ETHICS & JOINT REPRESENTATIONS

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

Hypo No.	*Subject*	*Page*

Impact of Joint Representations

1	Joint Representations: Creation	1
2	Joint Representations: Loyalty Issues	18
3	Joint Representations: Information Flow Duties in the Absence of an Agreement	28
4	Joint Representations: Information Flow Duties Under an Agreement to Keep Secrets	60
5	Joint Representations: Information Flow Duties Under a "No Secrets" Agreement	67

Identifying the Client Inside a Corporate Setting

6	Intentional Joint Representation of Corporate Employees	96
7	Accidental Creation of a Joint Representation of a Corporate Employee	110
8	Effect of a Joint Representation in Corporate Transactions	121

Joint Representations: Creation

Hypothetical 1

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

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

MAYBE

Analysis

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

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

Existence of a Joint Representation

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

Surprisingly, very few authorities or cases deal with this issue. The ABA Model Rules do not devote much attention to the creation of an attorney-client relationship.

The relatively new rule governing "prospective" clients explains the creation of that relationship (ABA Model Rule 1.18(a)) and the absence of that relationship. Id. cmt. [2]. The many ABA Model Rule comments dealing with what the rules call a "common representation" focus on the effects and risks of such a common representation, not on its creation. ABA Model Rule 1.7 cmts. [29]-[33].

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

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

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

Restatement (Third) of Law Governing Lawyers § 75 cmt. c (2000) (emphasis added). Restatement § 14 includes the predictable analysis of such a relationship formation.[1] That section of the Restatement does not even mention joint representations. Thus, the Restatement apparently assumes that a joint representation begins in the same way as a sole representation.

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

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

> The keys to deciding the scope of a joint representation are the parties' intent and expectations, and so a district court should consider carefully (in addition to the content of the communication themselves) any testimony from the parties and their attorneys on those areas.
>
> . . . .
>
> When, for example, in-house counsel of the parent [company] seek information from various subsidiaries in order to complete the necessary public filings, the scope of the joint representation is typically limited to making those filings correctly. It does not usually involve jointly representing the various corporations on the substance of everything that underlies those filings.
>
> . . . .
>
> The majority -- and more sensible -- view is that even in the parent-subsidiary context a joint representation only arises when common attorneys are affirmatively doing legal work for both entities on a matter of common interest.

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

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

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

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

An earlier district court decision listed ten factors.

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

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

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

> As in the single-client representation, the joint-client relationship begins when the "co-clients convey their desire

> for representation, and the lawyer accepts." . . . Whether joint representation exists depends on the understanding of counsel and the parties in light of the circumstances.

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

Creating a joint representation does not require any formal documentation.

- Merck Eprova AG v. ProThera, Inc., 670 F. Supp. 2d 201, 210, 211 (S.D.N.Y. 2009) (analyzing a law firm's claim that it did not jointly represent two companies, concluding that the lawyer had jointly represented both companies; explaining that "[n]o special formality is required to demonstrate the establishment of the [attorney-client] relationship."; ultimately finding that the law firm jointly represented the two companies; "Where counsel is engaged by two or more clients to represent them jointly in a matter, it is unrealistic to expect that each client will necessarily execute a separate retainer agreement, communicate with counsel independently, or provide individual payment for services rendered. It is at least equally likely that one representative will interact with the attorney on behalf of all of the clients. Where, for example, a husband and wife are engaged in a transaction with a third party concerning marital property, an attorney would generally understand that she represents both spouses, even if only one deals with the attorney in connection with the matter. Where one spouse establishes and effectuates the attorney-client relationship, it is understood that this is done on behalf of the other as well."; adding that "where two parties are jointly prosecuting a patent application, they are commonly considered to be joint clients"; disqualifying the law firm from adversity to one of the two former jointly represented clients).

The creation of a joint representation requires a meeting of the minds, not just one or the other client's understanding or expectation. For instance, one court rejected

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

the argument "that a joint representation of Party A and Party B may somehow arise through the expectations of Party B alone, despite Party A's views to the contrary."[3]

Analyzing these factors often requires a fact-intensive examination of the situation. For instance, as discussed more fully below, the Delaware Bankruptcy Court conducted a hearing focusing on such issues in the Teleglobe case. The court took testimony from the clients and the lawyers involved. The court ultimately determined that there was no joint representation between now-bankrupt corporations and their former parent. Teleglobe USA Inc. v. BCE Inc. (In re Teleglobe Commc'ns Corp.), 392 B.R. 561, 589, 590 (Bankr. D. Del. 2008).

Clients' Arguments that a Joint Representation Did Not Exist

In some situations, one client has an incentive to claim that a lawyer did not jointly represent it and another client.

Two scenarios seem to frequently involve this issue: (1) one of the arguable joint clients (usually a corporate family member) declares bankruptcy, and non-bankrupt arguable joint clients (usually corporate affiliates) argue that the same lawyer did not jointly represent all of them in the transaction resulting in the bankruptcy -- thus allowing those non-bankrupt companies to withhold documents from the bankruptcy trustee; or (2) a corporation argues that the same lawyer did not jointly represent it and a current or

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

former executive or employee -- thus allowing the company to withhold documents from the now-adverse executive/employee or to exercise sole power to waive the privilege protecting communications with its lawyer. In those situations, one of the arguable joint clients has an interest in arguing that no joint representation ever existed (at least on the pertinent matter).

The first scenario clearly sets up a fight over the existence of a joint representation. The trustee generally argues that the lawyer jointly represented the corporate family members on the same matter, while the non-bankrupt affiliate argues that the lawyer did not jointly represent the corporate family members on the matter. If the bankrupt affiliate wins, it generally obtains access to all of the lawyer's communications and documents. If the non-bankrupt affiliate wins, it usually can maintain the privilege that would protect its own communications with the lawyer.

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

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

In Teleglobe, the Delaware District Court ordered several law firms to produce documents to bankrupt second-tier subsidiaries of Canada's largest broadcasting

company -- finding that the law firms had jointly represented the entire corporate family.[4] The court even ordered the production of communications between Shearman & Sterling and the corporate parent, noting that the in-house lawyers who had received the Shearman & Sterling communications jointly represented the entire corporate family.

The Third Circuit reversed.[5] Although remanding for a more precise determination of which corporate family members the in-house lawyers and outside lawyers represented, the Third Circuit affirmed the basic premise that in-house and outside lawyers who jointly represent corporate affiliates generally cannot withhold documents relating to the joint representation from any of the clients.

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

On remand, the bankruptcy court for the District of Delaware ultimately found that there had not been a joint representation. In assessing the existence of a joint representation, the bankruptcy court conducted a lengthy hearing, taking evidence and testimony from various business folks and lawyers.[6] Among other things, the bankruptcy court noted that the ultimate parent was a Canadian company while the

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

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

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

subsidiaries were American companies; that there was no retainer letter describing the relationship; and that the parent had a separate law department from the subsidiaries.

More recently, another court dealt with the same issue -- but in the context of a corporate parent's sale of a subsidiary in the ordinary course of business, rather than in a bankruptcy setting. In that case, the law firms of Blank Rome and Quarles & Brady represented a parent and its fully owned subsidiary in a transaction involving the subsidiary's sale to a new owner. The subsidiary later sued its former parent, and sought the law firms' files. The court ordered production of the files, despite the law firms' argument that they never represented the subsidiary in the transaction. The court noted that the parent had presented "no evidence indicating that it ever hired separate counsel for [the subsidiary] before the date it was sold to [buyer]," so "the only attorneys who could have been representing [the subsidiary] at the moment the Lease Term Sheet was signed were Blank Rome and Quarles & Brady."[7] The court even ordered the production of a post-transaction document -- Blank Rome's invoice which referred to the firm's pre-transaction work.

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

In some ways, it should be easier to determine if individuals have been jointly represented in the trust and estate context than if corporations had been jointly represented. In the corporate family world, the attorney-client privilege can protect communications between the parent's lawyer and employees of any wholly owned subsidiaries (and perhaps partially owned subsidiaries controlled by the parent). This is

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

because every employee in the corporate family ultimately owes fiduciary duties to the parent. For this reason, in-house lawyers and outside lawyers representing a corporate family do not have to carefully establish an attorney-client relationship with corporate affiliates in order to assure privilege.[8]

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

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

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

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

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

Id. at 379.

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

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

Id.

Third Parties' Arguments that a Joint Representation Did Not Exist

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

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

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

representation on the same matter -- so there are very few per se unethical joint representations.

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

Courts recognize some limits on a lawyer's ability to represent clients with divergent interests. For instance, one court pointed to "the general policy that joint representations of clients with potentially adverse interests should be undertaken only when subject to very narrow limits." Neighborhood Dev. Collaborative v. Murphy, 233 F.R.D. 436, 442 (D. Md. 2005).[10]

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

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

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

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

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

- Van Kirk v. Miller, 869 N.E.2d 534 (Ind. Ct. App. 2007) (approving the validity of a consent allowing a lawyer to represent both sides in a negotiated transaction).
- North Carolina LEO 2006-3 (1/23/09) (holding that a lawyer can represent both the buyer and seller in a real estate transaction).
- But see New York LEO 807 (1/29/07) ("The buyer and seller of residential real estate may not engage separate attorneys in the same firm to advance each side's interests against the other, even if the clients give informed consent to the conflict of interest.").

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

Joint clients and their lawyer also have power to define the "information flow" within a joint representation -- although there are certainly some limits on this power, just as there are limits on the power to avoid any loyalty issues. ABA Model Rule 1.7

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

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

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

cmt. [31] ("In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential."); Restatement (Third) of Law Governing Lawyers § 60 cmt. l (2000) ("Co-clients can also explicitly agree that the lawyer is not to share certain information.").[11]

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

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

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

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

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

One 2010 case highlights what a difficult task third parties might have in doing so. In Oppliger v. United States, Nos. 8:06CV750 & 8:08CV530, 2010 U.S. Dist. LEXIS 15251 (D. Neb. Feb. 8, 2010), the court rejected the United States Government's argument that the attorney-client privilege did not protect communications between a company's buyer and seller -- who claimed that they had hired the same lawyer to represent them both in resolving a dispute over the sale. In fact, the court explained that the issue on which the same lawyer represented the buyer and the seller "constitutes a claim for breach of the Purchase Agreement." Id. at *14. That comes close to the totally prohibited "concurrent" representation under ABA Model Rule 1.7 (explained above) -- although that prohibition applies only to the actual assertion of a claim "in the same litigation or other proceeding before a tribunal." ABA Model Rule 1.7(b). Here, apparently, the parties had not asserted claims in litigation or other proceedings. However, it is remarkable that they would hire the same lawyer to represent them both in connection with such a possible claim.

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

> As a general rule, when individuals share an attorney as joint clients, the attorney-client privilege will protect communications, between the attorney and the joint clients, from all third parties, absent effective waiver. . . . The issue before the court is whether Mr. Oppliger and Mr. Behrns were joint clients of Mr. Gardner [lawyer]. A number of factors are relevant to determine the relationship between the individuals and counsel including the reasonable subjective views and conduct of the individuals and the attorney. . . . In this case, the undisputed facts show the

> attorney and both clients reasonably believed joint representation existed. In fact, the document at issue begins: the law firm's attorneys 'have represented and continue to represent each of the persons and entities addressed in this letter.' . . . Mr. Oppliger and Mr. Behrns met with Mr. Gardner regarding legal representation for a single issue for which they sought a cooperative resolution. Furthermore, the legal representation resulted in a settlement agreement. . . . Accordingly, the court finds a joint client relationship existed.

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

> In this case, Mr. Oppliger and Mr. Behrns sought an apparently amicable and joint resolution of an issue "which allegedly constitutes a claim for breach of the Purchase Agreement." . . . Mr. Oppliger and Mr. Behrns sought joint counsel, agreed to joint representation, and ultimately resolved the potential problem between them through a settlement agreement. The facts show that at the time of the relevant communications, Mr. Oppliger and Mr. Behrns were reasonable in believing in the existence of common interests and possessed reasonable expectations of confidentiality sufficient to support the attorney-client privilege.

Id. at *13-14.

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

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

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

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

* * *

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

Best Answer

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

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Joint Representations: Loyalty Issues

Hypothetical 2

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).[1]

Second, lawyers must deal with the issue of <u>information flow</u>. 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.

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

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

> 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, <u>a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated</u>. Moreover, because the lawyer is required to be impartial between commonly represented clients, <u>representation of multiple clients is improper when it is unlikely that impartiality can be maintained</u>. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

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

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

First, they can say nothing to their clients -- and deal with any adversity if it develops. Because there is no conflict until such adversity develops, there is no need for disclosure and consent. The advantage of this approach is that the lawyer is more likely to obtain the business. The disadvantage is that all of the clients will be disappointed if adversity develops -- and might feel that the lawyer has been deceitful by not advising them of that possibility.

Second, the lawyer can salute the possibility of adversity, and advise the clients that they (and the lawyer) will have to deal with adversity if it ever develops. This has

the advantage of warning the clients that they might have to address adversity, but of course leaves the outcome of any adversity uncertain.

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

Restatement

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

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

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

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

A comment provides some additional guidance.

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

Id. cmt. c.

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

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

> Husband and Wife consult Lawyer for estate-planning advice about a will for each of them. Lawyer has had professional dealings with the spouses, both separately and together, on several prior occasions. Lawyer knows them to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Lawyer may represent both clients in the matter without obtaining consent . . . . While each spouse theoretically could make a distribution different from the other's, including a less generous bequest to each other, those possibilities do not create a conflict of interest, and none reasonably appears to exist in the circumstances.

Id. illus. 1 (emphasis added).

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

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

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

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

> The same facts as in Illustration 1, except that Lawyer has not previously met the spouses. But in this instance, unlike in Illustration 2, in discussions with the spouses, Lawyer asks questions and suggests options that reveal both Spouse A and Spouse B to be knowledgeable about their respective rights and interests, competent to make independent decisions if called for, and in accord on their common and individual objectives. Lawyer has adequately verified the absence of a conflict of interest and thus may represent both clients in the matter without obtaining consent (see § 122).

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

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

ACTEC Commentaries

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

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

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

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

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

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

Id. at 93 (emphases added).

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

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

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

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

Not surprisingly, lawyers must monitor possible later adversity.

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

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

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

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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

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

Hypothetical 3

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

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

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

MAYBE

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

MAYBE

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

MAYBE

Analysis

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

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

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

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

The issue of information flow can be far more complicated. It makes sense to analyze the information flow issue in three different scenarios: (1) when the lawyer has not raised the issue with the clients at the start of the representation, so there is no agreement among them about the information flow; (2) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will not share secrets between or among the jointly represented clients; (3) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will share secrets between or among the jointly represented clients.

This hypothetical deals with the first scenario.

Wisdom of Agreeing in Advance on the Information Flow

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

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

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

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

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

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

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

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

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

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

> Before, or within a reasonable time after commencing the representation, <u>a lawyer who is consulted by multiple parties with related interests should discuss with them the</u>

> implications of a joint representation (or a separate representation, if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules). . . . In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent each of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.7, at 91-92 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf. (emphases added).

The ACTEC Commentaries even provide an illustration emphasizing this point.

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

Id. at 92 (emphasis added).

Not surprisingly, bars have provided the same guidance.

- District of Columbia LEO 327 (2/2005) (addressing a situation in which a law firm which jointly represented several clients withdrew from representing some of the clients and continued to represent other clients; explaining that the law firm which began to represent the clients dropped by the first firm asked that firm to disclose all of the information it learned during the joint representation, which the firm refused to provide; ultimately concluding that the firm had to disclose to its successor all of the information it had acquired from any of the clients during the joint representation; "Under the terms of the retainer agreement, the prior firm's duty to communicate any relevant

information to the other clients included any relevant information learned from other clients in the same matter, and this duty attached at the moment the prior firm learned the information. This underscores how important it is for a lawyer carefully to explain to all clients in a joint representation that, when they agree that any relevant or material information may be shared with one another, they cannot expect that any relevant or material confidential information they may subsequently reveal to the lawyer will be kept from the other co-clients." (emphasis added)).

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

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

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

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

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

In a Florida legal ethics opinion arising in the trust and estate context, the Florida Bar acknowledged that lawyers did not have to address the information flow issue at the beginning of a representation. Still, the Bar's discussion of the analysis in the absence of such an agreement highlighted the wisdom of doing so.

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

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

- Unnamed Attorney v. Ky. Bar Ass'n, 186 S.W.3d 741, 742, 743 (Ky. 2006) (privately reprimanding a lawyer who had jointly represented a husband and wife in connection with a criminal investigation for failing to explain to the jointly represented clients that he would share the investigation results with both of them; explaining that "Movant advised the Does that a conflict of interest could arise in the course of his work on their behalf. He also advised them that if a conflict of interest did arise he might be required to withdraw from the joint employment. However, he did not advise them that any and all information obtained during the joint representation or obtained in any communication to him by them would be available to each client and exchanged freely between the clients in the absence of a conflict of interest. Movant asserts that he did not anticipate the possibility that the interests of the Does would become so materially divergent that there would be a conflict of interest in providing the results of the investigation to each of them. He acknowledges that he did not explain the potential ramifications of joint representation in that regard." (emphasis added); noting that "[t]he investigation produced information that indicated that one of the Does was directly involved in the shooting, contrary to what Movant had been told. Upon discovery of this information, and following communications with the

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

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

Authorities Recognizing a "Keep Secrets" Default Rule

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

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

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

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

> As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and <u>each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit</u>. See Rule 1.4.

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

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

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

<u>Id.</u> (emphasis added).

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

It is unclear whether that second phrase involves a situation in which one of the clients indicates that she does not want the information shared -- but has not yet actually disclosed that information to the lawyer. That seems like an unrealistic

scenario. It is hard to imagine that a client would tell his lawyer: "I have information that I want to be kept secret from the other jointly represented client, but I'm not going to tell you what that information is." It seems far likelier that the client would simply disclose the information to the lawyer, and then ask the lawyer not to share it with the other jointly represented client. But if that occurs, one would think that the lawyer would be bound by the first phrase in the sentence -- which plainly indicates that "information will be shared" among the jointly represented clients.

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

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

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

This confusing ABA approach continued in a 2008 legal ethics opinion. In ABA LEO 450 (4/9/08), the ABA dealt with a lawyer who jointly represented an insurance company and an insured -- but who had not advised both clients ahead of time of how the information flow would be handled. Thus, the lawyer had not followed the approach recommend in ABA Model Rule 1.7 cmt. [31].

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

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

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

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

> The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if

> one client decides that some matter material to the representation should be kept from the other.

Id. (emphasis added).

However, the ABA legal ethics opinion instead inexplicably indicated that such a prior consent might not work. The ABA explained that it was "highly doubtful" that consents provided by the jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. ABA LEO 450 (4/9/08).[2] This conclusion seems directly contrary to Comment [31] to ABA Model

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

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

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

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

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

- Unnamed Attorney v. Ky. Bar Ass'n, 186 S.W.3d 741, 742, 743 (Ky. 2006) (privately reprimanding a lawyer who had jointly represented a husband and wife in connection with a criminal investigation for failing to explain to the jointly represented clients that he would share the investigation results with both of them; explaining that "Movant advised the Does that a conflict of interest could arise in the course of his work on their behalf. He also advised them that if a conflict of interest did arise he might be required to withdraw from the joint employment. However, he did not advise them that any and all information obtained during the joint representation or obtained in any communication to him by them would be available to each client and exchanged freely between the clients in the absence of a conflict of interest. Movant asserts that he did not anticipate the possibility that the interests of the Does would become so materially divergent that there would be a conflict of interest in providing the results of the investigation to each of them. He acknowledges that he did not explain the potential ramifications of joint representation in that regard." (emphasis added); noting that "[t]he investigation produced information that indicated that one of the Does was directly involved in the shooting, contrary to what Movant had been told. Upon discovery of this information, and following communications with the KBA Ethics Hotline, Movant determined that he should withdraw from the joint

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

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

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

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

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

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

representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation." (emphasis added)).

- New York LEO 555 (1/17/84) (addressing the following situation: "A and B formed a partnership and employed Lawyer L to represent them in connection with the partnership affairs. Subsequently, B, in a conversation with Lawyer L, advised Lawyer L that he was actively breaching the partnership agreement. B preceded this statement to Lawyer L with the statement that he proposed to tell Lawyer L something 'in confidence.' Lawyer L did not respond to that statement and did not understand that B intended to make a statement that would be of importance to A but was to be kept confidential from A. Lawyer L had not, prior thereto, advised A or B that he could not receive from one communications regarding the subject of the joint representation that would be confidential from the other. B has subsequently declined to tell A what he has told Lawyer L. Lawyer L now asks what course he may or must take with respect to disclosure to A of what B has told him and with respect to continued representation of the partners."; ultimately concluding that "It is the opinion of the Committee that (i) Lawyer L may not disclose to A what B has told him, and (ii) Lawyer L must withdraw from further representation of the partners with respect to the partnership affairs."; "The Committee believes that the question ultimately is whether each of the clients, by virtue of jointly employing the lawyer, impliedly agrees or consents to the lawyer's disclosing to the other all communications of each on the subject of the representation. It is the opinion of the Committee that, at least in dealing with communications to the lawyer directly from one of the joint clients, the mere joint employment is not sufficient, without more, to justify implying such consent where disclosure of the communication to the other joint client would obviously be detrimental to the communicating client. This is not to say that such consent is never to be found. The lawyer may, at the outset of the joint representation or even perhaps at some later stage if otherwise appropriate, condition his acceptance or continuation of the joint representation upon the clients' agreement that all communications from one on the subject of the joint representation shall or may be disclosed to the other. Where one joint client is a long-time client and the other is introduced to the lawyer to be represented solely in the one joint matter, it may be appropriate for the lawyer to obtain clear consent from the new client to disclosure to the long-time client. . . . Whatever is done, the critical point is that the circumstances must clearly demonstrate that it is fair to conclude that the clients have knowingly consented to the limited non-confidentiality." (emphasis added); "Both EC 5-16 and Rule 2.2 of the Model Rules emphasize that, before undertaking a joint representation, the lawyer should explain fully to each the implications of the joint representation. Absent

> circumstances that indicate consent in fact, consent should not be implied."; "Of course, the instant fact situation is a fortiori. Here, the client specifically in advance designated his communication as confidential, and the lawyer did not demur. Under the circumstances, the confidence must be kept.").

Authorities Recognizing a "No Secrets" Default Rule

In stark contrast to the ABA Model Rules' and various state bars' requirement that lawyers keep secrets in the absence of an agreement to the contrary, some authorities take the opposite approach.

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

Restatement. The Restatement takes this contrary approach.

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

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

> the part of the disclosing co-client. That position was rejected by the Council at its October 1995 meeting, resulting in the present formulation.

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

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

Elsewhere the Restatement again admits that

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

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

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

The mandatory disclosure language appears in several Restatement provisions.

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

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

> all information reasonably necessary for the co-client to make decisions in connection with the matter. . . . The lawyer's duty extends to communicating information to other co-clients that is adverse to a co-client, whether learned from the lawyer's own investigation or learned in confidence from that co-client.

Id. (emphases added).

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

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

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

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

Id. (emphasis added).

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

> Client X and Client Y jointly consult Lawyer about establishing a business, without coming to any agreement about the confidentiality of their communications to Lawyer. X sends a confidential memorandum to Lawyer in which X outlines the proposed business arrangement as X understands it. The joint representation then terminates, and Y knows that X sent the memorandum but not its contents. Subsequently, Y files suit against X to recover damages arising out of the business venture. Although X's memorandum would be privileged against a third person, in

> the litigation between X and Y the memorandum is not privileged. That result follows although Y never knew the contents of the letter during the joint representation.

Id. illus. 1 (emphasis added).

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

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

The discretionary disclosure language appears elsewhere.

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

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

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

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

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

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

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

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

The three <u>Restatement</u> illustrations represent a spectrum of the confidential information's materiality.

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

> 2. Lawyer has been retained by Husband and Wife to prepare wills pursuant to an arrangement under which each spouse agrees to leave most of their property to the other . . . . Shortly after the wills are executed, Husband (unknown to Wife) asks Lawyer to prepare an inter vivos <u>trust for an illegitimate child whose existence Husband has</u>

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

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

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

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

> 4. Lawyer represents both A and B in forming a business. Before the business is completely formed, A discloses to Lawyer that he has been convicted of defrauding business associates on two recent occasions. The circumstances of the communication from A are such that Lawyer reasonably infers that A believes that B is

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

Id. illus. 4 (emphases added).

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

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

ACTEC Commentaries. The ACTEC Commentaries take the same approach as the Restatement -- rejecting a "no secrets" approach in the absence of an agreement on information flow among jointly represented clients.[3]

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

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

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

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

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

> A lawyer who receives information from one joint client (the "communicating client") that the client does not wish to be shared with the other joint client (the "other client" is confronted with a situation that may threaten the lawyer's ability to continue to represent one or both of the clients. As soon as practicable after such a communication, the lawyer should consider the relevance and significance of the information and decide upon the appropriate manner in which to proceed. The potential courses of action include,

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

Id. at 76 (emphases added).

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

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

> lawyer may mention that the failure to communicate the information to the other client may result in a disciplinary or malpractice action against the lawyer.

Id. at 76-77 (emphases added).

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

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

Id. at 77 (emphases added).

The ACTEC Commentaries' conclusion about a lawyer's withdrawal in this awkward situation makes little sense. There are a number of situations in which a lawyer must withdraw from a representation without explaining why. In a joint representation context, a lawyer who has arranged for a "keep secrets" approach might well have to withdraw from both representations if information the lawyer has learned

from one client (and must keep secret from the other client) would materially affect the lawyer's representation of one or both clients. Even outside the joint representation context, lawyers might learn information from one client that would effectively preclude the lawyer from representing another client.

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

Thus, it does not make much sense to say (as the ACTEC Commentaries indicate) that the withdrawal letter "may arouse the other client's suspicions to the point that the communicating client or the lawyer may ultimately be required to disclose the information." Id. If there is a duty not to disclose the information, the lawyer sending the withdrawal letter simply cannot make the disclosure, regardless of any client's suspicions.

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

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

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

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

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

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

Id. at 929.

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

obligation to disclose is discretionary or mandatory" -- but clearly rejected the "keep secrets" approach.[4]

At least one bar also rejected the "keep secrets" approach in the absence of a previous agreement about information flow -- although in an opinion dealing with a lawyer's duty to disclose all pertinent information to former jointly represented clients. Although this scenario deals with privilege rather than ethics, it highlights the issue.

- Maryland LEO 2006-15 (2006) (holding that a lawyer fired by one of two jointly represented clients [who have now become adversaries] must withdraw from representing both clients, even if both clients consent to the lawyer's continuing to represent just one of the clients; "The lawyer is likely unable to provide competent and diligent representation to clients with interests that are diametrically opposed to one another. Further, (b)(3) [Maryland Ethics

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

> Rule 1.7(b)(3)] forbids the continued representation, even with a waiver, where one client asserts a claim against the other. That appears to be the case here, and, therefore, the conflict is not waivable."; also holding that the lawyer must provide both of the formerly jointly represented clients the lawyer's files; "With regard to the remaining two issues, former-Client B should have unfettered access to Attorney 1's files under what has been recognized by some courts as the 'Joint Representation Doctrine, ' which provides that: 'Generally, where the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other, and those confidential communications are not within the privilege in subsequent adverse proceedings between the co-clients." (emphasis added)).

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

Best Answer

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

B 6/14

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

Hypothetical 4

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

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

NO

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

NO

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

NO (PROBABLY)

Analysis

It makes sense to analyze the information flow issue in three different scenarios:

(1) when the lawyer has not raised the issue with the clients at the start of the representation, so there is no agreement among them about the information flow;

(2) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will not share secrets between or among the jointly represented clients;

(3) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will share secrets between or among the jointly represented clients.

This hypothetical deals with the second scenario.

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

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

ABA Model Rules

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

> In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

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

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

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

Restatement

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

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

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

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

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

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

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

Id. (emphasis added).

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

ACTEC Commentaries

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

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

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

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

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

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

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

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

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

* * *

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

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

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

Best Answer

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

B 6/14

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

Hypothetical 5

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

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

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

MAYBE

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

MAYBE

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

NO

Analysis

It makes sense to analyze the information flow issue in three different scenarios: (1) when the lawyer has not raised the issue with the clients at the start of the representation, so there is no agreement among them about the information flow; (2) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will <u>not</u> share secrets between or among the jointly represented clients;

(3) when the lawyer has arranged for the jointly represented clients to agree in advance that the lawyer will share secrets between or among the jointly represented clients.

This hypothetical deals with the third scenario.

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

ABA Model Rules

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

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

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

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

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

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

[1] ABA LEO 450 (4/9/08) ("When a lawyer represents multiple clients in the same or related matters, the obligation of confidentiality to each sometimes may conflict with the obligation of disclosure

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

However, ABA LEO 450 instead inexplicably indicated that such a prior consent might not work. The ABA explained that it was "highly doubtful" that consents provided by the jointly represented clients "before the lawyer understands the facts giving rise to

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

[2] In fact, that legal ethics opinion warns that such "an express agreement" might not work. The ABA explained that it was "highly doubtful" that a prospective consent provided by jointly represented clients "before the lawyer understands the facts giving rise to the conflict" will satisfy the "informed consent" standards. ABA LEO 450 (4/9/08).

the conflict" will satisfy the "informed consent" standards. ABA LEO 450 (4/9/08). This conclusion seems directly contrary to Comment [31] to ABA Model Rule 1.7 -- which advises that lawyers should obtain such an informed consent "at the outset of the common representation."

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

Restatement

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

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

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

ACTEC Commentaries

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

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

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

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

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

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

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

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

<u>Id.</u> at 77 (emphases added).

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

State Authorities

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

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

- District of Columbia LEO 327 (2/2005) ("[I]t was understood that (a) we will not be able to advise you about potential claims you may have against any of the Other Individuals whom we represent and (b) information you provide to use in connection with our representation of you may be shared by us with the Other Individuals whom we represent."; "After apparently learning certain confidential information from one of the jointly represented clients, the prior firm withdrew from representing the other clients and continued to represent only the client from whom the confidential information had been learned. Upon assuming the representation of the other clients, the inquiring law firm requested that the prior firm disclose all information relevant to its prior representation of those clients, including the confidential information that had led to its withdrawal. The prior firm refused. The inquirer seeks an opinion whether, under these circumstances, the prior firm is required to share with the other clients all relevant information learned during its representation, including any relevant confidences and secrets."; "[T]he retainer agreement here expressly provided that information disclosed in connection with the representation 'may be shared' with the other clients in the same matter."; "The retainer agreement presumably reflects a collective determination by all co-clients that the interests in keeping one another informed outweighs their separate interests in confidentiality. Where the disclosing client has expressly or impliedly authorized the disclosure of relevant, confidential information to the lawyer's other clients in the same matter, the duty to keep the non-disclosing clients informed of anything bearing on the representation that might affect their interests requires the lawyer to disclose the confidential information. . . . Where the disclosing client has unambiguously consented to further disclosure, a lawyer's duty of loyalty to and the duty to communicate with the non-disclosing client tips the balance in favor of disclosure. Indeed, in light of the disclosing client's consent, there is nothing left on the other side of the balance." (footnote omitted; emphases added); "It is, of course, possible that a client who has otherwise consented to the disclosure of confidential information may withdraw such consent for a specific disclosure. Where a client informs the lawyer before disclosing certain confidential information that he or she intends to reveal something that may not be shared with the lawyer's other clients (notwithstanding a prior agreement to do so), the lawyer has an obligation at that point to inform the client that no such confidences may be kept. . . . Under the terms of the retainer agreement, the

prior firm's duty to communicate any relevant information to the other clients included any relevant information learned from other clients in the same matter, and this duty attached at the moment the prior firm learned the information. This underscores how important it is for a lawyer carefully to explain to all clients in a joint representation that, when they agree that any relevant or material information may be shared with one another, they cannot expect that any relevant or material confidential information they may subsequently reveal to the lawyer will be kept from the other co-clients." (emphasis added); "If the clients had not all agreed that the prior firm was authorized to share relevant or material information, the 'default' rule in our jurisdiction is that the prior firm would have been prohibited from sharing one client's confidences with the others. . . . But by contracting around this 'default' rule, the clients (and the prior firm) agreed that relevant or material information would be shared. Under these specific circumstance -- where the disclosing client has effectively consented to the disclosure -- an attorney's subsequent refusal to share such information with the other clients violates the D.C. Rules of Professional Conduct." (emphasis added); "[A] lawyer violates the D.C. Rules of Professional Conduct when her [sic] or she withholds from one client relevant or material confidential information obtained from a co-client who has consented to the disclosure."; "Where one client has given consent to the disclosure of confidential information by the lawyer to another client, we have already concluded that the lawyer may reveal the confidence or secret. Here we conclude that the lawyer must do so if the information is relevant or material to the lawyer's representation of the other client. Because the disclosing client previously has waived confidentiality, there is nothing to weigh against either the lawyer's duty of loyalty to the non-disclosing client or the lawyer's obligation to keep that client reasonably informed of anything bearing on the representation that might affect that client's interests.").

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

- New York LEO 555 (1/17/84) (addressing the following situation: "A and B formed a partnership and employed Lawyer L to represent them in connection with the partnership affairs. Subsequently, B, in a conversation with Lawyer L, advised Lawyer L that he was actively breaching the partnership agreement. B preceded this statement to Lawyer L with the statement that he proposed to tell Lawyer L something 'in confidence.' Lawyer L did not respond to that statement and did not understand that B intended to make a statement that would be of importance to A but was to be kept confidential from A. Lawyer L had not, prior thereto, advised A or B that he could not receive from one communications regarding the subject of the joint

representation that would be confidential from the other. B has subsequently declined to tell A what he has told Lawyer L. Lawyer L now asks what course he may or must take with respect to disclosure to A of what B has told him and with respect to continued representation of the partners."; ultimately concluding that "It is the opinion of the Committee that (i) Lawyer L may not disclose to A what B has told him, and (ii) Lawyer L must withdraw from further representation of the partners with respect to the partnership affairs."; "The Committee believes that the question ultimately is whether each of the clients, by virtue of jointly employing the lawyer, impliedly agrees or consents to the lawyer's disclosing to the other all communications of each on the subject of the representation. It is the opinion of the Committee that, at least in dealing with communications to the lawyer directly from one of the joint clients, the mere joint employment is not sufficient, without more, to justify implying such consent where disclosure of the communication to the other joint client would obviously be detrimental to the communicating client. This is not to say that such consent is never to be found. The lawyer may, at the outset of the joint representation or even perhaps at some later stage if otherwise appropriate, condition his acceptance or continuation of the joint representation upon the clients' agreement that all communications from one on the subject of the joint representation shall or may be disclosed to the other. Where one joint client is a long-time client and the other is introduced to the lawyer to be represented solely in the one joint matter, it may be appropriate for the lawyer to obtain clear consent from the new client to disclosure to the long-time client. . . . Whatever is done, the critical point is that the circumstances must clearly demonstrate that it is fair to conclude that the clients have knowingly consented to the limited non-confidentiality." (emphases added); "Both EC 5-16 and Rule 2.2 of the Model Rules emphasize that, before undertaking a joint representation, the lawyer should explain fully to each the implications of the joint representation. Absent circumstances that indicate consent in fact, consent should not be implied."; "Of course, the instant fact situation is a fortiori. Here, the client specifically in advance designated his communication as confidential, and the lawyer did not demur. Under the circumstances, the confidence must be kept.").

In 1999, a New Jersey court found it unnecessary to decide whether a lawyer could, or was obligated to, disclose the client confidences to other jointly represented clients -- when the retainer agreement indicated that the lawyer could share confidences but not that the lawyer necessarily would disclose them.[3] The court was saved from this issue because the lawyer wanted to disclose the information.

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[3] A. v. B., 726 A.2d 924, 928, 929, 929-30, 931, 932 (N.J. 1999) (analyzing a situation in which a lawyer jointly representing a husband and wife in estate planning learns from a third party that the

* * *

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

Best Answer

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

B 6/14

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

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

Hypothetical 6

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

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

YES (PROBABLY)

Analysis

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

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

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

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

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

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

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

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

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

ABA Model Rules

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

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

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

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

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

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

Restatement

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

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

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

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

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

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

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

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

Id. cmt. d (emphasis added).

An illustration explains how this principle works.

> Client X and Client Y jointly consult Lawyer about establishing a business, without coming to any agreement about the confidentiality of their communications to Lawyer. X sends a confidential memorandum to Lawyer in which X outlines the proposed business arrangement as X understands it. The joint representation then terminates, and Y knows that X sent the memorandum but not its contents. Subsequently, Y files suit against X to recover damages arising out of the business venture. Although X's memorandum would be privileged against a third person, in the litigation between X and Y the memorandum is not privileged. That result follows although Y never knew the contents of the letter during the joint representation.

Id. illus. 1 (emphases added).

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

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

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

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

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

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

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

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

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

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

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

Id. (emphasis added).

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

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

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

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

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

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

Id. (emphasis added).

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

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

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

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

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

State Bars' Approach

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

omitted); "In determining whether parties are 'joint clients,' courts may consider multiple factors, including but not limited to matters such as payment arrangements, allocation of decisionmaking roles, requests for advice, attendance at meetings, frequency and content of correspondence, and the like"; holding that the FDIC had established that it was a joint client of a law firm and therefore could obtain access to the law firm's documents in a dispute between the FDIC and the other clients).

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

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

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

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

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

- Scrivner v. Hobson, 854 S.W.2d 148, 151 (Tex. Ct. App. 1993) ("With regard to the attorney-client privilege, the general rule is that, as between commonly

represented clients, the privilege does not attach to matters that are of mutual interest. . . . Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.").

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

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

Degree of Adversity

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

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

The "adverse proceeding" language seems broader than the "litigation" language. For instance, it might include administrative proceedings that do not count as

litigation under some courts' standards. However, both the ABA Model Rules and the Restatement obviously require a high degree of adversity among the former joint clients before finding that the privilege "evaporates."

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

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

> Relevant case law makes it clear that the rule thus described by McCormick [preventing one former jointly represented client from invoking the privilege in a dispute among the former jointly represented clients] . . . squarely applies when former joint clients subsequently face one another as adverse parties in litigation brought by any one of them. . . . The rule may also be invoked in an action brought by or against a successor-in-interest to a former joint client where any one of the other former joint clients stands as an opposing party in such action. . . . On the other hand, it has been ruled that the privilege of one joint client cannot be destroyed at the behest of the other where the two have

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

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

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

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

> merely had a 'falling out' in the sense of ill-feeling or divergence of interests.

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

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

Joint Clients' Power to Change the Rules

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

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

- See, e.g., In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005) (rejecting the applicability of a "Protocol" entered into by a parent and a then-subsidiary which authorized their joint lawyer Troutman Sanders to keep confidential from one client what it learned from the other; noting that the general counsel of the subsidiary agreed to the Protocol after the subsidiary became an independent company, but also explaining that the general counsel had ties both to the parent and to Troutman).
- N.Y. City LEO 2004-02 (6/2004) ("Multiple representations of a corporation and one or more of its constituents are ethically complex, and are particularly so in the context of governmental investigations. If the interests of the corporation and its constituent actually or potentially differ, counsel for a corporation will be ethically permitted to undertake such a multiple representation, provided the representation satisfies the requirements of DR 5-105(C) of the New York Code of Professional Responsibility: (i) corporate counsel concludes that in the view of a disinterested lawyer, the representation would serve the interests of both the corporation and the

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

Effect of a Lawyer's Improper Joint Representation

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

Under this rarely-applied principle, even if a lawyer was found to have engaged in some improper conduct by jointly representing multiple clients with adverse interests, that would not necessarily result in loss of the privilege in a later dispute between them.[7]

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

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

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

> Given Eureka's expectations of confidentiality and the absence of any policy favoring disclosure to CTI, Eureka should not be deprived of the privilege even if, as CTI suggests, the asserted attorney-client relationship should not have been created. We need not express any view on CTI's contention that Fried, Frank should not have simultaneously undertaken to represent Eureka in an interest adverse to CTI and continued to represent CTI in a closely related matter. As Wigmore's second principle expressly states, counsel's failure to avoid a conflict of interest should not deprive the client of the privilege. The privilege, being the client's, should not be defeated solely because the attorney's conduct was ethically questionable. We conclude, therefore, that Eureka was privileged not to disclose the requested documents.

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

Under this approach, joint clients can withhold from one another privileged communications if a lawyer has been improperly representing them (presumably in violation of the conflicts of interest rules). A fortiori, one would expect that a third party would not be able to pierce the privilege despite the adversity between the jointly represented clients.

Best Answer

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

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> against each other notwithstanding the lawyer's misconduct. Id.; see also 8 J. WIGMORE, EVIDENCE § 2312 (McNaughton rev. ed. 1961).

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

Intentional Joint Representation of Corporate Employees

Hypothetical 6

As the only in-house lawyer for a privately-held company, you are occasionally asked to represent company employees (often distant relatives of the primary owner). You want to make sure that such representations do not run afoul of any rules, or jeopardize your main job as the company's lawyer.

(a) May you intentionally represent a company employee in a company-related matter?

YES

(b) May you intentionally represent a company employee in a non-company-related matter?

MAYBE

Analysis

Introduction

Although it certainly raises conflicts of interest issues and privilege ownership issues, there is nothing inherently unethical about a lawyer representing both a corporation and one or more of the corporation's employees. In fact, ABA Model Rule 1.13 specifically acknowledges such joint representations.

> A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

ABA Model Rule 1.13(g).

Unauthorized Practice of Law/Multijurisdictional Practice Issues

However, the issue becomes much more complicated in the case of in-house lawyers.

This situation is governed by unauthorized practice of law ("UPL") regulations in each state. States take differing approaches to the permissibility of in-house lawyers representing individual constituents (officers, directors, employees) of their corporate client-employers. The stakes can be surprisingly high -- an in-house lawyer representing such an individual in a state that does not permit such representations would be engaging in the unauthorized practice of law. Most states prohibit the unauthorized practice of law in their criminal statutes.

Even in-house lawyers fully licensed in the state where they practice must examine their state's unauthorized practice of law rules. In-house lawyers represent somewhat of an anomaly in the law -- because they ultimately report to a nonlawyer (the company's board of directors). Because of this unique role, in-house lawyers must assess with whom they can establish an attorney-client relationship. At the extreme, an in-house lawyer working for a large retailer could not set up a table near the store's front door and begin representing customers who might want a will drafted for them. This would essentially make the corporation a law firm owned by shareholders -- which no state permits. On the other hand, some states allow in-house lawyers to represent their corporation's employees (subject to the conflicts rules). Other states are more liberal, and allow in-house lawyers to represent their corporation's former employees, and in some situations even their corporation's customers. However, each state takes a

slightly different approach, and in-house lawyers would be wise to check the applicable rules.

States' somewhat hostile attitude toward in-house lawyers' representation of such third parties creates a special dilemma for in-house lawyers hoping to engage in pro bono work. As indicated above, no in-house lawyer could begin to represent thousands of company customers. Technically, pro bono clients stand in the same shoes as those customers -- they are strangers to the corporation. Many states have wrestled with this issue, and most find a way to turn a blind eye toward any technical violation of the unauthorized practice of law rules that might occur if an in-house lawyer engages in pro bono work.

These issues become even more complicated for in-house lawyers who are <u>not</u> full members of the bar in the state where they are practicing. Traditionally, most states often did not require in-house lawyers to join the bar or even register with the bar in some way. However, most states now require in-house lawyers to either take the full step of joining the bar where they practice, or at least register in some way.

Cynics would argue that states are as much interested in the dues money as in their desire to police in-house lawyers' conduct. It is easy to see why states normally do not have much of an interest in regulating in-house lawyers. Because in-house lawyers generally cannot represent entities or people outside their corporate employer (as discussed above), there normally is no great danger that in-house lawyers will harm the public. And to the extent that they harm their corporation or its employees, the corporation itself generally can take care of such misdeeds.

The ethics rules contain provisions dealing with what in-house lawyers may do when practicing in states in which they are not licensed.

This issue (called the "multijurisdictional practice" (or MJP) issue) is governed by ABA Model Rule 5.5 and the parallel rules in states adopting the ABA approach.

Under ABA Model Rule 5.5, all lawyers (including in-house lawyers) may practice law in other states as long as they do not hold themselves out as being admitted in that state, and as long as they provide legal services in that other state only on a "temporary basis." In addition, the lawyer practicing in another state must either associate with a lawyer from that state, comply with whatever pro hac vice rules apply to appear before a tribunal, or engage in representations that "arise out of or are reasonably related to" the lawyer's practice in a state where the lawyer is admitted. ABA Model Rule 5.5(c).

Of special interest to in-house lawyers, ABA Model Rule 5.5(d) allows an in-house lawyer to represent the lawyer's "employer or its organizational affiliates" in a state where the lawyer is not licensed, even as part of a "systematic and continuous presence" in the other state. ABA Model Rule 5.5(d).

A comment explores this "safe harbor" -- which does <u>not</u> allow the in-house lawyer to represent individual constituents of the client-employer in the other state.

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

> client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

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

Thus, in-house lawyers moving to a state that follows the ABA Model Rules and not wishing to join that state's bar may represent the corporation's "organizational affiliates" -- but <u>not</u> any individual corporate constituents.

<u>Conflicts Issues</u>

Lawyers who represent corporations sometimes intentionally create a separate representation of a corporate employee. Such a joint representation does not have any dramatic effect on either the corporation's or the employee's attorney-client privilege. The lawyer must maintain the privilege protecting communications with the employee on such a separate matter, and must of course do likewise for any communications relating to the lawyer's representation of the corporation.

Such separate representations clearly carry ethics implications. A lawyer representing an employee on a traffic ticket matter has an attorney-client relationship with the employee, which precludes the lawyer from adversity to the employee even on unrelated matters (absent consent). This is one reason why wise lawyers try to avoid representing the employees of companies they also represent, even on unrelated matters. For instance, a lawyer representing a corporate vice president in buying a house cannot (absent consent) advise the company's board about its right to fire that vice president. Consent would normally be unavailable as a practical matter, because the board would not permit the lawyer to make the sort of disclosure necessary to obtain a valid consent. A lawyer might find it awkward to arrange for a prospective consent

when beginning to represent the employee in his or her house purchase, because it might send an unfortunate signal that such adversity might develop, or be a "turn off" to the lawyer's important contact and business generator in the corporate hierarchy.

When a law firm explicitly represents both the company and an employee, it might be necessary to determine if the representations are joint or separate. A lawyer who jointly represents a corporation and a corporate employee must consider all of the normal ramifications of such a joint representation on the same matter. First, the lawyer might not be able to keep secrets from either of the jointly represented clients. Second, a joint representation gives the employee equal ownership of and power over the attorney-client privilege. This means that the employee might have later access to the lawyer's file and communications between the lawyer and the corporation. It also means that absent some degree of adversity between the corporation and the employee, the corporation and the employee would have to unanimously vote to reveal any of their privileged communications to outsiders. Third, the development of any adversity between the jointly represented clients almost inevitably requires the withdrawal from representation of both clients. To make matters worse, the imputed disqualification rules applicable to law firms also generally apply to law departments, which means that an in-house lawyer's disqualification from a joint representation of the corporation and an individual employee normally would require the entire law department's disqualification.[1]

Lawyers might be able to mitigate some of the risks by arranging for a prospective consent from the employee, attempting to allow the lawyer to withdraw from

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[1] ABA Model Rule 1.0(c).

representing the employee if adversity develops between her and the corporation, while continuing to represent the corporation.[2] The efficacy of such prospective consents is outside the scope of this hypothetical, but it is worth noting that courts and bars examine prospective consents both when the lawyers arrange for them and when the lawyers attempt to rely on them. Thus, there is never a guarantee that such a prospective consent will allow the lawyer to continue representing the corporation on the same matter if that would include adversity to the employee who is now the lawyer's former client. Lawyers therefore can never assure their corporate clients with confidence that they can completely mitigate the risks of a joint representation should adversity develop.

Despite these risks, lawyers representing corporations frequently enter into such intentional joint representations.

Trying to avoid a joint representation might be easy, if the law firm represents the executive in some non-corporate matters such as a traffic ticket or a house purchase. However, law firms might try to "thread the needle" by claiming that they represented a company and an executive on a company-related matter, but that their representations were separate rather than joint. This is nearly an impossible argument to successfully make, absent very clear retainer letters.

A 2009 decision highlights the risks that a lawyer runs when intentionally entering into separate representations of both a company and one of its employees, who was

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[2] For instance, one court refused to disqualify a firm from representing a company in litigation adverse to a former company executive whom the firm had also represented -- finding that the firm had adequately described its role and obtained a valid prospective consent from the executive. Laborers Local 1298 Annuity Fund v. Grass (In re Rite Aid Corp. Sec. Litig.), 139 F. Supp. 2d 649, 660 (E.D. Pa. 2001).

under investigation for wrongdoing. In that case, a well-known California law firm undertook what the court called "three separate, but inextricably related, representations" of Broadcom and its CFO.[3] The law firm represented Broadcom in connection with the company's internal investigation of stock option issues, and the CFO in two lawsuits brought by shareholders alleging wrongdoing in connection with stock options. The law firm interviewed the CFO, and then disclosed information it learned during the interview to the U.S. Attorney's Office, the SEC, and Broadcom's auditor. When the government pursued criminal charges against the CFO, he sought to suppress the statements he had made to the law firm during the interview, and the trial court granted his motion. Among other things, the court noted that the law firm had not advised the CFO before the interview that the firm was wearing only its "Broadcom" hat during the interview, and that it might disclose to third parties what it learned from the CFO. The court explained that "whether an Upjohn [Upjohn Co. v. United States, 449 U.S. 383 (1981)] warning was or was not given is irrelevant" -- because the firm clearly represented the CFO.[4] As the court put it, "[a]n oral warning to a current client that no attorney-client relationship exists is nonsensical at best -- and unethical at worst."[5] In addition to suppressing the evidence, the court referred the law firm to the State Bar for "appropriate discipline," based on the firm's ethical misconduct that "[t]he Court simply cannot overlook."[6]

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[3] United States v. Nicholas, 606 F. Supp. 2d 1109, 1111 (C.D. Cal. 2009), rev'd and remanded sub nom. United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).

[4] Id. at 1117.

[5] Id.

[6] Id. at 1112.

The Ninth Circuit reversed the district court's holding, but lawyers should not breathe easy.[7] The Ninth Circuit (i) found that the law firm had represented both Broadcom and its former CFO Ruehle in connection with possible option backdating; (ii) agreed with Ruehle that the law firm had not provided the proper Upjohn warning to Ruehle, despite the lawyers' contrary claims (pointedly noting that the [law firm] lawyers "took no notes nor memorialized their conversation on this issue in writing";[8] (iii) held that the district court had improperly applied California law rather than federal law to the privilege question (meaning that the district court might have been upheld if it had made the same findings under the federal standard); (iv) noted that Ruehle "was no ordinary Broadcom employee" because he knew that the law firm was sharing information with Broadcom's auditor Ernst & Young (a fact that will not be present in most situations involving law firms representing both corporations and executives);[9] (v) labeled as "troubling" the law firm's "allegedly unprofessional conduct";[10] and (vi) emphasized that "our holding today should not be interpreted as carte blanche approval" of the law firm lawyers' testimony about their communications with Ruehle (implying that the law firm's proffer to the FBI might have included impermissible disclosures).[11]

These decisions highlight the tremendous risks corporate lawyers undertake when attempting to separately represent companies and executives in company-related matters where there is any chance of adversity.

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7 United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).

8 Id. at 604 n.3.

9 Id. at 610.

10 Id. at 613.

11 Id. at 613 n.10.

In 2012, two well-known Oregon state lawyers found themselves facing ethics charges as a result of allegedly representing multiple corporate employees without explaining the ethics implications and the possible adversity among them.

- Martha Neil, 2 Leading Lawyers Face Unusual Ethics Case re Claimed Conflict in Representing Corp. and Workers, ABA Journal, Dec. 5, 2012 ("Two leading corporate lawyers in Portland, Ore., are awaiting the results in an unusual legal ethics case, pursued a decade after the fact, concerning a claim conflict in their representation of a corporate client and its employees in a securities matter."; "Barnes H. Ellis, 72, a retired partner of Stoel Rives, and partner Lois O. Rosenbaum, 62, who followed Ellis as head of the renowned northwest regional law firm's securities practice, went to trial last month in a legal ethics case brought by the Oregon State Bar. It contended that the two attorneys, while representing Flir Systems Inc. in a shareholder suit and subsequent investigation by the Securities and Exchange Commission, helped protect the corporation by blaming employees the two lawyers purportedly represented, too, Willamette Week reports."; "In testimony at the 12-day ethics trial, the two said they had done nothing wrong, fully disclosing potential conflicts and making sure those who wanted outside counsel got outside counsel. However, working together in a joint representation helped those involved better defend themselves by sharing information, they said."; "'We didn't favor one client over another,' testified Ellis. 'In my mind, it was a perfect marriage of interests for us to represent the employees at their interviews and be able to share that information with the former officers that might have liability for past acts.'"; "He told the Portland Business Journal at the time the complaints were filed that 'a lawyer cannot effectively represent a company if the lawyer cannot appear for the company's employees. If that is the bar's position, that is a new concept that has no support in the rules of professional conduct.'"; the Formal Complaints against Barnes Ellis and Lois Rosenbaum allege that in 2000-2003 they simultaneously represented the publicly traded company FLIR, various board members, two lawyers who represented a special committee of FLIR's outside directors, various officers and managers (including FLIR's CFO, general counsel and Director of Sales Operations), and "all FLIR employees who would be interviewed by the SEC in the course of" an investigation (Formal Complaint ¶ 10, In re Conduct of Rosenbaum, Case No. 09-55 (Or. July 21, 2010); Formal Complaint ¶ 10, In re Conduct of Ellis, Case No. 09-54 (Or. July 21, 2010); the Formal Complaints allege that there were differing interests among these various clients at various times, but that Ellis and Rosenbaum "undertook the [multiple] representation without full disclosure to each client of the potential adverse impact of the multiple representation and without first obtaining each client's consent to the multiple representation" (Id. ¶ 15); the Formal Complaints allege that Ellis and Rosenbaum assisted some of their clients in implicating others of their clients as responsible for FLIR's allegedly improper

accounting, recordkeeping and financial reporting practices in 1998 and 1999; the Formal Complaints contain a number of examples of Ellis and Rosenbaum representing one or more clients who provided sworn statement to the SEC implicating other clients; Ellis is a member of the American College of Trial Lawyers, and has been listed in Best Lawyers in America and other similar lists for many years; he is a Harvard Law School graduate, and his bio indicates that he "has lectured extensively on corporate governance." (Stoel Rives LLP (search "Attorneys" for Ellis, Barnes), http://www.stoel.com/showbio.aspx?Show=230); Rosenbaum is a Stanford Law School graduate, and her bio indicates that she "has been listed for many years in both Chambers USA as one of America's leading securities litigators, and America's Best Lawyers, and in Oregon's Super Lawyers." (Stoel Rives LLP (search "Attorneys" for Rosenbaum, Lois), http://www.stoelrives.com/showbio.aspx?Show=408)).

The Oregon Bar found that the two well-known lawyers had violated the ethics rules -- but on a much smaller scale than the Bar's allegations.

- In re Ellis & Rosenbaum, Case Nos. 09-54 & -55, slip op. at 32, 35, 35-36, 37, 11, 72-73, 66, 69, 70, 72 (Ore. May 7, 2013) (holding that two prominent Portland, Oregon, lawyers were guilty of several ethics violations, although exonerating them of other allegations; ultimately issuing a public reprimand; explaining that in 2006 the publicly traded corporation FLIR announced that it was restating its financial statements, and that its CFO had resigned; explaining that the lawyers (Barnes H. Ellis and Lois O. Rosenbaum) represented FLIR and several of its officers and employees in connection with an SEC investigation, which lead to the SEC suing FLIR's former CEO; ultimately holding that the two lawyers' joint representation of FLIR and several other officers and employees was not initially improper, but that the SEC's issuance of Wells notices created the possibility of adversity among the joint clients; "The Trial Panel concludes that the Bar has not proven by clear and convincing evidence that an actual conflict of interest existed because neither Ellis nor Rosenbaum had a duty to contend for something on behalf of one client that they had a duty to oppose on behalf of another client. This is because, during the SEC investigation process, Ellis and Rosenbaum were not permitted to contend or advocate on behalf of a client. The advocacy period began when the SEC issued the Wells notices to certain individuals. However, as to each individual that received a Wells notice, they received independent representation from attorneys other than Ellis and Rosenbaum in preparing responses to the Wells notice or, in the case of Samper, not responding."; also holding that the two lawyers had not adequately explained the possible adversity when obtaining several individual clients' consent to continue representing the company; "The Trial Panel finds most troubling the statement in the FLIR Wells response is in the last section captioned 'Offer of Settlement.' At the end, in paragraph 4, Ellis and

Rosenbaum wrote: 'Finally, to the extent wrong-doing may have occurred, we understand that the SEC is pursuing fraud claims against one or more individuals who may have been responsible.' This statement tells the SEC that FLIR believes that wrong-doing may have occurred, and suggests that it is appropriate for the SEC to pursue fraud claims against one or more responsible individuals. At the time this statement was made, Ellis and Rosenbaum knew, as did the SEC, which individuals and former clients received Wells notices and against whom the SEC was pursuing fraud claims. These individuals and former or current clients included Samper [CFO], Fitzhenry [General Counsel] . . . , and Eagleburger [Vice President of Sales]."; "The Trial Panel concludes that the Bar has proven, by clear and convincing evidence, that this statement is adverse to the objective personal, business or property interest of Samper, Fitzhenry, and Eagleburger. Although the sentence does not refer to these individuals specifically, it must refer to Eagleburger and Samper because they were responsible, and action was taken against Eagleburger and Samper who immediately resigned."; "FLIR had made a detailed offer of settlement, and there was no need to conclude that offer by conceding that wrongdoing may have occurred, and implying that it was appropriate for the SEC to pursue fraud claims against responsible individuals, some of whom were Ellis and Rosenbaum's current or former clients. And to the extent that Ellis and Rosenbaum believed that the statement was necessary, the proper course of action would have been to send a draft of FLIR's Wells response to the attorneys for Samper, Fitzhenry, and Eagleburger and ask for their consent after full disclosure to send it to the SEC."; "[T]he Bar alleges that Ellis and Rosenbaum continued to represent FLIR in the criminal investigation. The Bar alleges that Ellis and Rosenbaum promised FLIR's full cooperation in that investigation, and they undertook to procure and produce to Garten [Assistant U.S. Attorney] and the FBI documents and information they had not previously produced to the SEC and then, by letter dated February 14, 2003, Garten advised Ellis and Rosenbaum of the cooperation he expected in exchange for his agreement not to prosecute FLIR. The Bar alleges that on March 3, 2003, Ellis and Rosenbaum requested Samper's and Daltry's [President of the company's board of directors] permission to continue to represent FLIR in the DOJ criminal investigation but those letters failed to fully disclose to Samper or Daltry eleven items of information that the Bar contends should have been disclosed."; "The Trial Panel concludes that the Bar has proved by clear and convincing evidence that Ellis failed to make full disclosure in order to obtain consent from Samper and Daltry to the continued representation of FLIR by Ellis, which constituted conduct involving misrepresentation and an actual or likely conflict of interest in violation of DR 1-102(A)(3) and DR 5-105(C)."; "The information Ellis failed to disclose to Daltry and Samper and their respective criminal defense counsel was relevant to enable, and reasonably indicated as important for criminal defense counsel to fully and adequately advise Daltry and Samper as to whether to consent to Ellis' continued representation of FLIR. No persuasive evidence was presented that the

assertion of relevance and importance of having the undisclosed information was unreasonable."; "As to the requested consent in the letter dated March 3, 2003, for Ellis and Rosenbaum's continued representation of FLIR during the criminal investigation, Ellis and Rosenbaum did not disclose to Samper or Glade [Samper's lawyer] or Samper's criminal defense attorney that in October of 2002, at Wynne [Member of the Board of Director's Special Committee] and FLIR's request, Rosenbaum telephoned the SEC attorney to ensure that she was aware of the Swedish drop shipment transaction, and subsequently provided her documentation as to that transaction."; "[T]he Trial Panel concludes that the failure to disclose her [Rosenbaum] contact with the SEC concerning the Swedish drop shipment program was a misrepresentation in violation of DR 1-102(A)(3). It was a misrepresentation because that information was critically important, it was known to Ellis and Rosenbaum, and it should have been disclosed to Samper and his criminal defense lawyer as well as his civil lawyer, Glade, and it may have resulted in Samper not giving his consent to Ellis and Rosenbaum continuing to represent FLIR."; "[T]he Trial Panel finds that such information (e.g., the February 14th DOJ letter, the request for and provision of compensation data, the representation of Fitzhenry in the Bar matter, and Rosenbaum's contact with the SEC to disclose the Swedish drop shipment transaction) was required to be disclosed to the clients, former clients and the clients' criminal attorneys when seeking their consent to Rosenbaum's continued representation of FLIR during the DOJ investigation and the representation of Fitzhenry by Ellis in the Bar matter. Rosenbaum's failure to disclose such information constituted lack of full disclosure in order to obtain consent from Samper and Daltry to the continued representation of FLIR and the representation of Fitzhenry in the Bar matter by Ellis, which constituted conduct involving misrepresentation and an actual or likely current conflict of interest in violation of DR 1-102(A)(3) and DR 5-105(E).")

There is a slight bit of good news for lawyers who would like to represent company executives in a very limited way. In a somewhat surprising approach that helps corporations, several courts have held that a company's lawyer's representation of a company executive during depositions or other testimony did not create a joint attorney-client relationship.[12] This forgiving attitude can have two significant

[12] Springs v. First Student, Inc., Case No. 4:11CV00240 BSM, slip op. (E.D. Ark. Nov. 30, 2011); Gary Friedrich Enters., LLC v. Marvel Enters., Inc., No. 08 Civ. 1533 (BSJ) (JCF), 2011 U.S. Dist. LEXIS 54154, at *11-12 (S.D.N.Y. May 20, 2011) ("In situations such as this where a former employee is represented by counsel for a defendant corporation for the purpose of testifying at a deposition at no cost to him, courts have not treated the former employee as having an independent right to the privilege, even where that employee believes that he is being represented by that counsel."); United States v. Stein, 463

implications. First, the lack of a joint attorney-client relationship means the company has the sole power to waive the privilege protecting the communications between the lawyer and the executive. Second, as an ethics matter, the lack of a joint representation allows the company lawyer to later represent the company adverse to the executive whom the lawyer had represented in such a limited way. Not surprisingly, other courts disagree with this approach.[13]

Conclusion

(a) Unless a conflict of interest would prevent it, an in-house lawyer fully licensed in a state can represent a company employee in a company matter.

(b) Unless a conflict of interest would prevent it, a fully licensed company lawyer may also represent a company employee in a non-company matter -- although in-house lawyers frequently seek to avoid such representations. An in-house lawyer who is not fully licensed in the state where he or she practices probably could not undertake such a representation.

Best Answer

The best answer to **(a)** is **YES**; the best answer to **(b)** is **MAYBE**. **B 6/14**

F. Supp. 2d 459 (S.D.N.Y. 2006); Under Seal v. United States (In re Grand Jury Subpoena: Under Seal), 415 F.3d 333 (4th Cir. 2005), cert. denied, 546 U.S. 1131 (2006). See also Wisconsin LEO E-07-01 (7/1/07).

[13] See, e.g., Advanced Mfg. Techs., Inc. v. Motorola, Inc., No. CIV 99-01219 PHX-MHM (LOA), 2002 U.S. Dist. LEXIS 12055, at *17-19 (D. Ariz. July 2, 2002).

Accidental Creation of a Joint Representation of a Corporate Employee

Hypothetical 7

As your company's in-house lawyer primarily responsible for litigation matters, you recently worked with outside counsel during an investigation of possible wrongdoing by three executives. You prepared notes of your interview sessions. Your notes reflect that you and your outside colleague made the following statements to the three executives:

- "We represent the company but we could represent you as well, as long as no conflict appeared."
- "We can represent you until such time as there appears to be a conflict of interest."
- "We represent the company, and can represent you too if there is not a conflict."

As it turned out, the executives had indeed engaged in wrongdoing -- and the company fired them. The federal government began to investigate the wrongdoing, and asked for your interview notes. The former employees' new lawyers claim that you and outside counsel jointly represented the company and the employees, which gives them a "veto power" over your waiver of the privilege. The federal government is becoming increasingly insistent that you hand over the notes.

May you waive the privilege covering your interview of the then-employees, over their objection?

MAYBE

Analysis

The real danger in the corporate context is that a lawyer representing the corporation will accidentally create a joint representation with a corporate employee.

Theoretically this should never happen. As a matter of ethics, lawyers dealing with company executives who might misunderstand the lawyer's role must "explain the identity of the client when the lawyer knows or reasonably should know that the

organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[1] The standard Upjohn warning includes essentially the same disclosure.

On the other hand, it is easy to see how lawyers who are not scrupulous in following their ethics duties and the Upjohn standard might generate a reasonable belief in corporate employees that the lawyer is representing them as well as the corporation in a corporate-related matter. This is because lawyers can engage in privileged communications with employees in their role as employees, without separately representing them. This is not the case with third parties. Neither the lawyer nor the third party in that non-corporate setting is likely to think that an attorney-client relationship exists. In contrast, a corporation's lawyer generally knows that the privilege applies to communications with the employees even if the lawyer does not represent them. The corporate employee in that setting knows that he or she is talking with a lawyer. Given this setting, it is no wonder that there can some confusion.

The key point here is not the existence of the privilege, but who owns it. The corporate lawyer following Upjohn and protecting a corporate client will ensure that the corporate client owns the privilege. This means that the corporation can assert the privilege and, most importantly, can waive the privilege. A corporate employee usually claims a joint representation when the corporation wants to waive the privilege otherwise covering communications between the corporate lawyer and the employee, and the employee wants to prevent such a waiver. This situation often arises when the government or another third party seeks disclosure of those communications. The corporation might want to cooperate with the government by disclosing them, while the

[1] ABA Model Rule 1.13(f).

employee who is often the subject of government inquiry wants to keep those communications secret.

Given the high stakes involved, one would think that company lawyers would always explicitly indicate whether they jointly represent employees with whom they are dealing. In other words, they would either explicitly disclaim an attorney-client relationship with the employees, or in very unusual circumstances explicitly articulate a joint representation. As the Southern District of New York explained,

> [t]his problem could be avoided if counsel in these situations routinely made clear to employees that they represent the employer alone and that the employee has no attorney-client privilege with respect to his or her communications with employer retained counsel. Indeed, the Second Circuit advised that they do so years before the communications here in question. But there is no evidence that the attorneys who spoke to Ms. Warley followed that course.

United States v. Stein, 463 F. Supp. 2d 459, 460 (S.D.N.Y. 2006) (footnote omitted).

An earlier example highlighted the dangers of ambiguity. In that case,[2] a court criticized (but ultimately found effective) what it called a "watered down 'Upjohn warning[]'" that a company's in house lawyers and outside lawyers gave to executives they were interviewing. The lawyers had made the following statements to the three executives that they interviewed:

- "[T]hey represented [the company] but that they 'could' represent him as well, 'as long as no conflict appeared.'"
- "We can represent [you] until such time as there appears to be a conflict of interest."

[2] Under Seal v. United States (In re Grand Jury Subpoena: Under Seal), 415 F.3d 333, 340 (4th Cir. 2005).

- "We represent [the company], and can represent [you] too if there is not a conflict."[3]

The employees had claimed joint ownership of the privilege covering the interview to block the company's disclosure of the interview notes to the government. The company ultimately won sole ownership of the privilege, but had to fight the now-former employees up to the circuit court level.

The law had to develop a test for determining whether a corporate employee's argument about a joint representation would succeed or would not.

Some lawyers who represent corporations also intentionally establish either separate or joint representations of corporate employees. In other situations, lawyers explicitly disclaim an attorney-client relationship with a corporate employee, following their ethics duty to disclose their role and the Upjohn warning's provision explicitly denying that the lawyer represent the employee either separately or jointly with the corporate client.

However, in the absence of such an intentional representation or explicit disclaimer of a representation, courts developed a standard for determining whether an attorney-client relationship exists between a corporation's lawyer and a corporate employee.

Thus, the test essentially amounts to a "default" standard in the absence of some explicit memorialization of a relationship or the lack of a relationship. Careful lawyers have already taken care of this issue, and therefore do not need a "default" standard.

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[3] Id. at 336.

However, the large number of cases dealing with such a "default" situation highlights many lawyers' inattention to this important issue.

A 1986 Third Circuit case articulated the most widely recognized standard -- the Bevill standard.[4] Under the Bevill standard, a corporate employee seeking to prove an attorney-client relationship with a corporation's lawyer (thus carrying both privilege and other ethics implications) must establish that:

- The employee approached the corporation's attorney for legal advice;
- The employee made it clear that the request had to do with matters that arose in his or her individual capacity;
- The attorney understood this request and advised on the matter even though there was a potential for conflict;
- These communications were confidential;
- The subject matter of the communication did not concern a more general corporate matter.

The critical element is the last one: The communication usually may not relate to the employee's duties on behalf of the corporation.[5]

Most courts now adopt the Bevill standard. For instance, in 2010, the Ninth Circuit explicitly adopted the Bevill standard.[6] Other courts have adopted variations of the Bevill standard, but with essentially the same bottom line.[7]

Most courts applying the Bevill standard refuse to recognize an attorney-client relationship between a corporation's lawyer and individual corporate constituents.[8] For

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[4] In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir. 1986).

[5] In re Grand Jury Subpoena, 274 F.3d 563, 573-74 (1st Cir. 2001).

[6] United States v. Graf, 610 F.3d 1148 (9th Cir. 2010) (the court ultimately determined that a company consultant did not meet that standard).

[7] United States v. Stein, 463 F. Supp. 2d 459 (S.D.N.Y. 2006).

instance, a 2010 Eastern District of Pennsylvania decision analyzed the issue, ultimately concluding that the corporation's lawyer did not also represent an executive.

> [A]t no time did Keany [company lawyer] think that he was representing [executive] individually. In fact, at some point during Keany's representation of [company], he advised [executive] that he should retain separate counsel. . . . [T]he conversations between [executive] and Keany only involved matters within [company] or the business affairs of [company]. At the hearing, [executive] failed to adduce any conversation with Keany which was confidential or which dealt with [executive's] personal liability or criminal exposure as opposed to [company's]. . . . Under these circumstances, Defendant can claim no attorney client privilege which would bar Keany's testimony at trial or which would trump [company's] waiver of the attorney-client privilege.

United States v. Norris, 722 F. Supp. 2d 632, 639-40 (E.D. Pa. 2010). Many courts take this approach.[9]

However, some courts permit those relationships and therefore recognize the privilege in limited circumstances.[10] Perhaps more importantly, a court finding that the

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[8] United States v. Norris, 753 F. Supp. 2d 492 (E.D. Pa. 2010), aff'd 419 F. App'x 190 (3d Cir. 2011); Grunstein v. Silva, 2010 Del. Ch. LEXIS 68 (Del. Ch. Apr. 13, 2010); In re Paul W. Abbott Co., Inc., 767 N.W.2d 14 (Minn. 2009).

[9] Kennedy v. Gulf Coast Cancer & Diagnostic Center at Se., Inc., 326 S.W.3d 352, 358 (Tex. Ct. App. 2010) (in a TRO proceeding, ordering a former in-house lawyer to return privileged documents that he had taken with him when he left the client's employment; holding that the company rather than any individual executives or directors own the privilege; "Kennedy's subjective intent notwithstanding, no evidence objectively manifests that EBGWH [Epstein Becker Law Firm, who represented the in-house lawyer even before he left the client's employment] secured the parties' consent or undertook any of the other steps that Texas law requires for dual representation of Gulf Coast and either the officers and directors or Kennedy individually. . . . We therefore hold that the trial court did not abuse its discretion in determining that Gulf Coast alone holds the attorney-client privilege applicable to the memo."); In re Grand Jury Proceedings, 469 F.3d 24 (1st Cir. 2006); United States ex rel. Magid v. Barry Wilderman, M.D., P.C., Civ. A. No. 96-CV-4346, 2006 U.S. Dist. LEXIS 56116 (E.D. Pa. Aug. 10, 2006); Applied Tech. Int'l, Ltd. v. Goldstein, Civ. A. No. 03-848, 2005 U.S. Dist. LEXIS 1818, at *11-12 (E.D. Pa. Feb. 7, 2005); In re Grand Jury Subpoena, 274 F.3d 563, 573 (1st Cir. 2001); United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 215 (2d Cir. 1997); United States v. Aramony, 88 F.3d 1369, 1390 (4th Cir. 1996).

[10] Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653, 659 (10th Cir.), cert. denied, 525 U.S. 966 (1998).

law firm had established an attorney-client relationship with an employee might disqualify the firm from representing the company if adversity develops between it and the employee.[11]

Even high-profile in-house lawyers might find themselves dealing with the ramifications of having accidentally created an attorney-client relationship with corporate employees.

Starting in 2012, Penn State's general counsel found herself embroiled in a high-profile question about whether she had simultaneously represented the University and two high-level officials appearing before a grand jury. A chronological list of newspaper articles show the deepening dispute -- and its possible effect in one of America's most celebrated child abuse cases.

- Shannon Green, Was Penn State's GC Counsel for University Officials?, Corporate Counsel, Feb. 3, 2012 ("In-house lawyers understand that they're hired to represent the entity that issues their paychecks -- not the company's executives and other staff. But as evidenced by the grand jury testimony of two Penn State University (PSU) officials, sometimes there can be a disconnect between how a company's lawyers and constituents understand the relationship. According to a special report in The Patriot News, when Tim Curley and Gary Schultz testified before a grand jury in the Jerry Sandusky child sex abuse investigation on January 12, 2011, they thought PSU's then-General Counsel Cynthia Baldwin was their counsel. The men said as much in their testimony, and Baldwin -- seated right beside them -- did not correct what she later called a misinterpretation. Baldwin did not respond directly to The Patriot News, but she deferred to Lanny Davis, the high-profile Washington, D.C., lawyer who was hired by Penn State last year after the scandal broke. Davis said that Baldwin had previously told the two officials that she represented the University, and that they were free to hire counsel of their own. Whether or not Curley and Schultz were justified in thinking they had representation, according to legal ethics scholar and law professor Charles Wolfram, it's quite common for employees to assume the company

[11] Home Care Indus., Inc. v. Murray, 154 F. Supp. 2d 861, 869 (D.N.J. 2001) (disqualifying Skadden, Arps from representing a company in an action against its former CEO; agreeing with the CEO that, because the lawyers created an environment in which he comfortably confided in them, his "belief that the [law] firm represented him personally was reasonable.").

lawyer's representation trickles down to them. "Employees often refer to their company's General Counsel as 'our' lawyer," he told CorpCounsel.com in an email. In-house lawyers know that employees often aren't aware of the distinction. And under ordinary circumstances, no harm results from the misunderstanding. But according to Wolfram, a professor emeritus at Cornell University Law School, "the crunch comes" when the interests of the organization diverge with those of one of the company's constituents. In those situations, lawyers have a duty under their state's version of the ABA Model Rules of Professional Conduct to set employees straight. The comments to Pennsylvania Rule 1.13, "Organization as a Client," indicate that "[w]hether such a warning should be given by the lawyer to any constituent individual may turn on the facts of each case." Wolfram said that most non-lawyers who were accompanied to a grand jury proceeding by a university lawyer would naturally assume that the lawyer was there to assist them personally.").

- Catherine Dunn, Court Weighs Admissibility of Ex-Penn State General Counsel Testimony in Criminal Cases, Corporate Counsel, Nov. 27, 2012 ("Can Cynthia Baldwin, the former general counsel of Penn State University (PSU), testify against two former Penn State officials in upcoming criminal proceedings?"; "That's the question before a Dauphin County, Pennsylvania, judge as former PSU senior vice president Gary Schultz and athletic director Tim Curley, who's on leave from the university, prepare their defense against charges stemming from the Jerry Sandusky sexual abuse scandal."; "Last week, attorneys for Curley and Schultz filed their second motion in a month related to Baldwin's counsel and the cases being brought against them by the Pennsylvania Attorney General. This latest filing seeks to bar Baldwin's testimony from a preliminary hearing scheduled for next month on new charges of conspiracy, endangering the welfare of children, and obstruction of justice."; "Curley and Schultz have also faced charges of perjury and failure to report suspected child abuse since November 2011. They are scheduled for trial in January."; "In the latest set of papers, filed last Tuesday, defense attorneys argue that testimony by Baldwin would violate Curley and Schultz's attorney-client privilege with the ex-general counsel, who left Penn State in June, having established the school's first in-house legal department in 2010."; "Curley and Schultz's lawyers argue that Baldwin acted as their attorney during a grand jury investigation into allegations that Sandusky molested children on Penn State's campus."; "Though just what role Baldwin played in the grand jury investigation has itself been an ongoing source of controversy -- particularly since the release of a Penn State internal investigation last summer."; "According to the Patriot News, which cited grand jury transcripts, both Curley and Schultz identified Baldwin as their legal counsel during their grand jury appearances in January 2011. But according to the Freeh Report, Baldwin has maintained that she represented the university during those appearances -- and not Curley or Schultz."; "Baldwin told the Special Investigative Counsel that she went to the Grand Jury appearances as the attorney for Penn State, and that she told both Curley

and Schultz that she represented the University and that they could hire their own counsel if they wished,' the report states."; "The defense teams for Curley and Schultz have taken a different view. In a motion to dismiss the charges against the two men filed earlier this month, defense attorneys argued that Baldwin's counsel to Curley and Schultz constituted a conflict of interest, and that they were deprived of their right to counsel."; "Prosecutors countered in a November 14 filing, arguing that 'at the time that Attorney Baldwin represented the Defendants, there was no actual conflict of interest,' according to court papers. 'Based on their interviews prior to testifying, it appeared that the Defendants intended to cooperate with the investigation. Such an action would not conflict with the interests of the other witnesses represented by attorney Baldwin, who also were cooperating.'").

- Ben Present, <u>Schultz Could Sue Ex-Penn State General Counsel</u>, Legal Intelligencer, Dec. 13, 2012 ("A former Penn State administrator facing criminal charges related to the Jerry Sandusky sex-abuse scandal has filed a praecipe for writ of summons against the university's former general counsel, Cynthia Baldwin, indicating he intends to sue her for legal malpractice."; "Gary Schultz, represented by a team of Sprague & Sprague attorneys led by Richard A. Sprague, filed papers that were docketed Wednesday in the Centre County Court of Common Pleas. Schultz faces charges of perjury, endangering the welfare of children, failure to report child abuse and other criminal charges related to allegations he engaged in a conspiracy to conceal allegations against Sandusky, the school's former defense coordinator and convicted serial child molester."; "In court papers, Schultz has pled Baldwin allowed him to 'believe she was his unencumbered, conflict-free lawyer,' telling him before is grand jury appearance that she would represent him at the proceeding."; "Former Penn State athletic director Tim Curley also moved to dismiss his case, or suppress his grand jury testimony in the alternative, arguing in court papers that Baldwin told him she could represent him before the grand jury."; "<u>When the two men testified before the grand jury, both said they were being represented by Baldwin.</u>"; "<u>Baldwin, however, has claimed she was present before the grand jury to represent the university -- not Schultz or Curley, both of whom have testified she was their lawyer.</u>" (emphasis added); "As previously reported by <u>The Legal Intelligencer</u>, Baldwin has labeled the whole thing a misunderstanding."; "Washington, D.C., attorney Lanny Davis, who Baldwin has previously authorized to speak on her behalf, told the <u>Harrisburg Patriot-News</u> and <u>The Legal Intelligencer</u> that, when <u>Baldwin told supervising Judge Barry Feudale and representatives from the Office of the Attorney General in Feudale's chambers that she represented the university, nobody objected to her listening to the administrators' testimony."; "Then, Davis told</u> <u>The Legal Intelligencer</u>, <u>when the administrators testified that Baldwin was their attorney, she did not think it was 'appropriate' to interrupt the proceedings and clarify.</u>" (emphases added)).

- Dan Packel, Sandusky Defendants Say State Knew Of Attorney Conduct, Law360, Jan. 8, 2013 ("Two former Pennsylvania State University administrators charged with covering up sexual abuse committed by former assistant football coach Jerry Sandusky argued Friday that the state knew that because of a conflict of interest, they were deprived of their right to counsel prior to going before a grand jury. Former Penn State Vice President Gary Schultz and former Athletic Director Tim Curley allege the prosecution conceded that Penn State's former general counsel Cynthia Baldwin represented both the university as well as the administrators, leading to a conflict of interest. They seek to suppress their grand jury testimony prior to their upcoming criminal trial. They contended in separate filings that Pennsylvania's Office of the Attorney General (OAG) was also aware of the conflict of interest. The circumstances in this case lead to the unavoidable conclusion that although aware of Ms. Baldwin's conflict, the OAG chose to ignore it in order to hear the testimony of her clients,' Curley said. 'Bluntly put, Ms. Baldwin and the OAG put their own interests before the interest[s] of the witnesses they were meant to protect.'"; "They contended that Baldwin, in her role for the university, was obligated to work to minimize its civil and criminal liability, and that as a consequence she was incapable of representing them as well since the parties had differing interests. In October motions, Schultz and Curley argued that Penn State's interests were best served by cooperation, while their own interests would have been better served by invoking their own Fifth Amendment rights. In Friday's filings, Curley and Schultz allege that in its response to their motions, the state conceded that while both defendants had the right to counsel before testifying, Baldwin did not consider herself to be their counsel, even though she represented herself as such to the judge and the defendants.").

- Matt Fair, Sandusky Defendants Can't Nix Ex-Penn State Attorney Testimony, Law360, Apr. 10, 2013 ("A state judge ruled Tuesday that he did not have authority to quash testimony from a former Pennsylvania State University attorney included in a grand jury presentment indicting a trio of school administrators for allegedly covering up the crimes of convicted child molester Jerry Sandusky.;" "While ousted Penn State president Graham Spanier and two other high-ranking administrators charged in the alleged conspiracy had sought to have testimony from former university attorney Cynthia Baldwin stricken from the presentment on grounds that she'd violated their attorney-client privilege, Judge Barry Feudale said that he lacked the authority to do so as the grand jury's supervising judge.;" "'The singular issue before this court involves the absence of jurisdictional authority for the grand jury supervising judge to quash a presentment after steps were properly taken to issue the presentment and adhere to statutory procedure.' Judge Feudale said. 'It is not within the supervising judge's jurisdiction to entertain the joint motion to quash presentments put before this court.'").

- Ama Sarfo, Ex-Penn State Execs Lose 2nd Atty Privilege Appeal, Law 360, June 19, 2013 ("The Pennsylvania Superior Court on Tuesday squashed a second appeal by two former Pennsylvania State University administrators who said a grand jury presentment relied on privileged attorney-client information and was defective, as they face charges for conspiring to cover up Jerry Sandusky's child abuse. Earlier this month, the state's Supreme Court denied petitions for review filed by former Penn State vice president Gary Schultz and former athletic director Tim Curley, saying they can raise their issue in their underlying criminal prosecution. The Superior Court on Tuesday declined to weigh in on the matter, saying that issues surrounding grand jury investigations can only be addressed by the state Supreme Court."; "In filings and a brief, Schultz, Curley and ousted Penn State President Graham Spanier argued that the conflict created by Baldwin's dual roles as their attorney and as attorney for the school effectively deprived them of their right to counsel. They also argued that Baldwin's testimony against them violated attorney-client and work-product privileges. However, Judge Feudale said his review of Baldwin's testimony left him inclined to disagree. 'My review of the testimony of attorney Baldwin before the grand jury persuaded me . . . that her testimony was circumspect and circumscribed,' he said. 'It was not a violation of the attorney-client privilege but rather was related to her belated awareness of the commission of alleged criminal acts and was in accordance with her responsibilities as an officer of the court. Finally, attorney Baldwin testified as approved by her then client, [Penn State,] the organization for which she was employed.'").

Penn State general counsel's experience highlights the wisdom of carefully defining the "client" in a corporate setting and -- especially -- avoiding the accidental creation of attorney-client relationships.

Best Answer

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

B 6/14

Effect of a Joint Representation in Corporate Transactions

Hypothetical 8

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

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

YES (PROBABLY)

Analysis

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

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

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

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

Application of the general principle means that a newly independent company generally may obtain access to the files generated by the law firm that jointly represented the companies while they were still members of the same corporate "family." If the newly independent company declares bankruptcy, a bankruptcy trustee can thus generally call upon the law firm or law department to produce all of its files generated during the former joint representation -- including communications between the lawyer and the parent that the lawyer also represented during the "transaction."

A number of cases highlight the frightening nature of this basic principle.

Mirant. In In re Mirant Corp., 326 B.R. 646, 649 (Bankr. N.D. Tex. 2005), the Troutman Sanders law firm was required to produce files it generated while jointly representing the firm's long-time client The Southern Company and the subsidiary which became known as Mirant when it became an independent company and later declared bankruptcy. The court rejected Troutman Sanders' argument that Mirant's bankruptcy trustee was not entitled to communications between Troutman Sanders and The Southern Company created during the joint representation and noted that "[i]t is well established that, in a case of a joint representation of two clients by an attorney, one

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2 Id. at *9.

3 Id. at *9-10, *10.

client may not invoke the privilege against the other client in litigation between them arising from the matter in which they were jointly represented."

Teleglobe. In Teleglobe Communications Corp. v. BCE Inc. (In re Teleglobe Communications Corp.), 493 F.3d 345 (3d Cir. 2007), the Third Circuit analyzed the nature of an in-house lawyer's representation of her employer and its corporate affiliates.

In Teleglobe, Canada's largest broadcaster (BCE) had a wholly owned Canadian subsidiary (Teleglobe), which in turn had several wholly owned second-tier U.S. subsidiaries. Teleglobe and its U.S. subsidiaries were developing a global fiber optic network. Not surprisingly, by late 2001 BCE started to reassess the project, exploring such options as restructuring, maintaining its funding or cutting off funding for Teleglobe and its subsidiaries. After this intensive reassessment involving in-house and outside lawyers (and undoubtedly generating troublesome documents), BCE decided to cut off funding.

Within just a few weeks, Teleglobe declared bankruptcy in Canada, and the second-tier subsidiaries declared bankruptcy in the United States. The bankrupt second-tier subsidiaries (now controlled by hostile creditors) sued BCE for cutting off their funding. They sought documents from BCE's law department and various outside law firms which had represented BCE, Teleglobe and its subsidiaries. The second-tier subsidiaries claimed that they had been jointly represented by BCE's in-house lawyers and their outside law firms.

The District of Delaware agreed with this argument, and gave the bankrupt subsidiaries access to all otherwise privileged documents shared with BCE's law

department. BCE appealed the district court's decision rather than turn over the documents.

In Teleglobe, the Third Circuit reversed and remanded. It agreed with the district court's analysis of both the ethics and privilege effects of a joint representation: (1) absent an agreement to the contrary, there can be no secrets among jointly represented clients; (2) former jointly represented clients generally can have access to their joint lawyer's files; (3) litigation adversity among jointly represented clients causes the privilege to evaporate, thus allowing any of them to use otherwise privileged communications in the litigation.

Although the Third Circuit's opinion started with a quote from the Righteous Brothers' song "You've Lost That Lovin' Feelin'," the opinion includes a serious analysis of several issues. Id. at 352 & n.1. Significantly, the Third Circuit specifically rejected arguments presented by amicus Association of Corporate Counsel.

Among other things, the Third Circuit rejected what in essence was the district court's automatic presumption that all lawyers representing BCE also jointly represented Teleglobe and its now bankrupt subsidiaries. The court remanded so the district court could assess with more care the nature of BCE's in-house and outside lawyers' representation of Teleglobe and its subsidiaries.

After the Third Circuit described the adverse consequences of a joint representation, it offered a roadmap for how in-house lawyers can avoid those consequences.

Most importantly, the court explained that in-house lawyers can limit the scope of their representation of corporate affiliates. The court provided the example of a

corporate parent's gathering of information from subsidiaries in order to make public filings -- which does not necessarily "involve jointly representing the various corporations on the substance of everything that underlies those filings." Id. at 373. The court also acknowledged that "in some of these circumstances in-house counsel may not need to represent the subsidiaries at all," because the parent company's lawyer can have privileged communications with subsidiaries' employees without representing the subsidiary. Id. at 373 n.27.

In discussing situations where a parent's and a subsidiary's interests might later diverge ("particularly in spin-off, sale and insolvency situations"), the court advised that "it is wise for the parent to secure for the subsidiary outside representation." Id. at 373. The court emphasized that this "does not mean that the parent's in-house counsel must cease representing the subsidiary on all other matters." Id. The court assured in-house lawyers that

> [b]y taking care not to begin joint representations except when necessary, to limit the scope of joint representations, and seasonably to [hire] separate counsel on matters in which subsidiaries are adverse to the parent, in-house counsel can maintain sufficient control over the parent's privileged communications.

Id. at 374. If in-house lawyers take this step, "they can leave themselves free to counsel a parent alone on the substance and ramifications of important transactions without risking giving up the privilege in subsequent adverse litigation [between a parent and a former subsidiary]." Id. at 383 (emphasis in original).

On remand, the Bankruptcy Court for the District of Delaware ultimately found that there had not been a joint representation.[4]

625 Milwaukee. Significantly, the same approach has been applied in the case of a parent's sale of a subsidiary in the ordinary course of its business, rather than in a bankruptcy setting.

In 625 Milwaukee, LLC v. Switch & Data Facilities Co., Case No. 06-C-0727, 2008 U.S. Dist. LEXIS 19943 (E.D. Wis. Feb. 29, 2008), law firms Blank Rome and Quarles & Brady represented a parent and its fully owned subsidiary in a transaction involving the subsidiary's sale to a new owner. The subsidiary later sued its former parent, and sought the law firms' files. The court ordered production of the files despite the law firms' argument that they never represented the subsidiary in the transaction. The court noted that the parent had presented "no evidence indicating that it ever hired separate counsel for [the subsidiary] before the date it was sold to [buyer]," so "the only attorneys who could have been representing [the subsidiary] at the moment the Lease Term Sheet was signed were Blank Rome and Quarles & Brady." Id. at *12. The court even ordered the production of a post-transaction document -- Blank Rome's invoice which referred to the firm's pre-transaction work. Accord Brownsville General Hosp., Inc. v. Brownsville Prop. Corp. (In re Brownsville General Hosp., Inc.), 380 B.R. 385 (Bankr. W.D. Pa. 2008).

New York City LEO 2008-2. A 2008 New York City legal ethics opinion thoroughly analyzed this issue, and also warned in-house lawyers of the risk they run by

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[4] Teleglobe USA, Inc. v. BCE Inc. (In re Teleglobe Commc'ns Corp.), Ch. 11 Case No. 02-11518 (MFW), Adv. No. A-04-53733 (MFW), 2008 Bankr. LEXIS 2130 (Bankr. D. Del. Aug. 7, 2008).

jointly representing corporate affiliates.[5] The New York City Bar suggested that an in-house lawyer in this situation could obtain a prospective consent.

> Careful drafting of the advance waiver will enhance the possibility that inside counsel will be able to continue to represent one or more clients after a conflict arises. In the context of a joint representation of a parent and an affiliate,

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[5] New York City LEO 2008-2 (9/08) (addressing an in-house lawyer's representation of corporate affiliate in the face of conflicts of interest; explaining that "[i]t is inevitable that on occasion parents and subsidiaries will see their interests diverge, particularly in spin-off, sale, and insolvency situations. When this happens, it is wise for the parent to secure for the subsidiary outside representation. Maintaining a joint representation for the spin-off transaction too long risks the outcome of Polycast [Tech. Corp. v. Uniroyal, Inc.], 125 F.R.D. [47, 49 (S.D.N.Y. 1989)], and Medcom [Holding Co. v. Baxter Travenol Lab.], 689 F. Supp. [842, 844 (N.D. Ill. 1988)] -- both cases in which parent companies were forced to turn over documents to their former subsidiaries in adverse litigation -- not to mention the attorneys' potential for running afoul of conflict rules."; first analyzing an in-house lawyer's representation of a parent and one or more wholly owned affiliates; explaining that in their scenario "inside counsel's representation is not of entities whose interests may differ because the parent's interests completely preempt those of its wholly owned affiliates"; also analyzing an in-house lawyer's representation of a parent and an affiliate that is only partially owned by the parent, or several affiliates controlled by, but not wholly owned by, a common parent; explaining that in that situation "inside counsel must act on the basis that the parent and each of its represented affiliates is a separate entity with separate interests"; concluding that in the second scenario in-house lawyers must analyze whether they can jointly represent affiliates with conflicting interests; "Inside counsel should consider carefully these conflict-of-interest rules. Sometimes, a potential conflict will be apparent from the outset of the representation. At other times, the conflict may not become apparent until after the joint representation has begun. To pick just one example, at the outset of a litigation in which a parent and a majority-owned affiliate have been sued, their positions may appear identical and they may choose to be jointly represented by inside counsel. Then discovery may unexpectedly reveal that there is a basis for the parent to offload responsibility onto the affiliate."; also saluting the "disinterested lawyer" test, which determines if an objective lawyer would believe that he or she could adequately represent multiple affiliate corporations in the joint representation; noting that the in-house lawyer might consider obtaining prospective consents from the various clients; "Careful drafting of the advance waiver will enhance the possibility that inside counsel will be able to continue to represent one or more clients after a conflict arises. In the context of a joint representation of a parent and an affiliate, the advance waiver should: [i]dentify for the clients the potential or existing conflicts with as much specificity as possible; [m]ake clear to the clients that the confidences and secrets of the affiliate will be shared with the parent; and [o]btain agreement from the affiliate that if inside counsel can no longer represent both parent and affiliate, inside counsel can continue to represent the parent irrespective of the confidences and secrets that the affiliate may have shared with counsel and irrespective of what work counsel may have performed for the affiliate."; explaining that in some circumstances the in-house lawyer might conclude that separate lawyers should represent the affiliates; also noting that "[i]t also bears emphasis, as stated above, that the person giving informed consent to the advance waiver on behalf of the affiliate must have the degree of independence from the parent, or from other affected affiliates, required by applicable corporate law"; also noting that an in-house lawyer might alternatively limit the representation to one or more affiliates in order to avoid conflicts; "Limiting the representation of an affiliate is at times accompanied by retaining other counsel -- for example, outside counsel -- to represent the affiliate on those matters in which conflicts preclude joint representation. Separate counsel can protect the affiliate's interests in the conflicted matter, while allowing inside counsel to perform other useful roles for both clients."; warning that "[s]ensitivity to conflicts between represented affiliates will help forestall judicial criticism and avoid unnecessary curtailment of inside counsel's continued functioning in their expected capacity").

> the advance waiver should: [i]dentify for the clients the potential or existing conflicts with as much specificity as possible; [m]ake clear to the clients that the confidences and secrets of the affiliate will be shared with the parent; and [o]btain agreement from the affiliate that if inside counsel can no longer represent both parent and affiliate, inside counsel can continue to represent the parent irrespective of the confidences and secrets that the affiliate may have shared with counsel and irrespective of what work counsel may have performed for the affiliate.

New York City LEO 2008-2 (9/08). Not surprisingly, the New York City Bar also reminded in-house lawyers that anyone signing such a prospective consent on the corporation's behalf "must have the degree of independence from the parent, or from other affected affiliates, required by applicable corporate law." Id.

Echoing the Third Circuit's warning in Teleglobe (discussed above), the New York City Bar also suggested that in-house lawyers might want to avoid representing corporate affiliates in certain circumstances.

> Limiting the representation of an affiliate is at times accompanied by retaining other counsel -- for example, outside counsel -- to represent the affiliate on those matters in which conflicts preclude joint representation. Separate counsel can protect the affiliate's interests in the conflicted matter, while allowing inside counsel to perform other useful roles for both clients.

Id.

Crescent Resources. In In re Crescent Resources, LLC, 457 B.R. 506 (Bankr. W.D. Tex. 2011), the Litigation Trust for bankrupt Crescent Resources sought the files of the Robinson, Bradshaw & Hinson law firm.

The Litigation Trust claimed that Robinson, Bradshaw had jointly represented Crescent and its parent Duke Ventures, LLC -- in a transaction that allegedly left Crescent insolvent after a transfer of over $1 billion to Duke. If there had been a joint

representation, universally recognized principles would entitle either of the jointly represented clients to the law firm's files. As the undeniable successor to Crescent Resources, the Litigation Trust would therefore be entitled to the law firm's files -- including all communications between the law firm and Duke about the transaction, even if no Crescent representative participated in or received a copy of those communications.

The court succinctly stated the issue.

> The major issue before the Court is whether the Trust is to be considered a joint or sole client, or no client at all, of RBH [Robinson, Bradshaw & Hinson] with respect to the Project Galaxy files.

Id. at 516.

The court also teed up the parties' positions.

> The Trust argues that RBH did represent Crescent Resources, while Duke would have the Court believe that RBH jointly represented Crescent Resources before the 2006 Duke Transaction and after the 2006 Duke Transaction, but not during the 2006 Duke Transaction. Duke further alleges that Crescent Resources was not represented by counsel at all during the 2006 Duke Transaction. Duke is arguing, essentially, that for the purposes of the 2006 Duke Transaction only, RBH did not represent Crescent Resources. So the issue to be resolved is whether RBH represented Crescent Resources with respect to the 2006 Duke Transaction.

Id.

Duke and Robinson, Bradshaw staked out a firm position, and both

> provided sworn testimony that Duke was RBH's sole client for Project Galaxy. Mr. Torning ["Duke's in-house attorney responsible for Project Galaxy and attorney in charge of outside counsel for Duke for Project Galaxy"] testified that it was his understanding "that at all times during Project Galaxy, RBH represented Duke, not Crescent."

Id. at 520. Thus, both Duke and Robinson, Bradshaw stated under oath that the law firm represented only Duke -- and did not represent Crescent.

The court looked at all the obvious places in assessing whether Robinson, Bradshaw solely represented Duke in the transaction, or jointly represented Duke and Crescent in the transaction.

First, the court found that a 2004 Robinson, Bradshaw retainer letter was somewhat ambiguous.

> "The Firm is retained to represent Duke Energy (or any of its subsidiaries or affiliates) and to render legal advice or representation as directed and specified by a Duke Energy attorney . . . with respect to a given matter . . . However, the Duke Energy Office of General Counsel has the ultimate responsibility and authority for handling all decisions in connection with the Services."

Id. at 519. A Robinson, Bradshaw lawyer testified that the firm "was unable to locate any engagement letter . . . in which Crescent Resources was a signatory." Id. Thus, there was no specific retainer letter for the pertinent transaction, but the earlier general retainer letter was not inconsistent with Robinson, Bradshaw's joint representation of Crescent in the transaction.

Second, the court pointed to Duke's payment of Robinson, Bradshaw's invoices. Id. at 520. The court explained that Duke's payment of Robinson, Bradshaw's legal fees did not necessarily preclude the firm's joint representation of Duke and Crescent.

> The evidence shows that Duke, not Crescent, paid for the legal services provided in connection with Project Galaxy. However, that is not dispositive, as there can still be an implied attorney-client relationship independent of the payment of a fee.

Id. at 522.

Third, the court noted Duke's argument that Robinson, Bradshaw "took direction from, reported to, and provided legal services to Duke." Id. at 520. In analyzing the direction issue, the court pointed to a Robinson, Bradshaw lawyer's testimony.

> Mr. Buck testified that neither he nor any RBH attorneys represented Crescent in the Project Galaxy transaction. . . . Mr. Buck additionally testified that he did not report to Crescent nor take direction from Crescent during Project Galaxy.

Id. at 521. Of course, the Robinson, Bradshaw lawyers had interacted with Crescent employees in connection with the transaction.

> Duke acknowledged that RBH worked with Crescent Resources on Project Galaxy, but downplayed that by stating that "of course [RBH interacted with Crescent], because they're representing Duke in the sale of . . . its 49 percent sharehold interest in Crescent. And of course, when you're providing information to the buyer—the prospective buyer—you're going to work with the company in which you're selling a portion of your shares." . . . . Duke argues that this contact between RBH and Crescent Resources is not the same as RBH representing Crescent Resources with respect to Project Galaxy.

Id. at 519.

Thus, Duke and Robinson, Bradshaw argued that the firm had not jointly represented Duke and Crescent in the transaction, relying on sworn statements to that effect from both Duke and the law firm; the lack of a specific retainer letter with Crescent; Duke's payment of the legal bills; and Duke's direction to the law firm in connection with the transaction.

The court then turned to contrary evidence presented by the Litigation Trust.

First, the court pointed to evidence clearly establishing that Robinson, Bradshaw had represented Crescent before the transaction. Id. at 518. The court also noted the

firm's failure to run conflicts when undeniably representing Crescent in a number of matters before the transaction.

Ironically, the court also pointed to Crescent's own application to retain Robinson, Bradshaw as its law firm in the bankruptcy -- which described the law firm's long-standing representation of Crescent.

> The Trust presented the Application to Employ RBH submitted to this Court on June 11, 2009 (the "Application") . . . . That document details RBH's pre-petition relationship with the Debtors. "RB&H has been representing Crescent and many of its debtor and non-debtor subsidiaries since 1986 and has served as Crescent's primary corporate counsel for several years." . . . . The Application states that "RB&H represented Crescent in connection with the formation, in 2006, of its current parent holding company, incident to a change in Crescent's historical ownership structure as a wholly-owned, indirect subsidiary of Duke Energy Corporation." . . . . The Application also contains the Declaration of Robert C. Sink in Support of Application to Employ (the "Sink Declaration") . . . . Mr. Sink is a shareholder with RBH and the declaration was made on RBH's behalf. In the Sink Declaration, Mr. Sink echoes the Application and states that "<u>RB&H has represented Crescent Resources and many of its debtor and non-debtor subsidiaries in various matters since 1986 and has served as Crescent's primary corporate counsel for several years.</u>"

<u>Id.</u> at 517-18 (emphasis added). The court concluded that

> <u>RBH represented both Crescent and Duke prior to Project Galaxy. There was no end to the attorney-client relationship</u> and RBH attorneys were going through Crescent files in performing the due diligence for Project Galaxy. It is reasonable that a current client would believe that an attorney was representing them if the attorney showed up to that current client's office and started going through files.

<u>Id.</u> at 522 (emphasis added).

The court also noted Robinson, Bradshaw's representation of Crescent <u>after</u> the transaction.

> Duke provided no evidence which would have given RBH cause to terminate their relationship with Crescent, nor did Duke provide any evidence that RBH gave notice to Crescent that RBH was terminating their relationship. Further, Duke acknowledges that RBH and Crescent continued to maintain an attorney-client relationship post Project Galaxy, which would negate any potential argument by Duke that RBH and Crescent's relationship may have terminated by implication.

Id. at 523.

Second, the court noted that Crescent did not have any other law firms represent it in connection with the transaction.

> RBH had a long-term relationship with Crescent before Project Galaxy. Additionally, there was no other representation of Crescent during Project Galaxy.

Id. at 521 (emphasis added).

Third, the court pointed to several Robinson, Bradshaw lawyers' website bios boasting that they had represented Crescent in the transaction.

> The Trust also discussed statements made by various RBH lawyers on RBH's website. Stephan J. Willen's page, under "Representative Experience" includes "Representing a real estate developer, as borrower, in connection with a $1.5 billion revolving and term loan letter of credit facility used to recapitalize the developer." The Trust stated that this represents the 2006 Duke Transaction and shows Mr. Willen's understanding that Crescent Resources was RBH's client with respect to the 2006 Duke Transaction. Additionally, William K. Packard's page, under "Representative Experience" states "Representation of Crescent Resources, as borrower, in connection with a $1.5 billion revolving and term loan letter of credit facility."

Id. at 518 (emphases added).

After examining both side's arguments, the court turned to the legal standard.

The court pointed to the Third Circuit's extensive analysis of this very issue in In re Teleglobe Communications Corp., 493 F.3d 345 (3d Cir. 2007).[6] The court noted that

> Teleglobe, relied on by both parties, reads almost as an instructional manual to in-house counsel on how to avoid tangled joint-client issues. Teleglobe instructs that a court should consider the testimony from the parties and their attorneys on the areas of contention.

Id. at 524. The court also pointedly noted that

> RBH and in-house counsel for Duke should have heeded the warnings in Teleglobe and taken greater care to have in place an information shielding agreement or ensured that Crescent was represented by outside counsel.

Id.

The court ultimately concluded that Robinson, Bradshaw had jointly represented Duke and Crescent in the transaction. The court therefore held that the Litigation Trust was entitled to Robinson, Bradshaw's files generated during the firm's joint representation of Duke and Crescent in the transaction.[7]

In looking ahead to litigation between Litigation Trust and Duke, the court also held found that

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[6] Id. at 516 ("The various cases cited by both the Trust and Duke involve cases where a parent corporation and subsidiary were represented by the same attorney during a spin-off, sale, or divestiture. See e.g. In re Teleglobe Commc'ns Corp., 493 F.3d 345 (3rd Cir. 2007) (in-house counsel of the parent corporation represented both the subsidiary and parent companies); Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47 (S.D.N.Y. 1989) (in-house counsel of the parent corporation represented both the subsidiary and parent in the sale of the subsidiary); Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841 (N.D.Ill. 1988); In re Mirant Corp.[,] 326 B.R. 646 (Bankr. N.D.Tex. 2005) (same law firm representing both parent and subsidiary in a public stock offering of the subsidiary). In those cases, the courts determined the parties were joint clients. The issue remaining before this Court is whether RBH represented Crescent Resources with respect to the 2006 Duke Transaction.").

[7] Id. at 524.

> Duke cannot invoke an attorney-client privilege to stop the Trust from using the joint-client files in adversary proceedings between Duke and the Trust.

Id. at 528. In contrast, the court held that

> the Trust may not unilaterally waive the joint-client privilege and use jointly privileged information in proceedings involving third parties, absent a waiver from Duke.

Id. at 530.[8] The court's conclusions follow the majority rule when joint clients become adversaries. The law generally allows either joint client access to their common law firm's files, and permits either joint client to use any of those documents in litigation with another joint client.

Best Answer

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

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[8] Id. at 529-30 ("The Restatement [Restatement (Third) of Law Governing Lawyers § 75 cmt. e (2000)] says co-client communication is not privileged as between the co-clients. The Trust's reading of the Restatement appears to state that if co-client communication is then used in an adversary [sic] between the former co-clients, it would then waive the privilege as to third parties. This would effectively make the privilege superfluous. Protections can be placed on any future hearings between Duke and the Trust, and any co-client privileged information can remain privileged as to third parties even if used in a future adversary proceeding between Duke and the Trust.").