Attorney-Client Privilege in the Corporate/Organizational Context (Ethics)

A number of New Hampshire's Rules of Professional Conduct require an attorney to protect and preserve attorney-client privilege, or, in other circumstances, clearly communicate whether attorney-client privilege will not, or may not, attach to certain communications. This CLE will address the NH and applicable federal case law outlining the scope of attorney-client privilege when an attorney represents a corporation or other organization (including considerations of who is identified as the client) and provide a survey of the ethical obligations that need to be navigated in that context.

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Attorney/Client Privilege in Corporate Context

GENERAL PRINCIPLES

Klonoski v. Mahlab, 953 F. Supp. 425 (D.N.H. 1996)

Generally, evidentiary privileges in New Hampshire are strictly construed.

Burden for establishing existence of given privilege is generally placed on the party asserting it.

Communications between an individual and a third party's counsel are ordinarily not protected by attorney/client privilege. See also Fortune Laurell, LLC v. Yunnan New Ocean Aquatic Product Science and Technology Grp. Co., Ltd., 2018 WL 3942230; 2018 N.H. Super. LEXIS 16 (N.H. Super. Ct. Aug. 14, 2018) (under N.H. R. Evid. 502(b), attorney/client privilege may be waived when a client communicates otherwise privileged information to a co-party).

KEY TESTS AND CASES

A. Upjohn v. United States, 449 U.S. 383 (1981)

Subject matter test / functionality test – as **opposed to control group test**, which is described in further detail in Section (B) below.

Applies in most state jurisdictions, including MA

Privilege extends to corporate employees, including some lower-level employees depending on the circumstances.

Work product doctrine applies in tax summons enforcement proceedings. IRS sought production of questionnaires that company's attorneys had sent to foreign managers seeking information about questionable payments to foreign government officials.

Counsel had interviewed recipients of questionnaire and other company employees. IRS also sought production of notes of these interviews. Company refused to produce these documents.

Big issues:

1. Scope of attorney/client privilege in corporate context
2. Whether to apply "control group" test

U.S. Supreme Court noted downsides of following the "control group" test & thus decided not to apply that test. Downsides of control group test include:

1. Discouraging communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client
2. Making it more difficult to convey full, frank legal advice to employees who will put into effect the client corporation's policy
3. Potentially limiting efforts of corporate counsel to ensure client's compliance with law

Upjohn Court did not reach the issue of warnings.

Upjohn warnings (given by corporate counsel, often in communications with corporate employees):

1. Attorney represents the corporation, not the interviewed employee.
2. Corporation holds the attorney/client privilege, not employee.
3. Conversation or communication is happening because the employee has information not generally available elsewhere.
4. Purpose of the conversation or communication is for the attorney to gather information for the corporate client, so as to provide proper legal advice to the corporation.
5. Employee should not share the substance of the conversation or communication with anyone, so as to minimize the risk of greater disclosure of confidential information.
6. Corporation may, as it sees fit, release employee's statements to third parties or government.

It may also be wise for corporate counsel to advise the employee of his/her right to seek legal advice from his own attorney. Upjohn warnings may be given to employees in writing.

B. Control group test

Minority view (e.g., Maine, NH Superior Court)

Control group test is the narrowest test.

Includes within its coverage the fewest number of organization employees

Definition of control group:

> [T]hose top management persons who [have] the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis for any final decision.

Totherow v. Rivier College, 2007 WL 811734; 2007 N.H. Super. LEXIS 4 (N.H. Super. Ct. Feb. 20, 2007) (Lynn, C.J.)

Plaintiff professor was fired by the defendant college in 2003. Plaintiff sued for, among other things, breach of contract, defamation, negligent and intentional infliction of emotional distress, and enhanced compensatory damages.

Plaintiff sought court permission to authorize counsel to conduct ex parte interviews of defendant college's "lower echelon employees . . . who are not representatives of the organization." Plaintiff wanted to interview current and former members of the defendant's Rank & Tenure Committee and Ad Hoc Hearing Committee, which the plaintiff contended played an advisory, nonbinding role in internal proceedings undertaken by the defendant before firing the plaintiff.

Chief Justice Lynn referred to the definition of "representative of a client" in N.H. R. Evid. 502(a)(2) to buttress his conclusion that the drafters of N.H. R. Prof. Conduct 4.2 intended to adopt the control group test.

Plaintiffs could not interview high level management officials of defendant college.

Plaintiffs were also not permitted to interview members of the Rank and Tenure Committee or Ad Hoc Hearing Committee, because the court deemed them to be part of the control group for purposes of this case.

Scenario 1: *THE CRASH*

(a) A company vehicle driven by a low-level employee is involved in a motor vehicle collision. The company and the driver are sued.

Q: Under the control group test (which is understood to apply in New Hampshire), are corporate counsel's communications with the chief executive officer about the details of the collision protected by attorney/client privilege?

Q: Under the control group test, can corporate counsel's communications with the driver/low-level employee about the details of the collision be protected by the attorney/client privilege? Is the answer different under the Upjohn test?

(b) The company wants to know what happened in the crash so that they can strategize their defense to the lawsuit. They ask corporate counsel to investigate the scene of the collision and compile a report. Corporate counsel asks his paralegal to perform the investigation and prepare the report.

Q: Is the report protected by the attorney/client privilege? What steps should be taken to increase the likelihood that said report will be protected from disclosure?

(c) The CEO sends corporate counsel an email asking (1) whether the company could be subject to increased liability if it knew that the driver was drinking on the job; (2) whether, as a general matter, the company should agree to pay larger premiums for more motor vehicle coverage moving forward; and (3) whether the company should disclose the existence of the lawsuit to potential purchasers prior to any contractual obligation to do so.

Q: Would some, all, or none of corporate counsel's response be privileged?

Scenario 2: *TROUBLE IN TOWN*

(a) The Chair of the Board of Selectmen for a local town receives a citizen complaint regarding alleged inappropriate police conduct (forcing a bystander to stop recording an arrest). Consistent with a prior vote of the Board authorizing the Chair to seek legal advice for the Town, the Chair emails Town Counsel for a legal opinion about the complaint, which is provided in a responding email. The Chair forwards the attorney's email to the Town Administrator requesting that it be circulated to the other members of the Board before their next scheduled meeting, during which they will go into a non-public session to discuss.

Q: Who is Town Counsel's client?

Q: Was the communication between the Board Chair and the attorney regarding the citizen complaint privileged under the control group test? Is the answer different under the *Upjohn* test? Would the answer be different if the Board Chair had included the Town Administrator in the original email chain?

Q: Did the Board Chair waive the privilege by sharing the attorney's advice with the Town's Town Administrator? Would the answer be different if the Board Chair had asked a lower-level Town employee to circulate the email? Would the answer be different if the Board Chair had forwarded the attorney's email to a captain in the police department to clarify a factual issue?

(b) Following the Board's non-public discussion of the legal advice, the Vice-Chair of the Board calls Town Counsel directly with follow-up questions. First, the Vice-Chair seeks clarification about the attorney's previously provided advice and the Town's potential liability regarding the pending police misconduct complaint. Second, the Vice-Chair informs Town Counsel that the Vice-Chair had also personally had a negative experience with a Town police officer, describing the circumstances, and asking what rights he might have personally.

Q: Is Town Counsel ethically permitted to take the phone call with the Vice-Chair?

Q: Assuming Town Counsel *does* take the phone call, is the discussion regarding the attorney's advice to the Board privileged?

Q: Assuming Town Counsel *does* take the phone call, is the discussion regarding the Vice-Chair's personal experience privileged? If it is privileged, who is the client holding the privilege? What, if any, statements should Town Counsel have made to the Vice-Chair once he raised his personal question?

(c) The Chair informs Town Counsel that the Board voted to authorize the attorney to investigate the allegation of police misconduct consistent with the Town's policy stating that the Town will promptly investigate citizen complaints. Additionally, while the complaint does not expressly threaten a lawsuit, Town Counsel has informed the Board of the risk of a claim in either state or federal court under these circumstances. In order to investigate, Town Counsel needs to meet with the involved police officer.

Q: Is Town Counsel's interview with the patrol officer protected from disclosure?

ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE IN THE CORPORATE CONTEXT

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I. Introduction

The modern in-house counsel must navigate a myriad of issues in order to maintain and maximize the protections afforded by the attorney-client privilege and work product doctrine. Basic questions such as who controls the privilege and who is the client often yield complicated answers in the corporate context. In the hopes of illuminating some of these vagaries, the following pages contain a summary of the relevant law in New Hampshire and application of that law to several scenarios that in-house counsel are likely to encounter. The end of this document contains a list of additional resources in-house counsel may find useful on this topic.

As counsel review these materials, it is important to remember that the scope of the attorney-client privilege and work product doctrine are evolving concepts, and courts have applied the existing rules in unpredictable ways. As a result, clients are best served by a careful examination of the facts and analysis animating prior decisions before they are applied to new legal questions.

II. Applicable Law

A. Attorney-Client Privilege in New Hampshire State Court

The attorney-client privilege is a common law doctrine that varies from jurisdiction to jurisdiction. In New Hampshire state court, the privilege is articulated as follows:

> Where legal advice…is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure…unless the protection is waived by the client or his legal representatives.

Hampton Police Assn., Inc. v. Town of Hampton, 162 N.H. 7, 15 (2011). This formulation identifies four requirements for establishing a privileged communication. The communication must: (1) seek legal advice; (2) from a lawyer in his / her capacity as lawyer; (3) be related to the advice sought; and (4) remain confidential.

Questions arise when these requirements are applied to a corporate client because corporations, by definition, must act through their constituents, and it is not always clear which of those constituents falls within the privileged group. Although the New Hampshire Supreme Court has not addressed this issue, it appears that New Hampshire uses the "control group" test to determine who is within the corporate privilege. The leading case is a 2007 decision from now retired New Hampshire Supreme Court Chief Justice Robert Lynn, who was then Chief Justice of the New Hampshire Superior Court. *See Totherow v. Rivier College*, 2007 WL 811734 (N.H. Super. Ct. Feb. 20, 2007). In *Totherow*, Justice Lynn surveyed the various tests courts have used to determine which corporate employees fall within the privilege and concluded that the control group test was most appropriate. He defined the control group as:

> "[T]hose top management persons who [have] the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis for any final decision."

Id. Essentially, the control group extends to those who make decisions on behalf of a corporation, and, in appropriate circumstances, those who must be consulted in the making of corporate decisions. In addition to *Totherow*, the Reporter's Notes for New Hampshire Rule of Evidence 502 provide further authority for application of the control group test.

It should be noted that the control group test represents the minority view. Other control group jurisdictions include Maine, Illinois, and Alaska. *See Harris Mgmt., Inc. v.*

Coulombe, 151 A.3d 7, 14 (Me. 2016); *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 257 (Ill. 1982); *Langdon v. Champion*, 752 P.2d 999, 1002 (Alaska 1988).

B. Attorney-Client Privilege in New Hampshire Federal Court

The New Hampshire federal court will apply state privilege law if sitting in diversity jurisdiction, and federal privilege law when operating under federal question jurisdiction. F.R.E. 501. This difference is important in the corporate context because federal privilege law does not use the control group test. Rather, federal law follows what has been termed the "Subject Matter Test" or "Functionality Test," as stated in *Upjohn v. United States*, 449 U.S. 383 (1981). Under *Upjohn*, the privilege extends to corporate employees, including sometimes lower-level employees, with whom corporate counsel communicate in furtherance of giving the company legal advice. *Id.* at 391-92.

It is also important to be familiar with the *Upjohn* test because it is applied in the majority of state jurisdictions. *See, e.g., RFF Family Partnership, LP v. Burns & Levinson, LLP*, 991 N.E.2d 1066, 1071 (Mass. 2013). Thus, when a company operates outside New Hampshire, it is possible if not likely that *Upjohn* will apply.

C. Work Product Protection

The work product doctrine protects from disclosure work done by an attorney in anticipation of or during litigation. *State v. Chagnon*, 139 N.H. 671, 673 (1995) (*citing Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)); *In re Grand Jury Subpoena*, 274 F.3d 563, 574-75 (1st Cir. 2001). By its terms, the doctrine is limited to work prepared in the context of actual or potential litigation. There are narrow circumstances in which a litigant can overcome the work product protection if the information sought is crucial and not otherwise available. *See, e.g.*, *Davis v. Emery Air Freight Corp.*, 212 F.R.D. 432, 436-37 (D. Me. 2003); *In re Vitamins Antitrust Litig.*, 211 F.R.D. 1, 4 (D.D.C. 2002); *Coogan v. Cornet Transp. Co.*, 199 F.R.D. 166, 167-68 (D. Md. 2001). Thus, unlike the attorney-client privilege, the work product doctrine does not provide absolute protection against disclosure.

III. Applying the Rules to Corporate Scenarios

A. Advising a Family of Companies / Subsidiaries & Affiliates

Courts "almost universally hold" that sharing of information amongst the corporate family does not waive privilege. *In re Teleglobe Comms. Corp.*, 493 F.3d 345, 369 (3d Cir. 2007); *see also Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1493 n.6 (9th Cir. 1989). *Teleglobe* is the leading case on these issues and various portions of the opinion have been cited with approval in state courts throughout New England. *See Fortune Laurel, LLC v. Yunnan New Ocean Aquatic Prod. Sci. and Tech. Grp. Co., Ltd.*, 2018 WL 3942230, at *3 (N.H. Super. Ct. Aug. 14, 2018); *RFF Family Partnership*, 991 N.E.2d at 1089; *Irving Oil Ltd. v. ACE INA Ins.*, 2015 WL 1756034, at *6 (Me. Bus. Ct. Mar. 17, 2015); *In re Champlain Marina Dock Expansion*, 2010 WL 2594034, at *1 (Vt. Env. Ct. 2010).

Teleglobe analyzed the relationship between in-house counsel and multiple corporate subsidiaries and affiliates as a co-client representation. 493 F.3d at 370. Under that rubric, a single attorney represents more than one client with the same or nearly the same interests, and the congruence of those interests define the scope of the representation. *See id.* at 363 (explaining that "[t]he keys to deciding the scope of a joint representation are the parties' intent and expectations"); *see also* Restatement (Third) of the Law Governing Lawyers § 75; *Sky Valley Ltd. P'ship v. ATX Sky Valley Ltd.*, 150 F.R.D. 648, 652-53 (N.D. Cal. 1993). The *Teleglobe* decision distinguished the co-client relationship from common interest or "community of interest" protection, which applies when multiple lawyers represent multiple clients with substantially the same interest. 493 F.3d at 364-65, 370; *see also Fortune Laurel*, 2018 WL 3942230, at *6; N.H. R. Evid. 502(b)(3).

Teleglobe's choice to analyze the corporate family as co-clients receiving advice from a single attorney is significant because the co-client privilege only shields privileged communications from parties outside the joint representation, so that when co-clients sue each other, all communications made during the course of the joint representation are discoverable. 493 F.3d at 366. Moreover, *Teleglobe* concluded that the same is true where the co-clients are a parent and subsidiary or affiliate. *Id.* at 368. Critically, this means that where a subsidiary becomes adverse to its parent and litigation ensues, the subsidiary may force

disclosure of privileged communications between in-house counsel and the parent. In addressing the waiver issues this rule raises, *Teleglobe* further explained that corporate officers of the parent who were also officers of a subsidiary could still receive advice from the parent's lawyer without turning the subsidiary into a co-client so long as they received that advice in their capacity as an officer of the parent. *Id.* at 372. In this way, the court reasoned, parent corporations could allow subsidiary management to participate in management of the corporate parent without accidentally creating a co-client relationship such that the subsidiary could force disclosure of privileged information in a subsequent adverse litigation. *See id.*

The *Teleglobe* opinion concluded its survey of privilege law by noting that it was advisable for in-house counsel to obtain separate counsel for a subsidiary or affiliate as soon as the potential for adversity arose in order to protect the privileged communications between in-house counsel and the parent in subsequent adverse litigation. *Id.* at 374.

B. Identifying Who Holds the Privilege

In the corporate context, management controls the privilege. *In re Grand Jury Subpoena*, 274 F.3d at 571. This rule holds even if it is new management. *CFTC v. Weintraub*, 471 U.S. 343, 349 (1985). Further, management of the surviving corporation following a merger controls the privilege. *Rayman v. Am. Charter Fed. Sav. & Loan Ass'n*, 148 F.R.D. 647, 652 (D. Neb. 1993); *Chronicle Publ'g Co. v. Hantzis*, 732 F. Supp. 270, 273 (D. Mass. 1990); *Hoffmann-La Roche, Inc. v. Roxane Labs., Inc.*, 2011 WL 1792791, at *6 (D.N.J. May 11, 2011); *Great Hill Equity Partners IV, LP v. SIG Growth Equity Funds, LLP*, 80 A.3d 155, 162 (Del. Ch. 2013). Note, however, that in transactions where only assets are transferred, the purchaser may not have control of the privilege unless provided for in the sale documents. *See, e.g., MacKenzie-Childs LLC v. MacKenzie-Childs*, 262 F.R.D. 241, 248 (W.D.N.Y. 2009) (citing cases). Further, when a corporation enters bankruptcy, the bankruptcy trustee controls the privilege. *Weintraub*, 471 U.S at 358.

Thus, when giving advice in the course of a corporate transaction or restructuring, in-house or corporate counsel should be mindful of who controls the client entity.

C. Communications Between Non-Lawyers

It is natural that, upon receiving advice from counsel, employees of the corporation will then communicate with each other in order to relay and implement that advice. Courts have held that communications between non-lawyers may still be privileged in the corporate context where the communications are: (1) between employees at the same company; (2) concerning corporate counsel's advice; and (3) among the class of persons within the control group or satisfying *Upjohn*. *See Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 442 (S.D.N.Y. 1995); *Santrade, Ltd. v. General Elec. Co.*, 150 F.R.D. 539, 545 (E.D.N.C. 1993); *Haddock v. Nationwide Fin. Servs., Inc.*, 2009 WL 3734059, at *1 (D. Conn. Nov. 7, 2009). Counsel rendering legal advice to corporate constituents may therefore consider advising them to pass on the advice consistent with the foregoing in order to protect the privilege.

D. Advising Corporate Officers in Their Personal Capacity

It is not uncommon for officers of a corporation to approach in-house counsel regarding matters that are related to the corporation but center upon the officer's individual rights and liabilities. This is a fraught area where counsel should proceed with caution in order to maintain the privilege.

The law presumes that a corporate attorney represents the corporation and not its officers. *In re Grand Jury Subpoena*, 274 F.3d at 571; *see also* N.H. R. Prof. Conduct 1.13(a). It is up to the officer, as the individual asserting the privilege, to prove otherwise. *In re Grand Jury Subpoena*, 274 F.3d at 571 (*citing United States v. Bay State Ambul. & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989)). The First Circuit looks to what is known as the "*Bevill* test" to determine whether the officer can overcome the presumption. *In re Grand Jury Subpoena*, 274 F.3d at 571-72 (*citing In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir. 1986)). The *Bevill* test considers whether:

(1) The officer approached corporate counsel for the purpose of seeking legal advice;

(2) The officer made clear to corporate counsel that he or she was seeking legal advice;

(3) Corporate counsel saw fit to communicate with the officer in an individual capacity knowing that a conflict could arise;

(4) The conversations were kept confidential; and

(5) The substance of the conversations did not concern matters within the company or its general affairs.

Id. at 572. The First Circuit clarified that an officer could satisfy the fifth factor so long as the conversation focused on the officer's *individual* rights and responsibilities even if it also touched on the affairs of the company. *Id.*

Similarly, although the New Hampshire Supreme Court has not adopted the *Bevill* test, it has declined to extend the privilege to a corporate officer in his individual capacity absent evidence that corporate counsel was advising him in that capacity. *See McCabe v. Arcidy*, 138 N.H. 20, 25-26 (1993).

As a result, in situations where a corporate officer seeks advice in an individual capacity, counsel should clarify and document the capacity the officer is acting in and the nature of the advice given in order to protect the privilege.

E. Internal Investigations

In the modern corporate environment, there are a multitude of reasons that a company may choose to conduct an internal investigation. Frequently those investigations involve counsel. Keeping in mind that a company is unlikely to know the results of the investigation prior to its completion, in-house counsel should take steps to maximize the scope of privilege and work product protection.

The typical investigation involves some combination of the following: (1) an attorney or firm is asked to investigate an event; (2) the attorney, the attorney's agents, and sometimes corporate employees interview witnesses concerning the event; (3) the investigation generates notes, draft reports, and other work product; and (4) a final report is presented to the company. At each step along the way, work product may be shared, and advice may be

given. Because internal investigations are often precipitated by an event that will give rise to litigation, privilege and work product protections are frequently tested.

When courts are called upon to determine whether a corporation can invoke the privilege or work product doctrine, they typically consider three factors.

1. Would the investigation have occurred absent the prospect of litigation?

First, courts examine whether and the extent to which the company would have done the investigation in the absence of litigation. If the investigation would have occurred even if no litigation was on the horizon, courts reason that the work product doctrine should not apply because it is limited to material prepared in anticipation of litigation. *See United States v. Aldman*, 134 F.3d 1194, 1202 (2d Cir. 1998); *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir.1992); *Wultz v. Bank of China Ltd.*, 304 F.R.D. 384, 395-97 (S.D.N.Y. 2015).

Thus, it may be wise for corporate counsel to document the reason for the investigation. Further, in some instances, companies have maintained the privilege by conducting parallel investigations—one as required, and one strictly in anticipation of litigation. *See Patel v. L-3 Comms. Holdings, Inc.*, 2016 WL 4030704, at *3-4 (S.D.N.Y. July 25, 2016). If resources allow, in-house counsel should consider this option as well.

2. Employee confusion over the attorney's role and the Upjohn Warning

Courts next consider the extent of any confusion over who the attorney represented when he or she was interviewing witnesses. In order to minimize such confusion, it is recommended that counsel provide what is called an "*Upjohn* Warning," which clarifies the roles of counsel and witness. An *Upjohn* Warning—based on the *Upjohn* decision—has appeared in various formulations, but it usually includes each of the following elements:

(1) The lawyer represents the company, not the employee;

(2) The interview is privileged and confidential;

(3) The company holds the privilege, not the employee;

(4) The company might waive the privilege at a later date; and

(5) The employee has information the lawyer needs and cannot get anywhere else.

In addition to providing and documenting this warning, it is best practice to assume that counsel's communications with employees outside the control group or beyond *Upjohn* protection will be discoverable even if counsel's work product based on the interview remains confidential.

Further, counsel should proceed with caution when using non-lawyers to conduct interviews. Generally, the privilege extends to those who are employed to assist the lawyer in rendering legal advice. N.H. R. Evid. 502(a)(4). It is accepted that use of attorney staff and paralegals does not waive the privilege. *See, e.g., Thompson v. Burhs Americas, Inc.*, 2009 WL 10711525, at *3 (D. Minn. June 23, 2009); *Bowen v. Parking Auth. of Camden*, 2002 WL 1754493, at *5 (D.N.J. July 30, 2002). Some courts have interpreted the scope of this protection narrowly and concluded that the privilege was waived where attorneys relied on consultants to conduct interviews. *See Columbia Data Prods., Inc. v. Autonomy Corp., Ltd.*, 2012 WL 6212898, at *19 (D. Mass. Dec. 12, 2012). Others have applied the protection broadly and maintained the privilege where corporate employees conducted interviews at the direction of counsel. *See Fair Isaac Corp. v. Texas Mut. Ins. Co.*, 2006 WL 3484283, at *3 (S.D. Tex. Nov. 30, 2006).

3. What will the company do with the results of the investigation?

Courts next consider what the company intends to do with the results of the investigation. If the investigation and final report thereof is in furtherance of legal advice, courts are more likely to maintain the privilege. If, however, it appears that the investigation was conducted in order to assist with a business decision, courts have refused to permit companies to use the privilege to shield investigation reports. *See Doe v. Phillips Exeter Academy*, 2016 WL 5947263, at *2-4 (D.N.H. Oct. 13, 2016) (applying federal privilege law); *U.S. Bank Nat'l Assn. v. PHL Variable Ins. Co.*, 2016 WL 1258466, at *4 (D. Minn. Mar. 30, 2016). As a result, corporate counsel should document the nature and reasons for the recommendations contained in the investigative report. In some instances, it may also be

advisable to issue multiple reports in order to segregate legal advice from business recommendations.

F. Former Employees

As employees more frequently change jobs over the course of a career, in-house counsel are increasingly confronted with scenarios in which an important witness no longer works for the company, or may even be the plaintiff in a suit against the company. For obvious reasons, the continued vitality of the corporate privilege in these situations is often fodder for litigation.

Like many issues regarding privilege and work product, the New Hampshire Supreme Court has not had occasion to address whether a former employee may access privileged material that was available to him or her during employment. A decision from the Business and Commercial Dispute Docket answered this question in the negative, concluding that because it is the corporation that holds the privilege, those who leave the control group and are no longer privy to privileged information cannot waive the privilege. *See Mason v. OSR Open Systems, Inc.*, No. 2016-CV-1294, at *6 (N.H. Super. Ct. May 24, 2017) (McNamara, J.). This decision is notable because it was based on an "evolving line of cases," which bodes well for future New Hampshire decisions on this point. *Id.*

On the question of whether conversations with former employees waive the privilege, Illinois—another control group jurisdiction—has concluded that they do. *See Barrett Indus. Trucks, Inc. v. Old Republic Ins. Co.*, 129 F.R.D. 515, 518 (N.D. Ill. 1990). In *Upjohn* jurisdictions, on the other hand, courts have been relatively consistent in extending the privilege to discussions with former employees who would have qualified for the privilege when they worked at the company. *See In re Allen*, 106 F.3d 582, 605-06 (4th Cir.1997); *In re Gen. Motors Ignition Switch Litig.*, 80 F. Supp. 3d 521, 531 (S.D.N.Y. 2015); *Perlata v. Cendant Corp.*, 190 F.R.D. 38, 41–42 (D.Conn.1999); *Command Transp., Inc. v. Y.S. Line (USA) Corp.*, 116 F.R.D. 94, 96-97 (D. Mass. 1987). Because the law in New Hampshire on this point is not as clear as it might be, in-house counsel would do well to proceed with caution when contacting former employees, and assume that such communications may not be privileged.

G. Fiduciary Exception

Although it only applies in limited circumstances, in-house counsel should be aware that courts have allowed shareholders pursuing derivative actions to obtain advice given to management upon a showing of good cause. *See Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-04 (5th Cir. 1970).

The New Hampshire Supreme Court has not addressed this issue, nor is the author aware of any New Hampshire trial court decisions applying the exception. Although many states recognize some form of the fiduciary exception, *see, e.g., Riggs Nat. Bank of Washington, D.C. v. Zimmer*, 355 A.2d 709, 711-12 (Del. Ch. 1976) (applying exception to trustees), others have refused to adopt it. *See Wells Fargo Bank v. Superior Ct.*, 990 P.2d 591, 595 (Cal. 2000); *Huie v. DeShazo*, 922 S.W.2d 920, 924 (Tex. 1996).

IV. Additional Resources

The foregoing text has attempted to summarize the relevant law surrounding attorney-client privilege and the work product doctrine and apply it to scenarios that in-house counsel are likely to encounter. In addition to this material, the author consulted the following resources.

The law firm of McGuire Woods offers a comprehensive handbook entitled *The Attorney-Client Privilege and The Work Product Doctrine: A Practitioner's Guide*. In addition, it makes available a database of decisions on privilege and work product online at:

https://attorneyclientprivilege.mcguirewoods.com/default.aspx

Similarly, the law firm of Jenner & Block maintains a lengthy summary of attorney-client privilege and work product decisions known as *Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine*. This document is available on the firm's website: www.jenner.com.

On the topic of internal investigations, the law firm of Jones Day publishes a guide containing relevant case law and best practices entitled *Corporate Internal Investigations: Best Practices, Pitfalls to Avoid*. The guide is available at www.jonesday.com.

Finally, for those with subscription access, Westlaw Practical Law contains several guides and practice notes on the topics of attorney-client privilege, work product doctrine, representing corporate clients, and internal investigations.

2018 WL 3942230 (N.H.Super.) (Trial Order)
Superior Court of New Hampshire.
Rockingham County

FORTUNE LAURELL, LLC,

v.

YUNNAN NEW OCEAN AQUATIC PRODUCT SCIENCE AND TECHNOLOGY GROUP CO., LTD., et al.

No. 218-2017-CV-01449.
August 14, 2018.

Order on the Plaintiff's Motion to Compel

N. William Delker, Judge.

***1** The plaintiff, Fortune Laurell, LLC, commenced this action against Yunnan New Ocean Aquatic Product Science and Technology Group Co., Ltd. and a number of its subsidiaries (the "YOK defendants") for, *inter alia*, common law breach of contract. One issue that is currently being litigated in this action centers around the propriety of a trustee attachment levied against High Liner Foods (USA) incorporated ("High Liner (USA)"), which is a subsidiary of High Liner Foods (Canada) ("High Liner (Canada)"). High Liner (Canada) is not a party to this law suit in any capacity. The plaintiff moves to compel the production of certain emails between employees of High Liner (Canada) and the YOK defendants, arguing that they are relevant to the dispute concerning the trustee attachment at issue. High Liner (USA) objects. For the following reasons, the plaintiff's motion to compel is GRANTED.

Background

A description of the facts underlying this action is set forth in the Court's prior order on High Liner (USA)'s motion to discharge, and is incorporated by reference herein. *See* Doc. # 18. In short, the plaintiff seeks to attach money which High Liner (USA) allegedly owes to the YOK defendants.

Pursuant to RSA 512:14, High Liner (USA) and the plaintiff have conducted discovery relative to High Liner (USA)'s chargeability as a trustee in this matter. In response to the plaintiff's document requests, High Liner (USA) produced a privilege log which, among other things, listed email communications between High Liner (Canada)'s head of procurement, Denis Galleria ("Galleria"), and his counterpart at the YOK defendants, Jane Yu ("Yu"). *See* Pl.'s Mot. Comp. Ex. C; *see also* Def.'s Obj. at 2 (listing the communications at issue).

On May 7, 2018, Fortune Laurell filed a motion to compel the production of these communications, arguing that the attorney client privilege did not apply because no attorney or agent thereof was a party to the communications. High Liner (USA) objected, arguing that the communications fell within the common interest doctrine. To support this position, High Liner (USA) submitted the affidavit of Tim Rorabeck ("Rorabeck") who is the Executive Vice President, Corporate Affairs, General Counsel, and Secretary for High Liner (Canada), and the Executive Vice President and Secretary of High Liner Foods (USA).

Rorabeck claims that the YOK defendants and High Liner (USA) share a common interest in the pending attachment. Rorabeck Aff. ¶ 5. Specifically, Rorabeck avers that "out of respect for" this Court, High Liner (USA) has acquired $600,000 from High Liner (Canada)—which funds would have been paid to the YOK defendants for fish it supplied to High Liner (Canada)—and that if the plaintiff prevails in this matter, High Liner (USA) will pay that money as directed by the Court. *Id*. Rorabeck further

asserts that the communications at issue reflect the advice as well as the thoughts and impressions of counsel for both entities as it relates to the attachment, and that such communications are part of a coordinated plan to align their respective strategies to better oppose the plaintiff. Rorabeck Aff. ¶ 6–7. Thus, the Court must determine whether the common interest doctrine shields the communications at issue.

Analysis

***2** Long before the adoption of the Rules of Evidence in 1985, the New Hampshire Supreme Court held that "[t]he common law rule that confidential communications between a client and an attorney are privileged and protected from inquiry is recognized and enforced in this jurisdiction." *Riddle Spring Realty Co. v. State*, 107 N.H. 271, 273 (1966) (quotation omitted). It is well settled that "[w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications related to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser unless the protection is waived by the client or his legal representatives." *Id*. (citation omitted). The burden of establishing the existence of the attorney-client privilege rests with the party asserting it. *McCabe v. Arcidy*, 138 N.H. 20, 25 (1993). In New Hampshire, "the rules of evidence which [ ] govern privileged matters at trial govern such matters when they arise during discovery." *Riddle Spring Realty Co.*, 107 N.H. at 273 (citation omitted).

"Although occasionally termed a privilege itself, the common interest doctrine is really an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person." *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007) (citation omitted). The common interest doctrine applies when two or more clients consult or retain the same attorney to represent them on a matter of common interest. *Cavallaro v. United States*, 284 F.3d 236, 249 (1st Cir. 2002); *see also* *United States v. Schwimmer*, 892 F.2d 237, 243 (2d. Cir. 1989) (noting that the common interest rule is also known as the joint defense privilege). "In such a situation, the communications between each of them and the attorney are privileged against third parties." *Cavallaro*, 284 F.3d at 249 (citations omitted). Similarly, "the privilege [also] applies to communications made by the client or the client's lawyer to a lawyer representing another in a matter of common interest." *Id*. at 249-50 (quoting *Proposed Fed. R. Evid*. 503(b) (emphasis added).

As relevant here, New Hampshire Rule of Evidence Rule 502(b) codifies the common interest rule. It provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or his or her representative and the client's lawyer or the lawyer's representative, (2) between the client's lawyer and the lawyer's representative, *(3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein*, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

N.H. R. Evid. 502(b) (emphasis added); *see also N.H. R. Evid.* 502 (a)(5) (stating that "[a] communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."). The New Hampshire rule was taken from the Uniform Rules of Evidence. *See N.H. R. Evid.* 502 (committee notes which state that "[n]one of the privilege rules were adopted from the Federal Rules of Evidence" but that some of the privilege rules were adopted from the Uniform Rules of Evidence); *cf. Uniform Rule of Evidence* 502(b)(3) ("by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein").

***3** The language of the New Hampshire rule is similar, but narrower than, proposed Federal Rule of Evidence 503. Although this federal rule was never adopted by Congress, it has guided the federal courts for decades. *See* *BDO Seidman, LLP*, 492 F.3d at 814-15 (noting that this proposed rule was promulgated by the United States Supreme Court in 1972). The proposed rule provides as follows:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications[,] made for the purpose of facilitating the rendition of professional legal services to the client…[,] by him or his lawyer to a lawyer representing another in a matter of common interest.

Proposed Fed. R. Evid. 503 (b); *see also* 56 F.R.D. 183, 236 (1972). The common interest rule is also recognized by the Restatement (Third) of the Law Governing Lawyers (the "Restatement"). The Restatement provides:

> If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged … that relates to the matter is privileged as against third persons....

Restatement (Third) of the Law Governing Lawyers § 76(1); *see also id*. at cmt. d (stating that "[u]nder the privilege, any member of a client set—a client, the client's agent for communication, the client's lawyer, and the lawyer's agent [cross reference omitted]—can exchange communications with members of a similar client set. However, a communication directly among the clients is not privileged unless made for the purpose of communicating with a privileged person …"); *Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc.*, 870 N.E.2d 1105, 1110 (Mass. 2007) (adopting the Restatement and noting that the common interest doctrine "prevents waiver of the attorney-client privilege when otherwise privileged communications are disclosed to and shared, in confidence, with an attorney for a third person having a common legal intent for the purpose of rendering legal advice to the client.").

Despite the absence of a uniform rule, there is a significant body of federal case law as to the common interest rule. However, the federal case law is incoherent on the issue of whether clients with a common interest may communicate with each other (outside the lawyers' presence) without waiving the attorney client privilege. Although the federal courts look to the proposed rule for guidance, the scope of the rule is ultimately a matter of federal common law. Put another way, the federal common interest rule is a judicially-created doctrine that is not strictly tethered to the language of Proposed Federal Rule of Evidence 503. This has led to differing results, a lack of clarity, and much dictum on the issue of whether a communication between clients is privileged under the rule.

A leading federal case on this issue is *In re Teleglobe Communications Corp.*, 493 F.3d 345, 364 (3d. Cir. 2007). In that case the, Third Circuit Court of Appeals construed a provision of the Delaware Rules of Evidence, which is similar to New Hampshire Rule 502(b). In analyzing that rule, the Court reasoned that in order for the common interest doctrine to apply, the communication must be shared with an attorney. Specifically, the Court said as follows:

> ***4** [T]o be eligible for continued protection, the communication must be shared with the *attorney* of the member of the community of interest. *Cf. Ramada Inns, Inc. v. Dow Jones & Co.*, 523 A.2d 968, 972 (Del. Super. Ct. 1986) (emphasizing that the relevant Delaware evidentiary rule protects communications disclosed to an attorney). Sharing the communication directly with a member of the community may destroy the privilege. Second, all members of the community must share a common legal interest in the shared communication. Rice § 4:35. Delaware Rule of Evidence 502(b)(3), which sets out the State's version of the community-of-interest privilege, incorporates both requirements (that the clients' separate attorneys share information and that the clients have a common legal interest):
>
> > A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications[,] made for the purpose of facilitating the rendition of professional legal services to the client… [,] by the client or the client's representative or the client's lawyer

> or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest.

Del. R. Evid. 502(b)(3).

> The requirement that the clients' separate attorneys share information (and not the clients themselves) derives from the community-of-interest privilege's roots in the old joint-defense privilege, which (to repeat) was developed to allow *attorneys* to coordinate their clients' criminal defense strategies. *See* *Chahoon v. Commw.*, 62 Va. 822, 21 Gratt. 822, 1871 WL 4931, at *11 (1871). Because the common-interest privilege is an exception to the disclosure rule, which exists to prevent abuse, the privilege should not be used as a *post hoc* justification for a client's impermissible disclosures. The attorney-sharing requirement helps prevent abuse by ensuring that the common-interest privilege only supplants the disclosure rule when attorneys, not clients, decide to share information in order to coordinate legal strategies.

Id. at 364–65 (emphasis in the original).

To the chagrin of many commentators, numerous federal courts have cited the above proposition of law (albeit, in dictum) even though it was premised upon a Delaware evidentiary rule. *See* William T. Barker, *The Attorney-Client Privilege, Common-Interest Arrangements, and Networks of Parties with Preexisting Obligations*, 53 Tort Trial & Ins. Prac. L.J. 1, n. 213 (2017) (collecting and commenting on the following relevant cases: *Shipyard Assocs., L.P. v. City of Hoboken*, No. 14-1145 (CCC), 2015 U.S. Dist. LEXIS 100927, at *15–16, *20 (D.N.J. Aug. 3, 2015) (refraining from ruling on common interest); *In Re: Plasma-Derivative Protein Therapies Antitrust Litig.*, No. 09 C 7666, No. 11 C 1468, 2013 U.S. Dist. LEXIS 29624, at *13 (N.D. Ill. Mar. 4, 2013) (citing *Teleglobe* on this point but never relying on it); *McLane Foodservice, Inc. v. Ready Pac Produce, Inc.*, No. 10-6076 (RMB/JS), 2012 U.S. Dist. LEXIS 76343, at *12-13 (D.N.J. Jun. 1, 2012) (summarizing *Teleglobe*); *In re Processed Egg Prods. Antitrust Litig.*, 278 F.R.D. 112, 118(E.D. Pa. Oct. 19, 2011) (summarizing *Teleglobe*); *D&D Assocs., Inc. v. Bd. of Educ. of N. Plainfield*, No. 03-1026 (MLC), 2011 U.S. Dist. LEXIS 51853, at *13–14 (D.N.J. May 13, 2011) (citing *Teleglobe* on this point but not relying on it); *Munich Reins. Am., Inc. v. Am. Nat'l Ins. Co.*, No. 09-6435 (FLW), 2011 U.S. Dist. LEXIS 41826, at 63–64 (D.N.J. Apr. 18, 2011) (summarizing *Teleglobe*); *Robert Bosch LLC v. Pylon Mfg. Corp.*, 263 F.R.D. 142, 146 (D. Del. 2009) (citing *Teleglobe* on this point but rejecting some privilege claims on other grounds and sustaining other claims without discussing this issue); *In re Ginn-LA St. Lucie Ltd.*, 439 B.R. 801, 805 & n.4 (Bankr. S.D. Fla. Nov. 9, 2010) (quoting *Teleglobe* and Restatement on this point in describing common interest doctrine, but only as background for another issue).

***5** In fact, nearly all the federal cases cited by High Liner (USA) contain dictum asserting that the communication must be made to an attorney to satisfy the rule. *See* *BDO Seidman, LLP*, 492 F.3d at 815 (citing proposed Rule 503(b) and stating that in order for the attorney-client privilege to attach, the communication in question must be made "to an attorney"); *In re Bevill, Bresler, & Shulman Asset Mgmt.*, 805 F.2d 120, 126 (3d. Cir. 1986) ("The joint defense privilege protects communications between an individual and an attorney for another when the communications are part of an on-going and joint effort to set up a common defense strategy." (quotation omitted)); *In re Tyco Int'l, Inc.*, No. MDL XXXXXX-B, Civ. 0-352–B, 02-1357–B, 2004 WL 556715, *1, *2 (D.N.H. Mar. 19, 2004) ("As the First Circuit has recognized, the common interest exception exists to permit lawyers for parties bound by a common interest to work together to achieve a shared goal." (citation omitted)); *In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001) ("The joint defense privilege protects communications between an individual and an attorney for another when the communications are part of an ongoing and joint effort to set up a common defense strategy." (quotation omitted)); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d. Cir. 1989) ("The common interest rule serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." (citation omitted));

Haines v. Liggett Group Inc., 975 F.2d 81, 94 (3d Cir. 1992) ("This joint defense privilege enables counsel for clients facing a common litigation opponent to exchange privileged communications and attorney work product in order to adequately prepare a defense without waiving either privilege." (citation omitted)); *Dexia Credit Local v. Rogan*, 231 F.R.D 268, 273 (N.D. Ill. 2004) ("Thus, where persons confer with counsel for the purpose of advancing their joint defense, the conference is sealed from outside view." (quotations omitted)).

However, as the Court observed while conducting its own research, there are numerous federal cases which hold that clients may communicate amongst each other on matters of common interest without waving the attorney client privilege. Take, for example, *Crane Sec. Techs., Inc. v. Rolling Optics, AB*, 230 F. Supp. 3d 10, 22 (D. Mass. 2017). In that case, the Massachusetts District Court held that "[t]he fact that communications are between nonlawyers does not per se waive the privilege." *Id*. at 21–22. The court described this holding as "uncontroversial" and cited a number of district court cases to support its reasoning. *See id*. at 22 ("In *In re Prograf Antitrust Litigation*, No. 1:11-md-02242-RWZ, 2013 WL 1868227, *1, 3 (D. Mass. May 3, 2013), the idea that non-lawyers could discuss or relay legal advice without copying an attorney was so uncontroversial that Judge Zobel, incorporating it into her ruling, did not even discuss it. Other courts have held the same."); *see id*. (citing *Gucci America, Inc. v. Gucci*, 2008 WL 5251989, *1 (S.D.N.Y. Dec. 15, 2008) (if privileged information is shared between parties that have a common legal interest, "the privilege is not forfeited even though no attorney either creates or received that communication"); *INVISTA North America S.a.r.l. v. M&G USA Corp.*, 2013 WL 12171721, *1, *5 (D. Del. Jun. 25, 2013) (common-interest doctrine protects communications between non-attorneys); *IBJ Whitehall Bank & Trust v. Cory & Associates, Inc.*, 1999 WL 617842, at *6-7 (N.D. Ill. Aug. 12, 1999) (attorney-client privilege exists for communications between non-lawyers: "[s]o long as the parties keep the advice within their circle of common interest, the privilege is not waived"); *McCook Metals LLC v. Alcoa Inc.*, 192 F.R.D. 242, 255 (N.D. Ill. Mar. 2, 2000) ("[I]t appears implicit in present day litigation with multiple attorneys required for proper representation that attorneys must be allowed to confer with each other regarding the representation of a client on a privileged basis in the same way that clients must be able to discuss the advice of counsel amongst themselves on a privileged basis" (citations omitted)); *see also Heidelberg Harris, Inc. v. Mitsubishi Heavy Industries, Ltd.*, No. 95 C 0673, 1996 WL 514997, *1 (N.D. Ill. Sept. 6, 1996) ("Of necessity, communications between their respective counsel - and between themselves as communicators of their counsels' opinions are well within the common legal interest extension of the attorney-client privilege."); *cf.* *United States v. Gotti*, 771 F. Supp. 535, 545 (E.D.N.Y. July 19, 1991) ("The defendants would extend the application of the joint defense privilege to conversations among the defendants themselves even in the absence of any attorney during the course of those conversations. Such an extension is supported neither in law nor in logic and is rejected.").

***6** Academics are as divided as the federal courts on this issue. Some have advocated for a broad rule that allows for similarly-situated parties to openly share the maximum amount of information possible without fear of compromising their respective legal strategies. *See* Barker, *supra* at 22-23 (discussing the opinion of Professor James Fischer). Others have argued that such a broad rule would do serious damage to the truth-finding mission of the justice system. *See id*. at 23 (discussing the opinion of Professor Gladys Giesel); *see also id*. ("[N]o one has ever made a convincing argument that strategy sessions among co-defendants produce a benefit to the legal system that outweighs the cost of the loss of evidence to the courts." (quoting *24 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure* § 5505, nn.2–3 (1986)); Katherine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. Pub. Int. L.J. 49, 79–80, n. 114 (2005) (arguing that "[e]xcluding direct client-to-client communications from a uniform common interest doctrine will uphold the boundaries of the attorney-client privilege and further the underlying search for truth.").

Thankfully, the Court need not become embroiled in this legal quagmire, as the requirements of New Hampshire Rule of Evidence 502(b) are unambiguous. "When interpreting a rule of evidence, as with a statute, [the Court] will first look to the plain meaning of the words." *State v. Willis*, 165 N.H. 206. 212 (2013). The Court finds that Rule 502(b) clearly states that a client may prevent the disclosure of a confidential communication made by him, his representative, his lawyer, or a representative of his lawyer; *to a lawyer* or an agent thereof "representing another party in a pending action and concerning a matter of common interest therein." *N.H. R. Evid.* 502(b). Thus, under the New Hampshire rule, there is no exception to the waiver of attorney-

client privilege when a client communicates otherwise privileged information to a co-party. Schaffzin, *supra* at 79–80, n. 114 (listing New Hampshire, and other states which have a similar evidentiary rule, and noting that the plain language of those rules suggests that those jurisdictions would not extend the common interest doctrine to direct client-to-client communications made outside the presence of counsel). This interpretation is in accord with well-settled New Hampshire law which holds that evidentiary privileges should be construed narrowly. *See Willis*, 165 N.H. at 212.

Put another way, if the drafters of the rule had intended to protect client-to-client communications, they would have worded the rule to allow a client to prevent the disclosure of a confidential communication made by him, his representative, his lawyer, or a representative of his lawyer, to another client or his agent(s) involved in a pending action and concerning a matter of common interest therein. *See Restatement*, *supra* § 76(1) ("If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, *a communication of any such client that otherwise qualifies as privileged* … that relates to the matter is privileged as against third persons...." (emphasis added)). Because they did not, the Court finds that the communications at issue are not privileged under the rule. *See N.H. R. Evid.* 502(b); Gordon J. MacDonald, *Wiebusch on New Hampshire Civil Practice and Procedure* § 22.21, [11] (4th Ed. Matthew Bender & Co.) (listing the 17 categories of confidential communications protected by the rule, with the one suggested by High Liner (USA) not being listed).

Although very few courts have addressed this precise issue, *see* Schaffzin, *supra* at 79 (noting as much), the Court finds support for its ruling in the Supreme Court of Texas' decision in *In re XL Specialty Ins. Co.*, 373 S.W.3d 46 (2012). In that case, the court construed an evidentiary rule which is substantively identical to New Hampshire Rule of Evidence 502(b). *Compare N.H. R. Evid.* 502(b) ("by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein"), *with Tex. R. Evid*. 503(b)(1)(C) ("by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein").

***7** The relevant facts of that case are as follows: Jerome Wagner, an employee of a Cintas Corporation ("Cintas"), sought workers compensation benefits from Cintas' insurance provider ("XL"). *In re XL Specialty Ins. Co.*, 373 S.W.3d at 48. A claims adjuster with XL's third party administrator denied Wagner's claim. *Id*. During the course of resulting administrative litigation, XL's outside counsel sent communications about the status of the administrative proceedings directly to Cintas. *Id*. In a subsequent lawsuit, Wagner sought those communications. *Id*. In finding that the attorney-client privilege did not shield them, the court held that "the communications were between XL's lawyer and a third party, Cintas, who was not represented by XL's lawyer (or any other lawyer) and was not a party to the litigation or any other related pending action." *Id*. at 53. After recognizing that Cintas may have shared a common interest with XL in the administrative proceeding, the court then held that "no matter how common XL's and Cintas's interest might have been, [the Texas] rule requires that the communication be made to a *lawyer or her representative* representing another party in a *pending action*" and therefore the privilege did not apply. *Id*. at 54 (emphasis in the original, citation omitted). Given the textual similarities in the Texas and New Hampshire rules, the Court is persuaded by this holding. Schaffzin, *supra* at 79, n. 114 (listing Texas and New Hampshire among the states unlikely to permit communications directly among clients given the language of their evidentiary rules); *Selby v. O'Dea*, 90 N.E.3d 1144, 1155 (Ill. App. Ct. 2017) (listing Texas and New Hampshire as states which have adopted rule 502(b)(3) of the Uniform Rules of Evidence).

For the foregoing reasons, the Court finds that the common interest rule does not apply to the email communications passed between Galleria and Yu because they were not made to "a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein." *See* N.H. R. Evid. 502(b). Accordingly, the plaintiff's motion to compel the production of those electronic communications is GRANTED.

So Ordered.

8/14/2018

DATE

<<signature>>

N. William Delker

Presiding Justice

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Mason v. OSR Open Sys.

Superior Court of New Hampshire, Merrimack County

May 24, 2017, Decided

No. 218-CR-2016-CV-1294

Reporter
2017 N.H. Super. LEXIS 12 *

W. Anthony Mason v. OSR Open Systems, Inc., Daniel D. Root and Peter J. Viscarola

Core Terms

Format, Native, email, metadata, documents, Principles, electronic, threading, files, discovery, features, analytics, parties, protective order, Stored, privileged information, control group, de-duplication, duplicate, display, kCura

Judges: **[*1]** Richard B. McNamara, Presiding Justice.

Opinion by: Richard B. McNamara

Opinion

ORDER

Plaintiff W. Anthony Mason ("Mason") has brought an action against OSR Open System Resources, Inc. ("OSR"), Daniel D. Root ("Root") and Peter G. Viscarola ("Viscarola") alleging that he was been an owner-employee of OSR for 22 years of the Company's 23 years of existence, and that he was wrongfully terminated by the Defendants.[1] Discovery has begun, and both parties believe that much of the discovery will be produced as electronically stored information ("ESI"). Plaintiff has filed a Motion requiring production of all ESI in Native Format[2]. Defendants have objected, and moved for a protective order under *Superior Court Rule 29 (a)*, alleging that production in Native Format is unduly burdensome and seeking that they be permitted to produce all electronic discovery in TIFF[3] or TIFF+[4] format. The Court held evidentiary hearings at which experts for both parties testified as to the need for a Native Format production and whether such a production is unduly burdensome. After considering the evidence and briefing, the Court orders that the Defendants shall produce all ESI in TIFF+ format, and need not produce the ESI requested in Native Format.

I

The principles **[*2]** governing production of ESI are set forth in *Superior Court Rule 25*. Under the Rule, parties have a duty to meet and confer about preservation of ESI promptly after litigation begins. *Superior Court Rule*

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[1] The Complaint contains 6 Counts. Count I is a contract claim, alleging breach of the employment agreement against OSR. Count II is a wage claim, alleging failure to pay wages due against all Defendants. Count III is a breach of contract claim for severance benefits against OSR. Count IV is a claim for unjust enrichment against OSR. Count V is a claim of breach of fiduciary duty against the other 2 shareholders, Viscarola and Root, alleging that Mason was a minority shareholder and that the other 2 shareholders, as majority shareholders, owed him fiduciary duties which they breached. Count VI seeks declaratory judgment that certain restrictive covenants running in favor of OSR are invalid.

[2] "Native Format" documents have an associated file structure defined by the original creating application. The file structure is referred to as the native format of the document. See the Sedona Conference Glossary: E-discovery & Digital Information Management, 15 Sedona Conf. J. 305, 341 (2014).

[3] TIFF is an abbreviation for "Tagged Image File Format").

[4] TIFF+ files consist of images folder containing Bates stamped TIFF images, a "TEXT" folder containing full body text files for each document and two separate "load files". One "load file" is referred to as an .opt file, which is a pointer to the "IMAGES" folder and the other is a "dat. file" which includes the data that corresponds to each image.

25 (a). A request for ESI must describe with reasonable particularity each item or category of items to be produced, and state the format in which the production is to be made. Superior Court Rule 25 (e). Requests for ESI must be made in proportion to the significance of the issues in dispute. Superior Court Rule 25(c) provides that if the request for ESI is considered to be out of proportion to the issues in the dispute, at the request of the responding party, the court may determine the responsibility for the reasonable cost of producing such ESI. The Comments to the Rule note that it is similar to Federal Rule of Civil Procedure 34.

The Defendants believe they should produce the ESI requested in a TIFF+ format. They assert that production in Native Format will require twice the expense of a TIFF+ production, because of the necessity of reviewing metadata for privileged documents. Defendants also argue that production of documents in Native Format could result in manipulation, because the documents are "live documents" and therefore subject to modification.

Plaintiffs insist that Native Format is the usual manner **[*3]** of production, and that their review of ESI will be limited unless such a production is made. They deny that production in Native Format will result in an increased expense to Defendants, and that the issue of document modification is not an issue, because they propose that the Defendants make a separate TIFF production, which cannot be altered. The law concerning production of ESI is growing rapidly throughout the United States, and is still relatively undeveloped in this State. Because there is little State law governing production of ESI, the parties cite federal cases and texts extensively. Both sides refer to federal law and to the *Sedona Principles, Best Practices Recommendations and Principles for Electronic Document Production*, (2nd ed. 2007) (Public Comment Version March, 2017) (Hereafter "*Sedona Principles* 2nd or 3rd Edition") to support their positions.

A

Plaintiff first argues that Rule 25(e), like Federal Rule of Civil Procedure 34 (b) (1) (C) allows a plaintiff to specify the format in which production should be made. Morgan Hill Concerned Parents Association v. California Department of Education, 2017 U. S. Dist. LEXIS 14983 (E.D. Cal. Feb. 1, 2017) *9. But the fact that a requesting party may specify the format does not mean that the producing party must necessarily comply with the format request. Rule 25(f) specifically provides that a party may object to a request **[*4]** for ESI. As Defendants note, there is ample authority for the proposition that a court will deny a Native Production request if a party shows that the production would be unduly burdensome. *See, e.g.* In re Porsche Cars of N. Am., Inc. Plastic Tubes Product Liability Litigation, 279 F.R.D. 447, 449-450 (S.D.Ohio 2012). Thus, the Court must consider the merits of the parties' positions.

B

Defendants' principal concern is that production in Native Format in this case will lead to disclosure of metadata. An electronic document or file usually includes not only the visible information but also hidden text, formatting codes, formulaic and other information associated with the file. These types of ancillary information are all called metadata; but there are important distinctions between different types of metadata. *Application metadata* is created as a function of the application software used to create the document or file. Common application metadata instructs the computer how to display the document (for example, the proper fonts, spacing, size and color). Other application metadata may reflect modifications in the document, such as prior edits or editorial comments. This information is embedded in the file it describes and moves with the file when it is moved or copied. *Sedona Principles* (2nd ed. 2007) **[*5]** p. 185.

System metadata reflects information related by the user or by the organization's information management system. Such information may track the title of the document, the user identification of the computer that created it, the assigned data owner and other document profile information. System metadata is generally not embedded within the file it describes, but stored externally elsewhere on the organizations information management system. Metadata is discoverable. *Sedona Principles* (2nd ed. 2007) p. 185-186. Because metadata can show changes made to a document during its drafting, as well as comments made by various reviewers of the document, its disclosure can therefore lead to disclosure of attorney-client privileged documents. New Hampshire Bar Association Ethics Committee Advisory Opinion #2008-2009/4, *Disclosure Review and Use of Metadata in Electronic Materials*.

Defendants do not claim that metadata is beyond the pale of discovery. But according to Defendants, the cost of production would be doubled if they are required to produce in Native Format, because they would need to review the metadata embedded in the files produced for privilege.

C

Defendants challenge the proposition **[*6]** that review of the metadata in a Native Production format would be necessary for two reasons. First, they argue that the fact that the bulk of the ESI production is email makes the issue of analysis for privilege straightforward. According to Plaintiff, a privileged document will reflect the fact that the document was sent to or received from an attorney. However, Defendants point out that whether the document may not have been sent to or from an attorney is not the end of the issue, because the document may contain attachments which have been reviewed or commented on by an attorney. Moreover, there are metadata files which could be privileged but whose existence cannot be determined from the face of the document. As pointed out in Defendants' Response to Plaintiff's Post Hearing Motion, reviewing metadata allows someone to see that a custodian stored certain emails (which may not otherwise be privileged) in a sub folder in Microsoft Outlook entitled, for example, "for counsel review". This could be an email that was sent or received long before the "for counsel review" subfolder was created, and therefore limiting a Native Production to a certain time frame would not eliminate the **[*7]** burden of reviewing the metadata produced.

Plaintiff also argues that there is relatively little privileged information which would need to be reviewed, because he was in OSR's control group until he was fired, only one year before litigation began, and therefore would have access to privileged information. The New Hampshire Supreme Court has never considered the issue of whether or not former employees who once had access to privileged information are entitled to it in subsequent litigation; however, "an evolving line of cases holds that they do not". E. Epstein, *The Attorney-Client Privilege and the Work Product Doctrine*, (5th Ed. ABA 2007) p. 174; see also 2012 Supp. pp. 49-52. The privilege is that of the corporation and the majority of courts hold that "the fact that a former employee had access to such privileged communications and actually saw the very disputed documents in the course of employment will not function as a waiver sufficient to give access to the privileged communications in the course of litigation". E. Epstein, *The Attorney-Client Privilege and the Work Product Doctrine*, (5th Ed. ABA 2007) p. 174. As the court noted in *Dexia Credit Local v. Rogan, 231 F.R.D. 268, 277 (N. D. Illinois 2004)* "thus, once Mr. Rogan's control group status **[*8]** terminated so did his right of access to privileged documents of the corporation... People may come and go within a control group, but a corporation as a litigant has a legitimate expectation that a person who leaves the control group were no longer be privy to privileged information". See also *Gilday v. Kenra, 2010 U.S.Dist. LEXIS 106310 at *7 (S.D. Ind. Oct. 4, 2010)*; *Genova v. Long Peaks Emergency Physicians*, 72 P.3d 454, 462-463 (Colo. App. 2003). The LLC is the holder of the privilege, not the individual members of the LLC; therefore, the fact that Mason was once a member of the control group of the LLC does not mean that the LLC is not entitled to assert its separate attorney-client privilege. *Montgomery v. eTreppid Techs, LLC, 548 F. Supp. 2d 1175, 1184-86 (D.Nev. 2008)*. The Court must therefore consider whether production is appropriate applying the standards of *Superior Court Rule 25*.

II

Plaintiff's principal argument is that his counsel will not be able to use the features on their discovery software unless the production is made in Native Format. He makes no claim that it is necessary to review metadata because of the potential for discovery abuse by Defendants. Compare *John B. v. Goetz, 879 F.Supp.2d 787 (M.D.Tenn. 2010)*.

Mason's counsel, Sheehan Phinney, Bass & Green ("Sheehan") uses a ESI discovery program called Relativity which is produced by company called kCura. Sheehan's Manager of Electronic Discovery Services, Charles Stewart ("Stewart") has been **[*9]** certified as a Relativity Administrator by kCura. in his affidavit in support of Mason's Motion for an Order Requiring Production of Electronically Stored Information in Native Format (hereafter "Motion to Produce"), Stewart described three important features which are contained in Relativity:

> 1. *De-duplication*: ESI productions usually contain duplicate documents such as an email sent to multiple persons. If an email sent to multiple persons is selected from each person's mailbox, the production will contain several copies of the same email. Relativity identifies duplicates and marks them appropriately so the reviewing attorneys need only review the duplicated email once.
>
> 2. *Email threading*: Relativity identifies all emails in a chain and that allows the program to show only those emails with unique content-typically, the last email of each branch of the chain of emails that might have been split off from a main thread or which may contain unique attachments. The software also identifies what it calls "duplicate spares" within email thread which are essentially

emails with duplicate content found elsewhere.

3. *Analytics*: Relativity contains analytic tools which allow reviewing attorneys **[*10]** to recognize patterns in the ESI, identify related documents, conceptually search documents and prioritize the most important documents for review.

Pltf.'s Mot. to Prod., Ex.2, Stewart Aff., ¶ 11.

Stewart stated unequivocally in his Affidavit of February 27, 2017, filed in support of Mason's Motion to Produce that "Relativity cannot and does not use TIFF files for de-duplication, e-mail threading, or analytics". *Pltf.*'s Mot.to Prod., Ex.2, Stewart Aff., ¶ 12.

Defendants objected to the Motion to Produce and filed a Combined Memorandum in support of their Motion for Protective Order and Objection to Plaintiff's motion for Order Requiring Production of Electronically Stored Information in Native Format (hereafter "Memorandum in Support of Protective Order"). Appended to their Memorandum in Support of Protective Order, Defendants appended an affidavit of Brandon M. Mack, Esq. ("Mack"). Mack is a licensed attorney employed by Epiq Systems, and is the Director of Analytics and Advanced Technologies which he described in his affidavit as a global legal services provider with a primary business focus on e-discovery services. Mack's Affidavit recited that Epiq offers kCura's Relativity program **[*11]** as a hosted data management and review solution for its clients. He stated that he is a Relatively Certified Administrator, a Relativity Certified Expert and a certified Relativity Expert Analyst. He stated in his affidavit that the format proposed by Defendants, TIFF+ would allow for full functionality of Relativity's de-duplication, email threading and analytics functions. Mack Aff. ¶14-15.

Because of the factual dispute, the Court held a hearing on the Motions on April 3, 2017, and Mack testified at that hearing in accordance with his affidavit. In addition, he testified that, contrary to Plaintiff's representations, Native Format production is not the industry standard, and that in his experience only about 5 % of ESI productions are in Native Format. His testimony was consistent with *Sedona Principles* (3rd ed. 2017) which notes that the most common way to produce ESI for more than a decade has been create a static electronic image in TIFF or PDF[5] file format. *Sedona Principles* (3rd ed. 2017) Comment 12. b., p. 89.

[5] PDF stands for Adobe "Portable Document File".

Following the evidentiary hearing on April 3, 2017, Mason filed a pleading captioned Plaintiff's Post Hearing Memorandum in Support of his Motion for Order Requiring Production **[*12]** of Electronically Stored Information in Native Format and his Objection to Defendants' Motion for Protective Order (hereafter "Post-Hearing Memo") with a supporting of Affidavit of Charles Stewart (hereafter "Second Affidavit of Stewart). Stewart's Affidavit stated that in 3 recent cases involving New Hampshire law firms, the parties produced ESI in native format. While the Court credits the testimony, it is not persuasive; it is simply a good example of the logical fallacy inherent in small sample inductive reasoning[6].

Stewart also stated in his Second Affidavit that after receiving the Defendant's Memorandum he conducted in additional investigations of the claims made by Defendants and their supporting affidavits by, among other things, consulting with kCura, the company that created and markets Relativity. His Second Affidavit stated, in relevant part, that after consulting with kCura, he agreed that Relativity's de-duplication, and analytical features will work with files produced in the TIFF format proffered by Defendant's counsel. Second Affidavit of Stewart, ¶ 3. However, he opined that Native Format files are preferable because using them allows use of a feature of Relativity **[*13]** called Viewer Mode. He also stated that 2 other key features of Relativity, keywords searching and persistent highlighting, features which automatically highlight words and phrases within a document, are were available in plain text mode in a TIFF production, which makes the features less efficient. Second Affidavit of Stewart, ¶ 3. He also claimed that email threading will not function in certain circumstances, primarily involving whether relevant header fields are displayed in the TIFF image. Second Affidavit of Stewart, ¶ 3 (i) (ii). The Court scheduled a further evidentiary hearing, which was held on May 18, 2017.

Stewart testified in accordance with his Second Affidavit. Plaintiff introduced several exhibits which purported to show that email threading did not function on documents produced in TIFF format by Defendants[7]. However, Mack testified credibly that email threading

[6] The testimony is not much different than saying "I saw 3 automobiles; they were all black; therefore all automobiles are black".

[7] It appears that the parties, working cooperatively agreed to exchange documents in TIFF format in advance of an upcoming scheduled mediation.

should work on Relativity unless there are differing versions of the email, one of which is redacted or if the file is loaded improperly. The Court is not persuaded by the few documents produced at the evidentiary hearing that Plaintiff will not be able to utilize Relativity's email threading features; it is **[*14]** another example of the fallacy of small sample inductive reasoning.

The Court does credit Stewart's testimony that Viewer Mode will not work unless there is a Native Production. However, the Court also credits Mack's testimony that Viewer Mode is most commonly used by users of Relativity for reviewing their own ESI. Moreover, it appears that while persistent highlighting and keyword searching may not be as easy to use in a TIFF production as in a Native Format production, they are still available to Plaintiff.

III

The Court must balance the interests of the parties in this case. It is true that Defendant's concern that documents produced in Native Format could be altered would not present a significant concern if the Court accepted Plaintiff's proposal. The protocol suggested by the Plaintiff calls for production of Native Format files with simultaneous production of TIFF files, with Bates numbers appended, to be used for depositions, hearings, pleadings and trial. But *Superior Court Rule 25(h)* specifically provides that a party is not required to produce ESI in more than one format. Therefore, at a minimum, a Native Format production will require the expense of preparation of files with Bates numbering for use **[*15]** at depositions, hearings and trial.

A more significant issue is whether or not Native Format production is necessary in order for the litigation to proceed efficiently. The Court is guided by the *Sedona Principles* 2nd and 3rd Editions. Principle 12 of both the 2007 and 2017 Editions provide essentially that production of ESI should be made in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the ESI and the proportional needs of the case. But to be "reasonably usable", ESI need not necessarily be produced in Native Format. *Sedona Principles*, (3rd ed. 2017), Comment 12. b. i. p. 90. In considering how production should be made, a court should consider:

> (a)the forms most likely to produce the information needed to establish the relevant facts related to the parties claims and defenses; (b) the need to receive ESI in particular formats in order to functionally access, cull, analyze, search and display the information produced; (c) whether the information sought is reasonably accessible in the forms requested; (d) the relative value, and potential challenges created by responding with ESI requested format; and (e) the requesting party's **[*16]** own ability to effectively manage, reasonably use and protect the information in the forms requested.

Sedona Principles, Comment 12.b. (3rd Ed., 2017) p. 89.

Production in either Native Format or TIFF+ will produce the information needed to establish the relevant facts. Plaintiff is not entitled to privileged information; the issue here is whether or not ESI in a TIFF+ format will allow Plaintiff to "functionally access, cull, analyze search and display the information produced". *Sedona Principles*, Comment 12.b. (3rd Ed., 2017) p. 89. The Court finds that the critical features of Relativity, de-duplication, email threading and analytics can be used if Defendants produce in TIFF+ format. "Typically, a requesting party does not need ESI produced in Native Format in order to access, cull, analyze, search and display the ESI". *Sedona Principles*, (3rd Ed. 2017), Comment 12. b., p. 89.

It is true that the Viewer Mode will not be available to Plaintiff. But as Mack credibly testified, Viewer Mode is generally utilized by Relativity users to analyze their own ESI. The information sought is therefore reasonably accessible to the Plaintiff. While Native Format may be an advantage to Plaintiffs, **[*17]** it will result in extraordinary expense to Defendants, literally doubling the cost of production. In this case, requiring production of files in Native Format "may cause difficulties in reviewing the material for responsiveness and for privilege before production. In addition, producing information in native format presents challenges regarding making a record of what was produced "and may make the electronic data manipulable in ways that could raise issues of authenticity". Wright & Miller 8B *Fed. Prac. & Proc.*, § 2219 (2010).

Plaintiffs have not explained why the relative value to them of the ESI production in Native Format outweighs the cost to the Defendants. The Court notes that under *Rule 25(c)* the Court has authority to shift the cost of production, but Plaintiffs have not briefed the issue of whether or not, in exchange for obtaining Native Format documents, the Court should require cost shifting. Compare *Covad Communs. Co. v. Revonet, Inc., 254 F.R.D. 147 (D.D.C. 2008)*. On this record, the Plaintiff's

Motion to Produce must be DENIED and Defendants' Motion for Protective Order must be GRANTED. Defendants shall produce all responsive documents in TIFF+ format.

SO ORDERED

5/24/17

DATE

/s/ Richard B. McNamara

Richard B. McNamara

Presiding Justice

End of Document

2007 WL 811734 (N.H.Super.) (Trial Order)
Superior Court of New Hampshire.

William D. and Barbara S. Totherow,
v.
Rivier COLLEGE, William J. Farrell and Therese Larochelle.

No. 05-C-296.
February 20, 2007.

West Headnotes (1)

[1] **Attorneys and Legal Services** Conduct as to Adverse Parties and Counsel

Counsel for plaintiff in wrongful termination action against college were entitled, consistent with Rules of Professional Conduct, to conduct ex parte interviews with employees of college who were not members of college's control group, that is, current employees of college other than those high level management officials responsible for or significantly involved in making of final decisions with regard to college's legal position in instant litigation.Rules of Prof.Conduct, Rules 1.13, 4.2.

Amended Order on Motion Authorizing Communications With Employees of Defendant Rivier College

Robert J. Lynn, Chief Justice.

Lynn, C.J.

The plaintiff, William D. Totherow, a long time professor of chemistry at defendant Rivier College, was discharged from his employment in 2003. Claiming that his discharge was improper, Totherow thereafter instituted this action against the college and two of its officials, President William J. Farrell and Academic Vice President Therese Larochelle. The writ contains counts for breach of contract, violation of the covenant of good faith and fair dealing, defamation, negligent and intentional infliction of emotional distress and enhanced compensatory damages. Plaintiff Barbara Totherow, the wife of William, also has made a claim for loss of consortium. Presently before the court is plaintiffs' motion for an order authorizing their counsel to conduct ex parte interviews (i.e., without prior notice to the defendants) of "lower echelon employees [of Rivier College] who are not representatives of the organization." [1] For the reasons stated below, I grant the motion in part and deny it in part.

Among the "lower echelon employees" plaintiffs' counsel seek permission to contact and interview on an ex parte basis are current and former members of the college's Rank & Tenure Committee and Ad Hoc Hearing Committee. According to plaintiff, both of these committees played an advisory, but non-binding, role in the internal proceedings undertaken by the college prior to the termination of Professor Totherow. In their response to the motion, the defendants, without specifying which employees fall within this designation, contend that Rule 4.2 prohibits plaintiffs' counsel from having ex parte contact with any current or former "members of the administration" of Rivier College. [2]

As amended effective July 1, 2006 [3] , New Hampshire Rule of Professional Conduct 4.2 states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 1.2(f)(1) is considered to be unrepresented for purposes of this Rule, except to the extent the limited representation lawyer provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation lawyer.

This rule traces its origins to the American Bar Association Canons of 1908, and was previously embodied in Disciplinary Rule ("DR") 7-104(A)(1) of the 1970 Model Code of Professional Responsibility (which in 1986 was replaced by the Rules of Professional Conduct). The rule has been adopted in one form or another by federal and state courts throughout the country. The purpose of the rule is "to protect the attorney-client relationship and to prevent clients from making ill-advised statements without counsel of their attorneys." *Clark v. Beverly Health & Rehabilitation Services, Inc.,* 797 N.E.2d 905, 909 (Mass. 2003) (quoting *Messing, supra,* 764 N.E.2d at 833-34)); accord. *United States v. Jamil,* 707 F.2d 638, 646 (2d Cir. 1983) (rule justified as effort to prevent skilled counsel from taking advantage of a represented person through use of "artfully crafted questions").

Although application of the rule is relatively straightforward when the represented person is an individual, the opposite is true when the one represented is a corporation or other collective organization. The difficulty arises, of course, because an organization can act only through it agents and employees, and the critical issue therefore is determining which agents or employees of the organization fall within the protection of the rule. A review of the decisions that have grappled with this issue reveals that courts have adopted no less than five different formulations, as specified below.

Control Group Test: This test is the narrowest and includes within its coverage the fewest number of organization employees. The control group is defined as:

> [T]hose top management persons who [have] the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis for any final decision.

Fair Automotive Repair, Inc. v. Car-X Serv. Sys., Inc., 471 N.E.2d 554, 560 (Ill.App. 1984). *See* *Klier v. Sordoni Skanska Construction Co.,* 766 A.2d 761, 766-70 (N.J.App. 2001). [4]

Blanket Ban: This approach represents the other extreme; it bans ex parte contact with all current and (under some formulations) former employees of the corporate adversary. Courts which have adhered to this view have tended to rely on the United States Supreme Court's decision in *Upjohn Co. v. United States,* 449 U.S. 383 (1981), which rejected the "control group" test in the attorney-client privilege context, and held that the privilege can apply to communications between lower echelon corporate employees and the corporation's lawyer. *See Young v. Plymouth State College,* Civil No. 96-75-SD (Oct. 22, 1998)(Devine, S.J.); *Public Service Elec. & Gas Co. v. Associated Elec. & Gas, Inc.,* 745 F.Supp. 1037,1039 (D.N.J. 1990).

Managing/Speaking Test: The managing/speaking test holds that the prohibition on ex parte contact applies only to those agents of the corporation who, under the applicable substantive law, have the legal authority to speak for and bind the corporation. The leading case authority for this approach is *Wright by Wright v. Group Health Hospital,* 691 P.2d 564 (Wash. 1984). *See also* *Palmer v. Pioneer Inn Associates, Ltd.,* 59 P.3d 1237, 1247-49 (Nev. 2002). [5]

Alter Ego Test: This test is similar to but slightly broader than the Managing/Speaking Test. It encompasses within the ambit of Rule 4.2 those employees or agents of a represented organization (1) whose acts or omissions have the legal power to bind the organization in the matter, (2) whose acts or omissions are imputed to the organization for the purposes of determining its liability, or (3) who are responsible for implementing the advice of the organization's lawyer. The leading case supporting this test is *Niesig v. Team I,* 559 N.Y.S.2d 493 (N.Y.Ct.App. 1990). *See also* *United States ex rel. O'Keefe v. McDonnell Douglas Corp.* 132 F.3d 1252 (8th Cir. 1998); *Strawser v. Exxon Co., U.S.A.,* 843 P.2d 613, 619-21 (Wyo. 1992). This test is broader than the Managing/Speaking Test in that it covers low level employees who have no authority to speak for or bind the organization, but who allegedly committed the act or omission upon which the organization's liability is based under the doctrine of respondeat superior. Under this test, ex parte contact with low level employees who are merely witnesses is not prohibited. As one court has pointed out, however, a practical difficulty with this test is that it may not be possible to determine whether a particular employee fits into the category of "mere witness" or one whose liability is imputed to the organization until after an interview of the employee is completed, and obviously a lawyer's right to conduct the interview cannot be made to turn on its outcome. *See* *Matter of Advisory Committee Opinion 688,* 633 A.2d 959, 962 (N.J. 1993).

Balancing Test: This test weighs the following factors -- (1) whether an employee's statements are likely to be admissible against the employer, (2) the employer's need to have counsel present in the particular circumstance of the case, and (3) the plaintiff's need for informal discovery -- and then makes a case by case determination of whether ex parte contact should be allowed. *See* *Curley v. Cumberland Farms, Inc.,* 134 F.R.D. 77, 82 (D.N.J. 1991); *Morrison v. Brandeis University,* 125 F.R.D. 14 (D.Mass. 1989); *Mompoint v. Lotus Development Corp.,* 110 F.R.D. 414, 418-19 (D.Mass. 1986); *Frey v. Department of Health & Human Services,* 106 F.R.D. 32,36 (E.D.N.Y. 1985).

Although the New Hampshire Supreme Court has not had occasion to address the issue of how Rule 4.2 applies in the organizational context, the existing commentary to New Hampshire's rule strongly suggests that the drafters intended to adopt the control group test. The New Hampshire Comments specifically reflect that certain language from the ABA comments to Model Rule 4.2 were eliminated by the Committee which drafted the New Hampshire rule. The New Hampshire comments state:

> The New Hampshire Committee has modified the official comment to Rule 4.2 by eliminating the following language from the comment thoughts by the ABA in August of 1983: "This rule prohibits communications by a lawyer... with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." Instead the New Hampshire Committee decided to adopt the comments originally proposed by the Kutak Committee in May of 1981.
>
> Using the example of taking a statement from the driver of a Titanic Oil gasoline truck involved in an accident, the committee felt there was nothing improper or unethical for plaintiff's counsel to take a statement from the driver even though counsel knew that Titanic Oil was represented by retained counsel. [6]

The conclusion that the drafters of New Hampshire Rule 4.2 intended to adopt the control group test is further reinforced by the fact that our rules of evidence explicitly adopt this test for purposes of applying the attorney-client privilege. *See* N.H.R. Evid. 502(a)(2) (defining "representative of a client" as "one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client"); *id.,* Reporter's Notes ("Uniform Rule 502(a)(2) adopts a definition in terms of authority to obtain or act upon the basis of legal services, the so-called 'control group' test, which the Federal Advisory Committee described as the 'most restricted position.' ... The approach of the Uniform Rule has been adopted, because it is consistent with the purpose of the privilege to encourage communications without unduly inhibiting trial preparation in the

special context of corporate activity. The 'control group' test is preferable to the principal alternative, which is that the privilege cover any employee communication to counsel directed by the employer and referring to the performance of his duties.").

Given the drafters' apparent purpose in promulgating New Hampshire Professional Conduct Rule 4.2, and in the absence of controlling precedent to the contrary from our supreme court, I apply the control group test in deciding the instant motion. Utilizing this test, I hold that plaintiffs' counsel may initiate ex parte contacts with, and may conduct ex parte interviews of, all current employees of defendant Rivier College other than those high level management officials of the college who are responsible for or are significantly involved in the making of final decisions with regard to the college's legal position in this litigation. *See* *Klier, supra,* 766 A.2d at 768. The mere fact that an employee of the college may possess factual information concerning the litigation, or even may have engaged in conduct that could be imputed to the college or upon which the college could be found liable, does not render such a person a member of the control group. *Id.* at 768-70.

However, I further hold that plaintiffs' counsel may not conduct ex parte interviews with current employees of Rivier College who either presently are members of the college's Rank & Tenure Committee or Ad Hoc Hearing Committee or were members of these committees at the time the proceedings against Professor Totherow were ongoing. Although it is true, as plaintiffs argue, that members of the foregoing committees lacked the authority to make final decisions regarding Professor Totherow's employment status, the record indicates that, at the very least, these committees played significant advisory roles to the college's top management in its decision-making on this matter. Consequently, I conclude that both committees are part of the college's control group for purposes of this litigation.

Lastly, I consider application of Rule 4.2 with respect to former employees of the college, including those former employees who may have been members of the Rank and Tenure Committee or the Ad Hoc Hearing Committee at the time those committees dealt with the Totherow matter. As to all such former employees of the college, I find the reasoning of cases such as *Clark, supra,* and *H.B.A. Management, Inc. v. Schwartz,* 693 So.2d 541 (Fla. 1997), persuasive and I therefore follow the majority view in holding that Rule 4.2 simply does not apply to former employees of an organization. Accordingly, former employees of the college may be contacted and interviewed ex parte by plaintiffs' counsel. [7]

So ordered.

February 20, 2007

ROBERT J. LYNN

Chief Justice

Footnotes

1 Although asserting their belief that they have a right to conduct ex parte interviews with lower echelon employees, plaintiffs' counsel note that if their view was later found to be incorrect they could be faced with possible sanctions for violating Rule 4.2 of the New Hampshire Rules of Professional Conduct. In order to avoid the prospect of such career-damaging exposure, counsel requests an affirmative order of approval from this court prior to undertaking said action.

2 Plaintiffs' motion suggests that the parties have engaged in a game of cat and mouse over this issue. Thus, in response to the request of plaintiffs' counsel that the defense assent to ex parte interviews, defendants' counsel have asserted that such assent cannot be provided until after plaintiffs' counsel identify the individuals they desire to interview. Not surprisingly,

plaintiffs' counsel declined this request and instead proposed that defendants' counsel identify which present or former employees of Rivier College the defendants claim are "administration members." Defendants' counsel have similarly declined to show their cards first.

3 The 2006 amendment substituted the word "person" for the word "party" in the first sentence and added the second sentence to the Rule. While it can be argued that, in some contexts, substitution of the word "person" for the word "party" reflects an intention that the amended rule prohibit ex parte contact with a broader class than the former version, courts generally have not interpreted this change to exp and the scope of the prohibition applicable to employees of a represented organization. *See* *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College,* 764 N.E.2d 825, 830-31 (2002).

4 In 1996, New Jersey adopted a more refined version of the control group formulation. It amended Rule 4.2 so as to specifically prohibit contact with a represented organization's "litigation control group." It then adopted RPC [Rule of Professional Conduct] 1.13, which states:

> For the purposes of RPC 4.2 ... the organization's lawyer shall be deemed to represent not only the organizational entity but also members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow such representation.

5 The cases purporting to apply the Managing/Speaking Test have not always reached consistent results on the issue of whether an attorney is prohibited from having ex parte contact with any agent or employee of a represented organization whose statement could merely bind the organization in an *evidentiary* sense (i.e., the employee's statement would be admissible against the organization as non-hearsay evidence under Rule of Evidence 801 (d)(2)(D)), or whether the agent or employee must have the authority to *conclusively* bind the organization. *See* *Weider Sports Equip. Co., Ltd. V. Fitness First, Inc.,* 912 F.Supp. 502, 507 n.7, 509-10 (D.Utah 1996). In its recent adoption of this test, the Nevada Supreme Court made it clear that only an employee who can conclusively *bind* the organization is included within that state's no-contact rule. *See Palmer, supra,* 53 P.3d at 1248.

6 Although the New Hampshire Supreme Court adopted the version of Rule 4.2 quoted at the beginning of this opinion in 2006, the court has not yet adopted either the revised ABA or New Hampshire comments to the rule. Thus, the existing comments quoted in the text are the ones applicable to this case. Proposed revisions to the comments are currently before the New Hampshire Supreme Court's Advisory Committee on Rules. The ABA comments to its latest (2004) version of the rule state that the rule is intended to adopt the Managing/Speaking Test. The proposed New Hampshire comments merely identify the various tests, indicate that the New Hampshire Supreme Court has not ruled on the matter, and note that New Hampshire has adopted the Control Group Test for purposes of applying the attorney-client privilege.

7 Of course, should any present or former employee of the college indicate that he or she is represented (either by the college's attorneys or by independent counsel), Rule 4.2 will preclude plaintiffs' attorneys from interviewing that person without the consent of the person's lawyer. Moreover, in conducting any ex parte interviews, plaintiffs' counsel must comport with Professional Conduct Rules 4.1 (governing a lawyer's duty of truthfulness to a third person), 4.3 (governing a lawyer's dealings with unrepresented persons), and 4.4 (requiring that a lawyer not resort to improper or illegal methods of obtaining evidence), and must refrain from inquiring into matters that are privileged. *See Clark, supra,* 797 N.E.2d at 911-12.

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953 F.Supp. 425
United States District Court, D. New Hampshire.

Richard F. KLONOSKI, et al., Plaintiffs,
v.
Benjamin MAHLAB, et al., Defendants.

No. 95–153–M.
|
Dec. 12, 1996.

Synopsis

Administrator of estate of patient who had died after she gave birth brought medical malpractice action against hospital, and sought to discover notes prepared by manager of hospital liability claims program during, and after, his interviews of hospital staff members who participated in or witnessed treatment of patient. After motion to compel was granted in part, hospital and staff members moved to reconsider, and the District Court, McAuliffe, J., held that: (1) notes were not protected by attorney work-product doctrine; (2) staff members were not clients of hospital's legal counsel, for whom manager was allegedly agent, as would allow protection of notes under attorney-client privilege; and (3) under New Hampshire law, as predicted by court, attorney-client privilege does not extend to communications between insured and insurance claims investigator.

So ordered.

Attorneys and Law Firms

***426** Donald J. Williamson, Joan A. Lukey, Boston, MA, for plaintiffs.

James P. Bassett, Concord, NH, for defendants.

ORDER

McAULIFFE, District Judge.

This is a medical malpractice action in which Dr. Richard F. Klonoski, both individually and as the administrator of the Estate of Jolanta Klonoski, seeks damages for the wrongful death of his wife, Jolanta. Mrs. Klonoski died shortly after giving birth to a healthy baby girl at Dartmouth Hitchcock Medical Center ("DHMC"). At issue is the discoverability of certain notes prepared by ***427** Richard Burke, manager of DHMC's liability claims program, as (and after) he interviewed a number of DHMC staff members who witnessed or participated in Mrs. Klonoski's medical treatment. Defendants claim that Burke's notes are shielded from discovery by the attorney-client privilege and/or the work-product doctrine.

By order dated July 16, 1996, the court granted in part plaintiff's motion to compel the production of Burke's notes. Defendants now move the court to reconsider that order. They argue that the court erred in ruling that Burke's notes: (i) are not shielded from discovery by the attorney-client privilege; and (ii) at best constitute "ordinary" (and not "opinion") work product subject to disclosure, given plaintiff's showing of substantial need.

For the reasons set forth below, the court reaffirms its order of July 16, 1996, granting in part plaintiff's motion to compel defendants to produce designated interview notes prepared by Burke.

I. *Defendants' Claims Regarding Opinion Work Product.*

This issue does not require extensive discussion. Defendants merely reiterate that Burke's notes are entitled to the heightened protections afforded "opinion" work product. They claim that "a complete review of the Documents establishes that the Documents contain mostly opinion work product, which Plaintiffs are not entitled to discover regardless of any substantial need and undue hardship." Defendants' Memorandum of Law in Support of Motion for Reconsideration at 10–11.

Having again carefully reviewed each of Burke's notes *in camera,* the court finds that defendants' contention lacks both a legal and factual basis. To the extent Burke's notes contain some "opinions," they are those of the *witnesses,* not Burke. Mr. Burke simply recorded what the witnesses told him about the circumstances surrounding Mrs. Klonoski's care. On occasion, the witnesses expressed *their* opinions regarding the care provided to Mrs. Klonoski and what aspects of that care may have, in their view, met or fallen below acceptable standards. Materials of that sort do not constitute *attorney opinion* work product and they are not entitled to heightened protection from discovery. *See In re San Juan Dupont Plaza Hotel Fire Litigation,* 859 F.2d 1007, 1015 (1st Cir.1988) ("Whatever heightened protection may be conferred upon opinion work product, that level of protection is not triggered unless the disclosure creates a real, *nonspeculative danger of revealing the lawyer's thoughts.*") (emphasis added).

Because it is reasonable to conclude that Burke's notes of the witnesses' statements could lead to discoverable evidence, and because plaintiff has demonstrated both a substantial need for those notes and an inability to obtain substantially the same information through other means (due to the witnesses' now faded memories), Burke's notes are not shielded from discovery by the work-product doctrine. *See* Fed.R.Civ.P. 26(b)(3).

II. *The Attorney–Client Privilege—Communications between a Client and a Representative of the Client's Attorney.*

In its earlier order, the court ruled that defendants failed to establish that the staff members fell within the so-called corporate "control group" at DHMC and, therefore, that defendants failed to demonstrate that the staff members' statements to Burke qualified under New Hampshire's attorney-client privilege as statements by a "client" (i.e., DHMC) or as statements by "representatives of a client" to the client's attorney. *See* N.H. Evid.R. 502(a)(2). In short, the court concluded that the staff members were not acting as the corporate client nor as "representatives" of the corporate client when they spoke to Burke. [1]

***428** In their motion for reconsideration, defendants, and now the intervening staff members whom Burke interviewed, assert that DHMC's legal counsel at the time, Attorneys David Cleary and Anil Madan, represented not only DHMC but also simultaneously represented them, individually. And, based on those alleged discrete attorney-client relationships, each staff member seeks to invoke his or her own attorney-client privilege in this case. In support of their position, intervenors note that DHMC is contractually obligated to provide all its employees with legal representation should they be sued. So, intervenors claim that when Burke interviewed them, he was acting as a representative of not only DHMC's counsel, but of *their* counsel as well. Accordingly, they conclude that any communications between them as DHMC staff members (i.e., as clients of Attorneys Cleary and Madan) and Burke (as the representative of those attorneys) are protected from disclosure by the attorney-client privilege. *See* N.H. Evid.R. 502(b)(1).

The question raised here is, then, whether the DHMC staff members were actually "clients" of Attorneys Madan and/or Cleary when they were interviewed by Burke. New Hampshire's attorney-client privilege, applicable here, provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client ... and the client's lawyer or the lawyer's representative....

N.H. Evid.R. 502(b). In order to invoke the protections afforded by New Hampshire's attorney-client privilege, each staff member must demonstrate that: (1) when speaking to Burke, he or she was (or sought to be) a client of Attorneys Madan and/or Cleary; (2) Burke was acting as the representative of Madan and/or Cleary (in their capacity as counsel to the staff member) when he conducted the interviews and prepared his notes; (3) the notes contain information communicated by the staff member for the purpose of facilitating the rendition of legal services to the staff member; and (4) the privilege has not been waived.

The intervening staff members have submitted affidavits to support their invocation of the privilege. The affidavits are substantially identical in form and content, and recite that: (1) following Mrs. Klonoski's death, each staff member was concerned that he or she might be named as a defendant in a malpractice suit; (2) each staff member realized that if he or she was named as a defendant in civil litigation, DHMC would pay for an attorney who would represent his or her interests; and (3) each staff member understood that Burke was assisting legal counsel by gathering "confidential" information which counsel would use in providing legal advice to the staff member and DHMC.

Those affidavits, though obviously prepared with skill and care, are particularly notable for what they fail to say rather than for what they do say. Indeed, if one reads the affidavits with the same care and attention to detail with which they were obviously prepared, several omissions are glaring. For example, no staff member plainly states that he or she knew or thought that Burke was working for *his* or *her* attorney at the time of the respective interviews. Nor do the staff members say that they believed that their statements were made in the context of an existing attorney-client relationship, to facilitate the rendition of current legal services to *them*. No staff member states that he or she sought out Burke (or the attorneys) anticipating a need for personal legal services, rather it was Burke that sought them out. Because such basic facts, and the factual context, are relevant in determining the existence of the privilege claimed, such omissions from the affidavits is surprising.

The staff members' honest belief that their statements to Burke were generally "confidential," their general understanding that Burke was working at the direction of an ***429** attorney, and their impression that the statements given would be used by DHMC's attorney in providing some type of legal advice to the staff member at some indefinite point in the future, are, on the other hand, insufficient, standing alone, to establish that the staff members actually had an attorney-client relationship with Attorneys Madan and Cleary, or even reasonably believed that when they spoke with Burke they were speaking with *their* lawyer's agent. [2] In a very general sense, perhaps, the touchstones of a valid privilege are alluded to in the affidavits, but more is required to establish the privilege, especially in light of the otherwise unsupportive record.

The record presented by defendants and intervenors shows, for example, that Burke himself never claimed to be the agent of any staff member's attorney. He said nothing to the staff members that could have reasonably led any of them to believe that any attorney was representing them, or that Burke was working for an attorney representing them. Mr. Burke's affidavit provides, in pertinent part:

> Beginning on or about 5/17/93, I began my on-site investigation and interviewed a number of nurses and physicians. I would have told each of my role as Service Center Manager, including the fact that *I had been retained by D–HMC to manage their professional liability claims program,* and *had been directed by the D–HMC Risk Management Department and their counsel* [presumably, risk management's counsel] to undertake a thorough investigation of the Klonoski matter. I would have told them of the virtual certainty that litigation would ensue, that allegations of nursing negligence would probably be made, that they were insureds under the D–HMC self-insurance program, and that they *would* be defended by counsel *approved by D–HMC, as necessary,* and that they would be asked to meet with defense counsel as the investigation developed.

Burke Supplemental Affidavit at para. 10 (emphasis added). Accepting that Burke actually told the staff members what he believes he "would have" told them (there is nothing to the contrary in the record and defendants and intervenors are the ones offering his affidavit), no staff member could have reasonably believed that, when speaking to Burke, he or she was speaking to a representative of his or her own lawyer. In fact, based upon Burke's representations, a reasonable person in the position of a staff member could only reasonably conclude that Burke was working for legal counsel retained by and representing DHMC (or its Risk Management Department); that only if it became "necessary" "would [each staff member] be defended by counsel"; and, then, legal representation would be provided each staff member only after designated counsel had been "approved by D–HMC." That is, staff members could have reasonably concluded only that at some time in the future, if it became necessary, an attorney would be ***430** provided for them as individuals, after DHMC approved such counsel.

Significantly, Burke scheduled the interviews for his own purposes and he did not tell any staff member he interviewed that legal counsel had already been "approved" by DHMC and retained to represent that staff member's interests. Nor did he tell any staff member that he was acting as the agent of an attorney who had been appointed to act as that staff member's counsel. Nor did he tell any staff member that DHMC's attorneys were simultaneously acting as counsel to all employees, whatever their respective and potentially conflicting interests might be. It is, therefore, difficult to understand how staff members can claim that they each knew or even reasonably understood that Burke was working for *his* or *her* attorney when interviewed. At best, the affidavits submitted, taken together, demonstrate that each staff member understood that Burke was working for DHMC's (Risk Management's) legal counsel (*not* their own counsel), and he was gathering information for use by both the Risk Management Department, and DHMC's legal counsel in defending DHMC in any lawsuits that might arise from Mrs. Klonoski's death. [3]

Finally, neither Attorney Madan nor Attorney Cleary (the outside counsel at whose direction Burke was ostensibly acting, at least in part) claims to have represented any of the staff members when they spoke to Burke about his investigative plans. For example, Attorney Madan's affidavit provides, in pertinent part, only that:

> During the course of my law practice, I am regularly retained by Mary Hitchcock Memorial Hospital ("Hospital") and the Hitchcock Clinic ("Clinic") and asked to provide legal advice concerning claims or potential claims for deaths or injuries that occur to DHMC patients. I am also retained to serve as defense counsel for DHMC in matters that are litigated.

Affidavit of Anil Madan, at ¶ 2. Based upon the representations made in Attorney Madan's affidavit, it is clear that he viewed himself as counsel to the corporate entities DHMC and the Hitchcock Clinic and *not* as simultaneously representing every individual employee of those entities. (Attorney Cleary's affidavit is substantially similar.)

Absent some indication by Burke's alleged principals (i.e., Cleary and Madan) that they were representing the individual staff members as well as DHMC, and given the decidedly ambiguous record developed by those asserting the privilege, the court cannot conclude that the intervening staff members have carried their burden of demonstrating that the attorney-client privilege attaches to their statements as contained in Burke's notes.

In sum, Burke's representations to the staff members establish that: (1) DHMC had not yet deemed it "necessary" to provide counsel to represent each staff member; (2) DHMC had not yet "approved" counsel to represent each staff member; and, therefore, (3) the staff members were not being represented by Cleary or Madan when they spoke to Burke. The staff members' affidavits are insufficient to establish that they actually thought, or could have reasonably thought, that Burke was acting as the agent for *their* lawyer(s) or that their statements to Burke were made in the context of an attorney-client relationship or even in the context of each staff member seeking such a relationship. And, finally, the affidavits of Attorneys Cleary and Madan provide no support for the claim that they represented or even remotely thought they represented the individual staff members

when they spoke to Burke (seemingly in passing) about Burke's investigative plans. The staff members' statements to Burke, as agent for the corporation's counsel, ***431** are not protected by the attorney-client privilege.

If the DHMC staff members, Burke, and Attorneys Madan and Cleary had testified at the hearing on defendants' motion to reconsider perhaps many of the ambiguities in this record could have been clarified; perhaps not. In any event, the court obviously cannot speculate as to what they might have said. Defense counsel (in their capacity as counsel to the staff members) chose to rely exclusively on the submitted affidavits and oral argument, [4] and that record is insufficient to support the conclusion that the staff members consulted with Burke with the understanding that he was a representative of *their lawyer(s),* and "for the purpose of facilitating the rendition of professional legal services" to them. N.H. Evid.R. 502(a)(1). Accordingly, the court finds that the staff members were not "clients" and were not seeking to become clients of DHMC's legal counsel when they gave their statements to Burke. Therefore, the staff members' statements to Burke as contained in his notes are not shielded from discovery by the attorney-client privilege.

III. *Communications Between an Insured and the Insurer's Agent.*

Defendants and the intervening staff members offer an alternate theory under which they claim that Burke's notes are shielded from discovery. They argue that those documents should be protected by an extension of the attorney-client privilege which, in some jurisdictions, applies to communications between an insured and an insurance claims investigator. To be sure, some courts have recognized that when an insurance policy requires an insurer to provide an insured with a defense, the insured's statements to the insurer (through its claims investigator) are privileged. So, for example, the Illinois Court of Appeals has held:

> In Illinois, the attorney-client privilege extends to communications between an insured and insurer, where the insurer is under an obligation to defend. This rule underscores the fact that the insurance carrier usually selects the attorney under a common liability contract. Therefore, "the insured may properly assume that the communication is made to the insurer as an agent for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured."

Hyams v. Evanston Hospital, 225 Ill.App.3d 253, 257, 167 Ill.Dec. 512, 514, 587 N.E.2d 1127, 1129 (Ill.App.1992) (citations omitted).

Courts that have expanded the attorney-client privilege in the same manner as Illinois appear to have done so based upon a willingness to recognize that an insurer will likely hire an attorney to represent the insured and, presumably, if the attorney had been retained immediately, he or she would have instructed the investigator to gather information and take statements from the insured prospective client. Thus, some courts have held that a claims investigator acts as the agent of an attorney (to be retained in the future) when he or she speaks to an insured about a matter which implicates the obligation to provide a defense, thereby recognizing a sort of "anticipatory" attorney-client privilege.

In this case, DHMC is self-insured for the first $2,000,000 of each medical malpractice claim made against it or any of its employees. Additionally, it is apparently obligated to defend and indemnify all DHMC employees named as defendants in medical malpractice actions, provided the employees were acting within the scope of their employment when the alleged act(s) of negligence occurred. Accordingly, intervenors' counsel argues that the court should view DHMC as an "insurer" for the purpose of determining whether statements made by its "insureds" (its staff members) to its claims investigator (Burke) are privileged under the described anticipatory attorney-client privilege. Stated somewhat differently, defendants suggest that the court should: (1) find that DHMC was acting in its capacity as "insurer" when ***432** it hired Burke and instructed him to conduct an investigation; and (2) hold, as a matter of New Hampshire law, that each staff member's statements to Burke, as agent for DHMC (in its role as insurer), fall within the scope of New Hampshire's attorney-client privilege. [5]

The court is not inclined to accept that invitation. Whether the Illinois rule and similar rules in other states represent a wise development in the law of privileges is somewhat beside the point, since the New Hampshire Supreme Court has not recognized an anticipatory attorney-client privilege that protects communications between an insured and an insurance investigator. Given that evidentiary privileges have traditionally been construed narrowly by the courts of this state, it is also unlikely that the

New Hampshire Supreme Court would, if presented with the opportunity to do so, expand the attorney-client privilege in the manner urged by defendants. *See, e.g., State of New Hampshire v. Melvin,* 132 N.H. 308, 310, 564 A.2d 458 (1989) (noting that "[i]t is well settled that statutory privileges should be strictly construed."); N.H. Evid.R. Evid. 501, Reporter's Notes (noting that "Rule 501 limits the sources of present rules of privilege to the federal and state constitutions, federal and state statutes and to these Rules of Evidence and other rules of court. The existing common law is thus no longer a source of evidentiary privilege doctrine."); *see also Fleet Nat. Bank v. Tonneson & Co.,* 150 F.R.D. 10, 13 (D.Mass.1993) ("Because the attorney-client privilege can and often does seriously impede the search for truth in a particular case, courts are naturally reluctant to extend it beyond the narrowest limits required to achieve its purpose of fostering effective attorney-client communication."). And, as this court previously held:

> The court is not inclined to stretch the precise language employed in New Hampshire's rules of evidence to cover the facts presented in this case ... A federal court called upon to apply state law must "take state law as it finds it: 'not as it might conceivably be, some day; nor even as it should be.' " *Kassel v. Gannett Co.,* 875 F.2d 935, 950 (1st Cir.1989) (quoting *Plummer v. Abbott Laboratories,* 568 F.Supp. 920, 927 (D.R.I.1983)). When state law has been authoritatively interpreted by the state's highest court, this court should apply that law according to its tenor. *Kassel,* 875 F.2d at 950. Where the signposts are blurred, the federal court may assume that the state court would adopt an interpretation of state law that is consistent with logic and supported by reasoned authority. *Moores v. Greenberg,* 834 F.2d 1105, 1107 n. 3 (1st Cir.1987). However, this court is and should remain hesitant to blaze new, previously uncharted state-law trails. Expansive reading of New Hampshire statutes and rules of evidence and the broadening of evidentiary privileges available under them is a function best left to the New Hampshire Legislature and Supreme Court.

Klonoski v. Mahlab, No. 95–C–153–M, slip op. at 8–9 (D.N.H. July 16, 1996).

In summary then, the court is constrained to hold that the staff members have failed to carry their burden of demonstrating that Burke's notes on their statements are shielded from discovery under New Hampshire's attorney-client privilege. They have not sufficiently developed the record to persuade the court, even by a preponderance of the evidence, that Burke's notes fall within the scope of that privilege.

While the affidavits submitted by the intervening staff members allege or allude to facts and conclusions which, if considered in isolation, might suggest that their statements to Burke could be privileged, the seemingly incomplete, definitely ambiguous, and predominantly conclusory statements contained in those affidavits are insufficient to support the claimed privilege, given the record in this case. It is of course the intervening staff members who bear the burden of demonstrating that their communications with Burke are shielded by the attorney-client ***433** privilege. As noted in *Moore's Federal Practice,* the general rule that evidentiary privileges are to be strictly construed requires that "the burden for establishing [the] existence [of a given privilege be] placed upon the party asserting it. Thus, a bald assertion of privilege is insufficient, ... since a trial court must be provided with sufficient information so as to rule on the privilege claim." 4 J.M. Moore & J.D. Lucas, *Moore's Federal Practice* ¶ 26.11[1] (1994) (footnotes omitted).

In the end, it is likely, and the court concludes, that the circumstances presented are just what they appear to be: a corporate defendant seeks to shield potentially damaging statements made by some of its employees to its investigator from discovery by asserting a blanket attorney-client privilege extending to all statements made by any employee to its corporate investigator. The record fails to support defendants' (or, more precisely, the staff members') invocation of that special privilege, and certainly no policy reasons militate in favor of recognizing such a privilege under the circumstances presented here.

Conclusion

Defendants' motion for reconsideration (document no. 40) is granted. Having heard counsels' oral presentations, reviewed the pleadings and exhibits submitted (including Burke's notes), and having considered the parties' respective arguments, the court

affirms its order dated July 16, 1996. Defendants' motion to stay the court's order dated July 16th (document no. 42) is denied as moot.

SO ORDERED.

All Citations

953 F.Supp. 425

Footnotes

1 Parenthetically, the court notes that when the *defendants* initially "invoked" the attorney-client privilege with regard to Burke's notes, the staff members who made statements to Burke (and who are said to hold the privilege as individual clients) were not parties to this litigation and had not invoked the privilege themselves. Defendants' counsel took the position at the hearing that *they* invoked the privilege on behalf of the staff members in their capacity as counsel to the individual staff members, and not in their capacity as counsel to defendants. After some discussion, counsel moved to permit the staff members to intervene for the limited purpose of invoking their claimed privileges. The court granted that motion. Therefore, the record is now clear that current defense counsel represent the named defendants and non-party staff members and each affected staff member is personally asserting the attorney-client privilege with regard to his or her statements to Burke.

2 The staff members no doubt had the "understandings" they claim. But it is not at all clear just what those understandings were. Although couched in the language of attorney-client privilege, the cryptic affidavits filed by the staff members fail to reveal the nature and the basis for those understandings. It is entirely plausible that the staff members truly believed their statements would be "confidential," but only in the general sense that information regarding patients, the rendition of medical care, and medical facility operations is usually "confidential" and not generally subject to public disclosure. The staff affidavits do not establish that they expected confidentiality because they were talking to their attorney about privileged matters. The staff members also might be saying that their statements to Burke (who disclosed that he was working, at least in part, for DHMC's risk management division) were "confidential" to the extent that they believed Burke was investigating Mrs. Klonoski's death on behalf of DHMC's "quality assurance committee." *See* N.H.Rev.Stat. Ann. 151:13–a (records of interviews and all other reports and statements generated during the activities of a hospital's quality assurance committee are confidential and protected from discovery); *see generally, In re K,* 132 N.H. 4, 561 A.2d 1063 (1989) (discussing the nature and scope of the statutory privilege). And, they no doubt understood that DHMC's attorneys would use their statements to defend DHMC and, if necessary or appropriate, to provide some kind of pertinent legal advice to them in the future (perhaps merely advising them to get legal counsel). Nevertheless, critical issues remain unaddressed: did the staff members understand that DHMC's attorneys were also *their* attorneys, and did they understand that their statements were made to a representative acting for *their* attorneys in that personal capacity?

3 Ordinarily, communications between an individual and a third party's counsel are not protected by the attorney-client privilege. *But see* N.H. Evid.R. 502(b)(3) (providing that the attorney-client privilege attaches to communications between an individual and a lawyer representing *another party* in a *pending action* and concerning a matter of common interest therein). Importantly, defendants do not claim (nor could they) that Burke's notes are protected by Rule 502(b)(3). Instead, their argument rests solely on the assertion that Burke was acting as the representative of the staff members' own attorney and his notes are privileged under N.H. Evid.R. 502(b)(1).

4 Defendants and the intervening staff members were well aware of the dispositive issues when they submitted their motion for reconsideration. Nevertheless, rather than prepare supplemental affidavits which might have clarified the factual bases for the asserted privileges, they chose simply to rely on the affidavits previously submitted.

5 This argument is, of course, in direct conflict with defendants' claim that Burke was acting as the agent of DHMC's *legal counsel* (to be distinguished from DHMC as insurer) when he interviewed the staff members. Nevertheless, defendants' argument does merit discussion.

End of Document

101 S.Ct. 677
Supreme Court of the United States

UPJOHN COMPANY et al., Petitioners,
v.
UNITED STATES et al.

No. 79–886
|
Argued Nov. 5, 1980.
|
Decided Jan. 13, 1981.

Synopsis
Corporation and in–house general counsel appealed from order of the United States District Court for the Western District of Michigan, Noel P. Fox, Chief Judge, enforcing an Internal Revenue summons for documents. The Court of Appeals, Sixth Circuit, 600 F.2d 1223, affirmed in part, reversed in part and remanded. Certiorari was granted, and the Supreme Court, Justice Rehnquist, held that: (1) District Court's test, of availability of attorney–client privilege, was objectionable as it restricted availability of privilege to those corporate officers who played "substantial role" in deciding and directing corporation's legal response; (2) where communications at issue were made by corporate employees to counsel for corporation acting as such, at direction of corporate superiors in order to secure legal advice from counsel, and employees were aware that they were being questioned so that corporation could obtain advice, such communications were protected; and (3) where notes and memoranda sought by government were work products based on oral statements of witnesses, they were, if they revealed communications, protected by privilege, and to extent they did not reveal communications, they revealed attorney's mental processes in evaluating the communications and disclosure would not be required simply on showing of substantial need and inability to obtain equivalent without undue hardship.

Judgment of Court of Appeals reversed, and case remanded.

Chief Justice Burger filed an opinion concurring in part and concurring in the judgment.

****678 **679** *Syllabus* [*]

***383** When the General Counsel for petitioner pharmaceutical manufacturing corporation (hereafter petitioner) was informed that one of its foreign subsidiaries had made questionable payments to foreign government officials in order to secure government business, an internal investigation of such payments was initiated. As part of this investigation, petitioner's attorneys sent a questionnaire to all foreign managers seeking detailed information concerning such payments, and the responses were returned to the General Counsel. The General Counsel and outside counsel also interviewed the recipients of the questionnaire and other company officers and employees. Subsequently, based on a report voluntarily submitted by petitioner disclosing the questionable payments, the Internal Revenue Service (IRS) began an investigation to determine the tax consequences of such payments and issued a summons pursuant to 26 U.S.C. § 7602 demanding production of, *inter alia*, the questionnaires and the memoranda and notes of the interviews. Petitioner refused to produce the documents on the grounds that they were protected from disclosure by the attorney–client privilege and constituted the work product of attorneys prepared in anticipation of litigation. The United States then filed a petition in Federal District Court seeking enforcement of the summons. That court adopted the Magistrate's recommendation that the summons should be enforced, the Magistrate having concluded, *inter alia*, that the attorney–client privilege had been waived and that the Government had made a sufficient showing of necessity to overcome the protection of the work–product doctrine. The Court of Appeals rejected the Magistrate's finding of a waiver of the

attorney–client privilege, but held that under the so–called "control group test" the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing [petitioner's] actions in response to legal advice ... for the simple reason that the communications were not the 'client's.' " The court also held that the work–product doctrine did not apply to IRS summonses.

Held:

1. The communications by petitioner's employees to counsel are covered by the attorney–client privilege insofar as the responses to the ***384** questionnaires and any notes reflecting responses to interview questions are concerned. Pp. 682–686.

(a) The control group test overlooks the fact that such privilege exists to protect not only the giving of professional advice to ****680** those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. While in the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same, in the corporate context it will frequently be employees beyond the control group (as defined by the Court of Appeals) who will possess the information needed by the corporation's lawyers. Middle–level—and indeed lower–level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. Pp. 683–684.

(b) The control group test thus frustrates the very purpose of the attorney–client privilege by discouraging the communication of relevant information by employees of the client corporation to attorneys seeking to render legal advice to the client. The attorney's advice will also frequently be more significant to noncontrol employees than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. P. 684.

(c) The narrow scope given the attorney–client privilege by the Court of Appeals not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. P. 684.

(d) Here, the communications at issue were made by petitioner's employees to counsel for petitioner acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. Information not available from upper–echelon management was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. P. 685.

2. The work–product doctrine applies to IRS summonses. Pp. 686–689.

(a) The obligation imposed by a tax summons remains subject to the traditional privileges and limitations, and nothing in the language ***385** or legislative history of the IRS summons provisions suggests an intent on the part of Congress to preclude application of the work–product doctrine. P. 687.

(b) The Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work–product doctrine. The notes and memoranda sought by the Government constitute work product based on oral statements. If they reveal communications, they are protected by the attorney–client privilege. To the extent they do not reveal communications they reveal attorneys' mental processes in evaluating the communications. As Federal Rule of Civil Procedure 26, which accords special protection from disclosure to work product revealing an attorney's mental processes, and *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451, make clear, such

work product cannot be disclosed simply on a showing of substantial need or inability to obtain the equivalent without undue hardship. P. 688.

600 F.2d 1223, 6 Cir., reversed and remanded.

Attorneys and Law Firms

Daniel M. Gribbon, Washington, D. C., for petitioners.

Lawrence G. Wallace, Washington, D. C., for respondents.

Opinion

***386** ****681** Justice REHNQUIST delivered the opinion of the Court.

We granted certiorari in this case to address important questions concerning the scope of the attorney–client privilege in the corporate context and the applicability of the work–product doctrine in proceedings to enforce tax summonses. 445 U.S. 925, 100 S.Ct. 1310, 63 L.Ed.2d 758. With respect to the privilege question the parties and various *amici* have described our task as one of choosing between two "tests" which have gained adherents in the courts of appeals. We are acutely aware, however, that we sit to decide concrete cases and not abstract propositions of law. We decline to lay down a broad rule or series of rules to govern all conceivable future questions in this area, even were we able to do so. We can and do, however, conclude that the attorney–client privilege protects the communications involved in this case from compelled disclosure and that the work–product doctrine does apply in tax summons enforcement proceedings.

I

Petitioner Upjohn Co. manufactures and sells pharmaceuticals here and abroad. In January 1976 independent accountants conducting an audit of one of Upjohn's foreign subsidiaries discovered that the subsidiary made payments to or for the benefit of foreign government officials in order to secure government business. The accountants, so informed petitioner, Mr. Gerard Thomas, Upjohn's Vice President, Secretary, and General Counsel. Thomas is a member of the Michigan and New York Bars, and has been Upjohn's General Counsel for 20 years. He consulted with outside counsel and R. T. Parfet, Jr., Upjohn's Chairman of the Board. It was decided that the company would conduct an internal investigation of what were termed "questionable payments." As part of this investigation the attorneys prepared a letter containing a questionnaire which was sent to "All Foreign General and Area Managers" over the Chairman's signature. The letter ***387** began by noting recent disclosures that several American companies made "possibly illegal" payments to foreign government officials and emphasized that the management needed full information concerning any such payments made by Upjohn. The letter indicated that the Chairman had asked Thomas, identified as "the company's General Counsel," "to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government." The questionnaire sought detailed information concerning such payments. Managers were instructed to treat the investigation as "highly confidential" and not to discuss it with anyone other than Upjohn employees who might be helpful in providing the requested information. Responses were to be sent directly to Thomas. Thomas and outside counsel also interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation.

On March 26, 1976, the company voluntarily submitted a preliminary report to the Securities and Exchange Commission on Form 8–K disclosing certain questionable payments. [1] A copy of the report was simultaneously submitted to the Internal Revenue Service, which immediately began an investigation to determine the tax consequences of the payments. Special agents conducting the investigation were given lists by Upjohn of all those interviewed and all who had responded to the questionnaire. On November 23, 1976, the Service issued a summons pursuant to 26 U.S.C. § 7602 demanding production of:

> "All files relative to the investigation conducted under the supervision of Gerard Thomas to identify payments to employees of foreign governments and any ****682** political ***388** contributions made by the Upjohn Company or any of its affiliates since January 1, 1971 and to determine whether any funds of the Upjohn Company had been improperly accounted for on the corporate books during the same period.
>
> "The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries." App. 17a–18a.

The company declined to produce the documents specified in the second paragraph on the grounds that they were protected from disclosure by the attorney–client privilege and constituted the work product of attorneys prepared in anticipation of litigation. On August 31, 1977, the United States filed a petition seeking enforcement of the summons under 26 U.S.C. §§ 7402(b) and 7604(a) in the United States District Court for the Western District of Michigan. That court adopted the recommendation of a Magistrate who concluded that the summons should be enforced. Petitioners appealed to the Court of Appeals for the Sixth Circuit which rejected the Magistrate's finding of a waiver of the attorney–client privilege, 600 F.2d 1223, 1227, n. 12, but agreed that the privilege did not apply "[t]o the extent that the communications were made by officers and agents not responsible for directing Upjohn's actions in response to legal advice ... for the simple reason that the communications were not the 'client's.' " *Id.*, at 1225. The court reasoned that accepting petitioners' claim for a broader application of the privilege would encourage upper–echelon management to ignore unpleasant facts and create too broad a "zone of silence." Noting that Upjohn's counsel had interviewed officials such as the Chairman and President, the Court of Appeals remanded to the District Court so that a determination of who was ***389** within the "control group" could be made. In a concluding footnote the court stated that the work–product doctrine "is not applicable to administrative summonses issued under 26 U.S.C. § 7602." *Id.*, at 1228, n. 13.

II

Federal Rule of Evidence 501 provides that "the privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51, 100 S.Ct. 906, 913, 63 L.Ed.2d 186 (1980): "The lawyer–client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"). Admittedly complications in the application of the privilege arise when the client is a corporation, which in theory is an artificial creature of the ***390** ****683** law, and not an individual; but this Court has assumed that the privilege applies when the client is a corporation. *United States v. Louisville & Nashville R. Co.*, 236 U.S. 318, 336, 35 S.Ct. 363, 369, 59 L.Ed. 598 (1915), and the Government does not contest the general proposition.

The Court of Appeals, however, considered the application of the privilege in the corporate context to present a "different problem," since the client was an inanimate entity and "only the senior management, guiding and integrating the several operations, ... can be said to possess an identity analogous to the corporation as a whole." 600 F.2d at 1226. The first case to articulate the so–called "control group test" adopted by the court below, *Philadelphia v. Westinghouse Electric Corp.*, 210

F.Supp. 483, 485 (ED Pa.), petition for mandamus and prohibition denied *sub nom. General Electric Co. v. Kirkpatrick*, 312 F.2d 742 (CA3 1962), cert. denied, 372 U.S. 943, 83 S.Ct. 937, 9 L.Ed.2d 969 (1963), reflected a similar conceptual approach:

> "Keeping in mind that the question is, Is it the corporation which is seeking the lawyer's advice when the asserted privileged communication is made?, the most satisfactory solution, I think, is that if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, ... then, in effect, *he is (or personifies) the corporation* when he makes his disclosure to the lawyer and the privilege would apply." (Emphasis supplied.)

Such a view, we think, overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. See *Trammel*, *supra*, at 51, 100 S.Ct., at 913; *Fisher*, *supra*, at 403, 96 S.Ct., at 1577. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts ***391** with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4–1:

> "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

See also *Hickman v. Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 393–394, 91 L.Ed. 451 (1947).
In the case of the individual client the provider of information and the person who acts on the lawyer's advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below–"officers and agents ... responsible for directing [the company's] actions in response to legal advice"–who will possess the information needed by the corporation's lawyers. Middle–level—and indeed lower–level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties. This fact was noted in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (CA8 1978) (en banc):

> "In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non–management personnel as well as from top executives. The attorney dealing with a complex legal problem 'is thus faced with a "Hobson's choice". If he ****684** interviews employees not having "the very highest authority", ***392** their communications to him will not be privileged. If, on the other hand, he interviews *only* those employees with the "very highest authority", he may find it extremely difficult, if not impossible, to determine what happened.' " *Id.*, at 608–609 (quoting Weinschel Corporate Employee Interviews and the Attorney–Client Privilege, 12 B.C.Ind. & Com. L.Rev. 873, 876 (1971)).

The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy. See, *e. g., Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1164 (DSC 1974) ("After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it").

The narrow scope given the attorney–client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law," Burnham, The Attorney–Client Privilege in the Corporate Arena, 24 Bus.Law. 901, 913 (1969), particularly

since compliance with the law in this area is hardly an instinctive matter, see, *e. g., United States v. United States Gypsum Co.*, 438 U.S. 422, 440–441, 98 S.Ct. 2864, 2875–2876, 57 L.Ed.2d 854 (1978) ("the behavior proscribed by the [Sherman] Act is ***393** often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct"). [2] The test adopted by the court below is difficult to apply in practice, though no abstractly formulated and unvarying "test" will necessarily enable courts to decide questions such as this with mathematical precision. But if the purpose of the attorney–client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all. The very terms of the test adopted by the court below suggest the unpredictability of its application. The test restricts the availability of the privilege to those officers who play a "substantial role" in deciding and directing a corporation's legal response. Disparate decisions in cases applying this test illustrate its unpredictability. Compare, *e. g., Hogan v. Zletz*, 43 F.R.D. 308, 315–316 (ND Okl.1967), aff'd in part *sub nom. Natta v. Hogan*, 392 F.2d 686 (CA10 1968) (control group includes managers and assistant managers of patent division and research and development department), with *Congoleum Industries, Inc. v. GAF Corp.*, 49 F.R.D. 82, 83–85 (ED Pa.1969), aff'd, 478 F.2d 1398 (CA3 1973) (control group includes only division and corporate ****685** vice presidents, and not two directors of research and vice president for production and research).

***394** The communications at issue were made by Upjohn employees [3] to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel. As the Magistrate found, "Mr. Thomas consulted with the Chairman of the Board and outside counsel and thereafter conducted a factual investigation to determine the nature and extent of the questionable payments *and to be in a position to give legal advice to the company with respect to the payments*." (Emphasis supplied.) 78–1 USTC ¶ 9277, pp. 83,598, 83,599. Information, not available from upper–echelon management, was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. [4] The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. The questionnaire identified Thomas as "the company's General Counsel" and referred in its opening sentence to the possible illegality of payments such as the ones on which information was sought. App. 40a. A statement of policy accompanying the questionnaire clearly indicated the legal implications of the investigation. The policy statement was issued "in order that there be no uncertainty in the future as to the policy with respect to the practices which are the subject of this investigation." ***395** It began "Upjohn will comply with all laws and regulations," and stated that commissions or payments "will not be used as a subterfuge for bribes or illegal payments" and that all payments must be "proper and legal." Any future agreements with foreign distributors or agents were to be approved "by a company attorney" and any questions concerning the policy were to be referred "to the company's General Counsel." *Id.*, at 165a–166a. This statement was issued to Upjohn employees worldwide, so that even those interviewees not receiving a questionnaire were aware of the legal implications of the interviews. Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made, *id.*, at 39a, 43a, and have been kept confidential by the company. [5] Consistent with the underlying purposes of the attorney–client privilege, these communications must be protected against compelled disclosure.

The Court of Appeals declined to extend the attorney–client privilege beyond the limits of the control group test for fear that doing so would entail severe burdens on discovery and create a broad "zone of silence" over corporate affairs. Application of the attorney–client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney:

> "[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different ****686** ***396** thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." *Philadelphia v. Westinghouse Electric Corp.*, 205 F.Supp. 830, 831 (q2.7).

See also *Diversified Industries*, 572 F.2d., at 611; *State ex rel. Dudek v. Circuit Court*, 34 Wis.2d 559, 580, 150 N.W.2d 387, 399 (1967) ("the courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer"). Here the Government was free to question the employees who communicated with Thomas and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them. While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney–client privilege. As Justice Jackson noted in his concurring opinion in *Hickman v. Taylor*, 329 U.S., at 516, 67 S.Ct., at 396: "Discovery was hardly intended to enable a learned profession to perform its functions ... on wits borrowed from the adversary." Needless to say, we decide only the case before us, and do not undertake to draft a set of rules which should govern challenges to investigatory subpoenas. Any such approach would violate the spirit of Federal Rule of Evidence 501. See S.Rep. No. 93–1277, p. 13 (1974) ("the recognition of a privilege based on a confidential relationship ... should be determined on a case–by–case basis"); *Trammel*, 445 U.S., at 47, 100 S.Ct., at 910–911; *United States v. Gillock*, 445 U.S. 360, 367, 100 S.Ct. 1185, 1190, 63 L.Ed.2d 454 (1980). While such a "case–by–case" basis may to some slight extent undermine desirable certainty in the boundaries of the attorney–clientt ***397** privilege, it obeys the spirit of the Rules. At the same time we conclude that the narrow "control group test" sanctioned by the Court of Appeals, in this case cannot, consistent with "the principles of the common law as ... interpreted ... in the light of reason and experience," Fed. Rule Evid. 501, govern the development of the law in this area.

III

Our decision that the communications by Upjohn employees to counsel are covered by the attorney–client privilege disposes of the case so far as the responses to the questionnaires and any notes reflecting responses to interview questions are concerned. The summons reaches further, however, and Thomas has testified that his notes and memoranda of interviews go beyond recording responses to his questions. App. 27a–28a, 91a–93a. To the extent that the material subject to the summons is not protected by the attorney–client privilege as disclosing communications between an employee and counsel, we must reach the ruling by the Court of Appeals that the work–product doctrine does not apply to summonses issued under 26 U.S.C. § 7602. [6]

The Government concedes, wisely, that the Court of Appeals erred and that the work–product doctrine does apply to IRS summonses. Brief for Respondents 16, 48. This doctrine was announced by the Court over 30 years ago in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). In that case the Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." *Id.*, at 510, 67 S.Ct., at 393. The Court noted that "it is essential that a lawyer work with ***398** a certain degree of privacy" ****687** and reasoned that if discovery of the material sought were permitted

> "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." *Id.*, at 511, 67 S.Ct., at 393–394.

The "strong public policy" underlying the work–product doctrine was reaffirmed recently in *United States v. Nobles*, 422 U.S. 225, 236–240, 95 S.Ct. 2160, 2169–2171, 45 L.Ed.2d 141 (1975), and has been substantially incorporated in Federal Rule of Civil Procedure 26(b)(3). [7]

As we stated last Term, the obligation imposed by a tax summons remains "subject to the traditional privileges and limitations." *United States v. Euge*, 444 U.S. 707, 714, 100 S.Ct. 874, 879–880, 63 L.Ed.2d 741 (1980). Nothing in the language of the IRS summons provisions or their legislative history suggests an intent on the part of Congress to preclude application of the work–product doctrine. Rule 26(b)(3) codifies the work–product doctrine, and the Federal Rules of Civil Procedure are made applicable ***399** to summons enforcement proceedings by Rule 81(a)(3). See *Donaldson v. United States*, 400 U.S. 517, 528,

91 S.Ct. 534, 541, 27 L.Ed.2d 580 (1971). While conceding the applicability of the work–product doctrine, the Government asserts that it has made a sufficient showing of necessity to overcome its protections. The Magistrate apparently so found, 78–1 USTC ¶ 9277, p. 83,605. The Government relies on the following language in *Hickman*:

> "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had.... And production might be justified where the witnesses are no longer available or can be reached only with difficulty." 329 U.S., at 511, 67 S.Ct., at 394.

The Government stresses that interviewees are scattered across the globe and that Upjohn has forbidden its employees to answer questions it considers irrelevant. The above–quoted language from *Hickman*, however, did not apply to "oral statements made by witnesses ... whether presently in the form of [the attorney's] mental impressions or memoranda." *Id.*, at 512, 67 S.Ct., at 394. As to such material the Court did "not believe that any showing of necessity can be made under the circumstances of this case so as to justify production.... If there should be a rare situation justifying production of these matters petitioner's case is not of that type." *Id.*, at 512–513, 67 S.Ct., at 394–395. See also *Nobles, supra*, 422 U.S., at 252–253, 95 S.Ct., at 2177 (WHITE, J., concurring). Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes, 329 U. S., at 513, 67 S.Ct., at 394–395 ("what he saw fit to write down regarding witnesses' remarks"); *id*, at 516–517, 67 S.Ct., at 396 ****688** ("the statement would be his [the ***400** attorney's] language, permeated with his inferences") (Jackson, J., concurring). [8]

Rule 26 accords special protection to work product revealing the attorney's mental processes. The Rule permits disclosure of documents and tangible things constituting attorney work product upon a showing of substantial need and inability to obtain the equivalent without undue hardship. This was the standard applied by the Magistrate, 78–1 USTC ¶ 9277, p. 83,604. Rule 26 goes on, however, to state that "[i]n ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Although this language does not specifically refer to memoranda based on oral statements of witnesses, the *Hickman* court stressed the danger that compelled disclosure of such memoranda would reveal the attorney's mental processes. It is clear that this is the sort of material the draftsmen of the Rule had in mind as deserving special protection. See Notes of Advisory Committee on 1970 Amendment to Rules, 28 U.S.C.App., p. 442 ("The subdivision ... goes on to protect against disclosure the mental impressions, conclusions, opinions, or legal theories ... of an attorney or other representative of a party. The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories ...").

***401** Based on the foregoing, some courts have concluded that *no* showing of necessity can overcome protection of work product which is based on oral statements from witnesses. See, *e. g., In re Grand Jury Proceedings*, 473 F.2d 840, 848 (CA8 1973) (personal recollections, notes, and memoranda pertaining to conversation with witnesses); *In re Grand Jury Investigation*, 412 F.Supp. 943, 949 (ED Pa.1976) (notes of conversation with witness "are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure"). Those courts declining to adopt an absolute rule have nonetheless recognized that such material is entitled to special protection. See, *e. g., In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (CA3 1979) ("special considerations ... must shape any ruling on the discoverability of interview memoranda ...; such documents will be discoverable only in a 'rare situation' "); Cf. *In re Grand Jury Subpoena*, 599 F.2d 504, 511–512 (CA2 1979).

We do not decide the issue at this time. It is clear that the Magistrate applied the wrong standard when he concluded that the Government had made a sufficient showing of necessity to overcome the protections of the work–product doctrine. The Magistrate applied the "substantial need" and "without undue hardship" standard articulated in the first part of Rule 26(b)(3). The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney–client privilege. To the extent they do not reveal

communications, they reveal the attorneys' mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

While we are not prepared at this juncture to say that such material is always protected by the work–product rule, we ***402** ****689** think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure. Since the Court of Appeals thought that the work–product protection was never applicable in an enforcement proceeding such as this, and since the Magistrate whose recommendations the District Court adopted applied too lenient a standard of protection, we think the best procedure with respect to this aspect of the case would be to reverse the judgment of the Court of Appeals for the Sixth Circuit and remand the case to it for such further proceedings in connection with the work–product claim as are consistent with this opinion.

Accordingly, the judgment of the Court of Appeals is reversed, and the case remanded for further proceedings.

It is so ordered.

Chief Justice BURGER, concurring in part and concurring in the judgment.
I join in Parts I and III of the opinion of the Court and in the judgment. As to Part II, I agree fully with the Court's rejection of the so–called "control group" test, its reasons for doing so, and its ultimate holding that the communications at issue are privileged. As the Court states, however, "if the purpose of the attorney–client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Ante*, at 684. For this very reason, I believe that we should articulate a standard that will govern similar cases and afford guidance to corporations, counsel advising them, and federal courts.

The Court properly relies on a variety of factors in concluding that the communications now before us are privileged. See *ante*, at 685. Because of the great importance of the issue, in my view the Court should make clear now that, as a ***403** general rule, a communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct. See, *e. g., Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 609 (CA8 1978) (en banc); *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491–492 (CA7 1970), aff'd by an equally divided Court, 400 U.S. 348, 91 S.Ct. 479, 27 L.Ed.2d 433 (1971); *Duplan Corp v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1163–1165 (DSC 1974). Other communications between employees and corporate counsel may indeed be privileged—as the petitioners and several *amici* have suggested in their proposed formulations [*] —but the need for certainty does not compel us now to prescribe all the details of the privilege in this case.

Nevertheless, to say we should not reach all facets of the privilege does not mean that we should neglect our duty to provide guidance in a case that squarely presents the question in a traditional adversary context. Indeed, because Federal Rule of Evidence 501 provides that the law of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience," this Court has a special duty to clarify aspects of the law of privileges properly ***404** before us. Simply asserting that this failure "may to some slight extent undermine desirable certainty," *ante*, at 686, neither minimizes the consequences ****690** of continuing uncertainty and confusion nor harmonizes the inherent dissonance of acknowledging that uncertainty while declining to clarify it within the frame of issues presented.

All Citations

449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, 47 A.F.T.R.2d 81-523, 30 Fed.R.Serv.2d 1101, 81-1 USTC P 9138, Fed. Sec. L. Rep. P 97,817, 1980-81 Trade Cases P 63,797, 1981-1 C.B. 591, 7 Fed. R. Evid. Serv. 785

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 288, 50 L.Ed. 499.

1 On July 28, 1976, the company filed an amendment to this report disclosing further payments.

2 The Government argues that the risk of civil or criminal liability suffices to ensure that corporations will seek legal advice in the absence of the protection of the privilege. This response ignores the fact that the depth and quality of any investigations, to ensure compliance with the law would suffer, even were they undertaken. The response also proves too much, since it applies to all communications covered by the privilege: an individual trying to comply with the law or faced with a legal problem also has strong incentive to disclose information to his lawyer, yet the common law has recognized the value of the privilege in further facilitating communications.

3 Seven of the eighty-six employees interviewed by counsel had terminated their employment with Upjohn at the time of the interview. App. 33a–38a. Petitioners argue that the privilege should nonetheless apply to communications by these former employees concerning activities during their period of employment. Neither the District Court nor the Court of Appeals had occasion to address this issue, and we decline to decide it without the benefit of treatment below.

4 See *id.*, at 26a–27a, 103a, 123a–124a. See also *In re Grand Jury Investigation*, 599 F.2d 1224, 1229 (CA3 1979); *In re Grand Jury Subpoena*, 599 F.2d 504, 511 (CA2 1979).

5 See Magistrate's opinion, 78–1 USTC ¶ 9277, p. 83,599: "The responses to the questionnaires and the notes of the interviews have been treated as confidential material and have not been disclosed to anyone except Mr. Thomas and outside counsel."

6 The following discussion will also be relevant to counsel's notes and memoranda of interviews with the seven former employees should it be determined that the attorney–client privilege does not apply to them. See n. 3, *supra.*

7 This provides, in pertinent part:

> "[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

8 Thomas described his notes of the interviews as containing "what I considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere." 78–1 USTC ¶ 9277, p. 83,599.

* See Brief for Petitioners 21–23, and n. 25; Brief for American Bar Association as *Amicus Curiae* 5–6, and n. 2; Brief for American College of Trial Lawyers and 33 Law Firms as *Amici Curiae* 9–10, and n. 5.

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United States District Court, D. Massachusetts.

AMERICA'S GROWTH CAPITAL, LLC
v.
PFIP, LLC d/b/a Planet Fitness.

Civil Action No. 12–12088–RGS.
|
Signed March 24, 2014.

Attorneys and Law Firms

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MEMORANDUM AND ORDER ON MOTION TO COMPEL PRODUCTION OF DOCUMENTS FOR WHICH PRIVILEGE IS CLAIMED

STEARNS, District Judge.

***1** In this discovery dispute, the court has been asked to review in camera twenty-two documents that defendant PFIP, LLC (Planet Fitness) has withheld in whole or in part under a claim of privilege. A copy of the privilege log listing the twenty-two documents (Dkt.# 91) is attached to this Order.

BACKGROUND

From June through November of 2012, the owners and executives of Planet Fitness, a company that franchises gymnasiums throughout the United States, were attempting to effect a sale or other strategic transaction involving the company. Among those involved in the negotiations at Planet Fitness were Marc Grondahl, Michael Grondahl, Chris Rondeau, Richard Moore, and David Kirkpatrick. Plaintiff America's Growth Capital, LLC (AGC) is an investment bank that was hired by Planet Fitness to identify and manage strategic opportunities. Benjamin Howe was AGC's Chief Executive Officer. On August 16, 2012, Planet Fitness and AGC executed an "engagement letter" defining the scope of AGC's work for Planet Fitness. On October 23, 2012, Planet Fitness signed a purchase agreement with TSG Consumer Partners, LLC (TSG), and the sale of Planet Fitness to TSG closed on November 8, 2012.

AGC alleges that Planet Fitness owes it a "strategic transaction fee" in connection with the TSG sale. Planet Fitness maintains that no fee is owed to AGC fee because the ultimate buyer, TSG, was not listed in the parties' engagement letter, and moreover, that AGC played no role in arranging the introduction of Planet Fitness and TSG. (Planet Fitness alleges it was the law firm of Ropes & Gray, LLP, which first brought TSG to its attention).

OVERVIEW OF THE DISCOVERY DISPUTE

AGC filed the Complaint in this case on November 8, 2012. In response to document requests from AGC, Planet Fitness produced a privilege log listing several hundreds of documents withheld under claims of attorney-client privilege and work-product privilege.[1] Planet Fitness has now narrowed its claims of privilege to twenty-two emails and five email attachments. All of the remaining disputed communications are from, to, or copied to Richard Moore and/or various attorneys at Ropes & Gray.

Richard Moore: Moore held the dual titles of Executive Vice President and General Counsel at Planet Fitness.[2] Moore acknowledges being the primary Planet Fitness liaison with Howe regarding AGC's engagement letter and services. He also played the "lead" role in negotiating the business aspects of the sale of Planet Fitness to TSG. The documents produced by Planet Fitness show that Moore frequently took part in discussions with the principals of Planet Fitness acting more as a business strategist than a legal counsel.

Ropes & Gray, LLP: The relationship between Ropes & Gray and Planet Fitness predates the instant litigation. Ropes & Gray transactional attorneys performed services for Planet Fitness in connection with the TSG sale at issue in this case. AGC alleges that these services went beyond the giving of legal advice and often involved purely business matters. This is more or less conceded by Planet Fitness, which maintains that Ropes & Gray (and not AGC) introduced TSG as a potential suitor. *See* Def.'s Summ. J. Br. (Dkt.# 50), at 16 ("On July 26, 2012, Ropes & Gray proposed several firm clients, including TSG, as potential purchasers who the firm had not yet contacted, 'but may have interest' in a potential

transaction with Planet Fitness."); *see also id.,* at 17 ("Michael Grondahl responded: 'Please don't waste time on [the TSG deal] because Ropes brought them to us. We agreed they weren't your client upfront so I don't want any confusion when it comes time to close. Blair originally had them meet us in '08.' ").

***2** *The Disputed Documents:* Planet Fitness has submitted the twenty-two emails and five attachments for in camera review. Of the twenty-two emails, eleven have been withheld in their entirety, and eleven have been redacted. All five email attachments have been withheld in their entirety. Planet Fitness asserts that all of the withheld communications fall within the attorney-client privilege, and that items # 8, # 9, # 10, # 11, # 12, # 13, and # 14 are also covered by the work-product privilege. [3]

DISCUSSION

The essential elements of the attorney-client privilege have been famously delineated by Wigmore and subscribed by the First Circuit:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Cavallaro v. United States, 284 F.3d 236, 245 (1st Cir.2002) (quoting 8 J.H. Wigmore, *Evidence* § 2292, at 554 (McNaughton rev.1961)). The party asserting the attorney-client or work product privilege bears the burden of showing that the privilege applies. *Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc.,* 449 Mass. 609, 619, 870 N.E.2d 1105 (2007).

The rationale behind the attorney-client privilege is that protecting client communications "encourages disclosures by the client to the lawyer that facilitate the client's compliance with the law and better enable the client to present legitimate arguments should litigation arise." *Cavallaro,* 284 F.3d at 245. The privilege, though time-honored, is limited, in that it "applies only to the extent necessary to achieve its underlying goal of ensuring effective representation through open communication between lawyer and client." *In re Grand Jury Subpoena,* 274 F.3d 563, 571 (1st Cir.2001) (citing *Fisher v. United States,* 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976)). *See also In re XYZ Corp.,* 348 F.3d 16, 22 (1st Cir.2003) ("The attorney-client privilege must be narrowly construed because it comes with substantial costs and stands as an obstacle of sorts to the search for truth."); *Pacamor Bearings, Inc. v. Minebea Co., Ltd.,* 918 F.Supp. 491, 510 (D.N.H.1996) (quoting *Fisher,* 425 U.S. at 403) ("[I]t protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.").

Communications about Business Strategy:
A key component of the privilege is that communications with the attorney must call upon the attorney in his or her capacity as a professional legal adviser. *See, e.g., Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs,* 60 F.3d 867, 884 (1st Cir.1995) ("The attorney-client privilege attaches only when the attorney acts in that capacity."). Thus, while the privilege extends to communications between corporate officers and in-house counsel, *see Upjohn Co. v. United States,* 449 U.S. 383, 389–390, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981), such communications are only protected if they were made to the individuals in their capacities as lawyers, not as business strategists or negotiators. *See United States. v. Windsor Capital Corp.,* 524 F.Supp.2d 74, 81 (D.Mass.2007) (noting that "the privilege does not apply when in-house counsel is engaged in 'non-legal work' " which includes "the rendering of business or technical advice unrelated to any legal issues") (internal citations omitted)).

***3** It is clear that the giving of business advice and requests for such advice are not protected by the privilege. *See Pacamor,* 918 F.Supp. at 511 (collecting cases related to the proposition that "business advice, such as financial advice or discussion concerning business negotiations, is not privileged"). Further, "business documents sent to corporate officers and employees as well as the corporation's attorneys, do not become privileged automatically." *Id.* (quoting

Simon v. G.D. Searle & Co., 816 F.2d 397, 403 (8th Cir.1987)).

Because an in-house lawyer often serves as a business strategist or financial consultant, "the invocation of the attorney-client privilege may be questionable in many instances" involving an in-house counsel "because the distinctions are often hard to draw." *Windsor,* 524 F.Supp.2d at 81 (quoting *City of Springfield v. Rexnord Corp.,* 196 F.R.D. 7, 9 (D.Mass.2000)). Indeed, "[A]n in-house lawyer may wear several other hats (e.g., business advisor, financial consultant)." *Id.*

Communications that are not confidential:

A communication "must have been intended to be confidential and made for the purpose of giving or obtaining legal advice to be vested with the attorney-client privilege." *City of Springfield,* 196 F.R.D. at 9. Therefore, documents that contain "information which is to be communicated to the public or others" or "which merely communicate information obtained from independent sources" are not protected by the attorney-client privilege. *Pacamor* 918 F.Supp. at 511 (quoting *Smith v. Conway Org., Inc.,* 154 F.R.D. 73, 78 (S.D.N.Y.1994)). *See also In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.),* 348 F.3d 16, 22 (1st Cir.2003) ("When otherwise privileged communications are disclosed to a third party, the disclosure destroys the confidentiality upon which the privilege is premised.").

For these reasons, " '[a]ttachments which do not, by their content, fall within the realm of the privilege cannot be privileged by merely attaching them to a communication with the attorney.' " *Pacamor,* 918 F.Supp. at 511 (quoting *Sneider v. Kimberly–Clark Corp.,* 91 F.R.D., 1, 4 (N.D.Ill.1980)). *See also id.* (noting that "attachments which are ... communications with outside parties ... cannot be privileged because the requisite confidentiality does not exist" and "attachments containing business, not legal information, cannot be privileged.").

THE WITHHELD DOCUMENTS

With these principles in mind, the court turns to the documents in dispute:

Planet Fitness must disclose the following documents in their entirety: [4]

9A–9C				
15A				
16A				
22	143	11/6/12	AC	Email chain between Richard Moore, Esq. and Mar c Grondahl reflecting legal advice from both Ropes & Gray LLP and Richard Moore, Esq. regarding structure of David Kirkpatrick's separation agreement, and David Kirkpatrick's acceptance of separation agreement.

***4** The email communications in item # 7 do not constitute requests for legal advice nor do they relate to such requests. The reference to the fact that Moore is the "GC" in one of the emails does not turn an otherwise non-legal series of exchanges between executives into a request for legal advice. [6] Items # 9A, # 9B, # 9C, # 15A, and # 16A are attachments containing business information rather than legal information and Planet Fitness has not asserted any independent claim of privilege for those documents. Therefore, they must also be disclosed. The information communicated in item # 22 is not confidential. The email plainly states that the very information contained in it had already been revealed to a third party. [7]

Planet Fitness must disclose the following documents, but with selected redactions:

Index	# Doc.	# Date	Claim	Revised Privilege Description
2	242	9/28/12	AC	Redacted portion o f email from Richard Moore, Esq. to Michael Grondahl, Marc Grondahl, Chris Rondeau and David Kirkpatrick containing legal advice regarding negotiations with TSG over non-compete contract clause, and replies concerning same.
3	243	Same	Same	Same
4	244	Same	Same	Same
5	245	Same	Same	Same
17	131	Same	Same	Same
18	132	Same	Same	Same
19	170	Same	Same	Same

Items # 2–# 5 and # 17–# 19 contain various portions of a continuous email chain with the subject line "TSG has come back with LOI."[8] In total, there are 3 redacted sections in these documents. Planet Fitness may retain two redactions in their entirety: (1) the redaction in the email sent by Marc Grondahl on September 28, 2012, at 11:53 AM, and (2) the redaction in the email sent by Rondeau on September 28, 2012, at 11:01 AM. Regarding the third redaction, contained in the email from Moore at 10:29 AM (the initial email of the chain), Planet Fitness must disclose the email, except that Planet Fitness may continue to redact only: (1) the last sentence (beginning with "This is a") of the first paragraph (which begins with "Guys—"), and (2) the last paragraph of that email beginning with "You guys ok with ...." and ending with "... like that."

***5** Items # 8–# 14 contain various portions of another email chain, with the first email coming from J. Owen Todd (AGC's attorney in this action) to David Fine of Ropes & Gray, attaching a draft complaint. This first email is obviously not privileged, as it is a communication between two opposing counsels (nor are the attachments sent by Todd to Fine, items # 9A, # 9B, and # 9C, as already indicated above). The remainder of the communications in the email chain that are from the "clients" (the Grondahls and Rondeau) do not constitute either a request for legal advice nor do they relate to such a request (e.g., "Tell Ben I'll have a boxing match winner makes decision."). To the extent the emails from the attorneys contain purely factual information ("AGC sued!"), or recount conversations with third-parties (such as "Pierre" from TSG), this information is not confidential, and therefore not subject to the privilege. The portions of the email Planet Fitness will be permitted to withhold are statements that could be construed, to fall within the work-product doctrine as "mental impressions" of the attorneys made in anticipation of litigation. Therefore Planet Fitness may redact the third paragraph of the email sent from Moore, on November 7, 2012, at 6:05 AM. (This paragraph begins with *"I think"* and ends with *"etc.)."*).

Index	# Doc.	# Date	Claim	Revised Privilege Description
21	169	11/6/12	AC	Email from Chris Rondeau to Richard Moore, Esq. requesting legal advice regarding tax structure of TSG deal.

Regarding item # 21, Planet Fitness may redact one line of text from the last email in the chain (sent by Rondeau at 8:09 AM) containing the phrase "Get ... thing." As Planet Fitness noted, this contains a request to "have a conversation about certain tax issues related to the TSG closing," Dkt. # 34, at 9.

Planet Fitness may continue to withhold the following documents in their entirety or with the current redactions:

Index	# Doc.	# Date	Claim	Revised Privilege Description
1	36	6/8/12	AC	Email chain with communications between Peter Tamposi, Esq. of Tamposi Law Group, Michael Grondahl, David Kirkpatrick, and Craig Benson regarding employment dispute with Jayne Conway and containing legal advice concerning settlement issues and settlement structure. Email chain forwarded by David Kirkpatrick to Richard Moore, Esq. and paralegal Cindy Nix, in which Cindy Nix is requested to gather information for use by Peter Tamposi, Esq. in ongoing settlement negotiations.
6	255	10/1/12	AC	Email chain including Richard Moore, Esq., David Fine, Esq., reflecting request for legal advice from Ropes & Gray LLP, and provision of legal advice from Ropes & Gray LLP, regarding assessment of "Up–C" corporate structure.
15	161	8/13/12	AC	Redacted portion of email from Richard Moore, E sq. to David Fine, Esq. and Matthew Byron, Esq. of Ropes & Gray LLP forwarding Equinox Offer Letter and seeking comment and legal advice from Ropes & Gray LLP regarding negotiating strategy and potential contractual counter-offers.
16	162	8/13/12	AC	Redacted portion of email from Richard Moore, E sq. to David Fine, Esq. and Matthew Byron, Esq. of Ropes & Gray LLP forwarding Equinox Offer Letter and seeking comment and legal advice from Ropes & Gray LLP regarding negotiating strategy and potential contractual counter-offers.
20	143	11/6/12	AC	Redacted portion of email from Richard Moore, E sq. to Michael Grondahl, Chris Rondeau, and Marc Grondahl providing legal advice concerning purchase agreement, specifically: consequences of pressing TSG to close with bridge note.

***6** The withheld communications in these documents could reasonably be construed to relate to requests for legal advice even though, in some cases, the request itself is not contained explicitly in the communication.

CONCLUSION

AGC's Motion to Compel is *GRANTED IN PART AND DENIED IN PART.* Within three days of this order, Planet Fitness must produce items # 7, # 9A, # 9B, # 9C, # 15A, # 16A, and # 22, in their entirety, must produce items # 2, # 3, # 4, # 5, # 8, # 9, # 10, # 11, # 12, # 13, # 14, # 17, # 18, # 19, and # 21, with the specified allowed redactions, and need not produce the previously withheld documents or portions thereof for items # 1, # 6, # 15, # 16, and # 20.

SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 1207128

Footnotes

1 Planet Fitness produced its first privilege log on June 14, 2013, listing over 300 withheld documents. *See* Dkt. # 31. It then produced a revised and more compact privilege log on July 3, 2013. After AGC moved to compel, Planet Fitness produced all but the twenty-two documents that figure in this decision.

2 Prior to joining Planet Fitness, Moore was employed as an attorney at Ropes & Gray.

3 The court will refer to the documents by the "index number" listed next to each document in the chart filed as Dkt. # 91.

4 For identification purposes, the court includes selected columns from the chart submitted by Planet Fitness.

Index	# Prior	# Date	Claim	Revised Privilege Description
7	270	10/5/12	AC[5]	Redacted portion of email from David Kirkpatrick to Richard Moore, Esq. containing request for legal advice regarding fee dispute with AGC.

5 The court has indicated a claim of Attorney–Client Privilege with the abbreviation "AC" and has indicated a claim of Work Product Privilege with the abbreviation "WP."

6 As noted, a communication cannot be privileged simply because of the title of the person receiving the communication.

7 The communication is from Moore to the owners of Planet Fitness and details what Moore told David Kirkpatrick (at this point a third-party) about Kirkpatrick's potential severance agreement.

8 Planet Fitness claims these communications are protected because Moore is advising Kirkpatrick and owners of PF on "legal concerns regarding a non-compete clause" and "the then-owners reply with their own thoughts and proposals for counter-offers on the same issue." Dkt. # 34, at 10.

Index	# Doc.	# Date	Claim	Revised Privilege Description
8	322	11/7/12	AC & WP	Email chain between Richard Moore, Esq., David Fine, Esq., Matt Byron, Esq., Michael Grondahl, Marc Grondahl, and Chris Rondeau attaching AGC's complaint and invoice as received on the same day, containing legal analysis of AGC's complaint in anticipation of litigation, and

				discussing legal strategy in responding to AGC's complaint.
9	324	Same	Same	Same
10	326	Same	Same	Same
11	327	Same	Same	Same
12	328	Same	Same	Same
13	329	Same	Same	Same
14	336	11/8/12	Same	Same

End of Document

Rule 1.13. Organization as Client

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

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer’s representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer’s actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer’s discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be

given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Ethics Committee Comment

In New Hampshire, a lawyer who represents an unincorporated association also represents each individual member of the association as to matters of association business. Franklin v Callum, 148 NH 199 (2002). This rule is an exception to the prevailing "entity theory" of representation reflected in Rule 1.13. See also Restatement of the Law Governing Lawyers § 96 (ALI 2000); McCabe v Arcidy, 138 N.H. 20, 26 (1993).

2004 ABA Model Rule Comment
RULE 1.13 ORGANIZATION AS CLIENT

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and

the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged

violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Other Rules

Rule 1.4. Client Communications
(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation.

Ethics Committee Comment

Attorneys seeking to determine the scope of the duty to communicate under this rule should also review ABA Comment 5 to Rule 2.1. That Comment states that when a matter is likely to involve litigation, Rule 1.4 may require a lawyer "to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." This comment may prove important given the overlap of Rules 2.1 and 1.4, the increasingly important role of alternative dispute resolution in litigation, and the implications this duty might have for a lawyer's civil liability.

ABA Comment to the Model Rules
RULE 1.4 COMMUNICATION

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Rule 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another; or

(2) to secure legal advice about the lawyer's compliance with these Rules; or

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order; or

(5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Ethics Committee Comment

The New Hampshire Rule reorganizes and changes Rule 1.6(b).

The New Hampshire Rule permits the disclosure of any criminal act involving death or bodily harm or substantial injury to the financial interest or property of another. Rule 1.6 should not be viewed as a departure from the general rule of client confidentiality, and should not be interpreted to encourage lawyers to disclose the confidences of their clients. The disclosure of client confidences is an extreme and irrevocable act. Hopefully no New Hampshire lawyer will be subject to censure for either disclosing or failing to disclose client confidences, as the lawyer’s individual conscience may dictate.

As to ABA Comments [18] (formerly Comment [16]) and [19](formerly Comment [17]), see Ethics Opinion 2008-9/4 discussing duties relating to “metadata;” www.nhbar.org/legal-links/Ethics-Opinion-2008-09_04.asp.] A lawyer is responsible for reasonably ensuring adequate protection of client confidences in data held or stored by others, including, e.g., offsite storage and “cloud” storage.

ABA Comment to the Model Rules
RULE 1.6 CONFIDENTIALITY OF INFORMATION

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it

will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been

made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertraining a new representation.

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be

required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Rule 1.7. Conflicts of Interest
(a) Except as provided in paragraphs (b) and (c), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

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

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

(c) Notwithstanding (a) and (b) above, a lawyer from the New Hampshire Public Defender Program may represent an individual for arraignment if that individual is not:
(1) a co-defendant of a defendant also represented by the New Hampshire Public Defender Program; or
(2) a witness in a case in which the New Hampshire Public Defender Program represents a client and it is a case in which the New Hampshire Public Defender Program determines that there is a significant risk that the representation of the witness will materially limit the lawyer's responsibilities to the existing client.

Comment
Paragraph (c) of Rule 1.7 is designed to address a difficulty that has arisen in connection with the anticipated implementation in the near future of Circuit Court – District Division Criminal Rules 2.20 through 2.23 (and equivalent rules that are to be promulgated for the Superior Court). These rules were developed in the wake of the New Hampshire Supreme Court's order in Nygn & a. v. Manchester District Court, No. 2011-0464 (decided March 16, 2012), and are designed to insure, to the maximum extent possible, that an attorney will actually be present to represent a defendant at arraignment.
The New Hampshire Public Defender (NHPD) is obliged, by statute, to represent all indigent criminal defendants charged with offenses punishable by incarceration. See N.H. RSA 604-B:2, :6 (2001). The only exception to this obligation is when NHPD has a conflict of interest that prevents it from providing conflict-free representation. In order to effectuate RSA 604-B, NHPD has in place an extensive internal conflict of interest policy to guide its attorneys and staff when determining whether NHPD is able to provide conflict-free representation. The conflict policy was written using the New Hampshire Rules of Professional Conduct and its annotations as guidance. NHPD's conflict policy requires NHPD office staff to run the names of the defendant and all witnesses through a statewide database. If the defendant is a co-defendant in an open case or an alleged victim or witness, a trained conflict resolution attorney, guided by the Rules of Professional Conduct, determines whether NHPD can represent the new defendant, or whether it must decline representation.
In State v. Veale, 154 N.H. 730, 734-35 (2007), the New Hampshire Supreme Court decided that NHPD is one firm for purposes of conflict determinations. Therefore, when NHPD is making conflict-of-interest determinations it operates under the assumption that all nine of the trial offices and the Appellate Defender constitute one law firm. This becomes a concern when NHPD has an attorney in one office representing a defendant, a witness name appears in that defendant's case, a conflict check is run, and the same name appears as a client in another office. In practice, there will rarely if ever be communication between the two attorneys about the individual; in fact the attorneys will most likely never even know about each other, but because of Rule 1.7 and the Veale case, NHPD would take precautionary measures and reject one of the cases. Historically, this approach has caused a substantial number of withdrawals, backlog for the courts, and delay for the clients. However, given the current state of the rules and the law, NHPD is unable to avoid withdrawal.

Paragraph (c) of the rule was adopted because the conflict of interest regime set forth in Rule 1.7(a) and (b) would significantly inhibit the ability of NHPD to participate in implementing the new arraignment rules which will be set forth in Circuit Court – District Division Rules 2.20 through 2.23. In order to effectuate the goal of having an attorney actually present to represent at arraignment all indigent defendants charged with felony or class A misdemeanor offenses, the number of instances in which NHPD will be called upon to provide such representation will increase substantially. Yet without the availability of NHPD attorneys to serve as counsel at arraignment, implementation of the new rules would not be possible due to the practical difficulties and prohibitive costs entailed in providing contract or appointed counsel in every circumstance where, under the prior version of Rule 1.7, NHPD could have been deemed to have a conflict preventing its attorneys from acting as counsel at arraignment.
New paragraph (c) of Rule 1.7 is designed to create an exception to the strict requirements of paragraphs (a) and (b) of the rule that will apply only to NHPD attorneys representing defendants at arraignment. Not only is this exception justified for the practical reasons stated above, but it also is justified by the need for the NHPD to respond quickly to court appointments for arraignment purposes and by the limited scope of the representation provided by NHPD to clients represented at arraignments only. It must be noted that the exception does not permit an NHPD attorney to represent co-defendants at arraignment. In addition, even where the client to be represented at arraignment by one NHPD attorney is a witness or an alleged victim in a case where another NHPD attorney represents the defendant, the representation will not be allowed if NHPD determines, in accordance with its internal conflicts policy, that there is a significant risk the representation at arraignment will materially limit the other NHPD attorney’s responsibilities to that attorney’s client.

Ethics Committee Comment

The requirements that a lawyer maintain loyalty to a client and protect the client's confidences are fundamental. Although both the former rule 1.7 and the current rule 1.7(b) allow a lawyer to undertake representation in circumstances when there is exists a concurrent conflict of interest, the lawyer should use extreme caution in deciding to undertake such representation. The lawyer must make an independent judgment that he or she can provide "competent and diligent representation" before the lawyer can even ask for consent to proceed. The court in subsequent proceedings can review such a judgment. See Fiandaca v. Cunningham, 827 F.2d. 825 (1st Cir. 1987).

In evaluating the appropriateness of representation in a conflict situation under 1.7(b), the New Hampshire Bar Association Ethics Committee has used under the old rules the "harsh reality test" which states:

"(i)f a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent. If this "harsh reality test" may not be readily satisfied by the inquiring attorney, the inquiring attorney and other members of the

inquiring attorney's firm should decline representation . . . ." New Hampshire Bar Association Ethics Committee Opinion 1988-89/24 (http://nhbar.org/pdfs/f088-89-24.pdf).

This test has proven useful to practicing attorneys and retains its validity under the amended rules.

As discussed in Comment 17 to the ABA Model Rules, the determination of whether two clients are directly aligned against one another so as to give rise to a non-waivable conflict will require case-by-case analysis in the context of the particular circumstances. Other factors – including the availability of insurance, hold harmless agreements or indemnification agreements – may also be relevant in determining whether the interests of the clients are in reality "directly adverse" so as to preclude waiver of, or consent to, the conflict. However, even when third party payers or other financial protections eliminate the clients' financial exposure in litigation, there are claims (for example, assertions of comparative fault among professionals) in which the client, not the insurer, may have a strong personal interest in a vigorous defense of their work despite the fact that insurance will cover any judgment. This makes such concurrent representation impossible. In making these determinations, the harsh reality test discussed above should be foremost in the attorney's mind.

2004 ABA Model Rule Comment
RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse

a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

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

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

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

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

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

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

Consent to Future Conflict

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

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

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

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

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation

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

[30] 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.

[31] 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. 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. 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.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

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

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules
(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For

purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship .

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Ethics Committee Comment

ABA Comment 8 raises concerns, by implying that Rule 1.8(a) would be inapplicable in the situation whereby the drafting attorney is named as a fiduciary for a client in a fiduciary role that could become potentially lucrative for the attorney. New Hampshire Bar Association Ethics Committee opinion 1987-88/9 (http://www.nhbar.org/pdfs/FO87-88-9.pdf) stated as follows:

When the attorney-fiduciary contracts to perform legal services, it could well be argued that the attorney-fiduciary is entering into a business transaction, or acquiring some type of pecuniary interest potentially adverse to a client thereby invoking Rule 1.8(a).

In its later Opinion 2008-09/1,

(http://www.nhbar.org/uploads/EthicsOpinion 2008-9-1.pdf) "Drafting Lawyer Acting as Fiduciary for Client," applying recent Rule changes that went into effect January 1, 2008, the Committee concluded that there may well be certain circumstances, such as the drafting attorney having actively solicited the client to utilize the fiduciary services of that attorney or affiliated law firm, that would constitute a "business transaction with the client" thereby triggering the necessity of that attorney having to comply with Rule 1.8(a).

2004 ABA Model Rule Comment
RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements

between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not

disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and

because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent).

Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Rule 1.18. Duties to Prospective Client
(a) A person who provides information to a lawyer regarding the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has received and reviewed information from a prospective client shall not use or reveal that information except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received and reviewed information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received and reviewed disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received and reviewed the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

a. the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

b. written notice is promptly given to the prospective client.

Ethics Committee Comment

1. The New Hampshire rule expands upon the ABA Model Rule in one area. The ABA Model Rule 1.18(a) defines a prospective client as one who "consults" with a lawyer about possible representation; the New Hampshire Rule defines prospective client as one who "provides information to a lawyer" about possible representation. ABA Model Rule 1.18(b) establishes a general rule for protection of information "learned" by a lawyer from a prospective client; the New Hampshire Rule clarifies the scope of the protection so that it applies to information "received and reviewed" by a lawyer from a prospective client.

In its version of Rule 1.18, New Hampshire's rule eliminates the terminology of "consultation" and learning and extends the protections of the rule to persons who, in a good faith search for representation, provide information unilaterally to a lawyer who subsequently receives and reviews the information. This change recognizes that persons frequently initiate contact with an attorney in writing, by e-mail, or in other unilateral forms, and in the process disclose confidential information that warrants protection. This change further recognizes that receipt and review are likely to be more objective standards than learning.

2. Not all persons who communicate information to an attorney unilaterally are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship (see ABA Model Rule comment No. 2); or for the purpose of disqualifying an attorney from participation in a matter; or through contemporaneous contact with numerous attorneys; is not a "prospective client" within the meaning of paragraph (a).

3. New Hampshire has concerns with ABA Comment 5, which purports to allow an attorney to secure prior "informed consent" from a prospective client that information provided in initial consultations would not preclude subsequent representation of another client in the matter. Unlike the more detailed analysis contemplated by Comment 22 to Rule 1.7, a prospective client's prior consent may be made more quickly and less likely to be "informed" as to the potential adverse consequences of such an agreement.

ABA Comment to Model Rules
RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule

1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Rule 4.3. Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows

or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

2004 ABA Model Rule Comment
RULE 4.3 DEALING WITH UNREPRESENTED PERSON

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.