

# BASIC CONFLICTS OF INTEREST RULES: KEY ISSUES

## 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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## **TABLE OF CONTENTS**

<b><u>Hypo No.</u></b>	<b><u>Subject</u></b>	<b><u>Page</u></b>
<b><u>Adversity to Current Clients: General Rules</u></b>		
1	General Rule -- Adversity to Current Clients.....	1
2	Conflicts Arising in the Course of a Representation.....	4
<b><u>Definition of "Client"</u></b>		
3	Government Entities.....	9
4	Partnerships.....	14
5	Associations .....	17
6	Insured/Insurance Company .....	21
7	Estates .....	41
8	Bond Counsel .....	44
<b><u>Definition of "Client" in a Corporate Setting</u></b>		
9	Identifying the Client Within a Corporate Entity .....	45
10	Resolving Intra-Corporate Disputes .....	57
11	Identifying the Client Within a Closely Held Corporation .....	60
12	Identifying the Client Within a Corporate Family: Outside Lawyers' Issues .....	94
13	Identifying the Client Within a Corporate Family: In-House Lawyers' Issues .....	115
<b><u>Definition of "Adversity"</u></b>		
14	Business Adversity .....	119
15	Adverse Financial Impact .....	122
16	Discovery of Clients .....	124

<b><u>Hypo No.</u></b>	<b><u>Subject</u></b>	<b><u>Page</u></b>
17	Positional Adversity .....	132
<b><u>Adversity in Joint Representations</u></b>		
18	Joint Representations: Basic Rules.....	136
19	Creditors.....	147
20	Opposite Sides of the Same Transaction .....	150
21	Opposite Sides of the Same Litigation .....	159
<b><u>Adversity to Former Clients: General Rules</u></b>		
22	General Rule -- Adversity to Former Clients .....	163
23	Defining the End of a Relationship .....	168
24	Irrelevance of the Time since the Representation Ended .....	174
25	Irrelevance of the Representation's Duration .....	177
<b><u>Applying to Former Client Information-Based Conflicts Analysis</u></b>		
26	Meaning of "Substantial Relationship" .....	180
27	"Playbook" Information.....	188
<b><u>Withdrawal from a Representation</u></b>		
28	Ability to Withdraw from a Representation At Any Time If There is No Prejudice.....	193
29	Ability to Withdraw if the Client Does Not Pay Invoices .....	195
30	The "Hot Potato" Rule .....	199
<b><u>Consents</u></b>		
31	Permitted Disclosure When Seeking Consents .....	206
32	Revocability of Consents.....	209
33	Prospective Consents .....	214

<b><u>Hypo No.</u></b>	<b><u>Subject</u></b>	<b><u>Page</u></b>
	<b><u>Disqualification</u></b>	
34	Disqualification -- Standards .....	238
35	Disqualification -- Process and Effect .....	248

## 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.<sup>1</sup> In Philadelphia LEO 2009-7, the bar held that the situation did not involve a "thrust upon"

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<sup>1</sup> 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

## Government Entities

### Hypothetical 3

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).<sup>1</sup> 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

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<sup>1</sup> 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

## Partnerships

### Hypothetical 4

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.<sup>1</sup>

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

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<sup>1</sup> 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

## Associations

### Hypothetical 5

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.<sup>1</sup>

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<sup>1</sup> 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

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

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apply equally to unincorporated associations. Thus the approach taken in this opinion is not affected by 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.").

disqualify Alston & Bird from handling a matter adverse to a Safeway 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 6

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.<sup>1</sup>

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

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<sup>1</sup> 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."").

- Virginia LEO 1863 (9/26/12) (explaining that Virginia case law and ethics opinions "suggest" that a lawyer hired by an insurance company to represent its insured represents only the insured; noting that on the other hand, absent a conflict of interest, the same lawyer may represent both the insurance company and the insured; concluding that given this situation, a plaintiff's lawyer may communicate ex parte with the insurance adjuster or other insurance company executive without the insured's defense lawyer's consent -- "unless the plaintiff's lawyer is aware that the defendant/insured's lawyer also represents the insurer [overruling LEOs 550, 687, 1169 and 1524 to the extent that it implies otherwise]." [overruled in LEO 1863 (9/26/12), which indicated that plaintiff's lawyer may speak ex parte with an insurance adjuster or other insurance company executive unless the plaintiff's lawyer is aware that the insured's lawyer also represents the insurance company].
- 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."<sup>2</sup>

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).

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<sup>2</sup> 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.").



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)).
- 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 Colquhoun 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 7

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](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.

Borisoff 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 8

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**.



## Identifying the Client Within a Corporate Entity

### Hypothetical 9

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).<sup>1</sup> 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."<sup>2</sup>

### **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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<sup>1</sup> Lawrence E. Jaffee Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412 (N.D. Ill. 2006).

<sup>2</sup> 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.<sup>3</sup>

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).<sup>4</sup>

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<sup>3</sup> 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.").

<sup>4</sup> 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.<sup>5</sup> 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).<sup>6</sup>

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<sup>5</sup> 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).

<sup>6</sup> 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.<sup>7</sup>

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. . . .

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<sup>7</sup> 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.<sup>8</sup>

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<sup>8</sup> 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 Podlucky 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.<sup>9</sup> 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."<sup>10</sup>

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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<sup>9</sup> Id. at 742.

<sup>10</sup> 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."<sup>11</sup>
- "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."<sup>12</sup>
- "By its Resolution, the Board authorized the Special Committee to retain counsel to conduct an investigation 'on behalf of the company.'"<sup>13</sup>

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

<sup>12</sup> Id. at 749 n.3.

<sup>13</sup> Id. at 749.

- "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."<sup>14</sup>
- "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.'"<sup>15</sup>
- "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."<sup>16</sup>

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.<sup>17</sup>

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.

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<sup>14</sup> Id. at 749-50.

<sup>15</sup> Id. at 750.

<sup>16</sup> Id. at 750.

<sup>17</sup> 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.

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 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

## Resolving Intra-Corporate Disputes

### Hypothetical 10

One of your law school classmates is interviewing for in-house law jobs. She is a careful planner, and she wants your reaction to two issues, "just in case they come up."

- (a) If state law and the governing corporate documents require a majority board of directors vote to fire the company's lawyer, may she continue to represent the corporation if the board deadlocks on a motion to fire her?

**YES**

- (b) What should your roommate do if the president of one wholly owned subsidiary gives her direction that is directly contrary to that given by the president of another wholly owned subsidiary?

**ARRANGE FOR THE PARENT TO RESOLVE  
THE DISPUTE, AND FOLLOW ITS DIRECTION**

### 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.

Among other things, there might be some question about the identity of the client of a corporation's law department. ABA Model Rule 1.0 cmt. [3] explains 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."

**(a)** In-house and outside lawyers generally must follow the direction of a corporate client's duly elected board.

If the board must follow a certain procedure to terminate the lawyer, the lawyer may continue representing the corporation until the board takes the required action.

- Virginia LEO 930 (6/11/87) (it is not improper per se for a lawyer to continue representing a corporate board when two members of the board are satisfied with the lawyer and two are not; the lawyer must serve the interests of the board as a whole).

Lawyers ignoring these principles can face serious consequences.

- Ky. Bar Ass'n v. Hines, 399 S.W.3d 750, 769 (Ky. 2013) (suspending for two years a lawyer who ignored a majority of a board and filed an action on behalf of the corporation; "[T]he simple fact is that Hines [lawyer] was hired by the corporation, which acts through its board and officers. . . . If some of the board members and shareholders were dissatisfied, they had remedies available, namely, a shareholder derivative suit. But that is not what Hines did. Instead, he filed suit directly on behalf of the corporation. He even admitted that his suit should have been a shareholder derivative suit as the litigation progressed. The fact that some of the board and shareholders were dissatisfied did not justify Hines's decision to side with them and presume they were the lawful controllers of the company, and then to file suit directly on behalf of the corporation."; "In fact, the decision whether to pursue litigation directly on behalf of the corporation is lodged solely with the board of directors.").

**(b)** Lawyers representing corporations may also represent their divisions and subsidiaries, but must take direction from the ultimate source of the corporation's authority.

This issue is easy in the case of corporate divisions that seem to have differing views -- the corporation's lawyer must follow instructions from the corporation's duly elected management.

- Restatement (Third) of Law Governing Lawyers § 131 cmt. d ("If a single business corporation has established two divisions within the 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 procedures.").

In the case of wholly owned subsidiaries, the same rule applies.

However, the issue becomes complicated in the case of subsidiaries that are less than wholly owned. This is because the lawyer must remember that the corporate client has fiduciary duties to minority shareholders. Restatement (Third) of Law Governing Lawyers § 131 cmt. d, illus. 2 (explaining that a lawyer representing a corporation that is 60% owned by its parent who is asked to assist in a transaction of uncertain fairness may do so only with the consent of the parent as well as the client, because the ownership of the two corporations "is not identical and their interests materially differ in the proposed transaction").

A 2008 New York City legal ethics opinion explained that in-house lawyers representing a corporate parent and a partially owned subsidiary "must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests." New York City LEO 2008-2 (9/08).

### **Best Answer**

The best answer to **(a)** is **YES**; the best answer to **(b)** is **ARRANGE FOR THE PARENT TO RESOLVE THE DISPUTE, AND FOLLOW ITS DIRECTION.**

## Identifying the Client Within a Closely Held Corporation

### Hypothetical 11

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.

- Sandra 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 adversary 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 principals 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 refrain 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 12

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.<sup>1</sup> However, it is unclear whether all members of the corporate "family" are also clients for conflicts purposes.<sup>2</sup>

### 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

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<sup>1</sup> ABA Model Rule 1.13(a).

<sup>2</sup> 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.<sup>3</sup> 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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<sup>3</sup> 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

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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

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;<sup>4</sup> and (2) a

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consent is required, under either paragraph of Rule 1.7, the lawyer should be prepared to show how he was able to make the various determinations required without contacting the client for information or consent -- particularly determinations (a) that the client does not have an expectation that the corporate affiliate will be treated as a client, and (b) that the proposed representation adverse to the affiliate will not have a material adverse effect on the representation of the client.").

<sup>4</sup> 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

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<sup>5</sup> -- 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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owned subsidiary of Corporation A; any judgment obtained against Corporation B will have a material 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.").

<sup>5</sup> 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-subsiary 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.<sup>6</sup> Other courts have found that the representation of one member of the corporate family does not have that effect.<sup>7</sup>

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<sup>6</sup> 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.

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

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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).

<sup>7</sup> 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).

- 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 of 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-subsidary relationship is even more attenuated than the parent-subsidary 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 13

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 § 131 illus. 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 Avail, 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**.

## Business Adversity

### Hypothetical 14

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

## Adverse Financial Impact

### Hypothetical 15

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**.

## Discovery of Clients

### Hypothetical 16

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.<sup>1</sup>

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

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<sup>1</sup> 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 matter<sup>3</sup> [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).<sup>2</sup>

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<sup>2</sup> 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

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.<sup>3</sup>

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.).

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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 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.").

<sup>3</sup> ABA LEO 367 (10/16/92).

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 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).<sup>4</sup> 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 do 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 --

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<sup>4</sup> Illinois LEO 05-01 (1/2006), *supra* note 2.

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 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."<sup>5</sup> 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

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<sup>5</sup> 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 17

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

## Joint Representations: Basic Rules

### Hypothetical 18

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 significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

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

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

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if the lawyer "reasonably believes" that she can "provide competent and diligent representation," the representation does not violate the law, and each client provide "informed consent." ABA Model Rule 1.7(b).<sup>1</sup>

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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<sup>1</sup> The ABA Model Rules require such consent to be "confirmed in writing," but many states do not. ABA Model Rule 1.7(b)(4).

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

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

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

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

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

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

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

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

### **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](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](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](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**.

B 6/14

## Creditors

### Hypothetical 19

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). On 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

## Opposite Sides of the Same Transaction

### Hypothetical 20

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 waive 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 21

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.<sup>1</sup>

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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<sup>1</sup> 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-mediator, 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

## General Rule -- Adversity to Former Clients

### Hypothetical 22

In connection with your service on a committee reviewing your state's ethics rules, you have been asked to vote on proposals governing adversity to former clients.

What basic conflict rule should apply to a lawyer's adversity to a former law firm client?

1. As long as the lawyers with material confidential information do not work on the matter (and comply with their ethical duty of confidentiality), other lawyers in the firm may be adverse to the former client.
2. As long as the firm sets up a formal "ethics screen" prohibiting the lawyers with material confidential information from revealing it to anyone else in the firm, other lawyers in the firm may be adverse to the former client.
3. If any lawyer at the firm has material confidential information from an earlier representation, no lawyer in the firm may be adverse to the former client.

**THERE IS NO "BEST ANSWER" IN THIS HYPOTHETICAL, BUT THE GENERALLY APPLICABLE RULE IS NO. 3 (THE NARROWEST RULE)**

### Analysis

The basic conflicts rule governing adversity to former clients primarily rests on a duty of confidentiality, rather than on a duty of loyalty.

Unlike the analysis when a lawyer considers adversity to a current client, this assessment therefore must consider the nature of the earlier representation, and the substance of the information the lawyer learned or was likely to have learned in the earlier representation. The bottom-line rule is that lawyers may not (absent consent) be adverse to a former client if:

- The adversity is in the "same" or "substantially related" matter as the earlier representation; or

- The lawyer acquired material confidential information that could now be used to the former client's disadvantage.

ABA Model Rule 1.9(b).<sup>1</sup>

The ABA Model Rules can be somewhat confusing, because the information-based concern does not appear in the black letter rule itself, but rather in a comment that defines as "substantially related" any matter in which the lawyer might have acquired material confidential information that the lawyer could now use against the client.

Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

ABA Model Rule 1.9 cmt. [3] (emphasis added).

Interestingly, the ABA Model Rules take a different approach to a lawyer's adversity to a current and to a former client.

Under ABA Model Rule 1.7, a lawyer faces a "concurrent conflict of interest" if the lawyer's representation of one client "will be directly adverse to another client" or if there is a "significant risk" with a lawyer's representation of a client will be "materially limited by the lawyer's responsibilities to another client [or] a former client." ABA Model Rule 1.7(a). In that circumstance, a lawyer may proceed only (among other things) if the client consents and if "the lawyer reasonably believes that the lawyer will be able to

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<sup>1</sup> ABA Model Rule 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.").

provide competent and diligent representation to each affected client." ABA Model Rule 1.7(b)(1). In other words, ABA Model Rule 1.7 contains what amounts to an objective "reasonable lawyer" standard that might prohibit the lawyer's representation despite client consent.

In contrast, ABA Model Rule 1.9 allows a lawyer (if the former client provides informed consent) to "represent another person in the same or substantially related matter in which [a new client's interests] are materially adverse to the interests of the former client." ABA Model Rule 1.9(a). That rule does not contain an explicit "reasonable lawyer" standard. However, a lawyer assessing a possible representation adverse to a former client presumably has to look at both ABA Model Rule 1.9 and ABA Model Rule 1.7. If an adversity to the former client would trigger the "materially limited" provision of ABA Model Rule 1.7(a)(2), the "reasonable lawyer" standard of ABA Model Rule 1.7(b)(1) presumably applies. ). One would think that the "materially limited" standard would automatically apply if the lawyer took a representation adverse to a former client "in the same or substantially related matter" in which the lawyer formerly represented the client, but the lack of a "reasonable lawyer" standard in ABA Model Rule 1.9 at least implies that such is not the case.

The Restatement takes the same approach. Restatement (Third) of Law Governing Lawyers § 132 (2000). The Restatement also builds the information issue into the "substantially related" definition, by indicating that

the current matter is substantially related to the earlier matter if: (1) the current matter involves the work the lawyer performed for the former client; or (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the

former client, unless that information has become generally known.

Restatement (Third) of Law Governing Lawyers § 132 (2000).

A 2008 District of Columbia legal ethics opinion provided a useful analysis.

A lawyer who has formerly represented a client in a matter is prohibited from representing another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent. Two matters are "substantially related" to one another if there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation is useful or relevant in advancing the client's position in the new matter. Subject to certain conditions, a lawyer may limit the scope of the new representation such that factual information normally obtained in the prior matter would be legally irrelevant to the advancement of the current client's position in the new matter. Specifically, by agreeing only to represent a client as to a discrete legal issue or with respect to a discrete stage in the litigation, a lawyer may be able to limit the scope of the representation such that the new matter is not substantially related to the prior matter. Restrictions on the scope of the representation that effectively ensure that there is no substantial risk that confidential factual information as would normally have been obtained in the prior representation would be useful or relevant to advance the client's position in the new matter may, under certain circumstances, be sufficient to avoid a conflict of interest."

District of Columbia LEO 343 (2/2008). The D.C. Bar also noted that

[t]he Restatement likewise suggests that "the lawyer may limit the scope of representation of a later client so as to avoid representation substantially related to that undertaken for a previous client." RESTATEMENT OF THE LAW GOVERNING LAWYERS at § 132 cmt. E (2007). . . .

Even if it is permissible generally to restrict a representation to avoid substantial overlap with a prior representation, it may not be possible in a particular case. Private lawyers, like former government lawyers, should "err well on the side of caution." We have considered two

different categories in which a lawyer may avoid the applicability of D.C. Rule 1.9 -- by agreeing only to represent a client as to a discrete legal issue and by agreeing to represent a client with respect to a discrete stage of the litigation. While we recognize that these categories can, under appropriate conditions, allow for lawyers to represent clients without violating D.C. Rule 1.9, we also appreciate that it may prove very difficult for lawyers to do so in fact. Where confidential information from the prior representation could be useful in or relevant to the new representation -- however it may be limited or circumscribed -- then the substantial-relationship test is satisfied, and the new representation may not proceed without the consent of the former client.

Id. (citation omitted).

The harshness of this information-based rule becomes apparent when combined with the general principle imputing any individual lawyer's disqualification to all other lawyers in that firm. ABA Model Rule 1.10. That concept makes sense in a loyalty-based context (as with adversity to a current client), but seems out of place when the prohibition rests on information (which of course is useless to any lawyer who does not possess the information).

Nevertheless, the general imputation rule normally precludes a law firm from avoiding a conflict in this setting by either expecting any of its lawyers with material confidential information to honor their ethics duties of confidentiality, or even erecting "ethics screens" around those lawyers so that others in the firm (untainted by the information) may pursue adversity to the former client.

### **Best Answer**

There is no "best answer" in this hypothetical, but the generally applicable rule is

**No. 3** (the narrowest rule).

N 3/12

## Defining the End of a Relationship

### Hypothetical 23

About six months ago, a doctor asked you to prepare an offer for an office building she was interested in purchasing. She gave you the figure to include in the offer, and you prepared and sent her a standard offer for her review. You have not heard from her since you sent her the draft offer, and you have no idea whether she ever presented it to the seller. This morning, you received a call from a company who wants you to pursue a trademark infringement action against the doctor (based on some phrases that the doctor uses in her marketing).

Without the doctor's consent, can you represent the company in the trademark action against the doctor?

### MAYBE

### Analysis

Every state's ethics rules recognize an enormous dichotomy between a lawyer's freedom to take matters adverse to a current client and a former client.

Absent consent, a lawyer cannot take any matter against a current client -- even if the matter has no relationship whatever to the representation of that client. ABA Model Rule 1.7. In stark contrast, a lawyer may take a matter adverse to a former client unless the matter is the "same or . . . substantially related" to the matter the lawyer handled for the client, or unless the lawyer acquired material confidential information during the earlier representation that the lawyer could now use against the client. ABA Model Rule 1.9.

Given this difference in the conflicts rules governing adversity to current and former clients, lawyers frequently must analyze whether a client is still "current" or can be considered a "former" client for conflicts purposes.

Absent some adequate termination notice from the lawyer, it can be very difficult to determine if a representation has ended for purposes of the conflicts analysis.

Interestingly, the meager guidance offered by the ABA Model Rules appears in the rule governing diligence, not conflicts.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

ABA Model Rule 1.3 cmt. [4].

In one legal ethics opinion, the ABA provided an analysis that adds to the confusion rather than clarifies.

[T]he Committee notes that 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, the strict provisions governing conflicts in simultaneous representations, in Rule 1.7, rather than the more permissible former-client provisions, in Rule 1.9, are likely to apply.

ABA LEO 367 (10/16/92). Thus, the ABA did not provide any standard for determining when a representation terminates in the absence of some ongoing matter.

The ACTEC Commentaries provide an analysis, but also without any definitive guidance.

[T]he lawyer may terminate the representation of a competent client by a letter, sometimes called an 'exit' letter,



that informs the client that the relationship is terminated. The representation is also terminated if the client informs the lawyer that another lawyer has undertaken to represent the client in trusts and estates matters. Finally, the representation may be terminated by the passage of an extended period of time during which the lawyer is not consulted.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.4, at 57 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) (emphasis added).

The case law is equally ambiguous, although some cases require some dramatic event or affirmative action by the lawyer before finding the representation to have ended.

- Johnson v. Riebesell (In re Riebesell), 586 F.3d 782, 789 (10th Cir. 2009) (holding that a lawyer had an attorney-client relationship with a client until the client terminated the relationship; "[W]e agree with the bankruptcy court, which held otherwise - an attorney-client relationship did exist because (1) the relationship did not formally terminate until March or April 2003, when Johnson terminated it.").
- Comstock Lake Pelham, L.C. v. Clore Family, LLC, 74 Va. Cir. 35, 37-38 (Va. Cir. Ct. 2007) (opinion by Judge Thacher holding that a law firm which had last performed work for a client in August 2005 should be considered to still represent the client, because the law firm "never communicated to [the client] that [the law firm's] representation had been terminated. Regardless of who initiated the termination or representation, the Rules place the burden of communication squarely upon the lawyer. . . . Because the burden is upon the lawyer to communicate with the client upon the termination of representation, the lack of communication of same from [law firm] could lead one to reasonably conclude that the representation was ongoing. It was [law firm's] burden to clarify the relationship, and they failed to satisfy that burden.").
- GATX/Airlog Co. v. Evergreen Int'l Airlines, Inc., 8 F. Supp. 2d 1182, 1186, 1187 (N.D. Cal. 1998) (disqualifying the law firm of Mayer, Brown & Platt upon the motion of the Bank of New York; explaining that the law firm's "use of the word 'currently' to describe the MBP/BNY relationship evidences its

- longstanding and continuous nature. Some affirmative action would be needed to sever that type of relationship, and MBP assumed the relationship had not been severed." (emphasis added); also concluding that the Bank was a current client because "MBP [the firm] assisted BNY [the Bank] on a repeated basis whenever matters arose over a three-year period. Although MBP may or may not still have been working on matters for BNY when the January 30 complaint was filed, it is undisputed that MBP billed BNY through January 12."), vacated as moot, 192 F.3d 1304 (9th Cir. 1999).
- Mindscape, Inc. v. Media Depot, Inc., 973 F. Supp. 1130, 1132-33 (N.D. Cal. 1997) (finding that a law firm's attorney-client relationship with a client was continuing as long as the lawyer had a "power of attorney" in connection with a patent, was listed with the Patent & Trademark Office as the addressee for correspondence with the client, and had not yet corrected a mistake in a patent that had earlier been discovered).
  - Research Corp. Techs., Inc. v. Hewlett-Packard Co., 936 F. Supp. 697, 700 (D. Ariz. 1996) ("The relationship is ongoing and gives rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand that the relationship is no longer depended on." (emphasis added; citation omitted); denying Hewlett-Packard's motion to disqualify plaintiff's counsel).
  - Shearing v. Allergan, Inc., No. CV-S-93-866-DWH (LRL), 1994 U.S. Dist. LEXIS 21680 (D. Nev. Apr. 4, 1994) (noting that the law firm had not performed any work for the client for over one year, but pointing to a letter that the law firm sent to the client indicating that they were a valuable client and that the firm remained ready to respond to the client's needs; granting motion to disqualify plaintiff's counsel).
  - Alexander Proudfoot PLC v. Federal Ins. Co., Case No. 93 C 6287, 1994 U.S. Dist. LEXIS 3937, at \*10 (N.D. Ill. Mar. 30, 1994) (holding that the insurance company could "assume" that the firm would continue to act as its lawyer if and when the need arose based on the law firm's prior service to the party and stating that "any perceived disloyalty to even a 'sporadic' client besmirches the reputation of [the] legal profession"), dismissed on other grounds, 860 F. Supp. 541 (N.D. Ill. July 27, 1994).
  - Lemelson v. Apple Computer, Inc., Case No. CV-N-92-665-HDM (PHA), 1993 U.S. Dist. LEXIS 20132, at \*12 (D. Nev. June 2, 1993) (quoting an earlier decision holding that "the attorney-client relationship is terminated only by the occurrence of one of a small set of circumstances" and listing those circumstances as one of three occurrences -- first, an express statement that the relationship is over, second, acts inconsistent with the continuation of the relationship, or third, inactivity over a long period of time (citation omitted); concluding that "[n]one of these events occurred in the instant action").

- SWS Fin. Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392, 1398, 1403 (N.D. Ill. 1992) (finding that an attorney-client relationship existed between Salomon Brothers and a law firm which had periodically answered commodity law questions, and had finished its last billable project about two months before attempting to take a representation adverse to Salomon; finding that the law firm had the "responsibility for clearing up any doubt as to whether the client-lawyer relationship persisted" (emphasis added); ultimately concluding disqualification was inappropriate).

At least one court has taken a more forgiving approach.

- Banning Ranch Conservancy v. Superior Court, 123 Cal. Rptr. 3d 348, 352 (Cal Ct. App. 2011) (holding that a lawyer's open-ended retainer agreement with the city entered into six years earlier did not render the city a current client when the lawyer had not provided services to the city under the agreement; "The 2005 agreements provide that the Shute firm would provide legal services to the City, on an 'as requested' basis, in connection with 'public trust matters of concern to [the City].' The agreements, however, conditioned such representation on the Shute firm's confirmation of its 'ability to take on the matter.' If such representation was requested and accepted, the agreed-upon rates were to be \$250 per hour for partners and \$215 per hour for associates. The City's supporting declarations showed the 2005 agreements never had been terminated."; "The Shute firm continued doing some minor legal work on another matter, but that matter concluded in early 2006. Other than the initial matter concerning mooring permit regulations, the City never requested that the Shute firm undertake any other legal work pursuant to the 2005 letter agreements."; overturning the trial court's disqualification order).

Thus, the safest (and in some courts, the only) way to terminate an attorney-client relationship is to send a "termination letter" explicitly ending the relationship.

Some lawyers (especially those who practice in the domestic relations area) routinely send out such letters.

However, most lawyers would find "termination letters" contrary to their marketing instincts. In fact, many lawyers continue to send e-mail alerts to former clients (usually addressed to "Clients and Friends"), inviting former clients to firm events, etc. All of

these steps are designed to bring future business, but of course they also provide evidence of a continuing attorney-client relationship.

Unfortunately, the consent remedy does not provide a very promising avenue either. A former client is not likely to feel any loyalty toward the lawyer who used to represent him or her -- and therefore might be less inclined than a current client to grant a consent to the lawyer who wishes to be adverse even on an unrelated matter.

**Best Answer**

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

N 3/12

## Irrelevance of the Time since the Representation Ended

### Hypothetical 24

You represented an antique dealer for about ten years, ending in 1990. Another client just asked you to handle a lawsuit against the antique dealer.

Without your former client's consent, may you represent a client adverse to the antique dealer now that twenty years has passed since you represented the dealer?

### MAYBE

### Analysis

Unfortunately for lawyers wanting some certainty, there is no "statute of limitations" for the ethics rules' prohibition on adversity to a former client in a matter substantially related to the matter the lawyer handled for the client.

This hypothetical comes from a 2009 Massachusetts case. The court disqualified the lawyer, noting that in 1989 the lawyer's paralegal reminded the antique dealer to carefully maintain all of the corporate books -- to avoid any personal liability.<sup>1</sup>

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<sup>1</sup> R & D Muller, Ltd. v. Fontaine's Auction Gallery, LLC, 906 N.E.2d 356, 358, 358-59 (Mass. App. Ct. 2009) (disqualifying plaintiff's lawyer, who had represented defendants many years earlier; "Affidavits and exhibits submitted in support of the motion to disqualify establish that, between 1980 and 1990, Cain Hibbard [plaintiff's lawyer] had represented the Fontaines [defendants in the current action] on personal and business matters. Among other things, in 1987, Cain Hibbard helped Dina Fontaine (Dina) incorporate Dina's Antiques, Inc., and advised her on the proper maintenance of corporate formalities. Two years later, on March 14, 1989, Cain Hibbard sent Dina a letter reminding her of the necessity of maintaining the corporate records of Dina's Antiques, Inc., so that they reflected the current state of the corporation accurately. The letter also advised Dina that 'these records are necessary to support the corporation's role as a separate entity, and they help to maintain a barrier against personal liability.' Shortly thereafter, on April 12, 1989, a Cain Hibbard paralegal wrote to Dina about updating her corporate minute book, and enclosed backdated stockholders' resolutions that she directed Dina to sign and return."; "Here, the judge determined that, even though considerable time had passed since Cain Hibbard represented the Fontaines, the attorneys had been exposed to confidential information that could be used to the Fontaines' disadvantage in the present case."; "The correspondence Cain Hibbard sent to Dina indicates that the firm had advised her and Dina's Antiques with respect to observing corporate formalities, in part to help 'maintain a barrier against personal liability,' and had provided her with backdated corporate resolutions to facilitate her belated compliance. In these circumstances, the judge could conclude in his discretion that Cain Hibbard had been exposed to confidential information germane

At about the same time, a Minnesota court analyzed the possible information overlap between a lawyer's adversity to an employee and the same lawyer's representation of the employee twenty-five years earlier in an employment discrimination case against another employer. In Niemi v. Girl Scouts, 768 N.W.2d 385 (Minn. Ct. App. 2009),<sup>2</sup> the court ultimately declined to disqualify the lawyer, finding that the lawyer had not obtained disqualifying information from the former client.

On the other hand, it should go without saying that a lawyer's earlier acquisition of information that has now become stale often will not preclude adversity to the former client from whom the lawyer acquired the information.

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to the present dispute and that the current and former matters are substantially related for purposes of rule 1.9(a).").

<sup>2</sup> Niemi v. Girl Scouts, 768 N.W.2d 385, 389, 389-90, 390 (Minn. Ct. App. 2009) (refusing to disqualify a lawyer from representing defendant in an employment discrimination case, although the same law firm had represented the plaintiff twenty-five years earlier in an employment discrimination case against another employer; "The second type of information identified by Niemi, her 'approach to litigation,' presents the weaker of the two arguments. As an initial matter, it is debatable whether this type of information can be described as 'confidential factual information.' Minn. R. Prof. Conduct 1.9 cmt. 3. It is not necessarily 'factual' in nature because it appears to consist primarily of Niemi's personal characteristics and behavioral tendencies or, more accurately, Roby's impressions of Niemi's personal characteristics and behavioral tendencies. See State ex rel. Ogden Newspapers, Inc. v. Wilkes, 211 W. Va. 423, 566 S.E.2d 560, 567 (W. Va. 2002) (stating that attorney's '[v]ague general impressions' about corporate client's 'philosophical outlook' did not warrant attorney's disqualification in subsequent lawsuit against corporation); Restatement (Third) of the Law Governing Lawyers § 132 cmt. d(iii) (2000) (stating that attorney's knowledge of manner in which client approaches litigation is not 'independently relevant' for purposes of substantial relation test, unless information is 'directly in issue or of unusual value in the subsequent matter'). In addition, the information is not necessarily 'confidential' because it may refer to information that is available to persons who are not part of the attorney-client relationship, such as opposing counsel, a court reporter transcribing a deposition, or court personnel, and perhaps even persons who know Niemi through social interactions. See Minn. R. Prof. Conduct 1.9 cmt. 3 ('Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying.').; see also Restatement (Third) of the Law Governing Lawyers § 132(2) (2000) (stating that rules do not restrict attorney's use of information that has become 'generally known')."; explaining that because "this type of information exists in practically every lawsuit," finding that such information would disqualify a lawyer "effectively prevent[s] an attorney from taking a position adverse to a former client for the remainder of the attorney's career. The drafters of the rules could have imposed a lifetime ban on being adverse to a former client, but the drafters obviously declined to do so."; ultimately concluding that "information consisting of Niemi's 'approach to litigation' does not justify a conclusion that the prior lawsuit and the present lawsuit are 'substantially related matters.' We reach this conclusion without considering whether this type of information retains any relevance or usefulness 25 to 30 years after it is acquired.").

- See, e.g., D.C. Rule 1.9 cmt. [3] ("Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related.").

### **Best Answer**

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

N 3/12

## Irrelevance of the Representation's Duration

### Hypothetical 25

A former client just filed a motion to disqualify your firm from handling a matter adverse to it. You check your time records, and discover that one of your lawyers spent less than two hours working for that client during the very brief time that you handled a matter for it.

Without the former client's consent, can you take a matter adverse to the former client whom you represented for less than two hours?

### MAYBE

### Analysis

Just as there is no statute of limitations on the prohibition against lawyers taking matters adverse to a former client that are "substantially related" to the matter the lawyer handled for the client, so there is no bright-line rule governing the duration of a representation that could result in disqualification.

Several courts have disqualified lawyers who represented clients for only a very short period of time.

- Quinn v. Georgilas, 16 LCR 23, 2008 Mass. LCR LEXIS 8 (Mass. Land Ct. Jan. 11, 2008) (disqualifying a law firm which had spent only 5.37 hours representing the former client three years earlier).
- El Camino Res., Ltd. v. Huntington Nat'l Bank, 623 F. Supp. 2d 863, 875, 876, 877, 878, 879 (W.D. Mich. 2007) (assessing a situation in which Pepper Hamilton acted as local counsel for a company, billing 2.5 hours during the first six months of 2007; explaining that Pepper Hamilton sought the client's consent to represent another client adverse to it, but was turned down; explaining that Pepper Hamilton later concluded that "a conflict of interest waiver was not necessary after all" because of an earlier consent the client had provided the firm; ultimately finding that the consent was not sufficient, and disqualifying Pepper Hamilton from adversity to its client; "Ethical rules involving attorneys practicing in the federal courts are ultimately questions of federal law. The federal courts, however, are entitled to look to the state rules of professional conduct for guidance."; "The law makes no distinction



between 'lead' and 'local' counsel in assessing their ethical duties. . . . There are no small or unimportant clients. Pepper Hamilton cannot and does not deny that ePlus Group was an active client of the firm when Pepper Hamilton agreed to undertake the representation of Huntington National Bank to oppose the claims of ePlus in this case." (citation omitted); "The courts universally hold that a law firm will not be allowed to drop a client in order to resolve a direct conflict of interest, thereby turning a present client into a former client."; "Pursuant to this universal rule, the status of the attorney/client relationship is assessed at the time the conflict arises, not at the time the motion to disqualify is presented to the court."; "This ethical rule is not triggered only when the attorney's motives are selfish or otherwise suspect. The rule vindicates the attorney's fundamental duty of loyalty: the breach of ethics is not triggered by bad motive or excused by good motive."; "A law firm is not privileged to extinguish its duty of loyalty to a present client by unilaterally turning it into a former client.").

- United States Filter Corp. v. Ionics, Inc., 189 F.R.D. 26 (D. Mass. 1999) (finding in a declaratory judgment action that a law firm could not handle a matter adverse to a former client, although the pertinent lawyer had spent only 1.6 hours representing the former client).
- Elan Transdermal Ltd. v. Cygnus Therapeutic Sys., 809 F. Supp. 1383, 1388, 1390 (N.D. Cal. 1992) ("The fact that Cost and Rothman billed only a short period of time does not preclude their work from being substantially related to the present litigation."; explaining that lawyers presumably discuss their cases with their colleagues; "Those attorneys most actively engaged on Cygnus projects shared a small office with other attorneys still with the firm. Chu, now the partner in charge of the representation of Elan, was in and out of the Menlo Park office. The presumption of shared confidences is based on the common-sense notion that people who work in close quarters talk with each other, and sometimes about their work. It is also only common sense that when there is no hard evidence of the subjects of years of office conversation, and firm conversation, and there is a significant amount of business to be gained by not remembering that anything relative to a particular former client's representation was discussed, there are strong incentives to claim no actual knowledge."; disqualifying a lawyer who was handling a matter adverse to a former client).

Thus, a lawyer analyzing adversity to a former client must examine the information conveyed, not the duration of the representation.

**Best Answer**

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

N 3/12

## Meaning of "Substantial Relationship"

### Hypothetical 26

Several months ago you began to represent a bank in foreclosing on a hotel in another state. Your bank client had loaned the hotel owner several million dollars five years ago, but he defaulted. Your conflicts check had showed that your firm had previously represented the hotel owner (the matter was called "General Business"), but the matter was closed over 15 years ago. Your firm had not done any work for the owner since then, and the partners who formerly represented the owner could not recall any of the details of their work for him.

You just received a letter from your state bar, reporting that the hotel owner has filed an ethics charge against you. As you hurriedly read the charge, you learn for the first time that 15 years ago your law firm represented the owner in buying the exact hotel upon which you are now helping the bank foreclose. As you do some more checking, you discover that some of the purchase closing documents actually contain your partners' signatures as witnesses. The hotel owner alleges that it is a blatant conflict of interest for you to foreclose on the very same hotel that your partners assisted him in buying.

Does your representation of the bank in the foreclosure matter violate the ethics rules?

### NO (PROBABLY)

### Analysis

Courts and bars take differing positions on the type of relationship that prevents a current representation adverse to a former client.

A comment to the ABA Model Rules provides some guidance to lawyers trying to define the "substantial relationship" test.

Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce.

Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

ABA Model Rule 1.9 cmt. [3] (emphasis added).

The ABA has noted that many courts require matters to be "identical" or "essentially the same" for them to meet the "substantial relationship" standard. ABA LEO 415 (9/8/99).

Most courts follow this basic approach. The Southern District of New York declined to disqualify the law firm of Morgan Lewis from adversity to Koch despite the firm's confidential antitrust audit of a Koch affiliate several years earlier -- pointing to the

requirement that the matters be "identical" or "essentially the same" to trigger the "substantial relationship" test.<sup>1</sup>

In this hypothetical, it would be tempting to conclude that the two matters are "substantially related" -- because they involve the very same piece of property.

However, the issues are quite different, because the current adversity involves a recent debt -- not the underlying transaction that occurred decades ago.<sup>2</sup>

The same debate sometimes arises if a lawyer represents a client in entering into a contract. The general rule would prohibit a lawyer from taking a matter adverse to the

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<sup>1</sup> Koch Indus., Inc. v. Aktiengesellschaft, S.A.R.L., 650 F. Supp. 2d 282, 286, 286-87, 285, 288 (S.D.N.Y. 2009) (declining to disqualify the law firm of Morgan Lewis from handling a matter adverse to Koch although it had conducted a confidential antitrust audit in 2001 for a different Koch affiliate; noting that Morgan Lewis had screened the lawyers handling the case against Koch from those lawyers remaining from the earlier project in which Morgan Lewis represented the Koch subsidiary; noting that the "substantial relationship" standard requires that the matters be "identical" or "essentially the same"; explaining that "[t]he Morgan Lewis audit that plaintiffs cite as the basis for their disqualification motion, however, took place in 2000 and 2001 -- two years after that transaction [which formed the basis of the current litigation Morgan Lewis was handling adverse to Koch]. Further, Morgan Lewis's audit of Koch and certain Koch affiliates did not include KoSa, which was the entity that actually purchased the polyester business that was the locus of the antitrust conspiracy. . . . Instead, the audit report indicates that Morgan Lewis recommended that Koch encourage Kosa to conduct its own antitrust audit and reflects Morgan Lewis's understanding that another law firm would be performing that audit. . . . The audit report is otherwise quite general, providing, for the most part, broad antitrust compliance advice and recommendations. Further, the audit report makes no reference to the DOJ's antitrust investigation, and Morgan Lewis was not otherwise involved in that investigation." (footnote omitted); noting but apparently finding insignificant the fact that "[i]n early 2003, Morgan Lewis sought a conflict waiver to represent a former KoSa customer in one such civil antitrust suit, and Koch's general counsel refused because of Morgan Lewis's prior antitrust compliance work for the company"; "[I]n 2003 Morgan Lewis had sought a conflict waiver to represent a former KoSa customer in a separate antitrust lawsuit related to the 1998 polyester business sale, and Koch's general counsel had refused. (Mem. at 6-7.) The inconsistency between seeking (and being denied) a conflict waiver in 2003 and proceeding with an adverse representation without notifying Koch just five years later is difficult to reconcile. If, indeed, this contradictory behavior was simply the result of a breakdown in Morgan Lewis conflict check procedures, then Morgan Lewis would do well to examine those procedures carefully and immediately, lest future disqualification motions made against it end less favorably.").

<sup>2</sup> See Stokes v. Firestone, 156 B.R. 181, 187 (Bankr. E.D. Va. 1993) (holding that a law firm's brief representation of a couple in buying land did not disqualify the firm from representing the now-former husband in suing the wife for failing to transfer her interest in the land to the former husband as part of a divorce agreement; explaining that "I find a substantial relationship lacking, even though there is a superficial resemblance in that both involve [the land]. The land use issues involved in the previous representation and the domestic relations issues involved in the current litigation are simply not related, much less identical").

former client if it involves the contract formation or the meaning of the contract. On the other hand, a lawyer who formerly represented the client in entering into the contract probably can take a matter adverse to the former client if the representation involves some later developing dispute over payment under the contract, some recent alleged breach, product quality issues, etc.

Not surprisingly, courts sometimes find a disabling "substantial relationship."

- Office of Lawyer Regulation v. Kostich (In re Kostich), 793 N.W.2d 494, 498 (Wis. 2010) (publicly reprimanding a lawyer who interviewed the victim of alleged sexual abuse by a Catholic nun, and then later defended the nun; "We agree with the referee's finding that G.K. [victim] was a former client of Attorney Kostich. As noted, SCR 20:1.9(a) provides that an attorney may not represent one client whose interests are materially adverse to the interests of a former client if the representation involves a matter that is the same or substantially related to the nature of the prior representation of the former client unless the former client consents in writing."; "Attorney Kostich's former relationship with G.K. and his subsequent representation of Giannini [nun] were both adverse and substantially related. G.K. sought legal advice from Attorney Kostich regarding assaults committed by Giannini and whether he could pursue litigation against Giannini. Attorney Kostich then undertook to defend Giannini in a criminal matter in which she was prosecuted for the same assaults on G.K. There is no dispute that Attorney Kostich received G.K.'s therapy records sometime in 1997 or that Attorney Kostich later received substantially the same records as part of the discovery materials in the same records as part of the discovery materials in the criminal case against Giannini."; "Attorney Kostich certainly did not obtain G.K.'s consent to the later representation to Giannini. Indeed, when G.K. learned that Attorney Kostich was going to represent Giannini in the criminal charges arising from the assaults, G.K. contacted Attorney Kostich and voiced his objection to the representation, and Attorney Kostich refused to step down as Giannini's attorney."; "Thus, the record evidence amply supports the referee's conclusion that by representing Giannini on criminal charges in which G.K. was the victim, after G.K. had consulted with Attorney Kostich about bringing a civil action against Giannini for the same sexual assaults that were the subject of the criminal proceedings, Attorney Kostich acted contrary to former and current SCR 20:1.9(a).").

In contrast, ethics rules, legal ethics opinions and case law highlight situations in which there is no disabling substantial relationship.

- Maryland LEO 86-62 (1986) (addressing the following situation: "You present the following factual situation. Your law firm previously represented both a husband and wife in an adoption matter and in preparing their Wills, the latter having occurred in 1981. Subsequently, the husband and wife obtained a divorce, each having separate representation by firms other than yours, at your insistence. The husband now requests you to redraft his Will, deleting his former wife as a legatee."; ultimately holding that "[t]he Committee does not believe that there is any inherent conflict in your situation such that you would have to automatically refuse representation of the husband").
- City of Atlantic City v. Trupos, 992 A.2d 762, 774, 775, 775-76 (N.J. 2010) ("A distillation of these varied precepts yields a workable standard: for purposes of RPC 1.9, matters are deemed to be 'substantially related' if (1) the lawyer for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior representation are both relevant and material to the subsequent representation. We adopt that standard because it protects otherwise privileged communications, see RPC 1.6(a) (proscribing revelation of 'information relating to representation of a client'), while also requiring a fact-sensitive analysis to ensure that the congruity of facts, and not merely similar legal theories, governs whether an attorney ethically may act adverse to a former client."; "[P]laintiff can point to no confidential communications it shared with the law firm that could have been or might be used against it in the 2009 tax appeals."; "[T]here is no record proof that the facts of the prior representation -- the law firm's 2006-2007 representation of plaintiff in defense of tax appeals -- are relevant or material to the 2009 tax appeals. The law firm's 2006-2007 work on behalf of plaintiff dealt with very large commercial properties appraised by a different appraiser than the one who provided the valuations at issue in the 2009 tax appeals. Thus, other than the purely superficial similarity that all of this work involved tax appeals, there are no facts in this record common to the 2006-2007 tax appeals in which the law firm represented plaintiff, on the one side, and the 2009 tax appeals in which the law firm represented taxpayers, on the other side."; "In sum, we conclude that (1) during its representation of plaintiff in 2006-2007, the law firm did not receive confidential information from plaintiff which can be used against plaintiff in the prosecution of the 2009 tax appeals adverse to plaintiff, and (2) the facts relevant to the law firm's 2006 representation of plaintiff also are not relevant and material to the law firm's representation of the taxpayers in the 2009 tax appeals. In those circumstances, the order of disqualification entered against the law firm was unwarranted and must be vacated.").
- Stanley v. Bobeck, 2009 Ohio 5696, at ¶¶ 21, 22 (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; "When an attorney brings an action against a former client on a matter substantially related to his prior representation of that client, the attorney is irrebutably presumed to have benefitted from confidential information relevant to the subsequent case. . . . However, when the attorney in the subsequent litigation is not the original attorney, but, instead, another attorney in the same law firm, the presumption of received confidences becomes rebuttable. . . . In the instant case, the presumption is rebuttable because the original attorney is not the attorney in the instant case. Instead, another attorney from the firm represented Bobeck."; "Stanley has failed to establish that defense counsel possessed confidential information that would be prejudicial to him in the current case. In fact, it is undisputed that counsel never met with Stanley or spoke with him. Instead, all conversations regarding Sunshine I were conducted with Bobeck. Therefore, it is difficult to imagine what confidential information MRFL could have obtained from Stanley given it had never communicated with him. Therefore, MRFL rebutted the presumption that confidential information was received. As a result, the third prong of the Dana [Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882 (6th Cir. 1990)] test has not been met.").

- Graham Co. v. Griffing, Civ. A. No. 08-1394, 2009 U.S. Dist. LEXIS 103222, at \*9, \*9-10, \*13, \*18 n.6, \*20 (E.D. Pa. Nov. 3, 2009) (denying defendant's motion to disqualify the plaintiff's law firm, because lawyers at the firm had earlier represented a corporate affiliate of the defendant and acquired material confidential information that the law firm could now use against the former client; explaining that "to perform a substantial relationship analysis under Rule 1.9, a court must answer the following three questions: (a) what is the nature and scope of the prior representation at issue; (b) what is the nature of the present lawsuit against the former client; and (c) in the course of the prior representation, might the client have disclosed to his attorney confidences which could be relevant to the present action and detrimental to the former client therein."; noting that "[e]ven if a party meets its burden of proving that matters are 'substantially related,' a screen between the attorneys representing the former client and those representing the client adverse to the former client can prevent the opportunity for any arguably confidential information to be used against the former client."; concluding that the law firm had properly screened the possibly affected lawyers from those currently representing the plaintiff against the defendant; "Plaintiff offered the testimony of Mr. Donahue, whom the Court finds to have been highly credible. Mr. Donahue testified, in sum, that (a) confidential information received from Commerce Banc and Commerce Banc Insurances Services during the MA Trademark Litigation was limited to Massachusetts-specific trademark and business opportunity issues, (b) all information and files were returned by Woodcock Washburn after its termination, (c) he could not even remember the vast majority of information he received several years before concerning



the MA Trademark Litigation, and (d) the entire Woodstock Washburn firm has been sternly advised in writing not to discuss any issues concerning Defendants or the instant litigation with Mr. Donahue and his former team. . . . Finally, Mr. Donahue affirmatively represented, as a member of the bar, that he has not shared any confidential information whatsoever with any Woodstock Washburn personnel involved with the instant litigation."; holding that the screening should also have included the law firm's billing records of its earlier representation; "In recognition of the fact that Woodstock Washburn's billing records related to the MA Trademark Litigation might, although very unlikely, contain some specific confidential information, the Court will order Woodcock Washburn to segregate those records from its general files so that its current litigation team may not access them, and to recirculate its screen memo to explicitly include prohibited communication of any confidential information contained in those billing records."; declining to disqualify the law firm, but ordering an additional screening mechanism; "For the sake of absolute caution, the Court will require Woodcock Washburn to revise its screen notice as discussed in footnote 6 of this Memorandum and re-issue it on November 16, 2009, as well as every two months following that date during the pendency of the instant action.").

Interestingly, one bar has explained that lawyers might be able to immunize themselves from a former client's allegation that the lawyers could use the former client's information against it -- which would otherwise require the lawyer's disqualification. In 2008, the Washington, D.C. Bar advised lawyers that they can avoid disqualification by "limit[ing] the scope of the new representation such that factual information normally obtained in the prior matter would be legally irrelevant to the advancement of the current client's position in the new matter."<sup>3</sup> This approach might be theoretically possible, but it is difficult to envision it working in the real world.

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<sup>3</sup> District of Columbia LEO 343 (2/2008) ("A lawyer who has formerly represented a client in a matter is prohibited from representing another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent. Two matters are 'substantially related' to one another if there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation is useful or relevant in advancing the client's position in the new matter. Subject to certain conditions, a lawyer may limit the scope of the new representation such that factual information normally obtained in the prior matter would be legally irrelevant to the advancement of the current client's position in the new matter. Specifically, by agreeing only to represent a client as to a discrete legal issue or with respect to a discrete stage in the litigation, a lawyer may be able to limit the scope of the representation such that the

## Best Answer

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

N 3/12

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new matter is not substantially related to the prior matter. Restrictions on the scope of the representation that effectively ensure that there is no substantial risk that confidential factual information as would normally have been obtained in the prior representation would be useful or relevant to advance the client's position in the new matter may, under certain circumstances, be sufficient to avoid a conflict of interest."; noting that "The Restatement likewise suggests that 'the lawyer may limit the scope of representation of a later client so as to avoid representation substantially related to that undertaken for a previous client.' RESTATEMENT OF THE LAW GOVERNING LAWYERS at § 132 cmt. E (2007)."; "Even if it is permissible generally to restrict a representation to avoid substantial overlap with a prior representation, it may not be possible in a particular case. Private lawyers, like former government lawyers, should 'err well on the side of caution.' . . . We have considered two different categories in which a lawyer may avoid the applicability of D.C. Rule 1.9 -- by agreeing only to represent a client as to a discrete legal issue and by agreeing to represent a client with respect to a discrete stage of the litigation. While we recognize that these categories can, under appropriate conditions, allow for lawyers to represent clients without violating D.C. Rule 1.9, we also appreciate that it may prove very difficult for lawyers to do so in fact. Where confidential information from the prior representation could be useful in or relevant to the new representation -- however it may be limited or circumscribed -- then the substantial-relationship test is satisfied, and the new representation may not proceed without the consent of the former client.").

## "Playbook" Information

### Hypothetical 27

You formerly represented a corporation on several (but not all) of its legal matters. Over the course of that representation, you learned quite a bit about the corporation's preferred approach to settlement discussions and negotiation strategies, corporate executives' willingness or unwillingness to be deposed by an adversary, etc. About six months after your representation of the company ended, you received a call from another company that wants you to handle a breach of contract action against your former client. When your former client learns of this possibility, its president calls you to complain, arguing that you are prohibited from taking the matter because of the "intimate" knowledge you acquired while representing the company.

Is the type of knowledge you acquired while representing the company sufficient to prevent you from taking the breach of contract matter without its consent?

### NO (PROBABLY)

### Analysis

Courts and bars have analyzed the type of information that prohibits lawyers from taking a matter adverse to a former client from or about whom the lawyer learned the information.

If even general information about a corporate client prohibited later adversity to that client, a lawyer would be forever barred from adversity to the corporation -- contrary to the general societal interest in favor of all clients hiring the lawyers they want. On the other hand, allowing a lawyer with fairly specific material confidential information to take a matter adverse to a former corporate client would violate the bedrock duty of confidentiality.

The ABA Model Rules indicate that

[i]n the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand,

knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

ABA Model Rule 1.9 cmt. [3] (emphasis added). Similarly, an ABA legal ethics opinion indicated that "general knowledge of the strategies, policies, or personnel of the former employer [for an in-house corporate lawyer] is not sufficient by itself" to disqualify the lawyer. ABA LEO 415 (9/8/99) (emphasis added).

The Restatement likewise indicates that

[a] lawyer might also have learned a former client's preferred approach to bargaining in settlement discussions or negotiating business points in a transaction, willingness or unwillingness to be deposed by an adversary, and financial ability to withstand extended litigation or contract negotiations. Only when such information will be directly in issue or of unusual value in the subsequent matter will it be independently relevant in assessing a substantial relationship.

Restatement (Third) of Law Governing Lawyers § 132 cmt. d (2000).

A number of commentators use the term "playbook" information -- although it is unclear in some situations whether "playbook" information is the type of useful confidential information that will disqualify a lawyer, or instead whether such information would not be sufficient. It makes more sense to use the term "playbook" in describing disqualifying information -- the type of useful information that a football team would gain by having the adversary's specific "playbook" for a particular game.

In any event, courts take differing approaches to the type of information that meets this standard.

For instance, in 2009 a Minnesota court refused to disqualify a lawyer from adversary to an employee, despite the employee's claim that the lawyer had learned

valuable confidential information about her when the lawyer represented her twenty-five years earlier in an employment discrimination case against another employer. The court explained that the type of disqualifying information that the former client claimed to have conveyed to her lawyer twenty-five years earlier "exist[] in practically every lawsuit," so that disqualifying the lawyer based on that information would "effectively prevent an attorney from taking a position adverse to a former client for the remainder of the attorney's career." Niemi v. Girl Scouts, 768 N.W.2d 385, 389 (Minn. Ct. App. 2009).<sup>1</sup>

In contrast, in 2007 a Maine court disqualified a lawyer from representing the husband in a divorce case, because the lawyer had previously represented the wife in a

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<sup>1</sup> Niemi v. Girl Scouts, 768 N.W.2d 385, 389, 389-90, 390 (Minn. Ct. App. 2009) (refusing to disqualify a lawyer from representing defendant in an employment discrimination case, although the same law firm had represented the plaintiff twenty-five years earlier in an employment discrimination case against another employer; "The second type of information identified by Niemi, her 'approach to litigation,' presents the weaker of the two arguments. As an initial matter, it is debatable whether this type of information can be described as 'confidential factual information.' Minn. R. Prof. Conduct 1.9 cmt. 3. It is not necessarily 'factual' in nature because it appears to consist primarily of Niemi's personal characteristics and behavioral tendencies or, more accurately, Roby's impressions of Niemi's personal characteristics and behavioral tendencies. See State ex rel. Ogden Newspapers, Inc. v. Wilkes, 211 W. Va. 423, 566 S.E.2d 560, 567 (W. Va. 2002) (stating that attorney's '[v]ague general impressions' about corporate client's 'philosophical outlook' did not warrant attorney's disqualification in subsequent lawsuit against corporation); Restatement (Third) of the Law Governing Lawyers § 132 cmt. d(iii) (2000) (stating that attorney's knowledge of manner in which client approaches litigation is not 'independently relevant' for purposes of substantial relation test, unless information is 'directly in issue or of unusual value in the subsequent matter'). In addition, the information is not necessarily 'confidential' because it may refer to information that is available to persons who are not part of the attorney-client relationship, such as opposing counsel, a court reporter transcribing a deposition, or court personnel, and perhaps even persons who know Niemi through social interactions. See Minn. R. Prof. Conduct 1.9 cmt. 3 ('Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying.').; see also Restatement (Third) of the Law Governing Lawyers § 132(2) (2000) (stating that rules do not restrict attorney's use of information that has become 'generally known')."; explaining that because "this type of information exists in practically every lawsuit," finding that such information would disqualify a lawyer "effectively prevent[s] an attorney from taking a position adverse to a former client for the remainder of the attorney's career. The drafters of the rules could have imposed a lifetime ban on being adverse to a former client, but the drafters obviously declined to do so."; ultimately concluding that "information consisting of Niemi's 'approach to litigation' does not justify a conclusion that the prior lawsuit and the present lawsuit are 'substantially related matters.' We reach this conclusion without considering whether this type of information retains any relevance or usefulness 25 to 30 years after it is acquired.").

personal injury action. The court described the type of disqualifying information that the lawyer had obtained.

An attorney representing a client in a personal injury action involving significant representation would learn confidential information about the way in which his or her client handles the stress of litigation. In the present case, for over two years Spurling observed Nadine's reaction to the numerous tribulations of the litigation process. Spurling personally observed: Nadine 's ability to testify under oath, her reactions to her adversary, her patience with the protracted process, her ability to accept compromise, her ability to handle stress, and the way in which she relates to her attorney. Disclosing knowledge of Nadine's strengths and weaknesses in these areas would be detrimental to her interests in another litigation, particularly in a contentious divorce action.

Hurley v. Hurley, 923 A.2d 908, 909, 912 (Me. 2007) (emphases added).<sup>2</sup> In addition to finding a "substantial relationship" based on this type of information, the court also held that there was a "second, independent basis "for the lawyer's disqualification -- the confidential nature of information the lawyer acquired "regarding [the former client's]

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<sup>2</sup> Hurley v. Hurley, 923 A.2d 908, 909, 912, 913 (Me. 2007) (disqualifying a lawyer from representing the husband in a divorce case after the lawyer had earlier represented the wife in a personal injury action; "During the course of litigation, which lasted over two years, Nadine [woman] revealed to Spurling [lawyer] details concerning her health, work history, injury history, and a workers' compensation claim."; explaining that the divorce action was "substantially related" to the earlier personal injury action because the lawyer acquired confidential information during the latter that would be relevant in the former; "An attorney representing a client in a personal injury action involving significant representation would learn confidential information about the way in which his or her client handles the stress of litigation. In the present case, for over two years Spurling observed Nadine's reaction to the numerous tribulations of the litigation process. Spurling personally observed: Nadine's ability to testify under oath, her reactions to her adversary, her patience with the protracted process, her ability to accept compromise, her ability to handle stress, and the way in which she relates to her attorney. Disclosing knowledge of Nadine's strengths and weaknesses in these areas would be detrimental to her interests in another litigation, particularly in a contentious divorce action."; also finding under what the court called the "alternative confidential information prong" of the disqualification standard that the lawyer acquired confidential information during a personal injury case that the lawyer could now use against the wife in the divorce case; agreeing with the lower court's determination "that the information Spurling acquired regarding Nadine's physical and mental health, work history, and the way she handles contested litigation was confidential, providing a second, independent basis for Spurling's disqualification.").

physical and mental health, work history, and the way she handles contested litigation."

Id. at 913.

**Best Answer**

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

N 3/12

## Ability to Withdraw from a Representation At Any Time If There is No Prejudice

### Hypothetical 28

One of your partners has been handling small employment discrimination cases for an out-of-state company with a factory in your town. Cases are slowly moving forward, but there are no depositions or trial dates on the immediate schedule. You just read a press release from that company indicating that it would begin manufacturing and selling outboard motors -- starting about three years from now. One of your firm's largest clients manufactures outboard motors, and you want to "clear the decks" now to avoid any possible conflict once the two companies begin to compete with one another.

Would it be ethical for you to withdraw now from the small employment discrimination cases your firm is handling?

### YES (PROBABLY)

### Analysis

State bar rules generally allow a lawyer to withdraw from a representation at any time, as long as the withdrawal does not prejudice the client. ABA Model Rule 1.16(b)(1) ("a lawyer may withdraw from representing a client if . . . withdrawal can be accomplished without material adverse effect on the interests of the client"). If the representation involves a tribunal, the withdrawing lawyer obviously must seek the tribunal's permission. ABA Model Rule 1.16(c).

The Restatement seems to acknowledge permissibility of such a "clearing the decks" withdrawal.

Withdrawal is effective to render a representation "former" for the purposes of this Section if it occurs at a point that the client and lawyer had contemplated as the end of the representation. . . . The representation will also be at an end for purposes of this Section if the existing client discharges the lawyer (other than for cause arising from the improper representation) or if other grounds for mandatory or



permissive withdrawal by the lawyer exist . . . , and the lawyer is not motivated primarily by a desire to represent the new client.

Restatement (Third) of Law Governing Lawyers § 132 cmt. c (2000).

In this hypothetical, you are not withdrawing from the representation to take a specific matter adverse to your current client -- so you should not be affected by the "hot potato" rule prohibiting dropping a client in order to take a particular matter against it.

Assuming that your withdrawal would not prejudice your client, the ethics rules would probably permit the withdrawal.

**Best Answer**

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

N 3/12

## Ability to Withdraw if the Client Does Not Pay Invoices

### Hypothetical 29

You are about three weeks away from a large trial, but your client just told you that it cannot afford to pay your last bill and will not be able to pay any future bills. Your law firm's management wants you to withdraw from the representation.

May you withdraw from representing a client who has not paid its bills?

### YES (PROBABLY)

#### Analysis

Under every state's ethics' rules, lawyers may withdraw from the representation if their client does not pay its bills -- even if the withdrawal would have a "material adverse effect" on the client.

Under ABA Model Rule 1.16(b), a lawyer may withdraw (even if the withdrawal cannot be "accomplished without material adverse effect on the interests of the client") if

[t]he client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given a reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.

ABA Model Rule 1.16(b)(1),(5). The lawyer can also withdraw (despite harming the client) if

the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.

ABA Model Rule 1.16(b)(6).

Of course, the Rules also require the court's permission to withdraw if the lawyer has appeared as counsel of record for the client in a case. ABA Model Rule 1.16 (c).

In states following the ABA Model Rules approach, the lawyer would also have to give "reasonable warning" that the lawyer will withdraw unless the client pays the bills.

Not all states require such a warning.

Lawyers frequently decide not to withdraw on the eve of a trial, corporate closing, etc. even if they are not being paid -- justifiably worried that the former client might file a malpractice case against the lawyer and claim that the law firm's withdrawal harmed the client in some way.

Still, some law firms choose to withdraw in such settings, and courts often allow them to withdraw.

- Brandon v. Blech, 560 F.3d 536, 538 (6th Cir. 2009) (reversing the trial court's refusal to allow Proskauer Rose LLP to withdraw from representing a client who had not paid his bills; "There are, of course, several occasions when a district court ought to prohibit counsel from withdrawing. For example, attorneys may forfeit the right to withdraw when they engage in strategically-timed or coercive behavior, like waiting until a client is 'over a barrel' before demanding payment. . . . To avoid such tactics, Model Rule 1.16(b)(5) requires counsel to give 'reasonable warning.' But Proskauer gave reasonable notice -- over three weeks -- and did not coerce in any regard; the case remained inactive, with no impending deadlines."; "Likewise, a district court may forbid withdrawal if it would work severe prejudice on the client or third parties. . . . But neither party identified any prejudice -- no one opposed Proskauer's motion, either before the district court or on appeal. And while the district court correctly noted that withdrawal would leave Blech without counsel, this does not amount to severe prejudice. The case remained inactive, with no imminent deadlines and ample time for Blech to retain new counsel.").

Another Restatement provision implies the same thing.

A lawyer or firm might be in a position to withdraw from fewer than all the representations in a joint-client representation and thereby remove a conflict if it is possible after withdrawal for the lawyer to continue representation only with respect to matters not substantially related to the former representation . . . or with respect to related matters for clients that are not adverse to the now-former client."

Restatement (Third) of Law Governing Lawyers § 121 cmt. e(ii) (2000).

Not surprisingly, lawyers withdrawing on this basis must carefully consider the applicable confidentiality rules.

- Oregon LEO 2011-185 (8/2011) (addressing the following facts: "During litigation, Lawyer and Client have a dispute concerning the representation. Lawyer and Client cannot resolve the dispute and Lawyer files a motion to withdraw in which Lawyer wishes to state one of the following: 1. My client won't listen to my advice; 2. My client won't cooperate with me; 3. My client hasn't paid my bills in a timely fashion; or 4. My client has been untimely and uncooperative in making discovery responses during the course of this matter."; finding such disclosure improper; "For example, a client's inability or refusal to pay may prejudice the client's ability to resolve the dispute with an opposing party. Likewise, a party's unwillingness to cooperate with discovery may lead the plaintiff to file additional pleadings or seek sanctions. Consequently, Lawyer cannot unilaterally and voluntarily decide to make this information public unless an exception of Oregon RPC 1.6 can be found."; "Neither a disagreement between Lawyer and Client about how the client's matter should be handled nor the client's failure to pay fees when due constitute a 'controversy between the lawyer and the client' within the meaning of Oregon RPC 1.6(b)(4). While there may be others, the two most obvious examples of such a controversy are fee disputes and legal malpractice claims. A client's dissatisfaction with the lawyer's performance may ultimately ripen into a controversy, but at the point of withdrawal, such a controversy is inchoate at best. In a fee dispute or malpractice claim, fairness dictates that the lawyer be on equal footing with the client regarding the facts. Such is not the case under the facts presented here."; "If the court orders disclosure, Lawyer may reveal information relating to the representation of Client under Oregon RPC 1.6(b)(5) but may only do so to the extent 'reasonably necessary' to comply with the court order. Lawyer should therefore take steps to limit unnecessary disclosure of confidential information by, for example, offering to submit such information under seal (or outside the presence of the opposing party) so as to avoid prejudice or injury to the client.").
- New Hampshire LEO 2010/2011-1 (holding that a lawyer whose client had not paid the lawyer's bills could not engage in certain conduct in an effort to pressure the client to pay the bills; "It is a violation of Rule 1.9 (Duties to Former Client) and Rule 1.6 (Confidentiality of Information) for an attorney to inform the Internal Revenue Service that the attorney has written off the account receivable and considers that the unpaid legal fees are a debt that has been forgiven."; "It is a violation of Rule 1.9 (Duties of Former Client) and

Rule 1.6 (Confidentiality of Information) for an attorney to inform a regulatory agency that a client owes unpaid fees to the attorney.").

**Best Answer**

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

N 3/12

## The "Hot Potato" Rule

### Hypothetical 30

You just received a call from the president of your firm's largest client. She asks that you file a lawsuit on your client's behalf against a small company from which your client buys equipment. Your conflicts check reveals that one of your lawyers is currently representing the equipment supplier in a very small unrelated real estate matter. You are familiar with the general ethics rules, and you ask your firm's "ethics guru" whether the rules allow you to withdraw from representing the equipment supplier so it will be considered a "former" client under the conflicts analysis -- thus permitting you to represent your largest client against it in this new unrelated matter.

Would it be ethical for you to withdraw from representing the equipment supplier so you could take the case against it for your largest client?

### NO (PROBABLY)

### Analysis

Given the enormous difference between the conflicts rule governing adversity to current clients (which prohibits adversity on any matter, absent consent) and adversity to former clients (which is an information-based rule, and often permits such adversity without consent), lawyers often face the temptation to turn a "current" client into a "former" client so they can apply the more lenient rule.

However, most bars and courts apply what is called the "hot potato" rule, which prohibits withdrawal from a representation if the withdrawal is motivated by the desire to immediately take a matter adverse to that client. The term "hot potato" apparently comes from a 1987 Northern District of Ohio case. Picker Int'l, Inc. v. Varian Assocs., Inc., 670 F. Supp. 1363, 1365 (N.D. Ohio 1987) ("A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client.").

Interestingly, the ABA Model Rules do not address this issue. In fact, it would seem that the ethics rules might permit such a withdrawal. Under ABA Model Rule 1.16(b)(1), a lawyer may withdraw from representation of a client if there is no "material adverse effect" on the client. That rule presumably examines the effect to the client in the matter from which the lawyer withdraws -- not some other matter. If that is true, then the lawyer's later adversity to the client in an unrelated matter would not appear to violate that rule.

Still, such a withdrawal normally receives strong condemnation. As the Restatement (Third) of Law Governing Lawyers § 132 cmt. c (2000) explains "[a] premature withdrawal violates the lawyer's obligation of loyalty to the existing client," and is effective only if the lawyer "is not motivated primarily by a desire to represent the new client."<sup>1</sup>

Most courts and bars follow this approach.

- 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; "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

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<sup>1</sup> 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.").

law firms from violating a duty of loyalty to a client that already exists in favor of a perhaps more lucrative client relationship.").

- Philadelphia LEO 2009-4 (3/2009) ("The inquirer previously represented Company A in connection with patent and trademark procurement. Company A then sold its business, along with all patents and trademarks, to Company B. The inquirer was not involved in any way with the asset purchase and did not represent Company A after the sale. The inquirer currently represents Company B in connection with maintaining IP rights related to the assets it purchased from Company A. Company A now wants to consult with the inquirer about a dispute with Company B concerning the terms of the asset purchase. The inquirer asks whether the so-called 'hot potato' rule prohibits him from terminating his representation of Company B so that he can represent Company A in the asset purchase dispute."; "Absent compliance with Rule 1.7(b), which includes informed consent from both clients, the inquirer can not represent Company A because the matter is directly adverse to the interests of the inquirer's current client, Company B. Moreover, the ethical violation cannot be avoided by the inquirer terminating his representation of Company B. As noted in International Longshoremen's Association, 909 F. Supp. 287, 293 (E.D. Pa. 1995), '[A]n attorney may not drop one client like a 'hot potato' in order to avoid a conflict with another, more remunerative client.'" (emphasis added)).
- Santacroce v. Neff, 134 F. Supp. 2d 366, 370, 371 (D.N.J. 2001) (recognizing the "hot potato doctrine," and disqualifying a law firm which attempted to drop a client in order to take a matter adverse to it, explaining that the firm dropped the client on December 22, 2000 and therefore was not representing the former client at the time she filed a complaint on January 4, 2001; "Here, Santacroce was fired as a client by Jaffe & Asher because it got wind of her proposed complaint against the Estate. This conclusion is compelled by the timing of the December 21 or 22 sharing of the complaint by Rosenbaum with Stifelman, the then-attorney for the Estate, coupled with the December 22 letter, which referred to her commencing an action against the Estate, asserted a conflict and fired her as a client. Thus, the appropriate date for evaluating the applicability of RPC 1.7(a) is not the filing date of the complaint, by which time Santacroce was a former client of Jaffe & Asher. Under the circumstances here, the appropriate date is after Jaffe & Asher found out about the proposed complaint but before the firm fired Santacroce [sic]. During that interval, Jaffe & Asher represented both Santacroce and the Estate. At that time, there was a clear conflict (as Jaffe & Asher asserted in the December 22 letter) and RPC 1.7(a) applies and precludes Jaffe & Asher's representation of defendants herein."; explaining that "[w]hen Jaffe & Asher found out that the firm's two clients, Santacroce and the Estate, were at odds, it dropped Santacroce like a 'hot potato.' The firm dropped Santacroce even before suit was filed in a transparent attempt to represent the



extraordinarily more remunerative client, the Estate of multimillionaire Goldberg. Although Jaffe & Asher claim that they terminated representation of Santacroce's only due to her inability to pay legal fees, this is belied by their own words. The firm itself refers to the 'conflict of interest' in their December 22, 2000 letter to Santacroce."; disqualifying the law firm).

- International Longshoremen's Ass'n, Local Union 1332 v. International Longshoremen's Ass'n, 909 F. Supp. 287, 293 (E.D. Pa. 1995) ("However, an attorney may not drop one client like a 'hot potato' in order to avoid a conflict with another, more remunerative client.").
- Schiffli Embroidery Workers Pension Fund v. Ryan, Beck & Co., Civ. A. No. 91-5433, 1994 U.S. Dist. LEXIS 2154, at \*11 n.2 (D.N.J. Feb. 23, 1994) (disapproving of "instances where a lawyer concurrently representing two clients simultaneously withdraws as counsel for one client and sues the reconstituted 'former' client on behalf of the other client").
- Harrison v. Fisons Corp., 819 F. Supp. 1039, 1041 (M.D. Fla. 1993) (disqualifying McDermott, Will and Emery; "Nor does MW&E's effort to end its relationship with First Union affect the outcome. A lawyer may not evade ethical responsibilities by choosing to jettison a client whose continuing representation becomes awkward. Allowing lawyers to pick the more attractive representation would denigrate the fundamental concept of client loyalty.").
- Stratagem Dev. Corp. v. Heron Int'l N.V., 756 F. Supp. 789, 793, 794 (S.D.N.Y. 1991) (finding that a law firm could not avoid a conflict by terminating a representation of a client against whom the firm wanted to take an adverse position; disqualifying Epstein Becker & Green [Epstein], because it represented a wholly owned subsidiary of a company that it later became adverse to; noting that Epstein Becker & Green sent a letter with the following language to its client; "Should you feel that a conflict, actual or potential, may exist, or should you want us to resign from this case because of our ongoing representation of Stratagem and affiliates, please let us know and we will resign as counsel in the labor matter."; explaining that Epstein sent a letter with the following language after the client objected to the firm's adversity to its parent: "From the tone and tenor of your letter, it is apparent that you would feel uncomfortable if we were to continue to represent [FSC] . . . . Accordingly, we hereby notify you that we are withdrawing as counsel to Fidelity in this lawsuit."; "Epstein Becker's obligations to Stratagem do not trump those it owes to FSC, even if they pre-dated them. Once Epstein Becker undertook to represent FSC, it assumed the full panoply of duties that a law firm owes to its client. Epstein Becker may not undertake to represent two potentially adverse clients and then, when the potential conflict becomes actuality, pick and choose between them. Nor may it seek consent for dual

representation and, when such is not forthcoming, jettison the uncooperative client.").

- Harte Biltmore Ltd. v. First Pennsylvania Bank, N.A., 655 F. Supp. 419, 421, 422 (S.D. Fla. 1987) (explaining that plaintiffs sought to disqualify the law firm which was representing the defendant bank; noting that as a result of a law firm merger, a lawyer representing one of the plaintiffs (on an unrelated matter) and the lawyer representing the bank ended up in the same firm; explaining that the firm withdrew from its representation of the plaintiff when it learned of the conflicts; rejecting the law firm's argument that the plaintiff was a former client, rather than a current client; holding that the law firm had "breached the duty of loyalty" owed to the plaintiff when it withdrew; discussing "[p]ublic confidence in lawyers and the legal system must necessarily be undermined when a lawyer suddenly abandons one client in favor of another. This is true regardless of the nature and extent of the representations of the clients involved and the size of the firm, how many separate offices it may maintain, or the number of jurisdictions in which the firm or its members may practice.").

On the other hand, at least two courts have found a violation of this rule but declined to disqualify the law firms involved.

- Metro. Life Ins. Co. v. Guardian Life Ins. Co., No. 06 C 5812, 2009 U.S. Dist. LEXIS 42475, at \*3, \*4-5, \*9-10, \*10-11 (N.D. Ill. May 18, 2009) (denying plaintiff's motion to disqualify Winston & Strawn from representing defendant, although finding that Winston had improperly terminated its representation of MetLife on unrelated matters; explaining that Winston had handled several unrelated matters for MetLife, which were arguably completed; noting that despite this fact, "[o]n February 18, 2009, in an email to MetLife's in house benefits attorney, Weisberg acknowledged that 'Guardian is an existing client,' but nevertheless sought a waiver from MetLife to represent Guardian. . . . MetLife refused to provide a waiver."; after receiving MetLife's denial, Winston sent a letter terminating its representation of MetLife; "Winston determined that its projects for MetLife had been completed, although not formally terminated. Importantly, the investigation revealed that Winston's representation of MetLife was, at most, sporadic and did not involve regularly scheduled meetings, conference calls or daily communication. In turn, Anderson and Thar concluded that MetLife was not a current client and, since all matters were complete, Winston could formally terminate its relationship with MetLife and represent Guardian without a conflict. On March 13, 2009 Rogers sent an email to his contacts at MetLife, confirming that Winston was not working on any active matters. . . . Then, on March 16, 2009 Winston sent a letter to Karen Francis-Moorer (MetLife refers to Francis-Moorer as a 'paralegal,' while Winston calls her a 'billing contact'), explaining

that Winston's representation had concluded."; "[I]t is well-settled that once an attorney-client relationship is established, it does not terminate easily. . . . Absent an express termination, 'something inconsistent with the continuation of the relationship must transpire in order to end the relationship.' . . . Examples of inconsistent conduct include: a client filing a grievance against his attorney; a client retaining another attorney; or a client refusing to pay his attorney's bill."; "In this case there is nothing inconsistent with Winston's relationship with MetLife. And, without a formal termination of the parties' relationship, MetLife reasonably could have considered itself a current client of Winston at the time Guardian approached Winston to represent it in this case. More importantly, the record is void of any evidence suggesting that MetLife and Winston contemplated an abrupt end to their relationship. In all respects, the representation continued even after Winston completed the immediate projects that MetLife assigned to the firm. See Perillo v. Johnson, 205 F.3d 775, 798-99 (5th Cir. 2000) ('Where the prior representation has not unambiguously been terminated, or is followed closely by the subsequent representation, there is more likely to be a conflict arising from defense counsel's representation of the first client . . .'); IBM Corp. v. Levin, 579 F.2d 271, 281-82 (3d Cir. 1978) (ruling that client was current client for conflict of interest analysis even where attorney had no specific assignment from client at the time the attorney undertook the adverse representation); Manoir-Electroalloys Corp. v. Amalloy Corp., 711 F. Supp. 188, 194 (D.N.J. 1989) (finding client to be a current client even though the law firm was not actively providing legal services to the client at the time the suit was filed and had not done so for four years); see also Quinones v. Miller, No. 01 C 10752, 2003 U.S. Dist. LEXIS 9176, 2003 WL 21276429, at \*29 (S.D.N.Y. June 3, 2003) (the 'mere passage of time do[es] not end the attorney-client relationship'); cf. Caban v. United States, 281 F.3d 778, 784 n.4 (8th Cir. 2002) (finding in a criminal case that a conflict based on a concurrent representation despite attorney's representation that work for the client was inactive)."; nevertheless finding that disqualification was not an appropriate remedy).

- SWS Fin. Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392, 1398, 1398-99, 1399, 1403 (N.D. Ill. 1992) (explaining that Schiff, Hardin and Waite which was then representing Salomon Brothers because it engaged in a series of discrete projects for the client, billed approximately \$40,000 from May 1990 to June 1991; "The undisputed facts demonstrate that Schiff served Salomon Brothers over a thirteen month period, answering Salomon's commodity law questions as they arose. The comment makes clear that Salomon Brothers was entitled to 'assume' that Schiff would continue to be its lawyer on a continuing basis Schiff had the [sic] and that responsibility for clearing up any doubt as to whether the client-lawyer relationship persisted. Consequently, this court finds that Salomon was a present client at the time Schiff began to represent Hickey against Salomon."; explaining that an attorney-client relationship can be terminated in one of three ways, none of which applied;

"First, the Drustar [Artromick Int'l, Inc. v. Drustar, 134 F.R.D. 226 (S.D. Ohio 1991)] court stated that the relationship can be terminated by the express statement of either the attorney or the client. Second, acts inconsistent with the continuation of the relationship (e.g., the client's filing a grievance with the local bar association against the attorney) are a second means. In Drustar, the court ruled that the client was a former client because he had refused to pay the attorney's bill and had retained other lawyers to do legal work which that attorney had formerly performed. Third even without overt statements or acts by either party, the relationship may lapse over time."; noting that Schiff did not expressly terminate the relationship with Salomon, and that such a termination "would have been invalid if made for the purposes of dropping Salomon like a 'hot potato' in order to obtain the more lucrative business Hickey [Salomon's adversary] could provide"; also noting that "the parties' behavior was not inconsistent with the continuation of the relationship. Indeed, if anything their behavior weighs very heavily in the direction of finding that that relationship was continuing. On August 13, about the time that Schiff began its work for Hickey against Salomon, Mr. Rosenzweig called Salomon's General Counsel to obtain consent for Schiff's representation of a commodity trading advisor in negotiations with Salomon. The other contacts between the firm and Salomon uniformly were conducted with the tone of a friendly, professional relationship, not at all inconsistent with the continuation of the lawyer-client relationship."; also noting that the relationship did not terminate through the passage of time; "Within two months of finishing its last billable project on June 25, 1991, Schiff had begun its adverse representation. The complaint was filed November 20, less than six months later. By comparison, the lawyer in Amalloy [Manoir-Electroalloys Corp. v. Amalloy Corp., 711 F. Supp. 188 (D.N.J. 1989)] began its adverse representation four years after last working for the client, yet the client was held to be a current client."; finding that Schiff had violated Rule 1.7, but not disqualifying the law firm; "The foregoing discussion should not be misunderstood to mean that this court does not take very seriously a lawyer's ethical responsibilities to avoid conflicts of interest. Schiff should not have agreed to bring this suit against Salomon Brothers. Rule 1.7 prohibited it from doing so. The court, however, does not believe that the costly sanction of disqualification should be automatic for a breach of even so serious an obligation as that imposed by Rule 1.7.").

### **Best Answer**

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

N 3/12

## Permitted Disclosure When Seeking Consents

### Hypothetical 31

In the last day or two, several potential new clients have called to see whether your firm could represent them. The conflicts checks have revealed the need for consents, and you want to know what steps to undertake.

- (a) May you call an existing client and ask for its consent to your representation of a new client in business negotiations adverse to your existing client?

### YES (PROBABLY)

- (b) May you call an existing client and ask for its consent to your representation of a new client in analyzing the existing client's patents which might be infringed by an important new product that the new client plans to market next year?

### NO (PROBABLY)

### Analysis

(a) Despite the strength of a lawyer's duty of confidentiality, state bars recognize a limited exception for disclosure of certain limited client information during the conflicts-clearance process.

Interestingly, the ABA Model Rules do not deal with this necessary exception. The closest the ABA Model Rules come to addressing a type of implied authorization to disclose confidential information when clearing conflicts comes from a comment to the rule governing a lawyer's sale of her practice. This is doubly strange, because that comment discusses a law firm's lateral hiring -- which has nothing to do with the sale of a law practice.

Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidential provisions of Model Rule 1.6 than do preliminary

discussions concerning the possible association of another lawyer or merger between firms, which respect to which client consent is not required.

ABA Model Rule 1.17 cmt. [7].

An ABA legal ethics opinion also discussed this type of implied authorization to disclose client confidences.

- ABA LEO 455 (10/8/09) (explaining that lawyers moving from one firm to another and law firms that hire them cannot rely on any specific rule allowing the exchange of information about clients necessary for a conflicts analysis, but may exchange such otherwise protected information -- although the disclosure "should be no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest"; noting that the exception in Rule 1.6 for disclosure "impliedly authorized" to represent a client does not apply, because the disclosures by the moving lawyer and the hiring law firm do not serve the client's interests; also pointing out that the exception in Rule 1.6 for disclosures necessary to "comply with other law" does not apply, because the exception refers to law, not ethics rules; acknowledging that although client consent would resolve any issue, obtaining the consent normally is impractical; emphasizing that the ethics rules are "rules of reason," and the recent rule change allowing the screening of lateral hires to avoid imputed disqualification highlights the permissibility of basic conflicts data disclosure that necessarily precedes such a lateral hire; explaining that in some situations, neither the moving lawyer nor the firm can disclose privileged information when the disclosure would "prejudice a client or former client" -- as with a planned hostile takeover, contemplated divorce, etc.; also noting that in other situations, it will quickly become apparent that conflicts will prevent the firm from hiring the moving lawyer -- such as situations in which there are "numerous existing matters" involving conflicts, or the law firm and the potential lateral hire "regularly represent[s] commonly antagonistic groups"; explaining that "conflicts information normally should not be disclosed when conversations concerning potential employment are initiated, but only after substantive discussions have taken place"; further explaining that if checking for conflicts will require a "fact-intensive analysis of information beyond just the persons and issues involved in a representation" (as when analyzing the "substantial relationship" between a current and former representation), the law firm might be able to analyze conflicts by obtaining information other than from the moving lawyer -- if not, the moving lawyer must seek the client's consent to disclose such detailed information, or rely on the new Rule 1.10 provision permitting screening of lateral hires to avoid imputed disqualification; concluding that the law firm receiving any confidential information as part of the conflicts analysis should limit use of the

information "to the detection and resolution of conflicts of interest, and dissemination of conflicts information should be restricted to those persons assigned to or involved in the conflicts analysis with respect to a particular lawyer.").

Most courts would necessarily take this approach as well. See, e.g., Virginia LEO 1147 (1/4/89) (explaining that a lawyer may reveal to a current client that the lawyer formerly represented the client's adversary's lawyer in that lawyer's own divorce years earlier; explaining that the disclosure should not embarrass the former client/lawyer and must be made to the current client in order to obtain proper consent).

Under the best approach, the law firm should first advise the new client of the conflict, and ask whether it wishes the law firm to seek the required consent from the current client. This maintains the confidentiality of the information received from the prospective new client, and allows the new client to decide whether to permit the disclosure of the information to the adversary, or instead to retain another law firm without such "baggage."

In this scenario, it seems likely that the new client would permit such disclosure.

**(b)** In some situations, revealing the new client's request for the representation would so clearly prejudice the new client that no lawyer could reveal it to the current client. This scenario seems like such a situation (although ultimately it would be up to the new client to make the decision).

### **Best Answer**

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

## Revocability of Consents

### Hypothetical 32

Before beginning to defend one of your clients in a lawsuit brought by another company that your firm represents on unrelated matters, you obtained both clients' consent. The litigation has now turned uglier than expected, and the client who is the plaintiff in the litigation just sent you a letter revoking its consent -- and insisting that you withdraw as counsel of record for the defendant.

Must you withdraw from the representation?

### NO (PROBABLY)

### Analysis

Surprisingly, not many state courts or bars have analyzed the revocability of consents.

It seems clear that a client may withdraw a consent at any time -- just as a client may fire a lawyer at any time, for any reason.

However, it would seem unfair to the other client if such a revocation required a lawyer's withdrawal from a representation that the lawyer began only in reliance upon the consent.

There is support for treating a consent like other contracts, and refusing to allow revocation as to matters on which the lawyer relied on the consent before undertaking.

The ABA Model Rules address this issue.

A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other



client and whether material detriment to the other clients or the lawyer would result.

ABA Model Rule 1.7 cmt. [21].

The Restatement takes essentially the same approach.

A client who has given informed consent to an otherwise conflicted representation may at any time revoke the consent . . . . Revoking consent to the client's own representation, however, does not necessarily prevent the lawyer from continuing to represent other clients who had been jointly represented along with the revoking client. Whether the lawyer may continue the other representation depends on whether the client was justified in revoking the consent (such as because of a material change in the factual basis on which the client originally gave informed consent) and whether material detriment to the other client or lawyer would result. In addition, if the client had reserved the prerogative of revoking consent, that agreement controls the lawyer's subsequent ability to continue representation of other clients.

A material change in the factual basis on which the client originally gave informed consent can justify a client in withdrawing consent. For example, in the absence of an agreement to the contrary, the consent of a client to be represented concurrently with another . . . normally presupposes that the co-clients will not develop seriously antagonistic positions. If such antagonism develops, it might warrant revoking consent. If the conflict is subject to informed consent . . . , the lawyer must thereupon obtain renewed informed consent of the clients, now adequately informed of the change of circumstances. If the conflict is not consentable, or the lawyer cannot obtain informed consent from the other client or decides not to proceed with the representation, the lawyer must withdraw from representing all affected clients adverse to any former client in the matter . . . .

....

In the absence of valid reasons for a client's revocation of consent, the ability of the lawyer to continue representing other clients depends on whether material detriment to the other client or lawyer would result and,

accordingly, whether the reasonable expectations of those persons would be defeated. Once the client or former client has given informed consent to a lawyer's representing another client, that other client as well as the lawyer might have acted in reliance on the consent. For example, the other client and the lawyer might already have invested time, money, and effort in the representation. The other client might already have disclosed confidential information and developed a relationship of trust and confidence with the lawyer. Or, a client relying on the consent might reasonably have elected to forgo opportunities to take other action.

Restatement (Third) of Law Governing Lawyers § 122 cmt. f (2000).

Several Restatement illustrations show how this basic principle works.

On Monday, Client A and Client B validly consent to being represented by Lawyer in the same matter despite a conflict of interest. On Wednesday, before either Client B or Lawyer has taken or forgone any significant action in reliance, Client A withdraws consent. Lawyer is no longer justified in continuing with the joint representation. Lawyer also may not continue to represent Client B alone without A's renewed informed consent to Lawyer's representation of B if doing so would violate other Sections of this Chapter, for example because A's and B's interests in the matter would be antagonistic or because Lawyer had learned confidential information from A relevant in the matter . . . . Similarly, if Client A on Wednesday did not unequivocally withdraw consent but stated to Lawyer that on further reflection Client A now had serious doubts about the wisdom of the joint representation, Lawyer could not reasonably take material steps in reliance on the consent. Before proceeding, Lawyer must clarify with Client A whether A indeed gives informed consent and whether the joint representation may thereby continue.

Restatement (Third) of Law Governing Lawyers § 122 cmt. f, illus. 5 (2000).

Clients A and B validly consent to Lawyer representing them jointly as co-defendants in a breach-of-contract action. On the eve of trial and after months of pretrial discovery on the part of all parties, Client A withdraws consent to the joint representation for reasons not justified by the conduct of Lawyer or Client B and insists that Lawyer cease representing Client B. At this point it would be difficult and

expensive for Client B to find separate representation for the impending trial. Client A's withdrawal of consent is ineffective to prevent the continuing representation of B in the absence of compelling considerations such as harmful disloyalty by Lawyer.

Id. illus. 6.

Client A, who consulted Lawyer about a tax question, gave informed advance consent to Lawyer's representing any of Lawyer's other clients against Client A in matters unrelated to Client A's tax question. Client B, who had not theretofore been a client of Lawyer, wishes to retain Lawyer to file suit against Client A for personal injuries suffered in an automobile accident. After Lawyer informs Client B of the nature of Lawyer's work for Client A, and the nature and risks presented by any conflict that might be produced, Client B consents to the conflict of interest. After Lawyer has undertaken substantial work in preparation of Client B's case, Client A seeks to withdraw the advance consent for reasons not justified by the conduct of Lawyer or Client B. Even though Client A was Lawyer's client before Client B was a client, the material detriment to both Lawyer and Client B would render Client A's attempt to withdraw consent ineffective.

Id. illus. 7.

Bars tend to take the same approach.

- North Carolina LEO 2007-11 (7/13/07) (addressing the following question: "May a lawyer rely on a written waiver of conflict regarding the matter at hand signed, with informed consent, by two or more parties, after a subsequent, unforeseen falling out among those parties? (So that the lawyer is not required to relinquish representation of a long-term client/party to the original waiver due to one of the other party/signees revoking the waiver and objecting to the lawyer's continuing to represent the long-term client.)"); holding that "a lawyer is not required to withdraw from representing one client if the other client revokes consent without good reason" if the factors favor continued representation; "The consent agreement may specify the effect of one client's repudiation upon the other client's right to continued representation and the lawyer's right to continue to represent the other client. The DC Bar suggests the following language: 'You have the right to repudiate this waiver should you later decide that it is no longer in your interest. Should the conflict addressed by the waiver be in existence or contemplated at that time, however, and should we or the other client(s) involved have acted in

reliance on the waiver, we will have the right -- and possibly the duty, under the applicable rules of professional conduct -- to withdraw from representing you and (if permitted by such rules) to continue representing the other involved client(s) even though the other representation may be adverse to you."").

- District of Columbia LEO 317 (11/19/02) (analyzing other opinions and case law dealing with revoked consents, and finding that generally a revoked consent does not require a lawyer's withdrawal from the other representation; "If there has been detrimental reliance by the other client or the lawyer, the lawyer ordinarily should continue representing the other client."; "If there has been no detrimental reliance by the other client or the lawyer, the lawyer and both clients in effect are restored to their positions immediately prior to the grant of the waiver. Given that the lawyer's acceptance of, and beginning work for, the other client (and in many cases, the repudiating client as well) typically will constitute reliance, cases in this category presumably will be rare, particularly where more than a brief period has elapsed since the waiver was granted.").

Case law also supports this approach.

- DeMeo v. Provident Bank, 2008 Ohio 2936 (Ohio Ct. App. 2008) (holding that borrowers could not sue a law firm for malpractice in representing the borrowers in a loan transaction while simultaneously representing the lender in an unrelated transaction, because the borrowers had consented to the adversity).
- Discotrade Ltd. v. Wyeth-Ayerst International, Inc., 200 F. Supp. 2d 355, 359 (S.D.N.Y. 2002) (explaining that a client "had the power to withdraw the waiver after consulting with her colleagues, at least before [the law firm] filed a complaint on behalf of [the adversary]").
- Fisons Corp. v. Atochem North America, Inc., No. 90 Civ. 1080(JMC), 1990 U.S. Dist. LEXIS 15284, at \*17 n.6 (S.D.N.Y. 1990) (explaining that the client was "estopped from revoking its consent due to [the other client's] reliance on the consent").

### **Best Answer**

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

N 3/12

## Prospective Consents

### Hypothetical 33

Your firm generally represents developers. A general contractor recently called one of your partners to see if she was available to handle some labor problems that the general contractor was facing. Your conflicts check reveals that you are not actively adverse to that general contractor, but you know that some of your developer clients deal with the general contractor, and you do not want to jeopardize your firm's opportunity to represent your large developer clients if they ever become adverse to that general contractor.

May you obtain a prospective consent from the general contractor that will allow you to represent your developer clients adverse to it in the future?

### YES (PROBABLY)

### Analysis

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

### ABA Model Rules

A comment to ABA Model Rule 1.7 explains that

[t]he effectiveness of such [prospective] waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the

other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

ABA Model Rule 1.7 cmt. [22].

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

## **Restatement**

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

A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent. . . . On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.

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

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

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

## **State Legal Ethics Opinions**

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

- New York City LEO 2008-2 (9/2008) (explaining that an in-house lawyer could obtain a prospective consent allowing the lawyer to take matters adverse to a

- former corporate affiliate; noting that the in-house lawyer might consider obtaining prospective consents from the various clients; "Careful drafting of the advance waiver will enhance the possibility that inside counsel will be able to continue to represent one or more clients after a conflict arises. In the context of a joint representation of a parent and an affiliate, the advance waiver should: [i]dentify for the clients the potential or existing conflicts with as much specificity as possible; [m]ake clear to the clients that the confidences and secrets of the affiliate will be shared with the parent; and [o]btain agreement from the affiliate that if inside counsel can no longer represent both parent and affiliate, inside counsel can continue to represent the parent irrespective of the confidences and secrets that the affiliate may have shared with counsel and irrespective of what work counsel may have performed for the affiliate.").
- New York LEO 823 (6/30/08) ("A lawyer cannot continue to represent joint clients in litigation if their strategies significantly diverge. The lawyer can continue to represent one of the joint clients in the litigation if the former client provides informed consent to the future representation and the lawyer can represent the current client zealously and competently. The lawyer is required to comply with the court's procedures for withdrawal.").
  - Pennsylvania LEO 2006-200 (7/26/06) (addressing a lawyer's simultaneous representation of a corporation and one of its constituents; acknowledging the possibility that the clients could grant a prospective consent; "In seeking to obtain a prospective waiver from clients, it frequently will be difficult for an attorney to make 'full disclosure' to the same extent as may be made with a concurrent waiver. This difficulty arises because it may not be clear to the attorney at the outset of the representation which conflicts might later arise. To satisfy his obligation of full disclosure the lawyer seeking a prospective waiver should, at a minimum, advise the client of the types of possible future adverse representations that the lawyer envisions, as well as the types of matters that may present such conflicts. The lawyer also should disclose the measures that he will implement to protect the client or prospective client should a conflict arise."; offering several examples of future conflicts that might arise between a corporate client and an individual client; "The following examples illustrate situations when future conflicts may arise: (a) A substantial discrepancy could develop between the testimony of the corporate representatives and the employee. (b) Based on newly discovered evidence, the corporation could reevaluate its decision as to whether the employee's actions were within the scope of the employee's employment, or whether they constituted actual fraud, willful misconduct or actual malice. (c) The corporation could later seek to disavow responsibility for the employee's actions. (d) A disagreement could arise as to whether the employee's actions were contrary to applicable laws or the corporation's policies and procedures. (e) A substantial difference could arise between the employee and the



- corporation regarding their respective goals in the litigation, for example, on questions such as the possibility or desirability of settlement. (i) The employee may seek vindication of her reputation or a trial on the merits of the case while the corporation's interest may be more economically motivated and oriented toward obtaining a favorable settlement in lieu of a trial, or (ii) The employee may desire to avoid the publicity and potential embarrassment of a trial and, therefore, favor settlement while the corporation as a matter of business judgment may favor litigation as a means of deterring future unfounded claims. (f) The corporation and the employee may disagree with one another at some point over other aspects of legal tactics and strategy."; advising the lawyer to explain the nature of the joint representation to both clients; "Once it is decided that the lawyer will represent the corporation and the constituent, it is important to have a clear understanding with both clients about: (1) whether and what kind of confidential information will be shared; (2) who will control the privilege with respect to such information; (3) how the attorney-client privilege will operate in the event a dispute arises between the clients concerning the matter; and (4) whether the lawyer will continue to represent the corporation even if a conflict develops between the corporation and the constituent. We recommend that all such understandings be confirmed in writing.").
- New York City LEO 2006-1 (2/17/06) ("We conclude here that a law firm may ethically request an advance waiver that includes substantially related matters if the following conditions are met: (a) the client is sophisticated; (b) the waiver is not applied to opposite sides of the same litigation and opposite sides in a starkly disputed transactional matter; (c) the law firm is able to ensure that the confidences and secrets of one client are not shared with, or used for the advantage of, another client; (d) the conflict is consentable under the tests of DR 5-105(C); and (e) special consideration is given to the other factors described in Formal Opinion 2001-2."; explaining that Formal Opinion 2001-2 indicated that "[I]n a transactional setting in which the parties' interests are inherently antagonistic, such as when one party is a hostile bidder and the other an unwilling target in a corporate takeover, or when lawyers in the same law firm would be required to negotiate substantive business terms head-to-head, simultaneous representation generally will be ethically prohibited. But in transactional settings in which the adversity between clients is less stark, the application of DR 5-105 is more relaxed and nuanced. We also observed in Formal Opinion 2001-2 that many law firms service clients that insist the firm simultaneously represent multiple clients with differing interests in a single negotiated transaction – an observation that has even more force today.").
  - Oregon LEO 2005-122 (8/2005) ("Nothing in Oregon RPC 1.7 prohibits a blanket or advance waiver from the State or from a nongovernment client as long as Lawyer adequately explains the material risks and available

- alternatives. See, e.g., ABA Formal Ethics Op No 05-436. Lawyer must be sensitive, however, to situations that were not contemplated in the original disclosure or that constitute nonwaivable conflicts. In the former situation, Lawyer would need to obtain the informed consent of each affected client as to the new conflict. In the latter situation, Lawyer would have to decline representation in the new matter that gives rise to the conflict. Oregon RPC 1.16(a)(1).").
- District of Columbia LEO 309 (9/20/01) ("Advance waivers of conflicts of interest are not prohibited by the Rules of Professional Conduct. Such waivers, however, must comply with the overarching requirement of informed consent. This means that the less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advance waiver will be valid. An advance waiver given by a client having independent counsel (in-house or outside) available to review such actions presumptively is valid, however, even if general in character. Regardless of whether reviewed by independent counsel, an advance waiver of conflicts will not be valid where the two matters are substantially related to one another."; noting that "the lawyer must make full disclosure of facts of which she is aware, and hence cannot seek a general waiver where she knows of a specific impending adversity unless that specific instance also is disclosed"; "Finally, any decision to act on the basis of an advance waiver should be informed by the lawyer's reasoned judgment. For example, a prudent lawyer ordinarily will not rely upon an advance waiver where the adversity will involve allegations of fraud against the other client or is a litigation in which the existence or fundamental health of the other client is at stake. In accordance with the foregoing, a client not independently represented by counsel (including in-house counsel) generally may waive conflicts of interest only where specific types of potentially adverse representations or specific types of adverse clients are identified in the waiver correspondence. A client that is independently represented by counsel generally may agree to waive such conflicts even where the specificity requirements set out in the preceding sentence are not satisfied."; noting the following prospective consent language, although not describing the text as "authoritative or exclusive": "As we have discussed, the firm represents many other companies and individuals. It is possible that during the time we are representing you, some of our current or future clients will have disputes or transactions with you. [For example, although we are representing you on \_\_\_\_\_, we have or may have clients whom we represent in connection with \_\_\_\_\_.] You agree that we may continue to represent, or undertake in the future to represent, existing or new clients in any matter, including litigation, even if the interests of such other clients in such other matters are directly adverse to yours, so long as those matters are not substantially related to our work for you.").

- California LEO 1989-115 (1989) (declining to find that all prospective consents are inappropriate; "Consequently, it is the opinion of the Committee that if, within the meaning of rule 3-310(F), the client is 'informed' of the potential risks that are foreseeable at the time of the consent, no Rule of Professional Conduct is violated by the attorney's requiring the client's advance waiver."; "[T]he nature of the subsequent conflict of interest may range from simply representing two clients in entirely unrelated matters to actually representing both side in the same dispute. While a court would doubtless preclude a lawyer from representing both sides simultaneously, the Committee believes that in such situation, if the original waiver was informed, local counsel could withdraw from its representation of lead counsel's client and continue to represent its own client even if otherwise confidential information would be used against lead counsel's client." (footnote omitted); "If the subsequent representation was unrelated to the original matter, the Committee believes that local counsel could continue its participation in the original matter at the same time as it is representing its own client in the unrelated matter."; "In summary, then, it is the opinion of the Committee that the execution of an advance waiver of conflict of interest and confidentiality protections is not per se improper; that to the extent that the waiver of confidentiality is 'informed,' it is valid; that to the extent that a potential client ripens into an actual conflict, the advance waiver may or may not be sufficient depending upon the degree of involvement and the nature of the subsequent conflict; that regardless of the validity of the waiver, it cannot be asserted as a defense to a disciplinary proceeding charging incompetent performance of legal services; and that under no circumstances may the agreement be used for the purposes of limiting the lawyer's civil liability for malpractice.").
- N.Y. County Law. Ass'n LEO 724 (undated) (finding that a lawyer might ethically seek a client's prospective consent; "The degree of disclosure that must be made in order for the client's or prospective client's consent to be 'informed' will also depend on other factors. For example, when the lawyer is seeking an advance waiver from a sophisticated client, such as a large corporation with in-house counsel, the adequacy of disclosure will be put to a less stringent test than if the client were a small business, an individual unsophisticated with respect to legal matters, a child or an incapacitated person."; "The Code does not require that the facts of each future adverse representation be known to the parties or described with precision in order for consent to be 'informed.' If such were the rule, no advance waiver would ever be enforceable; by their nature, such waivers include clients and claims that are not yet known. If the subsequent conflict should have been reasonably anticipated by the original client based on the disclosures made and the scope of the consent sought, we see no reason why the lawyer should not be permitted to rely on such consent under DR 5-105(C)."; "Notwithstanding that a lawyer may have obtained a client's consent to a future conflict, the lawyer must reassess the propriety of the adverse concurrent representation under

the 'obviousness' test discussed above when the conflict actually arises. The lawyer must determine whether he or she can adequately represent the interests of all affected clients at that time. Of course, if the actual conflict that materializes is materially different than the conflict that has been waived, the lawyer may not rely on the consent previously obtained."; "A lawyer can seek and a client or prospective client can give an advance waiver with respect to conflicts of interest that may arise in the future. The lawyer must first evaluate whether the future representation is likely to give rise to a non-consentable conflict. If the lawyer determines that the prospective conflict is consentable, he or she can proceed to make full disclosure to the client or prospective client and obtain that person or entity's consent. The validity of the waiver will depend on the adequacy of disclosure given to the client or prospective client under the circumstances, taking into account the sophistication and capacity of the person or entity giving consent.").

### Case Law

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

- McKesson Info. Solutions Inc. v. Duane Morris LLP, Civ. No. 2006CV121110 (Fulton County (Ga.) Super. Ct. Mar. 6, 2007) (in earlier order disqualifying Duane Morris, addressing McKesson's "Verified Complaint for Emergency Injunctive Relief and Disqualification of Duane Morris LLP" ("Nov. 7, 2006 Order")); explaining that Duane Morris was representing two individuals in arbitration against McKesson while simultaneously representing two of McKesson's sister subsidiaries in a separate action in Pennsylvania (Nov. 7, 2006 Order); noting that Duane Morris undertook Pennsylvania representation of the two other McKesson subsidiaries as local counsel pursuant to an April 27, 2006 engagement letter which "attempts to distinguish between McKesson Corporation's entities and contains a waiver of future conflicts" (Nov. 7, 2006 Order at 2); noting that Duane Morris's adversary in the arbitration and one of its clients in the Pennsylvania bankruptcy action were part of the same segment of the overall McKesson corporate family, and among other things reported to the same law department (Nov. 7, 2006 Order); rejecting Duane Morris's argument that the McKesson entities are separate for conflicts purposes (Nov. 7, 2006 Order); holding that Georgia's ethics rules apply because Duane Morris's lawyers' conduct is occurring in Georgia (Nov. 7, 2006 Order); and quoting Duane Morris's engagement letter signed by McKesson in the Pennsylvania bankruptcy action: "Given the scope of our business and the scope of our client representations through our various offices in the United States and abroad, it is possible that some of our present or future clients will have

matters adverse to McKesson while we are representing McKesson. We understand that McKesson has no objection to our representation of parties with interests adverse to McKesson and waive any actual or potential conflict of interest as long as those other engagements are not substantially related to our services to McKesson. We agree, however, that McKesson's consent to, and waiver of, such representation shall not apply in any instance where, as a result of our representation of McKesson, we have obtained proprietary or other confidential information of a non-public nature, that, if known to such other client, could be used in any such other matter by such client to McKesson's material disadvantage or potential material disadvantage. By agreeing to this waiver of any claim of conflicts as to matters unrelated to the subject matter of our services to McKesson, McKesson also agrees that we are not obligated to notify McKesson when we undertake such a matter that may be adverse to McKesson." (Nov. 7, 2006 Order at 10-11); holding that in this case the consent was inadequate and invalid as a matter of Georgia law: "In this case, Defendant's engagement letter does not refer to any particular parties or circumstances under which adverse representation would be undertaken. As such, the Court finds that MMM and MAI [Duane Morris's clients in the Pennsylvania bankruptcy action] could not have reasonably anticipated that Defendant would actually consider representation of the Smiths [Duane Morris's clients in the Georgia action against the other McKesson subsidiary] in the concurrent action where the adverse party is attacking McKesson Corporation products and accusing it of fraudulent conduct. Courts must ensure that the trust and loyalty owed by lawyers to their clients are not compromised." (Nov. 7, 2006 Order at 11); the November 7, 2006 Order was later vacated after Duane Morris's representation of the McKesson subsidiaries in the Pennsylvania bankruptcy case ended, and Duane Morris sent a letter to McKesson's lawyer in the Pennsylvania bankruptcy matter indicating that Duane Morris "intended to withdraw as counsel for MMM and MAI" in the Pennsylvania bankruptcy matter (Mar. 6, 2007 Order on Motion for New Trial and to Vacate the Permanent Injunction and To Dismiss on the Grounds that the Controversy is Now Moot, slip op. at 3-4); also noting that Duane Morris had moved to withdraw as counsel for the McKesson entities in the Pennsylvania bankruptcy matter, which was granted by the bankruptcy court (slip op. at 4); rejecting McKesson's reliance on the "hot potato" rule, based on its argument that Duane Morris's withdrawal as counsel occurred during the pendency of the arbitration in Georgia (slip op. at 5); holding that Duane Morris "did not improperly terminate or prematurely abandon its attorney-client relations" with the McKesson subsidiaries it was representing in the Pennsylvania bankruptcy proceeding (slip op. at 6); noting that neither of the McKesson entities or the chief lawyer representing them in the Pennsylvania bankruptcy matter objected to Duane Morris's motion to withdraw, which the bankruptcy court granted).

- Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1102-03 (N.D. Cal. 2003) (upholding the following prospective consent in a retainer letter between the Heller Ehrman Law Firm and First Data: "Our engagement by you is also understood as entailing your consent to our representation of our other present or future clients in "transactions," including litigation in which we have not been engaged to represent you and in which you have other counsel, and in which one of our other clients would be adverse to you in matters unrelated to those that we are handling for you. In this regard, we discussed [Heller's] past and on-going representation of Visa U.S.A. and Visa International (the latter mainly with respect to trademarks) (collectively, "Visa") in matters which are not currently adverse to First Data. Moreover, as we discussed, we are not aware of any current adversity between Visa and First Data. Given the nature of our relationship with Visa, however, we discussed the need for the firm to preserve its ability to represent Visa on matters which may arise in the future including matters adverse to First Data, provided that we would only undertake such representation of Visa under circumstances in which we do not possess confidential information of yours relating to the transaction, and we would staff such a project with one or more attorneys who are not engaged in your representation. In such circumstances, the attorneys in the two matters would be subject to an ethical wall, screening them from communicating from [sic] each other regarding their respective engagements. We understand that you do consent to our representation of Visa and our other clients under those circumstances."; noting that First Data moved to disqualify Heller Ehrman from representing Visa in an action against First Data; approving the prospective consent and denying First Data's motion to disqualify -- because the prospective consent provided a specific enough disclosure of the possible adversity and thus resulted in a knowing consent).
- Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc., 142 F. Supp. 2d 579, 582, 582-83 (D. Del. 2001) (denying Apple's motion to disqualify the Dechert Price firm; "As a general matter, a client may expressly or impliedly waive his objection and consent to an adverse representation. Given the facts in the record, Apple cannot reasonably or credibly maintain that Albert P. Cefalo, in-house counsel for Apple, believed that he was merely granting a transactional waiver."; "Given that Cefalo, who was the Director of Intellectual Property at Apple, knew about the possibility of suit from Elonex, his discussion with Tim Blank of Dechert in Boston was reasonably sufficient, or should have been sufficient, to cause Apple to appreciate the significance of any potential conflicts. Therefore, considering that Elonex had not yet filed a suit, the court concludes that Dechert had provided Apple with sufficient information about the possible conflict. The facts in the record suggest that Dechert obtained a prospective waiver from Apple. The ABA has affirmed the validity of the prospective waivers. . . . A prospective waiver should identify the potential opposing party, the nature of the likely subject matter in dispute,

and permit the client to appreciate the potential effect of the waiver. . . . Therefore, considering that Blank identified the possibility of this patent infringement suit, Cefalo was already aware of the possibility of suit, and the two discussed methods of dealing with the conflict, the court finds that Blank sufficiently explained the conflict in order to obtain a prospective waiver from Apple.").

- General Cigar Holdings, Inc. v. Altadis, S.A., 144 F. Supp. 2d 1334, 1336, 1339 (S.D. Fla. 2001) (enforcing a prospective consent obtained by Latham & Watkins; explaining that the client signed an engagement letter with the following provision: "Our firm has in the past and will continue to represent clients listed on the attached Exhibit A (each an 'Exhibit A Client') in matters not substantially related to this engagement. Accordingly, each Client agrees to waive any objection, based upon this engagement, to any current or future representation by the firm of any of the Exhibit A Clients, its respective parent, subsidiaries and affiliates in any matter not substantially related to this representation. Of course, we will not accept any representation that is adverse to you in this matter."; finding the prospective consent enforceable; "The engagement letter in the instant case was reviewed by outside counsel and the respective representatives of the corporations. As in Fisons [Fisons Corp. v. Atochem North America, Inc.], No. 90 Civ. 1080 (JMC), 1990 U.S. Dist. LEXIS 15284 (S.D.N.Y. Nov. 14, 1990)], it is clear that advance consent was obtained from knowledgeable and sophisticated parties. There is no dispute that the predecessors of Altadis, U.S.A. were aware of the Latham attorneys' relationship with General Cigar. Allowing for advance, informed consent has significant advantages to both clients and lawyers alike, especially where large firms and sophisticated clients are involved. While the engagement letter could have been more explicit, under the circumstances, it represents informed consent for potential adverse actions.").

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

- All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc., Nos. C 07-1200, -1207, -1212 & No. 06-2915, 2008 U.S. Dist. LEXIS 106619, at \*10-11, \*11, \*20-21, \*24, \*7-8, \*33-34, \*37-38 (N.D. Cal. Dec. 18, 2008) (assessing a situation in which lawyer John Vandavelde had represented Infineon's Vice President of Sales in connection with antitrust issues relating to the pricing of DRAM, and later joined (through a law firm merger) Crowell & Moring -- who was representing plaintiffs in an action against Infineon involving antitrust issues; noting: that Vandavelde's firm merged with Crowell on October 6, 2008, that two days later Infineon demanded that Crowell withdraw from representing its client in the case against Infineon, and that one day after the letter Crowell "despite its belief that there was no adversity between Hefner

[former Infineon executive] and its current clients in this litigation, decided to erect an 'ethics wall' to protect against the inadvertent disclosure of confidential information to personnel at Crowell that the Lightfoot Vandavelde lawyers learned during their representation of Hefner"; explaining that as part of the "ethics wall . . . [a]ccording to Crowell, Crowell's document management system has been specially coded so that none of the former attorneys and staff of Lightfoot Vandavelde can access any documents related to the current litigation"; rejecting Crowell's argument that Vandavelde did not have an attorney-client relationship with Infineon and therefore should not be disqualified or cause Crowell & Moring to be disqualified; "[A] conflict of interest may be created when, as here, an attorney (Vandavelde) has acquired confidential information about a non-client (Infineon) in connection with his representation of a client (Hefner), such as when an attorney obtains confidential information about a co-defendant of a client during a joint defense of an action. Indeed, contrary to plaintiffs' contention, the fact that Vandavelde and Infineon never had an attorney-client relationship is not determinative of whether disqualification of Crowell is appropriate because 'an attorney's receipt of confidential information from a non-client may lead to the attorney's disqualification.'"; pointing to Crowell & Moring's ethics screen at highlighting the firm's belief that there might be a problem; "Crowell's reaction to discovering that Vandavelde had previously represented Hefner in prior litigation relating to DRAM price-fixing immediately erecting an ethical wall -- suggests that Crowell recognized that Vandavelde had a duty to protect the confidential information he received from Infineon in the course of that litigation."; also rejecting Crowell's argument that a joint defense agreement under which Vandavelde represented the Infineon executive contained a valid prospective consent in which Infineon agreed not to seek his disqualification; noting that the joint defense agreement contained the following consent language: "While the precise nature of each possible conflict that may arise in the future cannot be identified at the present time, each client member after being informed of the general nature of the conflicts that may arise, knowingly, and intelligently waives any conflict of interest that may arise on account of this Agreement, including specifically from an attorney member of this Agreement, other than his, her or its own attorney, cross-examining him, her or it at trial in any other proceeding arising from or relating to the above Investigation. Each client member further waives any claim of conflict of interest which might arise by virtue of participation by his, her or its attorney in this Agreement. Each attorney member and client member waives any right to seek the disqualification of counsel for any other attorney member who is a party to this Agreement based upon a communication of joint-defense privileged information."; finding the prospective consent ineffective; "The court is not convinced that Infineon gave its informed consent to waive its right to seek disqualification of Vandavelde under the circumstances. Plaintiffs did not offer persuasive evidence or argument indicating that the prospective waiver provision sufficiently disclosed the nature of the conflict that has



subsequently arisen between the parties, and that Infineon knowingly and specifically waived its right to object to this conflict. Neither the language of the JDA nor the argument advanced by plaintiffs compels the conclusion that Infineon consented to Vandevelde prospectively undertaking adverse representation on behalf of plaintiffs against Infineon in substantially related litigation. Indeed, the only specific conflict waived by the parties in the JDA was the conflict that could arise if an attorney member of the joint defense (e.g., Vandevelde) cross-examined a defendant that the attorney member did not represent (i.e., Infineon) at trial or in any other proceeding arising from or relating to the joint defense. In other words, the parties to the JDA waived any duty of confidentiality for purposes of cross-examining testifying defendants. To the extent that plaintiffs urge the court to adopt a broader reading of the Paragraph 13, the court declines to do so."; ultimately finding that "disqualification of the entire Crowell firm is warranted. First, plaintiffs have not shown that Infineon's motion to disqualify was tactically motivated or otherwise brought for an improper purpose, such as to delay the proceedings. Second, while the court is mindful of the financial ramifications that disqualification of plaintiffs' counsel may subject plaintiffs to at this stage of the litigation, plaintiffs will not, as they suggest, be required to hire new counsel and prepare for a trial that is only six months away. Plaintiffs are simply mistaken in this regard. Only the dispositive motions involving Sun are being heard in December 2008 and only the trial of Sun will go forward in June 2009. The dispositive motions and trial for the four plaintiffs involved in this motion have yet to be scheduled. Thus, there is plenty of time for new counsel to get up to speed.").

- Celgene Corp. v. KV Pharm. Co., Civ. A. No. 07-4819 (SDW), 2008 U.S. Dist. LEXIS 58735, at \*3-4, \*13-14, \*21-24, \*32, \*41 (D.N.J. July 28, 2008) (not for publication) (concluding that the following prospective consent in retainer letters between the law firm of Buchanan & Ingersoll and one of its clients was not sufficient to avoid the firm's disqualification: "Recognizing and addressing conflicts of interest is a continuing issue for attorneys and clients. We have implemented policies and procedures to identify actual and potential conflicts at the outset of each engagement. From time to time we may be asked to represent someone whose interests may differ from the interests of the Company. We are accepting this engagement with the Company's understanding and express consent that our representation of the Company will not preclude us from accepting an engagement from a new or existing client, including litigation or other matters that may involve the Company. However, we will not accept an engagement that is directly adverse to the Company or any of its subsidiaries if either: (1) it would be substantially related to the subject matter of our representation of the Company or representation of Anthrogenesis Corp.; or (2) would impair the confidentiality of proprietary, sensitive or otherwise confidential communications made to us by the Company or Anthrogenesis Corp."; analyzing the standard for judging

prospective consents under Congoleum [Century Indem. Co. v. Congoleum Corp., 426 F.3d 675 (3d Cir. 2005)]; concluding that the Buchanan Ingersoll retainer letters did not satisfy the standard; "[T]ruly informed consent' requires the attorney to provide meaningful consultation to the client about potential conflicts. Thus, in determining whether Celgene gave 'truly informed consent,' the inquiry focuses in part on how Buchanan actually consulted with its client, Celgene, and informed Celgene about the potential conflict when consent was obtained."; concluding that the Buchanan Ingersoll retainer letters did not satisfy the standard; "This Court has examined the 2003 Retention Agreement and the 2006 Engagement Letter and does not find within either of those documents any of the following: 1) any statements which adequately communicate a proposed course of conduct with regard to concurrent conflicts of interest; 2) any explanation of the material risks of the course of conduct with regard to concurrent conflicts of interest; or 3) any explanation of reasonably available alternatives to the proposed course of conduct. . . . This Court finds no basis to conclude that either agreement manifests informed consent, within the meaning of RPC 1.0(e), for several reasons. First, both agreements propose a future course of conduct that is very open-ended and vague. Both provisions are so general that a reader has no clear idea what course of conduct Buchanan anticipated: what kinds of cases are substantially related? Did the parties anticipate that Buchanan would be adverse to Celgene in other patent cases? Second, there is nothing in the agreements to indicate that Buchanan communicated to Celgene adequate information or explanation about the risks of the proposed course of conduct, with regard to concurrent conflicts of interest: would Celgene be comfortable if Buchanan represented a generic pharmaceutical company in a patent case? Third, there is nothing in the agreements to indicate that Buchanan explained to Celgene reasonably available alternatives to the proposed course of conduct, such as Celgene asking Buchanan to specifically define 'substantially related' or requesting an even broader limitation -- perhaps that Buchanan would not represent any generic drug companies. The record does not show that Celgene received anything in return for agreeing to these provisions. Indeed, the agreements only appear to benefit Buchanan -- which further underscores the importance of Buchanan fully explaining the meaning and implications of the waiver. Neither agreement manifests informed consent within the meaning of RPC 1.7(b) and 1.0(e)."; "It is significant that Buchanan does not even assert, no less offer supporting evidence, that Buchanan at any time provided a consultation to Celgene on the conflict waiver, nor that Buchanan provided full -- or any -- disclosure on the matter of conflicts of interest, nor that Buchanan communicated 'adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.' RPC 1.0(e)."; ultimately holding that Buchanan Ingersoll did not carry its burden of proof in establishing that the client gave "truly informed consent" to the firm's representation of another client adverse to it).

- Wolk v. Flight Options, Inc., No. 03-cv-06840, 2005 U.S. Dist. LEXIS 19891 (E.D. Pa. Sept. 13, 2005) (refusing to validate a contingency fee arrangement because the lawyer had included a general prospective consent in the retainer agreement).
- Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 801-02, 820, 821 (N.D. Cal. 2004) (disqualifying Morgan Lewis & Bockius from representing a client adverse to another client who had signed a retainer letter containing the following prospective consent: "Morgan, Lewis & Bockius is a large law firm, and we represent many other companies and individuals. It is possible that some of our present or future clients will have disputes or other dealings with you during the time that we represent you. Accordingly, as a condition of our undertaking of this matter for you, you agree that Morgan, Lewis & Bockius may continue to represent, or may undertake in the future to represent, existing or new clients in any matter, including litigation, that is not substantially related to our work for you, even if the interests of such clients in those other matters are directly adverse to you. Further, you agree in light of its general consent to such unrelated conflicting representations, Morgan, Lewis & Bockius will not be required to notify you of each such representation as it arises. We agree, however, that your prospective consent to conflicting representations contained in the preceding sentence shall not apply in any instance where, as the result of our representation of you, we have obtained confidential information of a non-public nature that, if known to another client of ours, could be used to your material disadvantage in a matter in which we represent, or in the future are asked to undertake representation of, that client."; finding the prospective consent ineffective; "Applying these factors to the waiver executed by Dr. Winchell at Thomas' request, Winchell Decl., Ex. 1, the Court finds as follows: (1) the terms of the waiver are extremely broad and were evidently intended to cover almost any eventuality; (2) its temporal scope is likewise unlimited; (3) the record contains no evidence of any discussion of the waiver; (4) the waiver lacks specificity as to the conflicts that it covers and effectively awards Morgan, Lewis an almost blank check; (5) however, Morgan Lewis explicitly stated that it would not seek to represent Dr. Winchell and an adverse client in a 'substantially related' matter; and (6) Dr. Winchell's education and business experience are strongly indicative of a high degree of sophistication. Thus, the fifth and sixth factors tend to support a finding of informed consent, but the first four weigh in the opposite direction. The interests of justice (factor 7) remain to be determined." (footnote omitted); also explaining that "[u]nder the law of this jurisdiction, even if a prospective waiver of conflict has been obtained, the attorney must request a second, more specific waiver, 'if the [prospective] waiver letter insufficiently disclosed the nature of the conflict that subsequently arose between the parties.' . . . This Morgan, Lewis did not do.").

- Goss Graphics Sys., Inc. v. MAN Roland Druckmaschinen Aktiengesellschaft, No. C00-0035 MJM, 2000 U.S. Dist. LEXIS 18100, at \*7 (N.D. Iowa May 25, 2000) (disqualifying Kirkland & Ellis from representing a client adverse to another firm client who had signed a retainer letter with the following prospective consent: "In the event a present conflict of interest exists between [Goss] and [Kirkland's] other clients or in the event one arises in the future, [Goss] agrees to waive any such conflict of interest or other objection that would preclude [Kirkland's] representation of another client in other current or future matters. Accordingly, our representation of [Goss] in connection with the [Bankruptcy Proceedings] and in connection with any future matter will be with the understanding that such representation will not preclude [Kirkland] from continuing any present representation or assuming future representation in other matters that another client may request (other than a matter where [Goss] and another [Kirkland] client are on opposing sides of litigation).").
- Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356, 1359, 1359-60, 1360 (N.D. Ga. 1998) (disqualifying defendants' local counsel despite the following prospective consent which plaintiff Worldspan signed when the law firm began to represent plaintiff on unrelated matters approximately five years earlier: "As we have discussed, because of the relatively large size of our firm and our representation of many other clients, it is possible that there may arise in the future a dispute between another client and WORLDSPAN, or a transaction in which WORLDSPAN's interests do not coincide with those of another client. In order to distinguish those instances in which WORLDSPAN consents to our representing such other clients from those instances in which such consent is not given, you have agreed, as a condition to our undertaking this engagement, that during the period of this engagement we will not be precluded from representing clients who may have interests adverse to WORLDSPAN so long as (1) such adverse matter is not substantially related to our work for WORLDSPAN, and (2) our representation of the other client does not involve the use, to the disadvantage of WORLDSPAN, of confidential information of WORLDSPAN, we have obtained as a result of representing WORLDSPAN."; "Looking only at the original letter itself, the Court finds that its very language is ambiguous. The phrase 'will not be precluded from representing clients who may have interests adverse to WORLDSPAN so long as (1) such adverse matter' does not necessarily or even impliedly foreshadow future directly adverse litigation. It is the opinion of the Court that future directly adverse litigation against one's present client is a matter of such an entirely different quality and exponentially greater magnitude, and so unusual given the position of trust existing between lawyer and client, that any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse

representation would be undertaken, and all relevant like information."; noting that the prospective consent allowed the law firm to begin to represent new clients in matters adverse to its existing client WORLDSPAN, which the court indicated carried "added weight" in its analysis).

- Hasco, Inc. v. Roche, 700 N.E.2d 768, 776 (Ill. App. Ct. 1998) (finding that prospective consent language in a retainer letter was not sufficient; explaining the consent letter contained the following provision: "6. Waiver of Conflict of Interest. Each of Clients, as a subordinated lender to Arauca, has a claim against Arauca arising from any default by Arauca in repayment of the subordinated debt. Clients have been advised by Arauca that Arauca presently lacks sufficient resources to repay the subordinated debt. SRZ is presently representing Arauca in its pursuit of claims against FOC to recover lost profits on the Syntex transaction and for other relief. SRZ is also furnishing other legal advice to Arauca and its general partner, Arauca General, Inc. ("AGI"). A conflict exists between the interests of Arauca, AGI and each of the Clients. By executing this letter-agreement, each of the Clients hereby consents to waive any conflict of interest associated with the representation by SRZ of Arauca and the representation of Clients by SRZ with respect to their claims against FOC. Each Client further recognizes and acknowledges the SRZ shall have no obligation to advise any Client with respect to any actual or potential claim against Arauca."; concluding that "[a]lthough the Schuyler parties argue that this waiver extends to the NASD arbitration dispute, the circuit court correctly determined that this conflict waiver was limited to SRZ's representation of the subordinated lenders in the West Virginia lawsuit").
- Florida Ins. Guar. Ass'n v. Carey Canada, Inc., 749 F. Supp. 255, 259-60 (S.D. Fla. 1990) (disqualifying a law firm from representing the insured in a lawsuit by the insurer against the insured; rejecting the law firm's argument that it had a prospective consent, because the law firm had "failed to come forward with any written instrument evidencing such consent," and "has been unable to identify any single [insurance company] employee much less a specific conversation that ever provided [the law firm] with standing consent to sue" the insurance company).

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

- See, e.g., Brigham Young Univ. v. Pfizer, Inc., Case No. 2:06-CV-890 TS BCW, 2010 U.S. Dist. LEXIS 104164, at \*5-6, \*11, \*12 (D. Utah Sept. 29, 2010) (finding that a prospective consent Brigham Young University signed when retaining Winston & Strawn allowed Winston & Strawn only to represent

existing clients in matters adverse to BYU; quoting the following prospective consent language: "Advance Patent Waiver: As you may know, universities frequently hold patents in the product and inventions developed at such universities. Winston & Strawn LLP currently represents multiple pharmaceutical and other companies with respect to patent and intellectual property matters (collectively, the "Other Clients"), including litigation (the "Patent Matters"). Winston & Strawn LLP is not currently representing any Other Clients in matters adverse to the University. Because of the scope of our patent practice, however, it is possible that Winston & Strawn LLP will be asked in the future to represent one or more Other Clients in matters, including litigation, adverse to the University. Therefore, as a condition to Winston & Strawn LLP's undertaking to represent you in the BYU Matters, you agree that this firm may continue to represent Other Clients in the Patent Matters, including litigation, directly adverse to the University and hereby waive any conflict of interest relating to such representation of Other Clients."; finding that the prospective consent was limited only to current Winston & Strawn clients; "[T]he plain language of the engagement letter limits the term 'Other Clients' to companies the firm is, at the present, acting in their behalf or stead."; "The Court finds the plain language to be clear and fully supports the Magistrate Judge's conclusion that 'the waiver only applies to clients that Winston was representing with respect to patent and intellectual property matters as of the date of the agreement.'"; disqualifying Winston & Strawn from representing a new client (Pfizer) in a matter adverse to BYU).

### **Consent Language**

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

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

scope of the prospective consent,<sup>1</sup> might ultimately prove to be ineffective if a court must later assess the consent.

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

You also agree that this firm may now or in the future represent another client or clients with actually or potentially differing interests in the same negotiated transaction in which the firm represents you. In particular, and without waiving the generality of the previous sentence, you agree that we may represent [to the extent practicable, describe the particular adverse representations that are envisioned, such as "other bidders for the same asset" or "the lenders or parties providing financing to the eventual buyer of the asset"]. This waiver is effective only if this firm concludes in our professional judgment that the tests of DR 5-105 are satisfied. In performing our analysis, we will also consider the factors articulated in ABCNY Formal Opinion 2001-2, including (a) the nature of any conflict; (b) our ability to ensure that the confidences and secrets of all involved clients will be preserved; and (c) our relationship with each client. In examining our ability to ensure that the confidences and secrets of all involved clients will be preserved, we will establish an ethical screen or other information-control device whenever appropriate, and we otherwise agree that different teams of lawyers will represent you and the party adverse to you in the transaction.

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

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

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

Other lawyers in the Firm currently do [XXX] work for [existing client] and its affiliates, and expect to continue to do such work. In order to avoid any misunderstanding in the future, we ask that you confirm that the Company agrees to waive any conflict of interest which may be deemed to arise as a result of such representation. Please also confirm that neither the Company nor any of its affiliates will seek to disqualify our Firm from representing [existing client] or its affiliates in existing or future [XXX] or other matters. Our agreement to represent you is conditioned upon the understanding that we are free to represent any clients (including your adversaries) and to take positions adverse to either the company or an affiliate in any matters (whether involving the same substantive area(s) of law for which you have retained us or some other unrelated area(s), and whether involving business transactions, counseling, litigation or other matters), that are not substantially related to the matters for which you have retained us or may hereafter retain us. In this connection, you should be aware that we provide services on a wide variety of legal subjects, to a large number of clients both in the United States and internationally, some of whom are or may in the future operate in the same area(s) of business in which you are operating or may operate. (A summary of our current practice areas and the industries in which we represent clients can be found on our web site at [www.XXX.com](http://www.XXX.com).) You acknowledge that you have had the opportunity to consult with your company's counsel [if client does not have in-house counsel, substitute: 'with other counsel'] about the consequences of this waiver. In this regard, we have discussed with you and you are aware that we render services to others in the area(s) of business in which you currently engage.

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

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



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

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

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

"While the precise nature of each possible conflict that may arise in the future [in connection with a common interest agreement among several separately represented companies] cannot be identified at the present time, each client member after being informed of the general nature of the conflicts that may arise, knowingly, and intelligently waives any conflict of interest that may arise on account of this Agreement, including specifically from an attorney member of this Agreement, other than his, her or its own attorney, cross-examining him, her or it at trial in any other proceeding arising from or relating to the above Investigation. Each client member further waives any claim of conflict of interest which might arise by virtue of participation by his, her or its attorney in this Agreement. Each attorney member and client member waives any right to seek the disqualification of counsel for any other attorney member who is a party to this Agreement based upon a communication of joint-defense privileged information."

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

"Recognizing and addressing conflicts of interest is a continuing issue for attorneys and clients. We have

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

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

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

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

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

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

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

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

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

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

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

### **Best Answer**

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

N 3/12

## Disqualification -- Standards

### Hypothetical 34

Your law firm has either filed or defended a number of disqualification motions lately, and you would like to understand how the disqualification standard differs (if at all) from the conflicts analysis with which you are fairly familiar.

- (a) Is a court likely to disqualify a law firm upon finding it guilty of a conflicts violation?

**MAYBE**

- (b) Is the court likely to rely on an "appearance of impropriety" standard when assessing a disqualification motion?

**MAYBE**

### Analysis

(a) Although each state follows its own disqualification standard, many states explicitly recognize that a conflict of interest does not automatically result in a law firm's disqualification as counsel of record in litigation. ABA Model Rules Preamble & Scope explains that "violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation."

In some situations, a court's choice of laws determination can be dispositive.

- See, e.g., Alzheimer's Institute of Am., Inc. v. Avid Radiopharmaceuticals, Civ. A. No. 10-6908, 2011 U.S. Dist. LEXIS 140345, at \*23, \*6-7, \*7 n.5, \*9-10, \*12 (E.D. Pa. Dec. 7, 2011) (declining to disqualify the law firm of Bryan Cave, although it faced a conflict of interest in continuing to represent its client the Alzheimer's Institute of America after intervention in the lawsuit by the South Florida Board of Trustees, which Bryan Cave represented on unrelated intellectual property matters; explaining the choice of laws issue for the disqualification; explaining the situation facing Bryan Cave; "Under both California's and Pennsylvania's rules of professional conduct, a lawyer may not represent one client whose interest is directly adverse to another client's without the consent of each client. USF refused to give its consent to Bryan

Cave to continue representing AIA in these matters. Bryan Cave then filed its motion to withdraw because the attorneys believed they had an obligation to do so under the California and the ABA rules of professional conduct. Marshall explained that he moved to withdraw 'because [he] ha[d] to, not because [he] wanted to.'; "In a diversity action, the court 'must apply the choice of law rules of the forum state to determine what substantive law will govern,' Huber v. Taylor, 469 F.3d 67, 73 (3d Cir. 2006) (quoting Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)). Accordingly, we turn to Pennsylvania's choice of law rules to determine the applicable law." (footnote omitted); "Although this is not a diversity action, the issue of attorney conduct is a question of state, not federal law."; ultimately concluding that the Pennsylvania ethics rules apply; "[T]he plain language of Rule 8.5 and its explanatory comment clearly state that if the lawyer's conduct relates to a proceeding pending before a tribunal, the lawyer is 'subject only to the disciplinary rules of the jurisdiction in which the tribunal sits.' Because Bryan Cave's motion to withdraw pertains to a proceeding pending in this court and the Pennsylvania Rules of Professional Conduct govern this tribunal, Pennsylvania's Rules of Professional Conduct apply in this case."; rejecting USF's argument that California ethics rules applied, and emphasizing that under California Rules the disqualification would be mandatory; "USF is correct that California Rule of Professional Conduct 3-310 imposes a per se disqualification rule whenever a concurrent conflict is presented.").

Many states follow a two-part test when assessing disqualification motions. First, the courts determine if there is clear evidence of a conflict. Second, the court then determines whether the conflict would somehow "taint" the proceeding. These courts disqualify a law firm only if both of these tests are satisfied. Board of Educ. of N.Y. City v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) (holding that lawyers should be disqualified for conflicts only if the conflict will "taint the underlying trial").

The Second Circuit confirmed this approach in refusing to disqualify the law firm of Debevoise & Plimpton from representing MetLife.

[T]he showing of prejudice is required as a means of proving the ultimate reason for disqualification: harm to the integrity of the judicial system. . . . [D]isqualification by imputation should be ordered sparingly, . . . and only when the concerns motivating the rule are at their most acute.

Murray v. Metro. Life Ins. Co., 583 F.3d 173, 178 (2d Cir. 2009).

Other courts have taken this approach.

- Morin v. Maine Education Association, 993 A.2d 1097, 1099, 1100 (Me. 2010) ("Morin [labor advocate and board member of the Maine Education Association] testified that Edelman [lawyer who conducted an investigation of Morin's complaint about a "hostile and discriminatory work environment"] represented to her that her statements made during the interview would remain confidential and would not be shared with the Association. Morin's attorney testified that she would have been more 'guarded' during the interview if she had known that Bredhoff & Kaiser might later represent the Association, and that she would not have offered her opinion to Edelman as to litigation strategy or settlement terms. Edelman testified, in contrast, that he explained to Morin that the details of his investigation would remain confidential 'to the extent that's practical, given the investigation, or the extent consistent with the . . . pursuit of the investigation,' but that he would describe the nature of Morin's complaint to the Association. After concluding his investigation, Edelman substantiated Morin's allegation of discrimination."; declining to disqualify the lawyer who conducted the investigations; "[W]e require a showing that continued representation by the attorney would result in actual prejudice to the party seeking that attorney's disqualification. . . . [C]ourts will not assume the existence of prejudice to the moving party just by the mere fact that an ethical violation was committed, even when that ethical violation involves confidential communications. . . . A mere general allegation that the attorney has some confidential and relevant information he gathered in the previous relationship will not support disqualification. . . . Rather, the moving party must point to the specific, identifiable harm she will suffer in the litigation by opposing counsel's continued representation. Indeed, to allow disqualification with proof of anything less than such actual prejudice would be to invite movants to employ this 'obvious vehicle for abuse.'" (emphasis added; citations omitted)).

Other courts implicitly acknowledge that they will not be bound by the ethics rules' per se approach, but rather apply a balancing standard.

- Alzheimer's Institute of Am., Inc. v. Avid Radiopharmaceuticals, Civ. A. No. 10-6908, 2011 U.S. Dist. LEXIS 140345, at \*18, \*26-27, \*27, \*27-28, \*30 (E.D. Pa. Dec. 7, 2011) (declining to disqualify the law firm of Bryan Cave, although it faced a conflict of interest in continuing to represent its client the Alzheimer's Institute of America after intervention in the lawsuit by the South Florida Board of Trustees, which Bryan Cave represented on unrelated intellectual property matters; explaining the choice of laws issue for the disqualification; after concluding that Pennsylvania rather than California

ethics rules apply, finding that the Pennsylvania rules require a balancing of interests in the disqualification motion; "[U]nder Rule 1.16(c), the court can order a lawyer to continue to represent a client even if doing so would otherwise violate a disciplinary rule. Pa. Rules of Prof. Conduct R. 1.16(c)."; "In summary, the Pennsylvania standard calls for a balancing of the concerns addressed in Local Rule 5.1(c) and Pennsylvania Rules of Professional Conduct 1.7 and 1.16 to determine whether good cause exists to permit the withdrawal. The factors to weigh include the potential prejudice that the proposed withdrawal will cause the clients, lawyers and the other parties to the lawsuit, the delay to the proceedings and the harm to the administration of justice."; noting that Bryan Cave had served for two and a half years as AIA's counsel in the case, and had spent more than 7,200 hours representing AIA; also finding that USF would not be prejudiced by Bryan Cave's continued involvement for AIA after USF's intervention; "USF expressly concedes that it cannot identify 'any specific or material harm that USF has suffered or will suffer' as a result of Bryan Cave continuing to represent AIA in these patent infringement actions."; "The perception of betrayal alone does not require withdrawal."; "USF stipulated that Bryan Cave did not and will not receive any confidential information from USF as a result of its representation of USF that would be relevant or material to this case. . . . Indeed, the matters in which Bryan Cave is representing and has represented USF are unrelated to this litigation or any other litigation brought by AIA."; also noting that Bryan Cave had imposed an ethics screen; concluding that Bryan Cave could not have foreseen USF's intervention; "[B]ecause USF never claimed ownership of the inventions, it was reasonable for Bryan Cave to believe that there was no conflict with USF and no need to run a conflict check as to USF when it brought the patent infringement actions. USF's potential interest did not become apparent until our ruling on the cross-motions for summary judgment.").

- Am. Int'l Group, Inc. v. Bank of Am. Corp., No. 11 Civ. 6212 (BSJ), 2011 U.S. Dist. LEXIS 141012, at \*9, \*10, \*11, \*11-12, \*12, \*12-13, \*14-15 (S.D.N.Y. Dec. 6, 2011) (declining to disqualify the law firm of Quinn Emanuel from representing AIG in a lawsuit against Bank of America; "Disqualification is disfavored in this Circuit and, as a result, the party seeking it must meet a high standard of proof before it is granted."; "Courts will presume that the attorney shares his confidences with the firm, and so an attorney's successive representation risks disqualification of his firm as well. . . . In the Second Circuit, however, the confidence-sharing presumption is rebuttable."; "One method of rebutting the presumption is by demonstrating a timely and effective ethical screen 'that fences the disqualified attorney from the other attorneys in the firm' in connection with the case for which the conflict is alleged."; "Quinn's screening procedure was imperfect, without question. Quinn admits that it failed to realize a potential conflict until Defendants asserted one, on September 19, 2011. Because Quinn was unaware of the



conflict until September, Becker was asked to review and comment on the draft complaint and draft motion to remand. However, flawed screens-including late screens-are not fatal. In particular, screens erected immediately upon discovery of the conflict weigh against disqualification."; "Quinn erected an ethical screen within 24 hours of receiving notice of a conflict."; "[T]he Court finds that for several reasons Plaintiffs have rebutted the presumption that confidences were shared before the screen was erected. For one, Becker did not bring any confidential documents or files from Munger to Quinn, so there is 'no chance' that Quinn attorneys could have seen any."; "Also, as proof that no confidences were shared orally, Plaintiffs submit affidavits from all Quinn timekeepers who clocked more than 50 hours on the case swearing that no confidences were sought or received from Becker."; "Anyone else who recorded less than 50 hours on the case also confirmed that no confidences were sought or received. . . . And all temporary attorneys on the case have confirmed to the supervising associate that they have never communicated with Becker. . . . Not only has Becker sworn that he did not share any confidences, he further avers that he recalls his previous work on the First Franklin matter only at a high level of generality, and that he does not remember confidential information of First Franklin or Merrill Lynch."; "Lastly, the Court finds it unlikely that Becker inadvertently disclosed confidences before the screen was initiated given the 'de facto separation' that existed between him and the case. . . . As a partner in the London office, Becker was physically separated from the case. . . . Additionally, he was electronically separated from the case. An electronic audit of the Quinn document management system revealed that the only two documents Becker accessed on the system related to the AIG action were two mark-ups of the remand brief. . . . Becker never sought or obtained access to the folder relating to the action, which is maintained on a separate drive. . . . Finally, the Court notes that Quinn is a law firm with over 500 attorneys. Its 'large size makes the risk of inadvertent disclosures of confidences less likely.'" (citation omitted)).

- Wyeth v. Abbott Labs., 692 F. Supp. 2d 453, 458, 459, 459-60, 460 (D.N.J. 2010) (reversing a trial court's disqualification of Howrey LLP from representing a client adverse to Wyeth, because Howrey represented Wyeth in an ongoing patent matter, and was not representing another long-standing Howrey client against Wyeth in a patent infringement case pending in the District of New Jersey; noting that the District of Delaware found that Howrey's handling of a matter adverse to Wyeth was a Rule 1.7 violation, but declining to disqualify Howrey; explaining that "[w]hen presented with a motion to disqualify counsel, a court must strike a 'delicate balance' between the competing considerations. . . . On the one hand, the Court must examine the potential hardships that one party will experience if his lawyer is disqualified. On the other, the Court must weigh the potential hardships to the adversary if counsel is permitted to proceed."; finding that the Magistrate

Judge improperly applied a per se test instead of balancing factors; "Here, the Court finds that the Magistrate Judge, by applying an automatic disqualification rule, failed to undertake the necessary factual analysis and weigh the relevant factors before disqualifying Howrey from representing BSC [Boston Scientific Corp.] in this case. As such, the decision is erroneous and shall be set aside."; ultimately concluding that Howrey had violated Rule 1.7, but declining to disqualify the law firm; "Factors that this Court should consider in determining whether disqualification is warranted include: (1) prejudice to Wyeth; (2) prejudice to BSC; (3) whether's [sic] Howrey's representation of Wyeth in the Lonza matter has allowed BSC access to any confidential information relevant to this case; (4) the cost -- in terms of both time and money -- for BSC to retain new counsel; (5) the complexity of the issues in the case and time it would take new counsel to acquaint themselves with the facts and issues; (6) which party, if either, was responsible for creating the conflict."; "First, the substance of the two matters are completely unrelated. . . . Second, no Howrey personnel overlap on the two matters. . . . Third, as the matters are unrelated, Wyeth is unable to identify any confidential information accessible to Howrey in one case that could be used in the other. . . . Fourth, the Lonza matter has been dormant since November, 2008."; "According to BSC, Howrey has served as one of BSC's primary litigation counsel in matters relating to the stent products and technology at issue in this case for more than a decade. . . . Over approximately the past ten years, Howrey lawyers have billed an average of almost 14,000 hours per year on scores of different matters for BSC. . . . Given Howrey's historical representation and the complex technologies at issue in this case, depriving BSC of its counsel of choice deprives BSC of Howrey's depth of experience and expertise. Additionally, if BSC were required to obtain new counsel, there would likely be some delay in this litigation as well as certain additional costs incurred by BSC while new counsel familiarized itself with this case. In contrast, Wyeth has not identified any prejudice that it will suffer if Howrey is not disqualified from this matter."; "Given the different rules that apply across jurisdictions (national and international), when a global law firm such as Howrey undertakes to represent an entity that is part of large multi-national organization like Wyeth, counsel should take due care in identifying and confirming with the client at the outset of the representation exactly which entity is being represented. Apparently, that was not done here by Howrey. Because both parties contributed to creating the existing conflict, this factor weighs neither for nor against disqualification.").

- Air Prods. & Chemicals, Inc. v. Airgas, Inc., Civ. A. No. 5249-CC, 2010 Del. Ch. LEXIS 35, at \*6, \*7, \*8, \*8-9, \*9 (Del. Ch. March 5, 2010) (not for publication) (declining to disqualify Cravath, Swaine & Moore; "[W]here a case is filed in the Court of Chancery involving Delaware entities represented by out-of-state lawyers, and a request is made to disqualify a lawyer in that

case, that would obviously have an immediate effect on the litigation. I hold that the Court of Chancery has an obligation and the right to apply its own local rules in order to ultimately determine whether a particular lawyer or particular law firm may represent a client appearing before the Court of Chancery."; "Before this Court may enter the Draconian order of disqualification, a moving party seeking that drastic relief must come forward with clear and convincing evidence establishing a violation of the Delaware Rules of Professional Conduct so extreme that it calls into question the fairness or the efficiency of the administration of justice."; "Nothing before me shows that Cravath had access to or learned internal and non-public confidential information, corporate strategies or defense tactics during the course of its narrowly focused work for Airgas from 2001 until late October of 2009, or that such information, even if available to Cravath, would prejudice the fairness or the integrity of this proceeding."; "The evidence presented to me indicates that Cravath's work for Airgas between 2001 and 2009 was limited in scope and nature, confined to advising Airgas regarding the completion of debt financings, and involved neither contact nor advice regarding corporate governance, litigation matters, charter or by-law issues, merger and acquisition advice, defensive tactics or corporate counseling."; "Cravath did not counsel or meet with the most senior Airgas executives or the Airgas board of directors, and Airgas, in fact, had other long-standing counsel advising it on litigation, corporate governance and mergers and acquisition issues."; "What's more, even if Cravath had access from its earlier representation to information that might be relevant in this proceeding, it has represented to this Court that it has no intention of using such information, and as is customary, Cravath has erected an ethical wall to seal off those members of the firm who worked on the Airgas debt financings from those members of the firm working on the Air Products proposed business combination with Airgas.").

- Boston Scientific Corp. v. Johnson & Johnson Inc., 647 F. Supp. 2d 369, 371, 374, 374-75 (D. Del. 2009) (declining to disqualify Howrey from representing another client adverse to Wyeth, although finding that Howrey had improperly taken a matter adverse to Wyeth; explaining that "Howrey ha[d] handled several matters for the Wyeth family of companies. (DX 31 (timekeeper sheet showing Howrey's hours billed to 'Wyeth Pharmaceuticals' on various matters between 2003 and sometime in 2009)). In handling these matters, it has not always been clear which Wyeth entity Howrey has been representing. . . . While Howrey attorney Carreen Shannon, the drafter of the letters, declares that she understood her client to be 'Wyeth Pharmaceuticals,' the letters she drafted were '[o]n behalf of Wyeth, including Wyeth Pharmaceuticals B.V.'"; noting that Howrey's internal system listed many different billing addresses for a number of Wyeth entities; concluding that Howrey had violated Rule 1.7 by taking a matter adverse to a current client; "The record here does not contain any express agreements evidencing any current attorney-client relationship

between Howrey and Wyeth. The record, however, does support the conclusion that it is reasonable for Wyeth to believe that Howrey has been acting on its behalf with respect to the currently-active Lonza matter. . . . Howrey went to Wyeth to seek permission to represent Lonza Biologics, PLC, in an unrelated matter; because Howrey would have needed Wyeth's permission only if Wyeth were Howrey's client in the Lonza matter, it is reasonable for Wyeth to believe, from Howrey's overture, that it is in fact the client in the Lonza matter. For at least these reasons, then, Wyeth's behalf as to its status as a client of Howrey is reasonable, and since the Lonza matter is still active, there is a current attorney-client relationship between Howrey and Wyeth. Accordingly, Howrey's representation of plaintiffs in the instant suits violates Model Rule 1.7."; nevertheless declining to disqualify Howrey; "[T]he instant suits are unrelated to the Lonza matter; Howrey's Washington, D.C.-based attorneys are handling the instant suits, while its Europe-based attorneys continue to handle the Lonza matter; there is an ethical wall between the two matters -- leads to the same conclusion."; rejecting the concept that a ethics rule violation should automatically result in disqualification; "In the Third Circuit, and under this court's precedent, whether disqualification is appropriate depends on the facts of the case and is never automatic."; attributing part of the fault to Wyeth; "Moreover, Howrey's failure to comply with Model Rule 1.7 is, to a significant degree, due to Wyeth's conduct. Among other things, Wyeth's naming conventions, its use of the same in-house attorneys on matters involving different subsidiaries without consistently identifying to Howrey which entity those in-house attorneys were representing, and the willingness of it and its subsidiaries to receive billing invoices for matters on which they were not directly engaged with Howrey, together created significant confusion for Howrey as to which entity or entities it was representing, confusion which is evident from Howrey's time sheets, its mailing of billing invoices, and the averments of its attorneys in Europe. Wyeth should not now benefit from such obfuscatory conduct. Accordingly, the court declines to disqualify Howrey from the instant suits and instead orders Howrey to maintain its ethical wall.").

Upon reflection, this approach makes sense. The conflicts analysis focuses on the relationship between the client and the lawyer, while disqualification motions involve a number of other interests, including the client's right to hire a lawyer of its choosing, the court's docket, etc. Gen-Cor, LLC v. Buckeye Corrugated, Inc., 111 F. Supp. 2d 1049 (S.D. Ind. 2000)

(b) Both the ABA Model Rules and the Restatement have abandoned the "appearance of impropriety" standard for defining a conflict or disqualifying a law firm, because of its inherently ambiguous meaning. Restatement (Third) of Law Governing Lawyers § 121 cmt. c(iv) (2000) (rejecting the "appearance of impropriety" standard; noting that the standard "could prohibit not only conflicts as defined in this Section, but also situations that might appear improper to an uninformed observer or even an interested party").<sup>1</sup>

- City of Atlantic City v. Trupos, 992 A.2d 762, 772 (N.J. 2010) (noting that in the "2004 overhaul of the Rules of Professional Conduct . . . we eliminated the 'appearance of impropriety' language from the Rules of Professional Conduct" (internal quotations and citation omitted)).
- Gabayzadeh v. Taylor, 639 F. Supp. 2d 298, 305 (E.D.N.Y. 2009) ("Plaintiff's final argument is that Proskauer should be disqualified under Canon 9 of the ABA Model Code to 'avoid even the appearance of impropriety.' (P1.'s Mem. of Law in Supp. of Mot. to Disqualify 2.) 'The Second Circuit has repeatedly warned, however, that Canon 9, standing alone, does not warrant attorney disqualification in this Circuit.' Bass Pub. Ltd. Co. v. Promus Co. Inc., No. 92-CIV-0969, 1994 U.S. Dist. LEXIS 136, 1994 WL 9680, at \*9 (S.D.N.Y. Jan. 10, 1994) (citing Int'l Elecs. Corp. v. Flanzer, 527 F.2d 1288, 1295 (2d Cir. 1975)) (additional citations omitted). Canon 9 'should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules.' Flanzer, 527 F.2d at 1295. . . . Given that the plaintiff's asserted grounds for disqualification are devoid of substance, merely relying on Canon 9 is insufficient to warrant the disqualification of Proskauer in this action.").
- Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 609 (8th Cir. 1977).

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<sup>1</sup> Restatement (Third) of Law Governing Lawyers § 121 cmt. c(iv) (2000) ("This Section employs an objective standard by which to assess the adverseness, materiality, and substantiality of the risk of the effect on representation. The standard of this Section is not the 'appearance of impropriety' standard formerly used by some courts to define the scope of impermissible conflicts. That standard could prohibit not only conflicts as defined in this Section, but also situations that might appear improper to an uninformed observer or even an interested party."; "The propriety of the lawyer's action should be determined based only on facts and circumstances that the lawyer knew or should have known at the time of undertaking or continuing a representation. It should not be evaluated in light of information that became known only later and that could not reasonably have been anticipated.").

However, many courts continue to apply the "appearance of impropriety" standard when assessing disqualification motions. See, e.g., United States. v. Franklin, 177 F. Supp. 2d 459 (E.D. Va. 2001); Dacotah Marketing & Research, L.L.C. v. Versatility, Inc., 21 F. Supp. 2d 570 (E.D. Va. 1998).

### **Best Answer**

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

N 3/12

## Disqualification -- Process and Effect

### Hypothetical 35

For the past year, you and local counsel in another city have been defending a corporate client and one of its executives in a covenant-not-to-compete case. You were surprised to receive a call this morning from local counsel, advising you that the adversary had just filed a motion to disqualify that firm based on its alleged conflict caused by its representation of both the company and the executive. The motion claims that representing both defendants creates an inherent and insoluble conflict. A few questions come quickly to your mind.

- (a) May you argue that your adversary does not have standing to pursue a disqualification motion?

**MAYBE**

- (b) May you argue that the disqualification motion is barred by the doctrine of laches?

**MAYBE**

- (c) If your adversary succeeds in disqualifying your co-counsel, will you also automatically be disqualified?

**NO (PROBABLY)**

### Analysis

- (a) Courts differ on the concept of standing to seek an opposing counsel's disqualification.

Some courts indicate that only the client that might be hurt by the conflict may seek a lawyer's disqualification based on a concept.

- SEC v. Tang, No. C-09-05146 JCS, 2011 U.S. Dist. LEXIS 136188, at \*29, \*34-35 (N.D. Cal. Nov. 28, 2011) (finding that the SEC did not have standing to disqualify a law firm from representing the defendant; "Because motions to disqualify are often tactically motivated, they are strongly disfavored and are subjected to 'particularly strict judicial scrutiny.'"; "This court finds the reasoning of Colyer [Colyer v. Smith, 50 F. Supp. 2d 966 (C.D. Cal. 1999)] to

- be persuasive and therefore applies the majority rule that generally, a party seeking disqualification based on a conflict must be or have been a client. Further, having carefully reviewed the cases that have applied that rule -- as well as those that have invoked the exception -- the Court concludes that the facts here do not establish standing on the part of the SEC. Courts have invoked the exception in Colyer where particular facts have established that the party seeking disqualification had a personal stake beyond the general interest in the fair administration of justice. For example, in Decaview [Decaview Dist. Co. v. Decaview Asia Corp., No. C 99-02555 MJJ (ME), 2000 U.S. Dist. LEXIS 16534 (N.D. Cal. Aug. 14, 2000)] cited by the SEC, the party seeking disqualification had a personal interest because the counsel whose disqualification was sought had confidential information of the moving party in its possession. The Court has found no case that is factually on point with this case, where the only personal stake offered by the SEC is its interest in the integrity of the legal system. Accordingly, the Court concludes that the exception in Colyer does not apply and that under the general rule articulated in that case, the SEC does not have standing to bring a motion to disqualify based on the alleged conflicts arising out of Fenwick's former representation of Yu.").
- IMCO, L.L.C. v. Ford, No. C 11-01640 WHA, 2011 U.S. Dist. LEXIS 124535, at \*4-5, \*5, \*6, \*6-7 (N.D. Cal. Oct. 27, 2011) (holding that a plaintiff did not have standing to seek disqualification of a city attorney, because the plaintiff was not owed any fiduciary or other duty by the lawyer; "The general rule adopted in the Fifth, Third, and Eighth Circuits is that an attorney cannot be disqualified unless a current or former client moves for disqualification."; "Two circuits have adopted a minority view, finding non-clients to have standing to disqualify based on an ethical violation."; "The issue has not directly been addressed in the Ninth Circuit."; "California law follows the general rule that a party lacks standing to disqualify an attorney unless that party has a present or past attorney-client relationship with that attorney."; "The majority of circuits, as well as California courts, demand some sort of attorney-client or fiduciary relationship before a party can move to disqualify an attorney. IMCO does not now, nor ever had in the past, an attorney-client relationship with the City Attorney. IMCO does not allege to have had any fiduciary relationship with the City Attorney, nor that a duty of confidentiality was ever owed.").
  - Great Lakes Constr., Inc. v. Burman, 114 Cal. Rptr. 3d 301, 303, 307 & n.5, 309 (Ca. Ct. App. 2010) (holding that an adversary did not have standing to seek disqualification of a lawyer who allegedly had a conflict of interest in jointly representing two litigants; "Attorneys who jointly represent clients in the same action owe a duty of undivided loyalty to each of their clients and are subject to disqualification if an unwaivable conflict exists arising from the joint representation. We address whether a non-client may enforce this duty of loyalty and move to disqualify opposing counsel. In this case, the parties seeking disqualification were not present clients, former clients, or



- prospective clients, and they had no prior confidential relationship with opposing counsel. . . . Here, the non-client, moving parties have no legally cognizable interest in Graham's [lawyer] undivided loyalty to his clients. Therefore, the moving parties lacked standing to bring this motion to disqualify. We reserve the disqualification order."; "The State Bar Rules of Professional Conduct govern attorney discipline, not standards for disqualification in the courts. . . . We often look to the Rules of Professional Conduct for guidance."; "Generally, before the disqualification of an attorney is proper, the complaining party must have or must have had an attorney-client relationship with that attorney."; "[I]mposing a standing requirement for attorney disqualification motions protects against the strategic exploitation of the rules of ethics and guards against improper use of disqualification as a litigation tactic.").
- Simonca v. Mukasey, No. CIV. S-08-1453 FCD GGH, 2008 U.S. Dist. LEXIS 101969, at \*8, \*11 (E.D. Cal. Nov. 25, 2008) ("Although the Ninth Circuit has not squarely addressed whether a non-client may raise an objection to opposing counsel, the court in Colyer adopted the majority rule that allows only former and current clients standing to seek to disqualify opposing counsel."; "Thus, it is defendants [sic] ultimate burden to show they have standing to raise the issues in their disqualification motion in order for the court to exercise jurisdiction over the motion. . . . Accordingly, the court must consider whether defendants have demonstrated an injury in fact, that they will endure, as opposed to plaintiff, as a result of Sekhon's representation of plaintiff and the proposed class in this action.").
  - Xcentric Ventures, LLC v. Stanley, No. CV-07-00954-PHX-NVW, 2007 U.S. Dist. LEXIS 55459, at \*11 (D. Ariz. July 27, 2007) (holding that defendants did not have standing to move for plaintiff's lawyer's disqualification based on conflicts; pointing to earlier Ninth Circuit cases allowing disqualification motions based on conflicts only if the client or former client complains; holding that the "present Motion failed to articulate how Plaintiffs' representation will imminently result in any injury to Defendants and is transparently motivated by tactical considerations").
  - In re Appeal of Infotechnology, Inc., 582 A.2d 215, 221 (Del. 1990) (declining to adopt a "bright-line" test "denying standing to all non-client litigants to challenge misconduct that taints the fairness of judicial proceedings," but placing the burden of proof on the moving party to show existence of a conflict and how the conflict would adversely affect the administration of justice; holding that "[a]bsent misconduct which taints the proceeding, thereby obstructing the orderly administration of justice, there is no independent right of counsel to challenge another lawyer's alleged breach of the Rules outside of a disciplinary proceeding").

Other courts explain that conflicts of interest implicate systemic and institutional concerns, and therefore address conflicts issues when they are raised by any party, or even by the court sua sponte.

- Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, 797 N.W.2d 789, 794 (Wisc. 2011) (holding that non-clients may have standing to seek disqualification of the adversary's lawyer; "We address the first question relating to standing in light of our analysis of the standing cases. We conclude that as a general rule only a former or current client has standing to move to disqualify an attorney from representing someone else in a civil action. Nevertheless, a non-client party may establish standing, that is, may establish that a personal interest in the controversy is adversely affected and that judicial policy calls for protection of that interest, when the prior representation is so connected with the current litigation that the prior representation is likely to affect the just and lawful determination of the non-client party's position.").
- Chisolm v. Transouth Fin. Corp., A. No. 2:93cv632, 2000 U.S. Dist. LEXIS 8483 (E.D. Va. May 12, 2000) (disqualifying a former judge from participating in a case; not imputing his disqualification to the law firm of Hunton & Williams).

**(b)** As with the issue of standing, courts take differing positions on the availability of a laches defense in disqualification motions.

The Restatement acknowledges that a party's delay in seeking disqualification could affect the court's conclusion.

Even in the absence of consent, a tribunal applying remedies such as disqualification . . . will apply concepts of estoppel and waiver when an objecting party has either induced reasonable reliance on the absence of objection or delayed an unreasonable period of time in making objection.

Restatement (Third) of the Law Governing Lawyers § 122 cmt. (c)(i).

In 2009, the Second Circuit refused to disqualify Debevoise & Plimpton from representing MetLife, noting among other things the delay in plaintiff's filing of a disqualification motion.

[P]laintiffs' lengthy and unexcused delay in bringing its motion to disqualify weighs against disqualification. When plaintiffs filed this lawsuit in 2000, they knew that Debevoise had represented MetLife during demutualization and that it would continue to represent MetLife in this litigation. But plaintiffs did not move to disqualify even when, seven years later, the district court ruled that plaintiffs were clients of Debevoise. Instead, plaintiffs waited until after settlement negotiations broke down, five weeks before trial was scheduled to begin, to finally file their motion.

Plaintiffs' delay, which suggests opportunistic and tactical motives, magnifies the harms to the judicial system that already inhere in any disqualification by imputation, abuse the expectations of jurors, and has the general tendency to impair rather than promote confidence in the integrity of the judicial system.

Murray v. Metro. Life Ins. Co., 583 F.3d 173, 180 (2d Cir. 2009).<sup>1</sup>

Other bars and courts take the same approach, analyzing whether a party's delay in filing a disqualification motion should preclude relief.

- North Carolina LEO 2011-2 (4/22/11) (finding that a client's delay in seeking disqualification of a former lawyer might preclude an ethics violation, thus allowing the lawyer to continue representing the adversary; explaining that a lawyer met with a wife in 2002, but was never retained by her; further explaining that in 2009 the husband hired the lawyer to represent him in a divorce case; "Although delay will not be sufficient to constitute waiver in most

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<sup>1</sup> Murray v. Metro. Life Ins. Co., 583 F.3d 173, 178, 180 (2d Cir. 2009) (denying MetLife policyholders' motion to disqualify the law firm of Debevoise & Plimpton from representing MetLife in their lawsuit against MetLife related to its demutualization; rejecting the policyholders' argument that Debevoise must be disqualified because several of its lawyers would provide testimony at the trial that would be "prejudicial" to MetLife; noting that under Second Circuit law the party advancing that argument had to prove "specifically" how the lawyer's testimony would prejudice the client, and also that the likelihood of prejudice occurring was "substantial"; pointing to policyholders' delay in seeking disqualification of Debevoise as an additional grounds for denying the disqualification motion; "[P]laintiffs' lengthy and unexcused delay in bringing its motion to disqualify weighs against disqualification. When plaintiffs filed this lawsuit in 2000, they knew that Debevoise had represented MetLife during demutualization and that it would continue to represent MetLife in this litigation. But plaintiffs did not move to disqualify even when, seven years later, the district court ruled that plaintiffs were clients of Debevoise. Instead, plaintiffs waited until after settlement negotiations broke down, five weeks before trial was scheduled to begin, to finally file their motion."; "Plaintiffs' delay, which suggests opportunistic and tactical motives, magnifies the harms to the judicial system that already inhere in any disqualification by imputation, abuse the expectations of jurors, and has the general tendency to impair rather than promote confidence in the integrity of the judicial system.").

cases, the following factors should be taken into consideration when evaluating whether a former client's failure timely to object to a new, adverse representation should constitute a de facto waiver of the right to object: (1) whether the lawyer's failure to identify the conflict of interest and bring it to the attention of the former client was unintentional; (2) whether the former client knew of the new representation and the adverse interest entailed; (3) the length of the delay in lodging in objection; (4) whether there was an opportunity to lodge an objection; (5) whether the former client was represented by counsel during the delay; (6) the reason the delay occurred; and (7) whether disqualification will result in substantial hardship for the new client."; "In the present situation, Attorney A's failure to identify the conflict was unintentional, Wife, the former client, however, was fully aware of the new, adverse representation by Attorney A; had numerous opportunities to object to the new representation at earlier stages in the proceedings; and had legal counsel to advise her during the delay. Moreover, there does not appear to be a justification for Wife's delay in lodging her objection other than to gain a tactical advantage by waiting until disqualification would work a substantial hardship on Husband. Under these circumstances, Attorney A is not required to withdraw from the representation of Husband when Wife raised her objection.").

- Stanley v. Bobeck, 2009 Ohio 5696, at ¶ 10 (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; although ultimately reversing the disqualification, finding that the party seeking the disqualification had not waived the right to do so by waiting nine months to file a motion after noting the alleged conflict in a letter; noting that the trial was six months away, and that "no substantial discovery in the form of depositions or expert reports had been completed at that point").
- Halladay & Mim Mack Inc. v. Trabuco Capital Partners Inc., Case No. SACV 08-1138 AG (MLGx), 2009 U.S. Dist. LEXIS 97040, at \*12-13, \*14 (C.D. Cal. Oct. 5, 2009) (rejecting a law firm's argument that it should not be disqualified because the former client had waited too long to seek the firm's disqualification; "Even if an attorney possesses a former client's confidential information, a motion to disqualify the attorney will be denied if there has been 'unreasonable delay by the former client in making a motion and resulting prejudice to the current client.' . . . If a party opposing disqualification shows unreasonable delay and resulting prejudice, '[t]he burden then shifts back to the party seeking disqualification to justify the delay.' . . ."; "Here, Defendants moved to disqualify Murtaugh, Meyer less than a year after they were on notice of the conflict."; distinguishing cases in which the former client waited two and a half years and three years before seeking disqualification of its former law firm).

- Holm v. City of Barstow, Case No. EDCV 08-420-VAP (JCx), 2008 U.S. Dist. LEXIS 110391, at \*20, \*21 (C.D. Cal. Sept. 16, 2008) (rejecting a law firm's argument that its former client had waited too long to seek the firm's disqualification; "Lackie argues that Libby delayed unnecessarily in bringing this Motion."; "The Court finds Lackie's argument unpersuasive. Holm filed this action on February 29, 2008 and Libby's counsel, Mr. Meneses ('Meneses'), first raised the subject of a possible conflict of interest with Plaintiff's counsel on May 21, 2008. . . . According to Meneses' declaration, he first learned of the potential conflict of interest from his client on May 20, 2008. . . . From May until July, counsel met and conferred regarding the conflict of interest. Meneses filed his motion on August 12, 2008." (footnote omitted)).
- City of El Paso v. Soule, 6 F. Supp. 2d 616, 622 (W.D. Tex. 1998) ("The instant Motion was filed in March 1998, just after Defendants filed their answers. The Court concludes the period of time from October 1997 to March 1998 does not constitute an unreasonable delay. Thus Defendants have not waived their right to object to KGM's representation of the City.").

On the other hand, some courts focus on the systemic issues in declining to recognize a laches defense.

- KABI Pharmacia AB v. Alcon Surgical, Inc., 803 F. Supp. 957, 964 (D. Del. 1992) ("[I]t is generally established that laches is not a bar to a motion to disqualify since a court's supervision of the ethical conduct of attorneys practicing before it is designed to protect the public interest and not merely the interest of the particular moving party." (citation and internal quotations omitted); disqualifying a law firm despite the fact that the motion to disqualify was filed one year after the conflict manifested itself, and near the conclusion of discovery).

(c) The imputed disqualification rules normally impute an individual lawyer's disqualification to an entire "firm" (defined to also include corporate law departments).

ABA Model Rule 1.10. However, these imputed disqualification rules do not automatically extend to co-counsel.

- Venters v. Sellers, 261 P.3d 538 (Kan. 2011) (declining to disqualify a lawyer who had referred the case to another firm which was later disqualified).
- Gifford v. Target Corp., 723 F. Supp. 2d 1110, 1122 (D. Minn. 2010) (disqualifying a law firm which had represented a Target executive who had been exposed to privileged Target communications, and then became class

counsel for a class of employees suing Target in a related matter; not automatically disqualifying the disqualified law firm's co-counsel, but requiring that firm to file an affidavit explaining its exposure to any materials or information that the law firm had obtained from the Target executive; "Target also seeks disqualification of the Halunen firm's co-counsel, Levin Fishbein Sedran & Berman (the 'Levin firm'). Where knowledge gained by counsel through disclosures of protected information will lead to an improper benefit, disqualification is required to protect the judicial process and the interests of the former client. . . . The record lacks evidence that the Levin firm has knowledge of the protected communications and documents Doe provided to the Halunen firm. Nevertheless, it is conceivable that the Levin firm became aware of the privileged information Doe disclosed. Therefore, the Levin firm is required to file an affidavit describing its contact, if any, with Doe, its exposure to materials Doe provided to the Halunen firm, and its communications with the Halunen firm or others concerning disclosures made by Doe.").

- Restatement (Third) of Law Governing Lawyers § 123 cmt. c(iii) (2000) ("Two or more lawyers or law firms might associate for purposes of handling a particular case. A common example is a lawyer who appears as local counsel in litigation principally handled by another firm. Each lawyer must comply with the rules concerning conflict of interest, and other lawyers in their respective firms are governed by the rules of imputation. However, a conflict imputed within a firm does not extend by imputation to lawyers in another firm working on another matter.").

When the disqualification motion rests on some informational problem (as with adversity to a former client), most courts require an additional showing of actual transmission of tainted information before disqualifying co-counsel.

### **Best Answer**

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

N 3/12