if B, as a constituent of Corporation, has or obtains a right to learn the substance of confidential communications Attorney has with A in the course of the joint representation, which A does not want disclosed to B. These concerns exist not only during the representation, but after the representation as well. While B or some other person might not have the ability to learn the substance of A's confidential information while the joint representation of A or Corporation is pending, in some cases they may attain a position in the Corporation in the future that would entitle them to obtain such information from Attorney."; explaining that the individual half-owner represented by the lawyer may consent on behalf of the company; "Attorney may obtain Corporation's consent to the joint representation from A under the second of the two approaches set forth in the rule. Under the facts presented, A may consent to the joint representation for the Corporation because (1) A is the only other shareholder, and (2) as president of Corporation, A is authorized to retain counsel for the Corporation and oversee the representation of the Corporation by that counsel. These two facts taken together allow Attorney to ethically represent Corporation and A jointly with A's consent for both."; noting that "this opinion does not address a situation in which the lawyer seeking to represent Corporation and A has previously represented Corporation and in so doing has obtained confidential information that is material to the current dispute." (emphasis added); also noting that the lawyer may not assist the clients in violations of law that may harm the corporation).

- District of Columbia LEO 216 (1/15/91) ("The principle that a lawyer representing a corporation represents the entity and not its individual shareholders or other constituents applies even when the shareholders come into conflict with the entity. Courts have generally held, therefore, that a corporation's lawyer is not disqualified from representing the corporation in litigation against its constituents. . . . A different result may sometimes be required where the shareholders of a closely held corporation reasonably might have believed they had a personal lawyer-client relationship with the corporation's lawyer." (emphasis added); "[T]he corporation's lawyer may continue to take direction from A until the dispute over control of the corporation is resolved by the courts or the parties. If, however, the lawyer should become convinced that A's decisions are clearly in violation of A's own fiduciary duties to the corporation, the lawyer may be forced to seek guidance from the courts as to who is in control of the corporation, there being no higher authority within the corporation to whom the lawyer can turn. Throughout the representation, the lawyer must continue to recognize that the interests of the corporation must be paramount and that he must take care to remain neutral with respect to the disputes between the present shareholders, B and U, and between A and U." (emphasis added)).

Conclusion

As in all contexts, lawyers working with closely held corporations should carefully define the "client" or "clients" they represent. Of course, lawyers must also deal with ethics and legal principles that might burden them with duties to non-clients. But they can minimize avoidable risks by making sure everyone who owns or manages a closely held corporation knows the client's or clients' identity.

Even lawyers carefully documenting the clients' identity must avoid other missteps that can occur in a closely held corporate context.

Among other things, for example, lawyers disclaiming an attorney-client relationship with one or more of the corporation's owners might unwittingly make some filing or prepare an opinion letter or other document on behalf of that owner. Monitoring paralegals' or other nonlawyers' filings and correspondence might minimize this risk. Lawyers should also carefully check any "off-the-shelf" forms that they or their staff might use in such settings.

Even though the majority "default" rule generally allows lawyers to represent a closely held corporation and one of its owners against another owner, careful lawyers often avoid such an arrangement. Among other things, a court judgment or even a settlement might hand control of the corporation over to the adverse co-owner. Lawyers obviously would face termination at that point, but they might not realize that the new owner now controls the lawyer's former joint client (the corporation). This normally would allow the corporation (now in the hands of a former adversary) to access the lawyer's entire file. This could be bad enough for the lawyer if the file includes communications between the lawyer and the corporate decision makers who were then

in power but who have now lost control of the corporation. It could be even worse if the lawyer jointly represented the corporation and the other owner -- because most courts would give the corporate joint client access to communications between the lawyer and the other then-joint client (the owner).

All in all, lawyers should keep in mind ethics and legal principles that could cause them problems both in the short term and in the long term.

Best Answer

The best answer to this hypothetical is **MAYBE**.

B 6/14

Identifying the Client Within a Corporate Family: Outside Lawyers' Issues

Hypothetical 25

You have been asked to bring a lawsuit against a Dallas-based corporation. Although your law firm's computerized conflicts search does not reveal any problems, one of your partners just called to tell you that she is handling a small amount of labor work for one of the proposed defendant's sister corporations. Your law firm does not represent the parent. The sister corporations are in different businesses, but both rely on the parent's law department for legal advice.

May you represent your client in the lawsuit against the Dallas-based corporation (without its consent)?

MAYBE

Analysis

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 Model Rules generally seem to allow a lawyer representing one member of a corporate family to take matters adverse to another member of that family. However, the Rules also mention circumstances in which such representation will be impermissible -- thus depriving lawyers of certainty.

> 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

[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).

> 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] (emphasis added).

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 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.

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[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 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

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).

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 (2000).

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;[4] and (2) a

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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.").

[4] Restatement (Third) of Law Governing Lawyers § 121 cmt. d, illus. 6 (2000) ("Lawyer represents Corporation A in local real-estate transactions. Lawyer has been asked to represent Plaintiff in a products-liability action against Corporation B claiming substantial damages. Corporation B is a wholly owned subsidiary of Corporation A; any judgment obtained against Corporation B will have a material

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[5] -- the former is unacceptable, while the latter is acceptable.

State Ethics Rules

Most states follow the ABA Model Rules approach to this issue, which is discussed above. As explained in that discussion, the ABA Model Rules do not provide any certainty, and therefore give little comfort to lawyers tempted to take a matter adverse to a corporate client's affiliate if they would not otherwise be deterred from doing so by business concerns.

Several jurisdictions have specific ethics rules that seem to go further toward allowing such representations adverse to a corporate client's affiliates. However, none of them provide 100% certainty.

A Washington, D.C., ethics rule takes the most expansive approach, providing numerous comments on the issue and offering language that would seem to permit such representations in more circumstances than allowed in the ABA Model Rules.

One comment provides a general explanation of D.C. Rule 1.13:

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adverse impact on the value of Corporation B's assets and on the value of the assets of Corporation A. Just as Lawyer could not file suit against Corporation A on behalf of another client, even in a matter unrelated to the subject of Lawyer's representation of Corporation A . . . , Lawyer may not represent Plaintiff in the suit against Corporation B without the consent of both Plaintiff and Corporation A under the limitations and conditions provided in § 122.").

[5] Restatement (Third) of Law Governing Lawyers § 121 cmt. d, illus. 7 (2000) ("The same facts as in Illustration 6, except that Corporation B is not a subsidiary of Corporation A. Instead, 51 percent of the stock of Corporation A and 60 percent of the stock of Corporation B are owned by X Corporation. The remainder of the stock in both Corporation A and Corporation B is held by the public. Lawyer does not represent X Corporation. The circumstances are such that an adverse judgment against Corporation B will have no material adverse impact on the financial position of Corporation A. No conflict of interest is presented; Lawyer may represent Plaintiff in the suit against Corporation B.").

> As is provided in Rule 1.13, the lawyer who represents a corporation, partnership, trade association or other organization-type client is deemed to represent that specific entity, and not its shareholders, owners, partners, members or "other constituents." Thus, for purposes of interpreting this rule, the specific entity represented by the lawyer is the "client." Ordinarily that client's affiliates (parents and subsidiaries), other stockholders and owners, partners, members, etc., are not considered to be clients of the lawyer. Generally, the lawyer for a corporation is not prohibited by legal ethics principles from representing the corporation in a matter in which the corporation's stockholders or other constituents are adverse to the corporation. See D.C. Bar Legal Ethics Committee Opinion No. 216. A fortiori, and consistent with the principle reflected in Rule 1.13, the lawyer for an organization normally should not be precluded from representing an unrelated client whose interests are adverse to the interests of an affiliate (e.g., parent or subsidiary), stockholders and owners, partners, members, etc., of that organization in a matter that is separate from and not substantially related to the matter on which the lawyer represents the organization.

D.C. Rule 1.7 cmt. [21] (emphasis added).

However, the next two comments list the circumstances in which a lawyer representing one member of a corporate family generally cannot take a matter adverse to one of a corporate client's affiliates. The first situation involves the lawyer's acquisition of confidential information from the client that it could use against the client's affiliate.

> However, there may be cases in which a lawyer is deemed to represent a constituent of an organization client. Such de facto representation has been found where a lawyer has received confidences from a constituent during the course of representing an organization client in circumstances in which the constituent reasonably believed that the lawyer was acting as the constituent's lawyer as well as the lawyer for the organization client." See generally ABA Formal Opinion 92-365. In general, representation may be implied where on the facts there is a reasonable belief by the constituent that there is individual as well as collective representation. Id.

> The propriety of representation adverse to an affiliate or constituent of the organization client, therefore, must first be tested by determining whether a constituent is in fact a client of the lawyer. If it is, representation adverse to the constituent requires compliance with Rule 1.7. See ABA Opinion 92-365. The propriety of representation must also be tested by reference to the lawyer's obligation under Rule 1.6 to preserve confidences and secrets and to the obligations imposed by paragraphs (b)(2) through (d)(4) of this rule. Thus, absent informed consent under Rule 1.7(c), such adverse representation ordinarily would be improper if:
>
> (a) the adverse matter is the same as, or substantially related to, the matter on which the lawyer represents the organization client,
>
> (b) during the course of representation of the organization client the lawyer has in fact acquired confidences or secrets (as defined in Rule 1.6(b)) of the organization client or an affiliate or constituent that could be used to the disadvantage of any of the organization client or its affiliate or constituents, or
>
> (c) such representation seeks a result that is likely to have a material adverse effect on the financial condition of the organization client.

D.C. Rule 1.7 cmt. [22] (emphases added).

The next comment addresses another scenario in which the lawyer's representation would generally be improper -- if the lawyer's client and the adversary are considered "alter egos" of each other.

> In addition, the propriety of representation adverse to an affiliate or constituent of the organization client must be tested by attempting to determine whether the adverse party is in substance the "alter ego" of the organization client. The alter ego case is one in which there is likely to be a reasonable expectation by the constituents or affiliates of an organization that each has an individual as well as a collective client-lawyer relationship with the lawyer, a likelihood that a result adverse to the constituent would also be adverse to the existing organization client, and a risk that both the new and the old representation would be so adversely affected that the conflict would not be "consentable." Although the alter ego criterion necessarily

> involves some imprecision, it may be usefully applied in a parent-subsidiary context, for example, by analyzing the following relevant factors: whether (i) the parent directly or indirectly owns all or substantially all of the voting stock of the subsidiary, (ii) the two companies have common directors, officers, office premises, or business activities, or (iii) a single legal department retains, supervises and pays outside lawyers for both the parent and the subsidiary. If all or most of those factors are present, for conflict of interest purposes those two entities normally would be considered alter egos of one another and the lawyer for one of them should refrain from engaging in representation adverse to the other, even on a matter where clauses (a), (b) and (c) of the preceding paragraph [22] are not applicable. Similarly, if the organization client is a corporation that is wholly owned by a single individual, in most cases for purposes of applying this rule, that client should be deemed to be the alter ego of its sole stockholder. Therefore, the corporation's lawyer should refrain from engaging in representation adverse to the sole stockholder, even on a matter where clauses (a), (b) and (c) of the preceding paragraph [22] are not applicable.

D.C. Rule 1.7 cmt. [23] (emphases added).

Similarly, a comment to the Florida ethics rules regarding representation of related organizations provides that

> a lawyer or law firm who represents or has represented a corporation (or other organization) ordinarily is not presumed to also represent, solely by virtue of representing or having represented the client, an organization (such as a corporate parent or subsidiary) that is affiliated with the client. There are exceptions to this general proposition, such as, for example, when an affiliate actually is the alter ego of the organizational client or when the client has revealed confidential information to an attorney with the reasonable expectation that the information would not be used adversely to the client's affiliate(s). Absent such an exception, an attorney or law firm is not ethically precluded from undertaking representations adverse to affiliates of an existing or former client.

Florida Rule 4-1.13 cmt. (emphasis added). Thus, Florida also recognizes exceptions to the general rule if (1) the lawyer has learned confidences from the corporate client

that could be used against the affiliates, and (2) the two corporate family members are considered "alter egos" of each other.

Although Washington, D.C.'s, and Florida's ethics rules clearly decrease the uncertainty about whether lawyers can undertake such representations adverse to corporate clients' affiliates, neither rule reduces the uncertainty to zero. The presence of any uncertainty usually deters lawyers from undertaking such representations.

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].

State Bar Opinions

State bars also take differing approaches.

Predictably, the New York City Bar has frequently analyzed this issue. Unfortunately, the New York City Bar's most recent analysis adopts the sort of fact-intensive standard that lacks predictability.

- 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 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).").

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

- 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.[6] Other courts have found that the representation of one member of the corporate family does not have that effect.[7]

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[6] Bd. 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 (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).

[7] Whiting Corp. v. White Mach. 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).

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

- Honeywell Int'l, Inc. v. Philips Lumileds Lighting Co., Case No. 2:07-CV-463-CE, 2009 U.S. Dist. LEXIS 12496, at *4, *4-5, *6, *7-8, *8 (E.D. Tex. Jan. 6, 2013) (disqualifying Paul Hastings under the simultaneous concurrent representation standard; "Philips Lumileds claims that much of the work conducted by PHJW [Paul Hastings] on behalf of Philips is funneled through a wholly-owned Philips Division, Philips IP&S. Philips IP&S directs intellectual property legal strategy in the United States and abroad for Philips divisions and subsidiaries, including Philips Consumer Electronics, Philips Healthcare, and Philips Lumileds. Similar to other Philips subsidiaries, Philips Lumileds, the defendant in this case, receives legal direction from Philips IP&S. Neither Philips, nor any of its subsidiaries has consented to PHJW's handling this infringement case against Philips Lumileds."; "Honeywell, to the contrary, contends that Philips Lumileds is not a client of PHJW. Honeywell concedes that PHJW represents PENCA [sic] in a number of governmental matters. Honeywell, however, asserts that Philips Lumileds and PENAC [Philips Elecs., N. Am. Corp] do not share a parent-subsidiary relationship, but are attenuated affiliates of one another. Honeywell also denies the fact that PHJW has represented any of the above asserted Philips entities, including Philips IP&S."; "The first issue is whether Philips Lumileds is a current client of PHJW. Here, the issue centers on whether a corporate affiliation creates a concurrent client-lawyer relationship. The issue of whether a corporate affiliation 'ipso facto creates a client-lawyer relationship with every member of a corporate family when one of its members is formally represented by the lawyer' is not addressed in the ABA Model Rules themselves."; "Here, it is undisputed that (1) Philips Lumileds and the other Philips affiliates share a common legal department, Philips IP&S; (2) Philips and Philips Lumileds share common management, computer networks, and marketing designs; and (3) PHJW currently represents PENAC. As indicated above, Philips IP&S directs intellectual property litigation and licensing strategy for Philips subsidiaries worldwide, including Philips Lumileds. Additionally, while it is generally disputed, PHJW has had broad access to confidential information of various Philips entities, based on its representation of various Philips entities. In fact, Lawrence R. Sidman, a partner at PHJW, stated in his declaration that he had received confidential information concerning PENAC, Philips Consumer Electronics, Philips Healthcare, and Philips IP&S. . . . Although it is not clear whether PHJW's representation of PENAC will directly benefit Philips Lumileds, this fact is not dispositive."; "In addition, some courts have pointed to manifestations to the public as a factor relevant to disqualification."; "Here, both the Philips Lumileds' website and marketing materials feature the Philips logo. The PENAC website also features the Philips logo. Considering all the facts, the Court is persuaded that Philips Lumileds should be considered a current client of PHJW." (emphasis added)).

- Cascades Branding Innovation, LLC v. Walgreen Co., Case No. 11 C 2519, 2012 U.S. Dist. LEXIS 61750, at *17, *21, *22, *23-24 (N.D. Ill. May 3, 2012) (disqualifying the law firm of Robins Kaplan from adversity to the subsidiary of a parent company which had interviewed but not hired Robins Kaplan; noting that "[i]t is also clear that the parent company, Cascades Ventures, is directing the current litigation. See GSI, infra. Cascades Ventures and Plaintiff are managed by the same personnel, are part of the same corporate family and are closely aligned in purpose."; "It also appears that Cascades Ventures routinely operates its litigation through subsidiaries created for that purpose. In fact, the litigation which Brown sought to entice Robins Kaplan into filing was eventually filed through a subsidiary, Cascades Computer Innovation, LLC."; "[I]t is apparent that Cascades Ventures (the party that had the prospective-client relationship with Robins Kaplan) is effectively the same party as Cascades Branding for the purpose of conflict-of-interest analysis. This conclusion is based on the fact that Cascades Ventures is the sole owner of Cascades Branding, and due to the fact that Cascades Ventures appears responsible for acquiring and managing the legal representation of its subsidiaries. It is further based on the unique business model of Cascades Ventures, a non-practicing entity ('NPE') seeking to enforce patents through subsidiaries."; pointing to the parent's disclosure of material confidences to Robins Kaplan; "The August 25, 2010 communication reflects a distinct litigation strategy with regards to the Elbrus portfolio, and it further reflects that Schultz (e-mailing from an airport) was able to recall this information off the top of his head without the benefit of a file."; "The Court believes the e-mail at issue not only reflects strategy specific to one target in the Elbrus matter, but is illuminating as to Cascades Ventures' core litigation, licensing, reasonable royalty and business model strategies. . . . what sort of return Cascades Ventures would accept, what sort of settlements would make litigation profitable, and what sort of royalty and licensing agreements Cascades was looking for.").

- 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 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).

- Bd. 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).

In some situations, the analysis results in courts denying adversaries' disqualification motions.

- FDIC v. Commonwealth Land Title Ins. Co., Case No. 1:08CV2390, 2012 U.S. Dist. LEXIS 127247, at *13, *13-14, *14, *15 (N.D. Ohio Sept. 7, 2012) (finding that a law firm's representation of a parent company did not make one of the parent's subsidiaries a law firm client; "Defendant is not a client of Thompson Hine just by virtue of the fact that it is wholly owned by Chicago Title."; "Moreover, 'parent and subsidiary corporations are separate and distinct legal entities, "even if the parent owns all of the outstanding shares of the subsidiary."'. . . The attorney-client relationship is a contractual one, and a contract cannot bind parties that are not included in the contract."; "During the Brown and Moore matters, Defendant could not have had a reasonable belief that Thompson Hine was their counsel because Defendant was represented by their own attorneys. . . . Defendant was not a party to Chicago Title's Brown or Moore matters. Chicago Title and Defendant appear to have separate legal departments; otherwise this potential conflict would have been brought to the attention of the parties sooner. Chicago Title's indirect interest in its subsidiary (i.e., Defendant) succeeding in the litigation against the FDIC is solely insufficient to create a situation of direct adversity."; "The Court finds that Thompson Hine and Defendant did not have an attorney-client relationship.").

Ability to Define the "Client" in Retainer Agreements

Clients and lawyers can try to define the client as a matter of contract in their retainer agreements.

- e2Interactive, Inc. v. Blackhawk Network, Inc., No. 09-cv-629-slc, 2010 U.S. Dist. LEXIS 48333, at *4-5, *6, *12, *13-14, *14-15, *15, *16-17, *17, *17-18 (W.D. Wis. May 17, 2010) (refusing to disqualify Alston & Bird from handling a matter adverse to a Safeway subsidiary while simultaneously representing Safeway itself in another matter; also finding that Alston's past representation of a trade association that included Safeway's subsidiary did not warrant disqualification because the representation was not related to the matter Alston was handling adverse to the subsidiary; explaining that Safeway's in-house lawyer refused to sign Alston's retainer letter that limited the firm's representation to Safeway and excluded affiliates, but then signed a letter with the same provision on a later occasion two years later; "In September 2007, Safeway retained William Baker of Alston & Bird to represent Safeway in the Ware litigation. Ann Erickson, senior corporate counsel for Safeway, refused to sign Alston's initial proposed retainer agreement and specifically objected to an advance waiver of conflicts provision and a 'one client' provision limiting Alston's representation to the Safeway parent entity and not its subsidiaries. The first provision, entitled 'Waiver of Future Conflicts,' stated that Safeway waived any future conflicts so long as the subject matter was not substantially related to Alston's work for Safeway. The second provision, entitled 'Limitation of Client Relationship to One Entity, Not Affiliates,' provided that Alston's 'representation of Safeway, Inc., does not give rise to an attorney-client relationship between the Firm and . . . any . . . subsidiary or affiliated entity . . . .'"; "In summer 2009, Baker sent Erickson a new retainer letter to change the hourly fee arrangement for the Ware litigation, to a fixed monthly fee arrangement. The 2009 retainer letter contained the provisions titled 'Waiver of Future Conflicts' and 'Limitation of Client Relationship to One Entity, Not Affiliates,' that were identical to the provisions Erickson had struck in the October 2007 retainer letter. Erickson struck the 'Waiver of Future Conflicts' provision in the new retainer letter and Alston inserted a notice provision instead; however, she signed the revised retainer letter on or about September 1, 2009 without striking the 'Limitation of Client Relationship' provision."; holding that "[t]he attorney-client relationship may be informal and implied from the words and actions of the parties. . . . Whether and when an attorney client relationship exists depends on the contractual intent and conduct of the parties."; finding that there was no "Conflict by Agreement"; "Safeway struck these provisions, stating its position that by representing Safeway, Alston was representing Safeway's subsidiaries and that Safeway would not argue to allow Alston to sue its subsidiaries. However, Safeway never put these statements into the amended retainer, so it is not clear whether Alston actually agreed with

Safeway's position or simply agreed to delete the contrary language from the retainer agreement."; "That retainer was replaced with a 2009 retainer in which defendant agreed that Alston's representation of Safeway did not give rise to an attorney-client relationship between Alston and defendant's subsidiaries. In other words, any 'understanding' was erased on September 1, 2009 by agreement. Because there is no evidence that Alston had started representing plaintiffs by that date, the 2007 agreement created no conflict."; "Not so fast, argues defendant: Safeway should not be held to the terms of the 2009 agreement because it was not expecting the conflict terms to change from the previous agreement. This is not going to get defendant very far: a person signing a document has a duty to read it and know the contents of the writing." (emphasis added); "Defendant tries to shift the onus to Alston, by contending that the law firm was its 'fiduciary' who therefore was required to alert Safeway to every change made to the agreement rather than expect Safeway to read it. . . . If Alston sneaked in a change (or just forgot to include Safeway's redactions in the new version of the agreement), that's either a sharp practice or sloppy work, but neither is enough to conclude that a large corporation with sophisticated in-house lawyers should not be held to the terms of an agreement it signed." (emphasis added); also finding that there was no "conflict by creation of [an] attorney-client relationship," because even if the subsidiary was to be treated as a client for conflicts purposes pursuant to the 2007 letter, it did not create a full attorney-client relationship; "An agreement to treat a subsidiary as a client in this setting 'does not in itself establish a full fledged client-lawyer relationship with the affiliates,' ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 95-390 (1995), so no current or former client status arises out of such an agreement.").

- Avocent Redmond Corp. v. Rose Elecs., 491 F. Supp. 2d 1000, 1004, 1004 n.2, 1007-08, 1010, 1011 (W.D. Wash. 2007) (disqualifying Heller Ehrman from adversity to a corporate affiliate of a corporate client; noting that the retainer letter with its client specifically indicates that the law firm will represent its corporate client "and its affiliates"; "Had Heller Ehrman wanted to limit the scope of its representation, it could have done so by expressly limiting the OSA affiliates that it was agreeing to represent rather than broadly agreeing to represent all of them. As one scholar cited by defendant's expert states, 'The lack of a per se disqualification rule does not mean that the corporate family would be unable to impose such a rule. The law firm and client, in the initial engagement letter, could always agree to treat some or all members of the corporate family as a single entity, or as separate entities'). Ronald D. Rotunda, Conflicts Problems When Representing Members of Corporate Families, 72 Notre Dame L. Rev. 655, 687-88 (1997); see Dkt. # 68 at P8. Furthermore, the conflict at issue here could have been discovered earlier if Heller Ehrman had listed 'OSA . . . and its affiliates' as the client in its electronically-maintained conflicts database." (emphasis added); also noting that during the scope if its representation of the corporate client Heller

> Ehrman would have dealt with licenses in the same "patent family" as the patents at issue in the current adversity -- meaning that the law firm's previous representation of the corporate client was "substantially related" to the current adversity; also noting that Heller Ehrman retained its former client's files -- meaning that Heller Ehrman's current adversary would have to ask the law firm for its files; "This puts Heller Ehrman in the troublesome position of having to review and produce documents from its own files relating to the representation of a former client because a current litigation client has requested the documents in discovery."; "Should any issue regarding attorney-client privilege or work product doctrine arise, Heller Ehrman lawyers would be both asserting privilege or work-product on behalf of Redmond as an OSA affiliate, and representing defendants in contesting any claim of privilege.").

Although uncertainty might aid the client or the lawyer if some dispute arises, in most situations it is better for both to know the exact identities of all of the lawyer's clients.

Conclusion

There is no clear answer to this hypothetical. Under some courts' and bars' approaches, you might be barred from representing one subsidiary and being adverse to another. On the other hand, the sister-subsidiary relationship is even more attenuated than the parent-subsidiary connection, and the ABA Model Rules emphasize that the lawyer's client is the entity and not any of its constituents.

Under the logical fact-intensive approach, you would need more facts to decide whether you could represent your client in the lawsuit without the defendant's consent.

Best Answer

The best answer to this hypothetical is **MAYBE**.

B 6/14

Identifying the Client Within a Corporate Family: In-House Lawyers' Issues

Hypothetical 26

After about three years of practice, you decided to move in-house with your largest client. From your work with that client, you know that it has several wholly owned subsidiaries and several partially owned subsidiaries.

As an in-house lawyer, will you be jointly representing the parent corporation (which employs you) and all of its subsidiaries?

MAYBE

Analysis

Lawyers representing corporations owe their duty to the corporation as an entity, not to any of its constituents. ABA Model Rule 1.13(a). This basic rule seems easy to understand in the abstract, but can result in enormously difficult ethics situations for in-house and outside lawyers representing corporations.

The ABA Model Rules explain that

> [w]ith respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed.

ABA Model Rule 1.0 cmt. [3] (emphasis added).

The Restatement similarly recognizes that the existence of an attorney-client relationship within a single corporation or a corporate family depends on the circumstances.

> Whether a lawyer represents affiliated organizations as clients is a question of fact . . . . When a lawyer represents two or more organizations with some common ownership or membership, whether a conflict exists is determined primarily on the basis of formal organizational distinctions. If a single business corporation has established two divisions within a corporate structure, for example, conflicting interests or objectives of those divisions do not create a conflict of interest for a lawyer representing the corporation. Differences within the organization are to be resolved through the organization's decisionmaking procedure.
>
> If an enterprise consists of two or more organizations and ownership of the organizations is identical, the lawyer's obligation is ordinarily to respond according to the decisionmaking procedures of the enterprise, subject to any special limitations that might be validly imposed by regulatory regimes such as those governing financial institutions and insurance companies.
>
> On the other hand, when ownership or membership of two or more organizations is not identical, the lawyer must respect the organizational boundaries of each and analyze possible conflicts of interest on the basis that the organizations are separate entities. That is true even when a single individual or organization has sufficient ownership or influence to exercise working control of the organizations.

Restatement (Third) of Law Governing Lawyers § 131 cmt. d (2000). An illustration describes the complication triggered by other owners' stake in a subsidiary controlled by the lawyer's client/employer.

> A Corporation owns 60 percent of the stock of B Corporation. Lawyer has been asked by the President of A Corporation to act as attorney for B in causing B to make a proposed transfer of certain real property to A at a price whose fairness cannot readily be determined by reference to the general real estate market. Lawyer may do so only with effective informed consent of the management of B (as well as that of A). The ownership of A and B is not identical and their interests materially differ in the proposed transaction.

Restatement (Third) of Law Governing Lawyers § 131illus. 2 (2000).

In 2008, the New York City Bar took the same basic approach.

- New York City Bar LEO 2008-2 (2008) ("In analyzing the conflicts facing inside counsel that represent corporate affiliates, it is important to divide the discussion into two distinct scenarios. The first is when inside counsel represent a parent corporation and one or more of the parent's wholly owned affiliates. The second is when inside counsel represent (a) a parent and one or more affiliates that the parent controls, but does not wholly own, or (b) several affiliates controlled, but not wholly owned, by a common parent." (footnote omitted); "In the first scenario, inside counsel's representation is not of entities whose interests may differ because the parent's interests completely preempt those of its wholly owned affiliates. As a matter of corporate law, 'in a parent and wholly-owned subsidiary context, the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders.' Anadarko Petroleum Corp. v. Panhandle E. Corp., 545 A.2d 1171, 1774 (Del. 1988). See also Availl, Inc. v. Ryder Sys., Inc., 913 F. Supp. 826, 832 (S.D.N.Y. 1996) ('Because the officers and directors of a parent company owe allegiance only to that company and not to a wholly owned subsidiary, it is reasonable to conclude that a parent corporation itself is under no obligation to provide the subsidiary with independent representation . . . . It would be anomalous to impose a duty upon the corporation, an artificial person, when all the natural persons who are its officers and directors have no such duty, and there is no natural person to take up the duty.'), aff'd, 110 F.3d 892 (2d Cir. 1997).").

Thus, for conflicts purposes, corporate parents and their wholly owned subsidiaries generally are treated as a single client or joint clients, but partially owned subsidiaries may not be. This highlights the wisdom of in-house lawyers defining their "clients" for ethics purposes.

For purposes of privilege, most courts protect as privileged communications between a parent's lawyer and wholly owned or controlled subsidiaries' employees.

- SCR-Tech LLC v. Evonik Energy Servs. LLC, 2013 NCBC 42, at ¶ 18, ¶¶ 15, 26 (N.C. Super. Ct. Aug. 13, 2013) (reviewing the very sparse case law on privilege protection for communications with partially owned subsidiaries; dealing with communications to and from plaintiff SCR-Tech (1) when the company was partially owned by Ebinger; (2) when the company was then sold to, and wholly owned by, Catalytica, and (3) when the company later entered into a "common interest agreement" with Ebinger, because both faced similar litigation; applying a sort of sliding scale, considering both the percentage of ownership and any "shared legal interest."; concluding that the

privilege protected communications during all three situations, because (1) SCR-Tech's shared legal interest with Ebinger meant that the court did not have to determine whether Ebinger's 37.5% ownership (which gave it control) was "too limited" to assure privilege protection by itself; (2) Catalytica's 100% ownership of, and shared legal interest with, SCR-Tech assured privilege protection; (3) the "common interest" doctrine could protect communications between SCR-Tech and its former controlling shareholder Ebinger even in the absence of any corporate affiliation at that time.).

- Glidden Co. v. Jandernoa, 173 F.R.D. 459, 472-73 (W.D. Mich. 1997) ("The universal rule of law, expressed in a variety of contexts, is that the parent and subsidiary share a community of interest, such that the parent (as well as the subsidiary) is the 'client' for purposes of the attorney-client privilege. See Crabb v. KFC Nat'l Man. Co., 1992 U.S. App. LEXIS 38268, 1992 WL 1321 (6th Cir. 1992) ('The cases clearly hold that a corporate 'client' includes not only the corporation by whom the attorney is employed or retained, but also parent, subsidiary and affiliate corporations.') (quoting United States v. AT&T, 86 F.R.D. 603, 616 (D.D.C. 1979)). Consequently, disclosure of legal advice to a parent or affiliated corporation does not work a waiver of the confidentiality of the document, because of the complete community of interest between parent and subsidiary. Id. at *2. Numerous courts have recognized that, for purposes of the attorney-client privilege, the subsidiary and the parent are joint clients, each of whom has an interest in the privileged communications. See, e.g., Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 49 (S.D.N.Y. 1989); Medcom Holding Co. v. Baxter Travenol Lab., 689 F. Supp. 841, 842 (N.D. Ill. 1988). Simply put, a sole shareholder has a right to complete disclosure about the legal affairs of its wholly owned subsidiary.").

In-house lawyers can essentially assure privilege protection by jointly representing their client/employer and any wholly or partially owned subsidiaries. However, that can create conflicts issues if adversity develops, and perhaps more serious file ownership issues if such adversity develops.

Best Answer

The best answer to this hypothetical is **MAYBE**.

B 6/14

Effect of a Joint Representation in Corporate Transactions

Hypothetical 27

Last year, you represented your firm's largest corporate client in spinning off one of its subsidiaries to become an independent company. The timing could not have been any worse, and the newly-independent former subsidiary declared bankruptcy. This morning you received a call from the lawyer representing the recently-appointed bankruptcy trustee. The lawyer demanded all of your law firm's files created during your work on the transaction, claiming that you had jointly represented the parent and the then-subsidiary in the spin. Given that lawyer's threatening tone, you have been trying to remember what damaging documents might exist in the file -- while considering the trustee's lawyer's legal position.

If you had jointly represented the parent and the then-subsidiary in the spin transaction, does the bankruptcy trustee have the right to your law firm's file?

YES (PROBABLY)

Analysis

In many transactions in which one member of a corporate "family" becomes an independent company through either a stock or asset sale, the same lawyers represent both entities in the transaction. Lawyers representing the entire corporate family in such transactions can include in-house and outside lawyers.

This scenario often implicates the well-recognized principle that jointly represented clients usually have an equal claim on their joint lawyer's files. For instance, in In re Equaphor Inc.,[1] the court dealt with files that a law firm created during its joint representation of Equaphor and three individual co-defendants in a derivative action. When Equaphor later declared bankruptcy, the bankruptcy trustee moved to compel the law firm to turn over its litigation files. The individual clients resisted the

[1] Ch. 7 Case No. 10-20490-BFK, 2012 Bankr. LEXIS 2129 (Bankr. E.D. Va. May 11, 2012).

turnover -- emphasizing that Equaphor had been only a "nominal defendant" in the derivative action.[2] The court rejected this argument, noting that "while [Equaphor] may have been named as a nominal defendant, there is no such thing as a nominal client of a law firm," and that "there is no support in the case law for a 'nominal defendant exception' to the principle that all clients are entitled to an attorney's files."[3]

Application of the general principle means that a newly independent company generally may obtain access to the files generated by the law firm that jointly represented the companies while they were still members of the same corporate "family." If the newly independent company declares bankruptcy, a bankruptcy trustee can thus generally call upon the law firm or law department to produce all of its files generated during the former joint representation -- including communications between the lawyer and the parent that the lawyer also represented during the "transaction."

A number of cases highlight the frightening nature of this basic principle.

Mirant. In In re Mirant Corp., 326 B.R. 646, 649 (Bankr. N.D. Tex. 2005), the Troutman Sanders law firm was required to produce files it generated while jointly representing the firm's long-time client The Southern Company and the subsidiary which became known as Mirant when it became an independent company and later declared bankruptcy. The court rejected Troutman Sanders' argument that Mirant's bankruptcy trustee was not entitled to communications between Troutman Sanders and The Southern Company created during the joint representation and noted that "[i]t is well established that, in a case of a joint representation of two clients by an attorney, one

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[2] Id. at *9.

[3] Id. at *9-10, *10.

client may not invoke the privilege against the other client in litigation between them arising from the matter in which they were jointly represented."

Teleglobe. In Teleglobe Communications Corp. v. BCE Inc. (In re Teleglobe Communications Corp.), 493 F.3d 345 (3d Cir. 2007), the Third Circuit analyzed the nature of an in-house lawyer's representation of her employer and its corporate affiliates.

In Teleglobe, Canada's largest broadcaster (BCE) had a wholly owned Canadian subsidiary (Teleglobe), which in turn had several wholly owned second-tier U.S. subsidiaries. Teleglobe and its U.S. subsidiaries were developing a global fiber optic network. Not surprisingly, by late 2001 BCE started to reassess the project, exploring such options as restructuring, maintaining its funding or cutting off funding for Teleglobe and its subsidiaries. After this intensive reassessment involving in-house and outside lawyers (and undoubtedly generating troublesome documents), BCE decided to cut off funding.

Within just a few weeks, Teleglobe declared bankruptcy in Canada, and the second-tier subsidiaries declared bankruptcy in the United States. The bankrupt second-tier subsidiaries (now controlled by hostile creditors) sued BCE for cutting off their funding. They sought documents from BCE's law department and various outside law firms which had represented BCE, Teleglobe and its subsidiaries. The second-tier subsidiaries claimed that they had been jointly represented by BCE's in-house lawyers and their outside law firms.

The District of Delaware agreed with this argument, and gave the bankrupt subsidiaries access to all otherwise privileged documents shared with BCE's law

department. BCE appealed the district court's decision rather than turn over the documents.

In Teleglobe, the Third Circuit reversed and remanded. It agreed with the district court's analysis of both the ethics and privilege effects of a joint representation: (1) absent an agreement to the contrary, there can be no secrets among jointly represented clients; (2) former jointly represented clients generally can have access to their joint lawyer's files; (3) litigation adversity among jointly represented clients causes the privilege to evaporate, thus allowing any of them to use otherwise privileged communications in the litigation.

Although the Third Circuit's opinion started with a quote from the Righteous Brothers' song "You've Lost That Lovin' Feelin'," the opinion includes a serious analysis of several issues. Id. at 352 & n.1. Significantly, the Third Circuit specifically rejected arguments presented by amicus Association of Corporate Counsel.

Among other things, the Third Circuit rejected what in essence was the district court's automatic presumption that all lawyers representing BCE also jointly represented Teleglobe and its now bankrupt subsidiaries. The court remanded so the district court could assess with more care the nature of BCE's in-house and outside lawyers' representation of Teleglobe and its subsidiaries.

After the Third Circuit described the adverse consequences of a joint representation, it offered a roadmap for how in-house lawyers can avoid those consequences.

Most importantly, the court explained that in-house lawyers can limit the scope of their representation of corporate affiliates. The court provided the example of a

corporate parent's gathering of information from subsidiaries in order to make public filings -- which does not necessarily "involve jointly representing the various corporations on the substance of everything that underlies those filings." Id. at 373. The court also acknowledged that "in some of these circumstances in-house counsel may not need to represent the subsidiaries at all," because the parent company's lawyer can have privileged communications with subsidiaries' employees without representing the subsidiary. Id. at 373 n.27.

In discussing situations where a parent's and a subsidiary's interests might later diverge ("particularly in spin-off, sale and insolvency situations"), the court advised that "it is wise for the parent to secure for the subsidiary outside representation." Id. at 373. The court emphasized that this "does not mean that the parent's in-house counsel must cease representing the subsidiary on all other matters." Id. The court assured in-house lawyers that

> [b]y taking care not to begin joint representations except when necessary, to limit the scope of joint representations, and seasonably to [hire] separate counsel on matters in which subsidiaries are adverse to the parent, in-house counsel can maintain sufficient control over the parent's privileged communications.

Id. at 374. If in-house lawyers take this step, "they can leave themselves free to counsel a parent alone on the substance and ramifications of important transactions without risking giving up the privilege in subsequent adverse litigation [between a parent and a former subsidiary]." Id. at 383 (emphasis in original).

On remand, the Bankruptcy Court for the District of Delaware ultimately found that there had not been a joint representation.[4]

625 Milwaukee. Significantly, the same approach has been applied in the case of a parent's sale of a subsidiary in the ordinary course of its business, rather than in a bankruptcy setting.

In 625 Milwaukee, LLC v. Switch & Data Facilities Co., Case No. 06-C-0727, 2008 U.S. Dist. LEXIS 19943 (E.D. Wis. Feb. 29, 2008), law firms 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 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." Id. at *12. The court even ordered the production of a post-transaction document -- Blank Rome's invoice which referred to the firm's pre-transaction work. Accord Brownsville General Hosp., Inc. v. Brownsville Prop. Corp. (In re Brownsville General Hosp., Inc.), 380 B.R. 385 (Bankr. W.D. Pa. 2008).

New York City LEO 2008-2. A 2008 New York City legal ethics opinion thoroughly analyzed this issue, and also warned in-house lawyers of the risk they run by

[4] Teleglobe USA, Inc. v. BCE Inc. (In re Teleglobe Commc'ns Corp.), Ch. 11 Case No. 02-11518 (MFW), Adv. No. A-04-53733 (MFW), 2008 Bankr. LEXIS 2130 (Bankr. D. Del. Aug. 7, 2008).

jointly representing corporate affiliates.[5] The New York City Bar suggested that an in-house lawyer in this situation could obtain a prospective consent.

> 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

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[5] New York City LEO 2008-2 (9/08) (addressing an in-house lawyer's representation of corporate affiliate in the face of conflicts of interest; explaining that "[i]t is inevitable that on occasion parents and subsidiaries will see their interests diverge, particularly in spin-off, sale, and insolvency situations. When this happens, it is wise for the parent to secure for the subsidiary outside representation. Maintaining a joint representation for the spin-off transaction too long risks the outcome of Polycast [Tech. Corp. v. Uniroyal, Inc.], 125 F.R.D. [47, 49 (S.D.N.Y. 1989)], and Medcom [Holding Co. v. Baxter Travenol Lab.], 689 F. Supp. [842, 844 (N.D. Ill. 1988)] -- both cases in which parent companies were forced to turn over documents to their former subsidiaries in adverse litigation -- not to mention the attorneys' potential for running afoul of conflict rules."; first analyzing an in-house lawyer's representation of a parent and one or more wholly owned affiliates; explaining that in their scenario "inside counsel's representation is not of entities whose interests may differ because the parent's interests completely preempt those of its wholly owned affiliates"; also analyzing an in-house lawyer's representation of a parent and an affiliate that is only partially owned by the parent, or several affiliates controlled by, but not wholly owned by, a common parent; explaining that in that situation "inside counsel must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests"; concluding that in the second scenario in-house lawyers must analyze whether they can jointly represent affiliates with conflicting interests; "Inside counsel should consider carefully these conflict-of-interest rules. Sometimes, a potential conflict will be apparent from the outset of the representation. At other times, the conflict may not become apparent until after the joint representation has begun. To pick just one example, at the outset of a litigation in which a parent and a majority-owned affiliate have been sued, their positions may appear identical and they may choose to be jointly represented by inside counsel. Then discovery may unexpectedly reveal that there is a basis for the parent to offload responsibility onto the affiliate."; also saluting the "disinterested lawyer" test, which determines if an objective lawyer would believe that he or she could adequately represent multiple affiliate corporations in the joint representation; 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."; explaining that in some circumstances the in-house lawyer might conclude that separate lawyers should represent the affiliates; also noting that "[i]t also bears emphasis, as stated above, that the person giving informed consent to the advance waiver on behalf of the affiliate must have the degree of independence from the parent, or from other affected affiliates, required by applicable corporate law"; also noting that an in-house lawyer might alternatively limit the representation to one or more affiliates in order to avoid conflicts; "Limiting the representation of an affiliate is at times accompanied by retaining other counsel -- for example, outside counsel -- to represent the affiliate on those matters in which conflicts preclude joint representation. Separate counsel can protect the affiliate's interests in the conflicted matter, while allowing inside counsel to perform other useful roles for both clients."; warning that "[s]ensitivity to conflicts between represented affiliates will help forestall judicial criticism and avoid unnecessary curtailment of inside counsel's continued functioning in their expected capacity").

> 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 City LEO 2008-2 (9/08). Not surprisingly, the New York City Bar also reminded in-house lawyers that anyone signing such a prospective consent on the corporation's behalf "must have the degree of independence from the parent, or from other affected affiliates, required by applicable corporate law." Id.

Echoing the Third Circuit's warning in Teleglobe (discussed above), the New York City Bar also suggested that in-house lawyers might want to avoid representing corporate affiliates in certain circumstances.

> Limiting the representation of an affiliate is at times accompanied by retaining other counsel -- for example, outside counsel -- to represent the affiliate on those matters in which conflicts preclude joint representation. Separate counsel can protect the affiliate's interests in the conflicted matter, while allowing inside counsel to perform other useful roles for both clients.

Id.

Crescent Resources. In In re Crescent Resources, LLC, 457 B.R. 506 (Bankr. W.D. Tex. 2011), the Litigation Trust for bankrupt Crescent Resources sought the files of the Robinson, Bradshaw & Hinson law firm.

The Litigation Trust claimed that Robinson, Bradshaw had jointly represented Crescent and its parent Duke Ventures, LLC -- in a transaction that allegedly left

Crescent insolvent after a transfer of over $1 billion to Duke. If there had been a joint representation, universally recognized principles would entitle either of the jointly represented clients to the law firm's files. As the undeniable successor to Crescent Resources, the Litigation Trust would therefore be entitled to the law firm's files -- including all communications between the law firm and Duke about the transaction, even if no Crescent representative participated in or received a copy of those communications.

The court succinctly stated the issue.

> The major issue before the Court is whether the Trust is to be considered a joint or sole client, or no client at all, of RBH [Robinson, Bradshaw & Hinson] with respect to the Project Galaxy files.

Id. at 516.

The court also teed up the parties' positions.

> The Trust argues that RBH did represent Crescent Resources, while Duke would have the Court believe that RBH jointly represented Crescent Resources before the 2006 Duke Transaction and after the 2006 Duke Transaction, but not during the 2006 Duke Transaction. Duke further alleges that Crescent Resources was not represented by counsel at all during the 2006 Duke Transaction. Duke is arguing, essentially, that for the purposes of the 2006 Duke Transaction only, RBH did not represent Crescent Resources. So the issue to be resolved is whether RBH represented Crescent Resources with respect to the 2006 Duke Transaction.

Id.

Duke and Robinson, Bradshaw staked out a firm position, and both

> provided sworn testimony that Duke was RBH's sole client for Project Galaxy. Mr. Torning ["Duke's in-house attorney responsible for Project Galaxy and attorney in charge of outside counsel for Duke for Project Galaxy"] testified that it

> was his understanding "that at all times during Project Galaxy, RBH represented Duke, not Crescent."

Id. at 520. Thus, both Duke and Robinson, Bradshaw stated under oath that the law firm represented only Duke -- and did not represent Crescent.

The court looked at all the obvious places in assessing whether Robinson, Bradshaw solely represented Duke in the transaction, or jointly represented Duke and Crescent in the transaction.

First, the court found that a 2004 Robinson, Bradshaw retainer letter was somewhat ambiguous.

> "The Firm is retained to represent Duke Energy (or any of its subsidiaries or affiliates) and to render legal advice or representation as directed and specified by a Duke Energy attorney . . . with respect to a given matter . . . However, the Duke Energy Office of General Counsel has the ultimate responsibility and authority for handling all decisions in connection with the Services."

Id. at 519. A Robinson, Bradshaw lawyer testified that the firm "was unable to locate any engagement letter . . . in which Crescent Resources was a signatory." Id. Thus, there was no specific retainer letter for the pertinent transaction, but the earlier general retainer letter was not inconsistent with Robinson, Bradshaw's joint representation of Crescent in the transaction.

Second, the court pointed to Duke's payment of Robinson, Bradshaw's invoices. Id. at 520. The court explained that Duke's payment of Robinson, Bradshaw's legal fees did not necessarily preclude the firm's joint representation of Duke and Crescent.

> The evidence shows that Duke, not Crescent, paid for the legal services provided in connection with Project Galaxy. However, that is not dispositive, as there can still be an implied attorney-client relationship independent of the payment of a fee.

Id. at 522.

Third, the court noted Duke's argument that Robinson, Bradshaw "took direction from, reported to, and provided legal services to Duke." Id. at 520. In analyzing the direction issue, the court pointed to a Robinson, Bradshaw lawyer's testimony.

> Mr. Buck testified that neither he nor any RBH attorneys represented Crescent in the Project Galaxy transaction. . . . Mr. Buck additionally testified that he did not report to Crescent nor take direction from Crescent during Project Galaxy.

Id. at 521. Of course, the Robinson, Bradshaw lawyers had interacted with Crescent employees in connection with the transaction.

> Duke acknowledged that RBH worked with Crescent Resources on Project Galaxy, but downplayed that by stating that "of course [RBH interacted with Crescent], because they're representing Duke in the sale of . . . its 49 percent sharehold interest in Crescent. And of course, when you're providing information to the buyer—the prospective buyer—you're going to work with the company in which you're selling a portion of your shares." . . . . Duke argues that this contact between RBH and Crescent Resources is not the same as RBH representing Crescent Resources with respect to Project Galaxy.

Id. at 519.

Thus, Duke and Robinson, Bradshaw argued that the firm had not jointly represented Duke and Crescent in the transaction, relying on sworn statements to that effect from both Duke and the law firm; the lack of a specific retainer letter with Crescent; Duke's payment of the legal bills; and Duke's direction to the law firm in connection with the transaction.

The court then turned to contrary evidence presented by the Litigation Trust.

First, the court pointed to evidence clearly establishing that Robinson, Bradshaw had represented Crescent before the transaction. Id. at 518. The court also noted the firm's failure to run conflicts when undeniably representing Crescent in a number of matters before the transaction.

Ironically, the court also pointed to Crescent's own application to retain Robinson, Bradshaw as its law firm in the bankruptcy -- which described the law firm's long-standing representation of Crescent.

> The Trust presented the Application to Employ RBH submitted to this Court on June 11, 2009 (the "Application") . . . . That document details RBH's pre-petition relationship with the Debtors. "RB&H has been representing Crescent and many of its debtor and non-debtor subsidiaries since 1986 and has served as Crescent's primary corporate counsel for several years." . . . . The Application states that "RB&H represented Crescent in connection with the formation, in 2006, of its current parent holding company, incident to a change in Crescent's historical ownership structure as a wholly-owned, indirect subsidiary of Duke Energy Corporation." . . . . The Application also contains the Declaration of Robert C. Sink in Support of Application to Employ (the "Sink Declaration") . . . . Mr. Sink is a shareholder with RBH and the declaration was made on RBH's behalf. In the Sink Declaration, Mr. Sink echoes the Application and states that "RB&H has represented Crescent Resources and many of its debtor and non-debtor subsidiaries in various matters since 1986 and has served as Crescent's primary corporate counsel for several years."

Id. at 517-18 (emphasis added). The court concluded that

> RBH represented both Crescent and Duke prior to Project Galaxy. There was no end to the attorney-client relationship and RBH attorneys were going through Crescent files in performing the due diligence for Project Galaxy. It is reasonable that a current client would believe that an attorney was representing them if the attorney showed up to that current client's office and started going through files.

Id. at 522 (emphasis added).

The court also noted Robinson, Bradshaw's representation of Crescent after the transaction.

> Duke provided no evidence which would have given RBH cause to terminate their relationship with Crescent, nor did Duke provide any evidence that RBH gave notice to Crescent that RBH was terminating their relationship. Further, Duke acknowledges that RBH and Crescent continued to maintain an attorney-client relationship post Project Galaxy, which would negate any potential argument by Duke that RBH and Crescent's relationship may have terminated by implication.

Id. at 523.

Second, the court noted that Crescent did not have any other law firms represent it in connection with the transaction.

> RBH had a long-term relationship with Crescent before Project Galaxy. Additionally, there was no other representation of Crescent during Project Galaxy.

Id. at 521 (emphasis added).

Third, the court pointed to several Robinson, Bradshaw lawyers' website bios boasting that they had represented Crescent in the transaction.

> The Trust also discussed statements made by various RBH lawyers on RBH's website. Stephan J. Willen's page, under "Representative Experience" includes "Representing a real estate developer, as borrower, in connection with a $1.5 billion revolving and term loan letter of credit facility used to recapitalize the developer." The Trust stated that this represents the 2006 Duke Transaction and shows Mr. Willen's understanding that Crescent Resources was RBH's client with respect to the 2006 Duke Transaction. Additionally, William K. Packard's page, under "Representative Experience" states "Representation of Crescent Resources, as borrower, in connection with a $1.5 billion revolving and term loan letter of credit facility."

Id. at 518 (emphases added).

After examining both side's arguments, the court turned to the legal standard.

The court pointed to the Third Circuit's extensive analysis of this very issue in In re Teleglobe Communications Corp., 493 F.3d 345 (3d Cir. 2007).[6] The court noted that

> Teleglobe, relied on by both parties, reads almost as an instructional manual to in-house counsel on how to avoid tangled joint-client issues. Teleglobe instructs that a court should consider the testimony from the parties and their attorneys on the areas of contention.

Id. at 524. The court also pointedly noted that

> RBH and in-house counsel for Duke should have heeded the warnings in Teleglobe and taken greater care to have in place an information shielding agreement or ensured that Crescent was represented by outside counsel.

Id.

The court ultimately concluded that Robinson, Bradshaw had jointly represented Duke and Crescent in the transaction. The court therefore held that the Litigation Trust was entitled to Robinson, Bradshaw's files generated during the firm's joint representation of Duke and Crescent in the transaction.[7]

In looking ahead to litigation between Litigation Trust and Duke, the court also held found that

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[6] Id. at 516 ("The various cases cited by both the Trust and Duke involve cases where a parent corporation and subsidiary were represented by the same attorney during a spin-off, sale, or divestiture. See e.g. In re Teleglobe Commc'ns Corp., 493 F.3d 345 (3rd Cir. 2007) (in-house counsel of the parent corporation represented both the subsidiary and parent companies); Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47 (S.D.N.Y. 1989) (in-house counsel of the parent corporation represented both the subsidiary and parent in the sale of the subsidiary); Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841 (N.D.Ill. 1988); In re Mirant Corp.[,] 326 B.R. 646 (Bankr. N.D.Tex. 2005) (same law firm representing both parent and subsidiary in a public stock offering of the subsidiary). In those cases, the courts determined the parties were joint clients. The issue remaining before this Court is whether RBH represented Crescent Resources with respect to the 2006 Duke Transaction.").

[7] Id. at 524.

> Duke cannot invoke an attorney-client privilege to stop the Trust from using the joint-client files in adversary proceedings between Duke and the Trust.

Id. at 528. In contrast, the court held that

> the Trust may not unilaterally waive the joint-client privilege and use jointly privileged information in proceedings involving third parties, absent a waiver from Duke.

Id. at 530.[8] The court's conclusions follow the majority rule when joint clients become adversaries. The law generally allows either joint client access to their common law firm's files, and permits either joint client to use any of those documents in litigation with another joint client.

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.

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[8] Id. at 529-30 ("The Restatement [Restatement (Third) of Law Governing Lawyers § 75 cmt. e (2000)] says co-client communication is not privileged as between the co-clients. The Trust's reading of the Restatement appears to state that if co-client communication is then used in an adversary [sic] between the former co-clients, it would then waive the privilege as to third parties. This would effectively make the privilege superfluous. Protections can be placed on any future hearings between Duke and the Trust, and any co-client privileged information can remain privileged as to third parties even if used in a future adversary proceeding between Duke and the Trust.").

Intentional Joint Representation of Corporate Employees

Hypothetical 28

As the only in-house lawyer for a privately-held company, you are occasionally asked to represent company employees (often distant relatives of the primary owner). You want to make sure that such representations do not run afoul of any rules, or jeopardize your main job as the company's lawyer.

(a) May you intentionally represent a company employee in a company-related matter?

YES

(b) May you intentionally represent a company employee in a non-company-related matter?

MAYBE

Analysis

Introduction

Although it certainly raises conflicts of interest issues and privilege ownership issues, there is nothing inherently unethical about a lawyer representing both a corporation and one or more of the corporation's employees. In fact, ABA Model Rule 1.13 specifically acknowledges such joint representations.

> A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

ABA Model Rule 1.13(g).

Unauthorized Practice of Law/Multijurisdictional Practice Issues

However, the issue becomes much more complicated in the case of in-house lawyers.

This situation is governed by unauthorized practice of law ("UPL") regulations in each state. States take differing approaches to the permissibility of in-house lawyers representing individual constituents (officers, directors, employees) of their corporate client-employers. The stakes can be surprisingly high -- an in-house lawyer representing such an individual in a state that does not permit such representations would be engaging in the unauthorized practice of law. Most states prohibit the unauthorized practice of law in their criminal statutes.

Even in-house lawyers fully licensed in the state where they practice must examine their state's unauthorized practice of law rules. In-house lawyers represent somewhat of an anomaly in the law -- because they ultimately report to a nonlawyer (the company's board of directors). Because of this unique role, in-house lawyers must assess with whom they can establish an attorney-client relationship. At the extreme, an in-house lawyer working for a large retailer could not set up a table near the store's front door and begin representing customers who might want a will drafted for them. This would essentially make the corporation a law firm owned by shareholders -- which no state permits. On the other hand, some states allow in-house lawyers to represent their corporation's employees (subject to the conflicts rules). Other states are more liberal, and allow in-house lawyers to represent their corporation's former employees, and in some situations even their corporation's customers. However, each state takes a

slightly different approach, and in-house lawyers would be wise to check the applicable rules.

States' somewhat hostile attitude toward in-house lawyers' representation of such third parties creates a special dilemma for in-house lawyers hoping to engage in pro bono work. As indicated above, no in-house lawyer could begin to represent thousands of company customers. Technically, pro bono clients stand in the same shoes as those customers -- they are strangers to the corporation. Many states have wrestled with this issue, and most find a way to turn a blind eye toward any technical violation of the unauthorized practice of law rules that might occur if an in-house lawyer engages in pro bono work.

These issues become even more complicated for in-house lawyers who are <u>not</u> full members of the bar in the state where they are practicing. Traditionally, most states often did not require in-house lawyers to join the bar or even register with the bar in some way. However, most states now require in-house lawyers to either take the full step of joining the bar where they practice, or at least register in some way.

Cynics would argue that states are as much interested in the dues money as in their desire to police in-house lawyers' conduct. It is easy to see why states normally do not have much of an interest in regulating in-house lawyers. Because in-house lawyers generally cannot represent entities or people outside their corporate employer (as discussed above), there normally is no great danger that in-house lawyers will harm the public. And to the extent that they harm their corporation or its employees, the corporation itself generally can take care of such misdeeds.

The ethics rules contain provisions dealing with what in-house lawyers may do when practicing in states in which they are not licensed.

This issue (called the "multijurisdictional practice" (or MJP) issue) is governed by ABA Model Rule 5.5 and the parallel rules in states adopting the ABA approach.

Under ABA Model Rule 5.5, all lawyers (including in-house lawyers) may practice law in other states as long as they do not hold themselves out as being admitted in that state, and as long as they provide legal services in that other state only on a "temporary basis." In addition, the lawyer practicing in another state must either associate with a lawyer from that state, comply with whatever pro hac vice rules apply to appear before a tribunal, or engage in representations that "arise out of or are reasonably related to" the lawyer's practice in a state where the lawyer is admitted. ABA Model Rule 5.5(c).

Of special interest to in-house lawyers, ABA Model Rule 5.5(d) allows an in-house lawyer to represent the lawyer's "employer or its organizational affiliates" in a state where the lawyer is not licensed, even as part of a "systematic and continuous presence" in the other state. ABA Model Rule 5.5(d).

A comment explores this "safe harbor" -- which does <u>not</u> allow the in-house lawyer to represent individual constituents of the client-employer in the other state.

> 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. <u>This paragraph does not authorize the provision of personal legal services to the employer's officers or employees.</u> 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 assess the lawyer's qualifications and the quality of the lawyer's work.

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

Thus, in-house lawyers moving to a state that follows the ABA Model Rules and not wishing to join that state's bar may represent the corporation's "organizational affiliates" -- but not any individual corporate constituents.

Conflicts Issues

Lawyers who represent corporations sometimes intentionally create a separate representation of a corporate employee. Such a joint representation does not have any dramatic effect on either the corporation's or the employee's attorney-client privilege. The lawyer must maintain the privilege protecting communications with the employee on such a separate matter, and must of course do likewise for any communications relating to the lawyer's representation of the corporation.

Such separate representations clearly carry ethics implications. A lawyer representing an employee on a traffic ticket matter has an attorney-client relationship with the employee, which precludes the lawyer from adversity to the employee even on unrelated matters (absent consent). This is one reason why wise lawyers try to avoid representing the employees of companies they also represent, even on unrelated matters. For instance, a lawyer representing a corporate vice president in buying a house cannot (absent consent) advise the company's board about its right to fire that vice president. Consent would normally be unavailable as a practical matter, because the board would not permit the lawyer to make the sort of disclosure necessary to obtain a valid consent. A lawyer might find it awkward to arrange for a prospective consent

when beginning to represent the employee in his or her house purchase, because it might send an unfortunate signal that such adversity might develop, or be a "turn off" to the lawyer's important contact and business generator in the corporate hierarchy.

When a law firm explicitly represents both the company and an employee, it might be necessary to determine if the representations are joint or separate. A lawyer who jointly represents a corporation and a corporate employee must consider all of the normal ramifications of such a joint representation on the same matter. First, the lawyer might not be able to keep secrets from either of the jointly represented clients. Second, a joint representation gives the employee equal ownership of and power over the attorney-client privilege. This means that the employee might have later access to the lawyer's file and communications between the lawyer and the corporation. It also means that absent some degree of adversity between the corporation and the employee, the corporation and the employee would have to unanimously vote to reveal any of their privileged communications to outsiders. Third, the development of any adversity between the jointly represented clients almost inevitably requires the withdrawal from representation of both clients. To make matters worse, the imputed disqualification rules applicable to law firms also generally apply to law departments, which means that an in-house lawyer's disqualification from a joint representation of the corporation and an individual employee normally would require the entire law department's disqualification.[1]

Lawyers might be able to mitigate some of the risks by arranging for a prospective consent from the employee, attempting to allow the lawyer to withdraw from

[1] ABA Model Rule 1.0(c).

representing the employee if adversity develops between her and the corporation, while continuing to represent the corporation.[2] The efficacy of such prospective consents is outside the scope of this hypothetical, but it is worth noting that courts and bars examine prospective consents both when the lawyers arrange for them and when the lawyers attempt to rely on them. Thus, there is never a guarantee that such a prospective consent will allow the lawyer to continue representing the corporation on the same matter if that would include adversity to the employee who is now the lawyer's former client. Lawyers therefore can never assure their corporate clients with confidence that they can completely mitigate the risks of a joint representation should adversity develop.

Despite these risks, lawyers representing corporations frequently enter into such intentional joint representations.

Trying to avoid a joint representation might be easy, if the law firm represents the executive in some non-corporate matters such as a traffic ticket or a house purchase. However, law firms might try to "thread the needle" by claiming that they represented a company and an executive on a company-related matter, but that their representations were separate rather than joint. This is nearly an impossible argument to successfully make, absent very clear retainer letters.

A 2009 decision highlights the risks that a lawyer runs when intentionally entering into separate representations of both a company and one of its employees, who was

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[2] For instance, one court refused to disqualify a firm from representing a company in litigation adverse to a former company executive whom the firm had also represented -- finding that the firm had adequately described its role and obtained a valid prospective consent from the executive. Laborers Local 1298 Annuity Fund v. Grass (In re Rite Aid Corp. Sec. Litig.), 139 F. Supp. 2d 649, 660 (E.D. Pa. 2001).

under investigation for wrongdoing. In that case, a well-known California law firm undertook what the court called "three separate, but inextricably related, representations" of Broadcom and its CFO.[3] The law firm represented Broadcom in connection with the company's internal investigation of stock option issues, and the CFO in two lawsuits brought by shareholders alleging wrongdoing in connection with stock options. The law firm interviewed the CFO, and then disclosed information it learned during the interview to the U.S. Attorney's Office, the SEC, and Broadcom's auditor. When the government pursued criminal charges against the CFO, he sought to suppress the statements he had made to the law firm during the interview, and the trial court granted his motion. Among other things, the court noted that the law firm had not advised the CFO before the interview that the firm was wearing only its "Broadcom" hat during the interview, and that it might disclose to third parties what it learned from the CFO. The court explained that "whether an Upjohn [Upjohn Co. v. United States, 449 U.S. 383 (1981)] warning was or was not given is irrelevant" -- because the firm clearly represented the CFO.[4] As the court put it, "[a]n oral warning to a current client that no attorney-client relationship exists is nonsensical at best -- and unethical at worst."[5] In addition to suppressing the evidence, the court referred the law firm to the State Bar for "appropriate discipline," based on the firm's ethical misconduct that "[t]he Court simply cannot overlook."[6]

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[3] United States v. Nicholas, 606 F. Supp. 2d 1109, 1111 (C.D. Cal. 2009), rev'd and remanded sub nom. United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).

[4] Id. at 1117.

[5] Id.

[6] Id. at 1112.

The Ninth Circuit reversed the district court's holding, but lawyers should not breathe easy.[7] The Ninth Circuit (i) found that the law firm had represented both Broadcom and its former CFO Ruehle in connection with possible option backdating; (ii) agreed with Ruehle that the law firm had not provided the proper Upjohn warning to Ruehle, despite the lawyers' contrary claims (pointedly noting that the [law firm] lawyers "took no notes nor memorialized their conversation on this issue in writing";[8] (iii) held that the district court had improperly applied California law rather than federal law to the privilege question (meaning that the district court might have been upheld if it had made the same findings under the federal standard); (iv) noted that Ruehle "was no ordinary Broadcom employee" because he knew that the law firm was sharing information with Broadcom's auditor Ernst & Young (a fact that will not be present in most situations involving law firms representing both corporations and executives);[9] (v) labeled as "troubling" the law firm's "allegedly unprofessional conduct";[10] and (vi) emphasized that "our holding today should not be interpreted as carte blanche approval" of the law firm lawyers' testimony about their communications with Ruehle (implying that the law firm's proffer to the FBI might have included impermissible disclosures).[11]

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7 United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).

8 Id. at 604 n.3.

9 Id. at 610.

10 Id. at 613.

11 Id. at 613 n.10.

These decisions highlight the tremendous risks corporate lawyers undertake when attempting to separately represent companies and executives in company-related matters where there is any chance of adversity.

In 2012, two well-known Oregon state lawyers found themselves facing ethics charges as a result of allegedly representing multiple corporate employees without explaining the ethics implications and the possible adversity among them.

- Martha Neil, 2 Leading Lawyers Face Unusual Ethics Case re Claimed Conflict in Representing Corp. and Workers, ABA Journal, Dec. 5, 2012 ("Two leading corporate lawyers in Portland, Ore., are awaiting the results in an unusual legal ethics case, pursued a decade after the fact, concerning a claim conflict in their representation of a corporate client and its employees in a securities matter."; "Barnes H. Ellis, 72, a retired partner of Stoel Rives, and partner Lois O. Rosenbaum, 62, who followed Ellis as head of the renowned northwest regional law firm's securities practice, went to trial last month in a legal ethics case brought by the Oregon State Bar. It contended that the two attorneys, while representing Flir Systems Inc. in a shareholder suit and subsequent investigation by the Securities and Exchange Commission, helped protect the corporation by blaming employees the two lawyers purportedly represented, too, Willamette Week reports."; "In testimony at the 12-day ethics trial, the two said they had done nothing wrong, fully disclosing potential conflicts and making sure those who wanted outside counsel got outside counsel. However, working together in a joint representation helped those involved better defend themselves by sharing information, they said."; "'We didn't favor one client over another,' testified Ellis. 'In my mind, it was a perfect marriage of interests for us to represent the employees at their interviews and be able to share that information with the former officers that might have liability for past acts.'"; "He told the Portland Business Journal at the time the complaints were filed that 'a lawyer cannot effectively represent a company if the lawyer cannot appear for the company's employees. If that is the bar's position, that is a new concept that has no support in the rules of professional conduct.'"; the Formal Complaints against Barnes Ellis and Lois Rosenbaum allege that in 2000-2003 they simultaneously represented the publicly traded company FLIR, various board members, two lawyers who represented a special committee of FLIR's outside directors, various officers and managers (including FLIR's CFO, general counsel and Director of Sales Operations), and "all FLIR employees who would be interviewed by the SEC in the course of" an investigation (Formal Complaint ¶ 10, In re Conduct of Rosenbaum, Case No. 09-55 (Or. July 21, 2010); Formal Complaint ¶ 10, In re Conduct of Ellis, Case No. 09-54 (Or. July 21, 2010); the Formal Complaints allege that there were differing interests among these various

clients at various times, but that Ellis and Rosenbaum "undertook the [multiple] representation without full disclosure to each client of the potential adverse impact of the multiple representation and without first obtaining each client's consent to the multiple representation" (Id. ¶ 15); the Formal Complaints allege that Ellis and Rosenbaum assisted some of their clients in implicating others of their clients as responsible for FLIR's allegedly improper accounting, recordkeeping and financial reporting practices in 1998 and 1999; the Formal Complaints contain a number of examples of Ellis and Rosenbaum representing one or more clients who provided sworn statement to the SEC implicating other clients; Ellis is a member of the American College of Trial Lawyers, and has been listed in Best Lawyers in America and other similar lists for many years; he is a Harvard Law School graduate, and his bio indicates that he "has lectured extensively on corporate governance." (Stoel Rives LLP (search "Attorneys" for Ellis, Barnes), http://www.stoel.com/showbio.aspx?Show=230); Rosenbaum is a Stanford Law School graduate, and her bio indicates that she "has been listed for many years in both Chambers USA as one of America's leading securities litigators, and America's Best Lawyers, and in Oregon's Super Lawyers." (Stoel Rives LLP (search "Attorneys" for Rosenbaum, Lois), http://www.stoelrives.com/showbio.aspx?Show=408)).

The Oregon Bar found that the two well-known lawyers had violated the ethics rules -- but on a much smaller scale than the Bar's allegations.

- In re Ellis & Rosenbaum, Case Nos. 09-54 & -55, slip op. at 32, 35, 35-36, 37, 11, 72-73, 66, 69, 70, 72 (Ore. May 7, 2013) (holding that two prominent Portland, Oregon, lawyers were guilty of several ethics violations, although exonerating them of other allegations; ultimately issuing a public reprimand; explaining that in 2006 the publicly traded corporation FLIR announced that it was restating its financial statements, and that its CFO had resigned; explaining that the lawyers (Barnes H. Ellis and Lois O. Rosenbaum) represented FLIR and several of its officers and employees in connection with an SEC investigation, which lead to the SEC suing FLIR's former CEO; ultimately holding that the two lawyers' joint representation of FLIR and several other officers and employees was not initially improper, but that the SEC's issuance of Wells notices created the possibility of adversity among the joint clients; "The Trial Panel concludes that the Bar has not proven by clear and convincing evidence that an actual conflict of interest existed because neither Ellis nor Rosenbaum had a duty to contend for something on behalf of one client that they had a duty to oppose on behalf of another client. This is because, during the SEC investigation process, Ellis and Rosenbaum were not permitted to contend or advocate on behalf of a client. The advocacy period began when the SEC issued the Wells notices to certain individuals. However, as to each individual that received a Wells notice, they received independent representation from attorneys other than Ellis and

Rosenbaum in preparing responses to the Wells notice or, in the case of Samper, not responding."; also holding that the two lawyers had not adequately explained the possible adversity when obtaining several individual clients' consent to continue representing the company; "The Trial Panel finds most troubling the statement in the FLIR Wells response is in the last section captioned 'Offer of Settlement.' At the end, in paragraph 4, Ellis and Rosenbaum wrote: 'Finally, to the extent wrong-doing may have occurred, we understand that the SEC is pursuing fraud claims against one or more individuals who may have been responsible.' This statement tells the SEC that FLIR believes that wrong-doing may have occurred, and suggests that it is appropriate for the SEC to pursue fraud claims against one or more responsible individuals. At the time this statement was made, Ellis and Rosenbaum knew, as did the SEC, which individuals and former clients received Wells notices and against whom the SEC was pursuing fraud claims. These individuals and former or current clients included Samper [CFO], Fitzhenry [General Counsel] . . . , and Eagleburger [Vice President of Sales]."; "The Trial Panel concludes that the Bar has proven, by clear and convincing evidence, that this statement is adverse to the objective personal, business or property interest of Samper, Fitzhenry, and Eagleburger. Although the sentence does not refer to these individuals specifically, it must refer to Eagleburger and Samper because they were responsible, and action was taken against Eagleburger and Samper who immediately resigned."; "FLIR had made a detailed offer of settlement, and there was no need to conclude that offer by conceding that wrongdoing may have occurred, and implying that it was appropriate for the SEC to pursue fraud claims against responsible individuals, some of whom were Ellis and Rosenbaum's current or former clients. And to the extent that Ellis and Rosenbaum believed that the statement was necessary, the proper course of action would have been to send a draft of FLIR's Wells response to the attorneys for Samper, Fitzhenry, and Eagleburger and ask for their consent after full disclosure to send it to the SEC."; "[T]he Bar alleges that Ellis and Rosenbaum continued to represent FLIR in the criminal investigation. The Bar alleges that Ellis and Rosenbaum promised FLIR's full cooperation in that investigation, and they undertook to procure and produce to Garten [Assistant U.S. Attorney] and the FBI documents and information they had not previously produced to the SEC and then, by letter dated February 14, 2003, Garten advised Ellis and Rosenbaum of the cooperation he expected in exchange for his agreement not to prosecute FLIR. The Bar alleges that on March 3, 2003, Ellis and Rosenbaum requested Samper's and Daltry's [President of the company's board of directors] permission to continue to represent FLIR in the DOJ criminal investigation but those letters failed to fully disclose to Samper or Daltry eleven items of information that the Bar contends should have been disclosed."; "The Trial Panel concludes that the Bar has proved by clear and convincing evidence that Ellis failed to make full disclosure in order to obtain consent from Samper and Daltry to the continued representation of FLIR by Ellis, which constituted conduct involving misrepresentation and an actual or

> likely conflict of interest in violation of DR 1-102(A)(3) and DR 5-105(C)."; "The information Ellis failed to disclose to Daltry and Samper and their respective criminal defense counsel was relevant to enable, and reasonably indicated as important for criminal defense counsel to fully and adequately advise Daltry and Samper as to whether to consent to Ellis' continued representation of FLIR. No persuasive evidence was presented that the assertion of relevance and importance of having the undisclosed information was unreasonable."; "As to the requested consent in the letter dated March 3, 2003, for Ellis and Rosenbaum's continued representation of FLIR during the criminal investigation, Ellis and Rosenbaum did not disclose to Samper or Glade [Samper's lawyer] or Samper's criminal defense attorney that in October of 2002, at Wynne [Member of the Board of Director's Special Committee] and FLIR's request, Rosenbaum telephoned the SEC attorney to ensure that she was aware of the Swedish drop shipment transaction, and subsequently provided her documentation as to that transaction."; "[T]he Trial Panel concludes that the failure to disclose her [Rosenbaum] contact with the SEC concerning the Swedish drop shipment program was a misrepresentation in violation of DR 1-102(A)(3). It was a misrepresentation because that information was critically important, it was known to Ellis and Rosenbaum, and it should have been disclosed to Samper and his criminal defense lawyer as well as his civil lawyer, Glade, and it may have resulted in Samper not giving his consent to Ellis and Rosenbaum continuing to represent FLIR."; "[T]he Trial Panel finds that such information (e.g., the February 14th DOJ letter, the request for and provision of compensation data, the representation of Fitzhenry in the Bar matter, and Rosenbaum's contact with the SEC to disclose the Swedish drop shipment transaction) was required to be disclosed to the clients, former clients and the clients' criminal attorneys when seeking their consent to Rosenbaum's continued representation of FLIR during the DOJ investigation and the representation of Fitzhenry by Ellis in the Bar matter. Rosenbaum's failure to disclose such information constituted lack of full disclosure in order to obtain consent from Samper and Daltry to the continued representation of FLIR and the representation of Fitzhenry in the Bar matter by Ellis, which constituted conduct involving misrepresentation and an actual or likely current conflict of interest in violation of DR 1-102(A)(3) and DR 5-105(E).")

There is a slight bit of good news for lawyers who would like to represent company executives in a very limited way. In a somewhat surprising approach that helps corporations, several courts have held that a company's lawyer's representation of a company executive during depositions or other testimony did not create a joint

attorney-client relationship.[12] This forgiving attitude can have two significant implications. First, the lack of a joint attorney-client relationship means the company has the sole power to waive the privilege protecting the communications between the lawyer and the executive. Second, as an ethics matter, the lack of a joint representation allows the company lawyer to later represent the company adverse to the executive whom the lawyer had represented in such a limited way. Not surprisingly, other courts disagree with this approach.[13]

Conclusion

(a) Unless a conflict of interest would prevent it, an in-house lawyer fully licensed in a state can represent a company employee in a company matter.

(b) Unless a conflict of interest would prevent it, a fully licensed company lawyer may also represent a company employee in a non-company matter -- although in-house lawyers frequently seek to avoid such representations. An in-house lawyer who is not fully licensed in the state where he or she practices probably could not undertake such a representation.

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[12] Springs v. First Student, Inc., Case No. 4:11CV00240 BSM, slip op. (E.D. Ark. Nov. 30, 2011); Gary Friedrich Enters., LLC v. Marvel Enters., Inc., No. 08 Civ. 1533 (BSJ) (JCF), 2011 U.S. Dist. LEXIS 54154, at *11-12 (S.D.N.Y. May 20, 2011) ("In situations such as this where a former employee is represented by counsel for a defendant corporation for the purpose of testifying at a deposition at no cost to him, courts have not treated the former employee as having an independent right to the privilege, even where that employee believes that he is being represented by that counsel."); United States v. Stein, 463 F. Supp. 2d 459 (S.D.N.Y. 2006); Under Seal v. United States (In re Grand Jury Subpoena: Under Seal), 415 F.3d 333 (4th Cir. 2005), cert. denied, 546 U.S. 1131 (2006). See also Wisconsin LEO E-07-01 (7/1/07).

[13] See, e.g., Advanced Mfg. Techs., Inc. v. Motorola, Inc., No. CIV 99-01219 PHX-MHM (LOA), 2002 U.S. Dist. LEXIS 12055, at *17-19 (D. Ariz. July 2, 2002).

Best Answer

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

B 6/14

Accidental Joint Representation of a Corporate Employee

Hypothetical 29

As your company's in-house lawyer primarily responsible for litigation matters, you recently worked with outside counsel during an investigation of possible wrongdoing by three executives. You prepared notes of your interview sessions. Your notes reflect that you and your outside colleague made the following statements to the three executives:

- "We represent the company but we could represent you as well, as long as no conflict appeared."
- "We can represent you until such time as there appears to be a conflict of interest."
- "We represent the company, and can represent you too if there is not a conflict."

As it turned out, the executives had indeed engaged in wrongdoing -- and the company fired them. The federal government began to investigate the wrongdoing, and asked for your interview notes. The former employees' new lawyers claim that you and outside counsel jointly represented the company and the employees, which gives them a "veto power" over your waiver of the privilege. The federal government is becoming increasingly insistent that you hand over the notes.

May you waive the privilege covering your interview of the then-employees, over their objection?

MAYBE

Analysis

The real danger in the corporate context is that a lawyer representing the corporation will accidentally create a joint representation with a corporate employee.

Theoretically this should never happen. As a matter of ethics, lawyers dealing with company executives who might misunderstand the lawyer's role must "explain the identity of the client when the lawyer knows or reasonably should know that the

organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[1] The standard Upjohn warning includes essentially the same disclosure.

On the other hand, it is easy to see how lawyers who are not scrupulous in following their ethics duties and the Upjohn standard might generate a reasonable belief in corporate employees that the lawyer is representing them as well as the corporation in a corporate-related matter. This is because lawyers can engage in privileged communications with employees in their role as employees, without separately representing them. This is not the case with third parties. Neither the lawyer nor the third party in that non-corporate setting is likely to think that an attorney-client relationship exists. In contrast, a corporation's lawyer generally knows that the privilege applies to communications with the employees even if the lawyer does not represent them. The corporate employee in that setting knows that he or she is talking with a lawyer. Given this setting, it is no wonder that there can some confusion.

The key point here is not the existence of the privilege, but who owns it. The corporate lawyer following Upjohn and protecting a corporate client will ensure that the corporate client owns the privilege. This means that the corporation can assert the privilege and, most importantly, can waive the privilege. A corporate employee usually claims a joint representation when the corporation wants to waive the privilege otherwise covering communications between the corporate lawyer and the employee, and the employee wants to prevent such a waiver. This situation often arises when the government or another third party seeks disclosure of those communications. The corporation might want to cooperate with the government by disclosing them, while the

[1] ABA Model Rule 1.13(f).

employee who is often the subject of government inquiry wants to keep those communications secret.

Given the high stakes involved, one would think that company lawyers would always explicitly indicate whether they jointly represent employees with whom they are dealing. In other words, they would either explicitly disclaim an attorney-client relationship with the employees, or in very unusual circumstances explicitly articulate a joint representation. As the Southern District of New York explained,

> [t]his problem could be avoided if counsel in these situations routinely made clear to employees that they represent the employer alone and that the employee has no attorney-client privilege with respect to his or her communications with employer retained counsel. Indeed, the Second Circuit advised that they do so years before the communications here in question. But there is no evidence that the attorneys who spoke to Ms. Warley followed that course.

United States v. Stein, 463 F. Supp. 2d 459, 460 (S.D.N.Y. 2006) (footnote omitted).

An earlier example highlighted the dangers of ambiguity. In that case,[2] a court criticized (but ultimately found effective) what it called a "watered down 'Upjohn warning[]'" that a company's in house lawyers and outside lawyers gave to executives they were interviewing. The lawyers had made the following statements to the three executives that they interviewed:

- "[T]hey represented [the company] but that they 'could' represent him as well, 'as long as no conflict appeared.'"
- "We can represent [you] until such time as there appears to be a conflict of interest."

[2] Under Seal v. United States (In re Grand Jury Subpoena: Under Seal), 415 F.3d 333, 340 (4th Cir. 2005).

- "We represent [the company], and can represent [you] too if there is not a conflict."[3]

The employees had claimed joint ownership of the privilege covering the interview to block the company's disclosure of the interview notes to the government. The company ultimately won sole ownership of the privilege, but had to fight the now-former employees up to the circuit court level.

The law had to develop a test for determining whether a corporate employee's argument about a joint representation would succeed or would not.

Some lawyers who represent corporations also intentionally establish either separate or joint representations of corporate employees. In other situations, lawyers explicitly disclaim an attorney-client relationship with a corporate employee, following their ethics duty to disclose their role and the Upjohn warning's provision explicitly denying that the lawyer represent the employee either separately or jointly with the corporate client.

However, in the absence of such an intentional representation or explicit disclaimer of a representation, courts developed a standard for determining whether an attorney-client relationship exists between a corporation's lawyer and a corporate employee.

Thus, the test essentially amounts to a "default" standard in the absence of some explicit memorialization of a relationship or the lack of a relationship. Careful lawyers have already taken care of this issue, and therefore do not need a "default" standard.

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[3] Id. at 336.

However, the large number of cases dealing with such a "default" situation highlights many lawyers' inattention to this important issue.

A 1986 Third Circuit case articulated the most widely recognized standard -- the Bevill standard.[4] Under the Bevill standard, a corporate employee seeking to prove an attorney-client relationship with a corporation's lawyer (thus carrying both privilege and other ethics implications) must establish that:

- The employee approached the corporation's attorney for legal advice;
- The employee made it clear that the request had to do with matters that arose in his or her individual capacity;
- The attorney understood this request and advised on the matter even though there was a potential for conflict;
- These communications were confidential;
- The subject matter of the communication did not concern a more general corporate matter.

The critical element is the last one: The communication usually may not relate to the employee's duties on behalf of the corporation.[5]

Most courts now adopt the Bevill standard. For instance, in 2010, the Ninth Circuit explicitly adopted the Bevill standard.[6] Other courts have adopted variations of the Bevill standard, but with essentially the same bottom line.[7]

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4 In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir. 1986).

5 In re Grand Jury Subpoena, 274 F.3d 563, 573-74 (1st Cir. 2001).

6 United States v. Graf, 610 F.3d 1148 (9th Cir. 2010) (the court ultimately determined that a company consultant did not meet that standard).

7 United States v. Stein, 463 F. Supp. 2d 459 (S.D.N.Y. 2006).

Most courts applying the Bevill standard refuse to recognize an attorney-client relationship between a corporation's lawyer and individual corporate constituents.[8] For instance, a 2010 Eastern District of Pennsylvania decision analyzed the issue, ultimately concluding that the corporation's lawyer did not also represent an executive.

> [A]t no time did Keany [company lawyer] think that he was representing [executive] individually. In fact, at some point during Keany's representation of [company], he advised [executive] that he should retain separate counsel. . . . [T]he conversations between [executive] and Keany only involved matters within [company] or the business affairs of [company]. At the hearing, [executive] failed to adduce any conversation with Keany which was confidential or which dealt with [executive's] personal liability or criminal exposure as opposed to [company's]. . . . Under these circumstances, Defendant can claim no attorney client privilege which would bar Keany's testimony at trial or which would trump [company's] waiver of the attorney-client privilege.

United States v. Norris, 722 F. Supp. 2d 632, 639-40 (E.D. Pa. 2010). Many courts take this approach.[9]

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[8] United States v. Norris, 753 F. Supp. 2d 492 (E.D. Pa. 2010), aff'd 419 F. App'x 190 (3d Cir. 2011); Grunstein v. Silva, 2010 Del. Ch. LEXIS 68 (Del. Ch. Apr. 13, 2010); In re Paul W. Abbott Co., Inc., 767 N.W.2d 14 (Minn. 2009).

[9] Kennedy v. Gulf Coast Cancer & Diagnostic Ctr. at Se., Inc., 326 S.W.3d 352, 358 (Tex. Ct. App. 2010) (in a TRO proceeding, ordering a former in-house lawyer to return privileged documents that he had taken with him when he left the client's employment; holding that the company rather than any individual executives or directors own the privilege; "Kennedy's subjective intent notwithstanding, no evidence objectively manifests that EBGWH [Epstein Becker Law Firm, who represented the in-house lawyer even before he left the client's employment] secured the parties' consent or undertook any of the other steps that Texas law requires for dual representation of Gulf Coast and either the officers and directors or Kennedy individually. . . . We therefore hold that the trial court did not abuse its discretion in determining that Gulf Coast alone holds the attorney-client privilege applicable to the memo."); In re Grand Jury Proceedings, 469 F.3d 24 (1st Cir. 2006); United States ex rel. Magid v. Barry Wilderman, M.D., P.C., Civ. A. No. 96-CV-4346, 2006 U.S. Dist. LEXIS 56116 (E.D. Pa. Aug. 10, 2006); Applied Tech. Int'l, Ltd. v. Goldstein, Civ. A. No. 03-848, 2005 U.S. Dist. LEXIS 1818, at *11-12 (E.D. Pa. Feb. 7, 2005); In re Grand Jury Subpoena, 274 F.3d 563, 573 (1st Cir. 2001); United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 215 (2d Cir. 1997); United States v. Aramony, 88 F.3d 1369, 1390 (4th Cir. 1996).

However, some courts permit those relationships and therefore recognize the privilege in limited circumstances.[10] Perhaps more importantly, a court finding that the law firm had established an attorney-client relationship with an employee might disqualify the firm from representing the company if adversity develops between it and the employee.[11]

Even high-profile in-house lawyers might find themselves dealing with the ramifications of having accidentally created an attorney-client relationship with corporate employees.

Starting in 2012, Penn State's general counsel found herself embroiled in a high-profile question about whether she had simultaneously represented the University and two high-level officials appearing before a grand jury. A chronological list of newspaper articles show the deepening dispute -- and its possible effect in one of America's most celebrated child abuse cases.

- Shannon Green, Was Penn State's GC Counsel for University Officials?, Corporate Counsel, Feb. 3, 2012 ("In-house lawyers understand that they're hired to represent the entity that issues their paychecks -- not the company's executives and other staff. But as evidenced by the grand jury testimony of two Penn State University (PSU) officials, sometimes there can be a disconnect between how a company's lawyers and constituents understand the relationship. According to a special report in The Patriot News, when Tim Curley and Gary Schultz testified before a grand jury in the Jerry Sandusky child sex abuse investigation on January 12, 2011, they thought PSU's then-General Counsel Cynthia Baldwin was their counsel. The men said as much in their testimony, and Baldwin -- seated right beside them -- did not correct what she later called a misinterpretation. Baldwin did not respond directly to

[10] Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653, 659 (10th Cir.), cert. denied, 525 U.S. 966 (1998).

[11] Home Care Indus., Inc. v. Murray, 154 F. Supp. 2d 861, 869 (D.N.J. 2001) (disqualifying Skadden, Arps from representing a company in an action against its former CEO; agreeing with the CEO that, because the lawyers created an environment in which he comfortably confided in them, his "belief that the [law] firm represented him personally was reasonable.").

The Patriot News, but she deferred to Lanny Davis, the high-profile Washington, D.C., lawyer who was hired by Penn State last year after the scandal broke. Davis said that Baldwin had previously told the two officials that she represented the University, and that they were free to hire counsel of their own. Whether or not Curley and Schultz were justified in thinking they had representation, according to legal ethics scholar and law professor Charles Wolfram, it's quite common for employees to assume the company lawyer's representation trickles down to them. "Employees often refer to their company's General Counsel as 'our' lawyer," he told CorpCounsel.com in an email. In-house lawyers know that employees often aren't aware of the distinction. And under ordinary circumstances, no harm results from the misunderstanding. But according to Wolfram, a professor emeritus at Cornell University Law School, "the crunch comes" when the interests of the organization diverge with those of one of the company's constituents. In those situations, lawyers have a duty under their state's version of the ABA Model Rules of Professional Conduct to set employees straight. The comments to Pennsylvania Rule 1.13, "Organization as a Client," indicate that "[w]hether such a warning should be given by the lawyer to any constituent individual may turn on the facts of each case." Wolfram said that most non-lawyers who were accompanied to a grand jury proceeding by a university lawyer would naturally assume that the lawyer was there to assist them personally.").

- Catherine Dunn, Court Weighs Admissibility of Ex-Penn State General Counsel Testimony in Criminal Cases, Corporate Counsel, Nov. 27, 2012 ("Can Cynthia Baldwin, the former general counsel of Penn State University (PSU), testify against two former Penn State officials in upcoming criminal proceedings?"; "That's the question before a Dauphin County, Pennsylvania, judge as former PSU senior vice president Gary Schultz and athletic director Tim Curley, who's on leave from the university, prepare their defense against charges stemming from the Jerry Sandusky sexual abuse scandal."; "Last week, attorneys for Curley and Schultz filed their second motion in a month related to Baldwin's counsel and the cases being brought against them by the Pennsylvania Attorney General. This latest filing seeks to bar Baldwin's testimony from a preliminary hearing scheduled for next month on new charges of conspiracy, endangering the welfare of children, and obstruction of justice."; "Curley and Schultz have also faced charges of perjury and failure to report suspected child abuse since November 2011. They are scheduled for trial in January."; "In the latest set of papers, filed last Tuesday, defense attorneys argue that testimony by Baldwin would violate Curley and Schultz's attorney-client privilege with the ex-general counsel, who left Penn State in June, having established the school's first in-house legal department in 2010."; "Curley and Schultz's lawyers argue that Baldwin acted as their attorney during a grand jury investigation into allegations that Sandusky molested children on Penn State's campus."; "Though just what role Baldwin played in the grand jury investigation has itself been an ongoing source of controversy -- particularly since the release of a Penn State internal

investigation last summer."; "According to the Patriot News, which cited grand jury transcripts, both Curley and Schultz identified Baldwin as their legal counsel during their grand jury appearances in January 2011. But according to the Freeh Report, Baldwin has maintained that she represented the university during those appearances -- and not Curley or Schultz."; "Baldwin told the Special Investigative Counsel that she went to the Grand Jury appearances as the attorney for Penn State, and that she told both Curley and Schultz that she represented the University and that they could hire their own counsel if they wished,' the report states."; "The defense teams for Curley and Schultz have taken a different view. In a motion to dismiss the charges against the two men filed earlier this month, defense attorneys argued that Baldwin's counsel to Curley and Schultz constituted a conflict of interest, and that they were deprived of their right to counsel."; "Prosecutors countered in a November 14 filing, arguing that 'at the time that Attorney Baldwin represented the Defendants, there was no actual conflict of interest,' according to court papers. 'Based on their interviews prior to testifying, it appeared that the Defendants intended to cooperate with the investigation. Such an action would not conflict with the interests of the other witnesses represented by attorney Baldwin, who also were cooperating.'").

- Ben Present, Schultz Could Sue Ex-Penn State General Counsel, Legal Intelligencer, Dec. 13, 2012 ("A former Penn State administrator facing criminal charges related to the Jerry Sandusky sex-abuse scandal has filed a praecipe for writ of summons against the university's former general counsel, Cynthia Baldwin, indicating he intends to sue her for legal malpractice."; "Gary Schultz, represented by a team of Sprague & Sprague attorneys led by Richard A. Sprague, filed papers that were docketed Wednesday in the Centre County Court of Common Pleas. Schultz faces charges of perjury, endangering the welfare of children, failure to report child abuse and other criminal charges related to allegations he engaged in a conspiracy to conceal allegations against Sandusky, the school's former defense coordinator and convicted serial child molester."; "In court papers, Schultz has pled Baldwin allowed him to 'believe she was his unencumbered, conflict-free lawyer,' telling him before is grand jury appearance that she would represent him at the proceeding."; "Former Penn State athletic director Tim Curley also moved to dismiss his case, or suppress his grand jury testimony in the alternative, arguing in court papers that Baldwin told him she could represent him before the grand jury."; "When the two men testified before the grand jury, both said they were being represented by Baldwin."; "Baldwin, however, has claimed she was present before the grand jury to represent the university -- not Schultz or Curley, both of whom have testified she was their lawyer." (emphasis added); "As previously reported by The Legal Intelligencer, Baldwin has labeled the whole thing a misunderstanding."; "Washington, D.C., attorney Lanny Davis, who Baldwin has previously authorized to speak on her behalf, told the Harrisburg Patriot-News and The Legal Intelligencer that, when Baldwin told supervising Judge Barry Feudale and representatives

from the Office of the Attorney General in Feudale's chambers that she represented the university, nobody objected to her listening to the administrators' testimony."; "Then, Davis told The Legal Intelligencer, when the administrators testified that Baldwin was their attorney, she did not think it was 'appropriate' to interrupt the proceedings and clarify." (emphases added)).

- Dan Packel, Sandusky Defendants Say State Knew Of Attorney Conduct, Law360, Jan. 8, 2013 ("Two former Pennsylvania State University administrators charged with covering up sexual abuse committed by former assistant football coach Jerry Sandusky argued Friday that the state knew that because of a conflict of interest, they were deprived of their right to counsel prior to going before a grand jury. Former Penn State Vice President Gary Schultz and former Athletic Director Tim Curley allege the prosecution conceded that Penn State's former general counsel Cynthia Baldwin represented both the university as well as the administrators, leading to a conflict of interest. They seek to suppress their grand jury testimony prior to their upcoming criminal trial. They contended in separate filings that Pennsylvania's Office of the Attorney General (OAG) was also aware of the conflict of interest. The circumstances in this case lead to the unavoidable conclusion that although aware of Ms. Baldwin's conflict, the OAG chose to ignore it in order to hear the testimony of her clients,' Curley said. 'Bluntly put, Ms. Baldwin and the OAG put their own interests before the interest[s] of the witnesses they were meant to protect.'"; "They contended that Baldwin, in her role for the university, was obligated to work to minimize its civil and criminal liability, and that as a consequence she was incapable of representing them as well since the parties had differing interests. In October motions, Schultz and Curley argued that Penn State's interests were best served by cooperation, while their own interests would have been better served by invoking their own Fifth Amendment rights. In Friday's filings, Curley and Schultz allege that in its response to their motions, the state conceded that while both defendants had the right to counsel before testifying, Baldwin did not consider herself to be their counsel, even though she represented herself as such to the judge and the defendants.").

- Matt Fair, Sandusky Defendants Can't Nix Ex-Penn State Attorney Testimony, Law360, Apr. 10, 2013 ("A state judge ruled Tuesday that he did not have authority to quash testimony from a former Pennsylvania State University attorney included in a grand jury presentment indicting a trio of school administrators for allegedly covering up the crimes of convicted child molester Jerry Sandusky.;" "While ousted Penn State president Graham Spanier and two other high-ranking administrators charged in the alleged conspiracy had sought to have testimony from former university attorney Cynthia Baldwin stricken from the presentment on grounds that she'd violated their attorney-client privilege, Judge Barry Feudale said that he lacked the authority to do so as the grand jury's supervising judge.;" "'The singular issue before this court

involves the absence of jurisdictional authority for the grand jury supervising judge to quash a presentment after steps were properly taken to issue the presentment and adhere to statutory procedure.' Judge Feudale said. 'It is not within the supervising judge's jurisdiction to entertain the joint motion to quash presentments put before this court.'").

- Ama Sarfo, Ex-Penn State Execs Lose 2nd Atty Privilege Appeal, Law 360, June 19, 2013 ("The Pennsylvania Superior Court on Tuesday squashed a second appeal by two former Pennsylvania State University administrators who said a grand jury presentment relied on privileged attorney-client information and was defective, as they face charges for conspiring to cover up Jerry Sandusky's child abuse. Earlier this month, the state's Supreme Court denied petitions for review filed by former Penn State vice president Gary Schultz and former athletic director Tim Curley, saying they can raise their issue in their underlying criminal prosecution. The Superior Court on Tuesday declined to weigh in on the matter, saying that issues surrounding grand jury investigations can only be addressed by the state Supreme Court."; "In filings and a brief, Schultz, Curley and ousted Penn State President Graham Spanier argued that the conflict created by Baldwin's dual roles as their attorney and as attorney for the school effectively deprived them of their right to counsel. They also argued that Baldwin's testimony against them violated attorney-client and work-product privileges. However, Judge Feudale said his review of Baldwin's testimony left him inclined to disagree. 'My review of the testimony of attorney Baldwin before the grand jury persuaded me . . . that her testimony was circumspect and circumscribed,' he said. 'It was not a violation of the attorney-client privilege but rather was related to her belated awareness of the commission of alleged criminal acts and was in accordance with her responsibilities as an officer of the court. Finally, attorney Baldwin testified as approved by her then client, [Penn State,] the organization for which she was employed.'").

Penn State general counsel's experience highlights the wisdom of carefully defining the "client" in a corporate setting and -- especially -- avoiding the accidental creation of attorney-client relationships.

Best Answer

The best answer to this hypothetical is **MAYBE**.

B 6/14

Ownership of the Attorney-Client Relationship after Corporate Transactions

Hypothetical 30

As the most experienced transactional lawyer in your law department, you generally take responsibility for large corporate transactions. Your client has been trying to strategically downsize, and you have several questions about the effect of transactions on the attorney-client relationship (including the privilege).

(a) If you sell the stock of a subsidiary to another company, who will own the attorney-client relationship and privilege --

Your client?

The former subsidiary?

THE FORMER SUBSIDIARY

(b) If your client sells substantially all the assets of a subsidiary to another corporation, who will own the relationship and privilege --

Your client?

The asset's purchaser?

THE ASSET'S PURCHASER (MAYBE)

(c) Can you affect the relationship's and the privilege's ownership in the transactional documents?

MAYBE

Analysis

Although starting with the common-sense notion that in-house lawyers represent the institutional client and not any constituent of the institutional client, any analysis involving corporate transactions can create remarkably complicated and even frightening implications.

(a) As a corporate asset, the attorney-client relationship and privilege normally passes to corporate successors (who can assert or waive the privilege) -- including bankruptcy trustees. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 349 (1985); United States v. Campbell, 73 F.3d 44, 47 (5th Cir. 1996).

Lawyers representing corporations which are teetering on the edge of bankruptcy should keep this rule in mind. Bankruptcy trustees might ultimately control the privilege that would otherwise protect from public view desperate pre-bankruptcy communications between management and the lawyer.

The purchaser of a corporation's stock generally steps into the shoes of the previous owner, and may assert or waive the privilege.[1] As one court explained,

> the purchaser of a corporate entity buys not only its material assets but also its privileges. . . . Since the attorney-client privilege over a corporation belongs to the inanimate entity and not to individual directors or officers, control over privilege should pass with control of the corporation, regardless of whether or not the new corporate officials were privy to the communications in issue.

McCaugherty v. Siffermann, 132 F.R.D. 234, 245 (N.D. Cal. 1990). Other courts take the same approach.[2]

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[1] M-I LLC v. Stelly, Civ. A. No. 4:09-cv-1552, 2010 U.S. Dist. LEXIS 52736, at *11 (S.D. Tex. May 26, 2010) (holding that the company acquiring another company in a merger became the owner of the acquired company's privilege; explaining that the new owner's "management stood in the shoes of prior management and controlled GCS's attorney client privilege as it related to the company's operations.").

[2] Bass Pub. Ltd. v. Promus Cos., No. 92 Civ. 0969 (SWK), 1994 U.S. Dist. LEXIS 5474 (S.D.N.Y. Apr. 25, 1994) (finding that the former owner of a corporate subsidiary could not block the current owner from seeking documents from the subsidiary's law firm that were generated before the transaction; noting that the former owner of the subsidiary could have avoided this result by addressing the issue in the transactional documents); Rayman v. Am. Charter Fed. Sav. & Loan Ass'n, 148 F.R.D. 647, 652 (D. Neb. 1993) ("a surviving corporation following a merger possesses all of the privileges of the pre-merger companies"); In re Grand Jury Subpoenas 89-3 & 89-4, John Doe 89-129, 902 F.2d 244, 248 (4th Cir. 1990) (finding that the new management of a subsidiary created by divestiture could waive the privilege); Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 50-51 (S.D.N.Y. 1989) ("Polycast acquired this

One frightening but often misunderstood ramification of a stock transaction involves the buyer's possible purchase of the seller's privileged communications about that very transaction.

A 2013 Delaware court of chancery decision addressed this issue. In Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155 (Del. Ch. 2013), Chancellor Strine dealt with this ownership issue in connection with the buyer's allegation that selling shareholders defrauded it.

The court explained the factual context.

> After the Buyer brought this suit in September 2012 -- a full year after the merger -- it notified the Seller that, among the files on the Plimus computer systems that the Buyer acquired in the merger, it had discovered certain communications between the Seller and Plimus's then-legal counsel at Perkins Coie regarding the transaction. During that year, the Seller had done nothing to get these computer records back, and there is no evidence that the Seller took any steps to segregate these communications before the merger or excise them from the Plimus computer systems, the control over which was passing to the Buyer in the merger. It is also undisputed that the merger agreement lacked any provision excluding pre-merger attorney-client communications from the assets of Plimus that were transferred to the Buyer as a matter of law in the merger, and the merger was intended to have the effects set forth in the Delaware General Corporation Law ('DGCL'). Nonetheless, when the Seller was notified that the Buyer had found pre-merger communications on the Plimus

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authority to waive the joint privilege when it purchased the stock of Plastics. The power to waive the corporation's attorney-client privilege rests with corporate management, who must exercise this power consistent with their fiduciary duty to act in the best interest of the corporation. Just as Plastics' new management has an obligation to waive or preserve the corporation's privileges in a manner consistent with their fiduciary duty to protect corporate interests, Polycast, as parent and sole shareholder, has the power to determine those interests. Because there are ample grounds for a finding that the privilege is held jointly by Polycast and Uniroyal, and because Polycast acquired control over Plastics' privilege rights when it purchased the company, Polycast and Plastics' new management may now waive the privilege at their discretion." (citations omitted); finding that the purchaser of a subsidiary of Uniroyal was entitled to obtain copies of notes of the subsidiary's vice president that he prepared before the transaction).

> computer system, the Seller asserted the attorney-client privilege over those communications on the ground that it, and not the surviving corporation, retained control of the attorney-client privilege that belonged to Plimus for communications regarding the negotiation of the merger agreement. Before the court is a motion by the Buyer seeking to resolve this privilege dispute and determine, among other things, that the surviving corporation owns and controls any pre-merger privilege of Plimus or, alternatively, that the Seller has waived any privilege otherwise attaching to those pre-merger communications.

Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155, 156 (Del. Ch. 2013) (footnote omitted).

The court pointed to the buyer's merger into the purchased corporation, which by Delaware statute transferred all privileges to the merged entity -- including privileged communications about the purchase transaction. The court emphasized the Delaware statute's clear terms.

> The Buyer contends that under the plain terms of § 259 of the DGCL, the attorney-client privilege -- like all other privileges -- passes to the surviving corporation in the merger as a matter of law. Thus, the Buyer argues, this court must enforce the statute. The court agrees. If the General Assembly had intended to exclude the attorney-client privilege, it could easily have said so. Instead, the statute uses the broadest possible language to set a clear and unambiguous default rule: all privileges of the constituent corporations pass to the surviving corporation in a merger.

Id. at 159 (footnotes omitted).

The court noted that the selling shareholders could have negotiated the post-closing ownership of such privileged communications.

> Of course, parties in commerce can -- and have -- negotiated special contractual agreements to protect themselves and prevent certain aspects of the privilege from transferring to the surviving corporation in the merger.

Id. at 160. The court even pointed to language from an earlier Delaware chancery court case (applying New York law) that carved out such privileged communications from that sale.

> 'Section 1.2(h) [of the asset purchase agreement] provides that "'Excluded Assets" from the sale include "all rights of the Sellers under this Agreement and all agreements and other documentation relating to the transactions contemplated hereby."'"

Id. at 161 n.27 (quoting Postorivo v. AG Paintball Holdings, Inc., Consol. Civ. A. Nos. 2991- & 3111-VCP, 2008 Del. Ch. LEXIS 17, at *19 n.25 (Del. Ch. Feb. 7, 2008)).

Thus, after articulating a frightening scenario, the court prescribed a fairly simple remedy.

> Thus, the answer to any parties worried about facing this predicament in the future is to use their contractual freedom in the manner shown in prior deals to exclude from the transferred assets the attorney-client communications they wish to retain as their own.

Id. at 161.

In contrast, some courts recognizing this approach have articulated an exception for documents relating to the acquisition itself. In 2011, the Eastern District of New York explained the reason for this exception.

> [E]ven in those circumstances where the successor company is deemed to have acquired the predecessor's privilege, New York courts have carved out an exception for confidential communications related to the acquisition itself. . . . Otherwise, the successor company would have access to the confidential information of its direct adversary in the recently concluded negotiations. . . . Such a scenario, the courts reason, 'would significantly chill attorney client communication during such transactions.' . . . Moreover, the court is reluctant to imply such a provision into the parties' agreements when the parties could have provided it expressly.

Safeco Ins. Co. of Am. v. M.E.S., Inc., 289 F.R.D. 41, 53 (E.D.N.Y. 2011). Other courts have taken the same approach.[3]

Of course, lawyers and their clients must remember that any transaction such as this creates separate corporate entities -- which has ethics and privilege implications.

For instance, in 2010 the District of Kansas dealt with a transaction in which a portion of Boeing became a separate corporation named Spirit.[4] In that case, several labor unions sued Boeing in connection with its sale of a Wichita, Kansas, facility to buyer Spirit. Boeing and Spirit sought the return of protected emails that they claimed to have inadvertently produced to the unions.

The court refused to order the documents' return, finding that they did not deserve any protection, because Boeing had waived any attorney-client privilege protection during the sale to Spirit. As the court explained it, to "facilitate a smooth transition" after the sale of the Wichita facility, Boeing allowed 8,000 former Boeing employees (now working for Spirit) to continue using the Boeing email system.[5] Boeing argued that this disclosure of pre-transaction privileged documents in its email system to another company's employees did not waive the privilege, because there were "unique circumstances" resulting from "the need for Spirit employees to have access to the Boeing e-mail messages in order to continue their work at the Wichita facility."[6] The

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[3] Parklex Assocs. v. Parklex Assocs., Inc., No. 14514/2006, 2011 N.Y. Misc. LEXIS 5149 (N.Y. Sup. Ct. Oct. 31, 2011).

[4] Soc'y of Prof'l Eng'g Emps. in Aerospace v. Boeing Co., Case Nos. 05-1251- & 07-1043-MLB, 2010 U.S. Dist. LEXIS 27093 (D. Kan. Mar. 22, 2010).

[5] Id. at *12.

[6] Id. at *18.

court rejected Boeing's argument, concluding that Boeing had made "an educated business decision" to allow employees who no longer worked for Boeing to have access to Boeing electronic records.[7] Although the court acknowledged that the 8,000 Spirit employees with access to the Boeing records had themselves been Boeing employees, it nevertheless found a waiver.

> Unquestionably, Boeing was presented with a dilemma in how to handle e-mail files when negotiating with Spirit. Boeing made an educated business decision that it would not pre-screen the electronic files in order to preserve the confidentiality of attorney-client communications. However, Boeing presents no persuasive authority to support its contention that 'unique circumstances' excuse the intentional disclosure of attorney-client privileged communications to a third party. At best, Boeing proposes a 'business decision' exception to the general rule that disclosure of privileged materials to a third party waives the privilege. In the absence of persuasive authority, the court is unwilling to recognize a 'business decision' exception to the general rule. Accordingly, Boeing and Spirit's motion for a protective order and return or destruction of the e-mail messages shall be denied.

Soc'y of Prof'l Eng'g Emps. in Aerospace v. Boeing Co., Case Nos. 05-1251- & 07-1043-MLB, 2010 U.S. Dist. LEXIS 27093, at *21-22 (D. Kan. Mar. 22, 2010) (footnotes omitted)). This result is somewhat surprising. Disclosing pre-existing privileged communications to a former employee would not automatically waive the corporation's privilege. One would have thought that the court's holding that there had been a waiver would focus on emails created after the transaction rather than before the transaction. Still, the District of Kansas's analysis points out the necessity of remembering that post-transaction corporations must be treated as separate legal entities.

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[7] Id. at *21.

(b) Purchasers of a corporation's assets traditionally did not acquire the corporation's attorney-client privilege rights.[8]

Most courts formerly followed what is called a "bright-line" test -- holding that the privilege never accompanied assets sold to a third party.

However, starting several years ago, some courts began to look at the "practical consequences" of the corporate transaction rather than recognizing a strict dichotomy between stock and asset purchases.

> When ownership of a corporation changes hands, whether the attorney-client relationship transfers as well to the new owners turns on the practical consequences rather than the formalities of the particular transaction.

Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663, 668 (N.Y. 1996).

This "practical-consequences" test picked up steam when bankrupt corporations sold essentially all of their assets to another company, who then continued the bankrupt company's operations.[9]

A 2010 decision also articulated how the "practical consequences" test applies in a bankruptcy setting.

> The parties agree on the applicable legal standard: the power to assert or waive a corporation's attorney client privilege is an incident of control of the corporation. . . . Whether control of a corporation transfers from 'old' to 'new'

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[8] Yosemite Inv., Inc. v. Floyd Bell, Inc., 943 F. Supp. 882, 883-84 (S.D. Ohio 1996); In re Grand Jury Subpoenas 89-3 & 89-4 & 89-129, 734 F. Supp. 1207, 1211 n.3 (E.D. Va.), aff'd in part, vacated in part, 902 F.2d 244 (4th Cir. 1990).

[9] Coffin v. Bowater, Inc., No. 03-277-P-C, 2005 U.S. Dist. LEXIS 9395, at *9 (D. Me. May 13, 2005) (rejecting a bankruptcy trustee's attempt to waive a bankrupt company 's privilege; rejecting a "bright-line rule" that only a stock sale conveyed the privilege; finding that privilege now belonged to the purchaser of the company's assets (including all the company's "tangible and intangible rights"); explaining that because the "practical consequences" of the asset purchase "was to transfer virtually all control and continuation of the [company's] business to [the new owner]," the new owner -- not the company's bankruptcy trustee - had the right to waive or assert the privilege.).

> depends on the practical consequences of the transaction at issue. . . . The Defendants and Conseco assert that 'New Conseco is essentially the same business enterprise' as Old Conseco because of all the assets, sources of revenue and expense, and management of New Conseco are the same as that of Old Conseco just prior to the bankruptcy confirmation. . . . Because New Conseco acquired substantially all of Old Conseco's business operations, it also acquired Old Conseco's right to assert the attorney client privilege.

Schleicher v. Wendt, No. 1:02-cv-1332-WTL-TAB, 2010 U.S. Dist. LEXIS 48084, at *3-7 (S.D. Ind. May 14, 2010).

Several cases have rejected the traditional "bright-line" test and instead used a "practical consequences" test outside the bankruptcy setting. One court declined to follow the "bright-line test" when determining whether the privilege passed with assets rather than stock, and ultimately concluded that the transfer of assets also transferred the privilege.[10] Another court held in the context of a disqualification motion that the "practical consequences" standard applied in determining ownership of the attorney-client privilege after a corporate transaction (ultimately holding that the attorney-client privilege passed with a father's transfer of stock to his sons).[11]

In 2012, the Northern District of Texas dealt with a disqualification motion which focused on whether an asset sale conveyed the elements of an attorney-client relationship.[12] The court asked for more evidence, but noted that applying the "practical consequences" test involves

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10 Parus Holdings, Inc. v. Banner & Witcoff, Ltd., 585 F. Supp. 2d 995, 1002-03 (N.D. Ill. 2008).

11 Goodrich v. Goodrich, 960 A.2d 1275 (N.H. 2008).

12 John Crane Prod. Solutions, Inc. v. R2R & D, LLC, Civ. A. No. 3:11-CV-3237-D, 2012 U.S. Dist. LEXIS 67457 (N.D. Tex. May 15, 2012).

> such factors as the extent of the assets acquired, including whether stock was sold, and whether the purchasing entity continues to sell the same product or service, whether the old customers and employees are retained, and whether the same patents and trademarks are used.

John Crane Prod. Solutions, Inc. v. R2R & D, LLC, Civ. A. No. 3:11-CV-3237-D, 2012 U.S. Dist. LEXIS 67457, at *5 (N.D. Tex. May 15, 2012).

Just as the "practical consequences" test moved from the bankruptcy setting to other contexts, it has also been moving from settings where a company buys substantially all the assets of another company to settings where only a portion of a company's assets pass to the new owner. Thus, several courts have essentially divided up the privilege's ownership after a partial asset sale.

In 2008, a Delaware state court held that the purchaser of a company's assets acquired the privileged communications relating to the company's operations, but not relating to the acquisition that was the subject of later litigation.[13] A Delaware court engaged in an even more subtle analysis. The court addressed a transaction in which a company sold some assets to a buyer, but retained other assets. The court ultimately held that (1) the purchaser owned the privilege covering the seller's "ordinary course of business" communications occurring before the transaction; (2) the seller owned the privilege covering communications relating to the transaction; and (3) the seller owned the privilege relating to the assets it retained.[14]

All of this matters because disputes frequently arise between the seller of a subsidiary's stock or assets and the buyer of that stock or those assets. Thus, a

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[13] Orbit One Commc'ns, Inc. v. Numerex Corp., 255 F.R.D. 98 (S.D.N.Y. 2008).

[14] Postorivo v. AG Paintball Holdings, Inc., Cons. Civ. A. No. 2991-VCP, 2008 Del. Ch. LEXIS 17 (Del. Ch. Feb. 7, 2008) (unpublished opinion).

number of cases have dealt with adversity between a parent and a former subsidiary (or its new owner), with differing results.[15]

(c) Lawyers involved in corporate transactions might consider steps that could shape the privilege's later ownership, but a trend has deprived any certainty about another traditional step.

First, lawyers can avoid a joint representation of multiple clients involved in the transaction. This prevents one of the clients (now independent, or controlled by an

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[15] Fogel v. Zell (In re Madison Mgmt. Grp. Inc.), 212 B.R. 894 (Bankr. N.D. Ill. 1997) (the same lawyers represented a parent and a subsidiary; when the subsidiary went bankrupt, the trustee for the subsidiary sought to give to a third party (a creditor) documents created during the time of the joint representation; the court distinguished the situation from that in Santa Fe (in which the former subsidiary wanted to obtain documents for itself), and held that the parent could block the trustee for the former subsidiary from providing privileged documents to the third party creditor (although the parent and the former subsidiary were now adverse to one another)), rev'd on other grounds, 221 F.3d 955 (7th Cir. 2000); Glidden Co. v. Jandernoa, 173 F.R.D. 459 (W.D. Mich. 1997) (Glidden (now called Grow) sold its subsidiary (Perrigo) to the subsidiary's management; Grow then sued its old subsidiary and the subsidiary's management; the court ordered the former subsidiary to produce all of the requested documents to the former parent; the court also rejected the argument that the former subsidiary's management could assert their own privilege); Bass Pub. Ltd. v. Promus Cos., No. 92 Civ. 0969 (SWK), 1994 U.S. Dist. LEXIS 5474 (S.D.N.Y. Apr. 25, 1994) (Latham & Watkins represented both the parent (Promus) and a subsidiary (Holiday Inn), which was sold to Bass; the former subsidiary (which was merged into Bass) sought documents from Latham & Watkins dating from the time of the joint representation; although the court found that the documents were not created as part of a joint litigation defense effort, it ordered Latham & Watkins to produce the documents, finding that the jointly-represented subsidiary was entitled to them); In re Santa Fe Trail Transp. Co., 121 B.R. 794 (Bankr. N.D. Ill. 1990) (in-house lawyers represented both a parent and a subsidiary; the former subsidiary went bankrupt, and its trustee sought documents from the former parent; although the court found that the situation did not involve a joint litigation defense arrangement (but instead was a joint representation), the court held that the former subsidiary could obtain documents from the parent that were created before the closing of the spin (and certain document created after that date)); In re Grand Jury Subpoenas, 89-3; 89-4; 89-129, 734 F. Supp. 1207, (E.D. Va.) (a parent waives any attorney-client privilege applicable to documents by leaving those documents with the spun subsidiary), aff'd in part, vacated in part, 902 F.2d 244 (4th Cir. 1990); Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47, 50-51 (S.D.N.Y. 1989) (Uniroyal sold its subsidiary (Plastics) to a company called Polycast; Polycast sued Uniroyal for fraud; the court found that communications among the lawyers who jointly represented Uniroyal and its then-subsidiary Plastics did not involve a joint litigation defense, meaning that the new management of Plastics (now owned by Polycast) could obtain the documents); Medcom Holding Co. v. Baxter Travenol Labs, Inc.,120 F.R.D. 66 (N.D. Ill. 1988) (the parent (Baxter) sold all of the stock of its subsidiary Medcom to Medcom Holding; Medcom Holding later sued Baxter for securities fraud; the court found that the same lawyers represented Baxter and Medcom during the relevant time; the court held that Medcom's new management had the power to waive the privilege as to some of the documents; however, the court held that documents created during an earlier litigation when Baxter and its subsidiary were jointly represented could not be obtained by the subsidiary's new parent unless Baxter itself consented, even though adversity had developed between Baxter and the new owners of its former subsidiary).

entity or person who might become adverse to the remaining client) from claiming joint ownership of the privilege, or seeking discovery from the remaining client if adversity develops.

This step generally would prevent one of the other participants in the transaction from claiming some ownership of the privilege, but might make many possibly sensitive communications vulnerable to a third party's discovery. For example, a lawyer representing a corporate parent in the sale of a subsidiary could assure privilege protection for communications with the parent during the transaction by arranging for another lawyer to represent the subsidiary. However, explicitly disclaiming an attorney-client relationship with a subsidiary means that the lawyer normally could not claim privilege protection for any communications with the subsidiary's employees related to the transaction.[16] Third parties attacking the transaction would thus have a much easier time gaining access to those communications.[17]

Second, and somewhat ironically, lawyers might explicitly arrange for a joint representation in an effort to shape the privilege's ownership. One court even permitted the same lawyer to represent the buyer and the seller in a corporate transaction who were attempting to resolve one's claim against the other. The joint representation allowed them to protect communications relating to the claim's resolution from a third party's effort to discover those communications.

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[16] The parent and the lawyer might argue that the parent and the subsidiary had entered into a "common interest" agreement that avoided waiver of any privilege during the transaction, but this would be a difficult argument to win.

[17] Furthermore, the work product doctrine presumably would not provide an alternative protection for these communications. It would be difficult for the parent or the subsidiary to claim that they anticipated litigation involving the transaction. Even if they could do that, the communications at issue presumably would have been created even in the absence of such anticipation.

Thus, unlike the first technique discussed above, this approach protects the communications from third parties. However, it normally would not protect communications from one of the jointly represented clients should adversity develop between them. This approach would also essentially doom any chance that the lawyer jointly representing the clients in the transaction could represent either one if such adversity developed.

Traditionally, clients and their lawyers might have been able to affect the privilege's ownership by choosing an asset rather than a stock sale. However, it is no longer safe to assume that corporations could retain control of their privilege by selling assets rather than stock (although one court suggested that such a step might work).[18] This is because the "practical consequences" standard does not itself provide any certainty about whether the sale of assets will or will not transfer control of the privilege.

Several courts have explained (or at least hinted) that participants in corporate transactions might have some power to affect the privilege's ownership.

As explained above, in 2013 a Delaware chancery court not only explained that lawyers negotiating a stock sale could affect the ownership, it even recommended language that would carve out from the sale all privileged communications between the seller and the seller's lawyer about the transaction. Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155, 161 (Del. Ch. 2013).

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[18] Bass Pub. Ltd. v. Promus Cos., No. 92 Civ. 0969 (SWK), 1994 U.S. Dist. LEXIS 5474, at *6-7 (S.D.N.Y. Apr. 25, 1994) ("Had Promus [parent] wished, it could have sold only Holiday Inn's [subsidiary's] physical assets, which would have avoided the consequences [of allowing new management of the subsidiary to waive the privilege].").

In 1988, the Northern District of Illinois bluntly stated that corporate clients and their lawyers can shape the privilege's control in corporate transactions.

> It is reasonable then to treat the parties to a subsidiary divestiture by sale of stock as having contracted on the assumption that after the sale management of the divested corporation will control its attorney-client privilege. The parties are free to vary this rule by agreement. For example, if the selling parent will have a continuing interest after the sale in contracts, assets or liabilities of the subsidiary the parent can negotiate for special access or control to protect that interest. Similarly, if the attorneys who represent a corporate parent also represent its subsidiary in the sale of the subsidiary's stock they run the resulting risk that after the acquisition subsidiary management will waive the privilege with respect to its communications with those attorneys. A seller who wishes to avoid that result can do so by agreement with the purchaser or by employing separate counsel for the subsidiary and limiting to the parent's own attorneys those communications which the parent wishes to protect.

Medcom Holding Co. v. Baxter Travenol Labs., Inc., 120 F.R.D. 66, 70 (N.D. Ill. 1988). The court ultimately concluded that the new owners of a corporate subsidiary could waive the attorney-client privilege relating to pre-transaction communications, but explained that parties to the transaction could have arranged for a different result.

Since that 1988 decision, other courts have suggested similar steps.

- One court implied that parties to a corporate transaction could articulate in the merger agreement whether the privilege was part of the transaction.[19]

[19] Girl Scouts-Western Okla., Inc. v. Barringer-Thomson, 252 P.3d 844, 847, 849 (Okla. 2011) (holding that a successor after a merger owned the entities' attorney-client privilege; "Western [plaintiff] alleged ownership of all of Sooner's documents and materials based on the merger. In support of its counter-motion for summary judgment, Western attached the merger agreement, annual meeting minutes of Sooner and Red Lands adopting the merger agreement, the Certificate of Merger submitted to the Secretary of State and the Certificate of Merger issued by the Secretary of State. The merger agreement provides that all of the assets, properties, rights, privileges, immunities, powers and franchises of Sooner shall vest in the surviving entity. Likewise, under the merger agreement, all debts, liabilities and duties of Sooner shall become the debts, liabilities and duties of the surviving entity. Thus, under the merger agreement, what belonged to Sooner now belongs to Western. Western recognizes that matters that were confidential in the hands of Sooner must remain confidential in the hands of Western."; explaining

- One court suggested that a parent spinning off a subsidiary should contractually retain access rights to documents the spun company acquires in the spin.[20]

- One court suggested that a parent may retain the right to veto a newly spun subsidiary's waiver of the attorney-client privilege.[21]

Unfortunately, these steps do not provide any real certainty. For instance, a parent arranging for its subsidiary's relinquishment of the privilege would undoubtedly be vulnerable to the former subsidiary's argument that it was compelled to forfeit its privilege rights and therefore should not be bound by any such agreement.

Significantly, very little case law deals with such agreements, which probably means that very few companies enter into such agreements during corporate transactions. In one of the very few decisions dealing with this issue, the District of Delaware noted that the buyer and seller of corporate assets disagreed about the meaning and effect of an agreement that purported to shape the privilege's ownership.

> The express retention of attorney-client privilege rights, to the extent effective, was reserved for the non-related information that might end up in Chase hands because of the transfer of employees to Chase as part of the transaction. . . . That result is, of course, what one would expect, since it would be strange indeed for reasonable business people to negotiate a transaction in which material

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that "[i]f the client is a corporation, the privilege may be claimed by the successor, trustee, or similar representative."; implying that the companies could have altered this general rule in the agreement; "Sooner did not exempt or exclude confidential or any other materials from the merger agreement; it adopted a merger agreement that transferred all assets, properties and privileges to the surviving corporation. Ownership of Sooner's assets, as well as its attorney-client privilege, has now transferred to Western by operation of law as a result of the merger. To allow Attorney to assert Sooner's attorney-client post-merger would be in derogation of the merger agreement transferring ownership to Western.").

[20] Bass Pub. Ltd. v. Promus Cos., No. 92 Civ. 0969 (SWK), 1994 U.S. Dist. LEXIS 5474, at *6-7 (S.D.N.Y. Apr. 25, 1994).

[21] In re Grand Jury Subpoenas, 734 F. Supp. 1207 (E.D. Va.), aff'd in part, vacated in part, 902 F.2d 244 (4th Cir. 1990).

> information concerning the object of the purchase and sale was somehow retained as the property of the seller, with the buyer left as a warehouseman. Advanta has done nothing to demonstrate the documents at issue are, or any particular document is, unrelated to the business. Advanta having failed to carry the burden of establishing that the documents are privileged, the in limine application is denied.

Chase Manhattan Mortg. Corp. v. Advanta Corp., Civ. A. No. 01-507 (KAJ), 2004 U.S. Dist. LEXIS 7378, at *6-7 (D. Del. Apr. 23, 2004) (footnote omitted).

One of the other cases to deal with this situation refused to enforce an agreement that the subsidiary had entered into after it became independent. In that case the court rejected the applicability of a "protocol" entered into by a corporate parent and a former subsidiary which authorized their joint lawyers to keep confidential from one of the clients information they had obtained from the other client.[22] The court noted that the subsidiary's in-house counsel had ratified the "Protocol" one year after the divestiture, but that the general counsel "had ties to [the parent] and [the law firm which had jointly represented the parent and the subsidiary in the spin off of the subsidiary]" and therefore had "an interest in maintaining the validity of the transactions involved in the divestiture."[23] Thus, even an agreement entered into by a subsidiary after its independence might not have the desired effect.

In 2012, the Northern District of Illinois seemed to reject the notion that parties to a corporate transaction transferring assets could affect the privilege's ownership.

> [N]othing in the assigning documents for the '550 application between the various parties explicitly states that any attorney-client privileged documents were part of the

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22 In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005).

23 Id. at 652.

> conveyance. That omission is significant. Courts in this district have held that a transfer of assets from one corporation to another is not sufficient for transfer of the privilege, unless there is also a transfer of overall control; 'the right to assert or waive a corporation's attorney-client privilege is an incident of control of the corporation.' . . . Indeed, even when the parties sign a specific agreement to transfer the privilege along with certain assets, a court may nonetheless find that the privilege did not transfer.

Trading Techs. Int'l, Inc. v. GL Consultants, Inc., Civ. A. Nos. 05-4120 & -5164, 2012 U.S. Dist. LEXIS 34489, at *19 (N.D. Ill. Mar. 14, 2012).

The court seemed to indicate that parties to such a transaction could avoid a waiver only if they met the exacting standards of the common interest doctrine.

> Taken to its logical extreme, plaintiff's argument would imply that the attorney-client privilege attaches to any item conveyed from one party to another so long as the transferring party once spoke to an attorney about the item. Other courts have held that it is not error for a district court to find a lack of common interest and common attorney-client privilege when the sale of a patent is not executed as 'part of a joint legal claim or defense.' . . . This Court sees no reason to hold otherwise.

Id. at *20-21.

For lawyers hoping that they can control their client's privilege after such a transaction, this is a worrisome result. It shows that even lawyers with the foresight to suggest such agreements cannot assure their intended effect.

Given the case law's uncertainty, it is unfortunately unclear whether lawyers representing negotiating parties in a stock or asset sale can define the ownership. This is not to say that lawyers should not consider the privilege's ownership in corporate transactions, and perhaps even try to affect that ownership. As long as they realize the uncertainty, it seems beneficial to at least consider the ownership and make an effort

(even if unsuccessful) to retain, convey or share the attorney-client privilege. The judicial analysis of the privilege's ownership in the case of joint representations and asset sales generally does not describe any effort by the transactional parties to affect the privilege's ownership. Courts might be receptive to at least consider (if not enforce) the party's expectations. Although such expectations clearly cannot trump the legal principles governing the privilege, they might color a court's analysis.

Best Answer

The best answer to **(a)** is **THE FORMER SUBSIDIARY**; the best answer to **(b)** is **MAYBE THE ASSET'S PURCHASER**; the best answer to **(c)** is **MAYBE**.

B 6/14

Business Adversity

Hypothetical 31

You have developed a statewide reputation for representing retailers. Your largest client is a retailer which sells clothing. You just received a call from your client's largest competitor. You are flattered that the competitor has called you, but you also worry that representing both retailers might create an inappropriate conflict of interest.

May you represent both retailers?

YES (PROBABLY)

Analysis

As a matter of ethics, nothing automatically prohibits a lawyer from representing business competitors. In fact, lawyers might justifiably believe that the expertise they gain in representing one company makes them better able to skillfully represent companies in the same business sector.

A comment to the ABA Model Rules explains that

> simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

ABA Model Rule 1.7 cmt. [6].

Although representing competing businesses does not trigger a per se conflict, lawyers might find themselves confronting a conflict if business adversity has become legal adversity.

> Direct adversity requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests. ["For example, where a lawyer may have represented two clients in unrelated matters and both clients

> were in competition to sell foods to a third party, the representation of one of those clients in negotiating a sale to a third party would not constitute a violation of Rule 1.7(a). See Rule 1.7 cmt. 6."] There may be direct adversity even though there is no overt confrontation between the clients, as, for example, where one client seeks the lawyer's advice as to his legal rights against another client whom the lawyer represents on a wholly unrelated matter. Thus, for example, a lawyer would be precluded by Rule 1.7(a) from advising a client as to his rights under a contract with another client of the lawyer, or as to whether the statute of limitations has run on potential claims against, or by, another client of the lawyer. Such conflict involves the legal rights and duties of the two clients vis-à-vis one another.

ABA LEO 434 (12/8/04) (emphasis added).

This risk dramatically increases in heavily regulated industries, where business competitors need some government approval to operate. For instance, in the healthcare world regulations often require a hospital to seek government approval to expand. A business competitor opposing such an expansion therefore has a legal forum in which the competitor can complain about the expansion. Such a dispute clearly involves legal adversity rather than business adversity.

The Restatement gives another example.

> Lawyer has been retained by A and B, each a competitor for a single broadcast license, to assist each of them in obtaining the license from Agency. Such work often requires advocacy by the lawyer for an applicant before Agency. Lawyer's representation will have an adverse effect on both A and B as that term is used in this Section. Even though either A or B might obtain the license and thus arguably not have been adversely affected by the joint representation, Lawyer will have duties to A that restrict Lawyer's ability to urge B's application and vice versa. In most instances, informed consent of both A and B would not suffice to allow the dual representation . . . .

Restatement (Third) of Law Governing Lawyers § 121 cmt. c(i), illus. 1 (2000).

Representing competing businesses carries other risks too. First, lawyers are taking a business risk if they represent the competitor of a jealous (and lucrative) client. Second, the lawyer's acquisition of confidential information from one of the clients could place the lawyer in a nearly untenable position. For instance, a lawyer learning that a client is about to engage in some important business venture obviously may not tell the client's competitor. But what if the competitor asks the client for advice about that matter? The lawyer's silence could itself be telling, and possibly even violate the lawyer's confidentiality duties to the first client.

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.

N 3/12; B 8/14

Transactions

Hypothetical 32

As a litigator, you confess to being hypersensitive about possible conflicts. One of your clients just asked whether the conflicts rules about which you express such concern apply equally in a transactional setting.

Absent client consent, may a transactional lawyer represent a client in negotiating a friendly business arrangement with a company that the law firm represents on unrelated matters?

NO

Analysis

The ABA Model Rules could not be any clearer -- transactional adversity still counts as adversity for conflicts purposes.

> Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

ABA Model Rule 1.7 cmt. [7].

To be sure, many clients do not seem concerned about lawyers handling friendly transactional matters adverse to them. Most clients also readily provide consent for lawyers to do so. However, lawyers should remember that the same rules apply in both a litigation and a transactional setting.

Best Answer

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

Adverse Financial Impact

Hypothetical 33

You represent an insurance company in labor and employment matters. On behalf of another client, you recently filed a lawsuit against an out-of-state company, seeking $10 million in damages. You just received a call from the insurance company's vice president. She tells you that her company insures the out-of-state company, and that she considers your lawsuit against the company to be a direct conflict -- because the insurance company must pay the cost of defense and ultimately pay any judgment against the defendant company.

Is the lawsuit against the defendant company "adverse" to your insurance company client for conflicts purposes (thus requiring you to obtain the insurance company's consent before going forward)?

NO (PROBABLY)

Analysis

It is often difficult to determine if an adverse financial impact on a client triggers the need for consent. For instance, a lawyer's bank client might suffer financially if a transaction falls apart. If the transaction's demise results from a lawsuit that the lawyer has pursued, should the lawyer have obtained the bank client's consent before bringing the lawsuit?

This hypothetical comes from a ABA Legal Ethics Opinion, in which the ABA explained that the lawyer confronting this situation did not have a conflict. The ABA explained the definition of "adversity" that triggers the conflicts rules.

> Direct adverseness requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests. . . . There may be direct adverseness even though there is no overt confrontation between the clients, as, for example, where one client seeks the lawyer's advice as to his legal rights against another client whom lawyer represents on a wholly unrelated matter. Thus, for example, a lawyer would be precluded by Rule 1.7(a) from advising a

> client as to his rights under a contract with another client of the lawyer, or as to whether the statute of limitations has run on potential claims against, or by, another client of the lawyer. Such conflicts involve the legal rights and duties of the two clients vis-à-vis one another.

ABA LEO 434 (12/8/04). The ABA acknowledged that the lawyer might be prohibited from taking discovery of the insurance company client, depending upon the adverseness involved; the lawyer might be unable to represent the litigation client if the lawyer has protected information from the insurance company client that "would materially help the plaintiff in his claims against the insured defendant."

The Restatement discusses this issue, but without reaching a conclusion. Restatement (Third) of Law Governing Lawyers § 121 cmt. d (2000) explains that "problems could arise where the client and nonclient are individuals and representation adverse to the nonclient could have direct material effect on the client's interest. Such a situation would exist, for example, where a lawyer representing one spouse was asked to bring suit against the other, or where a lawyer representing one holder of an interest in property was asked by someone else to bring suit against the other holder in circumstances where the suit could materially and adversely affect the interest of the lawyer's client."

In some ways, this analysis resembles the type of "proximate cause" analysis found in tort law.

Best Answer

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

N 3/12

Trust and Estate Planning

Hypothetical 34

You have represented the patriarch of a wealthy family for many years. You also represent a number of his children in fairly minor matters, such as traffic infractions. The patriarch just called you to say that he has decided to disinherit one of the children whom you are currently representing in a minor traffic matter.

May you represent the patriarch in preparing a will that leaves nothing to one of his children (whom you currently represent in an unrelated matter)?

YES (PROBABLY)

Analysis

The issue here is whether the lawyer's representation of one client in disinheriting another client (whom the lawyer represents on an unrelated matter) is "directly adverse" to the disinherited client, or whether the representation creates "a significant risk" that the lawyer's representation of either client "will be materially limited by the lawyer's responsibilities to another client." ABA Model Rule 1.7; Restatement (Third) of Law Governing Lawyers §§ 121, 128 (2000).

This hypothetical comes from an ABA legal ethics opinion, which held that a lawyer generally may assist one client in disinheriting someone the lawyer currently represents in an unrelated matter.

In ABA LEO 434 (12/8/04), the ABA indicated that a lawyer in this situation was not "adverse" to the client being disinherited.

> Direct adverseness requires a conflict as to the legal rights and duties of the clients, not merely conflicting economic interests. . . . There may be direct adverseness even though there is no overt confrontation between the clients, as, for example, where one client seeks the lawyer's advice as to his legal rights against another client whom lawyer

> represents on a wholly unrelated matter. Thus, for example, a lawyer would be precluded by Rule 1.7(a) from advising a client as to his rights under a contract with another client of the lawyer, or as to whether the statute of limitations has run on potential claims against, or by, another client of the lawyer. Such conflicts involve the legal rights and duties of the two clients vis-à-vis one another.

ABA LEO 434 (12/8/04) (emphasis added). Because a beneficiary normally has only an expectancy in receiving money from the testator, the ABA explained that a lawyer representing a potential beneficiary in an unrelated matter may assist the testator in disinheriting the potential beneficiary (although of course the lawyer may decline the assignment).

The ABA LEO then explained the possible limitations on this basic principle. First, the answer might be different if the testator asked the lawyer to prepare an estate plan that violated an overall estate concept that the lawyer had put in place for multiple clients.

> Problems also can arise in situations where the lawyer has represented both the testator and other family members in connection with family estate planning. . . . If proceeding as the testator has directed violates previously agreed-upon family estate planning objectives, the lawyer must consider her responsibilities to other family members who have been her clients for family estate planning.

Id.

Second, the ABA warned that the answer might be different if the lawyer was advising the testator on the merits of disinheriting the lawyer's other client.

> By advising the testator whether, rather than how, to disinherit the beneficiary, the lawyer has raised the level of the engagement from the purely ministerial to a situation in which the lawyer must exercise judgment and discretion on behalf of the testator. In such circumstances, there is a heightened risk that the lawyer may, perhaps without

> consciously intending to do so, seek to influence the testator to change his objectives . . . in favor of her other client, thus permitting her representation of the testator to be materially limited by her responsibilities to the beneficiary or by a personal interest arising out of her relationship with the beneficiary.

Id. As the ABA explained, the conflict in that setting does not come from the lawyer being legally adverse to the other client, but rather from the possibility that the lawyer's representation of either or both clients will be "materially limited" by the lawyer's representation of the testator. ABA Model Rule 1.7(a)(2).

Many lawyers would turn down the type of assignment discussed in this LEO. It is therefore interesting to note that the ABA generally would approve a lawyer's participation in preparing such a document.

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.

N 8/12

Other Adverse Impact

Hypothetical 35

You are defending a nursing home in a lawsuit brought by a software company. You determine that your best defense might be to blame the software company's recently deceased president for incompetence. You don't intend to counterclaim against the company. However, you just received a call from the president's widow, whom one of your partners is representing in selling her house. The widow claims that your litigation strategy creates a conflict, because it would embarrass her.

Is your litigation strategy "adverse" to the widow for conflicts purposes (thus requiring her consent)?

NO (PROBABLY)

Analysis

In this scenario, the "adverse" impact on your firm's other client is reputational rather than monetary. Very few courts or bars have advised where to draw the line in settings like this, but it would seem that the conflicts rules would be triggered only by more direct adversity.

This situation might also trigger what is called a "rheostat" conflict under ABA Model Rule 1.7(a)(2). That rule recognizes that a lawyer faces a conflict of interest 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).

In 2004, the Washington, D.C., Bar dealt with another common scenario which sometimes perplexes lawyers -- may a lawyer who must turn down a matter because of a conflict recommend another lawyer to handle that matter? The D.C. Bar permitted such a step, undoubtedly to the relief of many lawyers.

- District of Columbia LEO 326 (12/2004) (analyzing the following question: "When a lawyer is approached by a potential client about a representation adverse to an existing client, after declining the case, the lawyer may refer the potential client to another lawyer."; ultimately concluding that the lawyer may provide such references; noting that under Rule 4.3, a lawyer may provide the advice to "secure counsel" to an unrepresented person; explaining that "[r]ecommending that an adverse person retain counsel does not constitute damage or prejudice to a client within the meaning of Rule 1.3(a)."; "First, the person would almost certainly find a lawyer even in the absence of a recommendation. Second, it would be mere speculation to conclude that the lawyer that the person might find on his own would not be as competent as the one recommended by the conflicted lawyer. The lawyer could be as good, better, or not as good as the one that the conflicted lawyer might recommend. Moreover, we cannot assume that it is disadvantageous to the referring lawyer's existing client for its adversary to be represented by competent counsel. Competent opposing counsel is likely in many cases to contribute to reaching a reasonable resolution of the dispute."; also noting the practical consequences that the lawyer might want to consider; "Moreover, a prudent lawyer who elects to make a recommendation might be wiser to suggest more than one name to avoid recriminations from the inquirer, should the recommended lawyer provide unsatisfactory, or from her client, should the recommended lawyer turn out to be vexatious.").

Best Answer

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

B 8/14

Discovery of Clients

Hypothetical 36

A new associate is preparing a number of third party subpoenas that you will have to issue in a commercial case. He just called to ask a few questions.

(a) Absent consent, may you issue a subpoena to another firm client (which your firm represents on unrelated matters) when you expect a dispute over the discovery you seek?

NO

(b) Absent consent, may you issue a subpoena to a bank (which your firm represents on unrelated matters), when there is no reason to think that the bank would resist or dispute the subpoena?

NO (PROBABLY)

Analysis

(a)-(b) The question here is whether discovery amounts to the sort of "adversity" that triggers the conflicts rules.

A comment to the ABA Model Rules explains that

> a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit.

ABA Model Rule 1.7 cmt. [6].

The ABA indicated in ABA LEO 367 (10/16/92) that a lawyer generally may not cross-examine or conduct discovery of a firm client, even if the cross-examination is

unrelated to the representation of that client. The ABA suggested that co-counsel may conduct such discovery.[1]

State courts and bars have dealt with this issue. Some cases and legal ethics opinions focus on the lawyer's duty of loyalty to every client -- thus essentially adopting a per se prohibition on the lawyer cross-examining any current client, even if the lawyer does not possess any material confidential information that the lawyer could use against the client.

- California LEO 2011-182 (2011) ("When an attorney discovers at the outset of representation that the attorney must serve a discovery subpoena for production of documents on another current client of the attorney or the attorney's law firm, serving the discovery subpoena is an adverse action such that a concurrent client conflict of interest arises. To represent a client who seeks to serve such a subpoena, the attorney must seek informed written consent from each client, disclosing the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client providing consent."; "Having defined 'adverse' as 'potential injury,' we are led to the conclusion that serving any type of third-party discovery on a current client is adverse and would violate an attorney's duty of loyalty. . . . '[D]iscovery *is* coercion' since it entails bringing '[t]he force of law . . . upon a person to turn over certain documents.' . . . Second, propounding discovery on an existing client may affect the quality of an attorney's services to the

[1] ABA LEO 367 (10/16/92) ("The Committee concludes that a lawyer's examining the lawyer's client as an adverse witness, or conducting third party discovery of a client, will ordinarily present a conflict of interest that is disqualifying absent consent of one or both of the clients involved (depending . . . on the nature and degree of the conflict) . . . ."; a witness would be considered a current client for conflicts purposes "if there is a continuing relationship between lawyer and client, even if the lawyer is not on a retainer, and even if no active matters are being handled"; a lawyer in that situation could face a conflict if the lawyer has "specific confidential information relevant to the cross-examination," or even if the lawyer only has general information -- "to the extent a lawyer's general familiarity with how a client's mind works is relevant and useful information, it may also be disqualifying information within the contemplation of Rule 1.8(b), which generally prohibits a lawyer from using information relating to the representation of a client to the disadvantage of the client unless the client consents after consultation"; in a situation where the lawyer is called upon to cross-examine a doctor client who is acting as the adversary's expert witness, "there will almost inescapably be a direct adverseness," thus requiring the doctor's consent to handle the cross-examination; "In some instances, a sufficient solution may be to provide for other counsel, also representing the litigation counsel, to deal with the client-witness: where local counsel as well as principal counsel are involved in a litigation, the disqualification applying to one of these will not ordinarily affect the other. In other circumstances, a satisfactory solution may be the retention of another lawyer solely for the purpose of examining the principal lawyer's client." (footnote omitted)).

client seeking the discovery, resulting in a diminution in the vigor of the attorney's discovery demands or enforcement effort. In addition, it is possible the documents sought could expose the client from whom discovery is being sought to claims from the client serving the discovery. Therefore, we conclude that Attorney's service of a document subpoena on Witness Client would be an action adverse to Witness Client's interests, and as a result such service would be prohibited absent proper consent." (emphasis added); explaining that the lawyer may obtain consent to engage in a discovery if both clients provide consent after full disclosure).

- Illinois LEO 09-02 (1/2009) (analyzing the ability of a lawyer to represent a doctor who has been sued along with the doctor's hospital by a plaintiff alleging wrongful death of a newborn baby patient; noting that "Attorney's law firm already represents the Hospital in at least two other unrelated medical malpractice lawsuits. In addition, Attorney represents another physician (3rd Party Physician) who will most likely be a witness against the first physician in a third unrelated medical malpractice lawsuit."; explaining that "[p]rior to his engagement, Attorney was advised that Physician's position in the lawsuit is directly adverse to the Hospital. Physician believed that she acted within the standard of care and that the death was caused by difficulties, in part, with hospital equipment."; later explaining that "[h]ere, Attorney is advised that Physician's position in the lawsuit is directly adverse to the Hospital's position because Physician believes that the injury was caused by an unforeseen difficulty with equipment provided by the Hospital"; "Although Attorney and the law firm are not representing the Hospital in this litigation, the fact that they currently represent the Hospital in other unrelated medical malpractice lawsuits leads to the objective conclusion that when Physician's defense places the blame on the Hospital and its equipment, Attorney's relationship with the Hospital will be adversely affected. Thus, the Rule 1.7(a) conflict with the Hospital remains."; also analyzing the possible conflict between the lawyer's representation of the defendant doctor and the lawyer's current representation of another doctor who might be an adverse witness; "[T]he 3rd Party Physician whom the lawyer currently represents in another matter3 [sic], while not a named defendant in the present lawsuit, took an adversarial position against Physician in the matter shortly after the alleged negligence by reportedly informing the Hospital staff members that, had he been called earlier, he could have safely undertaken the procedure."; "Attorney's ability to effectively cross-examine the 3rd Party Physician and attack his opinions and credibility may materially limit his responsibilities to Physician because his two clients have polar opposite opinions on what went wrong with the procedure in question."; "As for the conflict with the 3rd Party Physician, any attempt by Attorney to discredit the testimony of the 3rd Party Physician will certainly lead to the objective conclusion that Attorney's relationship with the 3rd Party Physician will be adversely affected. Additionally, a disinterested lawyer would undoubtedly conclude that Physician's defense will be adversely affected if Attorney is unable or unwilling to effectively cross-examine the 3rd

Party Physician by challenging his opinion, credibility, motive, and bias when, ultimately, such cross examination could adversely affect the 3rd Party Physician's defense in his own medical malpractice lawsuit."; noting that the lawyer could not undertake the representation even with the hospital's and other doctor's consent).

- Michigan LEO RI-218 (8/16/94) ("A lawyer may not undertake or continue representation which requires cross-examination of one of the lawyer's own clients as an adverse witness on behalf of another client.").

- Comm. on Legal Ethics v. Frame, 433 S.E.2d 579 (W. Va. 1993) (publicly reprimanding a lawyer who cross-examined one of his clients in another matter).

- North Carolina LEO RPC 72 (10/20/89) (explaining that a town attorney could not cross-examine an arresting officer on behalf of a criminal defendant, because the town attorney "represents the town police department and its employees").

One court has taken the inexplicable position that arranging for a subpoena to be served on a client did not amount to adversity sufficient to trigger a conflict, but that filing a motion to compel met that standard.

- In re Suard Barge Servs., Inc., Civ. A. No. 96-3185 c/w 96-3655, 97-0084, 97-1519 SECTION "R" (1), 1997 U.S. Dist. LEXIS 12364, at *4, *11, *12-13 (E.D. La. Aug. 18, 1997) (holding that a lawyer's third party subpoena for documents to another client was "not directly adverse" to that client, but that the lawyer's later motion to compel and for sanctions amount to the kind of adversity that required the client's consent; "Best [lawyer] subpoenaed Gray [other lawyer client] in the instant litigation, seeking records concerning an earlier, similar accident aboard the same barge when it was owned by GIS. Although Gray initially permitted Best to review all of the subpoenaed records, it later refused to furnish copies of all records. Best then filed a motion to compel against Gray in this Court, in which he argued that Gray was in contempt of court for refusal to comply with the subpoena and he requested sanctions, attorney's fees and costs."; "GIS and Gray moved to disqualify Best from representing Windham because Best allegedly represented Gray in an unrelated matter at the same time as he was representing Windham, and therefore has a conflict of interest, which Gray declines to waive."; "I find insufficient evidence to establish that Best's subpoena was 'directly adverse' to Gray."; "I do not find that the subpoena itself was 'directly adverse to Gray's interests. However, I find that Windham's motion to compel and for sanctions, filed while Best represented both Windham and Gray, was directly adverse to Gray.").

Other states emphasize the informational nature of the problem.

- Connecticut LEO 99-14 (7/28/99) ("We believe that a lawyer cannot reasonably conclude that cross-examination of another witness-client will not be limited by the duty of loyalty to that other client. The lawyer could not use any information the lawyer knew about the client or the client's interests or biases as part of the cross-examination. Use of just such information is the touchstone of effective cross-examination."; "Because the duty of loyalty would be compromised in relation to the witness-client and the quality of the representation is compromised in relation to the mother-client, neither should be asked to waive the conflict.").

Not surprisingly, a lawyer's ability to cross-examine a former client depends on such an informational analysis.

> A lawyer may represent a client in a matter unrelated to a prior divorce proceeding in which the lawyer represented former client who now may testify against his current client. However, the lawyer may not cross-examine the former client unless it can be done both without using information relating to the prior representation to the disadvantage of the former client and without materially limiting his ability to effectively cross-examine the former client to the detriment of the current litigation client.

Illinois LEO 05-01 (1/2006).[2]

[2] Illinois LEO 05-01 (1/2006) ("A lawyer may represent a client in a matter unrelated to a prior divorce proceeding in which the lawyer represented former client who now may testify against his current client. However, the lawyer may not cross-examine the former client unless it can be done both without using information relating to the prior representation to the disadvantage of the former client and without materially limiting his ability to effectively cross-examine the former client to the detriment of the current litigation client."; "When a lawyer has not clearly terminated the professional relationship with a client at the conclusion of a matter, it could be argued that a lawyer-client relation still exists under the circumstances."; "[I]f the divorce client were still a current client, the lawyer would be prohibited by Rule 1.7(a) from accepting the representation in question."; "Under Rule 1.9(a)(2), it would appear that the lawyer may cross-examine the former client as long as he does not use 'information relating to the representation' of the former client to the 'disadvantage' of that person, unless the information that the lawyer planned to use to attack the testimony of the former client was either subject to permissive disclosure under a specific exception to Rule 1.6, which seems unlikely in this situation, or has become 'generally known.'"; "The rules do not define what information is 'generally known' for this purpose. The concept appears to be borrowed from the law of agency, which also imposes duties of confidentiality upon agents. Comment b to Section 395 of Restatement Second, Agency defines a matter of general knowledge that an agent may use freely without liability to the principal as 'common knowledge in the community.' This definition seems consistent with the purposes of Rules 1.9."; "Finally, if the lawyer is prohibited from conducting the cross-examination of the former client under Rule 1.9, that conflict may not be cured simply by having another lawyer in the same firm conduct it. Under Rule 1.10 on imputed

As explained above, the ABA has suggested that a lawyer can arrange for another law firm to handle the discovery of one of the lawyer's clients if the lawyer herself could not undertake such a cross-examination.[3]

Several bars have also suggested this step.

> [I]t could even reach the point where the Neighbor Client would have to be cross[-]examined by a member of the law firm. That could perhaps be remedied by having any cross examination handled by another law firm brought in for that purpose.

Philadelphia LEO 2009-7 (7/2009) (analyzing a situation in which a law firm had "for a long period of time" represented the builder of a proposed office building, but learned two weeks before a scheduled zoning presentation that a neighbor of the building (whom the law firm represented on unrelated matters) opposed the project; explaining the effect of the later-developing conflict; explaining that the law firm had three choices: (1) withdraw from representing the developer in the project; (2) withdraw from representing the developer in litigation or some other administrative matters in which the neighbor might appear (although the law firm might be able to arrange for some other lawyer to cross-examine the neighbor at any hearing); (3) seek a waiver from the neighbor.).

The Illinois Bar has mentioned the same possible step.

> [I]f the lawyer is prohibited from conducting the cross-examination of the former client under Rule 1.9, that conflict

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disqualification, if one lawyer in a firm is prohibited from undertaking a representation, so is every lawyer in the firm. See ISBA Opinion No. 90-05 (November 1990). However, the lawyer may consider asking co-counsel (a lawyer from another firm who may be representing a co-party) to conduct the cross-examination. See Swanson v. Wabash, Inc., 585 F. Supp. 1094 (N.D. Ill. 1984). If a co-counsel is not available, the lawyer should seek another, unaffiliated lawyer to conduct the cross-examination.").

[3] ABA LEO 367 (10/16/92).

> may not be cured simply by having another lawyer in the same firm conduct it. Under Rule 1.10 on imputed disqualification, if one lawyer in a firm is prohibited from undertaking a representation, so is every lawyer in the firm. . . . However, the lawyer may consider asking co-counsel (a lawyer from another firm who may be representing a co-party) to conduct the cross-examination. . . . If a co-counsel is not available, the lawyer should seek another, unaffiliated lawyer to conduct the cross-examination.

Illinois LEO 05-01 (1/2006).[4] Thus, bars recognize the theoretical possibility that co-counsel could conduct the discovery.

However, as a practical matter, this solution may not work. If a lawyer is prohibited from cross-examining a current or former client, the lawyer would not be able to assist co-counsel in preparing for such discovery. Similarly, such a disqualified lawyer presumably would not be able to coordinate with co-counsel, strategize about how the discovery fits into the overall case, etc. It is therefore difficult to see how a lawyer could to anything but hand off the examination to co-counsel and wait to see what co-counsel comes back with. That may be the only solution in some situations, but it is not very satisfying -- and at some point the lack of coordination might so prejudice the current client that the lawyer would find it impossible to carry on the rest of the representation.

Not many courts have dealt with this issue, but in 2000 the District of New Jersey rejected the possibility of co-counsel handling discovery of the main counsel's client -- reflecting the "real world" difficulties of such an arrangement. In re Cendant Corp. Sec. Litig., 124 F. Supp. 2d 235 (D.N.J. 2000), the court denied a request by Paul Weiss to

[4] Illinois LEO 05-01 (1/2006), supra note 2.

represent Ernst & Young, because the firm also represented a possible subject of cross-examination. The court rejected the notion that Paul Weiss could arrange for co-counsel to conduct the cross-examination, concluding that Paul Weiss's lawyer "at some point will be required to work with co-counsel to develop trial strategy, organize opening and closing arguments and prepare other aspects of the case." The court also found it "difficult" to believe that the law firm's proposed "firewall is leak-proof, with over 175 attorneys in the litigation department alone."[5] Id. at 243 n.5.

Best Answer

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

N 3/12; B 8/14

[5] In re Cendant Corp. Sec. Litig., 124 F. Supp. 2d 235, 241-42, 243 & n.5 (D.N.J. 2000) (denying defendant Ernst & Young's request for a declaration that Paul Weiss lawyer Theodore Wells may represent it in litigation involving Cendant; explaining that Paul Weiss had represented a former Executive Vice President and Deputy General Counsel of Cendant in connection with claims against Cendant; also explaining that Ernst & Young had been represented by Lowenstein Sandler, but that Wells had moved from that firm to Paul Weiss and wished to continue representing Ernst & Young; explaining that Ernst & Young would arrange for co-counsel rather than Wells to conduct any future discovery of Paul Weiss's client; explaining that "[t]he Committee believes that as a general matter examining one's own client as an adverse witness on behalf of another client, or conducting third party discovery of one client on behalf of another client, is likely (1) to pit the duty of loyalty to each client against the duty of loyalty to the other; (2) to risk breaching the duty of confidentiality to the client-witness; and (3) present a tension between the lawyer's own pecuniary interest in continued employment by the client-witness and the lawyer's ability to effectively represent the litigation client. The first two of these hazards are likely to present a direct adverseness of interest falling within Rule 1.7(a); all three may constitute material limitations on the lawyer's representation, so as to come under Rule 1.7(b)."; rejecting the concept that co-counsel could conduct discovery of the former Cendant executive; "Mr. Wells or his colleagues at Paul Weiss at some point will be required to work with co-counsel to develop trial strategy, organize opening and closing arguments, and prepare other aspects of the case."; also explaining that Paul Weiss's large size meant that the proposed firewall might not work; "Furthermore, it is difficult for this Court to believe that the proposed firewall is leak-proof, especially in a firm with over 175 attorneys in the litigation department alone. Presumably, numerous attorneys would be required to assist in trial preparation and discovery for both E&Y and Ms. Lipton. Notwithstanding the good faith efforts of the attorneys to adhere to the firewall, this Court is cognizant that casual conversations in hallways, elevators, and other common areas may take place and may be overheard by the 'screened' attorneys for either E&Y or Ms. Lipton.").

Positional Adversity

Hypothetical 37

You have represented a bank for several years. It is not your largest client, but has been a steady source of business. On behalf of that client, you normally argue that a particular state statute does not allow a certain type of claim against banks. One of your partners just received a call from a potentially lucrative new corporate client, which is in the midst of litigation with another bank that you have never represented. In that litigation, the company wants to take the position that the state statute does allow such a claim against banks.

May you represent the corporate client in asserting its position on the meaning of the statute (without your bank client's consent)?

YES (PROBABLY)

Analysis

As a profession, lawyers seem to have no trouble taking internally inconsistent positions -- as when they file alternative pleadings.

Most courts and bars follow this same approach when dealing with what is called "positional adversity." The ABA Model Rules formerly recognized a bright-line rule under which it "is ordinarily not improper to assert such [antagonistic] positions in cases pending in different trial courts, but . . . may be improper to do so in cases pending at the same time in an appellate court." Ethics 2000 changes adopted a more subtle approach.

> Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client

> in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

ABA Model Rule 1.7 cmt. [24].

The Restatement takes the same approach.

- Restatement (Third) of Law Governing Lawyers § 128 cmt. f (2000) (explaining that lawyers "ordinarily may take inconsistent legal positions in different courts at different times," but warning that lawyers may face an ethics issue if this approach will materially and adversely affect another client). In Illustration 5, the Restatement indicates that a lawyer may (without the client's consent) argue in one federal district court case that evidence is admissible, while arguing in another federal district court case that similar evidence is inadmissible, "[e]ven if there is some possibility that one court's ruling might be published and cited as authority in the other proceeding.").

Nationally, bars generally take the same approach.

- District of Columbia LEO 265 (4/17/96) (rejecting an analysis based on "formalities," and instead focusing on a number of factors, "such as: (1) the relationship between the two forums in which the two representations will occur; (2) the centrality in each matter of the legal issue as to which the lawyer will be asked to advocate; (3) the directness of the adversity between the positions on the legal issue of the two clients; (4) the extent to which the clients may be in a race to obtain the first ruling on a question of law that is not well settled; and (5) whether a reasonable observer would conclude that the lawyer would be likely to hesitate in either of her representations or to be less aggressive on one client's behalf because of the other representation. In sum, we believe that the focus of the analysis ought not to be on formalities but should be on the actual harm that may befall one or both clients").

- California LEO 1989-108 (explaining that a lawyer may represent two clients in arguing "opposite sides of the same legal question before the same judge,"

although warning that "prudent" lawyers will make whatever disclosure the confidentiality rules allow, and obtain both clients' consent before doing so).

As explained above, the ABA Model Rules formerly prohibited lawyers from taking different positions before the same appellate court at the same time. The Restatement similarly indicates that a lawyer may not (even with consent) take different positions on the legal issue if both cases have been accepted for argument in the United States Supreme Court. Restatement (Third) of Law Governing Lawyers § 128 illus. 6.

A 2012 article describes an incident involving this issue.

- Tony Mauro, Roberts Takes Solicitor General's Office To Task Over Shifting Positions, Nat'l L. J., Nov. 27, 2012 ("Chief Justice John Roberts Jr. scolded a Justice Department lawyer in open court Tuesday, accusing the solicitor general's office of being less than candid in a brief describing the government's change in position on an issue before the court."; "The rare episode seemed to be a deliberate effort by Roberts to send a message to the solicitor general's office that it may be giving too-short shrift to the tradition of continuity between administrations that the court is accustomed to seeing. Solicitor General Donald Verrilli Jr. was in the courtroom and saw the unusual exchange."; "During routine arguments in an ERISA health insurance case titled US Airways v. McCutchen, Roberts zeroed in on footnote 9 in the government's brief, which described a position taken in previous ERISA cases by Bush Administration Secretary of Labor Elaine Chao and then stated that 'upon further reflection . . . the Secretary is now of [a different] view.'"; "Roberts said angrily, 'That is not the reason. It wasn't further reflection. We have a new secretary under a new administration, right?' He was referring to Obama administration labor secretary Hilda Solis."; "Joseph Palmore, the assistant to the solicitor general arguing in the case, agreed, and Roberts continued, 'It would be more candid for your office to tell us when there is a change in position that it's not based on further reflection of the secretary. It's not that the secretary is 'now of the view;' there has been a change. We are seeing a lot of that lately.'"; "When Palmore interjected that the law had changed in the last decade, Roberts replied, 'Then tell us the law has changed. Don't say the secretary is now of the view. It's not the same person. You cite the prior secretary by name, and then you say, the secretary is now of the view. I found that a little disingenuous.'"; "Palmore said, 'Well, I apologize for that,' and soon the discussion turned to other aspects of the case.").

Best Answer

The best answer to this hypothetical is **PROBABLY YES**.

N 3/12; B 8/14

Lobbying

Hypothetical 38

You just opened a wholly owned consulting firm to handle lobbying, public relations, crisis management, and other similar work. The first three potential projects have all raised issues that you have been asked to address.

(a) May your consulting firm subsidiary lobby for a general business tax increase, without the consent of all of your law firm clients who would pay the higher taxes?

YES (PROBABLY)

(b) Without the consent of a pest control company your law firm represents, may your consulting firm subsidiary lobby for tighter environmental controls on all pest control companies (of which there are approximately 100 doing business in your state)?

MAYBE

(c) Without the consent of a landfill your law firm represents, may your consulting firm subsidiary lobby for new landfill regulations that will dramatically increase operating costs for your client and the two other landfills in the state that are large enough to fall under the proposed new law?

NO (PROBABLY)

Analysis

(a)-(c) Very few courts or bars have analyzed what type of lobbying activities are so acutely "adverse" as to trigger the conflicts rules, therefore requiring consent.

Not surprisingly, the D.C. Bar has dealt with this issue -- finding that "most" but not all of the conflict of interest rules apply to lawyers who are acting as lobbyists.

- District of Columbia LEO 344 (7/2008) (analyzing the conflicts implications of lawyers engaged in lobbying efforts; noting that Washington, D.C., had adopted a different definition of "matter" than the ABA Model Rules; ultimately concluding that lawyers/lobbyists cannot represent competing lobbying clients in the same matter, but can lobby against the interest of a client that the

lawyer represents on unrelated matters; "Most of the conflict rules apply to lawyer-lobbyists engaged in lobbying. Lawyer-lobbyists in the District of Columbia who hold themselves out as lawyers may not advance opposing positions in the same lobbying matter even with consents from all of their lobbying clients. Moreover, the lawyer-lobbyists must also ensure that she is not placing herself in a position where she might have to pull her punches on behalf of one client so as to protect the interests of another. Such conflicts can be waived with informed consent from the affected clients, provided that the lawyer reasonably believes that he or she can provide competent and diligent representation. Absent special circumstances, all of these restrictions also apply to other lobbyists in the same law firm, even if those other lobbyists are not themselves lawyers."; "Lawyer-lobbyists are not, however, generally subject to Rule 1.7(b)(1) in the conduct of lobbying activities. This rule is confined to 'matter[s] involv[ing] a specific party or parties,' a phrase that excludes lobbying, rulemaking and other matters of general government policy. As a result, Rule 1.7(b)(1) does not prohibit a lawyer-lobbyist from advancing a position in a lobbying matter that may be opposed in that same lobbying matter by another client of the lawyer-lobbyist (or of the lawyer-lobbyist's law firm) where the other client is unrepresented in the lobbying matter or is represented by a different lobbyist who is not associated with the lawyer-lobbyist's firm."; "Finally, Rule 5.7 provides guidance for lawyers and law firms who wish to establish a law-related lobbying practice that is not governed by the conflicts provisions of the Rules of Professional Conduct. To do so, however, the lobbying client must receive clear notice that the services are not legal services and that the usual protections accompanying a client-lawyer relationship do not apply."; explaining the imputation of an individual lawyer/lobbyist's disqualification; "Under Rule 1.10, while lawyers are associated in a law firm, none of them may knowingly represent a client when any one of them practicing alone would be precluded from doing so by Rule 1.7. This rule imputing each lawyer's conflicts to all other lawyers in the firm applies to lobbying representations and lobbyists employed by a law firm. However, a conflict will not be imputed when 'the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm.' Rule 1.10(a)(1).").

In contrast, a Virginia legal ethics opinion concluded that lawyers' conflicts rules apply to lawyers/lobbyists -- although the line between those two activities can be blurred, and a lawyer's ownership of a lobbying firm complicates matters even further.

- Virginia LEO 1819 (9/19/05) (explaining that a lawyer who co-owns (with other nonlawyers) a lobbying firm must comply with certain ethics rules (such as the prohibition on criminal or wrongful conduct), although not rules that

apply only when a lawyer is "representing a client," such as the ex parte contact rule; noting that this lawyer's references to his expertise as a lawyer, etc. could create confusion about whether he is providing legal advice -- lawyers providing such services have "an affirmative duty to clarify the boundaries of the business relationship," including whether any legal services are included; concluding that lawyers not clarifying their role could find themselves bound by the confidentiality and conflicts rules governing lawyers representing clients -- although a lawyer providing legal services through a lobbying firm could be guilty of a misdemeanor for unauthorized practice of law; if this lawyer was simultaneously engaged in a law practice, the lawyer's "responsibilities to . . . a third person" (client of the lobbying firm) might prevent the lawyer from representing clients adverse to lobbying firm clients (a disqualification which would be imputed to all lawyers in the lawyer's law firm); the ethics rules governing conflicts do not apply to a lawyer/lobbyist's pure lobbying work; explaining that a lawyer who is acting only as a lobbyist can lobby against a former lobbying client for whom the lawyer previously lobbied; noting that if the lawyer must follow the conflicts rules because a lobbying client reasonably believes that the lawyer is supplying legal advice (and thus must comply with the conflicts rules), the individual lawyer's disqualification would not be imputed to the entire lobbying firm (because it is not a law firm)).

Lobbying activities can obviously involve a continuum of adversity. Although it is not easy to apply such a general principle in specific cases, generally only acute and direct adversity require a client's consent.

Best Answer

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

Degree of a "Material Limitation" That Creates a Conflict

Hypothetical 39

You were just appointed to your firm's Conflicts Committee, and you are trying to understand basic conflicts concepts. You realize that your firm cannot represent one client in a matter directly adverse to another client. You also understand that you cannot undertake a representation if one of your lawyer's judgment would be "materially limited" by that lawyer's duty to some other client or a third party, or by the lawyer's own interests. You are having some trouble understanding what level of possible "material limitation" triggers a problem under that second type of conflict.

For the material limitation type of conflict, what level of "limitation" requires you to treat a representation as a conflict requiring client consent, etc.

When a material limitation is "possible"?

When there is there a "significant risk" of a material limitation?

When a material limitation is "inevitable"?

WHEN THERE IS A "SIGNIFICANT RISK" OF A MATERIAL LIMITATION

Analysis

The ethics rules describe two types of conflicts of interest. Lawyers are most familiar with the first type -- in which "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1). Some folks describe this 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 provides "informed consent." ABA Model Rule 1.7(b).

The Restatement takes essentially the same approach, but provides more detail than the ABA Model Rules.

> A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

Restatement (Third) of Law Governing Lawyers § 121 (2000). A comment provides more guidance.

- Restatement (Third) of Law Governing Lawyers § 121 cmt. c(iii) (2000) ("General antagonism between clients does not necessarily mean that a lawyer would be engaged in conflicted representations by representing the clients in separate, unrelated matters. A conflict for a lawyer ordinarily exists only when there is conflict in the interests of the clients that are involved in the matters being handled by the lawyer or when unrelated representations are of such a nature that the lawyer's relationship with one or both clients likely would be adversely affected.").

Another comment explains that assessing such a conflict's materiality might include examining a client's retainer agreements and the client's statements.

- Restatement (Third) of Law Governing Lawyers § 121 cmt. c(ii) (2000) ("Materiality of a possible conflict is determined by reference to obligations necessarily assumed by the lawyer . . . , or assumed by agreement with the client either in the retainer agreement . . . or in the course of the representation . . . . An otherwise immaterial conflict could be considered material if, for example, a client had made clear that the client considered the possible conflict a serious and substantial matter.").

Another comment explains the meaning of the "substantial risk" factor.

- Restatement (Third) of Law Governing Lawyers § 121 cmt. c(iii), illus. 3 (2000) ("Clients A and B have come to Lawyer for help in organizing a new business. Lawyer is satisfied that both clients are committed to forming the enterprise and that an agreement can be prepared that will embody their common undertaking. Nonetheless, because a substantial risk of future conflict exists in any such arrangement, Lawyer must explain to the clients that because of future economic uncertainties inherent in any such undertaking, the clients' interests could differ in material ways in the future. Lawyer must obtain informed consent pursuant to § 122 before undertaking the common representation.").

Several Restatement illustrations provide examples of how this type of conflict rule can apply.

- Restatement (Third) of Law Governing Lawyers § 121 cmt. d (2000) ("Similar problems could arise where the client and nonclient are individuals and representation adverse to the nonclient could have direct material effect on the client's interest. Such a situation would exist, for example, where a lawyer

representing one spouse was asked to bring suit against the other, or where a lawyer representing one holder of an interest in property was asked by someone else to bring suit against the other holder in circumstances where the suit could materially and adversely affect the interest of the lawyer's client."; "In yet other situations, the conflict of interest arises because the circumstances indicate that the confidence that a client reasonably reposes in the loyalty of a lawyer would be compromised due to the lawyer's relationship with another client or person whose interests would be adversely affected by the representation.").

- Restatement (Third) of Law Governing Lawyers § 121 cmt. d, illus. 8 (2000) ("The same facts as in Illustration 7 , except that one-half of Lawyer's practice consists of work for Corporation A. Plaintiff could reasonably believe that Lawyer's concern about a possible adverse reaction by Corporation A to the suit against Corporation B will inhibit Lawyer's pursuit of Plaintiff's case against Corporation B . . . . Lawyer may not represent Plaintiff in the suit against Corporation B unless Plaintiff consents to the representation under the limitations and conditions provided in § 122. Because Lawyer's representation of Corporation A is assumed in Illustration 7 not to be adversely affected by the representation of Plaintiff, the consent of Corporation A to the representation is not required.").

Another illustration describes a scenario which does not involve an ethics conflict.

- Restatement (Third) of Law Governing Lawyers § 121 cmt. c(iii), illus. 5 (2000) ("For many years Law Firm has represented Bank in mortgage foreclosures and does so currently. Other lawyers in Law Firm have continuously represented Manufacturer as outside general counsel and do so currently. Bank and Manufacturer entered into an agreement under which Bank would loan a sum of money to Manufacturer. Lawyers from Law Firm did not represent either client in negotiating the loan agreement. A dispute arose between the parties to the agreement, and Manufacturer announced that it would file suit against Bank for breach of the loan contract. Absent client consent as provided in § 122, Law Firm lawyers may not represent either Bank or Manufacturer in the litigation . . . . Law Firm may not withdraw from representing either client in order to file or defend a suit on the loan agreement against the other . . . . Law Firm may, however, continue to provide legal services to both clients in matters unrelated to the litigation because as to those matters the clients' interests are not in conflict.").

A 2014 malpractice case against the well-known Blank Rome law firm highlights how this type of conflict can arise.

- Christine Simmons, Lawsuit by Divorce Client Against Blank Rome Proceeds, N.Y. L.J., Mar. 18, 2014 ("A judge has refused to dismiss parts of a legal malpractice suit brought by an ex-client of Blank Rome who claims the law firm threw her 'under the bus' when it simultaneously represented ex-husband's employer, Morgan Stanley, during her divorce. Blank Rome matrimonial partners Norman Heller and Dylan Mitchell represented Kristina Armstrong against her ex-husband, Michael Armstrong. She claims the firm never told her it was also representing her husband's then-employer, Morgan Stanley, in lucrative transactions -- even when Michael was on the company's management committee -- and the firm did not act in her best interests. Blank Rome moved to dismiss parts of her legal malpractice suit, claiming it contained allegations of conflict that were scandalous and unnecessary. But Manhattan Supreme Court Justice Anil Singh found Blank Rome and two partners failed to show that the parts of the complaint lacked relevance or necessity. Singh, however, dismissed a portion of the complaint for violating New York General Business Law. The parties will proceed to discovery, said Kristina's malpractice attorney, Jonathan Sack, of litigation boutique Sack & Sack. 'I believe the court got it right,' Sack said. ' 'There's a message to be sent to the defendants in so far as you need to fully disclose any perceived conflict that you reasonably believe could interfere with the zealous advocacy of a client matter.' 'You got to run a conflicts check,' he added.").

To make matters even worse, law firms have a very difficult time identifying conflicts like this. Almost by definition, law firms' conflicts analyses involve cross-checking client names. A dilemma such as that faced by Blank Rome normally wouldn't surface in such a conflicts check.

Best Answer

The best answer to this hypothetical is **WHEN THERE IS A "SIGNIFICANT RISK" OF A MATERIAL LIMITATION**.

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