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**THE ETHICS OF JOINT  
REPRESENTATION AND JOINT  
DEFENSE AGREEMENTS**

**Selected Hypotheticals With Analyses**  
**(adapted for criminal cases)**

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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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## Identifying Joint Representations

### Hypothetical 1

One of your firm's largest corporate clients just hired you to represent it in a criminal case filed against your client and several other companies, alleging environmental crimes resulting from the improper discharge into waterways of chemicals that your client and the other companies used in their manufacturing process. You know from experience that co-defendants in cases like this never sue each other or even "point the finger" at each other, so you tell your client that you will be able to represent it in the lawsuit. Soon after speaking with this client, you received a call from one of your partners, who tells you that she has just accepted a representation of another defendant in the case.

Is your firm's representation of these defendants 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.<sup>1</sup> That

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<sup>1</sup> 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 (continued...)”) (continued...)

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.

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.

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<sup>1</sup> (...continued)

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.”).

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) (citation omitted).<sup>2</sup>

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

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<sup>2</sup> Robert Bosch LLC v. Pylon Mfg. Corp., 263 F.R.D. 142, 145-46 (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)).

<sup>3</sup> 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)).

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).

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 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.

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.<sup>4</sup> 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.

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).

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

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<sup>4</sup> Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), Ch. 11 Case No. 02-11518-MFW & 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).

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

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

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

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<sup>6</sup> Teleglobe USA, Inc. v. BCE Inc. (In re Teleglobe Commc'ns Corp), 392 B.R. 561 (Bankr. D. Del. 2008).

### **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.<sup>7</sup>

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).<sup>8</sup>

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<sup>7</sup> 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).

<sup>8</sup> Interestingly, even if a lawyer was found to have engaged in some improper conduct by jointly representing multiple clients with adverse interests, that would not necessarily result in loss of the privilege.

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

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

Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 368 (3d Cir. 2007)

The much older Eureka case did not receive much attention until Teleglobe cited it, but stands for the same proposition. Eureka Inv. Corp. v. Chi. 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  
(continued...)

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 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

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<sup>8</sup> (...continued)

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.

will keep certain information confidential."); Restatement (Third) of Law Governing Lawyers § 60 cmt. 1 (2000) ("Co-clients can also explicitly agree that the lawyer is not to share certain information.").<sup>9</sup>

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. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 379 (3d Cir. 2007). However, the Third Circuit did not assess what would happen if a lawyer represented multiple corporations (or any other clients, for that matter) on a matter in which the client did not have a "common interest." Thus, it is unclear whether the Third Circuit was simply describing the situation before it, or what explains the contours of an acceptable joint representation.

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

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

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<sup>9</sup> To be sure, there are limits on such agreements, and courts reject obviously contrived arrangements, at least in disputes between former jointly represented clients. See, e.g., In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005) (rejecting the applicability of a "Protocol" entered into by a parent and a then-subsiary which authorized their joint lawyer Troutman Sanders to keep confidential from one client what it learned from the other; noting that the general counsel of the subsidiary agreed to the Protocol after the subsidiary became an independent company, but also explaining that the general counsel had ties both to the parent and to Troutman).

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

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 (internal citation omitted). 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)(3). 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 v. United States, Nos. 8:06CV750 & 8:08CV530, 2010 U.S. Dist. LEXIS 15251, at \*11-12 (D. Neb. Feb. 8, 2010) (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.

### **Best Answer**

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

B 11/14

## Confidentiality Duties in a Joint Representation

### Hypothetical 2

For the past six months or so, you have been defending a wealthy doctor and his wife against charges that they murdered one of the doctor's patients, who had been blackmailing him. Both of your clients have consistently and vehemently denied any involvement in the patient's death under suspicious circumstances. A few minutes ago, the doctor called you to say that he needed to tell you something: that, in fact, he had killed his patient, but his wife had nothing to do with it and knew nothing of his involvement. This news came as a shock, because you had actually believed his denial of any wrongdoing. The doctor asked you to keep his admission to you secret from his wife.

What do you do?

- (A) You must tell your other client (the wife) about the husband's admission of guilt.
- (B) You may tell your other client about the admission, but you don't have to.
- (C) You may not tell your other client about the admission.

**(C) You may not tell your other client about the admission (probably)**

### Analysis

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 – which necessarily involves the law supplying a "default rule"; (2) 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; (3) 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.

**"Default Rule" in the Absence of an Agreement Among the Clients:  
Authorities Recognizing a "Keep Secrets" Approach**

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

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

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

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

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

right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4.

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

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

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

Id. (emphasis added).

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

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

But if that occurs, one would think that the lawyer would be bound by the first phrase in the sentence – which plainly indicates that "information will be shared" among the jointly represented clients.

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

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

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

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

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

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

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

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

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

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

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

(4/9/08).<sup>10</sup> 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.

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<sup>10</sup> 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." (footnote omitted). 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." (footnote omitted). "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.").

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

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

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

information which necessarily included information he was obligated to keep confidential." (emphasis added)).

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

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

- Georgia LEO 03-2 (9/11/03) ("The obligation of confidentiality described in Rule 1.6, Confidentiality of Information, applies as between two jointly represented clients. An attorney must honor one client's request that information be kept confidential from the other jointly represented client. Honoring the client's request will, in most circumstances, require the attorney to withdraw from the joint representation." (emphasis added); "Unlike the attorney-client privilege, jointly represented clients do not lose the protection of confidentiality described in Rule 1.6, Confidentiality of Information, as to each other by entering into the joint representation. See, e.g., D.C. Bar Legal Ethics Committee, Opinion No. 296 (2000) and Committee on Professional Ethics, New York State Bar Association, Opinion No. 555 (1984). Nor do jointly represented clients impliedly consent to a sharing of confidences with each other since client consent to the disclosure of confidential information under Rule 1.6 requires consultation." (emphasis added); "When one client in a joint representation requests that some information relevant to the representation be kept confidential from the other client, the attorney must honor the request and then determine if continuing with the representation while honoring the request will: (a) be inconsistent with the lawyer's obligations to keep the other client informed under Rule 1.4, Communication; (b) materially and adversely affect the representation of the other client under Rule 1.7, Conflict of Interest: General Rule; or (c) or both." (emphasis added); "The potential problems that confidentiality can

create between jointly represented clients make it especially important that clients understand the requirements of a joint representation prior to entering into one. . . . If it appears to the attorney that either client is uncomfortable with the required sharing of confidential information that joint representation requires, the attorney should reconsider whether joint representation is appropriate in the circumstances. If a putative jointly represented client indicates a need for confidentiality from another putative jointly represented client, then it is very likely that joint representation is inappropriate and the putative clients need individual representation by separate attorneys.").

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

maintain client confidences and to keep each client reasonably informed, and obtain each client's informed consent to the arrangement. The mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another."; "Where express consent to share client confidences has not been obtained and one client shares in confidence relevant information that the lawyer should report to the non-disclosing client in order to keep that client reasonably informed, to satisfy his duty to the non-disclosing client the lawyer should seek consent of the disclosing client to share the information directly to the other client. If the lawyer cannot achieve disclosure, a conflict of interest is created that requires withdrawal."). [Although Washington, D.C., revised its ethics rules in 2007, new comments [14] - [18] to D.C. Rule 1.7 follow the ABA approach, and thus presumably do not affect the continuing force of this earlier legal ethics opinion.]

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

surmising by Wife occurs when Lawyer gives notice of withdrawal, Lawyer nevertheless has complied with the Rules of Professional Conduct and has not violated Lawyer's duties to Husband."; ultimately concluding that "[i]n 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 "[i]t 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." (footnote omitted) (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.").

**"Default Rule" in the Absence of an Agreement Among the Clients:  
Authorities Recognizing a "No Secrets" Approach**

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. I (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. I (2000).

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

The mandatory disclosure language appears in several Restatement provisions.

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

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

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

Id. (emphases added).

The same principle also appears in a broader discussion of joint representations.

A lawyer may represent two or more clients in the same matter as co-clients either when there is no conflict of interest between them . . . or when a conflict exists but the co-clients have adequately consented . . . . When a conflict of interest exists, as part of the process of obtaining consent, the lawyer is required to inform each co-client of the effect of joint representation upon disclosure of confidential information . . . , including both that all material information will be shared with each co-client during the course of the representation and that a communicating co-client will be unable to assert the attorney-client privilege against the other in the event of later adverse proceedings between them.

Id. (emphasis added).

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

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

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

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

Id. (emphasis added).

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

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

Id. illus. 1 (emphasis added).

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

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

lawyer earlier learned from another jointly represented client. If such a duty of disclosure exists after the representation ends, one would think that even a higher duty applies in the course of the representation.

The discretionary disclosure language appears elsewhere.

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

There is little case authority on the responsibilities of a lawyer when, in the absence of an agreement among the co-clients to restrict sharing information, one co-client provides to the lawyer material information with the direction that it not be communicated to another co-client. The communicating co-client's expectation that the information be withheld from the other co-client may be manifest from the circumstances, particularly when the communication is clearly antagonistic to the interests of the affected co-client. The lawyer thus confronts a dilemma. If the information is material to the other co-client, failure to communicate it would compromise the lawyer's duties of loyalty, diligence . . . , and communication (see § 20) to that client. On the other hand, sharing the communication with the affected co-client would compromise the communicating client's hope of confidentiality and risks impairing that client's trust in the lawyer. Such circumstances create a conflict of interest among the co-clients. . . . The lawyer cannot continue in the representation without compromising either the duty of communication to the affected co-client or the expectation of confidentiality on the part of the communicating co-client. Moreover, continuing the joint representation without making disclosure may mislead the affected client or otherwise involve the lawyer in assisting the communicating client in a breach of fiduciary duty or other misconduct. Accordingly, the lawyer is required to withdraw unless the communicating client can be persuaded to permit sharing of the communication . . . . Following withdrawal, the lawyer may not, without consent of both, represent either co-client adversely to the other with respect to the same or a

substantially related matter . . . . In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose. Beyond such a limited warning, the lawyer, after consideration of all relevant circumstances, has the further discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy. In making such determinations, the lawyer may take into account superior legal interests of the lawyer or of affected third persons, such as an interest implicated by a threat of physical harm to the lawyer or another person.

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

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

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

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

Interestingly, all of the illustrations involve a client disclosing the confidence to the lawyer – and then asking the lawyer not to share the confidence with another jointly represented client. As explained above, the ABA Model Rules provisions seem to address a much less likely scenario -- in which the client asks the lawyer not to share information

after telling the lawyer that the client has such information but before the client actually shares it with the lawyer.

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

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

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

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

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.

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.<sup>11</sup>

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](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

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<sup>11</sup> In fact, as explained above, the Restatement points to the ACTEC Commentaries as one of the sources of its guidance. Restatement (Third) of Law Governing Lawyers § 60 reporter's notes cmt. I (2000).

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 himself (or 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 "acknowledge[d] 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 issue whether the lawyer's obligation to disclose is discretionary or mandatory" – but clearly rejected the "keep secrets" approach.<sup>12</sup>

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.

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<sup>12</sup> 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 learned 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)).

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

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

### **Wisdom of Agreeing in Advance on the Information Flow**

Given the surprising and troubling disagreement among ethics authorities and case law on the "default rule" in the absence of an information-flow agreement among jointly represented clients, lawyers should arrange for such an agreement.

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

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

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

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

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

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

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

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 75 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) (emphasis added).

Before, or within a reasonable time after commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the implications of a joint representation (or a separate representation, if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules). . . . In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent each

of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.7, at 91-92 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](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.

- Missouri Informal Advisory Op. 2008-0003 (2008) (assessing the following question: "Can one attorney represent co-defendants in a criminal trial?"; answering as follows: "One attorney may represent two co-defendants, with appropriate disclosure and waivers. In order for this disclosure to be sufficient, the attorney must thoroughly advise co-defendants of the material advantages and disadvantages of joint representation, and discuss options and alternatives. Defendants should also be advised to seek independent advice from independent counsel. Both clients would have to agree there would be no confidentiality as between them. However, for example, if one co-defendant is considering a plea bargain that would be adverse to the interests of the other client, the conflict would become unwaivable and the attorney would have to withdraw. The informed consent must be confirmed in writing." (emphasis added)).
- North Carolina LEO 2007-7 (7/13/07) (holding that "a lawyer may continue to represent a husband and wife in a Chapter 13 bankruptcy after they divorce provided the conditions on common representation set forth in Rule 1.7 are satisfied."; "To obtain the informed consent of clients to a common representation, a lawyer must 'communicate adequate information and explanation appropriate to

the circumstances.’ Rule 0.1(f) (definition of ‘informed consent.’). In the current situation, Attorney A must explain to Husband and Wife the effect, if any, that the law of privilege and disclosure requirements in a bankruptcy proceeding might have on the common representation. In addition, Attorney A must inform each client of the right to information about the representation. As noted in comment [31] to Rule 1.7, ‘[t]he 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.’ See 2006 FEO 1.” (emphasis added)).

- North Carolina LEO 2006-1 (4/21/06) (“Attorney A represents both the employer and the [insurance] carrier and therefore has a duty to keep each client informed about the status of the matter. As noted in comment [31] to Rule 1.7, ‘. . . 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.’”; “Loyalty to a client is impaired when a lawyer cannot keep the client reasonably informed or promptly comply with reasonable requests for information. Rule 1.4(a); RPC 153; 03 FEO 12. The employer and the carrier are both entitled to Attorney A’s full, candid evaluation of all aspects of the claim. See 03 FEO12. If the carrier will not consent to Attorney A providing the same information to employer or the employer will not agree that certain information will be withheld, then Attorney A has a conflict and must withdraw from the representation of the employer and the carrier. If the carrier hires another lawyer to represent only the employer, Attorney A may – with the employer’s consent – continue to represent the carrier and withhold evaluation and litigation strategy information from the employer.” (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; “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.

### **Information Flow Duties Under a "No Secrets" Agreement**

One might expect that lawyers arranging for a "no secrets" provision in a joint representation or retainer letter would have a fairly easy time analyzing their duty. However, the ethics rules reflect a surprising degree of uncertainty.

**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.<sup>13</sup> This 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.<sup>14</sup>

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 the

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<sup>13</sup> 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." (emphasis added)).

<sup>14</sup> 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).

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. I (2000) (emphases added).

Thus, the Restatement apparently requires lawyers to comply with any "no secrets" agreement.

**ACTEC Commentaries.** The ACTEC Commentaries take a different approach. They explain that such a prior agreement is only one factor (apparently not dispositive) as the lawyer decides whether to share information the lawyer has learned from one jointly represented client with the other client.

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

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

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.6, at 76-77 (4th ed. 2006), [http://www.actec.org/Documents/misc/ACTEC\\_Commentaries\\_4th\\_02\\_14\\_06.pdf](http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf) (emphasis added).

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

The ACTEC Commentaries' confusing approach continues in the next paragraph -- which describes a lawyer's responsibility if the client declines to comply with the explicit

agreement that the joint lawyer would share all confidences with all jointly represented clients.

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

Id. at 77 (emphasis 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.

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.

**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.<sup>15</sup> The court was saved from this issue because the lawyer wanted to disclose the information.

### **Information Flow Duties Under an Agreement to Keep Secrets**

Lawyers following the nearly universal guidance to define the appropriate information flow in a joint representation retainer letter occasionally arrange for what could be called a "keep secrets" arrangement -- under which the lawyer will not share with all jointly represented clients what the lawyer learns from one of the jointly represented clients. 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.

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<sup>15</sup> 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)).

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. I (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](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](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.

### **Best Answer**

The best answer to this hypothetical is **(C) YOU MAY NOT TELL YOUR OTHER CLIENT ABOUT THE HUSBAND'S ADMISSION OF GUILT (PROBABLY).**

B 11/14

## Power to Waive the Privilege in a Joint Representation

### Hypothetical 3

You jointly represent two roommates charged with defrauding their landlord in tense negotiations with the prosecutor's office. One of your clients just called to ask whether she could provide certain documents or other information to the prosecutor during an upcoming debriefing.

- (a) Without the other client's consent, may this client give the prosecutor a legal memorandum that you prepared for and sent to both of your clients

**(B) NO**

- (b) Without the other client's consent, may this client disclose to the prosecutor the substance of communications that she had with you (outside the other client's presence).

**(A) YES**

### Analysis

Analyzing joint clients' power to waive their attorney-client privilege protection reflects the nature of the multiple representation.

**(a)-(b)** Joint clients must unanimously vote to waive privilege protection covering any of their joint communications, or communications from another client to their joint lawyer. In contrast, clients always maintain the power to waive privilege protection for their own communications with the joint lawyer.

The ABA Model Rules do not deal with waiver issues, but the Restatement discusses the waiver implications of joint representations, and case law has obviously focused on that issue too.

The Restatement 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.

Restatement (Third) of Law Governing Lawyers § 75 cmt. e (2000). 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).

Courts take a more understandable and comforting view.

The Trust's [successor to the affiliate] reading of the Restatement appears to state that if co-client communication is then used in an adversary 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 [parent] 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.

In re Crescent Res., LLC, 457 B.R. 506, 529-30 (W.D. Tex. 2011).

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.

**Courts' and Bars' Approach.** 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. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 24.302, 24.303 (3d. ed. 2013), published by Virginia CLE Publications.

### **Best Answer**

The best answer to (a) is (B) NO; the best answer to (b) is (A) YES.

## Effect of Adversity Among Jointly Represented Clients

### Hypothetical 4

You previously represented two co-defendants who were convicted of fraud and ordered as part of their sentences to pay restitution, for which they are jointly and severally liable. While one of your former clients has been paying restitution in compliance with the judgment, the other has not – despite having amply means to do so. The paying client has now sued the non-paying for contribution, and filed a third-party subpoena seeking all of your files. The non-paying client has objected to the subpoena, claiming privilege protection for his unilateral communications with you and your colleagues during the joint representation.

Is the objecting former client likely to successfully assert privilege protection for the unilateral communications with you during the joint representation?

**(A) YES**

### Analysis

As in nearly every other way, joint representations 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.<sup>16</sup> 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

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<sup>16</sup> 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.

no reason why the same standard would not apply after the joint representation 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 an ABA legal ethics opinion's<sup>17</sup> 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

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<sup>17</sup> 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.").

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.

A lawyer may represent two or more clients in the same matter as co-clients either when there is no conflict of interest between them . . . or when a conflict exists but the co-clients have adequately consented . . . . When a conflict of interest exists, as part of the process of obtaining consent, the lawyer is required to inform each co-client of the effect of joint representation upon disclosure of confidential information . . . , including both that all material information will be shared with each co-client during the course of the representation and that a communicating co-client will be unable to assert the attorney-client privilege against the other in the event of later adverse proceedings between them.

Restatement (Third) of Law Governing Lawyers § 60 cmt. 1 (2000) (emphasis added).

The same concept appears in a later Restatement section.

(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).

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

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. cmt. d (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.

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

- In re Equaphor Inc., Ch. 7 Case No. 10-20490-BFK, 2012 Bankr. LEXIS 2129, at \*9-10 (Bankr. E.D. Va. May 11, 2012) (assessing a situation in which the same law firm jointly represented Equaphor and three individual co-defendants in a derivative action; holding that the bankruptcy trustee for Equaphor could access law firm's files; rejecting the individual clients' argument that in the derivative action Equaphor had only been a "nominal defendant"; 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." (emphasis added)).
- 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. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 366, 368 (3d Cir. 2007) (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.").

- 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.").
- 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).

- 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."; "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." (emphasis added)).
- 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).

- 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.").

Bars have reached the same conclusion.

- North Carolina RPC 245 (4/4/97) ("When there is a joint representation of parties in a particular matter, each party is entitled to access to the legal file after the representation ends.").
- North Carolina RPC 153 (1/15/93) (holding that a lawyer who represents multiple clients must provide access to the lawyer's files to all of the clients; also holding that a lawyer must withdraw if adversity develops between multiple clients; "When a lawyer undertakes representation of codefendants, an impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony or incompatibility of positions. Identifying and resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation and not the client's responsibility. Once Attorneys A and B determined that Nurse's and Hospital's interests were the same and, presumably, that no conflict of interest existed and then undertook joint representation of Nurse and Hospital, with the consent of Hospital and its insurance company, information gathered on behalf of Nurse and Hospital (who were deemed to have the 'same interest') lost its confidential nature as between Nurse and Hospital by implied authorization, if not actual consent, under Rule 4(c)(1) and (2). Since Nurse relied on reasonable attorney-client expectations of protection of her interests and access to information, Attorneys A and B are now estopped to negate consent to the rights inuring to Nurse's benefit from the joint representation. Nurse is entitled to immediate possession of all information in the joint representation file or files of Attorney A and B accumulated to the date of

termination of representation that would or could be of some value to her in protecting her interests. This includes the items specified in the inquiry and any others that would or could be of some help to Nurse. The information must be surrendered unconditionally by Attorneys A or B without regard to whether the cost of its acquisition was advanced by either attorney or client (hospital). RPC 79. The attempt by Attorneys A and B to revoke the implied or actual authority to share information with Nurse can only apply prospectively to information gathered and work done after termination of representation." (emphasis added)).

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.<sup>18</sup> However, other courts have found the same effect in the case of a dispute<sup>19</sup> or controversy<sup>20</sup> between the former jointly represented clients. One court used the phrase "truly becomes adverse to his former co-plaintiffs."<sup>21</sup>

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

In re Grand Jury Subpoena Dated Nov. 26, 1974, 406 F. Supp. 381, 393-94 (S.D.N.Y. 1975) (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

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<sup>18</sup> See, e.g., Tekni-Plex, Inc. v. Meyner & Landis, 674 N.E.2d 663, 670 (N.Y. 1996).

<sup>19</sup> Griffith v. Davis, 161 F.R.D. 687, 693 (C.D. Cal. 1995).

<sup>20</sup> Brandon v. W. Bend Mut. Ins. Co., 681 N.W.2d 633, 642 (Iowa 2004) ("[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.").

<sup>21</sup> 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.").

"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. In 2004, the New York City Bar issued a legal ethics opinion explaining that joint clients could affect the impact of any later adversity among them.

- 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)).

One year later, the court dealing with a similar situation indicated otherwise, although there may have been extenuating circumstances.

- In re Mirant Corp., 326 B.R. 646 (Bankr. N.D. Tex. 2005) (rejecting the applicability of a "Protocol" entered into by a parent and a then-subsiary which authorized their joint lawyer Troutman Sanders to keep confidential from one client what it learned from the other; noting that the general counsel of the subsidiary agreed to the Protocol after the subsidiary became an independent company, but also explaining that the general counsel had ties both to the parent and to Troutman).

### **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.<sup>22</sup>

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<sup>22</sup> 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 8 J. WIGMORE, EVIDENCE § 2312 (McNaughton rev. ed. 1961).

(continued...)

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.

### **Effect of Now-Adverse Former Jointly Represented Clients' Use of Privileged Communications**

Surprisingly, few courts have dealt with the effect of now-adverse former joint clients using privileged communications against each other. Does such use allow third parties to access and use the same communications? Such a dramatic impact might give one of the

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<sup>22</sup> (...continued)

Teleglobe Commc'ns Corp. v. BCE, Inc. (In re Teleglobe Commc'ns Corp.), 493 F.3d 345, 368 (3d Cir. 2007).

former joint clients leverage in the dispute, and under any circumstance could harm one or all of the joint clients.

The Restatement takes the troubling position that now-adverse former joint clients' use of privileged communications against each other operates as a waiver as to the world -- thus allowing other third parties access to those communications. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 24.306 (3d. ed. 2013), published by Virginia CLE Publications.

### **Best Answer**

The best answer to this hypothetical is **(B) NO**.

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## Availability of the Common Interest Doctrine Among Participants with Adverse Defenses

### Hypothetical 5

You represent a large drug manufacturing company that has been charged by the State of California with reckless endangerment by producing a prescription drug that became badly contaminated and led to the death of many people. The state has also charged the drug distributor. Both your company and the distributor are asserting that they did not violate the law, essentially blaming each other for any possible contamination. However, you also want to cooperate with the distributor in trying to establish that the victims' deaths were caused by something else that they ingested, not the drug.

May your client enter into an effective common interest agreement with the drug distributor, despite the direct conflict of their defenses to the criminal charges?

**(A) YES**

### Analysis

As long as common interest agreement participants are in or anticipate litigation, they usually can safely exchange privileged communications about a common legal strategy – even if they are simultaneously pointing the finger at each other on other matters. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 20.805 (3d. ed. 2013), published by Virginia CLE Publications.

### Best Answer

The best answer to this hypothetical is **(A) YES**.

## Effect of Later Adversity Among Common Interest Agreement Participants

### Hypothetical 6

You represent one of several defendants in high-stakes commercial litigation, all of whom entered into a “common interest” agreement when the case began. Unfortunately, there has been a serious falling-out among the defendants, and you and your colleagues are trying to sort out its effect.

- (a) If one of the other defendants files a cross claim against your client, will it be able to use at trial any of the communications and documents that you shared with the other common interest participants under the agreement?

**(A) YES**

- (b) In that situation, will the other defendants be able to access and use any private communications you had with your client, which were not shared with the other common interest participants?

**(B) NO**

- (c) If one of the other defendants files a cross claim against your client, will you be able to represent your client in defending against that cross claim?

**MAYBE**

### Analysis

Adversity among former common interest agreement participants causes some of the same ramifications as in a joint representation setting, but differs significantly in other ways from the joint representation context.

(a) As in the joint representation context, common interest participants generally can use any shared privileged communications against other participants if adversity develops. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 24.404 (3d. ed. 2013), published by Virginia CLE Publications.

(b) Unlike the joint representation setting, common interest participants who have become adversaries can only discover and use privileged communications that have been disclosed among the participants.

This contrasts sharply with the joint representation created, in which the now-adverse former jointly represented clients generally can access and use any privileged communications that were part of the joint representation, even if they were not aware of those at the time. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 24.304 (3d. ed. 2013), published by Virginia CLE Publications.

(c) Several courts have applied joint representation principles to common interest arrangements when analyzing the effect of adversity on participants' lawyers.

The Restatement takes that approach.

A lawyer who learns confidential information from a person represented by another lawyer pursuant to a common-interest sharing arrangement . . . is precluded from a later representation adverse to the former sharing person when information actually shared by that person with the lawyer or the lawyer's client is material and relevant to the later matter . . . . Such a threatened use of shared information is inconsistent with the undertaking of confidentiality that is part of such an arrangement.

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

This makes some sense, because the participants' lawyers presumably have obtained privileged communications from the other participants, and it would seem unfair that they could use those against their former contractual allies. However, several ethics opinions have tried to move the law in the other direction. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 20.1404 (3d. ed. 2013), published by Virginia CLE Publications.

### **Best Answer**

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

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